

Public Access to Documents in the EU

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The Normative Development of Access to Documents

I. INTRODUCTION

IN 1992, IN the wake of the Danish rejection of further EU integration, Mitterrand suggested that a long-term oversight of the EU institutions lay in the lack of talking to (the) people.¹ In response to bitter criticism suggesting that there might be institutional autism two institutions of the EU (the Council and the Commission) produced codes of conduct governing access to the EU's internal documents. It was a long jump over an abyss: the perilous pit of rejection of the EU by its own constituent population. The purpose of this volume is to assess the robustness of the new legal rules that purport to signal to the international community that the EU institutions landed safely, and upright, on the other side of the precipice.

Within the new, access-embracing, legal framework the groundbreaking codes of conduct were the tip of the iceberg. Important certainly, but it is also true that they amounted to an incipient normative stage only of the European rules on access to documents. In fact, by the time the Treaty of Amsterdam came into force, a second constitutionalising stage would take over, and accordingly, access would be vested into Treaty articles of its own. Subsequently, and under a third stage of normative development that would hold well over a decade, access to documents would form the object of a European Regulation that is still in force today. A fourth stage, albeit limited to EU legislation on privacy, competition law and environmental law, describes the coming to terms with the subject of access to documents of other EU rules adopted and applied as sectoral laws that circumscribe the general law.

It might be said, and has been said, that the current framework is in need of reform, yet in the wake of the twentieth anniversary of its investiture as a European policy, access to internal documents in the EU is a cornerstone of the overall *acquis* of the Union that is both articulate and inescapable.

We propose to pay particular attention to the role of the EU courts in the shaping of the access to documents policy. Insofar as enforcement of these rules is concerned, over the last two decades both EU courts have together rendered judgment on more than 200 disputes concerning requests for documents. This valuable sample, admittedly not as extensive as might be wished, has played the fundamental role

¹ E Haywood, 'The European Policy of Francois Mitterrand' (1993) 31(2) *Journal of Common Market Studies* 269-82.

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of steering the practice of the institutions. Since this volume is intended to function as a handbook, the emphasis of this volume will be on the evolution through time (1994–2016) of the status quo of a series of access’ conceptual parameters. Thus, attention will be paid, for each of the four abovementioned stages of its evolution, to the central issues of the specific phase, namely: applicant profile and institutions involved; documents that form the object of requests; exceptions relied on; instances of legal silence; legal costs; Member State intervention; and appeals.

Regarding the lexicon of access to documents, many an author has spent time on the difference between access and transparency as well as on the disjunction between the concept of documents and the information contained therein. We choose, on the one hand, to favour the practical dimension of access in a judicial setting rather than the more articulate teleology of transparency, and on the other, to qualify, here, as interchangeable (with the exception of Chapter 4) the concepts of document and information.

This being said, the task that we embark on is Herculean, and the authors, only human.

II. WIDE OR DEEP? HORIZONTAL OR VERTICAL PROFILES IN LEGAL DESIGN

One may easily be led to assume that it is very simple to obtain documents from the institutions of the European Union (EU). On the one hand, the law of the EU declares that a right of access to documents has been liberally bestowed upon many persons. On the other hand, the public might confuse the name of rights acknowledged by EU law, with rights of similar designation that exist within one or more legal systems of the Member States of the EU.

A. A Plain Proposition?

The law, often criticised for pervasively employing ‘ponderous language as proof of its seriousness’,² has chosen a curious approach for this access policy forged in Brussels. The words and terms on which the EU acknowledges a right of public access to the documents that it holds are, for once, plain. First, the law clarifies that it is by way of a mere application (dispensing with the requirement for the intervention of legal counsel) that the process of enforcement of such a right should commence. Next, it is stated that it is sufficient to submit the application by post or by e-mail to any institution of the EU identifying the documents one wishes to consult. Finally, the law promises the applicant that an answer will be provided within 15 days.

Subsequently, if a refusal is issued, an opportunity to engage the same institution higher up in the hierarchy is afforded. Indeed, a confirmatory application (once again dispensing with the intervention of legal counsel) requesting the same documents,

² The expression is coined by Steven Pinker in *The Sense of Style, The Thinking Person’s Guide to Writing in the 21st Century* (New York, Penguin, 2014) 58.

and deliverable by post or e-mail, may be addressed to the body within the institution that is competent³ to hear such internal appeals.

Should a second refusal be issued, the applicant becomes entitled either to engage the EU Ombudsman⁴ by way of a simple complaint (that again dispenses with the intervention of legal counsel), and/or (in this case with the mandatory assistance of legal counsel) to engage the EU judicature. This last option must be carried out by way of an action lodged before the General Court⁵ (GC) intended to have the judicature annul the institutional refusal to grant the applicant access to the contested documents. Should the GC not do as the applicant requests, the route to the highest judicial authority of the EU remains available, under the form of an appeal to the European Court of Justice⁶ (ECJ).

While it is tempting to applaud simplicity in the language of the law, it is just as important to point out that simplicity is also a pitfall in disguise. After all, this legislation's main rhetorical target is the public in general. As a consequence, simple terminology, when employed by EU law in the description of broad advantages arising out of citizenship of the Union, may lead lay persons and/or novices to this litigation—less versed in the interpretation of ordinary words within a qualified context (ie what do 'person, institution, document, or No' mean for the law)—to misconceive what, in fact, the law has to offer. Where it occurs, that misconception will put a strain on the public's relationship with institutions,⁷ and might even affect applicants' expectations regarding what legal counsel (practitioners) may obtain from the judicature, if and when litigation is pursued before the EU courts.

³ Identifiable on a case-by-case basis, depending on which EU institution is involved.

⁴ Thorough the book we have chosen not to explore the role of the EU Ombudsman as an alternative to litigation before the EU judicature.

⁵ The GC is the new designation for the first instance court of the EU judicature. In fact, it was known as European Court of First Instance, or CFI, from 1988 until the coming into force of the Lisbon Treaty on 1 December 2009. Therefore rulings and orders of the first instance judicature will either be referred to as CFI (when delivered between 1989 and 1 December 2009) or as GC (when delivered post 1 December 2009). All cases lodged at GC (and/or CFI) level are identified by the letter T used as a prefix to the case's numerical reference; the choice of letter is inspired by the French term for first instance courts: *Tribunal*. The numerical reference identifies first, the order of lodging of the case within any year, and subsequently, the precise year of lodging of the case.

Still with regard to first instance rulings, as for the (much less frequent) involvement of the Civil Service Tribunal (CST), which deals mostly with staff cases where the CST is the first instance for litigation, the GC takes on the role of (final) appellate court. In such cases, the letter F is employed as a prefix to the numerical reference, and the choice of letter is inspired by the French designation for the civil service: *fonction publique*. The CST, due to the on-going revision of the EU judicial structure, is destined to disappear from the structure of the EU judicature shortly. See, as examples of references involving the CST, Case T-304/13P *Van der Aat a.o. v Commission*, which is the appeal of Case F-111/11 *Van der Aat a.o. v Commission*. Given that such cases are lodged as an appeal of a first instance ruling, the suffix P will be added, inspired by the French term for appeal: *pourvoi*.

⁶ All cases lodged at ECJ level are identified, first, by the letter C as a prefix, inspired by the French term for high or supreme courts: *cour*. Secondly, they are identified by a numerical reference (following the same criteria employed for the GC). Thirdly, and if a case is lodged as an appeal of a first instance ruling, the suffix P will be added, inspired by the French term for appeal: *pourvoi*.

⁷ The public may react with surprise when confronted with statements similar to that from Case T-436/09 *Dufour v ECB* [2011] ECR II-0772, para 72: 'The ECB argues that neither Decision 2004/258 nor European Union Law more generally provides for a right of public access to information'.

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It is also important to keep in mind that the drafting of initial applications (and even of subsequent confirmatory applications) is often undertaken without the assistance of legal counsel. It is only when litigation⁸ commences that the law dictates that a lawyer⁹ take charge.

In the face of such apparent candour of the words that frame the offer made to the public (that it has¹⁰ a right of access to documents) one cannot help but wonder if it is just as simple to enforce the offer. Therefore, and likewise simply put, it is the aim of this book to unravel the knot of what the EU promises.

B. Confusion and Misrepresentation

Turning to a distinct issue, the risk of confusion between what is offered by EU law versus the framework of national law, one should bear in mind that rights named ‘access to documents’ are acknowledged throughout the Member States of the EU. For this reason, members of the public (who are educated in the law of individual Member States) will often assume that if a right carrying the same name is acknowledged at EU level, its respective content, or at least its structure, is, and should be, identical to the national right. Intuitively (and misleadingly), the national standard acts as a ubiquitous measure of what the EU right should be, might be, or finally, might yet become. It plays the role of a *de lege ferenda* standard of comparison.

Although national law is undoubtedly the major source of inspiration for supra-national solutions, understanding the law of the European Union often requires severance from the purely internal national mindset. A correct analysis of rights of EU law must be performed autonomously, focusing on what is effectively before us—*de lege data*—at that, specific and often different, normative level.

There are of course certain traits of the EU policies that are also present in national law and are treated in the exact same way at both levels. However, other traits of policies present both at the national and EU levels—and that moreover carry the same name, ‘rights of access’—have parameters that vary from one framework (national law) to the other (EU law). The right of public access to documents (of the EU institutions)¹¹ being no exception it is consequently developed as a product of yet another layer of statute placed between the individual and the State. This occurs

⁸ Litigation may only be commenced if it is a challenge to a refusal of a confirmatory application. For an early definition of challengeable measure, see T-106/99 *Meyer v Commission* [1999] II-03273, para 31. More recently, on the same topic, see C-127/13P *Strack v Commission* [not yet reported] para 36, *in fine*.

⁹ With regard to admissible representation by a lawyer, the third para of Art 19 of the Statute of the Court of Justice includes a requirement which makes it necessary to engage a third person who is sufficiently detached from the client. On this point, see Case C-28/13P *Thesing and Bloomberg Finance v ECB* [not yet reported], order of the President of the ECJ, 6 November 2013; and also Case T-452/10 *ClientEarth v Council* [2011] II-00257, order of the GC, 6 September 2011. On the issue of the authority granted to an applicant’s lawyer, according to Art 44(5) of the rules of procedure, see Case T-383/08 *New Europe v Commission* [not reported], order of the GC, 23 April 2009.

¹⁰ eg Regulation 1049/2001, Art 1.

¹¹ For the EU, hereinafter ‘access’.

despite the fact that it is placed beyond (and not beneath) national law, thus giving rise to inverted regionalism.¹² The results are different intensities of width and depth between Member State and EU law.

C. A Discussion for Applicants, Practitioners, Academics, Institutions and Judges

The discussion we propose to embark on is intended to facilitate many tasks: those of applicants, practitioners, academics, institutions and even of the judiciary. The beneficiaries of the access policy (applicants) will be told the somewhat harsh truth about the practical significance of the EU's acknowledgement of such a right.¹³ Practitioners will be reminded both of what applicants (clients) expect of them, of the substantial size of the case-law governing *access*, and of the more common pitfalls of the procedure. Academics (especially those interested in issues related to governance of institutions) will be exposed to an analytical discussion of the alignment of incentives in the access policy. The institutions and the judiciary will hopefully gain a different view of the applicant person. For the authors of this book the applicant person (in the majority of cases) approaches both the institution and the judge with high expectations. Yet the applicant person is the same that, more often than not, turns away confounded.

We will begin by discussing the width and depth of the right of public access to documents of the EU institutions.

D. The Normative Width of Access

From a traditional standpoint, insofar as the width of any right is concerned, one way of measuring it is to count the persons involved. We inquire first about those who may ask for enforcement and second about those who are required to grant it.

The first group may be described as the basis of active legitimacy, and the second as the basis of passive legitimacy. Therefore, from this standpoint a right is wide either when (1) many persons (many potential applicants) are accorded an advantage; or when (2) many persons—or even only a single individual—are allowed to gain an advantage over many others (many potential addressees of requests).

Another way to measure a right's width is to ascertain whether that same right allows persons to ask others for many (types of) things. In this sense we define

¹² For a definition of inverted regionalism in EU Law the insightful JH Weiler, U Haltern and F Mayer, 'European Democracy and Its Critique, Five Uneasy Pieces' (1995) EUI Working Paper RSC No 95/11, 4 remind us that 'Even if the Union were to replicate in its system of governance the very same institutional set-up found in its constituent states, there would be a diminution in its specific gravity, in the political weight, in the level of control of each individual within the redrawn political boundaries. But, of course, the Union does not replicate domestic democratic arrangements'. See also, and in particular the discerning and groundbreaking analysis of F Lafay, 'L'accès aux documents du Conseil de l'Union: contribution à une problématique de la transparence en droit communautaire' (1997) 33 Jan-Mar (1) *Revue Trimestrielle de Droit Européen* 33, 37.

¹³ A very wide perspective of access' utility is propounded by V Luszcz, 'Gunpowder for Court Battles: Litigant's Access to EU Institution Documents' (2012) 13 *EUZW* 488–94.

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the scope or range¹⁴ of things over which advantages are granted regardless of the number of persons involved.

Still, we would need to ask three further questions to fully understand access' status quo, and in order to define its width. Question (1) would regard the size of access' public; Question (2) would regard the number of EU institutions subject to access' rules, and Question (3) would focus on the types of documents covered by access, from the perspectives of their physical format subject matter and author.

i. Three Questions Regarding the Width of Access

1. Who are the persons who may ask for documents? Only natural persons or also legal persons? Only citizens of the EU or also third-country nationals? Do they have to provide explanations for their request or even demonstrate a legitimate interest?
2. From which institution(s) may the documents be requested? Only from the Commission and the Council or are other institutions subject to this request?
3. How many (kinds of) documents may be requested? Only documents printed on paper? Electronic versions? Audiovisual recordings? Within this third question, it is also important to consider two further issues
 - 3(a). How many types of subject matter may accessible documents be related to: Free movement? Competition law? Agriculture? Environment? International relations?
 - 3(b). Are only documents that the institution produces directly accessible? Or are documents produced by others and held by the institution also covered by the access policy?

As we will see,¹⁵ access has been designed favouring its width within the EU framework. Even so, if a right is offered to many persons vis-à-vis many others, there is always the danger that many disputes will arise and the management of the right will become ungovernable: the respective judicature might be swamped. To deflect such dangers, the overall structure of a right (designed to be wide) is often re-calibrated into a manageable equilibrium through choices of policy that will place stringent bounds on that right's depth.

E. The Normative Depth of Access

When we say a right is deep we mean that the *results* of its enforcement are intense. We measure the remedial strength¹⁶ and impact of the advantages given, rather than focus—as before—on the number of advantages offered.

¹⁴ Lafay, 'L'accès aux documents du Conseil de l'Union' (n 12) employs the term '*étendue*', 68.

¹⁵ See Chs 2, 4.

¹⁶ Lafay (n 12) employs the term '*intensité*', 68. In the case law it is interesting to contrast the earlier terminology employed in Case C-5/93 *DSM v Commission* [1999] ECR I-4695, paras 2 and 36, which

When applied to access, we would ask two questions to define its depth.

Question (1) would regard the least that persons expect when they go to court, and Question (2) would regard the maximum expectation that persons who sue, entertain.

i. Two Questions Regarding the Depth of Access

1. If persons sue in court what is the minimum they might ask for? That the ruling of the court at least declares that the institution was wrong in refusing access to a document?
 - 1(a). One could go on to ask a sub-question: What happens if a court rules in their favour? Is it true that the decision to refuse access is annulled and thus a legal void is created retroactively? Does it follow logically that the institution must make another decision to replace the first?
2. If persons sue in court what is the maximum they might ask for? Is it feasible in EU law, as it is in national law, to request the court to order the institution to effectively grant access to a document previously denied?
 - 2(a). One could go on to ask a sub-question: What happens if a court rules in their favour? Do judges of the EU have power to address orders to the institutions?

To both questions—under the existing framework of EU access—a valid answer could not fail to recount that under EU law no injunction¹⁷ is contemplated. In other words, while the EU judiciary may declare that an institution wrongly denied access to a document, the same judges are not empowered to order the institutions to hand those same documents over to the applicant. Annulment of refusals is the

clearly carves out (positive) injunctions from the access model—‘When exercising judicial review of legality under Article 173 of the Treaty (now, after amendment, Article 230 EC), the Community judiciary has no jurisdiction to issue directions’—against a more recent and more intriguing approach in Case C-127/13P *Strack v Commission* (n 8) 145, considered below. It is not clear if the *Strack* formula is a hint that in the future (positive) injunctions might be clawed back into the model.

