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Freedom of Information in the European Union: The Scope and Themes

Kuo-lien Hsieh

Abstract

This article considers the three major issues that the studies of EU freedom of information law must cover. The first and second issues analyse the development of the law and policy on freedom of information in the European Economic Community and European Union between 1984 and 2008. These two topics concern how the Council, the Commission, and the Parliament enacted and implemented the rules on FOI protection, and on the role of the Community court in this field. The third major issue is about the examination of the roles of the European Parliament and the European Ombudsman, which have supplemented the role of the Court in securing this right. As to the objectives of the studies of EU FOI law: on the one hand, the studies seek to understand the degree of legal protection offered to freedom of information in the Union over the last two and a half decades; on the other hand, the research seeks to identify how the current EU FOI regime could be improved. To accomplish these objectives, attention is drawn to the following interrelated issues. First of all, it is worth considering the major controversies surrounding FOI law and policy between 1984 and 2008. In particular, attention must be focused on the extent to which the 2001 Regulation addresses the pre-existing obstacles to FOI protection. Secondly, the exceptions in Article 4(1) and Article 4(2) of the 2001 Regulation can be categorised as mandatory and discretionary respectively, but the distinction between the two provisions is vague. This indistinct dividing line should be removed to end the misunderstanding that the Council, the Commission, and the Parliament are entitled to refuse requests systematically when invoking the so-called mandatory exceptions. Thirdly, it is necessary to analyse the principles established by the 2001 Regulation, the EC Treaty, or by the Court to guide the interpretation of the exceptions laid down in the Regulation.

I. Problematic Trends

The European Union (EU) is widely considered to be insufficiently democratic, a concern neatly highlighted by the phrase "democratic deficit."[1] The EU's lack of democracy can be analysed from various perspectives, but previous research on this phenomenon has very

much focused on the policy and rule making of the EC institutions.[2] The issue of freedom of information does, however, deserves particular attention as failure to secure this right has a negative impact on the democratic nature of the Union. This is especially so, given the proposition that citizens should have a right to information held by their governments has at present been recognised within liberal democracies, which have adopted statutes to realise freedom of information.

At least two factors, other than the respective roles and operation of the EU institutions, have led to the democratic deficit displayed by the Union in its practices. First, the origin of the Union as an international organisation has ensured that secrecy and sensitivity attended its diplomatic relations. The European enterprise began on 18 April 1951 when three large Member States and three small ones met in Paris to sign the Treaty establishing the European Coal and Steel Community, which was the result of the "Schuman Plan."[3] French Foreign Minister, Robert Schuman, emboldened by Jean Monnet's suggestion and by the swing in official French opinion towards an economic accord with Germany, floated the proposal with secrecy and speed. Before the plan was revealed to the public, Mr. Monnet and Mr. Schuman clandestinely obtained approval from three key parties: the French, German, and U.S. governments.[4] As regards policy-making within the ECSC, the ECSC Treaty did not state that the highest decision-making body, namely the High Authority, was entitled to operate in absolute secrecy. However, the High Authority consisting of nine members, most of whom were appointed by the Member States, was allowed to make various arrangements for the operation of its departments, according to Articles 9(1), 10(1), and 16(1) of the ECSC Treaty.[5] Such information as was to be made available to the public was merely a sketchy description of the activities and the administrative expenditure of the ECSC, under Article 17 of the ECSC Treaty.[6] There was in those days much less of a climate of openness, which took decades to change. Whatever Community jurists may say of its present nature, the EU's origin ensured that much secrecy would for many years attend the political relationships between the Member States.

Second, the lack of a European identity among the population also poses a dilemma for European democracy. Democracy, which means popular sovereignty and implies the existence of a people, a *demos*, depends on a sufficient number of individuals feeling that they belong to the same political community. Democracy presupposes that most members of the electorate think of other voters in some sense as "one of us." The feeling of belonging to the same community is often expressed by terms such as "one nation." However, originally only the Member States rather than individuals played a role in the Community, though it is possible to see greater status afforded to the individual within the EU system through the introduction of direct elections and the concept of EU citizenship. Despite this, EU citizens, drawn from a number of separate nations, have only a limited sense of being European.[7]

Easier access to information from public authorities would help European citizens become familiar with the operation of the Union and assist them in participating in decision-making. In other words, the right to information is undoubtedly an essential part of the

democratisation of the EU administration.

The foundation of freedom of information concerns the democratic principle which has both "affirmative" and "critical" aspects. The affirmative aspect of democracy is that popular sovereignty is the source of authority to create and enforce obligations on citizens. The critical aspect, on the other hand, questions, limits and constrains public power.[8] Freedom of information is based on the latter but also has a link to the former. Professor Ian Harden has noted that "[t]he right [to call public authorities to account] cannot be exercised effectively without access to information about what the public authorities are doing and why. Public access enables citizens to scrutinise the activities of those exercising public authority and to make an independent evaluation of them."[9] Elaborating on the functions of this freedom, Professor Patrick Birkinshaw notes that "[f]reedom of information does not mean access to brute information alone such as documents or records in whatever form, as we shall see. It leads into open government in so far as it necessitates access to governmental decision-making in a more participatory form. The claims are couched in terms of a right to know, a democratic right."[10] The issues concerning access to the documents produced for decision-making of the EU authorities fall within the scope of the study of EU freedom of information law. Nonetheless, such research is not intended to consider generally all the topics regarding decision-making processes in the Union.[11]

The issues relating to FOI protection were almost completely neglected by Community jurists and the Community administration, prior to the initial defeat of the Treaty of Maastricht in June 1992 in Denmark, and its narrow approval in France three months later.[12] During the early days of the history of European integration, the discordance between the expectation of freedom of information and the secretiveness of the Union did not lead to a "crisis of legitimacy." The difficulties encountered in the adoption of the Maastricht Treaty, nevertheless, revealed the huge gap that existed between European citizens and the high-ranking officials which governed them. In the early 1990s, as Professor Desmond Dinan has said, "[t]he Council seemed secretive and self-serving, the Commission remote and technocratic, and the EP expensive and irrelevant."[13] The challenge encountered in obtaining the citizens' approval was attributable to the lack of information which citizens had about the Treaty and the proposed change to the EC at that time. The citizens of the Member States apparently felt that they were alienated from a complex system of governance, which was based on unelected institutions, perceived as remote and inaccessible owing to lack of participation.

