Access to Environmental Information: Delimitation of a Right

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I. INTRODUCTION

The correlation between democratic accountability and effective protection of the environment has increasingly been recognized both domestically and internationally.[1] Public participation in the everyday stewardship of the environment is considered a prerequisite for establishing and operating a proper environmental protection regime. The reasons for public involvement are eminently practical. Long gone are the days when acute environmental problems could be resolved by the traditional means of command legislation and state enforcement. The first phase of environmental regulation, the era of prohibitions, has ended, having successfully addressed problems of emission and disposal of major pollutants into the environment. The second phase, currently under way, necessitates much more elaborate means of intervention. Eventually a readjustment of our economic

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1. *See* HÅKAN NORDSTRÖM & SCOTT VAUGHAN, WTO, SPECIAL STUDIES 4, TRADE AND ENVIRONMENT 11 (1999), *available at* (visited June 24, 2000) <http://www.wto.org/wto/environ/environment.pdf>.

and social life towards the integration of environmental concerns will be necessary. In a democratic society such a task cannot be undertaken, let alone brought to fruition, without the effective involvement of an informed and proactive citizenry. Access to environmental information—accurate, current, relevant and complete information—thus becomes an indispensable tool for the development and implementation of environmental policies.[2]

The importance of citizen participation was realized early in the evolution of environmental law, although this was possible only in the context of highly organized structures that would contain the tension between citizen participation in the decision-making process and the ingrained state characteristics of confidentiality and secrecy. It was no accident that the first examples of such legislation are found in European Community (Community or EC) law. The Member States of the Community met all the requirements for citizen involvement and had all the administrative reflexes to preclude "excessive" messing about with the process of government.[3] Most recently, the international community, albeit at the regional level, was able to agree on similar rules of access to environmental information.[4] Underlying such normative developments is a reluctant yet constant movement toward the elaboration of the right to access to such information as an essential parameter to the slowly evolving human right to a decent environment.[5]

II. COMMUNITY REALITIES

A. Access to Information as a General Principle

Transparency in the decision-making process and free access to documents are among the primary tools available to the European Community, and the European Union (the Union) at large, in order to redress the balance of their legitimacy.[6] As the Community evolved from an international organization[7] to a major exercise of integration

2. *See* Cliona Kimber, *Access to Justice and Freedom of Environmental Information*, 1997 EUR. BUS. L. REV. 157.

3. *See infra* Part II.

4. *See infra* Part III.

5. *See infra* Part IV.

6. *See* Gráinne de Búrca, *The Quest for Legitimacy in the European Union*, 59 MODERN L. REV. 349 (1996).

7. In fact, three organizations were created: the European Coal and Steel Community (ECSC) was created in 1952, and the European Economic Community (EEC) and the European Atomic Energy Community ("Euratom") were created in 1958.

into a supranational entity,[8] the democratic deficit of the whole enterprise was increasingly brought to the fore. Such considerations led to a number of adjustments in the Treaty on European Union[9] (TEU) and especially in the Treaty of Amsterdam,[10] which amended Article 1 of the TEU to a single phrase setting out the objectives of the Union for the next century: "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen."[11] Transparency[12] and subsidiarity[13] were thus created fundamental principles of Community law[14] and the institutions were supposed to proceed accordingly.

A more specific individual right of access to Community documents is included in Article 255 of the Treaty establishing the European Community (the EC Treaty), as amended in Amsterdam: "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents . . . ."[15] The practicalities of implementation, regarding in particular Council of the European Communities documents, are further elaborated upon in Article 207(3) of the EC Treaty, which ultimately leaves the Council as the final arbiter of what can and cannot be made

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8. For a delightful overview of the growth of the Community, see Philip Allott, *The Crisis of European Constitutionalism: Reflections on the Revolution in Europe*, 34 COMMON MKT. L. REV. 439 (1997). *See also* J.H.H. WEILER, THE CONSTITUTION OF EUROPE—DO THE NEW CLOTHES HAVE AN EMPEROR? (1999) (discussing how European integration has led to a disempowerment in status as citizens).

9. Treaty on European Union, Feb. 7, 1992, O.J. (C 191) (1992), 31 I.L.M. 247 (1992) [hereinafter TEU] (renaming the EEC simply the "European Community" and creating a new entity, the European Union).

10. Treaty of Amsterdam, Amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, 1997 O.J. (C 340) [hereinafter Treaty of Amsterdam]. The Treaty of Amsterdam renumbered the articles of the founding treaties and this paper will follow the new enumeration.

