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Transparency- Not Just a Vogue Word

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Abstract

I therefore intend to focus my attention on transparency issues as they relate to the decision-making process and leave out those issues relating to the legislative process. Moreover, I shall restrict myself to examining a few selected issues concerning the topic and shall base my examination principally on some of the more recent judgments of the Court of First Instance and the Court of Justice of the European Communities (together, “Community Courts”).

TRANSPARENCY—NOT JUST A VOGUE WORD

*Bo Vesterdorf**

INTRODUCTION

Like subsidiarity, transparency has become a vogue word in recent years. In this Essay, I intend to show that within the European Union's institutions,¹ transparency has, however, now become more than just a fashionable new word. As I shall show, the notion covers some of the Community's most important principles of administration. In order to keep within the limits of an essay, I must necessarily impose certain restrictions on the extent of my treatment of the topic. I therefore intend to focus my attention on transparency issues as they relate to the decision-making process and leave out those issues relating to the legislative process.² Moreover, I shall restrict myself to examining a few selected issues concerning the topic and shall base my examination principally on some of the more recent judgments of the Court of First Instance and the Court of Justice of the European Communities (together, "Community Courts").

Transparency in the decision-making process ideally means that the public and the addressee of a legally binding decision must have access to information that is of importance to decisions that either have been taken or will be taken by an institution of the Union. It is, however, important to stress that while the notion of transparency, as invoked by politicians, essentially involves only the question of access to information for the gen-

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1. In the following I shall refer either to the European Union (the "Union") or the European Communities (the "Community") at random since for the purposes of this Essay it is not that important to distinguish between the broader (the "Union") and the narrower (the "Community") forms of cooperation between the 15 European Member States. In any event, it follows from the case law of the Court of Justice and the Court of First Instance that the principle of transparency applies equally to the decision-making process of either of the two legal entities.

2. Briefly, what has been done in this area is the following: (1) more Commission white papers on future legislation to allow for broader public discussion, (2) more comprehensive involvement by the European Parliament in the legislative process, and (3) public access to the results of votes and explanations of votes as well as to statements in the minutes, when the Council acts in its legislative capacity.

eral public, it actually covers more than that. It covers, in my submission, at least the four following important principles: (1) the right to a statement of reasons for a decision, (2) the right to be heard before a decision is taken, (3) a party's right of access to the file, and (4) the public's right of access to information. These four principles have all been the subject of litigation before the Community Courts. Recently, particularly the public's access to information has given rise to some important judgments. I shall examine these four principles placing particular emphasis on the examination of the general public's access to information.

I. THE DUTY TO GIVE REASONS

Article 190 of the Treaty establishing the European Community³ ("EC Treaty") provides that regulations, directives, and decisions shall state the reasons on which they are based. Article 190 does not draw a distinction between favorable and burdensome measures, or between measures that are aimed at individuals and those that are aimed at the public at large. The duty to give reasons is, in other words, of a universal nature.

The universal nature of the duty to give reasons is also reflected in the fact that the duty is intended to address a number of different "constituencies" at the same time. The statement of reasons therefore must provide information to all persons interested in the measure and ultimately the reasoning must be suffi-

3. See Treaty establishing the European Community, Feb. 7, 1992, art. 190, O.J. C 224/1, at 67 (1992), [1992] 1 C.M.L.R. 573, 697 [hereinafter EC Treaty], *incorporating changes made by Treaty on European Union*, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU]. The Treaty on European Union ("TEU") amended the Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], *as amended by Single European Act*, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA],

By virtue of the Treaty of Amsterdam, articles of the Treaty establishing the European Community ("EC Treaty") will be renumbered in the Consolidated version of the Treaty establishing the European Community ("Consolidated EC Treaty"). Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, art. 12, O.J. C 340/1, at 78-79 (1997) (not yet ratified) [hereinafter Treaty of Amsterdam]. Consequently, Article 190 of the EC Treaty will be renumbered as Article 253 of the Consolidated EC Treaty when the Treaty of Amsterdam is ratified. See Consolidated version of the Treaty establishing the European Community, art. 253, O.J. C 340/3, at 281 (1997), 37 I.L.M. 79, 130 (not yet ratified) [hereinafter Consolidated EC Treaty] (ex Article 190), *incorporating changes made by Treaty of Amsterdam, supra*.

cient to allow the Community Courts to ascertain whether or not the Community measure has been adopted *ultra vires*.⁴ In the case of burdensome measures addressed to an individual, due regard for the person to whom the measure is addressed plays a particular role, but the court's ability to control the legality of these measures is equally important. Where a third party has a direct and individual interest in the case, this interest must be taken into due consideration when giving reasons. It must be noted, however, that Community law does not vest in such a third party the same rights as those vested in a party to the case.⁵ The requirements for how elaborate the reasoning must be appear to differ from case to case, but they are never insignificant.⁶

A recent example of the importance that the Community Courts attach to the duty to state reasons may be found in the judgment of the Court of First Instance in the *Air France* case.⁷ In the Spring of 1994, the French authorities informed the European Commission that they planned to inject twenty billion French francs into the French flag-carrier Air France. In accordance with Article 93(2) of the EC Treaty,⁸ the Commission opened a procedure to examine whether this capital injection constituted state aid incompatible with the common market. On the basis of this examination, the Commission, in July 1994, adopted Decision 94/653/EC.⁹ In this decision, the Commission took the view that the capital injection constituted state aid within the meaning of Article 92(1) of the EC Treaty,¹⁰ and that

4. As pointed out by the Advocate General in *SA Hercules Chemicals NV v. Commission*, it is "important to stress that the requirement to state reasons . . . is purely procedural." Opinion of Advocate General Bo Vesterdorf, *SA Hercules Chemicals NV v. Commission*, Case T-7/89, [1991] E.C.R. II-869, II-908, [1992] 4 C.M.L.R. 84, 125. A deficiency in the substantive evaluation of a Community institution should therefore not be confused with a failure to fulfill the duty to give reasons.

5. Note in this regard that the duty to give reasons does not flow from the fact that there is a party to a given measure.

6. See, e.g., *Carla Micheli and Others v. Commission*, Case T-183/97, [1997] E.C.R. II-1473, II-1493, II-1496, at ¶¶ 49, 56 (order of President of Court of First Instance of Sept. 26, 1997); see also Bo Vesterdorf, *Begrundelse af forvaltningsakter i EF-retlig belysning, in LIBER AMICORUM OLE DUE, GADs FORLAG 379-411* (1994).

7. *British Airways and Others v. Commission*, Joined Cases T-371, T-394/94, [1998] E.C.R. II-2405.