Whilst most requests for orders of disclosure arise within the main action for annulment, on occasion, applicants have attempted to lodge a principal action for annulment and at the same time lodge an ancillary urgent request for the disclosure of the contested documents. In such cases, the EU judiciary has consistently dismissed all applications for interim relief, since to do otherwise would anticipate the decision of the courts in the main action. See eg T-610/97R *Carlsen a.o. v Commission* 1998] II-00485, order of the President of the CFI, 3 March 1998. As requests for these directions are issued under a framework of urgency, the references of such cases employ the letter R as a suffix. The reason is that this is inspired by the French term *référé* (*procédure d’urgence judiciaire*).

For an overview of the discussion of such directions as interim measures in judicial proceedings as an instrument of protection for individuals in EU law, see JL da Cruz Vilaça, *EU Law and Integration, Twenty Years of Application of Law* (Oxford, Hart, 2015) ch 5, 133.

¹⁷ Only negative injunctive orders ‘do not disclose’ are included in the EU’s legislative model for access. eg Case T-44/13 R *Abbvie v EMA* [not reported], Order of the President of the GC of 23 April 2013, in which, at point 2, the General Court ordered the European Medicines Agency not to disclose certain documents: ‘The EMA is ordered not to disclose the documents referred to in point 1 of the operative part of this order’. For more on this, see Ch 7.

normative floor against which case law may be construed, but at the same time, it is also its normative ceiling.¹⁸ Thus, access that is wide is not deep.

Its lack of depth balances the generosity of its width. Hence, although almost any person may request access to documents, if these are refused them, few persons bother to sue in court. In this context of ‘undersuit’¹⁹ what may appear to be a form of rational apathy²⁰—when capable persons who should care don’t react—is in fact a rational reaction to incentives.

F. The Name ‘Access’

Having clarified that the remedies for access are shallow, our concluding remark to this introduction regards the purpose of this book. If within all legal systems, it is widely accepted that where there is no remedy there is no right, what is the significance of a shallow remedy for an important right? This is the main challenge of this volume: a frank discussion of whether it is correct to designate the accomplishments of the EU on public access to institutional documents as a right of access at all, since that system denies applicants injunctive relief.

An alternative would be to name the EU position as a ‘right to annulment’. Or, as an alternative to opening the fundamental texts with the assurance to the beneficiaries that they have a right of access, rephrasing the founding legislative text in the following manner ‘the public has a right to have illegitimate refusals annulled’.

In fact, since its inception, the EU framework has accorded many applicants judicial review over their right to have their requests dealt with by the institutions

¹⁸ See, very recently, the rewording of what was, to date, a consistent position of the EU courts. In C-127/13P *Strack v Commission* (n 8) paras 145–47, the ECJ still excluded that it would be able to address orders to institutions, but rather intriguingly, added that this was so only in principle:

145 According to settled case law, the Courts of the European Union cannot, *in principle*, issue orders to an EU institution without encroaching upon the prerogatives of the administration (...).

146 Thus, contrary to the appellant’s assertions, the EGC was right to hold, in paragraph 90 of the judgment under appeal, that, in accordance with Article 264 TFEU, it was only open to it to annul the contested act. In so far as the appellant’s argument is based on Article 266 TFEU, it must be observed that that provision also does not provide for the possibility of issuing orders to the institutions.

147 That finding cannot be called into question by the appellant’s arguments based on Article 47 of the Charter, since that article is not intended to change the system of judicial review laid down by the Treaties.

¹⁹ ‘Undersuit’ may be defined as a socially inadequate level of suit where the private incentive to sue (since excessively low) is misaligned with the socially optimal incentive to do so. The concept is explored in S Shavell, *Foundations of Economic Analysis of Law* (Cambridge, MA, Belknap Press of Harvard University Press, 2004) Ch 4, ‘Litigation and the Legal Process’, 391: ‘The plaintiff (applicant) would not usually be expected to treat as a benefit to himself the social benefits flowing from the suit, notably, its deterrent effect on the behavior of injurers (here the institutions)’.

²⁰ For examples of other fields of law in which private parties display deceptive levels of litigious inertia, see L Rossi and S Galdes, ‘Portugal, Article 234 and Competition Law’ in B Rodger (ed), *Article 234 and Competition Law, An Analysis* (The Hague, Kluwer, 2008) 528–39; and L Rossi and M Sousa Ferro, ‘Report on Portugal’ in B Rodger (ed), *Competition Law, Comparative Private Enforcement and Collective Redress Across the EU* (The Hague, Kluwer, 2014) www.clcpecreu.co.uk

in accordance with the principles and procedures laid down.²¹ As a consequence, refusals deemed illegitimate are removed by the EU courts (annulled) and replaced by the institutions. At most, the applicant is entitled to a *deconstructive due process* in which something illegitimate is removed. No more, no less. There is no entitlement to a *constructive due process* in which documents are literally ‘handed over’ to the applicant upon order of the courts.

To be sure, an entitlement to deconstructive due process is very different from an entitlement to a more intense legal instrument (injunctive relief, ie the empowerment of the judiciary to address orders to the institutions) by way of which one would finally and concretely, hold a document in one’s hand. Therefore, one cannot but ask oneself if, by calling access in the EU context ‘access’, a misrepresentation²² has in a certain sense been nurtured.

In this first chapter we return to access’ *normative* origins and portray its development up to its present-day status. After all, comprehending the beginnings of the law—as it is—is a realistic point of departure.

III. TWO CODES OF CONDUCT FOR EUROPE

A. The Code of 1993

Chronologically, the normative development of access was born of an entanglement of acts that were simultaneously both inconspicuous and of dubious legal value. As a consequence, the investiture of access as a theme of EU law came about discreetly. First, the rules on how concrete requests from the public regarding access to documents should be dealt with by the EU institutions were laid down in a non-binding Code of Conduct of 1993.²³ That Code of Conduct (implemented by way of two Decisions) was the first instrument that could be relied on to challenge a refusal originating from a European institution before a court of law.

But it was *hors nomenclature*: when measured against the known range of *binding* instruments of EU law, it clearly did not fit. It was not a Treaty article, which would have been a prudent way to ground a policy. It was not a Regulation, which would have been a way to involve all EU institutions—with a legislative role—in the making of the policy. It was not a Directive, since, as such, it would not have been addressed to the EU institutions. It was not a Decision, although implementing Decisions were involved.

In comparison with the non-binding instruments of EU law with which the public was familiar, it also resembled a changeling. The Code of Conduct was neither a Recommendation, since it seemed to go beyond suggestion, nor an Opinion, since it was

²¹ Case T-105/95 *WWF UK v Commission* [1997] ECR II-00313, para 34.

²² The demand for remedies of greater strength on the part of the applicant has been quite evident from the outset, namely in Case T-50/96 *Primex Produkte Import a.o. v Commission* [1998] ECT II-3773 as well as in Case T-124/96 *Interporc v Commission* [1998] ECR II-231 (*Interporc I*).

²³ Code of Conduct, signed on 6 December 1993 by the Commission and the Council of Ministers on public access to Council and Commission Documents [1993] OJ L 340, 41; see Annex 1.

no proposed answer to any question. To put it bluntly, it was atypical. Therefore, no description of it was included among the list of expectable forms of EU acts contained in Article 189 of the treaty governing Europe in 1993.²⁴ The result was confounding. The nature of the Code of Conduct was elusive. Within the EU framework, no one knew exactly what a Code of Conduct meant. And, more importantly, since the Code of Conduct, as such, did not identify its own legal basis, neither was there a clear idea of what could be achieved through it.

Code of Conduct 1993

WHEREAS the said principles are without prejudice to the relevant provisions on access to files directly concerning persons with a specific interest in them;

WHEREAS these principles will have to be implemented in full compliance with the provisions concerning classified information; ...

...

[The Commission and the Council] HAVE agreed as follows:

General principle

The public will have the widest possible access to documents held by the Commission and the Council. ‘Document’ means any written text, whatever its medium, which contains existing data and is held by the Council or the Commission.

The Code of Conduct was geared for applications requesting two main types of documents: applications for published²⁵ documents and applications for internal documents. The latter, defined as ‘documents which are not yet finalised or not intended for publication, irrespective of confidentiality rating’²⁶ were, understandably, much more coveted than the former.

Concretely, the Code of Conduct established simple administrative proceedings divided into two distinct and separate phases and added a further and subsequent option of recourse to the Union’s judicature and/or Ombudsman to finally settle disputes.

The first phase of such proceedings consisted of an initial application for access to specific documents held by the Council or the Commission. Processing of initial applications had quite strict timings as the institution had only 30 days in which to reply. A second phase allowed applicants denied access in the first phase to lodge confirmatory requests. In its confirmatory response to the applicant, the institution—in case it wished to confirm refusal to the document—could rely on the same reasons

²⁴ The Treaty of Maastricht. For context on what the public might expect to be a right of legitimation of the EU vis-à-vis its citizens, see generally D O’Keefe, ‘Union Citizenship’ in D O’Keefe and P Towney (eds), *Legal Issues of the Maastricht Treaty* (London, Chancery Press, 1994) 87–107.

²⁵ No problems there. The applicant was simply told how and where to obtain them.

²⁶ European Commission, *Access to Commission Documents: A Citizen’s Guide* (OPOCE, 1997) 15. The Guide confirms that internal documents were the object of the Code by stating at 6: ‘The Commission understands that granting the public access not only to official publications, but also to *internal* documents, is an important component of its more ample information policy, allowing a vision as complete as possible of the activities of the Commission and of the European Union itself’ (author’s translation).

offered in the initial reply or, as an alternative it could put forth new and distinct reasons (among several typical exceptions listed). Another possibility was that the institution would alter the sense of the initial reply altogether, for example, by granting access to documents previously denied the applicant.

Whenever the second administrative phase was closed with a refusal the applicant would have to choose whether to lodge an action before the Union's courts or to address a complaint to the Ombudsman.

The normal arrangement would have been that as requests for access would be issued, some of the refusals would be challenged before the courts and the EU judiciary would clarify both the meaning of and the scope of the Code's rules.

But things were not so simple. To add to the issue of the Code's cryptic form, confusion was soon further enhanced by an odd debut. The subject matter of the proceedings *Netherlands v Council*,²⁷ (the seminal case of the access litigation before the EU courts) was improbable. To be sure, it concerned the Code of Conduct, but it was not grounded, as would have been expected, on the grievances of an applicant that had been denied a document by the Council or the Commission.²⁸ Rather, it told the story of the Netherlands joined by the European Parliament voicing, in unison, their dissent with the Council's (alleged) improper choice of legal basis for the new policy.²⁹

To unravel the knot and in order to understand the Netherlands' and the Parliaments' action—to understand why an EU institution and a Member State would go the length of challenging the Code's legal basis—one would have to retrace the normative steps that produced the text of the Code of Conduct. Indeed, to observe retrospectively how that first normative instrument was originated is quite revealing.

In truth, before a Code of Conduct even existed, the normative inspiration for an EU access policy had received its primary impetus from another uncommon act, a (mere) Declaration. The Declaration in question centred on the right of access to information, was numbered 17, and attached to the Final Act of the Treaty of Maastricht.³⁰

²⁷ Case C-58/94 *Kingdom of the Netherlands v Council of the European Union* [1996] ECR I-02169.

²⁸ This came to pass only 3 months later in *Carvel I* when, on 19 May 1994, John Carvel and Guardian Newspapers Ltd sued the Council before the CFI. The respective ruling was issued on 19 October 1995: Case T-194/94 *Carvel and Guardian Newspapers v Council* [1995] ECR II-02765.

²⁹ To this effect, on 10 February 1994, the Kingdom of the Netherlands, supported by the European Parliament, challenged the Council's option before the ECJ. The Commission and the French Republic sided with the Council, intervening in support of the latter within the proceedings.

³⁰ On this point, Opinion of Advocate General Maduro, delivered on 18 July 2007 in Case C-64/05P *Sweden v Commission (IFAW)* [2007] ECR I-11389, para 34:

The status of declarations annexed to Treaties remains relatively unclear. Although Article 311 EC provides that *protocols* annexed to the founding Treaties by common consent of the Member States 'form an integral part thereof' and therefore have the same legal value, the Treaty is silent on declarations. The preponderance of opinion refuses to recognize any binding legal effect for *declarations* included in final acts of Community treaties, seeing in them merely an expression of political commitment. The case law has long refused to take a stand on the matter. Only recently did it extend interpretative scope to declarations, thus falling into line with the accepted view in

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From the Parliament's point of view this constituted an original sin and impeded the Code of Conduct from being acknowledged as having been grounded on a robust legal origin.

Declaration on the Right of Access to Information

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 longer than 1993, a report on measures designed to improve public access to the information available to the institutions.

Yet despite the issues raised regarding the legal significance of this very act, Declaration No 17's effects branched out, unrelentingly, along two substantive fields over which the European public came to gain scrutiny: (1) the decision-making of both Council of Ministers and Commission when acting as executive bodies; and (2) the work of the Council of Ministers when acting in a legislative capacity.

This would give rise to an intricate chronology of many legal acts of disparate nature, form and purpose, as portrayed in the following table.

Table 1.1: The First Chronology Of Access: The 1993 And 1995 Codes Of Conduct

7 February 1992	Treaty of Maastricht is signed Declaration No 17, on access to information is annexed
16 October 1992	Birmingham European Council Declaration 'A Community Close to Its Citizens'
12 December 1992	Edinburgh European Council
22 June 1993	Copenhagen European Council
5 May 1993	Communication of the Commission 'Public Access'
2 June 1993	Communication of the Commission 'Openness in the Community'
1 November 1993	Treaty of Maastricht enters into force Declaration No 17, on access to information is in force
6 December 1993	<i>Code of Conduct 1993</i> approved by Parliament and Commission
6 December 1993	Decision amending Council's Internal Rules of Procedure

(continued)

international law Article 31 of the Vienna Convention of the law of Treaties of 23 May 1969 states that a treaty is to be interpreted in the light of its context, which encompasses 'in addition to the text, including its preamble and annexes... any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'. Declarations drawn up by the parties are thus included as bases of interpretation. Does this mean that the interpretation of a treaty thus given by common accord of the State Parties can go as far as to amend the stipulations in it? International law may have already provided a number of illustrations, in so far as the signatory States are a treaty's authentic interpreters, but that cannot be the case in Community law, given the rigid nature of the founding treaties which constitute the constitutional charter of the Communities.

Table 1.1: (Continued)

20 December 1993	Decision of the Council adopting the 1993 Code of Conduct
8 February 1994	Decision of the Commission adopting the 1993 Code of Conduct
10 February 1994	Case C–59/94 <i>Kingdom of the Netherlands and Parliament v Council</i> is lodged (ruled on 30 April 1996)
19 May 1994	Case T–194/94 <i>Carvel and Guardian Newspapers v Council</i> is lodged (ruled on 19 October 1995)
4 March 1994	Communication of the Commission ‘Improved Access to Documents’
30 January 1995	Decision of the Council on Classified Information
2 October 1995	<i>Code of Conduct 1995</i> (specific to legislative activity of the Council) appears in Press Release
22 September 1995	Case T–174/95 <i>Svenska v Council</i> is lodged (ruled on 17 June 1998)
6 December 1996	Decision of the Council extending deadlines for responses
2 October 1997	Treaty of Amsterdam is signed
13 January 1998	Case T–14/98 <i>Hautala v Council</i> is lodged (ruled on 19 July 1999)
1 May 1999	Treaty of Amsterdam enters into force

B. Code of 1993—Administrative Tasks

Within eight months of the issuance of Declaration No 17, pursuant to a summit held in Birmingham on 16 October 1992, the European Council issued a second Declaration³¹ stating that the Community institutions’ work was to be opened to the public. Foreign Ministers and Commission alike were thereby invited to examine proposals stemming from the Danish Government on the subject of openness, and to report on them in the forthcoming European Council meeting that was to be held on 12 December in Edinburgh.

A later and crucial development of the Birmingham–Edinburgh sequence was set in place by a downstream meeting of the European Council in Copenhagen on 22 June 1993. On this occasion the European Council invited the Council of Ministers and the Commission to pursue their work on the basis of the principle of citizens having the fullest possible access to information.

As endorsement, two Communications of the Commission, a first of 5 May 1993 entitled *Public Access to the Institution’s Documents*³² together with a second of 2 June 1993 entitled *Openness in the Community*,³³ laid down a provisional framework to govern access to documents and proposed that concrete parameters for

³¹ ‘A Community Close to its Citizens’ Bull EC 10–1992, 9.

³² Communication 93/C 156/05 [1993] OJ 1993 C 156, 5.

