

EU DOCUMENT REGISTERS: EMPIRICAL GAPS LIMITING THE RIGHT OF ACCESS TO DOCUMENTS IN EUROPE

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Abstract

This article examines the instrument of document registers as a pivotal medium for ensuring the right of access to EU documents and public accountability. While the general right of access to documents has been extensively analysed, document registers and especially their practice are still under-examined. This article specifically focuses on the registers of the Parliament, the Council and the Commission, highlighting two striking gaps. The first gap exists between the strict rules of the Access Regulation and the softer rules of the institutions, the second between what is provided on the abstract level by these rules and the practical level. As shown by an empirical study of the user-friendliness, completeness and proactivity of the registers, their current design and limited content severely limit people's right of access. In light of these shortcomings, this article recommends different practical approaches to increase the effectiveness of document registers. This would significantly improve the actual implementation of the right of public access to documents, while at the same time reducing the administrative burden on EU public institutions.

1. Introduction

Access to public documents is an important cornerstone of transparency and democratic accountability in the EU. Access is generally achieved in two ways: EU institutions may disclose documents on their own initiative

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(proactive disclosure) or release them upon request (passive disclosure). Both forms are foreseen in Regulation 1049/2001 (Access Regulation).¹

Document registers play a key role for both forms of disclosure. They are the preferred place for proactive disclosure and they are an important supporting tool for passive disclosure because such registers enable citizens to know which documents exist and can be requested.

While the general right of public access to documents has already been analysed in depth,² the instrument of document registers and especially their practice are still under-examined. This article aims to fill this deficiency for the registers of the Parliament, the Council and the Commission. It examines the legal foundations and the practice of these registers, revealing two salient gaps. The first gap exists between the strict rules of the Access Regulation and the softer rules of the institutions. The second – and even more glaring – gap exists between what is required by the entirety of these rules and what happens in practice. The latter gap emerges from an empirical study of the registers' user-friendliness, completeness and proactivity.

The article proceeds as follows. Section 2 reflects historically on the emergence of a right of access to documents under EU law. Section 3 provides an empirical analysis of the document registers of the Parliament, the Council and the Commission as regards their compliance with the Access Regulation. Sections 4 and 5 conclude by offering some advice on how to effectively enhance people's right to access documents through the strengthening of public registers.

2. The development of EU document registers

2.1. *The gradual emergence of a right of access to documents*

A first trace of the right of access to documents at EU level, which is to be understood in the context of harsh criticism about the distance of the

1. Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, O.J. 2001, L 145/43.

2. Without any pretence to completeness, cf. Rossi and Vinagre e Silva, *Public Access to Documents in the EU* (Hart, 2017); Curtin and Leino, "In search of transparency for EU law-making: Trilogues on the cusp of dawn", 54 CML Rev. (2017), 1673–1712; Hillebrandt, Curtin, and Meijer, "Transparency in the EU Council of Ministers: An institutional analysis", 20 ELJ (2014), 1–20; Driessen, *Transparency in EU Institutional Law. A Practitioner's Handbook*, 2nd ed. (Wolters Kluwer, 2012); Peers, "The new Regulation on access to documents: A critical analysis", 21 YEL (2001), 385–442; Curtin, "Citizens' fundamental right of access to EU information: An evolving digital passepartout?", 37 CML Rev. (2000), 7–41.

institutions to citizens,³ can be found in the Maastricht Treaty of 1992. Its Declaration No. 17 “on the right of access to information” states that “transparency of the decision-making process” is considered to strengthen “the democratic nature of the institutions and the public’s confidence in the administration”.⁴

In 1993, the Commission indeed presented two Communications on “Public access to the institutions’ documents”⁵ and on “Openness in the Community”.⁶ Despite their names, however, they are cautious in recognizing a right of access to documents. In late 1993, the Council and the Commission committed themselves to a right of access to documents in a joint Code of Conduct.⁷ This required applications to be written “in a sufficiently precise manner” and “contain information that will enable the document or documents concerned to be identified”. Later on, the Code of Conduct was also adopted by the Parliament.⁸

The next step on the road to more transparency came in 1997 with the Treaty of Amsterdam.⁹ Article 1(2) of the Treaty on European Union (TEU) solemnly declares the achievement of a new stage on the way to “an ever closer union among the peoples of Europe”, in which decisions are not only taken as closely as possible to the citizens, but also “as openly as possible”. This is complemented by the consistent introduction, under Article 255 of the Treaty establishing the European Community (TEC), of a right of access to documents. This right was limited to documents of three institutions, namely the Parliament, the Council and the Commission.

Despite the fact that the Amsterdam Treaty did not yet contain any provision on document *registers*, things evolved swiftly. On 1 January 1999, the Council put an electronic document register on the Internet. Its establishment was based on very practical considerations. Indeed, many requests based on the 1993 joint Code of Conduct and its implementation decisions¹⁰ were quite nebulous. While the Council’s internal rules required applicants to identify a document in a sufficiently precise manner, many applications were “very

3. See Rossi and Vinagre e Silva, *ibid.*, p. 1.

4. O.J. 1992, C 191/101.

5. COM(93)191 final, “Public access to the Institutions’ documents”, 5.

6. COM(93)258 final, “Openness in the Community”, 4.

7. Code of Conduct (93/730/EC) concerning public access to Council and Commission documents, O.J. 1993, L 340/41.

8. European Parliament Decision 97/632/EC, ECSC, Euratom of 10 July 1997 on public access to European Parliament documents, O.J. 1997, L 263/27.

9. O.J. 1997, C 340/1.

10. Council Decision 93/662/EC of 6 Dec. 1993 adopting the Council’s Rules of Procedure, O.J. 1993, L 304/1; Council Decision 93/731/EC of 20 Dec. 1993 on public access to Council documents, O.J. 1993, L 340/43; Commission Decision 94/90/ECSC, EC, Euratom of 8 Feb. 1994 on public access to Commission documents, O.J. 1994, L 46/58.

vague or general”. Rather than specific documents, applicants often requested “all preparatory discussions” related to (or “all texts in connection with”) a certain legal act, “all agendas for all working parties” under a certain framework or “statistics on qualified majority votes” since a certain moment in time. In other words, the Council complained about the high administrative burden associated with (necessarily) general requests – and it recognized a way to solve this problem: by “establishing a register of Council documents”.¹¹ This plan was greatly facilitated by the rise of the Internet.¹²

Consequently, the Council took the decision to establish a “public register of Council documents”.¹³ Interestingly, while the number of requests rose, the number of documents to be considered per request fell considerably: before the launch of the register, the Council had to take into account an average of 8.62 (1997) and even 11.79 (1998) documents per request – a number that dropped to just 6.61 in the first half of 1999.¹⁴ This is a clear indication that the register was fulfilling exactly its purpose: to enable knowledge of existing documents, thereby leading to more accurate requests and ultimately also to a reduced administrative burden.

The Council was clearly the pioneer in this field. It anticipated and facilitated the Copernican turn which took place in 2001 with the mandatory establishment of document registers for the three main EU institutions under the Access Regulation. Before addressing this in the next section, a few words on developments at the level of primary law are appropriate.

2.2. *Current EU primary law*

Following the Lisbon Treaty,¹⁵ EU primary law does indeed contain different relevant provisions not only on the right of public access to documents, but also on the establishment of public registers.

Article 1(2) TEU continues to demand that decisions be made “as openly as possible”. This requirement is now extended in Article 15 of the Treaty on the Functioning of the European Union (TFEU), both in terms of personal scope

11. Document 8330/96, para 3.1. Cf. also Council conclusion on the review of Council Decision 93/731/EC on public access to documents, Document 11974/96 – COR 1 REV 1, available at Council of the European Union, *Basic Texts on Transparency Concerning the Activities of the Council of the European Union* (Publications Office, 2000), p. 73, para 2.3.

12. Cf. Cardiff European Council, 15/16 June 1998, Presidency Conclusions, SN 150/1/98, REV 1, para 28, available at <consilium.europa.eu/media/21103/54315.pdf> (all websites last visited 15 Dec. 2023). See further Curtin, *op. cit. supra* note 2, 40.

13. Council decision on establishing a public register of Council documents, Document 6423/1/98 REV 1, available at Council of the European Union, *Basic Texts* cited *supra* note 11, p. 78.

14. Cf. Annex II Document 9862/99. See also Document 13275/00, 6 and 14.

15. O.J. 2007, C 306/1.

and content. Unlike the previous Article 255 TEC, the right of access to documents is no longer limited to the Parliament, the Council and the Commission. Nowadays, EU primary law refers it to all the “Union’s institutions, bodies, offices and agencies”, with certain limitations for the Court of Justice, the Central Bank and the Investment Bank. Such a broad right of access to documents is endorsed also by Article 42 of the Fundamental Rights Charter.¹⁶

The required degree of openness has also changed. While the right was previously limited to acts pertaining to the decision-making process, Article 15(1) TFEU now requires more generally that all the mentioned organs shall “work as openly as possible”. This also pursues the aim to “ensure the participation of civil society”. Article 15(3)(5) TFEU obliges the Parliament and the Council to publish “the documents relating to the legislative procedures”, thus confirming the particular importance of *legislative* transparency.

2.3. *The 2001 Access Regulation*

2.3.1. *The right of access to documents and the enabling role of registers*

The central legal act regulating both the right of access to Parliament, Council and Commission documents and the three institutions’ document registers is the Access Regulation 1049/2001.¹⁷ Adopted still under Article 255(2) TEC, it intends to “ensure the widest possible access to documents”¹⁸ and to give the right of public access “the fullest possible effect”.¹⁹

Document registers are to play a central role in fulfilling these goals. The three institutions shall provide “public access to an electronic register of documents” with the explicit aim of facilitating the exercise of the access right and making it effective (Art. 11).²⁰ The emphasis on the role of document registers for the *effectiveness* of the access right is particularly important. Without information about the very existence of documents, the right of access to documents would be toothless and could not be exercised in an

16. While the article focuses on the Parliament, the Council and the Commission, the relevant experience of other EU institutions – in particular the Court of Justice with its comprehensive search engine – will be reflected as well.

17. For the applicability of the Regulation to EU agencies, see the respective constitutive legal acts. In any case, according to Recital 8 of the Access Regulation, (at least) its principles should be applied by “all agencies”.

18. Art. 1(a) Access Regulation.

19. Recital 4 Access Regulation.

20. Recital 14 Access Regulation.

effective manner.²¹ The Union legislature was certainly aware of this fact.²² In fact, it could be argued that an *effective* right of access to documents and the existence of document registers form an inseparable duo. Hence, the access right also includes an active obligation of EU institutions to set up document registers.²³

The Access Regulation, which is based on a broad concept of “document”,²⁴ basically provides for two forms of access: one proactive and one passive. While the former means direct, unsolicited disclosure of documents and is particularly advocated for documents related to legislative procedures, the latter requires a prior written request from an individual, as noted in Article 2(4).

Document registers are of central importance for both forms of access. In the case of *proactive* disclosure, the registers are the preferred (though not the only permissible) place of publication.

Direct access is governed by Article 12 of the Access Regulation, revealing a clear preference for this form of disclosure. Indeed, the institutions “shall . . . make documents directly accessible to the public”, though “as far as possible” and in accordance with the institution’s rules.²⁵ This applies “[i]n particular” to legislative documents, that is to say documents drawn up or received during legislative procedures. This is reinforced by the fact that also the Court of Justice has recognized a “particular relevance” of an increased openness and a wider access to documents, also in connection with the principle of democracy, precisely in the area of legislation.²⁶ Beyond legislative documents, direct access shall also be granted – “[w]here possible” – to other documents, such as those concerning “the development of policy or strategy”. In all these cases, the register is clearly the preferred place of

21. Cf. Case T-436/09, *Dufour v. ECB*, EU:T:2011:634, para 29, and Case T-42/05, *Williams v. Commission*, EU:T:2008:325, para 71, noting “the initial acute difficulty which the identification of documents entails for citizens in search of information who, in most cases, do not know which documents contain that information, and who have to contact the administration holding the documents”.