8. EC Treaty, *supra* note 3, art. 93(2), O.J. C 224/1, at 31 (1992), [1992] 1 C.M.L.R. at 631 (Article 93(2) of EC Treaty will be renumbered as Article 88(2) of Consolidated EC Treaty).

9. Commission Decision No. 94/653/EC, O.J. L 254/73 (1994).

10. EC Treaty, *supra* note 3, art. 92(1), O.J. C 224/1, at 30 (1992), [1992] 1

this aid distorted competition in the Community. The Commission also found, however, that the aid facilitated the development of certain economic activities or economic areas, and therefore considered that the aid was lawful according to Article 92(3)(c) of the EC Treaty. A number of European air carriers competing with Air France challenged the Commission's decision before the Court of First Instance, arguing, *inter alia*, that the Commission had provided inadequate reasoning for the contested decision.

On two points, the Court of First Instance agreed that the Commission's reasoning was inadequate. The first of these concerned the financing of seventeen new aircraft for Air France.¹¹ During the court hearing, the Commission had put forward what one may call "additional" reasoning on this point. The Court noted that

that reasoning, developed by the Commission's agent before the Court, not only does not feature in the contested decision but is even contradicted by the reasoning therein to the effect that the aid was intended to finance, at least in part, the implementation of the restructuring plan featuring the modernisation of Air France's fleet.¹²

Referring to one of its former judgments, the Court continued, holding that

the operative part and the statement of reasons of a decision—which must be reasoned under Article 190 of the Treaty—constitute an indivisible whole, with the result that it is for the college of Commissioners alone, in accordance with the principle of collegiate responsibility, to adopt both the one and the other, any alteration to the statement of reasons going beyond simple corrections of spelling or grammar being the exclusive province of that college.¹³

C.M.L.R. at 630; (Article 92(1) of EC Treaty will be renumbered as Article 87(1) of Consolidated EC Treaty).

11. The second point on which the Court found the reasoning to be inadequate concerned the Commission's failure to provide adequate reasoning to support its view that a restriction imposed with regard to pricing, capacity, and number of routes on Air France's non-European Economic Area ("EEA") connections—in particular transatlantic connections—would be detrimental to Air France and would only benefit non-EEA companies, and would therefore have been manifestly contrary to the common interest. See *British Airways*, [1998] E.C.R. at ___, ¶¶ 279-80.

12. *Id.* at ___, ¶ 116.

13. *Id.* Along the same lines, the Court, concerning some other assertions, held

Based on this background, the Court of First Instance concluded "that the reasons given in the contested decision do not satisfy the requirements of Article 190 of the Treaty in so far as the purchase of 17 new aircraft is concerned."¹⁴

Having examined all of the pleas in law, the Court held that the contested decision suffers from insufficient reasoning on two points, concerning, respectively, the purchase of 17 new aircraft for FF11.5 billion . . . and the competitive position of Air France on the network of its non-EEA routes with the associated feeder traffic . . . Those two points are of crucial importance within the general scheme of the contested decision. That decision must consequently be annulled."¹⁵

Inadequate reasoning means insufficient transparency because the consequence is, firstly, that the parties affected by the measure are unable to determine whether the measure is issued on a sound legal basis or whether it could be challenged before the courts and, secondly, that the courts are unable to examine whether the arguments on a given point are well-founded.¹⁶ The *Air France* case shows the very considerable importance that the Community Courts attach to the obligation to give reasons. The very fact that inadequate reasoning can lead to the annulment of a decision authorizing the payment of twenty billion French francs is a clear reflection of this importance.

Sufficient reasoning both of individual decisions and of measures of general application is also of significant interest to the public in general because such reasoning is the way in which the Commission and/or the Council can explain why certain measures are necessary and why they have been drafted as they have.

II. *THE RIGHT TO BE HEARD*

In *Lisrestal and Others v. Commission*,¹⁷ the Court of First Instance held that

that these were "not covered by collegiate responsibility and therefore [could not] mitigate the defective reasoning by which the contested decision [was] vitiated." *Cf. id.* at ___, ¶ 118.

14. *Id.* at ___, ¶ 120.

15. *Id.* at ___, ¶ 454.

16. *Id.* at ___, ¶ 280.

17. *Lisrestal and Others v. Commission*, Case T-450/93, [1994] E.C.R. II-1177.

it is settled law that respect for the rights of the defence in all proceedings which are initiated against a person and are liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law which must be guaranteed, even in the absence of any specific rules concerning the proceedings in question . . . That principle requires that any person who may be adversely affected by the adoption of a decision should be placed in a position in which he may effectively make known his views on the evidence against him which the Commission has taken as the basis for the decision at issue.¹⁸

As is apparent from the above quotation, the right to be heard is a fundamental principle of Community law. Moreover, it is worth noting that the right to be heard plays a conspicuous role among the administrative law requirements that the Community institutions must observe. There are two probable reasons for this role.

First, the very nature of the activities of the Community institutions implies a limit on the Community Courts' ability to exercise in-depth control over substantive matters, such as the control exercised by the courts in several of the Member States. The Community Courts seek to counterbalance this limit by exercising more rigorous control over whether a case presents any material deficiencies *vis-à-vis* those procedural rules aimed at safeguarding the interests of the citizens. Ascertaining that the administrative steps leading to the decision have been followed in a manner that ensures the best possible quality of the decision taken is particularly important in this respect.¹⁹

As has already been pointed out by the former president of the Court of Justice several years ago,²⁰ the second reason for the importance attached to the right to be heard presumably resides in the fact that in those fields in which the Commission does have administrative powers *vis-à-vis* the citizens—particularly cases concerning competition and anti-dumping—it frequently bases its decision on information that has not been provided by the party to whom the decision is subsequently addressed. In

18. *Id.* at II-1194, ¶ 42.

19. Ole Due, *Le respect des droits de la défense dans le droit administratif communautaire*, 1987 *CAHIERS DE DROIT EUROPÉEN* 383, 385.

20. Ole Due, *Kontradiktionsprincippet i Fællesskabernes forvaltningsret*, *UGESKRIFT FOR RETSVÆSEN* pt. B, 321, 323 (1987).

many cases, a complainant has provided information of considerable importance to the ultimate decision—information to which the party to whom the decision is to be addressed should be given access and upon which he should have the possibility of commenting.