11. TEU, *supra* note 9, art. 1.

12. *See* Deirdre Curtin & Herman Meijers, *The Principle of Open Government in Schengen and the European Union: Democratic Retrogression?*, 32 COMMON MKT. L. REV. 391 (1995); *see also* Pierre Bischoff, *L'information du Secteur Public en Europe: Accès, Diffusion et Exploitation*, 432 REVUE DU MARCHE COMMUN ET DE L'UNION EUROPEENNE 620 (1999).

13. A protocol on the principles of subsidiarity and proportionality was also attached to the EC Treaty by the Treaty of Amsterdam. *See* Treaty of Amsterdam, *supra* note 10, at 105; *see also* PAUL CRAIG & GRÁINNE DE BÚRCA, EC LAW: TEXT, CASES AND MATERIALS 124-26 (2d ed. 1998); T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 111-13 (4th ed. 1998).

14. *See* CRAIG & DE BÚRCA, *supra* note 13, at 368-71 (regarding the principle of transparency).

15. Consolidated Version of the Treaty Establishing the European Community, Oct. 11, 1997, art. 255, O.J. (C 340) [hereinafter EC Treaty].

public.[16] In a typically democratic fashion, however, the activities of the Council in its legislative capacity, including results of votes, explanations of votes, and minutes, shall be made public.[17] The same applies to activities undertaken in the context of both the second pillar of the Union, the common foreign and security policy,[18] and the third pillar, police and judicial cooperation.[19] To a certain extent, this provision complements the right of every European citizen to petition any European institution,[20] in any of the official languages of the Community,[21] and have an answer in the same language.[22]

B. Access to Environmental Information

Although the link between access to environmental information and effective protective action was recognized long before the Community felt obligated to safeguard its democratic principles through transparent administration, there is still no comprehensive legal regime for environmental information held by public authorities. Acknowledging the fact that a fundamental right of access to administrative information is contained in the domestic legislation of all EC Member States, the Community began to regulate public participation in environmental decision-making at an early stage. Indeed, the most convincing evidence for the widespread acceptance of such regulation on the domestic level is arguably to be found in the long period during which Council Directive 90/313/EEC,[23] on access to information relating to the environment, was kept away from the august halls of the Court of Justice of the European Communities (the European Court of Justice or the ECJ).[24]

The contrast at the Community level could not be greater. No specific legislation regarding environmental information exists even today; thus, the right to access to environmental information is left subject to the trials and tribulations of a general right of access to

16. *See id.* art. 207(3).
17. *See id.*
18. *See* TEU, *supra* note 9, art. 28.
19. *See id*. art. 41.
20. *See* EC Treaty, *supra* note 15, art. 19.
21. The official languages are Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish. *See id.* art. 314.
22. There is a precedent in Regulation 1408/71, which allows the social security claimant to correspond with the social security administrations of all member states in any Community language. *See* Andrea Biondi, *The Flexible Citizen: Individual Protection After the Treaty of Amsterdam*, 5(2) EUR. PUB. L. 257-58 (1999).
23. 1990 O.J. (L 158) 56.
24. *See* discussion *infra* Part II.B.2.

information held by the Community institutions.[25] The European Court of Justice has had occasion to review these hesitant advances on a number of occasions, although never in the context of environmental information.[26] Yet, European Commission (Commission) statistics reveal that almost one fifth of all requests for information refer directly to environmental concerns or entail environmental repercussions.[27] Thus, the conclusions reached by the Court, upon examination of the existing rules and their interpretation, remain valid for delimiting a right of access to environmental information in the Community.

1. A Right Addressed to the Institutions

The inclusion in the founding treaties of provisions recognizing the right of information as an essential prerequisite of effective democratic participation in the decision-making process is certainly significant. However, in practice, little has changed in the everyday workings of Community organs. The right of access applies only to European Parliament, Council, and Commission documents, thus allowing the great bulk of paperwork generated by a bevy of institutions, specialized bodies, and administrative agencies to evade public scrutiny. Despite the expressed recommendation of the European Ombudsman,[28] that all these institutions adopt rules on public access to their documents, the situation has not been

25. *See* discussion *infra* Part II.B.1.

26. However, one such case before the ECJ was initiated by two environmental organizations in a long saga of confrontation with Community organs over the protection of the Burren National Park in Ireland. The British Branch of the World Wide Fund for Nature and An Taisce, the National Trust for Ireland, challenged a decision by the Irish authorities to construct an interpretative visitors center in the middle of the Burren National Park using EC structural funds. *See* Case C-325/94, An Taisce & World Wide Fund U.K. v. Commission, 1996 E.C.R. I-3727, *aff'g* Case T-461/93, 1994 E.C.R. II-733; *see also* Diana Comijs, *Individual Legal Protection under the Structural Funds*, 2 MAASTRICHT J. OF EUR. & COMP. L. 187 (1995) (reviewing the ECJ's 1994 decision).