22. Case T-42/05, *Williams v. Commission*, para 71.

23. Cf. Curtin and Mendes, “Article 42” in Peers, Herve, Kenner and Ward (Eds.), *The EU Charter of Fundamental Rights. A Commentary* (Beck/Hart/Nomos, 2014), p. 1101 (“need to set up registers of documents” as a “positive action” requirement of the Union in order to ensure compliance with the access right).

24. Cf. Art. 3(a) Access Regulation (“any content whatever its medium . . . concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility”).

25. For the rules of the institutions see section 2.4.1 *infra*.

26. Case C-39/05 P, *Sweden and Turco v. Council*, EU:C:2008:374, para 46. Cf. also Curtin and Leino-Sandberg, *Openness, Transparency and the Right of Access to Documents in the EU. In-depth analysis for the PETI Committee* (European Parliament, 2016), pp. 7–8.

disclosure. Even when direct access is provided by other means, the register shall indicate the location of the document, “as far as possible”.

Also in the case of passive access to documents, document registers decisively facilitate the retrieval of documents. In the apt words of the General Court, the register is “a research tool which is intended to enable citizens to identify the documents which are likely to be of interest to them”.²⁷ The information disclosed in the register should also support them in formulating requests “in a sufficiently precise manner to enable the institution to identify the document”, as required by Article 6(1) of the Access Regulation. If, however, an application is not formulated in this way, it may not be rejected and the institution is required to help the applicant.

According to Article 11 of the Regulation, documents need to be referenced in the register “without delay”. References shall include the following data: a reference number, the document’s subject matter and/or a short description of its content, the date of its receipt or creation and the date of entry.

Despite a different opinion held by the Commission, the inclusion of documents in the register is not at the full discretion of the institutions. Rather, the register must be complete in that, in principle, all documents that have been drawn up or received by an institution, or are in its possession, must be included. The view of the Commission, stated in a 2004 implementation report,²⁸ that the Access Regulation would neither “define the categories of documents that must feature in the register” nor “oblige the institutions to hold a register covering all the documents they receive or produce” is therefore hardly in line with the spirit of the Regulation. As seen above, Article 11 clearly obliges the three institutions to provide public access to a register of documents, and Article 12 requires them to make documents directly accessible to the public, even if this fundamental rule is limited by practicability (“as far as possible”) and needs to be further defined (“in accordance with the rules of the institution concerned”). Even if it were true, as argued by the Commission, that it “would be impossible” to keep a comprehensive register “given the very broad definition of the concept of document” in the Regulation,²⁹ it hardly seems permissible for the

27. Case T-42/05, *Williams v. Commission*, para 72.

28. COM(2004)45 final, “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”, para 5.1.2.

29. In this sense also Driessen, op. cit. *supra* note 2, pp. 202–203, noting that “it can hardly have been the legislator’s intention to require the institutions to mark, number, file and register each scrap of paper, no matter how ephemeral, on their Registers”, as that “would be excessive in terms of proportionality and administrative burden”, and arguing that “Article 11(2) should therefore rather be read as requiring the registration of all ‘official’ documents, that is, each document that does have an official number”.

Commission simply to determine “the families of documents forming part of the register”³⁰ and limit its scope to them – especially if the number of covered document types is very limited. This contradicts both the clear wording of Articles 11 and 12 of the Regulation and the registers’ aim to ensure the effectiveness of the access right.³¹ As noted by the European Ombudsman, the register has to be “as comprehensive as possible”.³²

2.3.2. *Normative exceptions and judicial interpretation*

Exceptions to the access right are regulated in Article 4 of the Access Regulation. They shall apply if the protection of certain public and private interests would be – “specifically and actually”³³ – undermined by disclosure. Some of these interests³⁴ are protected by mandatory exceptions, other exceptions³⁵ are relative as they are rebuttable in case of “an overriding public interest in disclosure”.

According to Article 4(1), a mandatory exception applies to documents where disclosure would undermine the protection of core public interests (namely, public security, defence and military matters, international relations, and financial, monetary or economic policy) or of the privacy and the integrity of an individual. Pursuant to Article 4(2) and (3), a rebuttable exception covers for instance court proceedings, commercial interests, or documents which could seriously undermine an institution’s decision-making process. In all these cases, access to documents shall be refused unless there is an overriding public interest in allowing the disclosure.

An exception under Article 4 of the Access Regulation does not exempt the institutions from their duty to immediately record a reference to the document in their register.³⁶ The reference, however, shall be formulated “in a manner which does not undermine protection of the interests in Article 4”³⁷ – for

30. Cf. Report cited *supra* note 28, para 5.1.2.

31. Riemann, *Die Transparenz der Europäischen Union. Das neue Recht auf Zugang zu Dokumenten von Parlament, Rat und Kommission* (Duncker & Humblot, 2004), p. 233.

32. Decision of the European Ombudsman closing his inquiry into complaint 3208/2006/GG against the European Commission, 18 Dec. 2008, available at <ombudsman.europa.eu/decision/en/3728>, paras. 16–19, and the “critical remark” in para 47.

33. According to the established case law of the Court of Justice. Cf. Case C-331/15 P, *France v. Schlyter*, EU:C:2017:639, para 61, and the case law cited.

34. E.g. public security, defence, privacy. Cf. Art. 4(1)(a) and (b) Access Regulation.

35. E.g. commercial interests, court proceedings and legal advice, inspections, investigations and audits (Art. 4(2) Access Regulation); documents drawn up for internal use or received before a decision has been taken as well as opinions for internal use and preliminary consultations, if disclosure would seriously undermine the (Recital 6: effectiveness of the) decision-making process (Art. 4(3) Access Regulation).

36. In this sense also Riemann, *op. cit. supra* note 31, p. 233.

37. Art. 11(2), second sentence, Access Regulation.

example, by using an abbreviated title instead of a full title that would reveal information which would be harmful if disclosed.³⁸

An exception to the obligation to include references to documents in the register is only applicable in the case of sensitive documents under Article 9 of the Regulation. To be qualified as sensitive, documents must be classified as “Top Secret”, “Secret” or “Confidential”, and protect essential interests of the EU or Member States notably in the areas of public security, defence and military matters. Only for these documents, referencing in the register is restricted insofar as persons with sufficient security clearance shall assess which references could be made in the register.³⁹ At the very least, the institutions must specify “the number of sensitive documents not recorded in the register”, together with the number of cases in which access was refused and the reasons for the refusals, in a report to be published annually.⁴⁰ The understanding and extent of these exceptions have been significantly shaped by the Court of Justice. Its case law has elaborated a distinction between legislative and administrative documents, requiring a lower level of access for the latter⁴¹ – and thus introducing a gradation that was not foreseen in this form by the Access Regulation. The Regulation demands *increased proactive disclosure* of legislative documents rather than accepting a *restricted access* to other documents.⁴² In any case, the access right has developed very differently in these two areas as a consequence of this distinction.

To put it briefly, for *legislative* documents the result of the judicial shaping is relatively transparency-friendly. There is an obligation to disclose opinions of the institutions’ legal service relating to legislative processes if there is no “reasonably foreseeable and not purely hypothetical” risk that disclosure might undermine the protection of legal advice, and also this risk must be weighed against the overriding public interest.⁴³ The Court of Justice has also set a high bar for documents on ongoing legislative procedures disclosing the positions of individual Member States.⁴⁴ Moreover, since recourse to

38. Commission Report cited *supra* note 28, para 5.1.2.

39. Art. 9(2) and (3) Access Regulation.

40. Art. 17(1) Access Regulation.

41. Cf. e.g. Case C-666/17 P, *AlzChem v. Commission*, EU:C:2019:196, para 65 (“the administrative activity of the Commission does not require such extensive access to documents as that required by the legislative activity of an EU institution”); Case C-365/12 P, *Commission v. EnBW*, EU:C:2014:112, para 91; Case C-139/07 P, *Commission v. Technische Glaswerke Ilmenau*, EU:C:2010:376, para 60.

42. Cf. also Curtin and Leino-Sandberg, *op. cit. supra* note 26, pp. 9–10.

43. Cf. Case C-39/05 P, *Sweden and Turco v. Council*, especially paras. 66–68; more recently also Case T-252/19, *Pech v. Council*, EU:T:2021:203, para 55.

44. Case C-280/11 P, *Council v. Access Info Europe*, EU:C:2013:671, paras. 54–64 and especially para 63.

so-called informal trilogues has become the rule,⁴⁵ the General Court has not only ruled against the existence of a presumption of non-disclosure of so-called four-column documents (which reflect the positions of the three institutions and, in the contested fourth column, the agreements reached during the trilogue),⁴⁶ but has also rejected an exception based on the provisional nature of the document and the fact that no agreement had yet been reached.⁴⁷

A completely different picture emerges for access to *administrative* documents. Especially in this area, transparency by disclosure would be particularly important, as the degree of publicity of these documents is by their nature much lower than that of legislative documents. However, the Court's strict differentiation between legislative and administrative documents has led to the judicial elaboration of "general presumptions of confidentiality" in several (key) administrative sectors, namely for State aid,⁴⁸ cartel,⁴⁹ merger control⁵⁰ and infringement⁵¹ procedures. These presumptions, which are not foreseen in the Access Regulation, exempt the institutions from carrying out case-by-case assessments of each document.

2.4. *Practical implementation*

2.4.1. *Restrictive reading by the Rules of Procedure*

The Parliament, the Council and the Commission have implemented the requirements of the Access Regulation in a slightly restrictive form. For instance, they all distinguish between different document types and access regimes, with proactive disclosure being the standard only for a rather small number of document types.⁵² Internal restrictions for the disclosure of opinions and contributions of the Legal Service, individual positions of

45. Cf. Case T-540/15, *De Capitani v. Parliament*, EU:T:2018:167, paras. 68–70; Curtin and Leino, op. cit. *supra* note 2, 1683.

46. Case T-540/15, *De Capitani v. Parliament*, para 84.

47. Cf. *ibid.*, paras. 85–114.

48. Case C-155/14 P, *AlzChem v. Commission*, paras. 31–32; *Commission v. Technische Glaswerke Ilmenau*, paras. 55 and 61.

49. Case C-365/12 P, *Commission v. EnBW*, EU:C:2014:112, para 92; Case T-611/15, *Edeka-Handelsgesellschaft Hessenring v. Commission*, EU:T:2018:63, paras. 83 and 85.

50. Case C-477/10 P, *Commission v. Agrofert Holding*, EU:C:2012:394, paras. 59 and 64; Case C-404/10 P, *Commission v. Éditions Odile Jacob*, EU:C:2012:393, paras. 118 and 123.

51. Case C-562/14 P, *Sweden v. Commission*, EU:C:2017:356, para 51; Case C-514/11 P, *LPN and Finland v. Commission*, EU:C:2013:738, especially paras. 56 and 65.