In the most recent case law, the Community Courts have examined the question of whether the right to be heard also covers third parties. As is apparent from Part II above, the duty to give reasons is not restricted to protecting only the party to whom the decision is addressed. Taking into account the relationship between the right to be heard and the right to obtain reasons—where, under Community law, the latter is closely related to review by the courts—the idea that the right to be heard should cover third parties does not really seem to be farfetched. In the *Sytraval* case,²¹ this issue appears to have been settled otherwise.

Until 1987, the French post office undertook, through its internal departments, the transportation of its own moneys and valuables. Thereafter, the post office chose to carry on these activities through a newly-formed company of which it held almost 100%. The post office supported the management of its new company through loans, by sending 220 officials to the company, and in other ways. One of the aims of the new company was to widen its customer base and its range of activities. The company was, in other words, intended to compete with the other providers of like services. This new competition did not go down well with the established providers of transportation of valuables. In particular, the latter held the view that part of the aid that the French State provided to the post office was passed on to the new company, thereby promoting unfair competition. The established providers therefore lodged a complaint with the European Commission. This complaint prompted the Commission to examine whether the case involved a violation of the EC Treaty provisions on state aid. While carrying out the examination, the Commission, *inter alia*, informed the complainants that their complaint raised “a number of important points of principle.” In February 1992, however, the Commission closed the file by sending a letter to the complainants and the French Govern-

21. *Commission v. Chambre Syndicale Nationale des Entreprises de Transport de Fonds et Valeurs*, Case C-367/95, [1998] E.C.R. I-1719 [hereinafter *Sytraval*].

ment in which it stated that the case did not concern illegal state aid. The complainants challenged this decision before the Court of First Instance.

In its judgment, the Court of First Instance held that the Commission's obligation to state reasons for its decisions may in certain circumstances require an exchange of views and arguments with the complainant, since, in order to justify to the requisite legal standard its assessment of the nature of a measure characterized by the complainant as State aid, the Commission needs to ascertain what view the complainant takes of the information gathered by it in the course of its inquiry In those circumstances, that obligation constitutes a necessary extension of the Commission's obligation to deal diligently and impartially with its inquiry into the matter by eliciting all such views as may be necessary.²²

The Court of First Instance thus annulled the Commission's decision. The Commission brought an appeal against this judgment before the Court of Justice. As concerns the right to be heard, the Commission stated before the Court of Justice that

whilst it is true that respect for the rights of the defence in any procedure initiated against a person which may result in an act adversely affecting him constitutes a fundamental principle of Community law, nevertheless, in State aid cases it is only the Member State concerned which finds itself in such a situation, and it is therefore only that State which must formally be called upon to express its point of view regarding the comments submitted by interested third parties.²³

Thus, the fundamental principle was not called into question. In its judgment, the Court of Justice held that

[a]s regards, first, the proposition that the Commission is under an obligation in certain circumstances to conduct an exchange of views and arguments with the complainant, flowing, according to the contested judgment, from the Commission's obligation to state reasons for its decisions, it must be stated that there exists no basis for the imposition of such an obligation on the Commission.²⁴

On the face of it, the case only concerns state aid. Never-

22. *Chambre Syndicale Nationale des Entreprises de Transport de Fonds et Valeurs (Sytraval) v. Commission*, Case T-95/94, [1995] E.C.R. II-2651, II-2677-78, ¶ 78.

23. *Sytraval*, [1998] E.C.R. at I-1768, ¶ 53.

24. *Id.* at I-1769, ¶ 58.

theless, there does not seem to be any basis for assuming that the judgment's limitation of the right to be heard only applies within the field of state aid. It thus seems reasonable to assume that only the addressee of a decision has a right to be heard unless the relevant legislation expressly provides differently.²⁵ This assumption is not least of importance with regard to competition cases.

To sum up, the right to be heard constitutes one of the fundamental principles of Community law, but the addressee of the decision to be taken may rely on this right in principle only.

III. A PARTY'S ACCESS TO THE FILE

Access to the file, the right to be heard, and the statement of reasons are all different aspects of the overall purpose of enabling the citizen to keep an eye on the authorities' activities and thereby to ensure that a given administrative decision is not defective.

The close relationship between the right of access to the file and the right to be heard is reflected in the related cases *Solvay v. Commission*²⁶ and *ICI v. Commission*,²⁷ in which the Court of First Instance stated

that the purpose of providing access to the file in competition cases is to enable the addressees of statements of objections to examine evidence in the Commission's file so that they are in a position effectively to express their views on the conclusions reached by the Commission in its statement of objections on the basis of that evidence. Access to the file is thus one of the procedural safeguards intended to protect the rights of the defence²⁸

Solvay and *ICI*, moreover, illustrate clearly how the Court of

25. An example of a provision that vests in others than the addressee a right to be heard may be found in Article 7 in Commission Regulation No. 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No. 17, 127 J.O. 2268 (1963), O.J. Eng. Spec. Ed. 1963-64, at 47.

26. *Solvay SA v. Commission*, Case T-30/91, [1995] E.C.R. II-1775, [1996] 5 C.M.L.R. 57.

27. *Imperial Chem. Indus. v. Commission*, Case T-36/91, [1995] E.C.R. II-1847, [1996] C.E.C. (CCH) 137 [hereinafter *ICI*].

28. *Solvay*, [1995] E.C.R. at II-1802, ¶ 59, [1996] 5 C.M.L.R. at 76; *ICI*, [1995] E.C.R. at II-1880, ¶ 69. Note that the judgment expressly refers to "competition cases." Bo Vesterdorf, *Complaints Concerning Infringements of Competition Law Within the Context of European Community Law*, 31 COMMON MKT. L. REV. 77, 88 (1994).

First Instance interprets the principle of access to the file. At the material time, the Belgian company Solvay, which was the largest producer in the world of synthetic soda-ash, had a market share of seventy percent in the Community, excluding United Kingdom and Ireland. The British company ICI, which was the second largest producer in the Community, had a share of over ninety percent of the United Kingdom market. Originally, the two companies had concluded a market-sharing agreement, but the agreement was formally cancelled in 1972. As the Commission suspected that the two companies had nevertheless continued their market-sharing practice, it initiated an investigation in 1989. The Commission also held the view that the two companies had abused their dominant positions in their respective markets.

The Commission conducted separate proceedings against Solvay and ICI. With respect to the alleged abuse of their dominant positions, the two companies were not allowed access to those documents that concerned the other company's alleged abuse. Documents concerning alleged abuse by one of the companies might, however, have contained information important to the defense of the other company.