³³ Communication 93/C 166/04 [1993] OJ 1993 C 166, 4.

public access to the executive activity of European institutions would be established normatively under an inter-institutional agreement.³⁴

To enforce the promise, the Council of Ministers and the Commission approved a Code of Conduct on 6 December 1993.³⁵ The Code of Conduct, in turn, foreshadowed that both institutions would adopt, separately, and on the basis of their individual rules of procedure, Decisions³⁶ establishing concrete conditions of practical access of the public to their internal documents.

By way of a first step, each institution would resort to a Decision to introduce necessary changes into the existing rules of procedure, if that proved to be necessary.³⁷ Amending the existing internal rules of procedure was, at the time, more pressing for the Council since, principally, its activity as legislator had to be equated with the forthcoming principles of a more open European Union. The second step consisted of, once again by way of a subsequent Decision of each signatory institution, adopting the Code of Conduct, thus converting its contents into internal rules of each of its signatories.

Despite the one-year term defined for the drafting of a new practical framework—it was scheduled to be completed before 1 January 1994—only the Council of Ministers met the deadline. Accordingly, on 20 December 1993 the Council of Ministers' first concrete Decision on access was published in the Official Journal.³⁸ The Council's implementing act was soon followed by a corresponding Commission Decision that came about on 8 February 1994.³⁹

A practical setback was that the duplication of Decisions was not germane to increase the policy's popularity with the public. Applicants would have to consult each Decision separately to identify, within each institution, the competent authority to which requests should be addressed.⁴⁰ However, identical standards were set regarding all other parameters for both institutions: the addressees, the concept of document, the time-limit for receiving a reply,⁴¹ the internal pre-judicial appeal before any refusal became definitive, the list of exceptions to access, the abstract fee that could be charged for copies exceeding 30 pages, and even the two alternate authorities entrusted with the pacification of disappointed applicants.⁴²

³⁴ On their nature, see F Snyder, 'Interinstitutional Agreements: Forms and Constitutional Limitations' in G Winter (ed), *Sources and Categories of European Union Law, A Comparative and Reform Perspective* (Baden-Baden, Nomos, 1996) 453.

³⁵ Annex 1.

³⁶ Typical binding acts of EU law described in the EC Treaty of Maastricht, Art 189.

³⁷ Decision 93/662/EC [1993] OJ L 303 revised the Council's Rules of Procedure.

³⁸ Decision 93/731, later amended by Decision 2000/527/EC [2000] OJ L 212.

³⁹ Decision 94/90 [1994] OJ L 46, 58.

⁴⁰ On 4 March 1994, a Communication of the Commission 94C/67/03, *Improved access to documents*, was issued, explaining the conditions for implementation of Decision 94/90, and was published in the Official Journal ([1994] OJ C 67, 5).

⁴¹ Regarding deadlines, on 6 December 1996, the Council amended Decision 93/731 through Decision 96/705/EC ([1996] OJ L 325, 19) extending the existing deadline, if necessary, for an additional month.

⁴² Indeed, under the new legal framework, definitive refusals originating from either institution could form the object of a complaint to the European Ombudsman or be challenged before the EU courts.

These implementing Decisions added a feature of great significance to the Code: a value for silence. It was determined that the absence of a timely answer was the equivalent of a timely refusal.⁴³ Thus, institutional inertia could not be opposed an applicant. And if it was, the silence was challengeable in court.

Council Decision 93/731

7(2). Failure to reply to an application within a month of submission shall be equivalent to a refusal, except where the applicant makes a confirmatory application, as referred to above, within the following month.

Commission Decision 94/90

2(4). Failure to reply to an application for access to a document within one month of application being made constitutes an intention to refuse access.

Failure to reply within one month of an application for review being made constitutes a refusal.

Implemented and further supplemented, the 1993 Code stood. It would prove to be—somewhat unexpectedly—a normative instrument that would spectacularly alter the relationship between the EU institutions and their public.

i. A Challenge to the Code of 1993

The dubious nature of the Code of Conduct was challenged almost immediately. Not by the public, to whom it was ultimately beneficial, but as we have stated,⁴⁴ by one of the Member States of the Union. Challenge to the Code's legal form was the motive behind the case of *Netherlands v Council*.⁴⁵ From the context it is clear that the Parliament had wanted to participate in the Code's drafting and, to be sure, a typical legislative EU act would have implied a role for the Parliament and would have caused less estrangement from the public. And in this light, the purpose of that first calling on the EU judicature is quite evident: an attempt to replace the Code by a Regulation. Through it, the Netherlands and the Parliament proceeded to question both the legitimacy of the Code and of all its subsequent implementing acts.

First, the 1993 Code of Conduct itself was challenged. Secondly, Decision 93/662/EC, introducing the amendment to Article 22 of the Council's rules of procedure that had been deemed necessary before the 1993 Code of Conduct could be adopted, was called into question. More importantly still, the Council's Decision adopting the 1993 Code of Conduct—Decision 93/731—was putatively labelled as a misuse of powers on the Council's part. The main grievance vis-à-vis the 1993 Code of Conduct was that—as a non-binding act—it could not purport to produce legal effects.

⁴³ See Ch 6.

⁴⁴ Case C-58/94 *Netherlands v Council* (n 27).

⁴⁵ E Chiti, 'Further Developments of Access to Community Information: Kingdom of the Netherlands v. Council of the European Union' (1996) 2 *European Public Law* 536.

As for the remaining implementing acts,⁴⁶ objections centred on the fact that both had been passed by the Council on the basis of Article 151(3) of the EC Treaty. That Treaty Article was the (only existing) basis that allowed the institution to adopt measures of internal organisation. Furthermore, Decision 93/731 had substantively ‘copied and pasted’ the terms of the 1993 Code of Conduct and, thus, transplanted what was written in the latter into internal rules of the Council.

Against this *modus operandi* of the institution, the Netherlands, for its part, argued that the Decisions of the Council went beyond the confines of its internal organisation. Since the rules were ultimately beneficial to the public, they were intended to have legal effects outside those (mere institutional) confines. The European Parliament argued instead that the principle of openness of the legislative process and access to connected legislative documents could not be treated as organisational matters purely internal to the institutions. Such a solution—binding Decisions reproducing a non-binding Code of Conduct—represented a misuse of the powers conferred on the institution by Article 151(3) TEC.

As the case before the ECJ progressed, the noise surrounding the challenge to the 1993 Code obscured the fact that yet another Council Decision had ensued, and once more on the basis of its revised rules of procedure. Pending the Council’s adoption of more general rules on access, Decision 24/95 of 30 January 1995⁴⁷ laid out measures thought necessary to protect classified information held within the General Secretariat of the Council.

Decision 94/95 of 30 January 1995 of the Secretary General of the Council

Article 1

This Decision lays down rules governing the arrangements for classifying information processed or prepared at the Council General secretariat enabling information so classified to be protected, whatever its origin, medium or stage of completion.

Article 2

1. Information may be graded in one of the following categories:

- (a) SECRET...
- (b) CONFIDENTIEL...
- (c) RESTREINT...

2. LIMITE and SN documents shall not be classified information within the meaning of this Decision. The references LIMITE and SN shall apply to documents internal to the institution which are not intended for disclosure to the public.

The same shall apply to other information, for example General Secretariat in-house notes, documents or correspondence, subject, where appropriate, to special treatment where protection is warranted...

Disclosure of such documents and information shall require the authorization of the Director-General responsible.

⁴⁶ In other words, the amendment to the Council’s Internal Rules and the Decision which adopted the 1993 Code of Conduct (93/731).

⁴⁷ Later consolidated by Decision 27 July 2000, [2000] OJ C 239, 1–5.

3. Information shall be classified only insofar and for as long as necessary. Where the period of classification of information has not been laid down, a decision on its maintenance or declassification shall be taken after no more than five years.

The Council was once more—and consistently—construing the access policy on the basis of its own internal rules. This early option did not preempt a later understanding—common rules that would overarch all three institutions—from being set in place together with the Commission and the European Parliament.

Six months later, on 30 April 1996, the ECJ condoned the Council's choice. The ECJ proceeded primarily to save the substantive content and form of all three acts under challenge and thus indirectly acknowledged the appropriateness of the legal basis of Decision 94/95 as well.

Case C-58/94 *Kingdom of the Netherlands v Council*

24. ... An action for annulment must be available [only] in case of all measures adopted by the institutions which are intended to have legal effects.

26. ... The Code of Conduct merely foreshadows subsequent decisions intended, unlike the Code, to have legal effects.

27. ... The Code is an act which is the expression of purely voluntary coordination therefore not intended in itself to have legal effects [and, as such, an act without legal effects may not be annulled, or, for that matter challenged].

38. ... There is nothing to prevent rules on the internal organization of the work of an institution having such effects

40. ... The Council is not guilty of any misuse of power.

Principally, the ECJ ruled that at the time there was no better alternative. Common rules that would straddle several institutions were certainly desirable but were not the *condition sine qua non* for a policy to commence. By way of the ruling what existed was preserved yet at the same time all players (the public, the institutions and Member States alike) were invited to work together (rather than against each other) to improve the policy's normative architecture. After all, an individual's right was under construction.

Hence, the prudent authority of the Court saved the policy and discouraged other applicants from challenging the corresponding implementing Decision of the Commission. Mollified by the ruling and in a constructive *volte face* the Parliament adopted the Code of Conduct,⁴⁸ becoming its third signatory institution.

Without intending to demean the ECJ's seminal ruling on these matters, with the benefit of hindsight one may emphasise that it is also true that the condoning of the 1993 Code of Conduct's legal basis by the ECJ on 30 April 1996 was greatly

⁴⁸ The European Parliament adopted the Code of Conduct by Decision 97/632 of 10 July 1997 [1997] OJ L 263, 25–29. On the details of the procedure, see A Guggenbuhl, 'A Miracle Formula or an Old Powder in New Packaging' in V Deckmyn and I Thomson (eds), *Openness and Transparency in the European Union* (Maastricht, EIPA, 1988) 12: 'It did so while at the same time adapting the exception protecting deliberations by stating that access to its documents may be refused in order to protect the confidentiality of deliberations of political groups or Parliament bodies meeting in camera. Access may also be denied to protect the confidentiality of the relevant services of the Parliament's secretariat'.

prompted by concurrent contemporary litigation, the *Carvel I* case, that had just taken place before the CFI.⁴⁹ Those proceedings had been concluded on 19 October 1995 (six months prior to the ECJ's ruling in *Netherlands v Council*). Therefore—regarding a request for access to documents pertaining to the Council's legislative activity—the public had already relied successfully before the CFI on the very legal basis that was also being challenged at ECJ level.

With its basis salvaged by the ECJ, the first objective of Declaration No 17—EU rules on public access to the executive activity of the Council and the Commission—was thus completed in less than two years (February 1992–December 1993). The next step in the normative development of access would take place in October 1997, by way of Article 255 of the Treaty of Amsterdam.

Table 1.2: Parallel Proceedings

	Lodged	Ruled on	Duration
Proceedings Before the CFI Case T-194/94 <i>Carvel and Guardian Newspapers v Council</i>	19 May 1994	19 October 1995	17 months
Proceedings before the ECJ Case C-59/94 <i>Kingdom of the Netherlands and Parliament v Council</i>	10 February 1994	30 April 1996	26 months

ii. Beyond the Code: Achievements of the Early Case Law

During the period that elapsed between the enactment of the 1993 Code of Conduct and the entry into force of the Treaty of Amsterdam on 1 May 1999, while not abundant,⁵⁰ the case law became an indispensable cornerstone of the access policy. Indeed, among other important clarifications, two of its early contributions are—in this context—particularly noteworthy since they inspired subsequent normative developments to the 1993 Code of Conduct.

The first contribution came forth in the *Svenska* ruling and centred on the scope, over all three pillars of the Union, of the competence of the EU judicature to rule on requests for access to documents.⁵¹ It was thus clarified, as early as 17 June 1998, that no area of Union activity was immune to the openness obligations. The second

⁴⁹ Case T-194/94 *Carvel v Council* (n 28).

⁵⁰ C Naome, 'The Case-Law of the Court of Justice and of the Court of First Instance on Transparency from Carvel to Hautala II (1995–2001)' in V Deckmyn (ed), *Increasing Transparency in the EU?* (Maastricht, EIPA, 2002) 147–98.

⁵¹ Case T-174/95 *Svenskajournalistförbundet v Council* [1998] ECR II-2289. See Ch 4. On this issue, see M Den Boer 'Steamy Windows: Transparency and Openness in Justice and Home Affairs' in Deckmyn and Thomson, *Openness and Transparency in the European Union* EIPA (n 48) 103.

contribution came in the *Hautala I* ruling⁵² and founded the concept of partial⁵³ access. In that case, the CFI considered that, as a general rule, when access to any document was requested, the institutions were bound to consider, for each one, if it was feasible to expurgate the documents, or, literally, to ‘separate out confidential parts’ that would remain withheld, and to release the remaining parts to the public.

C. Code of 1995—Legislative Tasks

While it is indisputable that the overall activity of the Council of Ministers was greatly affected by the novel paradigm of public access to the internal documents of the European institutions, it is important to point out that the abovementioned Code of Conduct of 1993 was not an isolated achievement. In truth, chronologically, it was only the first instrument of its kind to forge practical rules of public access to the Council of Ministers’ documents. Besides opening up the executive activity of institutions to the world, Declaration No 17 implicitly required the Union to produce new rules for public access in yet another part of institutional life: law-making.

Once again returning to the developments of the Edinburgh European Council, of 12 December 1992,⁵⁴ the Conclusions thereby produced, *Conclusions of the EEC on transparency and implementation of the Birmingham Declaration*, as well as addressing other subjects,⁵⁵ touched more specifically upon the role of the Council of Ministers as legislator. Six new principles were laid down that were to serve as guidelines for amendment of the Council of Ministers’ rules of procedure in order to permit access to documents related to its legislative role.

As we have mentioned, the trumpeted revision ensued one year later, on 6 December 1993, by way of Decision 93/662.⁵⁶ The changes to Articles 5 and 7.5 in particular gave way to the drafting of a detailed procedure concerning the authorisation of the release of records of votes and votes within legislative acts.⁵⁷ What is less known is that almost two years later, on 2 October 1995, (17 days before the *Carvel I*⁵⁸ ruling on access to Council documents related to its legislative activity was rendered), a Decision of the Council (that was not published in the Official Journal) gave rise to a new Code of Conduct, specific to the institution’s legislative role. This Code is referred to as the Code of Conduct of 1995.⁵⁹ Its main accomplishment was that the

⁵² Case T-14/98 *Hautala v Council* [1999] ECR II-2489. The action was lodged as early as 13 January 1998 and the ruling was issued on 19 July 1999, 2 months after the entry into force of the Treaty of Amsterdam.

⁵³ See Ch 4.

⁵⁴ Portrayed within Table 1.1.

⁵⁵ The Council’s executive activity.

⁵⁶ [1993] OJ L 304, 1–8.

⁵⁷ For further detail, see Guggenbuhl, ‘A Miracle Formula or an Old Powder in New Packaging’ (n 48) 17.

⁵⁸ Case T-194/94 *Carvel v Council* (n 28).

⁵⁹ Available in *Basic Texts on Transparency Concerning the Activities of the Council of the EU* (Luxembourg, Publications Office, Luxembourg, 2000) 53. The Code of 1995 is only marginally referred to in the literature; see generally M Nentwich, ‘The EU Intergovernmental Conference 1996/1997’ in A Follesdal and P Koslowski (eds), *Democracy and the European Union* (Berlin and New York, Springer, 1998) 93.

rules that had been previously amended in order for records of votes to be released were thereby extended to the statements and the minutes relating to the adoption of legislative acts of the Council.

Now the Union had two Codes of Conduct to regulate public access to the documents of the Council and the Commission, but as the second Code of Conduct of 1995 had been adopted by way of a Decision that was not published in the Official Journal, it is hardly surprising that it was never cited as the legal basis of any subsequent litigation.⁶⁰ In practice, the Code appeared only as part of a press release of the 1871st Council meeting (General Affairs) held in Luxembourg on 2 October 1995. No legal consequence was imposed vis-à-vis the Code due to its lack of publication, and in fact none was ever requested:

Code of Conduct on Public Access to the Minutes and Statements in the Minutes of the Council acting as Legislator

A (4) The Council is in favour of public access, in general, to the statements which it enters in its minutes when adopting legislative acts. When adopting such acts, the Council will therefore decide, in principle, that these statements are not covered by the obligation of professional secrecy, save in cases where, at the request of one of its members, the Council establishes it does not have the simple majority required by Article 5(1) of its rules of procedure to waive that obligation.

