How Transparent are EU 'Comitology' Committees in Practice?

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Abstract

Much of the debate on transparency is normative in nature: more transparency is 'good' from the perspective of democratic accountability. After all without information on what decisions are being taken and by whom it will not be possible for various accountability forums to hold actors to account. This article goes beyond the rhetoric on the need for more transparency in the political system of the European Union and examines in practice as a matter of empirical research how much transparency there really is. It also goes beyond a purely legal approach to access to information that depends upon the active participation of citizens and others in challenging refusals by specific institutions to grant access to specific documents. We are interested rather in the question to what extent the institutions are systematically and pro-actively providing access to their documents via the Internet. We focus on the Register of Comitology of the European Commission as a relatively limited case study and within this context limit ourselves further to a study of all the documents published in the latest year for which a benchmark was available - 2005. Are all comitology documents that exist in fact made available through this public register?

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I. Introduction

The political system of the European Union is not traditionally known for its 'transparency' either in terms of its institutional design or in terms of the full range of its rule-making outputs. On the contrary, for many years even legislation was discussed and adopted behind closed doors by the highly secretive Council of Ministers. Another bastion of secretive decision-making has been the so-called 'comitology' committees (see for a detailed description below). In this regard it has been consistently argued that 'good governance' as well a perspective inspired by constitutionalism as well as one inspired by democratic accountability mandates more transparency at the European level of who acts where and in what regard.[1] The lack of transparency has been a persistent subject of much of the –legal and political-scholarly writings on the subject of comitology in particular.

In recent years however the transparency of the political system as a whole has increased considerably for several reasons. First, EU level legislation granting a public right of access to the documents of certain EU institutions has given individual citizens and other actors the legal right to obtain a wide range of documents on request, without the need to provide any reasons.[2] This includes access to preparatory documents of the institutions themselves as well as documents from the many committees operating under the auspices of the three main law-making institutions (the Commission, the Council of Ministers and

[1] See, in general terms, C.Joerges and R.Dehousse (eds.), G*ood Governance in Europe's Integrated Market* (Oxford University Press, 2002), in particular the introduction by C.Joerges, "The Laws Problems with the Governance of the European Market", pp. 3-34.

[2] See, Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31 May 2001, p.43. See further, European Commission, Green Paper, Public Access to Documents held by the institutions of the European Community A review, COM (2007) 185 final (18 May 2007).

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the European Parliament). This legislation has in addition been applied voluntarily by a wide variety of other institutions and (quasi-) autonomous actors.[3] Second and as a response to this gradually changing culture shifting from 'secrecy' to (more) 'openness' there has been a pro-active effort by the core institutions to make information on their decision making committees and their wider information processes more easily accessible to the 'public' via Internet in particular. This has resulted in the – relatively recent – establishment of a number of general document registers of specific institutions (most impressively that of the traditionally highly secretive Council of Ministers).[4] The combined result of these two developments has, among other results, given researchers the tools to build up a picture of the inner workings of various (sub-) institutions based on a range of empirical data that is immediately accessible via Internet. In addition other more specific improvements have been made, such as the recent opening up of those Council meetings adopting legislative measures to the public.[5]

Much of the debate on transparency in the EU has been rather general in nature to date with a strong emphasis on the formal legal dimension and access to documents in particular. Access to documents has not only acquired the status of a rather fundamental norm in the EU legal and constitutional system it has also become highly 'legalized' with many of the most crucial issues as to the meaning of the exceptions, the relationship with

[3] See further, J.Helliskoski 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* 735-782.
[4] The three law-making institutions are under a legal obligation to establish such registers: see Article 11 of Regulation 1049/2001, op.cit.. The register of the Commission and that of the European Parliament have both been the subject of critique from the non-governmental sector in particular as being incomplete and not easily accessible. A recent case has been brought to the Ombudsman by Statewatch claiming that the Commission is in breach of its legal obligations to provide a proper register of its documents. See further, Press Release, http://www.statewatch.org/news/2007/apr/statewatch-ombuds-cases-april-2007.pdf
[5] See further, http://ue.eu.int/uedocs/cms_Data/docs/pressdata/en/gena/88199.pdf

national legal provisions and the relationship with other legal rights that also enjoy a fundamental status (eg. privacy and data protection[6]). The Court(s) in Luxembourg who were once seen as the unsung hero of those seeking to open up the inner institutional workings of the EU have come under fire recently for what is perceived to be an unnecessarily generous interpretation of the scope and meaning of several key exceptions to the legal right.[7] It is sometimes argued moreover that the legal regulations on access to documents are not that significant when one looks at how comparatively little use is made of the legal 'rights' granted by the public and moreover that the range of 'users' is very limited indeed (largely researchers and lawyers).[8]

We would suggest that the academic discussion on transparency has been too mono-focused on the chapter and verse of the legal right of access to information. Just as critical and in practice what it is all about is the quality and scope and completeness of the information and documents that the institutions make available on the internet, via either specific registers on their respective web-sites or via specific data-bases placed on the Internet. This is as far as most users get: either they get a 'hit' in terms of the document or information they are looking for or they do not. These 'passive' users as they might be termed will however benefit greatly from the front-running 'active'-and often highly critical- users who monitor the various registers and at times rather systematically request the institutions to put on the Internet those documents registered

[6] See further, H.Kranenborg, *Toegang tot documenten en bescherming van persoonsgegevens in de Europese Unie : over de openbaarheid van persoonsgegevens* (Kluwer, 2007)
[7] See further, J.Helliskoski and P.Leino, supra. note 3.
[8] See further, L.Cotino, "Theory and reality of public access to EU information" in: D.Curtin, A.Kellermann and S.Blockmans (eds.), *The EU Constitution: The Best Way Forward?* Kluwer

but not with availability via PDF file.[9] The numbers of users seeking to access information and documents directly via the Internet and the respective EU linked web sites is significantly larger than those who will follow the heavily procedural legal path.[10] Moving beyond the rhetoric liberally used by all the EU institutions in terms of the salience of transparency and how much they do to foster it, the time has come to study as a matter of empirical research what information is as a matter of practice begin made available by the institutions? Are there obvious 'gaps'? Do these 'gaps' relate to the exceptions the institutions are allowed under the legal regulations or are their other explanations on offer?