Granting freedom of information to citizens in the Member States has played a crucial role in improving the EU's imperfect democratic order, especially following the accession of two Nordic countries, Sweden and Finland, in 1995. As Professor Inger Österdahl records, upon Sweden's entry into the Union, many Swedish people feared that their domestic legislation on openness would not survive EU membership, because Community law at that time allowed for far less openness in certain areas than Swedish law.[14]

II. Scope of Freedom of Information

This section considers the scope of freedom of information through analysis of the phrases FOI, "transparency," "open government," and that of the status of FOI in legislation.

1. The Concept

For many who employ the phrase freedom of information, it means having access to government documents or information in any other form in order better to understand the policies of the government. In some jurisdictions, it means not only allowing access to files in whatever form they exist, but also opening up the meetings of governments, their advisory bodies and client groups to public scrutiny. Alternatively, it may involve access by individuals to files containing information about them – and an assurance that such information is not being used for improper or unauthorised purposes.[15]

The term "transparency" has been frequently employed in the language of the institutions to refer to the openness of the Community institutions and to their clear functioning. Also, "Transparency is linked to the citizens' demands for wider access to information and EU documents and for greater involvement in the decision-making process which would help foster a feeling of closeness to the Union."[16] This definition indicates that transparency, a central theme in the EU administration, has a wider reach than freedom of information.[17]

Freedom of information may, in turn, be seen as wider ranging than another commonly used phrase, "open government," in so far as the former covers potentially all information in the public and private domain. The two terms are not absolutely the same though very closely related, as the latter refers to openness of processes, as well as documentation and may concern private institutions in so far as they are used as a surrogate for governmental decision-making.[18]

2. FOI in Legislation

2.1. FOI in the Treaties

As regards the face of freedom of information in the European Union, what needs to be considered first is Article 1(2) of the Treaty on European Union, which concerns one of the general principles of the Union. This provision states that "[t]his 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" (emphasis added). The italicised words added at Amsterdam placed great emphasis on openness and subsidiarity. Rapid development then followed with an amendment to the EC Treaty by the

Amsterdam Treaty in the form of Article 255, which came into force in 1999. In May 2001, the Parliament and the Council adopted Regulation 1049/2001 of 30 May 2001, which was a landmark of the EU FOI evolution. [19]

Article 255 EC, which introduced a Treaty provision on freedom of information, provides that:

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.

The insertion of Article 255 EC has brought about a revolution in the FOI field since the article acts as the Treaty basis for EU FOI legislation, elevating the status of this right significantly.

The Lisbon Treaty, which entered into force on 1 December 2009, is expected to bring about an extension of FOI protection in the Union. It is worth noting that, first, Article 10(3) of the Treaty on European Union has introduced a new Treaty provision on freedom of information and open government. Article 10(3) TEU, a "provision on democratic principles", states that "[e]very citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken *as openly and as closely as possible* to the citizen" (emphasis added).

Secondly, Article 255 EC has been replaced by Article 15 of the Treaty on the Functioning of the European Union. This article provides that:

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.

This article indicates that first of all, a wide range of administrative, legislative, executive, and judicial functions of the Union will be put under democratic scrutiny through the exercise of freedom of information. Second, it is of interest to compare the position of Article 255 in the EC Treaty to that of Article 15 in the Treaty on the Functioning of the European Union. Article 255 EC is in Chapter 2 of the EC Treaty's Part V entitled "Provisions Common to Several Institutions." Article 255 EC does not emerge from either an EC Treaty section dealing with citizenship of the Union, or the general principles of the Union. Article 15 of the Treaty on the Functioning of the European Union, however, is in Title II of this Treaty entitled "Provisions Having General Application." Thus, the Functioning of the European Union recognises freedom of information as a fundamental right. It is difficult, though not impossible, for the EU authorities to claim that the general interest of the administration prevails over freedom of information.

2.2. FOI in the 2001 Regulation

Here, this study turns to concentrate on the all-important 2001 Regulation, in particular its objectives. Recital 2 of the Preamble to the 2001 Regulation states that "[o]penness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system." On the one hand, this stated purpose of the legislation, namely to make a contribution towards the democratic system of the Union, can be regarded as the fundamental purpose of this new law. On the other hand, Article 1 entitled "Purpose" provides for practical guidelines for determining whether a refusal of a request for access to information held by the Council, the Commission, or the Parliament is consistent with the principle of democracy. This article states that:

The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as "the institutions") documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents,
(b) to establish rules ensuring the easiest possible exercise of this right, and
(c) to promote good administrative practice on access to documents.

First of all, the principle of "widest possible access" set out in Article 1(a) is an essential part of this provision. The case law, which will be briefly examined in Section 3, has shown that this principle is not only an aspirational statement but also an enforceable rule of law.

Secondly, with respect to application procedures, a principle of "easiest possible exercise" of the right is laid down in Article 1(b). Thirdly, the principle set out in paragraph (c) concerns the purpose promotion of "good administrative practice on access to documents." This could be controversial in that it is unclear how far, if at all, it goes beyond the principle laid down in paragraph (a) which emphasises the importance of "widest possible access." Indeed, under paragraph (c), a refusal could be made on the ground that disclosure of information could jeopardise "good administrative practice," a term without clear definition.