52. Cf. List of Parliament's documents directly accessible to public, Annex 1 to the Decision of the Bureau of the European Parliament of 8 March 2010 adopting a list of the categories of documents directly accessible via the public register, available at <europarl.europa.eu/RegData/PDF/rev_801268_1_EN.pdf>; Art. 11(3) to (6) of Annex II of the Council's Rules of Procedure, Council Decision 2004/338/EC, Euratom of 22 March 2004 adopting the Council's

Member State delegations (Council)⁵³ as well as opinions and individual positions (Commission)⁵⁴ are questionable as well. At least, there are no internal legal restrictions on the inclusion of references in the registers – with the questionable exception of the Parliament, where references to non-legislative documents have to be included in the register only “as far as possible”.⁵⁵

On the positive side, both the Council and the Commission provide that documents released to individuals upon request are to be disclosed also in the register.⁵⁶ This is significant not least for reasons of equal treatment.⁵⁷ The Parliament and the Commission have also noted the importance of interconnecting document registers with an institution’s general document management system.⁵⁸ Arguably, a well-organized document management system could not only strengthen the access right by helping institutions to find documents more easily, but potentially also be the basis for an efficient and constant supply of the document register – for example, by automatically creating references in the public register after the internal registration of a document, possibly supplemented by an “opt-in” or “opt-out” option for proactive disclosure.⁵⁹

2.4.2. *The complicated register landscape*

2.4.2.1. The Commission: The search for the holy register

Practical challenges already arise from the intricate register landscape currently available. A first hurdle people have to face is to *find* the document registers, and then *identify* – out of the plethora of available registers – the “right” one where to find the document they are looking for. While the registers of the Parliament and the Council can easily be found via their

Rules of Procedure, O.J. 2004, L 106/22; Art. 9 Commission Decision 2001/937/EC, ECSC, Euratom of 5 Dec. 2001 amending its Rules of Procedure, O.J. 2001, L 345/94.

53. Cf. Art. 11(4) and (6) of the Council’s Rules of Procedure, Annex II.

54. Cf. Art. 9(3) Commission Decision 2001/937/EC, ECSC, Euratom.

55. Rule 122(3) of the European Parliament’s Rules of Procedures, available at <europarl.europa.eu/doceo/document/RULES-9-2023-11-01-TOC_EN>.

56. Cf. Art. 10(2) of the Council’s Rules of Procedure, Annex II; Art. 9(2) Commission Decision 2001/937/EC.

57. In this sense also Riemann, op. cit. *supra* note 31, p. 241.

58. Cf. the Rules on document management in the European Parliament, Bureau decision of 2 July 2012, PE 422.611/BUR, available at <europarl.europa.eu/pdf/cardoc/20120702_DEC_BUR_EN.pdf>, in particular its Arts. 1, 3, 4 and 9(b); Commission Decision 2002/47/EC, ECSC, Euratom of 23 Jan. 2002 amending its Rules of Procedure, O.J. 2002, L 21/23, Annex on Provisions on Document Management.

59. Cf. also Commission Report cited *supra* note 28, para 4.8.

homepages,⁶⁰ this is not the case for the Commission. In this regard, the Commission's homepage is far from intuitive. There is no direct link or recognizable route to the document register, but rather at least two misleading paths.

The first dead end is a box for “learn[ing] more about getting involved”. This only provides the user with links to the different social media channels of the Commission, without hinting on the existence of a document register, or generally on the right of access to documents.

The second plausible path is a link to “Publications” (caption: “Search for Commission documents on this website”). However, this also turns out to be a dead end, leading to a small register of its own, with some thousands of publications. Surprisingly, not even the word “transparency” (which should also be the path to the document register according to its web address)⁶¹ is mentioned on the homepage. Even a specific search for “document register” in the search bar leads to random single documents. Overall, it seems to be much more efficient to search the Commission document register “externally”, via a search engine.⁶² This is unsatisfactory; not least because it presupposes that one already knows and actively searches for the register, which is certainly not conducive to the widest possible access to documents.

Findability is not the only challenge of the Commission register. Another issue is that there is not just one register, but a *variety* of registers. Besides the main register,⁶³ there is the Competition Cases Register with documents on State aid, merger, anti-trust and cartel cases,⁶⁴ the Comitology Register,⁶⁵ a search portal for infringement decisions,⁶⁶ and numerous other websites, portals and databases.⁶⁷ It is questionable whether such a proliferation of

60. For the Council, access is granted via: <consilium.europa.eu/en> → “Transparency” (at the bottom) → “Search for documents” (under the heading “Public register of Council documents”). For the Parliament: <europarl.europa.eu/portal/en> → “Other websites” (at the top) → “Register”.

61. <ec.europa.eu/transparency/documents-register>.

62. The first result of a search for “document register” (without quotation marks) and “Commission” on <google.com> was the Commission's document register. Test conducted on 1 Oct. 2023.

63. <ec.europa.eu/transparency/documents-register/>.

64. Available since June 2023 at <competition-cases.ec.europa.eu>. The former search engine could be found at <ec.europa.eu/competition/elojade/isef>.

65. Available at <ec.europa.eu/transparency/comitology-register>.

66. Available at <ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions>.

67. See for an initial overview <ec.europa.eu/info/about-european-commission/service-standards-and-principles/transparency/freedom-information/access-documents/how-access-commission-documents_en>; cf. also Giménez Bofarull, Hoffmann-Axthelm and Manzi, *Hiding a Forest behind the Trees. Transparency, Integrity and Accountability at the European Commission* (Transparency International, 2021), pp. 20–21.

registers corresponds to the wording (“a register”) and spirit of Article 11 of the Access Regulation. In 2008, the European Ombudsman, while stating that the wording of Article 11 “indeed suggested that the legislator envisaged one single register per institution”, did not rule out that the objective of the provision could also be attained by maintaining “several registers rather than a single one”. However, the Ombudsman required that “the scope of these registers is clearly defined, that there are no overlaps” and, in particular, “that their number and scope is not such as to create confusion and thus make it difficult for the citizen to find the information she/he is looking for”.⁶⁸

Considering the technical possibilities in 2024, it could be expected that documents from other registers are at least displayed also in the main register with a link to their location.⁶⁹ Currently, however, the registers of the Commission are not sufficiently interconnected. To prove this, a sample test of the three registers was conducted on 1 October 2023.

In the Competition Cases Register, all decisions between 1 and 15 July 2019⁷⁰ were searched. The register showed 21 results with a total of 20 decisions.⁷¹ It turns out, by searching the reference numbers of these decisions, that all documents are *not* included in the main register of the Commission. As a result, not only is the main register seriously incomplete, but users who are aware of the existence of these documents are forced to request them – with a corresponding workload for the Commission – while they could actually be downloaded from another register (which is not mentioned at all).

The Comitology Register is also not consistently interconnected with the main register, as an indicative look at the 223 documents resulting from a search, in the “Documents” section, for all documents between 1 and 15 July 2019 shows. In fact, many of the resulting documents are document types that are not included in the Commission’s main register.

Finally, with regard to the search portal for infringement decisions, it is again clear that there is no interconnection. On the one hand, the (few) documents available via this portal⁷² are not document types covered by the main register. On the other hand, this portal itself provides users with only very little information, especially in document form. In sum, the Commission’s register landscape is not only quite intricate, but also very poorly interconnected. This does not seem to be in line with Article 12(4) of the

68. European Ombudsman Decision cited *supra* note 32, para 28.

69. For instance, this is the case for documents stored in EUR-Lex, which are referenced and linked in the Commission register.

70. The time interval allows for considering any subsequent inclusion in the main register.

71. The decisions in the cases SA.54234 and SA.54423 were decided together in C(2019) 5188 final.

72. Mostly memos with “INF” references and press releases with “IP” references.

Access Regulation, which requires a register – if it does not provide direct access to a document – to indicate “as far as possible . . . where the document is located”.

2.4.2.2. The Parliament: The Legislative Observatory as a role model

Besides its main document register,⁷³ the European Parliament also operates a separate register with the Legislative Observatory.⁷⁴ However, this is less problematic than at the Commission, since the (legislative) documents concerned can usually be found in both registers.

Unlike the three main document registers this contribution focuses on, the Legislative Observatory categorizes documents into “procedure files”. These procedure files provide “a centralized, frequently updated record of information on the different key players, events and documents relating to a particular procedure dossier”. They contain “document references, links and other useful information”, “factual, politically neutral summaries of major documents and events linked to a given procedure” and even “forecasts for future stages”.⁷⁵

A similar procedure-based structure of files can considerably facilitate the search for documents and could be a model for the main registers.⁷⁶ The coordinated and user-friendly organization of documents can indeed decisively enhance the right of access to documents, allowing interested persons to rapidly orientate themselves and identify relevant files.

The three institutions’ main registers lack such an internal structure. Documents are not arranged into procedure files and registers are therefore just “one-dimensional” collections of documents.⁷⁷ This clearly stands in the

73. Cf. Public Register of Documents, available at <europarl.europa.eu/RegistreWeb/home/welcome.htm>.

74. Available at <oeil.secure.europarl.europa.eu>. According to Curtin and Leino, op. cit. *supra* note 2, 1689, the Observatory is even “the most comprehensive institutional register”, at least for legislative documents. Giménez Bofarull, Hoffmann-Axthelm, Manzi and Teixeira, *One Rule for Them, One Rule for Us. Integrity Double Standards in the European Parliament* (Transparency International, 2021), p. 4, also find it to be “better than the document registers of any of the three institutions”, at least “at displaying documents relevant to a legislative procedure”.

75. Cf. the explanation at <oeil.secure.europarl.europa.eu/oeil/info/info2.do>.

76. Cf. also Hoffmann-Axthelm, *The Backroom Legislator. Transparency, Integrity and Accountability at the Council of the EU* (Transparency International, 2021), noting that the Legislative Observatory “is a good example of how many documents and processes pertaining to a legislative file can be intertwined and presented together” (p. 18) and that the display of legislative documents according to their procedural files would enable “anyone with an interest in a particular draft legislation [to] easily find the [related] documents” (p. 27).

77. A partial exception to this one-dimensionality is the Parliament register itself. While it also has no visible organization of documents into files, below the documents it often provides

way of obtaining a comprehensive overview of available documents on a subject. In this form, it is impossible to trace a specific procedure in the same way as reading a case file would allow. And this is clearly also a primary reason for the numerous requests in the style of “all documents relating to” a certain issue.

Admittedly, it is easier to build and handle such a structure for legislative than for non-legislative procedures, if only because of the sheer number of procedures. But why should such a structure not also be possible for non-legislative documents? It may be more complicated but – thanks to the already existing document management systems – it seems nevertheless feasible.

2.4.2.3. The Council: All-in-one

In contrast to the other two institutions, the Council maintains a single register which gives interested users access to all documents held by this institution. However, all that glitters is not gold. Efficient use of the register is hampered by the limited guidance provided to users and by some confusing search criteria. Moreover, although the register is generally quite complete and the data is often directly accessible, some categories of documents are largely missing. In order to examine these elements in relation to all the main registers of the three institutions, an empirical analysis was carried out, to which the following section now turns.

3. EU document registers compared: An empirical analysis

3.1. Introduction

Even the best rules are useless if they are not followed in practice. This clearly also applies to document registers, making an analysis of their *practice* necessary. Do they live up to the legal standards set out in the Access Regulation and, above all, EU primary law?

The following subsections analyse the document registers of the three institutions covered by the Access Regulation – the Parliament, the Council and the Commission – as regards both their design and their content.⁷⁸ Indeed,

various links to related files. This difference is likely to be related to the fact that the Parliament register contains almost only legislative documents and documents relating to activities of the Parliament, but hardly any (!) internal administrative documents, as we will see.

78. Note, however, that also several other EU structures, and especially agencies, are required to set up document registers. Cf. e.g. the inquiries of the Ombudsman on Frontex and Europol: Decision in case 2273/2019/MIG on the European Border and Coast Guard Agency's

a well-designed but incomplete register would be just as useless as a complete register with an inadequate structure.

Comparing the registers also helps to identify good administrative practices – an exercise that the three institutions should also strive for under Article 15 of the Regulation: “[t]he institutions shall develop good administrative practices in order to facilitate the exercise of the right of access”.

For the practical analysis of document registers, one question needs to be clarified in advance: what exactly makes a good register? Ultimately, this question could of course be answered in different ways. There is, however, a good starting point since the European Ombudsman has already dealt with this question in two twin cases on the document registers of Frontex and Europol. In fact, the Ombudsman noted that two “principles of good administrative practice” should in any case be observed: registers should be *user-friendly* and *complete*.⁷⁹ The following subsections examine the registers in the light of these criteria. In addition, the issue of the registers’ *proactivity* is also addressed. Do the three institutions expect a person to submit a request in order to release their documents, or do they make them public in a straightforward manner?