In order to justify the refusal of access to these documents, the Commission firstly observed that "although [the Commission's] officials themselves examined and re-examined all the documents in [the Commission's] possession, they found no evidence which might exculpate the applicant, so that there was no point in disclosing them."²⁹ To this argument, the Court of First Instance replied in the following terms:

[I]t should be stated that in the defended proceedings for which Regulation 17 provides it cannot be for the Commission alone to decide which documents are of use for the defence. Where, as in the present case, difficult and complex economic appraisals are to be made, the Commission must give the advisers of the undertaking concerned the opportunity to examine documents which may be relevant so that their probative value for the defence can be assessed.³⁰

The Court further pointed out that

[h]aving regard to the general principle of equality of arms,

29. *Solvay*, [1995] E.C.R. at II-1811-12, ¶ 81, [1996] 5 C.M.L.R. at 83.

30. *Id.*

which presupposes that in a competition case the knowledge which the undertaking concerned has of the file used in the proceeding is the same as that of the Commission, the Commission's view [that there was no need to allow the applicant access to the file where the Commission's own officials had examined the documents] cannot be upheld.³¹

The Court continued by pointing out the consequences of the Commission's decision not to allow the applicant access to certain documents, namely that

the rights of defence which the applicant enjoys during the administrative procedure would be excessively restricted in relation to the powers of the Commission, which would then act as both the authority notifying the objections and the deciding authority, while having more detailed knowledge of the case-file than the defence.³²

As a second argument for refusing the applicant access to the file, the Commission submitted "that ICI could have sent to the applicant the documents emanating from it [i.e. from ICI] and which were useful in its own defence."³³ The Court rejected this argument in the following terms:

However, such an approach does not take account of the fact that the defence of one undertaking cannot depend upon the goodwill of another undertaking which is supposed to be its competitor and against which the Commission has made similar allegations. Since the Commission is responsible for the proper investigation of a competition case, it may not delegate that task to the undertakings, whose economic and procedural interests often conflict.³⁴

The Commission's third argument for refusing access to the file was that the refusal was the consequence of the confidentiality that it had to observe. The documents, the Commission said, contained business secrets and both companies had expressly invoked the confidential nature of the documents. The Court of First Instance agreed that undertakings have a right to protection of their business secrets. The Court considered, however, "that that right must be balanced against the safeguarding of the

31. *Id.* at II-1812, ¶ 83, [1996] 5 C.M.L.R. at 84.

32. *Id.*

33. *Id.* at II-1813, ¶ 85, [1996] 5 C.M.L.R. at 85.

34. *Id.*

rights of the defence.”³⁵ The Court further pointed out that “[t]he Commission could have protected the business secrets by deleting the sensitive passages from the copies of the documents sent to the applicant”³⁶

On the basis of these considerations, the Court of First Instance concluded that the confidential treatment of the documents in question “in no way justified the Commission’s outright refusal to disclose them.”³⁷ The Court therefore held that “the contested decision [had to be] annulled in so far as it concerns the applicant.”³⁸

Solvay and *ICI* reflect the fact that transparency is a new concept for the Community institutions, and, for obvious reasons it takes time for such new practices to become firmly established. Judgments like the ones in *Solvay* and *ICI* are therefore crucial in the work towards establishing these new practices within the Community institutions.

IV. *THE PUBLIC’S ACCESS TO INFORMATION*

A. *The Legal Basis*

In the Final Act of the Treaty on European Union,³⁹ signed at Maastricht on February 7, 1992, the Member States incorporated Declaration No. 17 on the right of access to information in the following terms:

The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.⁴⁰

Declaration No. 17 was the Community’s first step towards acknowledging the public’s right of access to information. On December 6, 1993, the Council and the Commission adopted a Code of Conduct (93/730/EC) concerning public access to

35. *Id.* at II-1814, ¶ 88, [1996] 5 C.M.L.R. at 85.

36. *Id.* at II-1815, ¶ 92, [1996] 5 C.M.L.R. at 86.

37. *Id.* at II-1816, ¶ 95, [1996] 5 C.M.L.R. at 87.

38. *Id.* at II-1819, ¶ 104, [1996] 5 C.M.L.R. at 89.

39. O.J. C 191/95 (1992).

40. O.J. C 191/101 (1992).

Council and Commission documents.⁴¹ On December 20, 1993, the Council adopted Decision 93/731 on public access to Council documents.⁴² The Commission followed suit on February 8, 1994, by adopting Decision 94/90 on public access to Commission documents.⁴³ Today, these two decisions form the principal basis for the public's access to information.⁴⁴

The legal basis for the two decisions are Articles 151(3)⁴⁵ and 162⁴⁶ of the EC Treaty, which oblige, respectively, the Council and the Commission to adopt Rules of Procedure.⁴⁷ In other words, the public's right of access to information is set out in legal measures that in principle are aimed at regulating the internal affairs of the two institutions. One of the strongest proponents of the public's right of access to information, the Netherlands, found this construction unsatisfactory and therefore sued the Council before the Court of Justice, arguing that the Code of Conduct and the Council decision should be annulled.⁴⁸

With regard to the Council decision, the main Dutch argument was that it was illegal to adopt rules, the very purpose of which are to create rights for individuals, on the basis of provisions authorizing the Council to adopt measures relating to its internal organization and functioning.

The Court of Justice did not accept the Dutch Government's argument. Rather, the Court held:

So long as the Community legislature has not adopted general rules on the right of public access to documents held by

41. Code of Conduct concerning public access to Council and Commission documents, O.J. L 340/41 (1993) [hereinafter Code of Conduct].

42. Council Decision No. 93/731/EC, O.J. L 340/43 (1993) (on public access to Council documents).

43. Commission Decision No. 94/90/ECSC, EC, Euratom, O.J. L 46/58 (1994) (on public access to Commission documents).

44. Similar decisions have later been adopted by most of the other Community institutions. Cf. Jacob Söderman, *The Role and Impact of the European Ombudsman in Access to Documentation and the Transparency of Decision-Making*, in *OPENNESS AND TRANSPARENCY IN THE EUROPEAN UNION* 81 (V. Deckmyn & I. Thompson eds., 1998).

45. EC Treaty, *supra* note 3, art. 151(3), O.J. C 224/1, at 58 (1992), [1992] 1 C.M.L.R. at 681 (Article 151(3) of EC Treaty will be renumbered as Article 207(3) of Consolidated EC Treaty).

46. EC Treaty, *supra* note 3, art. 162, O.J. C 224/1, at 60 (1992), [1992] 1 C.M.L.R. at 684 (art. 162 of EC Treaty will be renumbered as art. 218 of Consolidated EC Treaty).