On adoption of the 2001 Regulation, the Parliament and Council regarded implementation of these three purposes as an important objective of this legislation. It is, therefore, not surprising that Article 17(2) requires that the Commission, at the latest by 31 January 2004, report on "the implementation of the *principles of this Regulation* and shall make recommendations, including, if appropriate, proposals for the revision of this Regulation and an action programme of measures to be taken by the institutions" (emphasis added). The Commission adopted this report on 30 January 2004. This provision indicates that the EU legislator made a deliberate effort to ensure that these purposes would not be compromised in the implementation of this important legal framework.

III. Objectives and Themes

1. Objectives

The objectives of the study of EU FOI law will be to:

1. Set out and explain the key Community regulatory provisions in this field noting, in particular, the range of information covered and scope of any exceptions to openness.
2. Assess the effectiveness of the procedures for obtaining information, in particular,

the availability of information concerning what is available, for example, through a register of documents, and enforcement mechanisms. In addition, issues concerning the availability of appeal procedures and the EC institutions' duty to provide reasons for refusals to grant information should also be analysed.

3. Examine the role of the Community courts in interpretation and enforcement of the above mentioned provisions.
4. Focus on the roles of the European Parliament and the European Ombudsman in EU FOI protection, which offer alternative mechanisms for enforcing transparency and openness of the EU institutions, agencies, and bodies. The Parliament and Ombudsman have long employed a number of measures, such as inquiries and petition procedures, in order to safeguard freedom of information in the Union.

2. Themes

2.1. Initial Development

The logical place to start is with the evolution of freedom of information legislation and policy in the Union. The Union, which at present commits itself to giving "the fullest possible effect to the right of public access to documents and to lay down the general principles on such access,"[20] does not have a long history of active steps to protect the right to information.[21] Generally, the evolution of policies and legislation in this field can be divided into three stages.[22]

2.1.1. Evolution I (1984~1992)

The first stage, from 1984 to 1992, was a phase of tentative steps towards openness. The European Parliament adopted an initial resolution on access to Community information in 1984.[23] Four years later, it adopted another resolution,[24] as the Council and the Commission failed to adopt comprehensive measures to make information in the Community more accessible to the public. Some progress was made by the two institutions to enhance public access to environmental information. On the one hand, the Council in June 1985 adopted a directive on the assessment of the effects of public and private construction projects on the environment.[25] The legislator noted in the preamble of the Directive that "for projects which are subject to assessment, a *certain minimal amount of information* must be supplied, concerning the project and its effects." (emphasis added). On the other hand, a significant initiative of the Commission on the subject during this period is its proposal for a draft directive on the freedom of access to environmental information.[26] In addition, the 1990 *Zwartveld* judgment, which concerned the conflicts between secrecy within the Commission and freedom of information, indicates that the Community clearly needed FOI legislation.[27] Policy governing freedom of information in the Union was born out of a

deep crisis of legitimacy which threatened the integration of Europe in the late 1980s and early 1990s. At this first stage, on the one hand, it was difficult for the public to gain access to information in the possession of the Community institutions. On the other hand, the institutions did not have a firm legal basis on which to refuse access, however justified in the public interest. Both the public and the EC institutions can, therefore, be considered victims of the absence of FOI legislation at this stage of the FOI evolution.

2.1.1. Evolution II (1993~2000)

Attention should then focus on the policies and legislation made between 1993 and 2000, principally the 1993 Code of Conduct and corresponding Council Decision 93/731 and Commission Decision 94/90, in response to the legitimacy crisis.[28] This constitutes the second phase of Community involvement in this field. The Code of Conduct, the two decisions, and court rulings relating to these three measures, must be examined. Here this Article lists the key judgments delivered during this period before briefly looking at what they indicate.

1. The 1995 *Carvel* judgment, which examined the discretionary exception for documents relating to the institutions' internal proceedings in Article 4(2) of Council Decision 93/731.[29]
2. The 1996 *Netherlands* judgment, which mainly concerned the legal basis of Decision 93/731 and whether freedom of information could be regarded as a fundamental human right at that time.[30]
3. The 1997 *WWF* judgment concerning the indistinct dividing line between the two categories of mandatory and discretionary exceptions set out in the Code of Conduct.[31]
4. The 1998 *Interporc I* judgment which considered whether the public interest exception relating to court proceedings in Commission Decision 94/90 authorised the Commission to refuse public access to all documents relating to pending proceedings.[32]
5. The 1998 *Carlsen* judgment, which considered whether protection of the public interest justified the refusal to grant access to the opinions of the Legal Services of the Community institutions. At issue was whether there was a public interest exception relating to protection of legal advice under Decision 93/731.[33]
6. The 1998 and 2000 *van der Wal* judgments.[34] This dispute concerned Article 190 EC (now Article 253 EC), and the public interest exception relating to court proceedings laid down in the Code of Conduct.[35]
7. The 1998 *Svenska Journalistförbundet* judgment.[36] This case mainly related to former Article 190 EC, as well as the public interest exception relating to public security set out in Article 4(1) of Decision 93/731.

8. The 1999 *Rothmans* judgment, which was about former Article 190 EC, and the so-called "authorship rule" in the Code of Conduct.[37] The main dispute was whether an EC institution, namely the Commission, was entitled to refuse access to minutes of "comitology" committees by invoking that controversial rule.
9. The 1999 and 2001 *Hautala* judgments, which primarily concerned whether partial access to documents might be granted under Decision 93/731.[38] In considering this subject, the Community courts took serious account of the principle of widest possible access laid down in the Code of Conduct, as well as the principle of proportionality.