3.2. *The criterion of user-friendliness*

3.2.1. *Notion*

For the European Ombudsman, *user-friendliness* means that the register should “make it as easy as possible for individuals to navigate through the register and identify specific documents to which they may want to obtain access”. Accordingly, user-friendliness entails “having a dedicated register webpage, while the layout of the register should be explained and links to the different sections should be provided in case there are several locations where information/documents can be found”.⁸⁰ This criterion (for the Ombudsman: “principle”) can be specified further by the following aspects: usability for both normal and expert users; presence of technical features that facilitate the

(Frontex) public register of documents, 3 Feb. 2021, available at <ombudsman.europa.eu/decision/en/137721>; Decision in case 2272/2019/MIG on the European Union Agency for Law Enforcement Cooperation’s (Europol) public register of documents, 4 Feb. 2021, available at <ombudsman.europa.eu/decision/en/137775>.

79. Cf. Proposal of the European Ombudsman for a solution in case 2273/2019/MIG on the European Border and Coast Guard Agency’s (Frontex) public register of documents, 7 Oct. 2020, available at <ombudsman.europa.eu/solution/137293>, paras. 26–30, and the relevant Decision cited *supra* note 78; Proposal of the European Ombudsman for a solution in case 2272/2019/MIG on the European Union Agency for Law Enforcement Cooperation’s (Europol) public register of documents, 7 Oct. 2020, available at <ombudsman.europa.eu/solution/136602>, paras. 24–28, and the relevant Decision cited *supra* note 78.

80. *Ibid.*, para 27 (Frontex) and para 25 (Europol).

use, and absence of technical problems; various search criteria (e.g. document types, policy area) and search features (e.g. full-text search); existence of explanations.

Beyond the apparent relevance of a user-friendly register to make the right of access to documents enforceable by interested persons, it is the Access Regulation that in Article 6 already openly requires EU institutions to “provide information and assistance to citizens on how and where applications for access to documents can be made”, in particular “by providing information on the use of the public registers of documents”. It is a short step to infer from this requirement a demand for self-informative and user-friendly registers.

The three registers are assessed below in terms of their user-friendliness.

3.2.2. *Layout*

The document registers of the Parliament, the Council and the Commission all have a dedicated webpage. However, what first catches the eye is the greatly differing layouts, be it in terms of the arrangement of navigation bars (EP: on top; Commission: left; Council: none), of design (from different pictures and a lot of text at the Parliament to the sober list of search bars at the Council) or – importantly – of search functions.

While the Council directly lists all available search options and the Commission opts for an in-between solution (one search bar with the possibility to expand more criteria and to change to a search by reference), the search options at the Parliament seem to be limited to keywords, references and dates. This impression is, however, wrong. Looking more carefully, the Parliament does also offer a separate advanced search page; but its link is not directly visible, being partly hidden in the navigation bar on the upper left under “Search”.

3.2.3. *Explanations*

In terms of explanation of the layout, all three registers offer at least rudimentary support. At the Council, however, guidance is limited to one short explanation and two examples of reference numbers written directly below the respective search bars. This is hardly sufficient to enable users, and especially non-expert users, to make good use of the register.

The register of the Commission has the advantage that it is less dependent on explanations, as the search bars and search options are quite intuitive (e.g. an option to choose between searches for “one word at least”, “all words” or “the exact phrase” and to search “in title and content” or “in title only” – as compared to no information at all on such search options for the Council). Moreover, a small section on Frequently Asked Questions (FAQ) at least offers very basic guidance.

The best support is offered by the Parliament. Information is provided on the webpage, together with links to legal background, the general “Ask EP” contact form, a separate – albeit almost empty – “Help” page (under “Search”), and especially a few, though useful, aids at the search bars. It is explained that “speech marks” will enable users “[t]o conduct a search with more than one word”, and there are different examples of references which show, at least to attentive users, also the option of using asterisks to find documents whose reference is only partially known.⁸¹

A comparative glance at the InfoCuria case law portal of the Court of Justice⁸² shows, however, that also the instructions provided by the Parliament could be significantly improved. At InfoCuria, a click on one of the question marks next to all search bars opens a 25-page long (!) PDF document⁸³ with detailed guidance ranging from general explanations on the meaning, nature, and content of each search bar to specific information on various options to refine searches (e.g. by using special characters⁸⁴ and logical operators⁸⁵). Despite its length, this document can be considered as a best practice that could significantly improve the usability of all three registers – albeit ideally by offering at least some supporting information directly on the website and not only in one large PDF document that is downloaded automatically and unexpectedly.

3.2.4. *Interconnections*

Another feature mentioned by the Ombudsman is the existence of links to different sections – and arguably also to different registers – whenever documents are located at various locations.

In this spirit, the Parliament register has a page with “useful links”, including a link to the other document registers and its own Legislative Observatory.⁸⁶ At the Commission, there is also a webpage listing different document sources.⁸⁷ This page contains links to the registers and portals of the

81. E.g. out of the long list of examples, “P8_A(2014)0123” and “P8_A(2014)*”, “E-006 071/2014” and “*6071*” or “535.988” and “535*”.

82. Available at <curia.europa.eu/juris/recherche.jsf ?language=en>. As noted *supra*, this article concentrates on the registers of the Parliament, the Council and the Commission. However, the search engine of the Court of Justice appears in this case to be an important point of comparison for the registers of the three institutions.

83. InfoCuria – Online help, available at <curia.europa.eu/common/juris/en/aideGlobale.pdf>.

84. Asterisks, underscores and inverted commas. Cf. InfoCuria – Online help, 7, 11 and 13–15.

85. AND (space), OR (comma) and EXCEPT (!). Cf. *ibid*.

86. Cf. <www.europarl.europa.eu/RegistreWeb/links/home.htm>.

87. Cf. <commission.europa.eu/about-european-commission/service-standards-and-principles/transparency/access-documents/how-access-commission-documents_en>.

other institutions too, something that is completely missing in the Council register.⁸⁸

As regards the Commission, one has, however, to note that the webpage containing the different sources is particularly concealed. On the register's homepage, the user has to click on the FAQ, choose "What if I do not find the document I am looking for?", and click on the link to the "other registers and websites managed by the Commission and other EU institutions".

3.2.5. *Overview*

A further aspect mentioned by the Ombudsman in terms of the registers' user-friendliness is their suitability to allow individuals to obtain an overview of the documents held by the institution. As noted above,⁸⁹ the Parliament's Legislative Observatory can be considered a role model in this regard. This specific register for legislative acts categorizes documents into "procedure files", allowing for a very efficient overview on available documents in a certain case. This model should be adopted by the other institutions too and extended to administrative files.

3.2.6. *Request*

A commendable tool of the Commission register is the option to immediately request referenced but not disclosed documents by clicking on the "request document" button. This not only takes the user directly to the request form, but all the reference information on the document to request (type, year, number, language and version as well as responsible Directorate-General or service) are already pre-filled. However, to this end a EU Login Account is needed – and its password remembered.

In contrast, this linking function is completely missing in the Parliament register. The Council at least provides a link to the access form which, however, is empty and must be filled in manually. An adjustment of the latter two registers is thus needed in order to better achieve the registers' purpose of facilitating the right of access to documents.

As an additional idea, the registers could also include links to previous *negative* decisions on access requests. Such a feature would at the same time provide guidance to citizens on the documents that can be obtained and

88. Except for a link at the bottom of a general website on the "transparency and access to documents" policy of the Council. See <consilium.europa.eu/en/general-secretariat/corporate-policies/transparency>.

89. Cf. section 2.4.2.2 *supra*.

reduce the administrative burden on the institution concerned (supposing that this feature would lead to fewer requests for the same document).⁹⁰

3.2.7. *Basic and expert users*

At least in principle, all three registers can be used by both basic and expert users. However, their *effective* use will often require a certain knowledge of the institutions and their inner structure. As this is unavoidable to a certain extent, it would be even more important to offer advanced support and explanations to non-expert users.

The clear distinction, at the Parliament and the Commission registers, between basic and advanced search functions seems sensible in order to meet the needs of different groups of users. Essential instruments especially for more expert users are the possibilities mentioned to refine searches by using special characters and logical operators.⁹¹ Unfortunately, a practical test shows that at least some of these important search features do not work in any of the three registers, clearly limiting their usability.⁹²

The Commission register also features some useful technical tools that increase the value of the register. A content preview allows a quick, yet complete view of the content of documents in a pop-up window without the need to download them in PDF format. Expert users also benefit from the possibility to export results in CSV files. These files can be opened with programmes such as Microsoft Excel and used for a wide variety of metadata analysis, even in the case of thousands of search results. At the same time, the

90. Cf. also European Ombudsman, Decision in case 763/2020/DL on the European Commission's failure to make public proactively all "confirmatory decisions" it takes reviewing negative decisions on requests for access to documents, available at <ombudsman.europa.eu/decision/en/140202>, para 30: "Failing to publish a complete set of metadata on access requests and related replies and failing to list the documents to which access was refused risks depriving the public of relevant information about how the Commission assesses requests".

91. See *supra* at notes 84 and 85.

92. Two tests were conducted on 1 Oct. 2023. The first test concerned the use of an asterisk to find words with the same root, but different endings. According to the example provided in InfoCuria – Online help, 11, "admissib* will find documents containing the words admissible, admissibility, inadmissible" (emphasis omitted). Typing "admissib*" in the basic search bars ("Keywords" at the Parliament and the Commission, "Words in text" at the Council) should thus deliver significantly more results than "admissible" (in both cases without quotation marks). However, the opposite was the case, with 10 versus 10,000 results (the maximum number of displayable results) at the Parliament, 10 versus 1,000 (*idem*) at the Council, and 3,034 versus 3,700 results at the Commission. The second test searched for "transparency !privacy". The goal was to find only documents containing the word "transparency" but not the word "privacy". However, already the first documents displayed in the three registers contained both words. In contrast, as noted, the register of the Commission asks the user to choose whether to search for "one word at least", "all words" or "the exact phrase". Coherently, this latter register does indeed seem to sort out documents containing the word "privacy".

Council operates open data sets with the metadata of both the document register and the database on access requests.⁹³ Assuming appropriate expertise, these datasets can be very useful for research purposes.

3.2.8. *Search features*

One final important aspect in terms of user-friendliness are the available search features. The lack of some important search features has already been criticized. On the positive side, though, it must also be noted that the registers at least allow for full-text searches,⁹⁴ including the basic tool of putting words between quotation marks in order to search for a specific word sequence (in the Commission register, this can also be achieved by using the “exact phrase” option). Moreover, all three registers enable a search for keywords and document references. Other search criteria common to all three registers are language, date, and type of the document.⁹⁵

The other search functions vary, with the Parliament offering the most with five: year, authority, topic (quite randomly ranging from “Europe” to “Geography” to “Law”), parliamentary term, and author (e.g. MEPs). The Commission offers only two additional options with the “responsible services” (e.g. a certain Directorate-General) and “categories”, a useful feature that allows searches for specific document categories covered by the register. The Council provides only one additional search option for “subject matters”, with a long and confusing⁹⁶ list ranging from A (“Autorité palestinienne (PLO)”) to Y (“Yugoslavia (YU)”). Instead of or in addition to this feature, the Council would be well advised to offer a more useful search option by “policy area” – for example, along the lines of its classification of access requests into 28 policy areas in the annual reports.⁹⁷ At the same time, the Council could consider adding other useful search options such as “document categories” or “responsible structures”.⁹⁸ Without these changes,

93. Cf. <consilium.europa.eu/en/general-secretariat/corporate-policies/transparency/open-data>.

94. This may seem obvious from today’s perspective, but it was only added to the Commission register in 2014. Cf. Giménez Bofarull, Hoffmann-Axthelm and Manzi, op. cit. *supra* note 67, p. 20.