Anyone who looks at the range of empirical data relating to the EU on the Internet will appreciate that this is a mammoth task. In order to begin with a subject matter or actor that was relatively contained and thus a feasible object for preliminary empirical study we selected the so-called "comitology" committees of the EU. Its name already conjures up images of secretive bureaucracy and opaque procedures. Indeed even in institutional terms it is a strange animal: being 'housed' within the Commission in organizational and institutional terms but delegated powers by the Council of Ministers and ultimately –to some limited extent- being subject to overruling by the Council as ultimate 'master'. That

[9] One example is the highly active monitoring work done by a small London based charity, Statewatch, with a specific interest in civil liberties and human rights. See further www.statewatch.org

[10] It would be interesting to assess how many people actually accessed the website to look for Comitology documents but the number of visits to the website was not yet monitored in 2005. The number of visits in the end of 2006 was approximately 7.000 visits per month. It is interesting to compare those quite substantial figures to the number of requests for access to comitology documents via the access to documents regulation. Unfortunately at the present time these figures are not available for either 2005 or 2006 as the Commission has not (yet) produced an annual report on its implementation of the legal rules. It is not expected however to be more than a mere handful, if that.

said comitology committees have evolved in practice into (quasi-) autonomous entities that follow their own methods of discussion and decision-making [11] (see further below)

Since 2003 a database was put on Internet specifically in order to provide a public window on the basic organizational and institutional 'facts' of comitology committees as well as enabling an interested user to follow their decision making processes with a paper trail. In a leap, of almost quantum proportions, Comitology committees moved from being relatively invisible in structural and substantive terms to, in theory at any rate, one of the most structurally visible and documented of the institutional actors. The concrete value of this register, however, depends on its completeness. Are all comitology documents in fact made available through this public register? Our aim is to analyze the nature and extent of transparency of comitology decision-making. We do so on the basis of a concrete empirical study and assessment of comitology transparency in one specific year: 2005.

II. Understanding Comitology and Transparency

A. The Facts of Comitology

This article focuses on one specific type of EU 'institution', namely 'comitology' committees that are a long-standing feature of the EU institutional landscape in various

[11] See further C. Joerges and J. Neyer, 'From intergovernmental bargaining to deliberative political processes: the constitutionalization of comitology', (1997) 3 *European Law Journal* 273–99; D. Curtin, 'Holding (quasi-) autonomous EU administrative actors to public account', *European Law Journal*, (2007) 13 (4), pp. 523-541 and R. Dehousse, 'Comitology: who watches the watchmen?' (2003) 10 (5) *Journal of European Public Policy* 798-813.

specific policy sectors. Even by EU standards they are very hybrid both in terms of their nature, composition and tasks. To understand present-day debates and practices, we need to describe briefly how and why comitology was created. When the first comitology committees were created in the early 1960s, this was seen as a compromise between the Council and the Commission. Even though the Commission was responsible for implementation of general rules in principle, the Council felt that it should not have too much leeway in doing so. 'Management committees' were established by the Council, composed of representatives of the member states who were empowered to advise in detail on specific implementation proposals made by the Commission[12]. Such management committees are still in use today, and are mainly used for managing European funds and managing the Common Agricultural Policy. It is now known as the *management procedure*. If a committee objects to a Commission proposal by means of a qualified majority vote, the matter is forwarded to the Council. In the absence of such a qualified majority against its proposal the Commission can go ahead with implementation.

With the growth in EU legislation, the use of the committee procedure had grown by the mid-1990's to well over 200 and the name 'comitology' stuck. Two other procedures were also introduced over the years – the so-called advisory procedure and the heavier regulatory procedure. The *advisory procedure* is the lightest for the Commission as the representatives of the member states simply vote by simple majority, and as the label 'advisory' suggests, the Commission is not obliged to follow the committee's opinion.

[12] See further, C.F. Bergström *Comitology: Delegation of powers in the European Union and the Committee System*, Oxford: Oxford University Press (2005), at p.285.

The *regulatory procedure* is much more constraining and is the procedure that the Commission objects to most[13]. If the regulatory procedure is imposed in secondary legislation for a specific (sub-) sector then the comitology committee has to first approve the draft measure by a qualified majority of its members before the Commission can go ahead. If a qualified majority of the committee is not in favor then the matter must be forwarded to the Council as well [14]. There is one other procedure known as the *safeguard procedure* that gives every single member of the committee the right to by-pass the Commission and go directly to the Council. As it is rarely used in practice, it is not further discussed in this paper.

Comitology committees are not referred to as such in the treaties but are successively brought to life in various guises in the details of specific policy areas (subject to general rules laid down by EU legislation). The activities of such committees cover a wide variety of subject matter: from the Community's cereals regime and plant propagation to the technical standards for cableways and data protection. As the six years of Commission reporting (see infra.) show us the numbers of committees active in a given year do vary somewhat although they tend to be in and around the 200 mark. For example in the latest report, 2006, there were a total of 202 committees active in that year. [15]As might be expected certain directorates-general dominate. For example, the DG's of Agriculture, Environment, Transport and Energy, and Health and Consumer

[13] See the Commission's White Paper on Governance: COM (2001) 428, final, 25 July 2001.
[14] Council Decision 1999/468/EC The 'regulatory procedure with scrutiny', which is another procedure, was introduced after 2005 and therefore falls beyond the scope of this analysis (see below).
[15] See, Report from the Commission on the working of committees during 2005, COM (2006) 446, Brussels, http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0446en01.pdf

Protection, together account for 45.1 percent of all committees, while 18 other DGs host the remaining 54.9 percent.

B. Institutional Autonomy

Comitology committees are intrinsically schizophrenic as to where in institutional terms they belong: they are established by the Council and populated by national civil servants and, sometimes, scientific experts but their task is to assist the Commission in performing its executive/rule-making tasks. The specific institutional configuration of comitology is explained by the fact that in the EU political system there is a plural executive: the Council is the original executive power and the Commission exercises executive power when the Council delegates that power to it. One can understand the Commission as in this sense its 'agent' and in this perspective it is not so surprising that the Council as traditionally the primary lawmaker in the EU has devised a number of procedural strategies to 'rein-in' the Commission in the manner it could exercise its (delegated) executive power. Yet this may be a rather formal discussion; as a matter of practice it is hard to disagree with Weiler who views these committees as functioning in much more autonomous terms as having "long lost their allegiance to their controllers and work(ing) very much within their own universe for what they perceive as their function and task". [16]

In terms of outside oversight over the activities of the comitology committees there is traditionally very little. The Court of Justice can provide ultimate judicial review of the