What do these cases indicate? First of all, this Article concentrates on the legal rules or principles employed by applicants and the Court to interpret narrowly the exceptions set out in the Code of Conduct and the corresponding Council and Commission decisions.

1. In the 1995 *Carvel* and 1997 *WWF* judgments, as well as 1999 and 2001 *Hautala* judgments, the CFI stressed the importance of the principle of "widest possible access" set out in the first section of the Code of Conduct.[39]
2. Section 4, subsection 2 of the Code of Conduct was held by the Court to require a balancing test. The CFI elaborated on the balancing test in the *Carvel* judgment and emphasised its importance in the 1997 *WWF* and 1998 *Svenska Journalistförbundet* judgments.[40]
3. In the *WWF*, the *Interporc I*, and the *Rothmans* judgments, the CFI stated that the Commission, in refusing access to the documents sought, should have provided sufficient reasons as required in Article 253 EC.[41] The *Carlsen* and *van der Wal* judgments, however, show that the CFI has not adopted a consistent approach when interpreting the terms "sufficient reasons" and "adequate reasoning."[42] The CFI insisted on the clear reasoning obligation and adopted a stricter approach in the 1998 *Svenska Journalistförbundet* judgment.[43]
4. The CFI introduced the principle of proportionality into the EU FOI field in its *Hautala* judgment.[44]

Secondly, the Council and Commission between 1993 and 2000 tended to refuse applications systematically, which indicated that the two institutions held to the view that secrecy ought to be the rule and openness the exception. This view is reflected in the 1995 *Carvel* and 1998 *Interporc I* judgments.[45] Thirdly, there seemed to be a clear distinction between the two categories of exceptions set out in the Code of Conduct. The first category of exceptions appeared to be mandatory and the other discretionary. As to the first category of exceptions, section 4, subsection 1 of the Code of Conduct stated that, the Council and the Commission "*will* refuse access to any document whose disclosure *could* undermine" the protection of certain public interests, as well as privacy, and commercial secrecy, etc. Ac-

cording to section 4, subsection 2 of the Code of Conduct, the two institutions "*may* also refuse access in order to protect the institution's interest in the confidentiality of its proceedings." However, the 1995 *Carvel*, 1997 *WWF*, 1998 *Interporc I*, 1998 *Carlsen*, 1998 *Svenska Journalistförbundet* judgments, and the 2001 *Hautala* judgment indicate that the distinction between these two provisions is not at all distinct.[46] This is because the Council and the Commission were under analogous obligations to balance relevant interests or to give adequate reasoning for their refusals when invoking the first, second, or both categories of exemption.

To sum up, EU citizens were granted more freedom of information by the Code of Conduct and the two corresponding decisions than they had been given before 1993. The rules in these three legal measures, however, provided the public with only limited freedom of information, which indicated that the leaders within the Council and Commission at that time believed that secrecy should be the rule and openness the exception. However, the Community courts and, in particular the CFI, adopted a contrary stance on this issue, establishing the principle that openness should be the rule and secrecy the exception. The Courts made an obvious effort to extend the right of access through interpreting the exceptions narrowly by reference to Article 253 EC (former Article 190 EC) and the principle of proportionality. It can be concluded, therefore, that it was the Community courts, rather than the three instruments, that elevated freedom of information almost to the level of a fundamental right.

2.2. The Present EU FOI Regime: Evolution III (2001-2008)

Towards the end of the second stage, the Amsterdam Treaty, signed in June 1997, explicitly acknowledged a right of access to documents held by the EU institutions. It directed that an implementing regulation should be adopted within two years of the entry into force of the Treaty. The European Parliament and the Council adopted a new regulation in May 2001,[47] which came into effect the following December, marking the start of the third stage. It is interesting to analyse the 2001 Regulation, its implementation, and relevant court decisions. In particular, it is worth considering whether the Union has now done enough to meet the demands for more openness or, alternatively, whether it has achieved only partial success. Professor Ian Harden said in 2001 that "[w]hen the (2001) public access Regulation is implemented, it should significantly enhance the openness of the European Union."[48] Meanwhile, Professor Patrick Birkinshaw observed that the general feeling was that the European Parliament had done well to see through its major proposals on the subject, though certain parties were still disappointed by some of the concessions on "sensitive" documents.[49]

The steps taken by the EU do seem significant. Nonetheless, this Article asks if any provisions of the 2001 Regulation could, or indeed are, proving problematic for freedom of information. It is necessary to consider not only the provisions of the 2001 Regulation and

the relevant judgments, but also the influence of established administrative attitudes and norms about the confidentiality of interstate communications, which could have a significant impact on how the rules operate in practice and which could even trump demands for freedom of information. Here is a list of the most important policy documents:

1. Council Annual Reports on Access to Documents for 2002 to 2007;[50]
2. Reports from the Commission on the Application between 2002 and 2007 of the 2001 Regulation;[51]
3. Report from the Commission on the Implementation of the principles in the 2001 Regulation.[52]

In addition, the Court of Justice has continued to make an important contribution to the law and has interpreted some of the key articles of the 2001 Regulation. Here this Article lists the key judgments.