95. E.g. “Answers to written questions”, “Mail (Official) – Outgoing” or “Written questions” (Parliament); “‘A’ item note”, “Contribution of the Legal Service” or “Cover note” (Council); “Decision”, “Impact assessment” or “Report” (Commission).

96. E.g. see the division into “EGYPT (EG)” and “EGYPT (ET)” with 204 and 42 results respectively (on 1 Oct. 2023 and searching for English documents).

97. Cf. e.g. Annex to the Council 2020 Report, 24 March 2021, Document 7090/21, 28.

98. E.g. preparatory bodies or Council configurations. In this sense also Meijers Committee, “‘Working Documents’ in the Council of the EU Cause a Worrying Increase in Secrecy in the Legislative Process”, 2021, 8, at <www.commissie-meijers.nl/wp-content/uploads/2021/09/2107_en.pdf>.

however, the register “remains difficult to use”, as it is “complicated to find documents relating to legislative procedures without detailed data about the relevant document”.⁹⁹

3.3. *The criterion of completeness*

3.3.1. *Notion*

Completeness is understood by the European Ombudsman to mean that “all documents concerning the core activities of the institution concerned – such as legislative documents and documents concerning its decisions, strategy and policy – should be recorded individually (if not published proactively)”. As “other types of documents” are concerned, such as staff-related documents, “the register should refer to their existence, at the very least by listing categories of documents, if they are not recorded individually”.¹⁰⁰

This “principle” (as the Ombudsman emphatically calls it) also requires that there should be no *automatic* exclusion of documents, but only the possibility, upon a *case-by-case* assessment, not to add references to documents “if disclosing their very existence could very likely risk undermining any protected public interest”.¹⁰¹

A final aspect mentioned by the Ombudsman is the need to maintain the register “in a timely manner”, which means that it “needs to be updated on a very regular basis”.¹⁰²

3.3.2. *A legal requirement*

As a rule, the Access Regulation requires the three institutions to provide *complete* access to their documents. Clearly, the very same Regulation provides for reasonable exemptions for sensitive documents, recognizes that this goal is limited by practicability (“as far as possible”) and requires the institutions’ internal regulations to define it further. However, as a rule, registers are legally required to be complete, as emphasized also by the Ombudsman.¹⁰³

The criterion of completeness means that registers must contain all documents within the broad understanding of the term laid down in Article 3(a) of the Access Regulation. This includes all non-transitory documents within the sphere of responsibility of the institutions, regardless of whether

99. Curtin and Leino-Sandberg, *op. cit. supra* note 26, p. 23.

100. European Ombudsman Proposals cited *supra* note 79, para 28 (Frontex) and para 26 (Europol).

101. *Ibid.*, para 29 (Frontex) and para 27 (Europol). Italics omitted.

102. *Ibid.*, para 30 (Frontex) and para 28 (Europol).

103. See *supra* at section 3.3.1.

they concern legislative or other – administrative – activities, and not only final documents, but also documents drawn up or received during proceedings.

The completeness of the three registers is scrutinized in the next subsections. Arguably, it is difficult to search for documents that are *not* available (without knowing about them). However, different methodological strategies have been employed to this end, tailoring them to the characteristics of each register. This provided an empirical insight into whether the three registers comprehensively store or refer to all documents produced or received by the institutions.

3.3.3. *The Parliament*

The document register of the Parliament contains almost 875,000 references – but that alone says nothing about its completeness.¹⁰⁴ The internal rules of the Parliament¹⁰⁵ differentiate between (a) legislative documents and a specified number of other directly accessible documents, and (b) other – e.g. administrative – documents. The latter shall not be disclosed and even their *references* shall be registered only as far as it is possible.

To trace this difference in practice, all English documents from 1 to 15 July 2019 were searched. The 986 resulting documents were assigned to 44 different document types.¹⁰⁶ However, there did not seem to be any internal administrative documents. In addition, all the 986 documents were directly accessible.¹⁰⁷ While this seems commendable at first glance, it could instead be an indication that the register is largely limited to parliamentary documents, which are typically of a public nature. Indeed, this preliminary finding of a large absence of administrative documents (or of documents that are referred to but not disclosed) remains unchanged when other time periods are tested.

This result is consistent with the experience of others in trying to obtain access to Secretary-General notes, or documents on MEP allowances.¹⁰⁸ It indicates that the Parliament's practice in maintaining the register does not

104. By 31 Dec. 2022, the number of document references in the database was 874,428: Public Access to Documents 2022. Parliament 2022 Report, PE 747.530/BUR/ANN, 5.

105. See *supra* at section 2.4.1.

106. The number of documents for these most common types is mentioned in the field “Document type” on the left navigation bar, but not in the eponymous field in the advanced search option (left of the “Keywords” search bar).

107. Cf. also Parliament 2022 Report cited *supra* note 104, 6, stating that “practically all documents” in the register “can be directly downloaded via the website”.

108. Giménez Bofarull, Hoffmann-Axthelm, Manzi and Teixeira, *op. cit. supra* note 74, pp. 21–22, also with reference to the case of a journalist requesting access to 22 Secretary-General's notes and being granted access to just one: Teffer, “The shadowy EU Parliament boss who likes to say ‘no’”, available at <euobserver.com/eu-election/144382> (15 March 2019).

comply with the demanding standards of the Access Regulation, at least for non-parliamentary – and especially internal administrative – documents. Overall, it seems that while the European Parliament itself is used to carrying out its parliamentary activities in the sunlight, the EP administration tends to operate in the dark.

3.3.4. *The Council*

The Council might well be an opposing example to the Parliament: while its legislative working methods are often criticized as being non-transparent,¹⁰⁹ its document register, which contained 482,786 original language documents at the end of 2022,¹¹⁰ is generally quite complete – and also its annual reports are informative, especially compared to those of the Parliament. This could be an indication that the Council’s administration is more open to transparency than its political-diplomatic top level.¹¹¹

The completeness of the Council register was tested via a random sample of ST (standard) documents, as this is the category to which by far the most documents referenced in the register belong. ST documents are numbered serially, starting with the number 5001. In 2019, they were then numbered consecutively up to 15340. This means that at least 10,340 ST documents from 2019 should be referenced in the register, although in reality their number is much higher because there are often several documents under the same reference. Against this background, some of these serial numbers were searched manually.¹¹² In total, 202 documents were considered, of which only four¹¹³ could not be found in the register – and a targeted access request for these four documents revealed that they were “never issued”.¹¹⁴ It can thus be deduced, at least for this limited sample, that all ST documents that should be

109. Just see Hoffmann-Axthelm, op. cit. *supra* note 76, with the indicative title “*The Backroom Legislator*”, but especially the more nuanced view taken by Hillebrandt, “Twenty-five years of access to documents in the Council of the EU: Ever-greater transparency?”, 61 *Politique Européenne* (2018), 142. Cf. also Hillebrandt, Curtin and Meijer, op. cit. *supra* note 2, 1–20.

110. Council 2022 Report, Document 8311/23, 6.

111. Cf. also Hoffmann-Axthelm, op. cit. *supra* note 76, pp. 32–33, who notes the existence, in the General Secretariat, of “currents in favour of increased legislative transparency” and brings the example of a 2018 draft policy paper, which, however, “ended up devoid of most meaning” after an informal Coreper meeting in 2020.

112. Specifically, all the first 100 documents (serial numbers 5001/19 to 5100/19) were searched, supplemented by searches for one random document out of each hundred further documents.

113. 6033/19, 6945/19, 7406/19 and 11034/19. Test conducted on 1 Oct. 2023.

114. Council General Secretariat, Directorate-General Communication and Information, Directorate Information and Outreach, Head of Unit of the Information Services Unit/Transparency, Letters dated 20 Aug. 2021, Ref 21/1381-mj-rh/jl, and 26 Aug. 2021, Ref 21/1381-mj-rh/jl ADD 1.

registered can be found in the register. Arguably, also the fact that many of these 202 documents are referenced but not directly accessible (while in the Parliament register one has to search a long time to find even *one* referenced but not accessible document) is another indication of the register's completeness – at least for ST documents.

This last qualification is very important, as the completeness of the Council register is massively compromised by the insufficient disclosure of an important document category. Indeed, after the launch of the Delegates Portal¹¹⁵ in 2015, the various existing categories of informal or working documents were replaced by the new category “Working document” (WK).¹¹⁶ Considering the Council's over 150 (!) working parties and committees,¹¹⁷ these documents are of great importance for its activities – and they would be equally important for citizens to understand the Council's working methods and the course of specific (legislative) proceedings. However, WK documents are not disclosed in the document register – and they are not even referenced separately. We only learn of their very existence because lists of distributed WK documents are disclosed, at regular intervals (mostly half-yearly or quarterly) and for the single working parties, in ST documents. Typically, these lists contain references, subjects and creation dates of WK documents.¹¹⁸ Apart from the fact that such delayed “mass registration” of documents is in any case inadmissible – and therefore an open violation of Article 11(3) of the Access Regulation, requiring references to be recorded “without delay” – a major problem with this practice persists even after the retroactive listing in ST documents. In fact, an individual WK document still cannot be found separately in the register (e.g. by searching its reference or title) even though, according to Article 11(2) of the Regulation, this should actually be the rule especially for legislative documents.¹¹⁹

This problem seems even more serious in view of the large number of WK documents. While their exact number is unknown since this is not reported in

115. Cf. <delegates.consilium.europa.eu>, described as “the one-stop shop for delegates involved in the decision making process of the Council”.

116. Cf. Meijers Committee, Report cited *supra* note 98, 1 and 3–4; Special Report of the European Ombudsman in strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process, 16 May 2018, available at <ombudsman.europa.eu/en/special-report/en/94921>, Annex 2.

117. Cf. Report on the inspection of documents and meeting of the European Ombudsman's inquiry team concerning Council transparency during the COVID-19 crisis, 12 Jan. 2021, available at <ombudsman.europa.eu/report/en/136827>, 4.

118. To get an overview of these ST documents, just enter “list of working papers” (with quotation marks) in the “Words in subject” search bar of the Council register. On 1 Oct. 2023, this search returned (over) 1,000 results.

119. Cf. also Meijers Committee, Report cited *supra* note 98, 5–6; European Ombudsman Report cited *supra* note 116, paras. 28–29.

the annual access to documents reports, in 2020 it was estimated to be about 15,000.¹²⁰ There are, however, exact figures for 2017 – published in the annual activity report of the Council’s Directorate-General for Communication and Information¹²¹ (which, by the way, cannot be found in the register). According to the report, the total number of documents “produced and distributed to Delegations in 2017” amounted to 40,382, and almost half of them (18,781, and thus considerably more than all the ST documents) were WK documents.¹²² Unfortunately, the reports of the following years no longer contain such detailed information on the documents. However, looking at the estimate for WK documents and the number of documents added to the register in the following years,¹²³ the ratio seems unchanged. This means that about half of the Council’s documents cannot be found in the register – an unsatisfactory result that cannot be repaired by the indirect referencing practice, as the access right is not fulfilled if in-depth knowledge of the Council’s structure and working methods is required to find out about the mere existence of documents.

3.3.5. *The Commission*

That the document register of the Commission is not complete is already clear from the analysis of its user-friendliness since, in many areas, Commission documents are only referenced and can be accessed – to a sometimes insufficient extent¹²⁴ – through other registers or portals. In addition, while a comprehensive register would contain at least the references to all types of documents, as broadly defined by the Access Regulation, the Commission register is limited to eight document categories.¹²⁵

120. Based on the highest observed serial number and a sample of the second half of 2020: cf. Meijers Committee, Report cited *supra* note 98, 4.

121. Council Directorate-General Communication and Document Management, 2017 Annual activity report of the authorizing officer by delegation, SN 1896/18, available at <consilium.europa.eu/media/35702/dgf-2017-aar-final-publ-internet.pdf>.