[16] See, J. Weiler, "Epilogue: Comitology as Revolution Infranationalism, Constitutionalism and Democracy" In: C. Joerges and E. Vos (eds.) *EU Committees. Social Regulation, Law and Politics* (Hart Publishing, 1999), 347.

final Commission decisions adopted on the basis of committee opinions.[17] But this is indirect review only and does not reach into the inner annals of the committee functioning as such. The European Parliament was traditionally not involved in oversight of comitology at all - for many years – it was not even informed of the wheeling and dealing of the committees[18]. This exclusion only began to change as the European Parliament gradually acquired a more central role in EU law-making processes. In a constant tug of war with the other two actors involved in law-making, the European Parliament finally got in 1999 what became known as *ultra vires* scrutiny, namely the power to revoke committee opinions if they were beyond the formal legal powers of a committee. This procedural power had to be exercised in a resolution of the EP within a month after the committee had given its opinion.[19] This rather limited power has recently been overtaken by a more significant new power to veto certain draft implementing measures changing 'non-essential elements' of basic legislation (albeit it only those adopted via co-decision), known as the regulatory procedure with scrutiny. Using this new procedure the European Parliament has the right to overturn committee opinions within a specific time period. The Council enjoys the same right.[20]

[17] See further, K.Bradley "Comitology and the Courts: tales of the unexpected" in H.Hofmann and A.Turk, *EU Administrative Governance* (Edgar Elgar, 2006), pp.417-447.

[18] See further, Bergström, pp. 294-295, supra note 12.

[19] Originally the period for this form of scrutiny was three months. In 2000, however, the European Parliament agreed with the Commission to reduce this period to one month only. See the inter-institutional agreement between Commission and Parliament on procedures for implementing Council Decision 1999/468/EC, OJ 2000 L 256/19.

[20] Council Decision 2006/512/EC, OJ 2006 L200/11. Our empirical research is limited to 2005 and hence does not take account of this fifth procedure, established in 2006.

C. Comitology and Transparency

One of their most defining features for a long time was that comitology committees existed and functioned as an unseen hand of European integration, shrouded in a great deal of mystery. As recently as 1999 a Select Committee of the House of Lords reported that no list of comitology committees was 'publicly available nor is there an authoritative account of what each does'.[21] It was only with the advent of a new (general) comitology decision that the Commission was placed under a legal obligation to publish from 2000 onwards an 'annual report on the working of committees'.[22] This provides a public window on at the very least the numbers of such committees in existence at a given time as well as the types of procedures followed, the numbers of meetings held etc. The Commission for the past six years has systematically produced this report and it is a valuable source of general information that can be tracked on an annual basis.

The European Parliament has fought tenaciously over the years the fact that it has traditionally been excluded from any oversight over comitology processes both in terms of input and output. It has gradually acquired via the informal road of inter-institutional agreement with the European Commission in particular the right to obtain 'all draft implementing measures' emanating from comitology committees in advance of final adoption by the Commission (or the Council, as the case may be).[23] As and from 2001 such documents have been transmitted electronically to the European Parliament. The

[21] House of Lords, Select Committee on European Communities, Delegation of Powers to the Commission: Reforming Comitology, Third Report, 2 February 1999.

[22] See, Article 7 (4) of Council decision of 28 June 1999 laying down the procedure for the exercise of implementing powers conferred on the Commission. The Commission had in fact prepared a prior report on the 'work of the committees in 1995' drafted at the specific request of the European Parliament and sent to the European Parliament on 24 July 1996 (SEC (96) 1498).

[23] Interinstitutional agreement between Commission and Parliament on procedures for implementing Council Decision 1999/468/EC, OJ 2000 L256/19.

fact that the Commission has had to organize and systematize a database with such output readily accessible for the European Parliament led it to launch and maintain a 'register of comitology' relating to the work of comitology committees. Although limited to those documents actually sent to the European Parliament it is since early 2003 publicly accessible through Internet and includes as well as output (draft decisions) also agendas of meetings, minutes of meetings and voting results. [24]

Because the resources of the European Parliament are limited, as with any parliament, it partially needs to rely on others to keep track of comitology committees [25]. If these third parties (stakeholders, non-governmental organizations and members of the public) are not in a position to track the activities and processes of such committees in a timely and effective fashion, the Parliament would be seriously handicapped in its ability to ultimately participate in the process of holding such committees to account for their actions and inactions. This is what makes public transparency just as relevant as direct transparency vis-à-vis the European Parliament.

D. Committee Work Processes

Comitology is a very important part of the legislative process that should not be underestimated. In the year 2006 alone, about 64 percent of all the legislation that was

[24] The register can be found at the following URL: http://ec.europa.eu/transparency/regcomitology/

[25] See, M. McCubbins, and T. Schwartz, "Congressional oversight overlooked: police patrols versus fire alarms", (1984) 28 (1) *American Journal of Political Science* 165-179.

eventually adopted by the Commission was passed through the committees first[26]. The remainder mainly consisted of acts that applied existing legislation to new member states, of distributing fishing quota and of legislation directed against specific international suspects of terrorism.

Comitology committees are involved in teasing out the details of rule making and implementation of laws that form part of non-legislative tasks delegated to the European Commission. This effectively makes comitology a rule-maker together with the Commission, as the Commission is bound by legislation to submit their draft measures to the committees. The committees basically give their opinion on these draft measures; depending on the specific procedure that has to be followed their opinion will have certain procedural effects. Very often in order to ensure that the Commission can adopt the draft implementing measure it engages in practice in a process of discussion and debate as to the precise provisions of its final draft implementing measures with the committee[27]. This informal process gives committee members more power than they might formally appear to have.

Implementing measures are obviously less fundamental than the legislation that the Council and Parliament usually adopt. However, they do contain specified, fleshed-out standards that are binding on the public. Comitology may produce 'secondary legislation', but that makes it no less relevant. For civil society and the parties that have

[26] Found by retrieving all Commission legislative output through EUR-LEX in September 2007 and counting how many times an opinion of a comitology committee was referred to under 'whereas'.
[27] Joerges and Neyer, *op. cit.*, note 10 *supra*

to comply with legislation, "the devil is often in the detail"[28]. For this reason, secrecy cannot be tolerated. Citizens, and the institutions that represent them, need to be able to follow the wheeling and dealing of the committees.