In the case of a statement by one or more members of the Council, the Council will seek the agreement of the author(s) of the statement before deciding to make it available to the public...

B (1) When adopting the minutes of its minutes, the Council will systematically examine the question of whether to make public the references to documents before the Council* and the decisions taken or conclusions reached by the Council which are contained in the minutes regarding the final adoption of its legislative acts. As regards statements in the minutes, the decision taken by the Council when adopting the legislation will determine whether they can be made available to the public, without prejudice of the Council Decision of 20 December 1993 on public access to Council documents.

* The decision to make minutes public does not mean that the documents referred to therein will be made available to the public.⁶¹

Having remained for the most part in near oblivion, it did, nonetheless, leave a legacy: the role of the Council as legislator would always require separate attention⁶² within access' general framework. The second objective of Declaration No 17 (access to

⁶⁰ On the internal institutional practice pursuant to the 1995 Code of Conduct, see H Brunmayer, 'The Council's Policy on Transparency' in Deckmyn and Thomson (n 48) 71.

⁶¹ 10204/95 (Presse 271, 2 October 1995) 15–18.

⁶² See section IV.C below for our comments on Art 207(3) TEC; Art 6 of the Preamble to Regulation 1049/2001 (Transparency Regulation) and Art 7 of the Preamble of Regulation 1367/2006 (Aarhus Regulation). Whilst the leading cases remain Joined Cases C-39/05P & C-52/05P *Sweden and Turco v Council* [2008] ECR I-04723, paras 45 and 46 and also Case C-350/12P *Council v Sophie in't Veld* [not yet reported] this area has attracted interest from the commentators. See, for an overview, S Lea and PJ Cardwell, 'Transparency Requirements in the Course of a Legislative Procedure, Council v Access Info Europe' (2015) 21(1) *European Public Law* 61–80. For the environmental area, see also T Schomerus, 'Access to Information on Legislative Proceedings: Case Note on the Judgement of the Court (2nd Chamber) of 18 July 2013, C-515/11' (2013) 10(4) *Journal for Environmental and Planning Law* 397–401.

documents of the institutions when acting in a legislative capacity) was thus implemented in just under four years (February 1992–October 1995). Ten months later, the Treaty of Amsterdam would further the normative development.

IV. TREATY ARTICLES FOR ACCESS

A. Article 1 TEU

As the first EU Treaty to touch upon the subject, the Treaty of Amsterdam (entered into force on 1 May 1999) embraced the access policy with remarkable enthusiasm. The institutions were so eager to engage the public that their commitment was drafted into the very first Article of the TEU.

Article 1 TEU

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen

The principal accomplishment of the words chosen to ground the policy in the TEU was that the reference to the obligation of openness was made within an ample context: ‘the Union’. In doing so, the Article normatively overcame the (previously alleged) insulation from public scrutiny of the second and third pillars of Union activity.⁶³ Two further articles in the TEC would complete the novel constitutional framework, both calling for sub-constitutional, joint normative detail from the Parliament, the Commission and the Council. Access was thus gifted with a constitutional ceiling to supplement the 1993 and 1995 Codes of Conduct and promised a new floor of ordinary legislative status.

B. Article 255 TEC

In contrast to the TEU’s systematic option of placing access at the forefront of the constitutional text, the positioning of the theme in the TEC, albeit positive and novel, was less dramatic:

It is striking that the citizen’s right to obtain information on the Union’s decision-making procedures, which from the perspective of democracy can be considered a highly fundamental matter, is regulated in a Title of the EC Treaty containing certain provisions which are ‘common to several institutions’. The decision to place it here [Article 255] rather than for example in the section dealing with citizenship of the Union or general principles of the Union seems to have been an attempt to deny the fundamental status of the individual’s right to information or to place it anywhere near on a par with, for example, the general principles laid down in Article 6. Instead the implication is still that the right of access

⁶³ See Ch 4. Prior to the normative (statutory) clarification, the issue of the transversal scope of access had been resolved in the case law by way of *Svenska* (n 51).

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to documents is a matter concerning the internal functioning of a number of institutions themselves.⁶⁴

Article 255 TEC

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 European Parliament, 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 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.

Article 255 acted, as we have mentioned, as a supplement to the 1993 and 1995 Codes of Conduct that were still in force. Moreover, it is important to observe that Article 255 was accompanied by a separate Declaration to the TEC, Declaration No 35.⁶⁵

While the Treaty Article was necessary and felicitous, the Declaration was rather less so. It might even be said that it was a catalyst of confusion. This holds true for two reasons: the first, its timing, and the second, the choice of wording it employed.

Declaration on Article 255 of the Treaty establishing the European Community (ex 191a TEC)

The Conference agrees that the principles and conditions referred to in Article 191a(1) of the Treaty establishing the European Community 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.

Regarding the poorly chosen timing of the Declaration, it must not be forgotten that neither constitutional instrument (Treaty of Amsterdam or its Declaration No 35) revoked⁶⁶ the Codes of Conduct. Moreover, the Treaty limited itself to a mere enunciation of a general policy that was yet to be detailed. The existing Codes of Conduct, on the contrary, consisted of rules to be applied immediately: mainly detailed procedural rules about how requests for access were to be concretely dealt with.

It is simple to defend that the efficacy of the Declaration was clearly subject to a condition: that the Council, the Commission and the Parliament would, within a period of two years, determine *new* rules for access. In the same way it is simple to state (today) that it should have been understood that it was to shape the new rules for which the Declaration was intended. But because the 1993 Code of Conduct was formally still in force at the time the Declaration was enacted, the new measure

⁶⁴ D Curtin, 'Democracy, Transparency and Political Participation' in Deckmyn and Thomson (n 48).

⁶⁵ On the legal status of Declarations, see n 30 above.

⁶⁶ This position is corroborated by Case T-191/99 *Petrie a.o. v Commission* [2001] ECR II-3677, para 36.

(in spite of its ‘not yet’ status) conflicted philosophically with the existing author’s rule. Under such an arrangement the institutions were not empowered to disclose documents originating from third parties. Rather, the party requesting access was required to address its request directly to the author of the document.⁶⁷ The confluence of the Declaration (meant to govern the future) and the author’s rule (which governed the present) engendered public suspicion, and suspicion within access—a context that purports to encourage transparency—is never productive.

As for the wording employed, given the context in which the institutions held the final word over self-produced documents only, the advent of a Declaration making references to the possibility that institutions might choose to release ‘documents *originating from the Member States*’ was, literally, chaotic. It brought on suspicion that some documents held by the institutions (at least those originating in the Member State) might—in the immediate future—become the subject of new rules.

Doctrine⁶⁸ was quick to protest—legitimately—that although a hiatus (that would last until the new rules came into force) was to be reckoned with, the mere confluence of the 1993 Code of Conduct, and Declaration No 35 inevitably raised doubts as to the meaning of a phrase of Article 255(1) of the Treaty itself: ‘European Parliament, Council and Commission Documents’. The main point in issue was whether the Article’s scope overarched incoming documents. That it was—at any rate—directed at the self-produced documents of the institutions was fairly clear.

At its early stage, the judicature kept a prudent distance from this doctrinal debate. In fact, while the 1993 Code of Conduct was in force the author’s rule was consistently and simply upheld. Thus, in practice, because of the ‘not yet’ bound on its enforceability, Declaration No 35 was ignored. Accordingly, no comfort⁶⁹ was given to the hypothesis that some of the incoming documents might have been withdrawn from the 1993 Code’s exclusionary rule and placed (too soon) under a novel procedure as sketched out in Declaration No 35.

Only at a much later stage would the judicature rule on this subject,⁷⁰ and as a result two crucial issues raised regarding the Declaration were finally clarified: namely its position in the hierarchy of EU law and the meaning of the phrase to ‘to request the Commission or the Council’.

As a final remark regarding the normative contribution of Article 255, its part 2 foreshadowed comprehensive normative detail of ordinary level that was to replace the 1993 and 1995 Codes of Conduct within a period of two years. As a result, a Regulation numbered 1049/2001 of 30 May 2001 would become applicable from 3 December 2001.⁷¹ Furthermore, the article’s part 3 confirmed that it was through amendments to each institution’s rules of procedure that, if necessary, specific practical provisions should be laid down.

⁶⁷ See Ch 2.

⁶⁸ Curtin, ‘Democracy, Transparency and Political Participation’ (n 64) 115.

⁶⁹ Case T-47/01 *Co-Frutta v Commission* [2003] ECR II-4441, para 59.

⁷⁰ By way of an interpretative ruling rendered, and that had as its object the new, common rules that the Treaty of Amsterdam had promised; Case C-135/11P *IFAW* [not reported].

⁷¹ See section VII of this chapter for our discussion on Regulation 1049/2001.

C. Article 207(3) TEC

From another angle the Treaty of Amsterdam, via Article 207(3) TEC focusing specifically on the Council's *legislative* activity, supplemented the simple determinations of the 1995 Code of Conduct. This article engendered a revision of the Council's rules of procedure with a view to making public the records of its votes, minutes and statements.

Article 207(3) TEC

Whenever the Council is to act in its legislative capacity, the results of votes and explanations of votes as well as the statements in the minutes shall be made public.

The Council is to itself define the cases in which it is to be regarded as acting in its legislative capacity.

In the same way that this had been significant for the *executive* activity, discussed above, the term 'whenever' extends the obligation laid down in the Article to legislative activity in all areas of Union competence, for example, within all three pillars, and does so textually.⁷² As a result, the reining in of all European fields of activity under the cloak of access brought unity to the Union's policy and simplified its understanding by the public.

Nevertheless, and mostly because of the preponderant role of the EU courts, the material significance of an option laid down as Treaty-based, and therefore at the constitutional level, did not entirely live up to its constitutional clothes. First, since the constitutional rules were not the original stimulus of access, when they did come forth, the case law had been allowed a head start, and therefore an upper hand. Three-and-a-half years of prior litigation with accomplishments of the calibre of partial access are a significant inheritance, difficult to deflect or outshine. Secondly, the very first time an applicant attempted to use the constitutional leverage, the Court of First Instance postponed any concrete utility of that normative novelty. It ruled that the newly introduced Treaty articles did not have direct effect.⁷³ As such, without the adoption of subsequent legislative measures of ordinary status that the constitutional framework merely foreshadowed, Article 255 (at that moment) could not be (innovatively) used in court.⁷⁴ Thirdly, under such (suspended until the

⁷² See Ch 4.

⁷³ In the fluctuating language of the Court, the wording employed is 'not directly applicable'; *Petrie* (n 66) para 34.

⁷⁴ The deliberate choice of not drafting the exceptions to the principle also at constitutional level was interpreted (too) enthusiastically by the applicant in *Petrie* (n 66); cf Guggenbuhl (n 48) 16, offers a more conservative reading of that absence:

It is worth noting that while providing such general rules for the European Union and recognizing the fundamental nature of the right of Access to Documents, article 255.2 TEC does not at the same time make provision for the necessary exceptions. By not eliminating the decisions on the exceptions—both the current decisions [93/731 and 94/90] and the one to be adopted [ex Article 255 TEC] by the Council, article 255.2 TEC actually adds a layer of legal reference for the free access to documents. Transparency in this sense is not very well served.

legislative hiatus is overcome) status it was impossible to predict from the Treaty's scant words⁷⁵ if the new rules that it called for could alter the principle that annulment was access' ceiling.

Like a suddenly deflating balloon, the enthusiasm for the constitutional basis shrank and quickly departed.

Case T-191/99 *Petrie a.o. v Commission*

34 Contrary to the applicants' contention, Article 1, second paragraph, EU and Article 255 EC are not directly applicable. In this regard, as is clear from the judgment in Case 26/62 *Van Gend en Loos* [1963] ECR 1, the criteria for deciding whether a Treaty provision is directly applicable are that the rule should be clear and unconditional, in the sense that its implementation must not be subject to any substantive condition, and that its implementation must not depend on the adoption of subsequent measures which either the Community institutions or the Member States may take in the exercise of a discretionary power of assessment.

35 In this case, Article 1, second paragraph, EU is not clear in the sense required by the case law cited. It is likewise obvious that Article 255 EC is, by virtue of paragraphs 2 and 3 thereof, not unconditional and that its implementation is dependent on the adoption of subsequent measures. The determination of general principles and limits which, on grounds of public or private interest, govern exercise of the right of access to documents is a matter entrusted to the Council in the exercise of its legislative discretion.

36 It follows that the entry into force of Article 1, second paragraph, EU and Article 255 EC did not automatically render inoperative the provisions contained in Decision 94/90.

37 The applicants' argument that Decision 94/90 must be construed in accordance with the principles set out in Article 255 EC cannot be accepted. Because Article 255 EC does not lay down an unconditional obligation, the Commission could not, in advance of a determination by the Community legislature of the principles and limits to govern application of the article, deduce from it criteria for interpreting the provisions of Decision 94/90 that limit the right of access to documents.

38 It follows that the applicants' plea alleging failure to comply with Article 255(1) EC and Article 1, second paragraph, EU must be rejected as being unfounded.

D. Article 41 and 42 of the Charter of Fundamental Rights

The arsenal of access' soft constitutionality was not yet complete. Another atypical provision would concur in the design of the odd supra-legislative status it was accorded: the Charter of Fundamental Rights. The Charter, proclaimed on 7 December 2000, added two relevant articles to the normative status of access. Article 41

⁷⁵ On this point, see U Oberg, 'Public Access to Documents after the Entry into Force of the Treaty of Amsterdam: Much Ado about Nothing?' (1998) 2(8) European Integration Office On-line Papers 2 <http://eiop.or.at/eiop/pdf/1998-008.pdf>.

concerning the principle of sound administration, and Article 42 specifically dedicated to access to documents:

Article 41

Right to Good Administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
 - The right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
 - The right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
 - The obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 42

Right of Access to Documents

Any citizen of the Union, and any natural or legal person residing, or having its registered office in a Member State, has a right of access to documents of the institutions' agencies; in whatever form they are produced.

The new reference signified a further layer of institutional commitment, no doubt, and it is also true that in its aftermath applicants would add references to the Charter in their written submissions to the EU courts.⁷⁶ Articles 41 and 42 of the Charter were often pleaded together and were considered as intimately linked. However, there was an underlying *non sequitur* element that was inescapable: inclusion in the Charter (except for the inclusion of agencies alongside the Council, the Commission and the Parliament as parties to whom documents might be requested) brought no substantive improvement to the practical conditions already provided for in the 1993 Code, in the implementing Decisions or in Article 255 TEC. In this sense of practical neutrality, the concurrence of the Charter could be viewed as yet another dispersive, non-binding⁷⁷ red herring⁷⁸ in the normative development of this peculiar right.

⁷⁶ See generally G de Burca, 'The Drafting of the Charter of Fundamental Rights' (2001) 26 *European Law Review* 126. See also D Curtin and J Mendes, 'Article 42' in S Peers, T Herve, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights, A Commentary* (Munich/Oxford/Baden-Baden, Beck/Hart/Nomos, 2014) 1099–119.

⁷⁷ See Ch 3. The Charter has since acquired binding legal status, namely with the entry into force of the Treaty of Lisbon.

⁷⁸ The ECJ has recently ruled that the Charter, and specifically Art 47 is unable to alter the nature of judicial review in an access to documents setting: Case 127/13P *Strack v Commission* (n 18) paras 145–47:

V. A CHALLENGE TO POST-AMSTERDAM IMPLEMENTING
DECISIONS, PRE-REGULATION 1049/2001

In the aftermath of the Treaty of Amsterdam, access would not be granted either peace or stability. With a Regulation yet to come, the institutions were faced with a prior and more immediate task, the adoption of preparatory measures. It should be noted that in the meantime (December 1999) two Presidency Reports were adopted⁷⁹ within the Conclusions of the European Council meeting in Helsinki. They centred on the subject of developing the EU's means for military and non-military crisis management within the framework of a strengthened European security and defence policy. In order to implement these Conclusions, the Council (of Ministers) adopted three further Decisions on access.

The first was Decision 2000/23/EC⁸⁰ on the improvement of information on the Council's legislative activities and the public register of Council documents; the second was Decision 2000/C239/01⁸¹ of the Secretary General of the Council/High Representative for the Common Foreign and Security Policy on measures for the protection of classified information applicable to the General Secretariat of the Council; and the third was Decision 2000/527/EC,⁸² amending Decision 93/731/EC.

As had been the case with Decision 93/731 and Decision 94/95, their legal basis was the Council's powers of internal organisation.

Decision 2000/23/EC

Preamble...