122. *Ibid.*, 7.

123. 24,760 original language documents were added in 2022. Cf. Council 2022 Report cited *supra* note 110, 7.

124. See e.g. the scant information on infringement proceedings, where there is no trace of references to individual documents, either in the specific search portal or in the main register. This is contrary to the legal standards of the Access Regulation despite the existence of a general presumption of confidentiality.

125. C (autonomous Commission acts, including delegated and implementing acts and other types of decisions); COM (Commission proposals, recommendations, communications, reports etc.); JOIN (Commission and High Representative joint acts); OJ (agendas of Commission meetings); P (decisions by the Commission President); PV (minutes of Commission meetings); SEC (documents which cannot be classified in any of the others series); SWD (Commission staff working documents). Cf. the search bar “Categories” in the register.

Whether at least the eight document categories covered are complete cannot be tested, precisely due to serial numbers that are not always strictly consecutive.¹²⁶ In any case, the total number of existing but not registered documents cannot be determined. The resulting inadequacy of the register has been widely criticized, including by the European Ombudsman.¹²⁷ Even the Commission had already noticed in 2004, at a time when the register covered essentially the same categories as today, that the “documents covered by” its register “are to be gradually extended”.¹²⁸

The main problem is that the documents belonging to the eight disclosed categories are very “formal” and official. In most cases, they are the final decisions or at least the final documents produced by the Commission in a given procedure before it is taken further by other institutions. *Preparatory* documents, and especially internal documents preparing decisions or final documents of the Commission, are not covered at all.¹²⁹

If one compares these kinds of documents with those regularly released by the Commission as a result of access requests,¹³⁰ the absence of a whole range of – less official, but therefore not necessarily less interesting – documents is

126. C documents, for instance, seem to be numbered starting with serial number 1, but either the numbering is not continuous (and this seems to be the case considering the large jumps between serial numbers with similar dates) or almost half of them are not registered. In 2019, SWD documents were also numbered continuously at least from 1 to 230 (and then again, with only few exceptions, from 261 to 456, while there are also many higher serial numbers), but the numbers 18, 19, 142 and 221 are missing. However, a request for access to these four documents revealed that they really do not exist or, in one case (142), were merged into a later SWD document: Email replies of the Commission to access requests GESTDEM 2021/4584–4587 on 16 and 19 July 2021.

127. Cf. European Ombudsman Decision cited *supra* note 32, especially paras. 19–22, 42–45, and the “critical remark” in para 47 (the failure “to comply with Article 11 of Regulation by omitting to include all relevant documents . . . constitutes an instance of maladministration”). See also Curtin and Leino, *op. cit. supra* note 2, 1689 (“no comprehensive public register”); Leino-Sandberg, “Public access to ECB documents: Are accountability, independence and effectiveness an impossible trinity?” in *Building Bridges: Central Banking Law in an Interconnected World* (European Central Bank, 2019), p. 208 (Commission register “clearly below an acceptable standard”); Curtin, *Executive Power of the European Union* (OUP, 2009), p. 222 (“not all documents produced or handled by the Commission are included or even listed in a comprehensive and accessible manner”) and p. 225.

128. Report cited *supra* note 28, para 5.1.3.

129. This becomes apparent just by looking at a small sample: of the 479 registered documents dated between 1 and 15 July 2019, most of the 401 C documents are (implementing) decisions, the 38 COM documents are mostly proposals for decisions or reports, many of the 20 SEC documents are notes of decisions adopted through specific procedures, the 17 SWD documents are often (summaries of) evaluations of legal acts, while the 3 OJ documents are agendas of Commission meetings.

130. For some examples, one only has to look at the website <asktheeu.org>, where countless access requests (also) to the Commission are published together with the answers of the Commission and the released documents.

even more striking. Many released documents are business cases and project charters, project status reports, minutes of meetings between Commission services or project teams, notes to and replies from other EU bodies, IT documents or usability tests, to name just a few.¹³¹ Unfortunately, these documents are not listed let alone disclosed in the register even after their release to individuals upon request.¹³²

It must be said that the Commission has repeatedly pointed out that it would be impossible for it to keep a comprehensive register¹³³ and that it was not obliged to list “documents of a purely internal nature” in the register.¹³⁴ However, especially internal documents may be of particular interest. Is it not precisely these documents that contribute to the shaping of a particular policy but, unlike the final result (e.g. a proposal for a legal act), are not published by default? Is it not precisely these documents that are thus the *essence* of a right of access to documents? And how should a person become aware of these documents if their very existence is not even disclosed in the register? The alternative for the individual, as already recognized by the Council more than two decades ago,¹³⁵ is to randomly request all documents on a given subject, thereby both increasing the administrative burden and leading to unjustified discretionary powers on the part of the institution to decide which documents are considered relevant at all.

3.3.6. *Sensitive documents*

The analysis of the registers’ completeness will now be concluded with a look at *sensitive* documents, i.e. classified documents protecting certain essential EU or Member State interests.

As already outlined, the Access Regulation provides for a special regime for these documents, under which the institution concerned may decide, if necessary, not even to register references if doing so could jeopardize the protected interest. However, the institutions are obliged to at least publish the number of non-referenced documents in their annual reports.

Consequently, the Council states in its 2022 report that “279 classified documents were referenced” and that it “issued 1,783 classified documents

131. European Commission Secretariat-General, Director of Directorate C – Transparency, Efficiency & Resources, Letter in the procedure GESTDEM 2021/3971 proposing a fair solution in accordance to Art. 6(3) of the Access Regulation, 6 July 2021, Ares(2021)4386649.

132. See, as a mere example, the more than two dozen documents released to the applicant in GESTDEM 2020/6149, which still cannot be found in the document register. Cf. <asktheeu.org/request/ease_and_artificial_intelligence#incoming-29472>.

133. Cf. e.g. Commission Report cited *supra* note 28, para 5.1.2; European Ombudsman Decision cited *supra* note 32, paras. 14, 22 and 44–45.

134. Cf. Curtin, *op. cit. supra* note 127, p. 225, with reference to a 1999 discussion paper of the Commission.

135. See *supra* at section 2.1.

that are not listed in the register”.¹³⁶ In previous years, these figures amounted to 255 and 564 (2021);¹³⁷ 460 and 379 (2020);¹³⁸ 908 and 99 (2019);¹³⁹ 905 and 73 (2018);¹⁴⁰ 552 and 259 (2017);¹⁴¹ and 497 and 248 (2016).¹⁴² This is in complete contrast to both the Parliament and the Commission. While the Parliament always emphasizes that “[n]o sensitive document, within the meaning of Article 9 of Regulation (EC) No 1049/2001, was recorded in the public register”,¹⁴³ the Commission either states that “[n]o sensitive documents falling within [the covered] categories were created or received”¹⁴⁴ or, more recently,¹⁴⁵ simply does not mention the issue at all.

The fact that neither the Parliament nor the Commission record exemptions for sensitive documents is another indication that their registers are incomplete. Either the obligation to register documents is taken so loosely that there are no records of these non-referenced documents, or the register is structurally inadequate to such an extent that there were no sensitive documents to be included in the first place – and thus no need to exclude them and document this process in the annual report. At first glance, this seems unlikely. However, given the depicted narrow scope of the registers of the Parliament (largely limited to public parliamentary documents) and the Commission (largely limited to final – and official – documents), it may even be conceivable. In any case, these figures confirm the general finding that the EU registers, and especially those of the Parliament and the Commission, are incomplete.

3.4. *The target of maximum proactivity*

3.4.1. *Notion*

Proactivity is another important factor in examining the extent to which current registers of documents reflect the deeper meaning of the general right

136. Council 2022 Report cited *supra* note 110, 7.

137. Council 2021 Report, Document 8196/22, 6.

138. Council 2020 Report cited *supra* note 97, 8.

139. Council 2019 Report, Document 7483/20, 3.

140. Council 2018 Report, Document 7917/19, 3.

141. Council 2017 Report, Document 8689/18, 3.

142. Council 2016 Report, Document 7903/17, 3.

143. Cf. the annual reports of the Parliament for 2022 (cited *supra* note 104), 2021 (PE 730.712/BUR/ANN), 2020 (PE 692.104/BUR/ANN), 2019 (PE 650.308/BUR/ANN), 2018 (no PE reference), 2017 (PE 620.190/BUR/ANN) and 2016 (PE 605.750/BUR/ANN), in each case on page 5.

144. Cf. COM(2018)663 final, “2017 Annual Report of the Commission”, 5; COM(2017)738 final, “2016 Annual Report of the Commission”, 4.

145. Cf. the annual reports for 2022 (COM(2023)523 final), 2021 (COM(2022)498 final), 2020 (COM(2021)459 final), 2019 (COM(2020)561 final) and 2018 (COM(2019)356 final).

of public access to documents. Proactivity can be defined as “taking action to make changes yourself rather than reacting to things that happen”.¹⁴⁶ For the purposes of this study, it means that an institution should provide public access in a straightforward manner (and not only references) to as many documents as possible, without waiting for corresponding requests.

It is the Access Regulation itself which, in Article 12, requires EU institutions to make documents “directly accessible” to the public, even if only “as far as possible”. Legislative documents in particular “should . . . be made directly accessible”.

3.4.2. *The Parliament*

For the register of the Parliament, this analysis is the easiest: as already mentioned, it is a challenge to come across referenced but not accessible documents *at all*. This is confirmed by the generally not very informative annual report, which only states that “[p]ractically all documents . . . can be directly downloaded via the website”.¹⁴⁷ However, as noted, this almost complete direct accessibility of the Parliament register is anything but an indication of its completeness – let alone proactivity.

3.4.3. *The Council*

Much more interesting and challenging is examining the proactivity of the registers of the other two institutions. The Council provides comprehensive information in this regard in its annual reports. Accordingly, on 31 December 2022, 71.9 percent of all the 482,786 original language documents available in its register “were public and available to download”.¹⁴⁸ The same applies to 69.6 percent of documents added in 2022,¹⁴⁹ 73.7 percent of the 2021 ones,¹⁵⁰ 72.8 percent of the 2020 ones¹⁵¹ and 70.9 percent of the 2019 ones.¹⁵² This means that a reasonably large proportion of Council documents are directly accessible.

However, the annual reports of the Council also reveal a well-known problem. In 2022, for instance, the Council issued 11,173 LIMITE documents,¹⁵³ i.e. “documents internal to the Council which are not

146. Cf. the entry “proactive” in the Cambridge Dictionary, available at <dictionary.cambridge.org/dictionary/english/proactive>.

147. Parliament 2019 Report cited *supra* note 143, 6.

148. Cf. Council 2022 Report cited *supra* note 110, 6.

149. *Ibid.*, 7.

150. Council 2021 Report cited *supra* note 137, 6.

151. Council 2020 Report cited *supra* note 97, 8.

152. Council 2019 Report cited *supra* note 139, 3.

153. Cf. Council 2022 Report cited *supra* note 110, 7.

automatically made public”.¹⁵⁴ Yet, such documents are not secret and can therefore be requested by individuals. This practice is particularly problematic for legislative documents. In this area, Article 12(2) of the Access Regulation requires direct access to be the rule, but also in this specific field the percentage of documents initially marked as LIMITE – and thus not accessible – is very high: out of the 4,340 legislative documents added in 2022, no less than 2,139 were issued as LIMITE.¹⁵⁵ Thus, 45 percent of all formal documents registered in 2022 – and even 49 (!) percent of legislative documents – are not directly accessible. Whether this practice meets the normative requirements of the Access Regulation is highly questionable.