47. In addition, the Council also based its decision on Article 22 of its Rules of Procedure.

48. *Netherlands v. Council*, Case C-58/94, [1996] E.C.R. I-2169, [1996] 2 C.M.L.R. 996.

the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organization, which authorizes them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration.⁴⁹

The Court continued: “The fact that Decision 93/731 has legal effects vis-à-vis third parties cannot call in question its categorization as a measure of internal organization. There is nothing to prevent rules on the internal organization of the work of an institution having such effects.”⁵⁰

Thus, even though the Council and the Commission chose to issue rules on the public’s access to information on the basis of their Rules of Procedure, the rules still vest in the citizen a right of access and a corresponding duty on the two institutions. The Court’s reasoning and conclusion obviously apply also to the Commission decision, as is made clear in the judgment of the Court of First Instance in *WWF UK v. Commission*:⁵¹ “Although Decision 94/90 is, in effect, a series of obligations which the Commission has voluntarily assumed for itself as a measure of internal organization, it is nevertheless capable of conferring on third parties legal rights which the Commission is obliged to respect.”

In conclusion, the Council’s and the Commission’s decisions on the public’s access to documents are binding on the two institutions and vest in the citizen a legally enforceable right. It is, in this respect, important to repeat that these obligations are assumed voluntarily by the two institutions and that the rules might have provided wider or narrower access to information if the two institutions so wished. This observation is important in so far as the restrictions on access to information in the two decisions are restrictions that each institution may, if it wants to, relinquish in any individual case as long as doing so does not violate other legally binding obligations, such as the duty to respect business secrets pertaining to individual companies or persons.

49. *Id.* at I-2198, ¶ 37, [1996] 2 C.M.L.R. at 1019.

50. *Id.* at I-2198, ¶ 38, [1996] 2 C.M.L.R. at 1019.

51. *WWF UK (World Wide Fund for Nature) v. Commission*, Case T-105/95, [1997] E.C.R. II-313, [1997] 2 C.M.L.R. 55.

B. *The General Principle Laid Down in the Two Decisions*

Both the Council's and the Commission's decisions provide that the public shall have access to any written text, whatever its medium, held by either of the two institutions. The decisions also provide for exceptions in situations in which the institutions must not allow access to documents, such as when the disclosure could undermine the public interest. The decisions further provide that the institutions may refuse access in order to protect the confidentiality of their proceedings.

C. *Exceptions to the Right of Access*

1. Introduction

It is a well-known principle under Community law that exceptions to a rule are interpreted restrictively, whereas the rule itself is given a broad interpretation. This principle particularly applies when the rule concerns a basic principle of Community law, such as the free movement of goods or one of the citizens' fundamental rights.

As pointed out by Advocate General Tesauro in *Netherlands v. Council*,⁵² the right of access to information is "an expression of the democratic principle."⁵³ It consequently follows that any exceptions to the right of access to information must be interpreted narrowly and with great prudence.⁵⁴

The Code of Conduct expressly provides for the following exceptions to the right of access:

The institutions *will* refuse access to any document whose disclosure could undermine:

- the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),
- the protection of the individual and of privacy,
- the protection of commercial and industrial secrecy,
- the protection of the Community's financial interests,
- the protection of confidentiality as requested by the natural or legal persons that supplied the information or as re-

52. *Netherlands*, [1996] E.C.R. I-2169, [1996] 2 C.M.L.R. 996.

53. Opinion of Advocate General Tesauro, *Netherlands v. Council*, Case C-58/94, [1996] E.C.R. I-2169, I-2180, ¶ 15, [1996] 2 C.M.L.R. 996, 1007.

54. *See, e.g., WWF*, [1997] E.C.R. at II-343, ¶ 56, [1997] 2 C.M.L.R. at 72.

quired by the legislation of the Member State that supplied the information.

They *may* also refuse access in order to protect the institution's interest in the confidentiality of its proceedings.⁵⁵

The exceptions mentioned in the first three indents of paragraph 1 are exceptions that are well-known from the legislation, in, for example, the Scandinavian countries, which are generally recognized as the countries having the most far-reaching and well-developed legislation on public access to information held by the public authorities.

The public's access to information has, however, been restricted in ways other than those that are immediately apparent from the above citation. First of all, the application of the principle that the institution to which the citizen has addressed his or her request shall only provide access to documents of the institution itself has proved an important obstacle to the citizen's access to information. A second important obstacle to the access to information is the fact that the institutions appear to interpret the above exceptions in such a way that any document containing information covered by one or more of the exceptions, as well as other information not covered by any of the exceptions, is completely exempted from the right of access. Thirdly, the Council has argued that the public interest exception must be interpreted so as to cover also opinions provided by the institutions' own legal services.

In what follows, I shall examine these three issues. Before examining these issues, however, I will briefly consider the interpretation of the exceptions to access to information laid down in the two decisions on access to documents.

2. Interpretation of Exceptions to Access to Information

As shown above, the decisions on access to documents provide that where five, specifically-enumerated exceptions apply, access *must* be refused. When the institution has an interest in the confidentiality of its proceedings, it *may* refuse access. This latter exception was examined in *Carvel and Guardian v. Council*.⁵⁶

55. Emphasis author's own.

56. *John Carvel and Guardian Newspapers, Ltd. v. Council*, Case T-194/94, [1995] E.C.R. II-2765, [1995] 3 C.M.L.R. 359.

In this case, John Carvel, a journalist with the British newspaper *Guardian*, had applied to the Council for access to certain documents. The Council turned down his application on the ground that the documents in question “directly refer to the deliberations of the Council and cannot, under its Rules of Procedure, be disclosed.”⁵⁷ Mr. Carvel challenged this decision before the Court of First Instance, which held:

It is clear both from the terms of Article 4 of Decision 93/731 and from the objective pursued by that decision, namely to allow the public wide access to Council documents, that the Council must, when exercising its discretion under Article 4(2), genuinely balance the interest of citizens in gaining access to its documents against any interest of its own in maintaining the confidentiality of its deliberations.⁵⁸

The Court’s judgment in *Carvel* reflects the fact that the Council’s and the Commission’s decisions on access to documents include mandatory exceptions as well as discretionary exceptions. When information in a document is not covered by a mandatory exception, the Council and the Commission *may* lawfully provide access to that information, even if it is covered by one of the discretionary exceptions. Moreover, it is arguable that the Community institutions *must* consider any request for access to information even if this information is covered by one of the mandatory exceptions.⁵⁹

3. The Authorship Principle

The Code of Conduct provides that “[w]here the document held by an institution was written by a natural or legal person, a Member State, another Community institution or body or any other national or international body, the application must be sent direct to the author.”⁶⁰ The principle thus established is often referred to as the principle of authorship. Basically, it requires the citizen to address his or her request for access to a document to the author of the document, even when a Commu-

57. *Id.* at II-2775, ¶ 16, [1995] 3 C.M.L.R. at 364.