2) Without prejudice to Council Decision 93/731/EC of 20 December 1993 on public access to Council documents(1) and to the principles and limits governing the right of access to documents to be adopted under Article 255 of the Treaty establishing the European Community:

— further efforts should be made to improve information on the Council's legislative activities as defined in Article 6 of its Rules of Procedure,

145 According to settled case-law, the Courts of the European Union cannot, in principle, issue orders to an EU institution without encroaching upon the prerogatives of the administration (see judgments in *Verzyck v Commission*, 225/82, EU:C:1983:165, paragraph 19, and *Campogrande v Commission*, C-62/01 P, EU:C:2002:248, paragraph 43).

146 Thus, contrary to the appellant's assertions, the EGC was right to hold, in paragraph 90 of the judgment under appeal, that, in accordance with Article 264 TFEU, it was only open to it to annul the contested act. In so far as the appellant's argument is based on Article 266 TFEU, it must be observed that that provision also does not provide for the possibility of issuing orders to the institutions.

147 That finding cannot be called into question by the appellant's arguments based on Article 47 of the Charter, since that article is not intended to change the system of judicial review laid down by the Treaties (see judgment in *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 97).

⁷⁹ Annex IV to the Presidency Conclusions.

⁸⁰ Decision of 6 December 1999.

⁸¹ Decision of 27 July 2000.

⁸² Decision of 4 August 2000.

28 *The Normative Development of Access*

- measures should be taken to enhance further the performance of the public register of Council documents accessible on the Internet (<http://ue.eu.int>) since 1 January 1999,
- the Council's internal procedures for public access to its documents should be further rationalised by using information technologies and avoiding excessive bureaucracy.

Decision 2000/C239/01

Preamble...

(2) It is (therefore) necessary to amend Decision No 24/95 of the Secretary-General on measures for the protection of classified information applicable to the General Secretariat of the Council with regard to the grades of classification by adding the grade 'TRÈS SECRET/TOP SECRET' and by reinforcing internal arrangements, it being understood that this amendment is provisional pending the adoption of more complete measures in the near future.

Decision 2000/527/EC

Preamble ...

(6) Since the security and defence of the Union or of one or more of its Member States or military and non-military crisis management represent public interests which Decision 93/731/EC(2) is intended to protect, this should be specifically mentioned among the reasons justifying refusal of access to a document...

Decision 93/731 is hereby amended...

Decision 2000/23/EC(3) is hereby amended as follows:

1. The following shall be added as the second subparagraph of Article 2: 'The public register of Council documents contains no reference to documents classified TRÈS SECRET/TOP SECRET or 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.'

As a consequence, another inter-institutional conflict took place. The Parliament—once—again came forth, insisting that normative developments to access should be made through common Regulations instead of by various Decisions of each institution. Accordingly, the Parliament attempted to have two of the Council's three implementing Decisions annulled. On 23 October 2000, an action for annulment was directed at Council Decision 2000/C239/01 and at Council Decision 2000/527. Case C-387/00 *Parliament v Council*⁸³ much resembled a behavioural replica of the earlier *Netherlands v Council*.

Case C-387/00 *European Parliament v Council of the European Union*

⁸³ Case C-387/00 *European Parliament v Council of the European Union* [2000] OJ C 355, 15.

The Parliament Claimed:

...

Infringement of an essential procedural requirement: the Legal basis for the Decisions at issue is inappropriate. Since Article 255 EC enshrined for the first time in primary legislation rights of access to documents of the Parliament, the Council and the Commission, the Council no longer has power to regulate such matters under the head of its powers of internal organization. Article 28(1) and Article 41(1) of the Treaty on European Union explicitly provide that rights of access extend also to documents concerning the common foreign and security policy and cooperation in the fields of justice and home affairs.

The obligation to lay down general principles and limits upon the rights of access to documents in accordance with the codecision procedure (Article 255(2) EC) is, admittedly, one that is to be complied with within a period of two years. However, that obligation came into effect as soon as the treaty of Amsterdam came into force, which necessarily excludes the adoptions of any unilateral measures laying down such general principles and limits.

Breach of the obligation to cooperate in good faith (Article 10 EC): despite the fact that the Commission adopted a proposal for a regulation, in accordance with Article 255(2) EC, and that the Parliament expected to collaborate closely with the Council and the Commission under the codecision procedure, the Council adopted the measures at issue without the knowledge of the Parliament.

Breach of the principle of institutional equilibrium: by adopting its decision unilaterally and without having regard to the procedures laid down in the Treaty, the Council also breached the principle of institutional equilibrium.

On 22 March 2002, the action was closed by an order of the Court of Justice and removed from the register without proceeding to the stage of a ruling. It should not be forgotten that although 18 months separated the closure of Case C-387/00 from its proposal, Regulation 1049/2001, enacted on 30 May 2001 (seven months after the lodging of the action), came into force on 3 December 2001, with the Parliament as one of its authors and as a consolidation measure⁸⁴ of all prior initiatives on the access topic.

By way of conclusion, with its origin in the Treaty of Amsterdam and its convergence at the moment from which Regulation 1049/2001 became applicable, a second chronology would unfold and assume relevance. It is summarised in Table 1.3.

⁸⁴ Regulation 1049/2001, Preamble (3). See generally S Peers, 'The New Regulation on Access to Documents: A Critical Analysis' (2001) 21(I) *Yearbook of European Law* 385-442. Regarding the institutional positions see:

1. Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and the Council regarding public access to the European Parliament Council and Commission Documents (COM (2000) 30 final-COD 2000/0032).

II. Proposal for a European Parliament and Council Regulation regarding Public Access to Parliament, Council and Commission Documents, OJ C 177E, 26.6.2000; COM (2000) 30; Bull. 2-2000, point 1.9.2.

Table 1.3: The Second Chronology of Access: the Treaty of Amsterdam and Beyond

2 October 1997	Treaty of Amsterdam is signed
1 May 1999	Treaty of Amsterdam enters into force
25 August 1999	Case T-191/99 <i>Petrie v Commission</i> is lodged (ruled on 11 December 2001)
December 1999	Helsinki European Council Presidency reports on military and non-military crisis management
6 December 1999	Council Decision improvement of information on legislative activities and public register of documents
27 July 2000	Council Decision on the protection of classified information
4 August 2000	Council Decision amending Decision 93/731/EC
23 October 2000	Case C-387/00 <i>Parliament v Council</i> is lodged (removed from the register on 22 March 2002)
7 December 2000	Charter of Fundamental Rights is proclaimed
26 February 2001	Treaty of Nice is signed
30 May 2001	Regulation 1049/2001 is enacted
28 November 2001	European Parliament Bureau Decision on Access to Documents
29 November 2001	Council Decision 2004/840/EC
3 December 2001	Regulation 1049/2001 is applicable
5 December 2001	Commission Decision 2001/937/EC, ECSC, Euratom

VI. POST-AMSTERDAM ACHIEVEMENTS OF THE CASE LAW, PRE REGULATION 1049/2001

With the Treaty of Amsterdam in force, but before the advent of a Regulation to govern access, the principal contribution of the case law to the debate was the clarification that the Treaty articles, on their own, would be accorded no direct effect. This statement of the GC was issued in the *Petrie*⁸⁵ ruling. As a consequence of the ruling, in spite of their co-existence alongside the Treaty articles, the 1993 and 1995 Codes of Conduct would stand until a Regulation replaced them.

VII. A GENERAL FRAMEWORK—REGULATION 1049/2001

The month of May of the year 2001 is a landmark in the access theme. And it might be said that the enactment of 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 (hereinafter Regulation

⁸⁵ Case T-191/99 *Petrie a.o. v Commission* (n 66).

1049/2001)⁸⁶ embodied, on many fronts, a renaissance of the access policy. It was a keenly awaited legislative instrument of ordinary status and represents a common and thorough response of the Parliament, the Council and the Commission to the access theme.

As a first comment, Regulation 1049/2001 proved to be notably resilient. It would endure well over a decade of growing case law, the entry into force of two subsequent Treaties (Nice and Lisbon) and a failed attempt at reform.⁸⁷ Indeed, as we write, in 2016, it is still in force.⁸⁸ This resilience may alternatively reflect the appropriateness of the solutions adopted within Regulation 1049/2001 or could also signify that once a first Regulation was adopted the institutions were unable to agree again to further reform.

Although this legislation will be discussed in detail over the subsequent chapters, we will briefly comment here on its three more important normative contributions. First, in relation to the Treaty-based provisions, the advent of an implementing act under the typical form of a Regulation filled the normative gap that the Treaty of Amsterdam had opened. Secondly, its dimension was confined to an attractive six-page format, which in spite of its discreet length, spanned not only the background to the Regulation but also purpose, beneficiaries and scope; exceptions; relations with the Member States; procedure; treatment of sensitive documents; registers; annual reports; implementation; and even the relationship with the historical archives of the EEC and the EEA. Thirdly, it was a chance to start anew: a rare opportunity to normatively embrace selected achievements of the prior case law (partial access) and a good excuse to innovate on⁸⁹ or even discard altogether⁹⁰ less cherished characteristics of the pre-2001 model. Injunctive relief (understood as the power of the judicature to address (positive) orders to the institutions) was kept outside the EU scheme and was simply not mentioned.

As a final remark, Regulation 1049/2001 encouraged conforming self-regulation on the part of each institution by way of amendments to existing rules of procedure.⁹¹ Accordingly, the Regulation's three signatory institutions effected amendments to their rules of procedure. On 28 November 2001, the Parliament was the first institution to comply and adopted Bureau Decision on public access to European Parliament documents.⁹² One day later, on 29 November 2001, the Council adopted Decision 2004/840/EC.⁹³ The Commission, for its part, adopted Decision 2001/937/EC, ECSC Euratom, on 5 December 2001.⁹⁴

⁸⁶ [2001] OJ L 145.

⁸⁷ See generally HR Kranenborg, 'Is it Time to Revise the European Regulation on Public Access to Documents?' (2006) 12(2) *European Public Law* 251–74. See also I Harden, 'The Revision of Regulation 1049/2001 on Public Access to Documents (2009) 2 *European Public Law* 239–56.

⁸⁸ On this resilience, see M Maes, 'Le droit d'accès aux documents des institutions européennes: ou en est la révision du règlement 1049/2001?' (2014) 3 *Revue du Droit de L'Union Européenne* 475–97.

⁸⁹ Innovation occurred regarding: active legitimacy; the classification of purpose of inspections, investigations and audits as a public interest exception, and more stringent deadlines were introduced.

⁹⁰ The so-called author's rule was set aside.

⁹¹ Regulation 1049/2001, Art 17 of the Preamble, and Art 18 of its core.

⁹² [2001] OJ C 374, 1.

⁹³ [2001] OJ L 313, 40.

⁹⁴ [2001] OJ L 345, 94.

A. Selected Achievements of the Prior Case Law Drafted into Regulation 1049/2001

It is also important to emphasise that Regulation 1049/2001 was not a mere theoretical and self-important normative exercise. In fact, two case law-originated principles were incorporated in it. These both enriched the novel framework for access and consolidated (eight years of) experience arising from the litigation into the normative level. First, Article 4(6) of Regulation 1049/2001 embraced the *Hautala*-ruling-based inheritance of partial access⁹⁵ as a normative requirement. Secondly, and credibly it was in the wake of the *Svenska*⁹⁶ ruling that Article 8 of the Preamble to Regulation 1049/2001 made an explicit reference to the requirement that the full application of the Regulation was to be ensured over ‘all activities of the Union’. It was an important addition. In contrast with the Treaties’ mere allusion that this was so, the Regulation was definitive on the subject. The matter was, finally, harmoniously resolved at all three levels: in the case law, in the Treaty and now at the ordinary normative level as well.

B. Normative Changes Introduced by the Regulation to the Pre-2001 Model

If it is true that on the one hand, Regulation 1049/2001 took inspiration from lessons learned between 1993 and 2001, on the other hand notable changes were introduced that completely upset the paradigm that had governed the policy over the previous (eight) years.⁹⁷

The first notable change was that active legitimacy was (theoretically) restricted.⁹⁸ The 1993 Code of Conduct’s inclusive general concept of the public was abandoned in favour of a two-tier reference to applicants in Article 2 of Regulation 1049/2001. In Article 2, a first category of applicants identified *by right*,⁹⁹ is contrasted with a second category characterised as applicants *by grace of the institution*.¹⁰⁰

The second notable change was performed via Article 4, this time pertaining to the exceptions. What reads today ‘as the protection of the purpose of inspections, investigations, and audits’ is inspired by a similar set of exceptions that enjoyed a very different status under the 1993 Code of Conduct. In fact, according to the previous rules, audits were not included at all in the list of exceptions. At the time of the 1993 Code of Conduct, two mandatory exceptions (within the ‘public interest’ heading) for investigative proceedings in general were foreseen solely ‘as

⁹⁵ Case T-14/98 *Hautala v Council* (n 52).

⁹⁶ Case T-174/95 *Svenskajournalistförbundet v Council* [1998] ECR II-2289 (n 51).

⁹⁷ See generally on the effects of the new paradigm J Heliskoski and P Leino, ‘Darkness at the Break of Noon: the Case Law on Regulation No 1049/2001 on Access to Documents’ (2006) 43 *Common Market Law Review* 735–81.

⁹⁸ See Ch 2.

⁹⁹ Regulation 1049/2001, Art 2(1): ‘citizens of the Union and natural or legal persons residing or having their registered office in a Member State’.

¹⁰⁰ Regulation 1049/2001, Art 2(2): ‘any natural or legal person not residing or having its registered office in a Member State’.

regards inspections and investigations'. With the advent of the new rules a part of the old public interest heading was first redrafted¹⁰¹ and then reclassified by Regulation 1049/2001.¹⁰²

Thirdly, the length of deadlines was altered. Via Article 7 these were shortened to 15 days in contrast to the Code of Conduct's more generous concession (30 days). Fourthly, a notable innovation that indeed amounts to a purposeful *volte face* in policy was the abandonment of the so-called author's rule. Regulation 1049/2001 embraced the novel idea that all documents held by the institutions were covered by the EU policy. The new rule was laid down in Article 2(3), and further by Article 4(4) and 4(5). This new option (foreshadowed by Declaration No 35 attached to the Treaty of Amsterdam) under which the institutions would retain final control over the fate of any document transmitted to them, would later bring about significant tension between the institutions and the Member States.¹⁰³ From another angle, albeit equally seriously, the departure from the author's rule would additionally give rise to intense conflict within the realm of EU competition law, namely regarding access to documents transmitted to the institutions by private persons under leniency proceedings.¹⁰⁴

C. Treaty of Nice

Just as Regulation 1049/2001 began to acquire increasing stability and to receive input from the judiciary, the almost contemporary appearance of a new Treaty for the EU on the horizon—the Treaty of Nice—represented a double threat to progress made: new (and contradictory) rules would have rendered previous lessons learned completely obsolete, and much in the same way new (even if merely additional) rules would require another round of adaptation from the public, the institutions and judiciary alike.

Interestingly, the Treaty of Nice neither added new and contradictory rules to the access policy nor, for that matter, added any new and merely complementary ones to it. The Treaty of Nice entered into force on 1 February 2003, and simply left the content of the references to access in both TEC and TEU unchanged. In fact the result of the desire to keep the old references pristine was so remarkable that even the numbers of the Treaty articles remained constant. In the TEU it was again—just as it had been under the Treaty of Amsterdam—Article 1 to ground the access policy. In the TEC, access was kept under the umbrella of Article 255.

Article 1 of the TEU of the Treaty of Nice

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

¹⁰¹ See Ch 5.

¹⁰² See Ch 5.

¹⁰³ See Ch 4.

¹⁰⁴ See Ch 7.

Article 255 TEC of the Treaty of Nice

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 European Parliament, 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.

D. Failed Attempt at Reform

Between the entry into force of the Treaty of Nice and the entry into force of the Treaty of Lisbon and its aftermath, a number of attempts of reform of the framework of Regulation 1049/2001 came to populate the access normative background, but none has been successful. The first of these is linked to the tentative advent of the Constitutional Treaty signed in 2004.¹⁰⁵ Under the Treaty, Article 42 of the Charter of Fundamental Rights¹⁰⁶ would have been extended to all institutions and bodies of the Union. Moreover, access to the executive activity-related documents would have been regulated through Article I–50(3) and Article III–399, which drew on Article 255 TEC but also established that certain institutions would be subject only to access obligations when exercising their administrative tasks.