There has been a lengthy discussion in the academic literature about the nature of the work processes of comitology committees in particular. Joerges, with a number of other scholars, has made –and reiterated also recently[29]- the claim and produced some empirical support to this effect (albeit by now dating back to a decade or more ago) that committee members become socialized into inter-administrative discourse patterns within the various committees and "deliberate" among one another ultimately producing an epistemically good result[30]. Deliberation is contrasted with the more intergovernmental "negotiation" one might expect from Member State representatives inputting their government view into the EU decision-making process[31]. More recently Joerges has presented the work processes in comitology committees as a variant of conflict of laws. It is beyond the remit of this article to address the issue of how to theorize committee processes or whether we can best understand them as arenas of "deliberative supranationalism" or not. Clearly the last word has not yet been said on how we can best qualify and understand the discussions that take place prior to arriving at an opinion

[28] See: R. van Schendelen and R. Scully, "Introduction", (2006) 4 *The Journal of Legislative Studies* 1-13.
[29] See C. Joerges, ''Deliberative Political Processes' Revisited: What Have we Learnt about the Legitimacy of Supranational Decision-Making', (2006) 44 *Journal of Common Market Studies* 779-802.
[30] Joerges and Neyer, *op. cit.*, note 11 *supra*
[31] See, M.Pollack, 'Control Mechanism or Deliberative Democracy? Two Images of Comitology', (2003) 36 *Comparative Political Studies* 125-155.

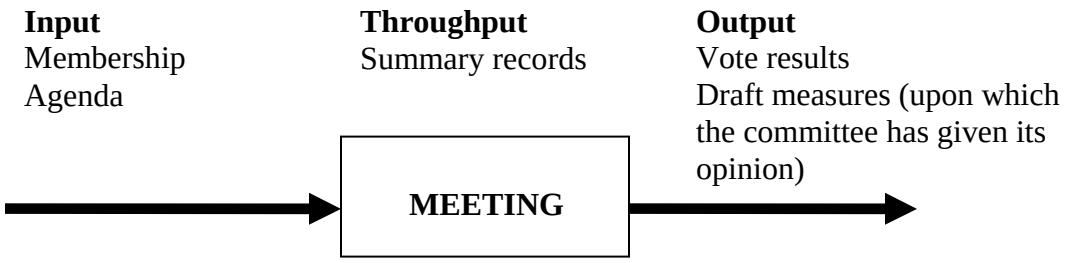
(draft decision). More empirical work is definitely needed and may lead to more nuanced conclusions.[32]

However, as much as an epistemically good result is desirable, its legitimacy should be understood in a broader sense. It is true that comitology involves teasing out little bits and pieces of legislation that probably would not be very interesting to anyone outside the group of people that actually does this highly detailed work. But nevertheless, comitology does produce legislation that eventually is binding on the general public. Therefore, its transparency is very important. In the words of Christian Joerges: "There is a great deal wrong with building up opaque networks which get entrusted with the task of seeking to carry through what they have learned or agreed upon in democratic societies. Such a model may be soft because it no longer relies on mandatory provisions. It is for the same reason wrong because it risks empowering the executive and removing the virtues of democratic accountability, of rule-bound public governance and its judicial control."[33]

Our interests in this article are to attempt to understand the extent to which the activities of comitology are actually *made* transparent. Our initial assessment, also based on the types of information made visible in the comitology register, leads us to suggest the following representation of their work processes and the documents that are created in those processes (see Figure 1):

[32] See Blom-Hansen and Brandsma, (2008, forthcoming)
[33] C. Joerges, *What is left of the European Economic Constitution?*, (2004) EUI Law Working Papers, No. 13

Figure 1: Committee Work Processes



The inputs for the work processes are the agenda with the issues to be discussed and sometimes voted upon, and the participants in the discussions and voting. The meetings form the heart of the working processes: issues are discussed and these discussions are recorded in the voting records (throughput). The discussions and votes eventually result in two types of outputs: draft measures that have been voted upon and the vote results. This representation of Comitology work processes is helpful for disentangling different forms of transparency.

III. Understanding Transparency

The opening up of comitology processes needs to be understood within wider debates about transparency in the context of the EU. [34] In 1998, the European Ombudsman, Jacob Söderman defined the term transparency in a rather narrow fashion as mandating that: 'the process through which public authorities make decisions should be understandable and open; the decisions themselves should be reasoned; as far as possible, the information

[34] See further, D. Curtin, and A.J. Meijer, 'Does transparency strengthen legitimacy?' (2006) 11 (2) *Information Polity*, 109-122.

on which the decisions are based should be available to the public.' [35]. The accent in this definition clearly lies on the legal dimension in the sense of the formal manner in which decisions are reasoned as well as on the issue of public access to information[36]. According to Lord Nolan transparency is said to require that 'holders of public office should be as open as possible about all decisions and actions they take'[37]. They should, in his view, give reasons for their decisions and restrict information only when the wider public interest clearly so demands. It can be argued however that transparency not only incorporates the rather passive right of every citizen to have access to information (if they activate that formal legal right) but also the much broader and more pro-active duty of the administration itself to ensure that information about its policy and actions is provided in an accessible fashion.

Administrations worldwide use the internet to enhance their transparency proactively. According to Moon, Welch and Wong who have studied the effects of government websites on transparency, transparency refers to the availability of information for navigating a large-scale social system.[38] Transparency is about the magnitude of online information available on official government websites. Web-based transparency is measured using different elements of interactivity. Transparency can be regarded as a sort of layman's basic map of an organization and reveals the depth of access it allows, the

[35] See, J. Söderman, *The Citizen, the Administration and Community Law*, General report for the 1998 Fide Congress, (Stockholm, 1998)

[36] V. Deckmyn, *Increasing transparency in the European Union*, (European Institute for Public Administration, 2002) ; B. Vesterdorf 'Transparency – not just a vogue word', (1999) *Fordham International Law Journal* 903.

[37] Lord Nolan, First Report of the Committee on Standards in Public Life, Cm 2850, (1995) HMSO, London. p14

[38]See, M.J. Moon, E.W. Welch, and W. Wong, *What Drives Global E-governance*? *An Exploratory Study at Macro Level*, Proceedings of the 38th Hawaii International Conference on System Sciences (2005).

depths of knowledge about processes it is willing to reveal, and the level of attention to citizen response it provides. [39]In a sense one can say the more transparent an organization is (via its website or otherwise), the more it is willing to allow citizens to monitor it performance and to participate in its policy processes.