This is all the more problematic because the LIMITE marking is done independently of a prior assessment of whether exceptions under Article 4 of the Access Regulation are applicable.¹⁵⁶ On the contrary, there is a clear indicator that, in most cases, the marking was not justified, and that is the percentage of LIMITE documents disclosed to individuals upon request. In 2022, out of 10,902 requested documents,¹⁵⁷ no less than 9,019 were – almost always fully¹⁵⁸ – released upon initial requests, and another 82 documents upon confirmatory applications. This corresponds to a very high rate of 83.5 percent in 2022,¹⁵⁹ after an astonishingly high rate of 89.5 percent in 2021,¹⁶⁰ 88.6 percent in 2020,¹⁶¹ and 81.8 percent in 2019.¹⁶²

As a result, also 1,207 of the new 2,139 legislative documents added in 2022 and marked as LIMITE were already made public upon request, and another 112 of them were made partially available.¹⁶³ For 2022, this is equivalent to full disclosure of 56.4 percent and partial disclosure of 5.2 percent of them. Thus, “only” 820 of the 4,340 legislative documents originally concerned are still not accessible, and in many cases this is probably just because they have not yet been requested.

The high percentage of positive responses to access applications may seem commendable. However, this high percentage is also a clear sign that direct disclosure, if necessary with some redactions, could be a more efficient

154. Handling of documents internal to the Council, 9 June 2011, Document 11336/11, 2 (para 4).

155. Cf. Council 2022 Report cited *supra* note 110, 7.

156. Cf. European Ombudsman Report cited *supra* note 116, paras. 33–34.

157. Cf. Annex to the Council 2022 Report cited *supra* note 110, 24.

158. Full releases: 8,064; partial releases: 955. Cf. *ibid.*

159. Interestingly, according to the Council this rate would be as high as 88.7%. However, this is clearly due to a calculation error.

160. Cf. Annex to the Council 2021 Report cited *supra* note 137, 25.

161. Cf. Annex to the Council 2020 Report cited *supra* note 97, 23.

162. In the 2019 Annual Report, however, this percentage is erroneously stated as 86.4: Council 2019 Report cited *supra* note 139, 21.

163. Cf. Annex to the Council 2022 Report cited *supra* note 110, 34.

practice in most cases.¹⁶⁴ Or, put simply, if more than eight out of ten requested LIMITE documents are released, why not try to make proactive disclosure the rule?

3.4.4. *The Commission*

The document register of the Commission, as already seen, clearly includes too few categories of documents. Are these documents at least consistently accessible to the public?

In order to provide an up-to-date overview, on 1 October 2023 the accessibility of referenced documents from 2019 was scrutinized. The result is as follows. The register referenced 487 SWD documents, out of them only 108 were publicly accessible (22.17 percent); 471 SEC documents (189 accessible, therefore 40.12 percent); 8,741 C documents (745 accessible, i.e. 8.52 percent); 663 COM (554 accessible, i.e. 83.55 percent); 42 OJ documents (all accessible); 42 PV documents (all accessible); 18 JOIN documents (none accessible),¹⁶⁵ and 3 P documents (none accessible too).¹⁶⁶ That this is still the case is confirmed by the Commission itself, which assumes, in the Annex to a 2020 implementing decision, that the register “provides metadata for approximately 260 000 documents” and that “[o]ut of this, around 29 000 documents (11 percent) have PDF . . . files attached, translated in multiple languages”.¹⁶⁷

Thus, not only is the register of the Commission incomplete, it also shows a surprisingly low level of proactivity. The high success rate of access requests is also meaningful: in 2022, the Commission only refused access in 12 percent of the cases at the initial stage. Moreover, as regards those documents whose

164. This was one of the “lessons” from Finland’s attempt to enhance proactive legislative transparency during its Council Presidency in the second half of 2019: the “presidency and the GSC services have not been informed of any adverse effect or other negative impact of these practices”. Cf. *Openness and Transparency during Finland’s Presidency of the Council of the European Union – Presidency Report*, 13 Dec. 2019, Document 14856/19, 9.

165. It is incomprehensible that JOIN documents, which are even published on EUR-Lex, are not accessible also via the Commission register.

166. These figures differ from the “number of documents entered in the register” according to the Annex to the Commission 2019 Report cited *supra* note 145, 1. However, this difference most likely exists because the number given in the report also counts “previous version(s)” of the same document as separate documents, whereas in the register these previous versions are shown as part of the same document and are not counted as separate search results. In addition, one should note a discrepancy between the data available. In theory, adding up the number of documents listed under the different categories should provide the total number of documents held by the Commission. In turn, this figure should correspond to the number of documents displayed when all eight categories are selected (or fully deselected) on the website. However, this is not the case. If one sums up the number of documents held in each category, the result is 10,467; if one selects all the categories on the website, the result is 10,441; and if one deselects all of them, the result is 10,437.

167. ISA² Work Programme 2020, C(2020)1171 final, Annex 1 – Part 2/2, 347.

access was initially refused, the Commission granted at least partial access in 51 percent of the cases that reached the confirmatory stage.¹⁶⁸ As just argued for the Council, this high percentage is an indicator for the limited risk of a more proactive disclosure policy.

3.4.5. *Release-to-one, release-to-all*

A final question is: are the disclosed documents subsequently made accessible to everyone? While there is no legal obligation under the Access Regulation to do so, “release-to-one, release-to-all”¹⁶⁹ is still a “commendable practice”¹⁷⁰ – and for the Council and the Commission it also constitutes a legal obligation under their internal Rules of Procedure.

The importance of *proactive* document registers cannot be stressed enough. In the case of “classic”, passive access to documents, documents are not accessible by default; they are released only upon request and only to single individuals. Under this model, documents remain relatively secret, at least as long as the released documents are not disclosed *erga omnes* in a highly visible online portal. Proactive disclosure, on the other hand, is much less unequal: the documents become common property and thus enable much broader public scrutiny of the functioning of the institutions.

In practice, there are significant differences between the three institutions. Although not legally obliged to do so, the *Parliament* register keeps a separate document type for these documents, searchable via the “Advanced search” option.¹⁷¹ Under this type, a total of 674 documents is currently displayed. However, this figure already proves that released documents are not uploaded consistently in the register: only in 2021, over 1,153 Parliament documents were disclosed, while the year before this happened to “a similar number” of documents.¹⁷² Apparently, the remaining documents have not been uploaded yet. This disappointing result was also confirmed by previous scholarly analyses.¹⁷³

168. Cf. Annex to Commission 2022 Report cited *supra* note 145, 6.

169. As this practice is sometimes called in the US. Cf. e.g. Noveck, “Open data: The future of transparency in the age of big data” in Pozen and Schudson (Eds.), *Troubling Transparency* (Columbia University Press, 2018), p. 218.

170. European Ombudsman Proposals cited *supra* note 79, para 22 (Frontex) and para 20 (Europol). Also for the US, Noveck proposes “shifting to a release-to-one, release-to-all strategy”, “perhaps with a short delay . . . to maintain media incentives” (Noveck, *ibid.*, p. 218).

171. “6 Other categories of document disclosed in the framework of Regulation (EC) No 1049/2001”. For it, one has to click on “Document type” at the top of the page.

172. Parliament 2021 Report cited *supra* note 143, 7. The 2022 Report does not provide a figure in this regard.

173. Giménez Bofarull, Hoffmann-Axthelm, Manzi and Teixeira, *op. cit. supra* note 74, p. 20.

The register of the *Council* does not have an own search function for released documents, but its open data website includes a separate search portal¹⁷⁴ that allows to “browse requests for public access to Council documents”. This portal provides an informative look into all access requests and their answers; whenever documents were subsequently published in the register, it also provides direct links to them. However, public accessibility is not the standard for all released documents. In the case of “public upon request” replies, the “document is public but too old or of a type that cannot be loaded into the register”. To approximate how common these replies are, on 1 October 2023, a sample was run limited to requests dated between 1 and 15 July 2019. This showed that 135 released documents (and nine partially released documents) were available in the register, but 216 (and nine partially released documents) were not. Thus, at least during this limited period, the Council made far less than half of the documents released to individuals accessible *erga omnes* in the register. The reasons for this are unclear, especially since documents from 2019 are certainly not “too old” to “be loaded into the register”. Apart from that, the Council’s intelligible display of information on all access requests in open data format is commendable.¹⁷⁵

Finally, the *Commission* has long failed to fulfil its obligation to disclose released documents. This only recently changed when the long-awaited “Electronic Access to European Commission Documents” portal (EASE)¹⁷⁶ was finally launched. This website grants access to documents partially or fully disclosed after 1 October 2022. A compact search feature means documents can be browsed according to their date of disclosure, competent department, or the presence of redactions based on the exceptions listed in Article 4 of the Access Regulation. A different subpage allows a request to access further Commission’s documents to be submitted, providing useful advice and legal information to the user.¹⁷⁷ On 15 December 2023, EASE encompassed 5,497 documents.

4. Shortcomings and hopes for EU document registers

4.1. *A violation of the Access Regulation*

In sum, the analysis of the document registers of the Parliament, the Council and the Commission has revealed two types of divergence: first, between the

174. See [<consilium.europa.eu/en/general-secretariat/corporate-policies/transparency/open-data/access-to-documents>](https://consilium.europa.eu/en/general-secretariat/corporate-policies/transparency/open-data/access-to-documents/).

175. And was also noted by the European Ombudsman Decision cited *supra* note 90, para 28.

176. See [<ec.europa.eu/transparency/documents-request/home>](https://ec.europa.eu/transparency/documents-request/home/).

177. See [<ec.europa.eu/transparency/documents-request/guidance>](https://ec.europa.eu/transparency/documents-request/guidance/).

Access Regulation 1049/2001 and the internal rules of the three institutions; second, and even more clearly, between the law and the practice of document registers. While the three institutions are legally obliged to use the registers as a key support tool to ensure the effectiveness of people's right of access to documents, in practice registers can at best partially fulfil this role since they are structurally *incomplete*. Moreover, the three registers are lacking *user-friendliness* and their *proactivity* is also extremely limited. In short, the practice of the three registers does not meet the legal requirements of the Access Regulation, albeit to varying degrees.

The Commission is perhaps the furthest from the legal ideal of a complete register. Not only are its documents scattered across a confusing jumble of registers, portals and websites, but their scope, and especially the scope of the main register, is structurally inadequate as it is mostly limited to formal, official and/or final documents. Given the public nature of most registered documents, also the low percentage of direct accessibility is incomprehensible. The Parliament does slightly better, but most likely only because the parliamentary activity and the associated documents inherently have a high degree of publicity. With regard to (internal) administrative documents, however, the Parliament register seems to be just as inadequate. Interestingly, the Council, otherwise considered as particularly non-transparent, is best positioned in relation to the contents of the register. However, mainly due to its practices with Working Documents (WK) and LIMITE documents, it too does not reach a sufficient standard. The Council in particular could also improve the user-friendliness of its register.

The empirical analysis has thus demonstrated that the practice of the three registers is not compliant with the Access Regulation, which requires that references to documents are recorded "without delay", that documents – and especially legislative ones – be made proactively accessible as far as possible, that the register indicates where documents can be found elsewhere, that institutions provide information and assistance to citizens "on the use of the public registers", etc.

Such a divergence between normative requirements and the practice of the three registers is reinforced by a lack of enforceability. Just as European "judges are not empowered to order the institutions to hand . . . documents over to the applicant",¹⁷⁸ it is also hard to imagine an enforceable court order to keep a user-friendly and complete register.

178. Rossi and Vinagre e Silva, op. cit. *supra* note 2, pp. 7–8. Cf. also the order issued on 14 July 2015 in the Case T-617/14, *Pro Asyl v. EASO*, EU:T:2015:561, para 53 ("However, even if such an omission [of keeping a document register] were to be imputable to EASO, it could not be sanctioned in the context of an action for annulment"; free translation, as the order is only available in German and French). According to the Opinion of A.G. Kokott in the Case

This may all sound quite sobering, but there is also an enormous potential for improvement. In fact, all three registers have positive aspects, particularly in terms of appearance and functionality. User-friendliness and transparency could be increased by harmonizing the annual reports,¹⁷⁹ which are an important instrument of comparison and ultimately a valuable accountability tool as long as their quality is adequate. Improving the infrastructure of the registers would also benefit the institutions, as many unnecessary access requests could be avoided if users were able to find documents that are already available in the registers.