1. The 2001 *Petrie* judgment, which concerned the authorship rule, as well as the public interest exceptions relating to investigations, inspections, and court proceedings, which were set out in the Code of Conduct.[53]
2. The 2002 *Kuijer* judgment.[54] This dispute was about the principle of proportionality and the public interest exception relating to international relations set out in Article 4(1) of Council Decision 93/731.
3. The 2003 *Interporc II* judgment.[55] Like the *Petrie* case, this judgment related to the public interest exception regarding court proceedings in the Code of Conduct, and to the authorship rule, issues which became extremely contentious after the 2001 Regulation came into effect.
4. The 2001 and 2004 *Mattila* judgment.[56] This dispute was about whether the Council and the Commission should apply the principle of proportionality where, had they done so, they would not agree to partial access.
5. The 2003 *Messina* judgment, which related to the first action concerning a request made pursuant to the 2001 Regulation.[57] This case was principally about Article 4(5) of the Regulation, or the so-called "non-disclosure rule", which can be regarded as a "Member State" exception.[58] The invocation of this highly controversial provision has triggered ongoing debate.
6. The 2005 *VKI* judgment.[59] The Commission in a refusal attempted to justify its failure to carry out a concrete, individual examination of the numerous documents in question by reference to the principle of proportionality. The CFI held that this refusal constituted "a manifest breach of the principle of proportionality," because a concrete, individual examination helps the Commission to identify "the only documents covered, in whole or in part," by exceptions set out in the 2001 Regulation.[60]

What do these judgments mainly indicate?

1. The CFI held in the *Kuijer* and *Mattila* judgments that the Council was obliged to consider the principle of proportionality when they refused access to documents.[61] However, as the Council in both refusals invoked the public interest exception relating to protection of international relations, it remains uncertain whether an institution bears the same duty when invoking other exceptions in refusals.
2. In the *Petrie* and *Messina* cases, the Council and the Commission failed even to think of the principle of proportionality in their refusals.[62] What was worse was that in the *VKI* case, the Commission in a refusal of access to documents attempted to justify its failure to carry out a concrete, individual examination of the documents by reference to the principle of proportionality.[63] The CFI rightly held that this refusal constituted a manifest breach of this principle. This judgment indicates that the lack of an express provision establishing the principle in the 2001 Regulation could prejudice those who request access to public information.
3. The 2001 *Petrie* and 2003 *Interporc II* judgments indicate that the authorship rule ran counter to the principle of widest possible access set out in the Code of Conduct.[64]
4. Article 4(5) of the 2001 Regulation differs significantly from the authorship rule set out in the Code of Conduct. Under Article 4(5), the Council, the Commission, and the Parliament are not bound by the requests from the Member States. In the 2003 *Messina* judgment, however, the CFI ignored this important feature.[65]
5. As regards the public interest exceptions relating to investigations, inspections, and court proceedings set out in the Code of Conduct, as well as the two corresponding decisions, the 1998 *van der Wal*, 2001 *Petrie*, 2003 *Interporc II* judgments indicate that the purpose behind these exceptions was unclear.[66]
6. As to what Article 253 EC required when an institution invoked the authorship rule set out in the Code of Conduct, in the 1999 *Rothmans* and 2001 *Petrie* judgments, the CFI regarded the reference to the authorship rule to provide a sufficiently clear basis for the decision in conformity with Article 253.[67]

What must then be considered here is the relationships between the principle of proportionality and EU FOI law. The CFI introduced the principle of proportionality into the area of freedom of information in the *Hautala* judgment. It was, however, unclear as to how this principle should be applied by the Council and Commission. What the CFI stated in *Hautala* was that "Article 4(1) of Decision 93/731 *must* be interpreted in the light of the principle of the right to information and *the principle of proportionality*" (emphasis added).[68] Did the institutions bear the same obligation when invoking any exceptions laid down in the

Code of Conduct? The Courts did not answer this question in *Hautala*, *Kuijer*, or *Mattila*. Although they were responding to challenges relating to specific exceptions, one might have expected some guidance as to whether such a key principle as proportionality had a wider application in this context. Both the Council and Commission were uncertain about when the Court would intervene. This was probably the reason that, in the *Mattila* case, the two institutions failed even to think of this principle when refusing Mr. Mattila's requests. At present, a much more important issue concerns the relation between the principle of proportionality and the exceptions set out in the 2001 Regulation.

Hautala, *Kuijer*, and *Mattila* judgments, delivered between 1999 and 2004 have two common features. First, the public interest exception relating to international relations was invoked in all three cases. Second, in addressing all three disputes, the ECJ was of the view that the Council, the Commission, or both institutions' refusals of *partial access* were inappropriate. As to the first characteristic, the importance of the principle of proportionality should be emphasised not only in circumstances where the international relations exception is invoked. In *Mattila*, the ECJ annulled the Council and Commission refusals mainly because the institutions failed to consider the principle of proportionality in their refusals, which deprived the applicant of his right to a fair hearing. As regards accomplishment of this purpose, now the three institutions should apply this principle when invoking any of the exceptions set out in the Regulation. This is because, whenever a refusal of a request is made, the applicant would immediately need to examine the reasoning behind the denial, irrespective of which exception is invoked. As to the second common feature, the Courts appeared to have limited the proportionality review to determining whether partial access should be granted. The use of the proportionality test should be extended to deciding whether full access should be granted.

2.3. The Roles of the European Parliament and Ombudsman in EU FOI Protection

The first two themes concern both the relevant implementing measures adopted by the EU institutions and the disputes concerning freedom of information which have come before the ECJ and CFI to date. A key question which underlies the study of EU FOI law is about whether the judicial institutions of the Community were able to develop appropriate guidelines in this area and make significant inroads into secrecy. Generally, the Court has made a considerable contribution to FOI protection in the Union. It has not, however, adopted a consistent approach when applying legal rules or principles, such as the balancing test and the principle of proportionality, to counter systematic refusals of access to information. The principle of proportionality is more likely to be an effective principle of review across the EU FOI field. This doctrine should help the public counter overbroad interpretations of exceptions in a more effective way. This principle places great emphasis on a reasonable relationship between the ends and the means. As regards freedom of information, the end is to maintain the various interests protected by the exceptions to openness, while the means is a

refusal of a request for access to information held by the EC institutions.