58. *Id.* at II-2789, ¶ 65, [1995] 3 C.M.L.R. at 372. The obligation to balance the citizen’s interests in gaining access to a document against the institution’s interest in maintaining confidentiality has been reiterated in other cases. *Svenska Journalistförbundet v. Council*, Case T-174/95, [1998] E.C.R. II-2289, ___, ¶ 113.

59. *See supra* Part IV.3.1.

60. Code of Conduct, *supra* note 41, O.J. L. 340/41, at 41 (1993).

nity institution is in possession of the document and when nothing indicates that the document must be treated confidentially. It might be argued that this principle does not form one of the exceptions to the right of access and, in my view, it is difficult to argue that it constitutes a limit to the scope of application of the right of access as provided in the Code of Conduct because such an interpretation could be considered incompatible with the overall aim of allowing the public the widest possible access. It might thus be argued that the principle of authorship constitutes simply a procedural rule indicating to the public where to address a request for access. The consequence of such an interpretation would be that if the author to whom the request should primarily be addressed refuses to give access, then the institution concerned could still grant such access by applying its own rules. Whether this interpretation is correct might be answered by the Court when it hands down its judgment in the *Rothmans* case,⁶¹ which concerns the Commission's refusal to allow access to a document held by the Commission but drawn up by a committee provided for under Council Decision 87/373/EEC of July 13, 1987.⁶²

As noted above, it is arguable that the Community institutions must consider any request for access to information. In the case of the authorship principle, such a rule would mean that a Community institution may not turn down a request for access to a document solely by referring to the fact that the document was not drawn up by that institution. There would need to be some further reason to justify such refusal.

To illustrate how this mechanism might work, one may imagine that the Commission has asked a very large number of companies to provide statements of a clearly non-confidential nature. If a person requests the Commission to be allowed access to these statements, then one could argue that it is disproportionate for the Commission to refuse such access on the *sole* basis that it is not the author of the statements.

Refusing access on the basis of the authorship principle furthermore seems to conflict with the overall principle of Declaration No. 17 and of the Code of Conduct, namely that "[t]he public will have the widest possible access to documents held by the

61. *Rothmans v. Commission*, Case T-188/97 (pending case).

62. Council Decision No. 87/373/EEC, O.J. L 197/33 (1987) (comitology).

Commission and the Council.”⁶³

Because the purpose of the Council’s and the Commission’s decisions on access to documents is to give effect to the Code of Conduct and the basic principle therein, it might be argued that those decisions cannot infringe the principle of giving “the widest possible access” by turning the authorship principle into a “true” exception.

In conclusion, it is arguable that the authorship principle in itself cannot constitute an adequate basis for the Community institutions to turn down a request for access to a document. The question therefore is what more is necessary before such a request may be refused. I will not, however, embark upon an effort to address this question here. It is, nevertheless, clear that even if the authorship principle may be a practical way for the institutions to solve the delicate problem of granting access to a document sent to it by either a Member State or a private company—an access to which the sender might object for various reasons—and to avoid difficult discussions with the sender of the document, it is a very far reaching restriction. In reality, it substantially reduces the value of access to information because one of the main reasons for this principle is precisely to enable the public to appreciate what information has been received from a third party.⁶⁴

4. Access to Information or to Documents?

Declaration No. 17, cited above, expressly refers to “information,”⁶⁵ and not to “documents.” When giving effect to the citizens’ right of information, the Council and the Commission, however, chose to refer to the right of access to documents. Even though this difference may seem trivial, in fact it is not. Imagine for instance that a citizen requests access to information of a non-confidential nature in a document. This document, however, also contains information of a confidential nature

63. Code of Conduct, *supra* note 41, O.J. L 340/41, at 41 (1993).

64. It is not an answer to this objection that one may ask the third party (the author) to allow access to the document. First, if the author is a private party, he or she may arbitrarily refuse to grant such access. Second, if the author is a Member State or one of its public authorities, one is dependent on the scope of the national laws on access to information of that State, if such laws exist, which is not always the case.

65. The French language version of Declaration 17, entitled “Déclaration (n° 17) relative au droit d’accès à l’information” also expressly refers to “*information*.”

clearly covered by one of the exceptions laid down in the decisions providing for access.

If it is not possible to separate the confidential and the non-confidential information, or for any other reason, it is not possible to allow access to the non-confidential part of the document without risking disclosure of the contents of the confidential part of the document, then it seems obvious that the whole document must be covered by the exception clause. But what if it is possible to separate the confidential and the non-confidential parts? Does the exception only cover the confidential parts of the document or does it cover the document as such?

Advocate General Tesauro, in his opinion in *Netherlands v. Council*, opined that the citizens' right of information existed before the Council's and the Commission's decisions on access to documents. Accordingly, these decisions are confined to organizing the operation of the two institutions in the light of that right.⁶⁶

Advocate General Tesauro explicitly refers to the right of information, thereby supporting the view that the right of access is to information and not just to documents. This view also finds support in the Court of First Instance's case law on access to the file and in the European Ombudsman's decisions. Thus, in *Solvay*,⁶⁷ concerning the Commission's refusal to allow Solvay the right of access to certain of the file's documents, the Court of First Instance noted the following: "The Commission could have protected those secrets by deleting the sensitive passages from the copies of the documents sent to [Solvay], in accordance with the general practice of the Directorate-General for competition (DG IV) in this area, which was even followed in part in the present case."⁶⁸

66. Opinion of Advocate General Tesauro, *Netherlands v. Council*, Case C-58/94, [1996] E.C.R. I-2169, I-2182, ¶ 20, [1996] 2 C.M.L.R. 996, 1010. The case only concerned the Council decision so, formally speaking, Advocate General Tesauro's was only dealing with this decision and not with the Commission decision. Since the Commission decision was issued after the Council decision and since the two decisions are pursuing the same objective, Advocate General Tesauro's observations necessarily apply *mutatis mutandis* to the Commission decision.

67. *Solvay SA v. Commission*, Case T-30/91, [1995] E.C.R. II-1775, [1996] 5 C.M.L.R. 57.