Transparency is sometimes regarded as a hallmark of good governance and, as such, as a value in itself. From that perspective, good government conforms with criteria such as responsiveness, accountability, effectiveness, transparency and so forth. We are not taking that position in our article and, in contrast, regard transparency as a necessary precondition for all forms of accountability.[40] The basic argument is that accountability cannot take place if the facts that are to be evaluated are not known. Accountability in Democratic government will only be regarded as legitimate if it can be called to account. In that sense, this article deals with one element in a chain that runs from transparency to accountability and leads to legitimacy.

Right from the start, literature on informatisation has indicated that the use of information and communication technologies (ICTs) increases transparency. [41]Using the work of Davenport, Meijer stresses that the use of ICTs especially strengthens the informational

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[39] E.W. Welch and C.C. Hinnant, *Internet Use, Transparency, and Interactivity Effects on Trust in Government*, Proceedings of the 36th Hawaii International Conference on System Sciences (2003).

[40] M. Bovens, 'Analyzing and Assessing Accountability: A Conceptual Framework', (2007) 13(4) *European Law Journal* 447.

[41] S. Nora and A. Minc, *The Computerisation of Society: A Report to the President of* France (MIT Press, 1980); V. Bekkers, *Nieuwe vormen van sturing en* informatisering (New Forms of Steering and Informatisation) (Eburon Frissen 1993); P.H.A. Frissen, *De Virtuele Staat. Politiek, Bestuur, Technologie: Een Postmodern* Verhaal (Academic Service, 1996); C. D. Raab, 'Electronic Confidence: Trust, Information and Public Administration', in Th.M. Snellen and W.B.H.J. Van den Donk (eds), *Public Administration in an Information Age* (IOS Press, 1997), at 113 – 133.

transparency of government – i.e. more data are registered – and the analytical transparency is increased– i.e. ICTs offer more opportunities to analyze data.[42] This impact of ICTs on government result in what he calls 'transparent government'. Welch and Wong emphasize the same effects but also indicate that many organizations are reluctant in using the Internet in order to increase transparency and therefore practices may be different from what organizations express in their policy documents.[43]

The Comitology Register on the Internet forms a perfect illustration of these theoretical discussions. The Internet is used to enable public access to comitology documents. However, the relevance of the public register depends on its completeness. Are all comitology documents available through this public register? To answer this question we need to understand how are actually as a matter of practice included in this register. The information processing consists of the following elements:[44]

- The secretariat of the various committees – staff of the related Commission DG's – supports the committees administratively. They are responsible for drawing up the agendas, the membership lists, the summary records of the minutes (the minutes) and the text of the final draft measures. These secretariats control the recording of information on the work of committees.

[42] See, A.J. Meijer, 'Transparent government: Parliamentary and legal accountability in an information age', (2003) 8 (1-2) *Information Polity*, 67-78.
[43] See E.W. Welch and W. Wong, 'Global Information Technology Pressure and Government Accountability: The mediating Effect of Domestic Context on Web Site Openness', (2001) 11 (4) *Journal of Public Administration Research and Theory* 509–538.
[44] This information is based on an interview with three staff members of SG E1 of the European Commission (April 24, 2007).

- In some DG's the committee secretariat is responsible for uploading the information into the Comitology Register (decentralized information processing). In other DG's the responsibility for uploading the information rests with one person or unit in the according DG (centralized information processing).
- On uploading it can be indicated whether the information should be accessible to the general public or only to the European Commission and the European Parliament. Finalized documents are accessible to the public; access to working documents may be restricted.
- Once uploaded, the information is accessible to the (horizontal) Comitology Contact Unit of the European Commission. The system then generates an e-mail message and sends the document to the European Parliament. The European Parliament does not have direct access to the EC Comitology Register as such.
- All the documents that have not been labelled as publicly accessible are not made directly available on the public register in PDF file, but are listed in the Register by name, date etc.. Once this has been done, it is possible for a member of the public or other actor to formally request access to the document in question by activating their right to public access laid down in the access to documents regulation (see infra.).

This system should guarantee that all documents of committee processes are available through the comitology register. However, as it has been shown extensively in the literature on information systems, information systems do not necessarily function in

practice in accordance with their formal design. [45]This makes it necessary to study information systems in an empirical manner in order to evaluate their actual performance. Does the Comitology register indeed meet the expectation that all Comitology documents sent to the European Parliament are available online to the general public? In our evaluation of transparency as a precondition for public accountability we will focus on the nature of information that is being made accessible (see figure 1). We distinguish between information about *input* (members of the committees and agendas of meetings), *throughput* (minutes of meetings) and *output* (votes and draft measures).

IV. Methodology

The theoretical discussion highlights the fact that an evaluation of the value of comitology transparency for public accountability requires an empirical assessment of the resulting transparency, i.e. not the documents that *should* be available through the website but the documents that *are* actually made available in practice. We formulate the following research question for our evaluative research:

- To what extent do committees publish information on the Comitology Register about the input, throughput and output of their work processes?

[45] C. Ciborra. *The Labyrinths of Information. Challenging the Wisdom of Systems*, (Oxford University Press, 2001). B.A. Nardi, V.L. O'Day, *Information Ecologies: Using Technology with Heart*, (MIT Press, 1999)

In order to be able to assess to what extent committee behavior *is* actually made transparent, a benchmark is needed to know how much information should be there in the first place. The Commission's Secretariat General provides this benchmark every year in the form of an Annual report on the work of the Committees' (European Commission, 2006).[46] It was therefore appropriate to analyze the most recent year for which a Commission annual report was available. This was 2005 at the time we carried out our research (early 2007). Furthermore, we limited ourselves, for practical purposes, to committees that physically met during 2005. 48 of the 250 existing committees did not have a meeting in 2005, and these were excluded from our analysis given that they will in such circumstances have produced no documents.[47] We collected all the available data from the online Comitology register, and classified them according to their function in terms of input, throughput and output. The following data were collected and classified.

[46] The Annual Report itself is only a brief summary, but the Annex to it – which is available on request – lists for every single committee lots of information, such as the number of meetings, the number of votes, committee procedures, duration of the meetings, et cetera. The data available in the online register was then compared to the figures in the Annex of the annual report. For example: if a committee meets four times, we would expect to find four minutes, agendas and membership lists as well. The data for the Annex to the Annual Report are gathered by sending all DGs a spreadsheet and asking them to fill in the number of committee meetings. This processing of information is most probably not directly connected to the information processing for the Comitology Register (Interview with three staff member of SG E1 of the European Commission, April 24, 2007).