The EU experience of reform gave cause for optimism because it led to the adoption of treaty provisions and the Code of Conduct, two corresponding Council and Commission decisions, as well as the 2001 Regulation, which appeared to have improved the EU imperfect democratic order. But does the EU truly recognise freedom of information as a fundamental right? Or does it take advantage of this right instrumentally for political objectives, in particular, to enhance accountability in the Union? The significant body of case law, which highlights problems with the operation of the right of access, indicates that the Council and Commission have been systematically refusing access to information by invoking certain exceptions. To reduce such refusals, the author suggests that the EU legislator include an explicit reference to the principle of proportionality in the 2001 Regulation. This proposed provision requires that (A) the proportionality test be applied when any of the exceptions set out in the Regulation are invoked, and (B) the way this test is applied in any given cases should be expressly indicated in the refusal.

The third theme is mainly about the roles of the European Parliament and Ombudsman in this field. Certain achievements by the Parliament in furthering freedom of information have already been examined in previous parts of this study. For instance, the Parliament, which was the first Community institution to have its own policy on freedom of information, adopted an important Resolution in mid 1984.[69] The Parliament, which has defended freedom of information with passion, also actively participated in the process of adopting the 2001 Regulation.[70] The role of the Parliament is to represent the peoples of the Community. Article 189 EC makes it clear that the Parliament consists of "representatives of the peoples of the States brought together in the Community." The defence of freedom of information by this institution corresponds well to its fundamental role.

The Ombudsman's functions and findings deserve specific attention, as the institution has long been active in influencing other institutions and bodies and has made a considerable contribution in this field.[71] Just as Professor Patrick Birkinshaw has said, "[t]he Ombudsman has in fact attacked secrecy in the EU with missionary zeal. All institutions not covered by the Code [of Conduct], including the court, eventually accepted that they should adopt their own practices in relation to access which were based on the Code. Without such a practice, they would run the risk of being found guilty of maladministration."[72]

IV. Concluding Remarks

This article considers the three major issues that the studies of EU FOI law must cover. The first and second issues analyse the development of the law and policy on freedom of information in the European Economic Community and European Union between 1984 and 2008. These two topics concern how the Council, the Commission, and the Parliament enacted and implemented the rules on FOI protection, and on the role of the Community court in this field. The third major issue is about the examination of the roles of the European Par-

liament and the European Ombudsman, which have supplemented the role of the Court in securing this right.

As to the objectives of the studies of EU FOI law: on the one hand, the studies seek to understand the degree of legal protection offered to freedom of information in the Union over the last two and a half decades; on the other hand, the research seeks to identify how the current EU FOI regime could be improved. To accomplish these objectives, attention is drawn to the following interrelated issues. First of all, it is worth considering the major controversies surrounding FOI law and policy between 1984 and 2008. In particular, attention must be focused on the extent to which the 2001 Regulation addresses the pre-existing obstacles to FOI protection. Secondly, the exceptions in Article 4(1) and Article 4(2) of the 2001 Regulation can be categorised as mandatory and discretionary respectively, but the distinction between the two provisions is vague. This indistinct dividing line should be removed to end the misunderstanding that the Council, the Commission, and the Parliament are entitled to refuse requests systematically when invoking the so-called mandatory exceptions. Thirdly, it is necessary to analyse the principles established by the 2001 Regulation, the EC Treaty, or by the Court to guide the interpretation of the exceptions laid down in the Regulation.

Notes

[1] Trevor Hartley, *Constitutional Problems of the European Union* 18 (1999); Patrick Birkinshaw, *Freedom of Information, The Law, the Practice and the Ideal* 1 (3d ed. 2001). Democratic deficit refers broadly to the belief that the Union lacks sufficient democratic control. Lynn Dobson and Albert Weale, *Governance and Legitimacy*, *in* THE EUROPEAN UNION: HOW DOES IT WORK? 157 (Elizabeth Bomberg and Alexander Stubb eds., 2003).

[2] For instance, many community experts have long been interested in the operation of the European Parliament and European Commission. Several writers have pointed out that the Community has no government or opposition which can be held directly accountable for the EU's action. Hartley, *supra* note 1, at 19, and Dobson and Weale, ibid. Some commentators consider the Commission the government of the community, but it is not a party government. No political party is responsible for the policies proposed by the Commission as no party holds power. Secondly, some political analysts originally thought that the problem of the democratic deficit would be solved as soon as the European Parliament was directly elected by the European citizens. Nevertheless, the Parliament gave the Community little more than a façade of democracy, because the directly-elected Parliament had initially limited control over the legislative process, though its position has been enhanced by procedural changes introduced by the Maastricht and Amsterdam revisions to the Treaty of Rome: the co-decision procedure introduced under Article 251 (ex Article 189b) EC. Thirdly, the excessive secretiveness in the Council is also a major cause of the democratic deficit. This institution's lack of openness has a negative impact on the EU citizens' freedom of information.

[3] The three large Member States are Germany, France, and Italy, and the three small ones are Belgium, the Netherlands, and Luxembourg. This Treaty entered into force on 25 July 1952.

[4] Desmond Dinan, *Ever Closer Union? An Introduction to the European Integration* 21-22 (2d

ed. 1999), and sources there cited.

[5] Article 9(1) of the ECSC Treaty provides that "[t]he High Authority shall consist of nine members appointed for six years and chosen on the grounds of their general competence," while Article 10(1) states that "[t]he Governments of the Member States shall appoint eight members of the High Authority by common accord. These eight members shall appoint the ninth member, who shall be duly elected if he receives at least five votes." Under Article 16(1) of the Treaty, that "[t]he High Authority shall make *all appropriate administrative arrangements* for the operation of its departments" (emphasis added).