68. *Id.* at II-1815, ¶ 92, [1996] 5 C.M.L.R. at 86. The Court even suggested a solution for the provision of access by the Commission when the preparation of non-confidential versions of all the documents in question proved difficult. In such circum-

Access to the file in *Solvay* concerns the right of defense and thus differs from the public's general right of information. Nevertheless, it seems difficult to justify the premise that the institutions must allow a defendant access to "information," whereas the public at large will only be allowed access to "documents."

Likewise, in a case decided in July 1998, the European Ombudsman was faced with the issue of whether the fact that a document included confidential information meant that the Council could refuse access to the entire document. In his conclusion, the Ombudsman stated:

The Council's justification of its refusal of access to documents under Article 4(2), in particular the use of the word "therefore," implies that access should be refused to every document which contains detailed national positions, regardless of how insignificant a proportion of the document this element may constitute, or of what the other contents of the documents may be. The Ombudsman does not consider that this reasoning allows it to be confirmed that the Council complied with the obligation to strike a genuine balance between the interests involved.⁶⁹

5. Legal Advice Provided by the Legal Service of an Institution

The Community institutions often receive legal opinions from their legal services. The question may arise as to whether the public has a right of access to these opinions. When the opinion concerns court proceedings in which the institution is involved, the information clearly falls within the exceptions in which the institution can refuse access. The question is, however, whether there is a wider right or duty to refuse access to opinions of an institution's legal service.

On the one hand, one may argue that allowing access to such opinions could give rise to uncertainty regarding the legal-

stances, the Court stated, the Commission could have sent to the applicant a list of those documents containing confidential information, requesting the applicant to identify those documents on the list to which the applicant would like to gain access. The Commission would then have to prepare non-confidential versions of these documents only.

69. The Decision of the European Ombudsman on complaint 1057/25.11.96/STATEWATCH/UK/IJH against the Council is accessible via the Internet. See The European Ombudsman Decision (visited Mar. 8, 1999) <<http://www.euroombudsman.eu.int/decision/en/961057.htm>> (on file with the *Fordham International Law Journal*).

ity of Community measures, and could have a negative effect on the functioning of the Community institutions causing the stability of the Community legal order and the proper functioning of the institutions to suffer. As the stability of the Community legal order and the proper functioning of the institutions are matters of public interest, which is one of the mandatory exceptions in the Code of Conduct, the institution in question is obliged not to divulge the opinions of its legal service to the public.

The argument against this interpretation seems to be that the exceptions set out in the Code of Conduct must be interpreted restrictively, meaning that “public interest” cannot be given an interpretation that is so broad that it prohibits an institution from allowing public access to any opinion issued by its legal service. It could be argued that the better interpretation of the public interest exception is that the categories⁷⁰ enumerated in the Code of Conduct under the “public interest” heading must be considered exhaustive. In other words, the institution is only obliged to refuse access on the basis of the public interest exception where the information requested falls within one or more of these categories.

The question of access to opinions of an institution’s legal service has been dealt with in the order of the President of the Court of First Instance in *Norup Carlsen and Others v. Council*.⁷¹ The applicants in *Norup Carlsen* were parties in proceedings against the Danish Prime Minister before the Danish Supreme Court. As part of these proceedings the applicants had requested that the Council provide access to certain Council documents. These documents reproduced the written views of the Legal Services of the Council and the Commission. The Council refused to allow the applicants access, holding that allowing such access would be against the public interest. The applicants therefore initiated proceedings before the Court of First Instance, requesting the annulment of this decision. As the applicants had requested access to the documents in order to use these in the Danish court proceedings and as the Danish Supreme Court would render judgment before the Court of First

70. These enumerated categories are public security, international relations, monetary stability, court proceedings, inspections, and investigations.

71. *Hanne Norup Carlsen and Others v. Council*, Case T-610/97, [1998] E.C.R. II-485.

Instance was likely to render its judgment, however, the applicants applied to the President of the Court of First Instance requesting access to the documents.

The President refused to issue the requested interim measures, observing that the measures would not be of a provisional nature. Granting the applicant access would anticipate the judgment of the Court of First Instance on the action for annulment. Moreover, such disclosure would have effects that could not be definitively brought to an end when the judgment was delivered.⁷² The President also discussed whether the Council had been justified in refusing access on the basis that such access would contravene the public interest. On this point, the President agreed with the Council that a written opinion of the Council's Legal Service was of such special nature that the requirement of ensuring maintenance of legal certainty and stability of Community law, and, of ensuring that the Council is able to obtain independent legal advice, had to be regarded as legitimate with regard to both the letter and the spirit of the Code of Conduct and Decision 93/731.⁷³ The President further held that the interpretation of the public interest exception should not be restricted so as to cover only the five categories enumerated in the Code of Conduct.⁷⁴

Obviously, the order by the President of the Court of First Instance in *Norup Carlsen* is of great importance in the correct construction of the access rules *vis-à-vis* opinions of an institution's legal service. As is clear, however, the President turned down the application on two grounds: first, because the request was clearly not of a provisional nature, and second, because, as noted by the President, the action was not one of *fumus boni iuris*. It might be possible to argue that, to some degree at least, the latter argument has the character of an *obiter dictum* because the fact that the order sought could not be of a truly provisional kind was so obvious that it was not really necessary to consider the question of whether the case was one of *fumus boni iuris*. Perhaps, therefore, it might be somewhat premature to consider the question finally settled.

72. *Id.* at II-506, ¶ 56, [1998].

73. *Id.* at II-503, ¶ 47, [1998].

74. *Id.* at II-503-04, ¶ 48, [1998].

V. *WHAT DIRECTION IS TRANSPARENCY TAKING?*
SOME FINAL REMARKS

In this Essay, I have provided an examination of a few selected aspects of transparency in the decision-making process. Irrespective of the fact that my examination has only dealt with a limited part of a vast topic, I believe that the picture that I have drawn makes it possible to make some remarks, albeit cautious ones, about how the law is developing.

I have examined above the duty to give reasons, the right to be heard, a party's right of access to the file, and the public's access to information. It is important to emphasize, however, that the overall heading or the focal point of this Essay is transparency. What is apparent from my examination is that there have been very considerable differences in the evolution of the different aspects of transparency. For instance, the duty to state reasons is an obligation that, so to speak, has been around for years and that is well-developed in the case law of the Community Courts. In contrast, only very recently has the citizen's right of access to information been established in Community law, and it is still undergoing substantial development.