The decisive quantum leap, however, would be to improve the *completeness* and *proactivity* of all three registers. This is urgently necessary in view of the clear deficiencies that have been uncovered in this regard. And again, a change in their practice would ultimately also benefit the institutions themselves. It would not only alleviate the problem, particularly lamented by the Commission, of requests relating to “complete specific files or to ‘all documents’ on a given subject, requiring the analysis of a large number of documents”, but it could also lead to a reduction in access requests if documents were disclosed proactively on a wide scale. This would, of course, require far-reaching adaptations of the document management systems in order to link these internal systems in a much better way, and ideally even automatically, with the external registers.¹⁸⁰ These changes, however, are needed in order to ensure the greatest possible access to documents – ideally timely and *proactively*, not just reactively and upon request. And indeed, this is what the ongoing (and never-ending) project of a “Joint Legislative Portal” seems to be aiming at.

4.2. *The Joint Legislative Portal: Waiting for light at the end of the tunnel*

One enterprise that will – directly or indirectly – shape the future of the right of public access to documents is the Joint Legislative Portal (JLP), which is years behind schedule.

C-127/13 P, *Strack v. Commission*, EU:C:2014:455, para 67, “Compliance with the duty to register documents cannot therefore be enforced by means of an application for access to documents. Rather, in order to enforce such compliance, an action for failure to act under Art. 265 TFEU would have to be brought”. This position was referred to by the Court in para 44 of the judgment.

179. Already in 2004, it was considered “to draw up annual reports based on a uniform model”. Cf. Commission Report cited *supra* note 28, para 7.1.5.

180. Cf. already in 2008, European Ombudsman Decision cited *supra* note 32, para 22: “The Ombudsman therefore found it difficult to see why it should be impossible for the Commission to draw up a comprehensive register of documents on the basis of the existing internal registers”.

In its 2021 Communication entitled “Better Regulation: Joining forces to make better laws”,¹⁸¹ the Commission considered “[i]ncreased transparency” as an important element for better law-making. In particular, the Commission intended to reach out to the Parliament and the Council “to set up a common evidence register, the Joint Legislative Portal, that will allow anyone interested in EU policy-making to find easily all the evidence underpinning a given initiative”. In this regard, the Communication noted that “[o]pening up scientific evidence . . . is also essential to strengthen public trust”.¹⁸² Overall, the goal was to “make evidence underpinning every legislative proposal easily accessible by interlinking databases and repositories better and gradually opening them up to the public”.¹⁸³

This Communication gives the impression that the Commission was willing to extend the practice of timely and proactive disclosure of documents. What is confusing, however, is the repeated reference to “evidence”.¹⁸⁴ How is this notion of evidence to be understood? Is the Commission only concerned with those documents that are supposed to create the “scientific” basis for the respective legislative projects? If so, what about all other documents of the legislative process? The reference to the JLP, which Parliament, Council and Commission agreed to introduce back in 2016,¹⁸⁵ but has still not been implemented, may suggest that disclosure of *all* related documents – and not only of evidence in the narrower sense – is intended. On the other hand, the designation of the JLP as a “common evidence register” is at least peculiar and may equally indicate a restrictive understanding of the same JLP, which was in no way limited to evidence, but intended to include all relevant information and documents.¹⁸⁶ In any case, the Communication shows once again that the general trend is towards more proactive transparency – especially for, but hopefully not limited to, scientific and expert knowledge.

Moreover, information and documents disclosed in the JLP are to be structured in one file for each legislative procedure, and it is precisely this structured approach – so far only available at the Legislative Observatory of the Parliament – that would represent a significant improvement over the

181. Cf. COM(2021)219 final, “Better regulation: Joining forces to make better laws”.

182. *Ibid.*, 7.

183. *Ibid.*, 21.

184. Hillebrandt, “New Commission Communication on law making calls for ‘increased transparency’”, *Open Government in the EU* (5 June 2021), available at <eu-opengovernment.eu/?p=2041>.

185. Cf. para 39 of the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission of 13 April 2016 on better law-making, O.J. 2016, L 123/1.

186. Cf. also Hillebrandt, *op. cit. supra* note 184, concluding that “[i]t remains unclear whether the [Communication] is intended to reframe and override, or rather to complement the previous interinstitutional commitment”.

current landscape of unstructured document registers. According to the current outlook, the JLP is to be delivered by the end of 2024.¹⁸⁷

4.3. *Recommendations*

4.3.1. *Structured registers*

The suggested proactive turn should thus be accompanied by another paradigm change in order to enable orientation: a shift towards *structured* document registers. As the Commission rightly points out, the registers are currently “scoped, designed and implemented in an isolated manner”, resulting in data made available “as ‘isolated hubs’ of potentially inter-related information”.¹⁸⁸ Such a structured approach could be implemented by organizing the registers in procedure files, as is the case today (almost) only in the Legislative Observatory of the Parliament, and/or by providing contextual information for each document.

For instance, this could be done by adding direct links to all documents referenced in the requested document, or to related documents of the same or other EU institutions, along the lines of the commendable EU database of the Austrian Parliament.¹⁸⁹ The Legislative Observatory and the database of the Austrian Parliament could together form a model for the document registers of the European Parliament, the Council and the Commission, as well as of other EU institutions and agencies.

A well-structured register is key also for equality reasons. While expert users such as journalists or academics could find their way around even in a disordered register, this is not the case for “normal” users. An interested citizen will hardly have enough time, resources, competence, and patience to delve into an unstructured register showing hundreds of thousands of different documents lacking an evident organization. This is demonstrated by the fact that current statistics on requests for documents show a preponderance of requests from academics and other specialized user groups such as lawyers, civil society, the private sector and journalists.¹⁹⁰ The establishment of structured document registers is therefore critical to ensuring that the right of

187. Cf. the answer given by Vice-President Šefčovič on behalf of the European Commission to parliamentary question E-002508/2022, 14 Sept. 2022.

188. European Commission, Secretariat-General, Final Report. Study on the Secretariat-General Registers, Doc. Version 18.0, 26 April 2019, 15.

189. Available in German at <parlament.gv.at/PAKT/EU>.

190. In 2022, for instance, at least 8% of initial requests to the Commission, 33% of requests to the Parliament, and 25% (33% in 2021) of initial requests to the Council came from academia. Cf. Annex to Commission 2022 Report cited *supra* note 145, 4; Parliament 2022 Report cited *supra* note 104, 10; Council 2022 Report cited *supra* note 110, 25; Council 2021 Report cited *supra* note 137, 25.

(all) citizens and persons residing in the Union to access documents under EU primary law is respected as a positive obligation.

4.3.2. *Completeness*

According to the Access Regulation, document registers must be complete and contain at least a reference to all documents created or received by EU public institutions. As shown, however, the current implementation of the three registers shows critical shortcomings as regards their completeness.

To overcome this situation, action is needed in several respects. First, the institutions should ensure that, as a rule, all documents are referenced in the register in a timely manner. Second, they should avoid automatically marking documents as “LIMITE”, as this classification hinders their automatic disclosure and requires citizens to specifically ask for them. Third, public registers should not be limited to documents that contain “evidence” (whatever that may mean), since this would unduly restrict the application of the Access Regulation and, more importantly, the scope of the right of access to documents as enshrined in EU primary law. Fourth, for the same reason, a strict distinction between legislative and administrative documents (thus limiting the right to access the latter) must be avoided as much as possible. In the EU, administrative documents play a crucial role in the public decision-making process and must therefore be accessible to interested citizens. Fifth, a policy of “release-to-one, release-to-all” could better ensure general equality and – on a more pragmatic note – avoid unnecessary requests for already released documents.

To achieve all these goals, a “transparency by design” approach and a closer connection between (internal) document management systems and (external) document registers seem very promising.

4.3.3. *Transparency by design*

At first glance, such comprehensive registers may seem difficult to implement. However, this could change if there were a much stronger focus on what the Ombudsman aptly calls “transparency by design”.¹⁹¹ For instance, the requirements of a later disclosure could already be taken into account when setting up a document; for example by marking text passages that fall under an exception according to Article 4 of the Access Regulation. This could be done with the help of a tool that enables invisible marking of affected passages so that, at a later stage, staff could simply change between the full and redacted versions of the documents with one click.¹⁹² Also, the reasons for the

191. European Ombudsman Decision cited *supra* note 90, para 22.

192. Cf., for a similar idea, the Report of the European Ombudsman following his [sic] visit to the European Police Office (Europol), OI/9/2012/OV, 18 Dec. 2014, available at

redaction of these passages could already be given at this moment in order to simplify later decisions on access requests. Likewise, “redactions of personal data and other sensitive information” could be made “a standardized operation”.¹⁹³

4.3.4. *Closer interconnection between internal and external registers*

Ideally, transparency by design could even go so far as to link the (external) document registers more closely to the (internal) document management systems and make use of the fact that the systems of the Parliament and the Commission¹⁹⁴ already classify single documents into procedure files. For example, all internal references and file structures could automatically be transferred to the external register – with a standard “opt-in” feature for full-text disclosure, which should be the rule, and an exceptional “opt-out” option with regard to the references of sensitive documents under Article 9 of the Access Regulation. Such an automatic interconnection of the internal and external registers may be costly in its implementation, but it could then contribute to significantly reducing the administrative burden of the institutions, especially if it involves a change to a *structured* document register that would make the burdensome “all documents” requests obsolete. Ultimately, an automatic interconnection of this kind would constitute a Copernican turn towards an administration that operates in the sunlight.

4.3.5. *User-friendliness*

Finally, the importance of user-friendliness cannot be overstated. Document registers should be designed in such a way that enables both expert and non-expert users to use them, rapidly finding the information they are looking for. It is apparent how such a feature is closely interrelated with the principle of equal treatment, allowing people to exercise their right of access to documents regardless of their expertise and available resources.

In order to increase the user-friendliness of the registers, several relevant features have been mentioned above: a clear layout, easy-to-understand explanations, the presence of links, a structure that allows an informative overview of the available documents, an easily accessible form for requesting missing documents, and numerous search tools that meet the needs of both

<ombudsman.europa.eu/visit-document/en/49145>, para 30. There are already tools on the market that use artificial intelligence (AI) to anonymize documents more efficiently.

193. Cf. European Ombudsman Decision cited *supra* note 90, para 26 and the first suggestion for improvement.

194. At the Commission there is already the possibility to “externalize” documents from the document management system (Ares) to the public. Cf. European Commission, Ares Administration Manual, Version 5, Ares 2.5, 25 Oct. 2013, 16–18, available at <asktheeu.org/es/request/1089/response/3901/attach/5/Admin%20ARES%20EN.pdf>.

basic and expert users. *Pro futuro*, one could also consider merging the three registers into one, or at least providing for a common design of the registers. This in itself would allow users familiar with one of the registers to efficiently use the others as well, decisively improving the effectiveness of the right of public access to documents under EU primary law.

5. Conclusion

A shift towards more proactive and structured document registers, supported and achieved by a stronger focus on “transparency by design”, would undoubtedly represent a quantum leap in terms of both their user-friendliness and completeness. It remains to be seen, however, whether the will exists for such far-reaching changes, or whether the EU document registers will retain their current – inadequate – form, in which they can only be fruitfully used by a limited number of specialized users.

In their current form, one might even wonder whether the registers have not become an outdated instrument. This question could be the subject of future research, as could the question of adapting the registers – and the access right in general – to changed forms of communication, and thus documents. In any case, the issue of transparency by disclosure and the closely related tool of document registers have clear political implications and are linked to core questions of democracy. Ultimately, a more proactive and structured document register could help transform access to documents from a somewhat dusty tool for academics and other specialized users to a more effective means of information, control and accountability.