On the legislative role of the institutions, Article I–50 would have laid down a requirement for public meetings of the Council when discussing and voting on a draft legislative act, and finally Article II–399(2) would have called for publication of documents related to legislative proceedings. The entire project having been abandoned, the proposed rules nonetheless served as an inspiration for the subsequent framework of access within the Treaty of Lisbon.¹⁰⁷

As a second reference to an attempt at change, on 9 November 2005 the Commission established a European Transparency Initiative.¹⁰⁸ However, neither this specific initiative nor subsequent follow-up attempts of renewal have been successful in recasting the ever resilient Regulation 1049/2001.

¹⁰⁵ [2004] OJ C 310/1.

¹⁰⁶ Renumbered as II-102.

¹⁰⁷ See section VII.E below.

¹⁰⁸ European Commission, Green Paper on the European Transparency Initiative, COM(2007) 127-Final (not published in the Official Journal).

E. Treaty of Lisbon

Notably, the Treaty of Lisbon would not attempt to alter access' parameters either. In fact, the policy that has consistently been drafted into both TEU and TEC since the Treaty of Amsterdam has not been treated differently under the latest Treaty governing the EU, which entered into force on 1 December 2009. Access remains at the forefront of the TEU, enshrined into the very first Article and in the following terms:

Article 1 TEU

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

Still within the TEU, on another front, Article 16(8) replicates the recurrent dichotomy between access related to the executive role of the institutions versus a 'special attention criteria' reserved for access related to the legislative role of the EU institutions and, accordingly establishes that:

Article 16(8) TEU

The Council shall meet in public when it deliberates and votes a draft legislative act. To this end, each Council meeting shall be divided into two parts, dealing respectively with deliberations on Union legislative acts and non-legislative activities.

As for access' current position within the TFEU, Article 15(3) has succeeded Article 255 of the TEC as the main Treaty provision that serves as a concrete basis for access:

Article 15 TFEU (ex Article 255 TEC)

1. In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.
2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.
3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.

The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.

The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph.

F. Achievements of the Case Law under Regulation 1049/2001

While the normative development of access from Treaty to Treaty has been gentle and conservative, the accomplishments of the case law that developed on the basis of Regulation 1049/2001 are at once numerous, innovative and vigorous. They will be commented on by area of influence in Chapters 2–8, with special emphasis accorded to Chapter 5 (Exceptions). It is, however, not untimely to present a synopsis of the backbone of the combined contributions to this debate from the EU judicature.

It is striking how some issues addressed by the case law stand out, and even more striking how the normative context of access as it stands today cannot be fully understood without a prior understanding of them. Free from any temporal order in their address, four problematic issues may be identified: two of which are settled, two of which are not.

The first problematic issue concerns the deadlines established in Regulation 1049/2001. More precisely, it concerns their imperative nature when the deadline is established vis-à-vis an institution. The issue gave rise to the highly controversial *Co-frutta v Commission*¹⁰⁹ ruling of 19 January 2010 and was subsequently resolved and more adequately settled only 10 months later with the (no less controversial) *Ryanair v Commission*¹¹⁰ ruling of 10 December 2010.

The second problematic issue centred on the sensitive possibility that the EU institutions be granted the final word over the possibility of release to the public of documents originating in the Member States. This was especially pressing in cases—as occurred in the *IFAW*¹¹¹ proceedings—in which Member States specifically requested that the institution not release the document. Normative basis held insufficient, it took Advocate General Maduro's Opinion favouring a teleological approach,¹¹² to overcome the contrasting views on the point. The ECJ concurred with the Advocate General and left the Member States with no choice other than the surrender of their voiced claims for autonomy. The feat was accomplished in spite of a significant setback for the Member States: they were not to be acknowledged veto power over the destiny of self-originating documents.¹¹³

¹⁰⁹ Joined Cases T-355/04 & T-446/04 *Co-frutta v Commission* [2010] ECR II-00001 (*Co-frutta II*).

¹¹⁰ Joined Cases T-494/08 to T-500/08 & T-509/08 *Ryanair v Commission* [2010] ECR II-5723. As late as May 2014, the issue of their 'imperative nature' has been discussed once again and clearly confirmed in AG Kokott's Opinion delivered on 22 May 2014 in Case C-127/13 P *Strack v Commission* [not yet reported] para 40.

¹¹¹ Case C-64/05P Joined Cases C-39/05P and C-52/05P *Sweden and Turco v Council IFAW* (n 30).

¹¹² Opinion of AG Maduro in Case C-64/05P Joined Cases C-39/05P and C-52/05P *Sweden and Turco v Council, IFAW* (n 30).

¹¹³ A Barav, 'Opacité et Transparence, ou, le droit d'empêcher, la jurisprudence em matière d'access aux documents provenant des États Membres detenues par les institutions communautaires' in *Chemins D'Europe, Mélanges em Honneur de Jean-Paul Jacqué* (Paris, Dalloz, 2010) 29–62; P Cabral, 'Member

The third problematic issue, to this day governed by fluctuating criteria, is the answer to the question of whether the institutions must actually and concretely examine a document before they take definitive decisions on its release to the public. This third issue was examined in the *Turco*¹¹⁴ proceedings that rose through the ranks of the EU judicial system in a striking manner.¹¹⁵ From ECJ's final judgment a tripartite test, known as the three-limbed *Turco* test, may be derived. The test serves as a benchmark to assess the propriety of the institution's examination of the contested documents. Its subsequent popularity with the ECJ has, however, been somewhat inconstant.¹¹⁶

The fourth and final issue, possibly the most problematic of all, lies in the advent of an incipient (and ever-growing) theorisation of presumptions¹¹⁷ (controversially described as rebuttable) within the access context. This novel approach has been resorted to by the institutions in the fields of access to documents related to judicial proceedings¹¹⁸ and access to competition proceedings (State aid, merger control, and more recently, concerted practices).¹¹⁹ Access to leniency documents has also taken on a life of its own and does not cease to attract attention from commentators.¹²⁰ Less justifiably, it has somewhat simplistically, also been accepted by the EU judicature when applied by the institutions to environmental files.¹²¹

State Documents in EC Law' (2006) 31(3) *European Law Review* 378–89. For an account of an interesting *volte face* in the case-law, see V Tourrès, 'Droit d'accès aux documents juridiques: un pas vers la transparence?' Trib EU, 27 Février 2015, Breyer / Commission, aff. T-188/12' (2015) 1 *Revue des affaires européennes* 195–204.

¹¹⁴ Case T-84/03 *Turco v Council* [2004] ECR II-4061 (*Turco I*).

¹¹⁵ See Ch 7. The Kingdom of Sweden, which had supported the applicant in first instance, proceeded to lodge an independent State appeal against the first instance ruling. The independent appeal was subsequently joined with Mr Turco's (applicant at first instance) own appeal and decided together by the ECJ: Joined Cases C-39/05P and C-52/05P *Sweden and Turco v Council* (2008) ECR-I 4723 (*Turco II*).

¹¹⁶ cf Case C-365/12P *Commission v EnBW (EnBW II)* [not reported], the judgment of the Court, 12 February 2014 (and the Opinion of AG Villalon).

The issue's importance has very recently been revived through Advocate General Eleanor Sharpston's Opinion rendered on occasion of the *Council v Sophie in't Veld* proceedings (n 62) on the subject of access and international relations; Case C-350/12P, Opinion of Advocate General Eleanor Sharpston, 13 February 2014 [not yet reported].

¹¹⁷ See Ch 5.

¹¹⁸ Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API ASBL and Commission* [2010] ECR I-08533 (*API II*).

¹¹⁹ In the field of State aid, see Case C-139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885 (*TGI II*); In the field of Concerted Practices, see *EnBW II* (n 116), involving Regulation no 1/2003 and 773/2004. For 3 structured and incisive overviews of the presumptions in competition law, see K Jurimae, 'The Interaction between the EU Transparency Policy and The Enforcement of EU Competition Law, Who Should Strike the Balance and How Should it be Struck?' (2012) *European Competition Law Annual* 365–95; O Speltdoorn, 'The Technische Glaswerke Ilmenau Ruling, a Step Backwards in Transparency in EU Competition Cases?' in *Constitutionalising the EU Judicial System, Essays in Honour of Pernilla Lindth* (Oxford, Hart, 2012) 439–72; K Lenaerts, 'The Principle of Transparency and its Limits in the Context of Competition Investigations' (2014) 4 *Osterreichische Zeitschrift fur Kartellrecht* 123–26.

¹²⁰ See eg D Mandrescu, 'Access to Leniency Programme Documents Based on the Transparency Regulation: The European Commission v EnBW Energie Baden-Württemberg AG' (2015) 42(3) *Legal Issues of Economic Integration* 301–15.

¹²¹ Joined Cases C-514/11 & C 605/11 *LPN and Finland v Commission* [not reported].

By contrast, Advocate General Sharpston's Opinion rendered in the abovementioned¹²² *Sophie in't Veld* proceedings has, for the moment, kept at bay recent attempts at extension of this practice to the field of international relations.¹²³

VIII. RULES GOVERNING SPECIAL TOPICS

While it is undoubtedly the main normative instrument on access, Regulation 1049/2001 does not stand as sole normative governor of the subject. On occasion it encounters concurrent law of the EU that deals with public access to internal documents (under a variety of normative forms) and which must be reasoned with and taken into account.

A. The Exceptions in Article 4 of Regulation 1049/2001

A first threshold of normative concurrence with Regulation 1049/2001 is foreshadowed by the Regulation itself. Indeed its Article 4 provides for a series of exceptions to its own application.¹²⁴

Regulation 1049/2001, Article 4—Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- (a) the public interest as regards:
 - public security,
 - defence and military matters,
 - international relations,
 - the financial, monetary or economic policy of the Community or a Member State;
- (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

¹²² Case C-350/12P *Council v Sophie in't Veld* (n 62).

¹²³ See generally GM Lentner, 'Access to Documents of the Institutions: Transparency of International Negotiations: Council of the Union v Sophie in't Veld, ECJ (First Chamber) Judgment of 3 July 2014, C-350/12P' (2014) 4 *European Law Reporter* 123–29.

¹²⁴ See Chs 4 and 5.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

Accordingly, the so-called 'right of access to documents' will fall away if disclosure of a document would undermine the protection of one or more of nine concurrent concerns of the EU. Article 4, in fact, consists mainly of a list of equally meritorious interests that are both nurtured by the EU and are the object of specific rules on public access, that are often quite disconnected from Regulation 1049/2001. As such, it is on a case-by-case basis that prevalence or capitulation of these is determined versus the interest served by disclosure of documents.¹²⁵

B. The Environmental Law of the EU

A second threshold of normative concurrence with Regulation 1049/2001 may be identified: it is the case of environmental EU law. By contrast to what has been said above regarding other areas of EU law, this relationship has been construed as a normative development to Regulation 1049/2001. It is the latest theme to be regulated by a specific statute on access, concurrent but coordinated with Regulation 1049/2001. Not surprisingly, any rules or judgments delivered within its context generate great expectation¹²⁶ in the public.

There are three reasons that explain this. First, the discussion of environment together with access is (relatively) new. Second, and differently from the interests protected by the list of exceptions within Article 4 of Regulation 1049/2001, protection of the environment principally calls for more access, not less. Finally, the nature of environmental applicants also matters. These consist mainly of NGOs that have,

¹²⁵ The issue of the intensity and enforcement in the case law of each of the exceptions established in Regulation 1049/2001's Art 4 will be discussed individually throughout Chs 4 and 5.

¹²⁶ For an early perspective of what role environmental law would play within the access framework, see S De Abreu Ferreira, 'The Fundamental Right of Access to Environmental Information in the EC: A Critical Analysis of WWF-EPO v Council' (2007) 19 *Journal of Environmental Law* 399–408.

since the early days,¹²⁷ inveterately prodded and probed the EU institutions about the validity of the reasons for refusing to disclose documents. Furthermore, they have—of late—come to assume a role that is comparable to that of sentinels, and bellicose ones at that. They are ever watchful over the concrete day-to-day practice of the Institutions related to the concession of documents to the public, and are just as eager to take matters before the EU courts.¹²⁸

As a normative option, access to environmental information has been addressed by reference to two separate thresholds that should not be confused. While it is true that both resulting instruments are inspired by the Aarhus Convention¹²⁹ their individual purposes are quite divergent. One threshold (the main focus of our discussion)—established under the form of a Regulation¹³⁰—is addressed to the EU institutions that function within stringent limitations to access (annulment as a ceiling) and is not intended to have any effect whatsoever on Member State law. It is known as the Aarhus Regulation, that is in fact Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and access to Justice in Environmental matters to Community institutions and Bodies dated September 6, 2006. It lays down a framework that principally seeks to facilitate a wider dimension of access to (environmental) information.

A second threshold—established under the form of a Directive¹³¹—has been addressed solely to the Member States and its aim is to approximate, where possible, the rules governing access to environmental information of disparate national fora. Both of these instruments will be commented on in Chapter 5.

C. An Outlier—The Council of Europe’s Convention on Public Access to Official Documents

It is worth noting that on 18 June 2009 a Convention on Access to Official Documents was signed within the Council of Europe’s legal framework of reference. But it is equally important to clarify that given its distinct and legal setting (pertaining to issues that are governed exclusively by Council of Europe rules) it is not apt to deploy efficacy on EU law. Therefore it is not to be considered a normative development to the EU framework on access. Having left the reference, we choose not to address the instrument in further detail.¹³²

¹²⁷ Case T-105/95 *WWF UK* (n 21).

¹²⁸ See Ch 2.

¹²⁹ Although the European Community signed the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters as early as 1998, the process was concluded only in 2005: [2005] OJ L 124/1.

¹³⁰ Regulation 1367/2006 [2006] OJ L264/16 (Aarhus Regulation). See Annex 4.

¹³¹ Directive 2003/4/ EC on public access to environmental information [2003] OJ L 41/26.

¹³² Available at: www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205

IX. CONCLUSIONS

The excursion along this normative development has brought to light the many normative acts that sought to foster the legitimation of the EU institutions vis-à-vis their public by way of the construction of an access policy. There are 23 normative contributions that have helped build the current status quo, and it is true that, taken together, they form a notable accomplishment.

From the origins of rather general Communications and Declarations the EU has today not only successfully grounded its access policy at the forefront of its constitutional concerns, but has also provided practical rules to ground its practice and laid down judicial (and non-judicial) remedies to ensure its enforcement.

This notwithstanding, it is also evident that the irreconcilable rational selfishness of actors involved is a great hindrance to the affirmance of a robust right of access to documents within the EU. The institutions will fight each other in order to secure (a louder) voice within the policy. The Member States (who voted for the policy) will fight the Institutions in order to secure final control over the destiny of self-produced documents. The individuals' right under construction rises from difficult battlefields.

Access seems to soldier on, nonetheless.

It does so in a way of its own, of course, since what exists in the EU is a certain form of access. That is very different from saying that in the EU access exists, and that it has been normatively laid down under a certain form.

Throughout the seven chapters that follow a practice-oriented analysis will be undertaken, focusing principally on the existent case law regarding seven topics. The first three topics focus on access' protagonists and on the object of requests for disclosure: *Applicants* (Chapter 2) who may ask *Institutions* (Chapter 3) for *Documents* (Chapter 4). The two subsequent chapters address refusals, and refusals come in two forms: the first is valid reasons to say 'No' explicitly, *Exceptions* (Chapter 5), the second, *Silence*, that means 'No' (Chapter 6). The two closing chapters are addressed from a fairly metric-oriented standpoint. First, the issue of why the *EU Member States* (albeit involved) are not to be considered main protagonists, as well as the role of other actors (Ch 7). Lastly, *Appeals*, their structure and their measure of success are discussed (Ch 8).

5

Exceptions

I. INTRODUCTION—THE UNDERTONES OF ‘NO’

‘NO’ ALWAYS HURTS. There has yet to be a sane person who does not cringe in disappointment when a request is refused. So, precisely because refusal is so unwelcome, its study becomes central to a discussion, the focal point of which is precisely how institutions respond to a request for access to documents.

So far we have clarified what it is that applicants may request from institutions and what it is that institutions might refuse them: documents.¹ Now it is time to address the different issue of *when* and *why* institutions may refuse² to disclose documents.

When institutions believe that a certain document must be withheld from the public, they frame that refusal under one of several so-called ‘exceptions’, the building blocks of a menu³ that allows the EU institutions to keep documents insulated from public scrutiny. Thus, within the access policy, ‘No’ is no monotonous term. It is actually rare that a refusal will simply state ‘No’.⁴ In most cases refusals make explicit that it is ‘No because x’ or ‘No because y’.

II. A HISTORICAL PERSPECTIVE

There is still considerable difficulty in understanding the overall scheme of the exceptions that govern access. True, it always was (and still is) both intricate and layered.