[47] Some committees publish more information than our benchmark indicates there should be available. Two sections of the Standing Committee on the Food Chain and Animal Health, for example, publish agendas for one meeting more than registered. Similar 'surpluses' were found elsewhere too. In total, we had 2 agendas, 2 attendance lists, 86 draft measures, 10 summary records and 128 vote results more than expected. In these cases we assume that our benchmark (i.e. the Annual Report by the Commission) is inaccurate. As we cannot answer the question what the 'real' benchmark should be here, we simply assume that whenever there is more information available than expected, then all information is available. Or, in other terms, we limited transparency to 100%. Furthermore, if committees did meet but did not vote, no draft measures were available nor should they be available. This lead to missing values in the data set (i.e. 0 divided by 0 is an impossible operation), and these cases were left out of the analysis. In total, 158 cases remained.

- *Input*. Two types of documents were studied: membership lists and agendas.[48] The number of membership lists and agendas was compared to the number of meetings recorded in the annex to the Annual Report to calculate the percentage of availability through the website. Where several versions of the same document were found (e.g. updated versions, or membership lists available separately and also below the minutes), only one version was counted to avoid miscalculation.
- *Throughput*. Information on throughput can be available under either of the labels of 'minutes' or 'summary records' (we will use the latter term), but the meaning is the same: a brief description of the discussions in meetings. The number of summary records was compared to the number of meetings mentioned in the Annex to the Annual Report.
- *Output*. The output of the committee procedure is a vote, according to any of the existing committee procedures, and a draft measure. The extent to which the results of the votes are available indicates the transparency of the output. Vote results presented separately and within the summary records were both counted as output, and it was checked that the same results were not counted twice. Draft measures show what the committees have finally voted about. The number of draft measures was compared to the number of opinions.

The findings of our quantitative research were discussed with three staff members of Secretariat General E1 of the European Commission on April 24, 2007 to enhance our understanding of Comitology work processes and information exchanges.

[48] Discussion papers can be regarded as additional input. None of these papers is mentioned on the website. We cannot evaluate this transparency since there is no information about the number of these papers.

V. Results

A. Transparency in general

The overarching concept of transparency is broken down into its constitutive components of input, throughput and output transparency. In order to measure the degree of input transparency, we looked at the availability of agendas and of attendance lists. For measuring throughput transparency, we investigated the availability of summary records. Output transparency was measured by the availability of draft measures and vote results.

Table 1 presents the aggregate data for all committees. Data was collected for all committees that met in the year 2005.

Table 1: Transparency in general

	Number of documents *expected*	Number of documents *available*	Percentage available
Agendas	946	616	65.1 %
Attendance lists	946	512	54.1 %
Summary records	946	641	67.8 %
Vote results	2,715	2,369	87.3 %
Draft measures	2,715	149	5.5 %

There were 946 committee meetings in 2005. If all agendas and attendance lists were made publicly available, we would expect to find agendas and attendance lists for the same 946 meetings in the online repository. 616 agendas were actually available online either in Word- or in PDF-format, while a further 52 agendas were listed, but not

available. This means that the online availability of agendas is 65.1 percent. One possible reason for finding fewer agendas than expected is that agendas may relate to combined meetings of two or more committees. In that case there would be fewer agendas than meetings. However, the number of combined meetings is low and cannot explain the difference. Further, an explanation might be that a wider definition of meetings is used for the annual report, maybe also including informal meetings without agendas and attendance lists. The remaining option, of course, is simply that not all documents have been disclosed.

Attendance lists were found in several forms. They could be put online under their own heading or included in the summary records (see below), and either including the names of the participants or not. All varieties were counted in a way to make sure that the same lists were not counted twice. In sum, it turns out that there are less attendance lists available than agendas. Exactly 500 attendance lists were counted where the names of the participants were not disclosed, usually below the summary records (e.g. 'Latvia, Ministry of Agriculture, 2 participants'), while 12 examples were found where the names of the participants were mentioned. A further 12 attendance lists were mentioned online, but not available. The total of 512 available attendance lists is 54 percent of the total number of meetings. The low number of attendance lists may be explained by the fact that membership does not change much in terms of the participating ministries and units in the various national civil services. Committees may find it less relevant to publish the same attendance list for every meeting.

Instead of the expected 946 summary records we counted only 641, which is 67.8 percent of the total of 946 meetings). This percentage is similar to the percentage of available agendas. No summary records were available for nearly one third of the meetings. Of course the sheer number of 641 is not indicative of the quality of the minutes. Therefore, apart from a document count, all committees were also graded in terms of the general quality of their summary records. The following grades were used:

Poor: Summary records of poor quality only mention that there was a discussion about a certain topic, or the Commission presented certain issues. These summary records do not inform the reader of the contents of a discussion or a presentation.

Fair: Summary records of fair quality offer some more information, such as specific requests of the Commission or of member states. Still, information about the content of discussion is lacking.

Good: 'Good' summary records also shed light on the discussion itself by presenting points of view and arguments.

Excellent: Summary records were classified as 'excellent' when they give a summary of discussions, arguments, if possible also counterarguments, points of view of specific member states, et cetera.

In drawing up this classification, we were not guided by the number of pages of the summary record, rather only by the quality. The following table shows the quality of the summary records:

Table 2: Quality of summary records

	Poor	Fair	Good	Excellent	N (committees)
Quality of Summary records	61 (45.2%)	54 (40.0 %)	16 (11.9%)	4 (2.9%)	135 (100%)

Note: Figures show the *number of committees* where the quality of the summary records was coded as being poor, fair, good or excellent

As there were 63 committees not publishing any summary records at all, these were excluded so that 135 committees remain. Most committees do not perform well when it comes to the quality of the minutes: 61 out of 135 committees perform poorly. Only four committees could not do better. This means that even though about two-thirds of all summary records are available on-line, in many instances their quality is such that the reader will have a hard time figuring out what has actually been discussed in those meetings.