It seems to me that the different aspects of transparency are developing along an S-curve. At one point or another the right comes up like a new bud. In the beginning, it is not clear whether it will grow or wither, but after some time it establishes itself as a new right and its period of development begins. With respect to the citizen's right of access to information, this development has taken place at an astonishing pace. At some point, the new right begins to mature. It has, more or less, reached its limits. Perhaps the *Sytraval* case⁷⁵ is a sign that the right to be heard has reached this stage? Following maturity, the changes are only few and far between. Most of the case law will concern the application of a well-established principle. Such is the case with the duty to state reasons.

The citizen's right of access to information is the newest addition to transparency's many faces, and in these years this young bud seems to be growing considerably. Predicting the precise development of this right is difficult, but it may still be interesting to look at the direction in which it is moving.

75. *Commission v. Chambre Syndicale Nationale des Entreprises de Transport de Fonds et Valeurs*, Case C-367/95, [1998] E.C.R. I-1719.

The Treaty of Amsterdam⁷⁶ provides more important changes to the citizen's right of access to information. The most important of these probably is the introduction of Article 191a, which provides the following:

1. Any citizen of the Union, and any natural or legal person residing or having their registered office in a Member State, shall have a right to access to European Parliament, Council and Commission documents, subject to 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 189b 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.⁷⁷

Following the entry into force of the Treaty of Amsterdam, the Parliament, the Council, and the Commission will be under an obligation to lay down procedures for the treatment of applications from the public for access to documents. The three institutions will face a lot of questions in their work towards these new rules of procedure. Among the questions that they will need to solve are the following four:

The first question is whether the new legal measure will apply to the Parliament, the Council, and the Commission only, or whether it will be given a broader application. In this respect, it is worth emphasizing that the Treaty of Amsterdam also provides that paragraph two of Article A⁷⁸ of the Treaty on European Union shall be worded in the following terms: "This Treaty marks a new stage in the process of creating an ever closer union

76. Treaty of Amsterdam, *supra* note 3.

77. *Id.* art. 2(45), O.J. C 340/1, at 46 (1997) (inserting Article 191a into EC Treaty); Consolidated EC Treaty, art. 255, O.J. C 340/3, at 282 (1997), 37 I.L.M. at 130 (ex Article 191a).

78. *See* Treaty of Amsterdam, *supra* note 3, art. 1(4), O.J. C 340/1, at 7 (1997) (replacing Article B, ¶ 2 of TEU); Consolidated version of the Treaty on European Union, art. 1, ¶ 2, O.J. C 340/2, at 152 (1997), 37 I.L.M. 67, 68 (not yet ratified) ex Article B, ¶ 2, *incorporating changes made by* Treaty of Amsterdam, *supra*. By virtue of the Treaty of Amsterdam, articles of the TEU will be renumbered in the Consolidated version of the Treaty on European Union. Treaty of Amsterdam, *supra*, art. 12, O.J. C 340/1, at 78-79 (1997).

among the peoples of Europe, in which decisions are taken *as openly as possible* and as closely as possible to the citizen.”⁷⁹

One of the fundamental principles of this Treaty will thus unequivocally be to provide for the widest possible access to documents. Moreover, the European Ombudsman has held that he considers an institution’s failure to provide rules on access to documents to constitute maladministration.⁸⁰

A second question is whether the measure should include the principle of authorship. Such a principle would—as mentioned above—largely reduce the value of the right of access to information. One may indeed question to what extent such a restriction conforms with the principles that should govern a modern public administration.

Thirdly, one may ask what constitutes a “document” within the meaning of Article 191a of the TEU? A letter going from one directorate general to another within the Commission or from one Community institution to another or from a third party to a Community institution must constitute a document.⁸¹ But what about the preliminary written deliberations of the official drafting the letter? It seems to me that not everything in writing may be considered to constitute a document; there must be some lower limit. This question concerns, in reality, the problem of whether preparatory documents should be classified as internal documents to which access is not obligatory. In any case, one must keep in mind that the access rules are intended to provide the widest possible access, meaning that one must be very cautious in restricting the citizen’s right of access to information. One of the important questions in this respect will be to determine whether, even if Article 191a refers to “documents” and not to “information,” the institutions should be obliged to give access in part⁸² to documents even though the document

79. Emphasis author’s own.

80. THE EUROPEAN OMBUDSMAN, ANNUAL REPORT 1996, at 87 (Strasbourg, Apr. 21, 1997) (in French version). The annual report is accessible via the Internet. See *The European Ombudsman, Annual Report 1996 – 22.04.1997* (visited Feb. 3, 1999) <http://www.euro-ombudsman.eu.int/report96/en/96_def.htm> (on file with the *Fordham International Law Journal*).

81. Obviously, where the letter contains confidential information, this information may be exempted from access by the public.

82. Institutions should, for example, provide access to the non-confidential part of the document in question.

also contains information covered by one of the exceptions to right of access.

A fourth question, and closely related to the third question, is whether the Community institutions should set up a register of all documents to which the public has access. There can be no doubt that such a register would greatly enhance the true value of the public's access.⁸³

The work on the legal measure provided for in Article 191a will pose a range of other questions. It must, however, be clear that Article 191a is not intended to be a step backwards. The legal measure must therefore take the present legal situation as its point of departure. It would, for instance, be a clear step backwards if the legal measure required the person applying for access to justify an interest in the document requested. Equally, it seems very difficult to imagine how the institutions could argue that all documents relating to a given area, such as state aid, must be exempted from the citizens' right of access regardless of whether the actual document contains information that must be treated confidentially.

The development set out above is, it is submitted, desirable and in fine harmony with Declaration No. 17. Nevertheless, it is important not to overlook the fact that the Union comprises fifteen independent⁸⁴ Member States. In my view, the Member States still need, at least to some degree, to be able to conduct some of their political negotiations—including negotiations leading to the adoption of legally binding measures—in the same way as other diplomatic negotiations, which means that they must be confidential. If the public is given unconditional and full access to information regarding all of the Member States' political negotiations, then it is obvious that we run the risk of the Member States moving their negotiations from the meeting room to the corridors, and thus, outside procedures governed by law. Clearly, not only would such a situation not strengthen transparency within the Community, but also, it might in fact lead to greater legal uncertainty.

83. The Council has set up such a register, which may be accessed via the Internet. See *Public register of Council documents* (visited Feb. 3, 1998) <<http://register.consilium.eu.int/utfregister/introEN.htm>> (on file with the *Fordham International Law Journal*).

84. This importance is not diminished even if these States have handed over considerable parts of their sovereignty to the Union.

Still, even though there are several remaining hurdles on the way, the citizens' right of access to information, which was recently but a small bud, is developing rapidly and has already become a very valuable means of ensuring more transparency in the decision-making process.