¹ See Ch 4.

² This chapter will serve first to discuss the many possible exceptions (or grounds) at the basis of explicit refusals to requests for access. Secondly, turning to a related but as yet undeveloped topic, we will touch upon the principal lines of the relationship that exists today between the EU rules on access to documents and the EU rules on access to environmental information. Thirdly, we will address the need for the harmonious interpretation of Regulation 1049/2001 with other rules of EU law in areas other than the environment. Within a fourth part of this chapter we have chosen to engage in a separate discussion on the interplay of exceptions and the so-called ‘private’ interests that are at stake when any request for access is considered.

Before overall conclusions are drawn, further discussion will serve to distinguish timely and single explicit refusals from late and/or multiple explicit refusals to the same request. This last part, in particular, will bridge the discussion to Ch 6, in which implicit refusals are considered.

³ Currently, all the statute-based exceptions to public access to documents of the EU are listed under Art 4 of Regulation 1049/2001 and under Art 6(2) of Regulation 1367/2006.

⁴ With the exception of instances of legal silence (Regulation 1049/2001, Art 8); see Ch 6.

Furthermore, the case law method does not help. On the one hand, the judiciary tends to quote (and rely on) paragraphs that rule(d) the past as if the legal framework of 1993⁵ had never moved on in 2001. On the other hand, the judiciary has come to converge on a criterion regarding the type of examination that the institutions must make of the contested documents before refusing them, which is far removed from the instructions laid down in the law.⁶ ‘No’ has thus taken on a rather aloof connotation.

In order to understand what is valid today (2016), it is therefore essential to contrast the legal structure of 1993 with that of 2001, for the sake of ascertaining what still might be held on to, and what must be left behind.

After we describe the background to and the structure of the policy, we will look at the mandatory exceptions of 1993, how that context was revised in 2001, and how it must be differently understood and applied since then. We will then proceed in the same way with regard to the discretionary exception of 1993.

A. From 1993 to 2001 and Beyond

The text of the 1993 Code of Conduct that listed the exceptions to access was short and (deceptively) simple:

1993 Code of Conduct

(Mandatory Exceptions)

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

- The public interest (taken to overarch 6 sub-types of situations): public security, international relations, monetary stability, court proceedings, inspections and investigations.
- Individuals and their privacy.
- Commercial and industrial secrecy.
- The Community’s financial interests.
- The confidentiality of the person who supplied the information (at the request of the same).
- The confidentiality of the Member State who supplied the information (as required by national legislation).

(Discretionary Exception)

The institution *may* also refuse access in order to protect the institution’s interest in the confidentiality of its proceedings.

⁵ See below for a discussion of the case law. The EU courts, eg, have continued to resort, well beyond 2001, to the same words that protected investigations between 1993 and 2001; Case T-105/95 *WWF UK v Commission* [1997] ECR II-00313, para 63: ‘the type of confidentiality the Member States are entitled to expect’. This in spite of a novel framework for investigations post-2001.

⁶ Indeed, as we will see, Art 4(6) of Regulation 1049/2001 has been practically annihilated.

i. 1993: The Background

Upon a close reading of other excerpts of the 1993 text together with the specific articles on exceptions, it might be said that there were two priors to the structure of the access policy.

ii. Cornerstone 1: A Policy for Internal Documents

The first cornerstone, which does not always come across clearly, was that the access policy, at its core, concerned public access to the internal⁷ documents of the EU. These are documents that are not yet finalised or that are not intended for publication:

Code of Conduct 1993

The public will have the widest possible access to documents held by the Commission and the Council.

‘Document’ means any written text, whatever its medium, which contains existing data and is held by the Council or the Commission.

By contrast, the access policy was not purposefully constructed to cater for any published documents. Nonetheless, if requests were to arise for those, the applicant would simply be told where to find them. Such cases were not governed by any access policy: they were governed by the prior status quo of the document, ie public.

iii. Cornerstone 2: a Policy for Documents Authored by the EU

The second cornerstone was that any document requested from the institutions would have had to have been drawn up by the EU. If, conversely, it was authored by any other entity, under the Code of Conduct that document fell outside the policy’s reach:

Code of Conduct 1993

Where the document held by an institution was written by a natural or legal person, a Member State, another Community institution or body or any other national or international body, the application must be sent direct to the author.

iv. The Structure: Mandatory v Discretionary Secrecy

With regard to the structure of the policy, it was split down the middle into two distinct halves. The EU rules, on the one hand, validated refusals meant to impede public access to internal documents that, in spite of the existence of an access policy,

⁷ See Ch1. The main institutional task between 1993 and 2001 was to sift out applications according to the criterion of whether they sought documents from the EU that were already published (so that the applicant might be told where to obtain them) or, more crucially, internal documents. This second category was taken to mean ‘documents which are not yet finalised or not intended for publication, irrespective of the confidentiality rating’; European Commission, *Access to Commission Documents: A Citizen’s Guide* (OPOCE, 1997) 15.

still had to be kept covert. The first half of the policy was all about mandatory secrecy since this had to be assured in six cases (listed above). What is interesting is that it was established to protect a very wide range of interests, encompassing both the public and the private sector. These six counter-interests to access came to be known as the mandatory exceptions.

On the other hand, the policy also validated refusals meant to impede public access to different internal documents that, in spite of the existence of an access policy, *might* be kept covert. Within this second context, secrecy was neither called for nor obvious; it was an institutional choice, a mere possibility. This discretionary secrecy could have been preferred in one context only (listed above). By contrast to the former exceptions, this particular institutional counter-interest to access came to be known as the discretionary exception.

Therefore, between 1993 and 2001, within the legislative text that governed access the difference between the words ‘will’ and ‘may’ was crucial. It drew a line between the outer bounds of the policy (beyond which access could not be granted) and the degree of voluntary institutional engagement with the access policy. Thus, for the first six cases and six sub-types of the first case it was written: ‘the institutions will⁸ refuse’. By contrast, only in the case of confidentiality of the EU proceedings was ‘the institutions may⁹ also refuse’ written into the law.

III. 1993: WHAT WAS MANDATORY

Before we proceed it is important to say that in 1993 it was inconceivable that the EU would offer the public an entire access policy and that, at the same time, there would be even the slightest of chances that documents would not be read by the institutions before being refused.

And so, in the rear of the policy an unwritten presumption stood: that before the institutions would even dare to make statements about whether a document could be released or not (thereby correlating a document to an exception), the former would have been examined (ie read). This unwritten presumption of correct correlation, in fact, translates the natural reaction of most persons to institutional statements: when an institution refuses access to a document alleging that the same is covered by a certain exception, whilst one does not really *know* if the allegation is correct or well grounded, one *presumes* that the allegation is correct and well grounded.

With regard to the mandatory class of exceptions to access, in 1993, the wording of the Code, albeit clear, called for an impeccable command of grammar. Where a mandatory exception applied, it addressed an order of non-disclosure to the institutions—since (‘will’) a modal auxiliary verb, indicating obligation, was employed—and thus, the former enjoyed no discretion to counter it:

1993 Code of Conduct, Mandatory Exceptions

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

⁸ Decision 93/731 and Decision 94/90: ‘Documents *shall* not be granted ... where their disclosure could undermine’.

⁹ Decision 94/90: ‘They *may* also refuse access in order to protect the institution’s interest in the confidentiality of its proceedings’.

Because of the verbal connotation ('will'), there were clearly two explicit (written) presumptions¹⁰ at work.

First, an absolute¹¹ presumption of preponderance of the (confidentiality to be accorded to) interests protected by those exceptions could be read. To that effect, the interest in keeping the contested documents under a shroud of confidentiality always takes precedence over any utility (public and/or private) that might be derived from the disclosure of the same. Because of the presumption, the institutions were not obliged (of their own motion) to consider the benefits of disclosure.¹²

Secondly, another written presumption came in tandem with the first. It sprang from another verbal option ('could') and was related to harm in disclosure. In fact, since the grounding phrase in the Code was 'the institutions *will* refuse documents whose disclosure *could* undermine' and not 'whose disclosure [actually] undermines', the verbal use of the conditional waived the requisite of an *actual* harm-based evaluation. As such, the rule established as prohibited any disclosure held to be even *potentially* harmful.

In all, the protection of the interests listed in the exceptions resulted in their unfailing prevalence over whatever it was they should prevail over. Notably, in 1993, time after time it was understood that the mandatory exceptions prevailed over both the *private* interests of the person who had requested the documents and the *public* interest in the betterment of institutional accountability to the public.

At the core of a mandatory exception lay the belief that—in spite of the existence of an access policy—there was no need to take other interests¹³ into account:

Case T-105/95 *WWF UK v Commission*

38. The Commission goes on to add that the exceptions in the Code of Conduct are distinguished according to their mandatory or discretionary character. The Commission points out that when it relies upon a mandatory exception it has no need to engage in an

¹⁰ What is a (legal) presumption? It is permission from the law to assume that something (usually a prerequisite) has been fulfilled and/or complied with although we are not sure that that is so. On occasion, the law allows players (persons and institutions) to act on the basis of such presumptions. This means that decisions may be taken without certainty that one or more prerequisites (to the decision) have been met.

Moreover, the law allows for presumptions of two types. The first type of presumption allowed is an absolute presumption (*jure et de jure*). In these cases there is no room for (interested) parties to demonstrate that what has been assumed is in fact not true. By contrast, the second type of presumption allowed is a rebuttable one (*juris tantum*). Where it appears, it gives room to the players of any procedure to demonstrate that what has been assumed in first light is actually not true.

¹¹ As opposed to presumptions that are rebuttable.

¹² However, even that limitation to access had to be reconciled with the requirement that the contested documents be categorised; Case T-105/95 *WWF UK v Commission* (n 5) para 30.

¹³ Also, Case T-20/99 *Denkavit Nederland v Commission* [2000] ECR II-3011, para 39.

As a last comment, within the access policy, the expression 'public interest' is considered under many dimensions. On the one hand, at present, access' vocabulary ubiquitously employs the expression 'public interest in disclosure'. On the other hand, as noted above, there are many other (and conflicting) public interests that call for non-disclosure. Namely, the Code listed 6: public security, international relations, monetary stability, court proceedings, inspections and investigations. In addition, potential harm to privacy, commercial and industrial secrecy, the Community's financial interests, as well as requests for confidentiality from suppliers of information or stemming from Member State legislation, whilst not qualified as public interests, would equally embody imperative arguments to refuse disclosure.

exercise of balancing its interests against those of the person who has requested access to the documents. It argues that, having regard to the nature of the interests involved under the heading of mandatory exceptions, the balance of interests was in effect struck at the time when the Code of Conduct was adopted.

As we mentioned in the beginning of the section, in the rear, both presumptions (the absolute presumption of preponderance and the presumption of harm in disclosure) rested on a third, underlying and implicit (ie unwritten) presumption: that, before deciding to refuse documents to any applicant, the institutions would have undertaken a correct and faithful triage of the contested documents.

In other words, throughout the access policy it is always assumed that there is a measure of fit between the contested documents and the exception that the institutions have *prima facie* relied on to refuse access to the same to the applicant.

The judicature would, over time qualify this presumption of correct correlation as rebuttable. In other words, the judicature came to admit that it is possible that the institutions (sometimes) err¹⁴ when they correlate contested documents to exceptions.¹⁵ Nonetheless, the valid operation of the presumptions of preponderance and harm was completely dependent on a correct, *ex ante*, correlation between the contested documents and the exception relied on.

Therefore, and albeit to a large extent unnoticed by many of the policy's addressees, an intricate and subtle trio, correlation, preponderance and harm were at the basis of—and governed the procedure inherent to—the deceptively straightforward policy established by the 1993 Code of Conduct.

A. 1993–2001: *WWF and Hautala*: The Reasons behind the Requirement Categorisation and the Advent of a Necessary Analysis of the Feasibility of Partial Access

It was in this extremely restrictive context that the pre-Regulation 1049/2001 case law on mandatory exceptions developed. The leading case on mandatory exceptions is *WWF UK v Commission*.¹⁶ A further case on disclosure of documents related to investigations but contextualised with the author's rule is *Petrie v Commission*.¹⁷ Finally, the *Hautala v Council* proceedings, that practically call the curtain on the case law derived from the 1993 Code of Conduct, temper the presumption of preponderance of confidentiality with a criterion of proportionality and thereby formalise the possibility of partial access.

¹⁴ Case T-105/95 *WWF UK v Commission* (n 5); Case C-353/99 P *Council v Hautala* [2001] ECR I-9565.

¹⁵ Nevertheless, concomitantly, the judicature failed to identify clearly which actor of the access policy is called to disprove the presumption.

¹⁶ Case T-105/95 *WWF UK v Commission* (n 5).

¹⁷ Case T-191/99 *Petrie et al v Commission* [2001] ECR II-3677.

i. WWF

With regard to *WWF UK* and as early as 1995, the relationship between circumstances covered by a mandatory exception—such as the existence of an investigation—and the allegation that such an exception might apply to an extensive set of documents (the entirety of an investigative file) was discussed. In that particular case, the investigation (taken as an activity) was completed, but the institution had yet to take a final decision as to its outcome.

Moreover, the Commission had refused access to a large number of documents, alleging that the contested documents were covered by two¹⁸ exceptions.

Case T-105/95 *WWF UK*

63. In this regard, the Court considers that the confidentiality which the Member States are entitled to expect of the Commission in such circumstances warrants, under the heading of protection of the public interest, a refusal of access to documents relating to investigations which may lead to an infringement procedure, even where a period of time has elapsed since the closure of the investigation.

64. It is important, nevertheless, to point out that the Commission cannot confine itself to invoking the possible opening of an infringement procedure as justification, under the heading of protecting the public interest, for refusing access to the entirety of the documents identified in a request made by a citizen. The Court considers, in effect, that the Commission is required to indicate, at the very least by reference to categories of documents, the reasons for which it considers that the documents detailed in the request which it received are related to the possible opening of an infringement procedure. It should indicate to which subject-matter the documents relate and particularly whether they involve inspections or investigations relating to a possible procedure for infringement of Community law.

This ruling, in particular, shows how, since the very inception of the case law derived from the 1993 Code, even where a document was clearly related to a mandatory exception, that (mere) connection was not sufficient to alone ground a valid refusal.

On this very point, the ruling opened a discussion around categories of documents. It is a principal cornerstone of the access history and establishes (that there is to be) a hands-on relationship between the institutions and the contested documents once a request for disclosure is made.

It is true that the Court's first preoccupation was that the institutions clearly explain to applicants exactly which and how many of the contested documents fall under which exception.

But it is equally important to note that in fact, such a task increased the possibility that the institution might find that some categories of document within a file, or even some documents, a priori, formally classified as overarched by a certain category might not undermine any interest protected by a mandatory exception.

¹⁸ Although we are focusing on the mandatory framework, it is important to note that the concrete outcome of *WWF* was overshadowed by the circumstance that the institutions had failed to clarify whether all of the documents were covered at once by both the exceptions relied on or not.

This would be the case if, upon examination of the ‘entire file’, some documents contained therein were found not to be covered by any of the exceptions.

Therefore, it is commonly accepted that as early as 1995 the ECJ called on the institutions to check and verify (on a case-by-case basis) the presumption¹⁹ written nowhere: because the key to the access procedure was a real (ie actual) connection between the contested documents and the exception that the institutions had *prima facie* relied on to refuse them.

One way to look at it is to assume that the judicature sought to render accessible documents that had been dropped into an investigative file either by mistake or by inappropriate association with the (secrecy inherent to an) investigation.²⁰ The applicant thus enjoyed a better chance that the request for disclosure might be satisfied, at least in part.²¹

The practical effects of the categorisation requirement emerge from an attentive reading of the early case law. In fact, it was not uncommon for the institutions to hand out some (harmless) documents, although they were related to (ie involved) investigations. What was also clear was that the institutions themselves acknowledged (in practice) that the information these particular documents contained, if released, and albeit involving an investigation, would not undermine any asserted interest. The sensitivity of the Court, taking the form of a minimum imposition, and the (hands-on and generous) practice of the institutions, paved the way for what was later to be known in the case law as ‘partial access’.²²

ii. *Hautala*

Not surprisingly, in July 1999, the procedural requirement of the consideration of the feasibility of partial access²³ was born into a mandatory exception,²⁴ the protection of international relations.²⁵

¹⁹ See especially the discussion on this point as per the 2001 framework (section V).