[6] Article 17 of the ECSC Treaty states that "[t]he High Authority shall publish annually, not later than one month before the opening of the session of the Assembly, a general report on the activities and the administrative expenditure of the Community." The Assembly refers to the Common Assembly, the precedent of the European Parliament.

[7] Hartley, *supra* note 1, at 20; Ian Harden, *Citizenship and Information*, 7 European Public Law 184 (2001).

[8] Harden, *supra* note 7, at 184-185.

[9] Harden, *supra* note 7, at 185.

[10] Birkinshaw, *supra* note 1, at 28.

[11] Some academic writers have considered generally the major issues concerning decision-making in the Union, which closely relate to a broad and ever-expanding concept of "accountability." ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION (Anthony Arnull and Daniel Wincott eds., 2002). Carol Harlow, *Accountability in the European Union* (2002); Deirdre Curtin, *Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability*, *in* REGULATION THROUGH AGENCIES: A NEW PARADIGM OF EUROPEAN GOVERNANCE 1-32 (Damien Geradin, Rodolphe Munoz, and Nicolas Petit eds., 2005).

[12] Denmark rejected ratification of the Maastricht Treaty by referendum on 2 June 1992. A referendum in France ratified this Treaty on 20 September 1992 by only 50.4 percent to 49.4 percent.

[13] Dinan, *supra* note 4, at 152.

[14] Inger Österdahl, *Openness v. Secrecy: Public Access to Documents in Sweden and the European Union*, 23 European Law Review 336 (1998).

[15] Birkinshaw, *supra* note 1, at 1.

[16] Europa (the portal website of the European Union), Section on Glossary, *available at* http://europa.eu/scadplus/glossary/transparency_en.htm (last visited January 15, 2010).

[17] Professor Deidre Curtin has also said that "[t]ransparency refers not only to access to government-held information by individuals and legislative assemblies (both the European Parliament and the national parliaments), but also, more widely, to open government as such (the question of opening up meetings, rule-making proceedings and governmental deliberations to the public)." Deidre Curtin, *'Civil Society' and the European Union: Opening Spaces for Deliberative Democracy?*, *in* COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW vol. VII, Book 1 250 (Academy of European law ed., 1999). See also Carol Harlow, *Freedom of Information and Transparency as Administrative and Constitutional Rights*, *in* CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES vol. II 285-286 (Alan Dashwood and Angela Ward eds., 2000). It bears noting that the scope of transparency has not yet been fully crystallised. However, some academic writers have made attempts to identify its elements. For instance, Dr. Linda Senden discusses Articles 253-255 EC and the principle of certainty when she considers the principle of transparency. Linda Senden, *Soft Law in European*

Community Law 96-104 (2004),.

[18] Birkinshaw, *supra* note 1, at 27-28.

[19] Regulation EC 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission Documents [2001] OJ L145/43.

[20] Dobson and Weale, *supra* note 1, at 157.

[21] Professor Curtin also said in 1999 that "[t]he topic of transparency, in the sense of the openness of the EU legislative process, was until a couple of years ago a virtual non-subject." Curtin, *supra* note 17, at 250.

[22] This Article divides the evolution of FOI policies and legislation into three stages, but it should be noted that some progress in FOI protection was made earlier than this. See e.g. Council Decision of 8 December 1975 establishing a common procedure for the setting up and constant updating of an inventory of sources of information on the environment in the Community (76/161/EEC) [1976] OJ L31/8.

[23] Resolution on the compulsory publication of information by the European Community [1984] OJ C172/176.

[24] Resolution on the compulsory publication of information by the European Community [1988] OJ C49/174.

[25] Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EEC) [1985] L175/40.

[26] Proposal for a Council Directive on the freedom of access to information on the environment [1988] OJ C355/5. The Council of Ministers adopted the Directive ([1990] OJ L158/56), which entered into force on 1 January 1993.

[27] Case C-2/88 Imm, *Zwartveld and others* [1990] ECR I-3365.

[28] The Code of Conduct concerning public access to Council and Commission documents (93/730/EC) [1993] OJ L340/41. Council Decision of 20 December 1993 on public access to Council documents (93/731/EC) [1993] OJ L340/43, and Commission Decision of 8 February 1994 on public access to Commission documents (94/90/ECSC, EC, Euratom) [1994] OJ L46/58.

[29] Case T-194/94, *John Carvel and Guardian Newspapers v. Council* [1995] ECR II-2769.

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

[31] Case T-105/95, *WWF (United Kingdom) v. Commission* [1997] ECR II-313.

[32] Case T-124/96, *Interporc Im- und Export GmbH v. Commission* [1998] ECR II-231.

[33] Case T-610/97, *Carlsen and others v. Council* [1998] ECR II-485.

[34] Case T-83/96, *Gerard van der Wal v. Commission* [1998] ECR II-545, and Joined cases C-174/98 and C-189/98, *Kingdom of the Netherlands and Gerard van der Wal v. Commission* [2000] ECR I-0001.

[35] Former Article 190 EC provides that "[r]egulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty."

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

[37] Case T-188/97, *Rothmans International BV v. Commission* [1999] ECR II-2463. The authorship rule provides that "[w]here the document held by an institution was written by a natural or legal person, a Member State, another Community institution or body or any other national or international body, the application must be sent direct to the author."