In order to measure the availability of vote results and draft measures we used another benchmark: the number of votes, which is mentioned in the annual report. Draft measures form the basis for voting: this is what the votes are about. As only the final versions of draft measures are published after they are voted upon by the committees[49], they should be regarded as information on output rather than on input. The total number of votes was 2,715, which also means that the same number of draft measures should be expected. In fact, the number of available draft measures is much lower: it is only 149, with another 348 mentioned, but not available. Therefore, only 5.5 percent of all draft measures are

[49] Interview with three staff members of SG E1 of the European Commission (April 24, 2007)

made transparent. Transparency of vote results is better, with 2,369 results out of 2,715 being available on-line (87.3 percent).

The fact that there are relatively few draft measures available could be due to the fact that the committees not working under co-decision are not formally obliged to publish these documents. Only the draft measures that belong to acts adopted under co-decision need to be made available to the EP (Council Decision 1999/468/EC). Agendas, attendance lists, vote results and summary records will be made available independently of the procedure used by the committee. This exception applies to the management committees that deal with the Common Agricultural Policy, and as these account for the bulk of committee activity with 1,405 votes in 2005 this explains a large portion of the missing draft measures on-line. However, this reasoning should not distort the argument. The question is to what extent committee activity is made transparent – not to what extent the committees live up to their legal obligations. From this perspective the low availability of draft measures is disturbing. It means that the general public can fairly well find out to what extent the committees agree with Commission proposals, but hardly at all what they actually vote about.

Given the above findings, we must conclude that in general the committee system could be much more transparent. About 45 percent of the attendance lists are missing, 35 percent of the agendas are not published, an astonishing 95 percent of the draft measures are not disclosed and about 32 percent of the summary records are not available online. When summary records are available, the vast majority of about 85 percent is of poor

quality. Despite the rules on transparency in the particular case of comitology, there seems to be a wide gap between rules and practice of disclosing information.

B. Work Processes of Committees

The figures presented so far are indicative of the transparency of comitology in general. However, this *en-bloc* treatment of all committees does not reflect the fact that there are important differences between committees. Some committees are performing a lot better in terms of transparency than others. This section will therefore take a closer look at each of the elements per committee.

Table 3 shows the extent to which the committees publish the information that is needed for input, throughput and output transparency. Not all committees that meet do actually vote, which explains why N is lower in the latter case.

Table 3: Transparency per committee

	0% available	1-25% available	26-50% available	51-75% available	76-100% available	N (committees)
Agendas	63	4	21	22	88	198
Attendance lists	97	9	23	8	61	198
Summary records	63	7	28	15	85	198
Vote results	54	7	23	10	68	162
Draft measures	132	5	8	6	11	162

Note: figures show the *number of committees* where *x* % of the information is available

With all information except draft measures, committees seem to perform either good or bad with respect to each of these elements. In part this is due to the frequency of meetings. The less frequently a committee meets, the greater the likelihood that its scores

will be near or at the extremes of 0 and 100 percent, or exactly halfway at 50 percent. The categorical presentation applied in this table solves some of this, but no presentation can remedy this in full. Nevertheless the figures in Table 2 are informative: 63 committees do not publish any agendas at all on the internet register, while 88 are performing well. The remainder is found in between. A similar picture emerges for the membership lists, where in 97 cases there are no participation lists at all. The pattern is similar with summary records and vote results. Many committees perform either good or bad. The draft measures are exceptions to this pattern. As these are rarely published on the internet register it comes as no surprise that hardly any committee publishes all draft measures there are to publish.

Committees perform differently when it comes to making certain information transparent. As will be shown now, there are hardly any committees that disclose all the documents they should publish. For each committee, we computed its general transparency score by adding up the transparency scores on the elements described above. In order to avoid bias in the general transparency index, we made sure that the input related, throughput related and output related transparency scores received the same weight. The quality of summary records has been ignored to avoid mix-up of different sorts of data. The index runs from 0 to 300, and its distribution is displayed below (Table 4) [50]:

[50] The general transparency index has a reliability value of 0.77 (Chronbach's Alpha), which is better than the threshold value of 0.70 that is usually applied.

Table 4. General transparency index

	0	1-50	51-100	101-150	151-200	201-250	251-300	N (committees)
General transparency score	28	12	17	30	28	40	3	158

Mean score: 135.75

Note: Figures show the *number of committees* having a certain score on the general transparency index

Table 4 clearly shows that there are hardly any committees making all documents available through the register. Further, 28 of the 158 committees do not make any information transparent at all. Of the three committees in the best performing category, only one committee publishes all information on input, throughput and output that there is to publish: the committee establishing a community policy regarding water[51].

C. Policy Area and Type of Committee

The committees performing well and badly are to a great extent randomly distributed over the DGs. However, the DG of Agriculture is an exception to this. Table 5 shows the distribution of committees over the general transparency index again, but classified per DG. DGs hosting less than 7 committees are taken together under the heading of 'other DGs'.

[51] Also known as the 'Water Framework Directive'. See Article 21 of European Parliament and Council Directive 2000/60/EC

Table 5. General transparency index per DG

	0	1-50	51-100	101-150	151-200	201-250	251-300	N (committees)
DG AGRI	1	0	0	0	5	18	0	24
DG AIDCO	0	1	3	0	0	4	0	8
DG EAC	1	1	0	2	1	2	0	7
DG ENTR	6	3	2	0	5	1	0	17
DG ENV	1	1	1	7	4	3	2	19
DG INFSO	2	0	2	0	2	2	0	8
DG JLS	2	0	3	3	1	0	0	9
DG SANCO	2	0	1	5	4	5	1	18
DG TAXUD	2	2	1	2	1	1	0	9
DG TREN	1	0	2	4	2	0	0	9
Other DGs	10	4	2	7	3	4	0	30
Total	28	12	17	30	28	40	3	158

Mean score: 135.75

Note: Figures show the *number of committees* having a certain score on the general transparency index

An ANOVA analysis of variance shows that the committees working under the DG of Agriculture have significantly higher transparency scores than the grand mean score of 135.75. There, the mean score is 217.66. For the other DGs, the variance between the committees in terms of their score on the transparency index appears random. Given these results it is also not surprising to find committees working under the management procedure to be significantly more transparent, as the bulk of committees using this procedure works under the DG of Agriculture (Table 6):

Table 6. General transparency index per voting procedure

	0	1-50	51-100	101-150	151-200	201-250	251-300	N (committees)
Advisory procedure	5	1	1	0	1	2	0	10
Management procedure	6	2	5	5	8	24	0	50
Regulatory procedure	10	6	8	16	10	9	3	62
Combination of procedures	7	3	3	9	9	5	0	36
Total	28	12	17	30	28	40	3	158

Mean score: 135.75

Note: Figures show the *number of committees* having a certain score on the general transparency index

VI. Evaluating Transparency in Practice

The analysis has resulted in a description of the resulting transparency of all committees that met in 2005. On the basis of this description we can now answer our research question: to what extent do committees publish information on the Comitology Register about the input, throughput and output of their work processes? It has been shown that the levels of transparency of input, throughput and output of the work processes of comitology committees fall short of the (Annual Report) benchmark. In every case, the main picture is that for each type of document that can be disclosed the committees either publish all or nothing on the internet register.