²⁰ Another possible reading, but one that has an echo only in the case law and not within Regulation 1049/2001’s Art 4(6), is that it is quite naïve to hold that, by way of the categorisation requirement, the judicature only sought to render accessible documents that had been dropped into an investigative file either by mistake or by inappropriate association with the investigation. In *WWF*, the expression of the last sentence of para 64 ‘related to a possible procedure for infringement’ read within the context of the first sentence of para 64, could, in the alternative, be interpreted as meaning both indispensable to the investigation and sensitive. In this manner, that burden of categorisation (a minimum imposition) would have obliged the institutions to examine each document covered by the exception, on the basis of a concrete harm test, whereupon, and in addition, the institutions would be in the condition to blank out harmful passages.

²¹ This logic would become the foundation for the later ‘partial access’.

²² *Hautala* (n 14).

²³ Also discussed, from a different perspective, in Ch 4.

²⁴ An exception today regulated under Regulation 1049/2001, Art 4(1).

²⁵ Yet, however meritorious, the burden of categorisation imposed on the institutions was ultimately of little avail to applicants. The institutions could—and did—divide investigative files into a standardised categorisation and then state, in regard to every category, that its entirety was related to and involved an investigation. Finally, this traditional institutional tactic would take on more serious proportions and consequences within the post-2001 framework, under which investigations are framed under Art 4(2).

Partial access means two things. First, it means that the institution satisfies itself that a document (initially refused) may be disclosed, because upon examination of the same the institution is sure that the document itself or parts of the same are (after all) not covered either by the exception relied on in first light, or by any other exception. Secondly, it means that for documents or parts of documents indeed covered by an exception the institution will consider if blanking out (ie redacting) the sensitive passages is feasible.

a. Two Levels of Categorisation

The combined requirements of *WWF* and *Hautala*, however, imply that institutions face a difficult task. A preliminary, categorisation serves a first purpose, which is to establish a *prima facie* relationship between documents and exceptions (which of the contested documents are in principle covered by each exception relied on).

Yet once that has been achieved, a second categorisation is necessary.²⁶ It concerns the sort of documents related to each exception.

This second categorisation, which needs to be undertaken with regard to each pile of documents previously ascribed per exception, serves to predict the different thresholds of harm posed by each different sort of related document (notes, letters, reports, etc) to the asserted counter-interest (which competes with an interest in disclosure). This is because, necessarily, the examination of the contested documents with a view to concluding as to the feasibility of partial access is dedicated to rebutting another presumption: that disclosure of the contested documents will undermine an asserted (counter-)interest.

This means that in 1993, even when the contested documents had been preliminarily assessed as harmful *vis-à-vis* one of the interests protected by an exception (a mandatory one, which left no room for access), the institutions were still obliged (via case law, *WWF*) to check if any of the contested documents had been incorrectly connected to a certain exception, and/or if any of the harmful documents contained any harmless passages. Later, and in addition,²⁷ the feasibility of blanking out the harmful passages would also have to be considered.

However, and in spite of this new figure (partial access) that imposed on the institutions that they make an effort to crack the hard shell of the mandatory class, the mandatory class of documents remained highly insulated from public scrutiny.

²⁶ This has, accordingly, been required by the judicature.

²⁷ Partial access, born into a *mandatory* exception—it is never redundant to restate the context of its genesis—pre-Regulation 1049/2001 requiring the blanking out of harmful passages, also carried over as an *ex lege*, mandatory, general and pervasive institutional burden of triage of documents into Regulation 1049/2001, Art 4(6).

iii. *Petrie, The Redundancy (or not) of the Author's Rule*

The substantial degree of insulation that the mandatory exceptions offered in 1993 is well illustrated by the *Petrie*²⁸ proceedings. The case emphasises how (all) exceptions construed pre-Regulation 1049/2001 actually enjoyed a double insulation from access. The fact that the insulation was double would, of course, be extremely relevant within the mandatory context, since that context was, of itself, already greatly restrictive.

Under the framework laid down by the 1993 Code another compelling argument in favour of non-disclosure had to be contextualised with this already robust protection of multiple interests: namely the author's rule. It functioned both as an independent and/or redundant argument whenever documents requested originated from a third party. In fact, as we have mentioned earlier (cornerstone 2), a connection criterion of authorship to any third party would—of itself—trump any request for disclosure. Thus, the institutions of the EU were not even under the obligation to consider releasing documents of that type.

In *Petrie*, the case concerned a request for access to an investigative file in which (practically) the entirety of the documents used by the institution to conduct the investigation was not EU-originating.

As such, the author's rule²⁹ placed them well outside the confines of the 1993 Code's influence. In these cases, no categorisation (of the non-EU documents) was imposed other than, at the most, a division into EU-originating and non-EU originating documents. Subsequently, only the implications of the EU originating documents' disclosure would be considered, and, if the disclosure of the latter could undermine the investigation, their release was prohibited.

Because investigations were at the time harboured under the public interest exception (mandatory, without a balancing test), no deference to any opposing interest in disclosure was possible. It was neither called for nor allowed.

In sum, under the 1993 Code of Conduct, documents already insulated from disclosure due to the (mandatory, without a balancing test) context into which they were born were further shrouded by the (possibly redundant) author's rule. Still, their governance was subject to three tasks, all of which were incumbent on the institutions.

B. 1993: Synopsis of Tasks Incumbent on the Institutions within the Mandatory Context

First, a categorisation of requested documents per applicable exception was required as a minimum rule. Secondly, the prediction of the level of harm posed by the release

²⁸ Case T-191/99 *Petrie et al v Commission* (n 17).

²⁹ The fact that it was not the EU that had authored the documents.

of any document, at least per sort of document (notes, letters, reports) within the pile per exception, was a requirement that the Court also wished to be satisfied. Thirdly, and finally, the governance of the mandatory exceptions (post-*Hautala*,³⁰ that is) was subject to the consideration of the possibility of partial access.³¹

Table 5.1: 1993 Code of Conduct: Mandatory Exceptions and Institutional Burdens

Prior 1, Internal document
Prior 2, Author's rule
1. Categorisation of documents in regard to connection with each exception asserted.
2. Within pile 1, prediction of thresholds of harm posed by release of each category/type of documents sought and the exception that they threatened.
3. Consideration of whether partial access was feasible.

i. Relevance of Temporal Sequence: Petrie and Hautala

Before we conclude the discussion on the mandatory exceptions of the 1993 Code of Conduct, it is important to emphasise the importance of the temporal sequence of the rulings that came forth as a consequence of both the *Hautala* and the *Petrie* proceedings.

On the one hand, Case T-14/98 *Heidi Hautala v Council* was lodged on 13 January 1998 and ruled on 19 July 1999. The respective appeal, Case C-353/99P *Council v Heidi Hautala*, was lodged on 22 November 1999 and ruled on 6 December 2001. On the other hand, Case T-191/99 *Petrie v Commission* was lodged on 25 August 1999 and ruled on 11 December 2001. The *Petrie* ruling (of the CFI) post-dates the *Hautala* ruling (of the ECJ) by a mere five days.

When the *Petrie* proceedings were lodged, partial access, as a (new) landmark of the access procedure, advertised as a victory for applicants, was already on display on the CFI's website, and had been there for at least one month. Moreover, it is difficult to envisage that over the 16 months it took to issue the *Petrie* ruling, one section of the first instance judicature did not have the time to acquaint itself with such a momentous new development ruled by another section of the same court.

True, the applicant in *Petrie* did not pursue the argument of partial access. But it is even more of a loss to the public at large that the first instance judicature did not care (of its own motion if necessary) to draw on *Hautala*³² to reset the governance of

³⁰ *Hautala* (n 14).

³¹ Such a model was all the more relevant from *Hautala* onwards, rendered on 19 July 1999, whereby the consideration of partial access became a procedural imposition on the institutions.

³² Albeit limited to the first instance gravitas of Case T-14/98 *Hautala v Council* and in spite of possible *ultra petita* criticism.

public access to documents linked to the mandatory exceptions to the new standards of the case law.³³

That is precisely what the ECJ did a mere five days later. It embedded partial access (both halves of the figure, disclosure of documents not covered *and* redaction of documents covered, if feasible) deep into the highest degree of insulation that the 1993 Code of Conduct had to offer (the exception is harboured today under Article 4(1) of Regulation 1049/2001).

As a final comment, partial access (when confirmed by the ECJ a mere two weeks before the 1993 Code would forever disappear from the law of the EU) should not to be understood as part of a heritage that was fraying. On the one hand, it was but the inevitable and necessary development of *WWF*. On the other hand, and although most would think that this goes without saying, regardless of which exception encompassed the contested documents, it compelled the institutions to read³⁴ the same, attentively.

IV. 1993: WHAT WAS DISCRETIONARY

Moving into the second half of the structure of the 1993 Code of Conduct, as we have noted, in 1993 a discretionary exception had also been included in it. It concerned institutional confidentiality, or institutional ‘space to think’.

1993 Code of Conduct

The institution *may* also refuse access in order to protect the institution’s interest in the confidentiality of its proceedings.

Within the discretionary context too a very subtly³⁵ outlined presumption of preponderance is discernible. However, here (in contrast to what occurred within the mandatory context) the presumption is rebuttable. What is established is an optional (ie discretionary) preponderance of the interest of the confidentiality of institutional proceedings over other prospective interests that applicants might attempt to assert. In addition, clearly only the institutions were put in a position to (choose to) disprove the presumption.

Case T-105/95 *WWF UK*

38 When a discretionary exception is invoked, the balancing of interests (the institution’s interests in confidentiality of proceedings against those of the person who has requested access to the documents) is undertaken at that point.

³³ Moreover, the first instance judiciary had received a sign. Regulation 1049/2001, published in May 2001 and applicable from 3 December 2001, had moved investigations into Art 4(2), removing them from the greater insulation of Art 4(1).

³⁴ *cf* Case T-29/08 *LPN v Commission* [2011] ECR II-06021, para 113.

³⁵ The subtlety is in fact marked in such a way that it functions as a serious obstacle to the understanding of the provision’s significance.

A. The Relevance of Personal Interests, if Notorious

It is important to recall that in 1993 access was—and still is—an impersonal³⁶ right. This meant that applicants were not bound to offer reasons for seeking documents. But, in 1993 it was equally true that in regard to situations in which only institutional confidentiality was at stake, alongside the interest that any anonymous citizen³⁷ might have in disclosure, particular private interests, if well known³⁸ had to be taken into account. The consideration of notorious particular interests was a requirement stemming from the permissive redaction of the exception of a discretionary nature (eg the institutions *may* refuse) in conjunction with the self-imposed³⁹ standards of governance of that discretion by the institutions.

Case T- 111/00 *British American Tobacco*

42. As regards, first of all, the assessment of the applicant's interest, it should be borne in mind that, under Decision 94/90, any person may request access to any unpublished Commission document, without being required to give a reason for the request (*Svenska Journalistförbundet v Council*, paragraph 65). One consequence of that situation is that, where it has no information on the particular reasons underlying a request for access, the institution concerned cannot be criticised, when it comes to balance the various interests at stake for the purpose of application of the non-mandatory exception, for assessing the applicant's interest by reference to the interest that any citizen might have who asks for access to the institution's documents, and without taking into account particular interests of which, by definition, it is unaware.

43. However, in the circumstances of the present case, the Commission cannot contend that it was unaware of the applicant's intentions in submitting its request for access to the minutes in question. As is clear from the documents before the Court (see paragraphs 7 and 8 of the present judgment), that request was preceded by steps which the applicant took in order to put its case opposing the decision taken by certain Member States to treat expanded tobacco as 'smoking tobacco' within the meaning of Article 5(1) of Directive 95/59 and, consequently, to make it subject to the regime provided for in Directive 92/12 concerning products subject to excise duty. The aim of the applicant's request, in view of the implications that such treatment would have for it from both a tax and administrative point of view, was thus to ascertain what positions were adopted on that question within the committee.

44. Against that background, the Commission clearly could not have been unaware of the applicant's interest in being able to ascertain not only the substance of the discussions but also the identities of the delegations voicing the opinions expressed.

³⁶ See Ch 2. There is no link to direct and individual concern.

³⁷ An impersonal interest or *erga omnes* standard as quoted by B Driessen, *Transparency in EU Institutional Law* (Alphen aan den Rijn, Kluwer, 2012); see Ch 2.

³⁸ *Hautala v Council* (n 14); Case T-204/99 *Olli Mattila v Council* [2001] ECR II-02265 paras 106–07; and Case T-111/00 *British American Tobacco* [2001] ECR II-02997, paras 42–50.

³⁹ See Case T-105/95 *WWF UK v Commission* (n 5) para 38.

45. Next, it must be observed that that interest could not be regarded as irrelevant to the balancing of the interests at stake.

But for this difference—that here the presumption of preponderance was always rebuttable, and that it was necessary for the institutions to undertake a balancing of interests—the discretionary framework was governed by the three presumptions that ruled the mandatory exceptions as well: correlation, preponderance and harm.

B. Governance Similar to that Inherent to the Mandatory Exception

As a consequence, the governance of the discretionary exception was also no different from the governance of the mandatory context of the 1993 Code either. Let us begin by stating that if the categorisation of requested documents was imposed in regard to mandatory exceptions as a necessary institutional burden, that same burden was—all the more so—ascribable to the domain of the discretionary exception. Moreover the requirement of the establishment of involvement⁴⁰ between the documents sought and the exception asserted applied equally to this peculiar shade of ‘No’.

The same may be said of partial access. If, as a procedural burden imposed on the institutions, it was born into the mandatory exception of the protection of international relations, then, forcibly, it carried over—still under the 1993 Code of Conduct—into the less severe domain of the protection of institutional ‘space to think’.

This signified, first, that the categorisation of documents, and, secondly, that the verification of any documents attached to one of the single independent exceptions, and thirdly, the consideration of the possibility of partial access, were also at the forefront of institutional governance of the contest between the advantages stemming from a broad implementation of the access policy and the interest in institutional confidentiality.

C. 1993: Synopsis of Tasks Incumbent on the Institutions within the Discretionary Context

In sum, under the 1993 Code, when offered the option to disclose or to hold back documents that could undermine their internal ‘space to think’, the institutions needed to discharge the burden of reasoning refusals along a double standard. First, by complying with the duties inherent to mandatory exceptions; subsequently, by further demonstrating that ‘a balance (of competing interests, public and/or private, and the latter only if notorious) had ‘been struck’ or that a ‘balancing test’ had been employed.

⁴⁰ Indispensable to and sensitive.

Table 5.2: 1993 Code of Conduct: Discretionary Exceptions and Institutional Burdens

Prior 1, Internal document
Prior 2, author's Rule
1. Categorisation of documents
2. Establishment of relation of pertinence between documents sought and exception asserted.
3. Consideration of whether partial access was feasible.
4. Balancing institutional space to think against competing interests of the person who had requested access to the documents — interest of any citizen in accessing the documents — particular interests of the requesting parties, if notorious.

D. 1993: Mandatory v Discretionary, Summation

What is 1993 as a first structure of the access policy? First, two cornerstones existed in the foreground to that structure: the prerequisite that the contested documents would be internal documents and the exclusionary impact of the author's rule. Secondly, all depended on whether the contested document concerned either half of the (theoretical) dichotomy put into place: mandatory or discretionary. If it fell under the second half, a balancing of competing interests would have to be struck.

Thirdly, and for both the mandatory and discretionary halves of the dichotomy, the (obviously institutional) task of categorisation had to be discharged.

Fourthly, the feasibility of partial access needed to be assessed. Moreover, the latter assessment implied two levels of analysis: on the one hand, whether parts of the documents were (after all) not covered by any exceptions and, on the other hand, for all documents and/or parts of documents that were indeed encompassed within an exception, whether redaction was feasible.

The entire structure was profoundly changed in 2001.

V. WHAT CHANGES IN 2001?

In 2001 many changes come forth. As we will see the tendency is that less insulation is (or should be) afforded to all (kinds of) documents held by the EU. In addition, the author's rule is hacked down and so is the entire concept of a Discretionary Framework⁴¹ for exceptions. The new scheme for exceptions is now mandatory

⁴¹ It is important to point out that some doctrine, even post-Regulation 1049/2001, continues to rely on the mandatory/discretionary distinction to distinguish Art 4(1) from Arts 4(2) and (3) of Regulation 1049/2001. See eg D Curtin and J Mendes, 'Article 42' in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights, A Commentary* (Munich/Oxford/Baden-Baden, Beck/Hart/Nomos, 2014) and also L Coudray, *La transparence et l'accès aux documents, Traité de Droit Administratif Européen* (Brussels, Bruylant, 2014) 699–712. We propose a different terminology since in all 3 articles the wording employed is 'shall'. This is, however, a mere detail of terminology and one option.