[38] Case T-14/98, *Hautala v. Council* [1999] ECR II-2489, and Case C-353/99P, *Council v.*

Hautala [2001] ECR I-9565.
[39] *supra* notes 29, 31, and 38.
[40] *supra* notes 29, 31, and 36.
[41] *supra* notes 31, 32, and 37.
[42] *supra* notes 33 and 34.
[43] *supra* note 36.
[44] *supra* note 38.
[45] *supra* notes 29 and 32.
[46] *supra* notes 29, 31, 32, 33, 36, and 38.
[47] *supra* note 19.
[48] Harden, *supra* note 7, at 193.
[49] Birkinshaw, *supra* note 1, at 484.
[50] The Council, Section on Documents , *Council Annual Report on Access to Documents – 2002* (Brussels, the Council, April 2003), http://www.consilium.europa.eu/uedocs/cmsUpload/EN-AR-02.pdf; The Council, *Council Annual Report on Access to Documents – 2003* (Brussels, the Council, April 2004), http://www.consilium.europa.eu/uedocs/cmsUpload/RapAnCons.en03.pdf; The Council, *Council Annual Report on Access to Documents – 2004* (Brussels, the Council, May 2005), http://www.consilium.europa.eu/uedocs/cmsUpload/new08896.en05INT.pdf; The Council, *Council Annual Report on Access to Documents – 2005* (Brussels, the Council, October 2006), http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/ENCounAnnRep_acces05.pdf; The Council, *Council Annual Report on Access to Documents – 2006* (Brussels, the Council, April 2007), http://www.consilium.europa.eu/uedocs/cmsUpload/ENacces2006int.pdf; The Council, *Council Annual Report on Access to Documents – 2007* (Brussels, the Council, April 2008), http://www.consilium.europa.eu/uedocs/cmsUpload/ACCESS_int.en08.pdf (last visited January 15, 2010).
[51] The European Commission, Section on Transparency, *Report from the Commission on the Application in 2002 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding Public Access to European Parliament, Council and Commission documents*, COM(2003) 216 final, (Brussels, European Commission, 29 April 2003), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0216:FIN:EN:PDF; The European Commission, *Report from the Commission on the Application in 2003 of Regulation (EC) No 1049/2001 regarding Public Access to European Parliament, Council and Commission documents*, COM(2004) 347 final, (Brussels, European Commission, 30 April 2004), http://europa.eu/eur-lex/en/com/rpt/2004/com2004_0347en01.pdf; The European Commission, *Report from the Commission on the Application in 2004 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding Public Access to European Parliament, Council and Commission documents*, COM(2005) 348 final, (Brussels, European Commission, 29 July 2005), http://ec.europa.eu/transparency/access_documents/docs/rapport_2004/COM(2005)348-EN.pdf; The European Commission, *Report from the Commission on the Application in 2005 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding Public Access to European Parliament, Council and Commission documents*, COM(2007) 548 final, (Brussels, European Commission, 24 September 2007), http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0548en01.pdf; The European Commission, *Report from the Commission on the Application in 2006 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding Public Access to European*

Parliament, Council and Commission documents, COM(2007) 841 final, (Brussels, European Commission, 20 December 2007), http://ec.europa.eu/transparency/access_documents/docs/rapport_2006/en.pdf; The European Commission, *Report from the Commission on the Application in 2007 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding Public Access to European Parliament, Council and Commission documents*, COM(2008) 630 final, (Brussels, European Commission, 10 October 2008), http://ec.europa.eu/transparency/access_documents/docs/rapport_2007/COMM_PDF_COM_2008_0630_F_EN_RAPPORT.pdf (last visited January 15, 2010).

[52] European Commission, Section on Transparency, *Report from the Commission on the Implementation of the principles in EC Regulation No 1049/2001 regarding Public Access to European Parliament, Council and Commission Documents*, COM(2004)45 final, (Brussels, European Commission, 30 Jan. 2004), http://europa.eu/eur-lex/en/com/rpt/2004/com2004_0045en01.pdf (last visited January 15, 2010).

[53] Case T-191/99, *David Petrie, Victoria Jane Primhak, David Verzoni and Others v. Commission* [2001] ECR II-3677.

[54] Case T-211/00, *Aldo Kuijer v. Council* [2002] ECR II-485.

[55] Case C-41/00, *Interporc Im- und Export GmbH v. Commission* [2003] ECR I-2125. This dispute concerned implementation of the 1999 *Interporc I* judgment, *supra* note 32. What was under appeal was, however, not that decision but another dispute brought to the CFI following *Interporc I*.

[56] Case T-204/99, *Olli Mattila v. Council and Commission* [2001] ECR II-2265, and Case C-353/01P, *Olli Mattila v. Council and Commission* [2004] ECR I-1073.

[57] Case T-76/02, *Mara Messina v Commission* [2003] ECR II-3203.

[58] Article 4(5) states that "[a] Member State may request the institution not to disclose a document originating from that Member State without its prior agreement."

[59] paras. 97-100, Case T-2/03, *Verein für Konsumenteninformation v. Commission* [2005] ECR II-1121.

[60] paras. 97-100, *supra* note 59.

[61] *supra* notes 54 and 56.

[62] *supra* notes 53 and 57.

[63] *supra* note 59.

[64] *supra* notes 53 and 55.

[65] *supra* note 57.

[66] *supra* notes 34, 53, and 55.

[67] *supra* notes 37 and 53.

[68] para. 87, *supra* note 40.

[69] This Resolution, and another relevant Resolution adopted by the Parliament in 1988 have been analysed in **3.2.1.1**.

[70] The Parliament, whose opinions prevailed over the Commission proposal, adopted the Regulation jointly with the Council in May 2001. *supra* note 20.

[71] The role of the Ombudsman is to reduce maladministration. Article 195(1) EC provides that:

> The European Parliament shall appoint an Ombudsman empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of *maladministration in the activities of the Community institutions or bodies*, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. (emphasis added)

[72] Birkinshaw, *supra* note 1, at 368-369, and reference there cited. The Ombudsman also boasted that his inquiries on public access to EU documents "led almost all the Community institutions and bodies to adopt and publish rules on access." European Ombudsman, *What can the European Ombudsman Do for You* 15 (2002).