Input and throughput transparency are clearly below full transparency. The resulting input transparency falls short of complete transparency: only 65% of the agendas and 54% of the membership lists are available through the register. One should also notice that the membership lists do not give any personal information about the members of the committees but only lists which countries were present at the meetings. This means that stakeholders and citizens have limited opportunities to check whether all issues that should be on the agendas of the committees have actually been on these agendas. They will also find difficulties in assessing which countries have actually participated in the meetings and subsequent output of the committees, and it will be impossible for them to find out whether or not there may have been a clash of interests between the participating experts and the issues that were on the agenda.

The picture for throughput is similar. 67% of the summary records is available through the register. This means that citizens and stakeholders are not able to check what has been discussed in one third of the meetings. Additionally, the quality of many of the summary records was limited. In general, the records provide only very brief information about the discussions within the committees.

The resulting output transparency is most disturbing. Voting records are generally available (87.3% of the votes) but only 5.5% of the draft measures were available through the online register. The draft measures are the most important result of the committees and would form the focus of accountability vis-à-vis the European Parliament. What was the result of committee work? What was it that the committee in the end said 'yes' to? Citizens and stakeholders have no opportunity to access this information and thus neither can call the committees to account.

Still, we have observed that the committees working under the DG of Agriculture are performing significantly better than committees under other DGs. This coincides with the finding that the management procedure has a positive effect on transparency, as most committees using this procedure work under the DG of Agriculture. Their scores, however, still do not come close to full transparency – a score that has only been reached by one single committee: the committee working on the water framework directive.

The analysis shows that the resulting transparency is far below the transparency that could be expected if all Comitology documents would end up in the public register. On the basis of our research we cannot provide an explanation for this discrepancy. Theories about information systems stipulate that the outcome of complex systems is the result of interactions between a variety of actors with different perceptions and incentives[52]. Research into these interactions is needed to explain why the resulting transparency fall short of the benchmark.

VII. Concluding Observations

In our paper we have highlighted the shortcomings of the existing Comitology Register on the basis of a relatively detailed study of one year – 2005. This should be put in a broader context. Compared to the situation only a few years back, considerably more information is being made available than was previously the case. A number of other institutions have facilitated this process of opening up comitology processes to further public scrutiny. The European Parliament has been in the vanguard in this regard although its recent successes do not stretch across the full spectrum of comitology decisions but only those that are implementing legislative rules adopted by the co-decision procedure. This is quite a significant limitation. The Court of Justice has also facilitated the possibility that comitology committees may be subject to more public scrutiny by requiring the Commission secretariats to grant access to specific comitology

[52] C. Ciborra, *op. cit.* Note 45 *supra*, B.A. Nardi and V.L. O'Day, *op. cit.* note 45 *supra*.

documents pursuant to a formal request.[53] This means that where Committee documents are mentioned on the register but are not made available publicly via Internet (perhaps because there is no legal obligation to transmit them to the European Parliament) individuals or stakeholders or indeed other actors can request them under the formal access rules and the Commission administration as a whole (as opposed to the committee secretariat) will have to decide if access is to be granted or not (subject to a limited number of exceptions), subject to appeal also to the EU Ombudsman.

This latter route is clearly very demanding of the role of citizens and stakeholders in that they need to undertake at times rather extensive research in order to establish what documents may be missing from the public register and they also have no easy means of knowing what information is not being made 'public' but is being given to the European Parliament, nor indeed what reasons may have motivated committee secretariats not to make information publicly available. The failure to give reasons in the existing system makes it very hard to challenge (or even know of) such negative decisions. The strength of the access to documents legal requirements is that all decisions to grant or refuse information must be motivated; as a result it can be subject to appeal in one form or another and there can be the beginnings of a holding to account for such specific decision-making. As a matter of practice however the annual reports by the Commission on the access that has been granted to its documents reveals that lone citizens and even individualised stakeholders in fact do not often formally request access to documents. In that sense, one could argue that active transparency is especially relevant for less

[53] See further Case T-188/97, *Rothmans International BV v. Commission*, [1999] ECR

powerful parties. It opens up decision-making processes to the 'smaller' voices in Europe.

This discussion shows that the time is ripe for a more structural approach to be taken to the problem. In the context of the follow up to Green Paper discussions on reform to the access to documents regulation[54], specific attention could be addressed to the interface between access to specific documents (and information) and the need to ensure that all documents are listed on the public comitology register even if they are not all made immediately publicly available in PDF format. It is this listing that enables further public scrutiny to take place as to whether they have been correctly withheld or not and what reasons have played a role in the decision taking in that regard. Moreover a case can be made for further training of Commission staff who are taking the front-line decisions as to whether documents should be placed on the web or not. Over and above coordination and streamlining our research shows that the processing of information internally within the Commission requires improvement. The only fault-line even today is not what the requirements are vis-à-vis the European Parliament but also more broadly the requirements governing access to information and in particular the rule that information can only be withheld if the information in question falls within one of the exceptions to the right to public access.

At the moment, the Commission is working towards a common database for the Commission and the European Parliament. This may facilitate European Parliament

[54] COM(2007) 185 final, Green Paper, *Public Access to Documents held by institutions of the European Community*. A review http://ec.europa.eu/transparency/revision/docs/gp_en.pdf

access to information but does not solve the problem that not all documents end up in the register. In other words, is a case not to be made for the general availability of all draft implementing measures and not only those that are legally required to be given to the European Parliament, which seems to be the guiding line at present? If the law-making institutions (European Parliament, Commission and Council) have no desire to take this point up now, is this not a possible subject for an own initiative inquiry of the EU Ombudsman in the interests of further transparency and access to information in the EU, over and above what the institutions have managed to agree together to reveal (in inter-institutional agreements, behind closed doors)? We believe that it is and that a broader public debate on the manner in which the EU institutions are pro-actively making information available via Internet is both salient and timely.