27. *See* Silvia Schikhof, *Access to (Environmental) Information*, 4 MAASTRICHT J. OF EUR. & COMP. L. 386, 387 (1997).

28. The Ombudsman is an independent officer appointed by the European Parliament. His task is to receive complaints from every citizen alleging maladministration in the activities of any Community institution or body, notify accordingly the competent authority, and report the outcome of such intervention to both the European Parliament and the authority concerned. *See* EC Treaty, *supra* note 15, art. 195; *see also* A. Pliakos, *Le Médiateur de l'Union Européenne*, CAHIERS DE DROIT EUROPEEN 563 (1994); Konstantinos Magliveras, *Best Intentions but Empty Words: The European Ombudsman*, 20 EUR. L. REV. 401 (1995) (evaluating the Ombudsman's powers and duties).

redressed.[29] Such rules remain essentially voluntary in nature and are not intended to have any legal effect.[30]

There is of course a precedent for the above. In the build-up towards the express "constitutional" recognition of a right of access, the Commission was instructed, in Declaration 17 attached to the Final Act of the TEU, to carry out a comparative survey on the rules governing public access to information in the EC Member States.[31] The ensuing communication[32] served as the basis for the development of a Code of Conduct adopted by the Council and the Commission, which regulated access to their respective documents.[33] The Code was implemented by Council Decision 93/731/EC[34] and Commission Decision 94/90/ESCS/EC/Euratom[35] respectively. It is expected that the Rules of Procedure, prescribed in Article 255 of the EC Treaty, will follow the same pattern.

The Code of Conduct is based on the general principle that the public will have the widest possible access to documents held by the Commission and the Council "with a view to strengthening the democratic character of the Community institutions and the trust of the public in the administration."[36] Documents are broadly defined as "any written text, whatever its medium, which contains existing data

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29. *See* Special Report of the European Ombudsman to the European Parliament Following the Own-initiative Inquiry into Public Access to Documents, 616/PUBAC/F/IJH, 1998 O.J. (C 44) 9; *see also* Peter Gjerhoeff Bommer, *The European Ombudsman: A Novel Source of Soft Law in the European Union*, 25 EUR. L. REV. 39 (2000).

30. *But see* Case C-58/94, Netherlands v. Council, 1996 E.C.R. I-2169, 2198. *See generally* Jos Jansen, *Recent Developments on Access to Environmental Information: Transparency in Decision-Making*, 7 EUR. ENVTL. L. REV. 268-76 (1998).

31. *See* TEU, *supra* note 9, Declaration On the Right of Access to Information, 31 I.L.M. 247 (1992). The Declaration on Transparency provides:

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

Id. at 367.

32. *See* Commission Communication to the Council, the Parliament and the Economic and Social Committee on Public Access to the Institutions' Documents, 1993 O.J. (C 156) 5.

33. *See* Code of Conduct 93/730/EC concerning Public Access to Council and Commission Documents, 1993 O.J. (L 340) 41.

34. 1993 O.J. (L 340) 43.

35. 1994 O.J. (L 46) 58.

36. Case T-309/97, Bavarian Lager Co. v. Commission, [1999] 3 C.M.L.R. 544, 545 (regarding Commission Decision 94/90); *see also* Case T-174/95, Svenska Journalistförbundet v. Council, 1998 E.C.R. II-2289, 2290 (finding that objective of Council Decision 93/731 is to give wide access to citizens).

and is held by the Commission or the Council."[37] The use of the term "held," rather than "created," implies that the Community organs, and also, acting in the second and third pillars, the Union organs, are obligated to make available to the public any documents which have been forwarded to them by other sources, unless confidentiality was expressly requested.[38] Indeed, Declaration 35 attached to the Treaty of Amsterdam specifically provides that an EC Member State will be allowed to request that the Commission or the Council not disclose a document originating from that state to a third party without its prior agreement.[39] The European Ombudsman has already indicated that he will not allow an extension of this power to the other institutions.[40]

The Court of First Instance of the European Communities (the Court of First Instance or the CFI) has further extended the application of the decisions implementing the Code of Conduct to all documentation held by the Community institutions, irrespective of their content.[41] The issue has been examined with respect to documents referring to the common foreign and security policy under Title V, the judicial review of which is expressly excluded from the jurisdiction of the ECJ.[42] In *Hautula v. Council*, the Court of First Instance, considering Article 207(3) of the EC Treaty to be the legal basis for Council Decision 93/731 (and presumably Commission Decision 94/90 as well), held that, in view of the provision of Article 28 of the TEU, and "in the absence of provisions to the contrary,"[43] documents relating to Title V fall within the regulatory ambit of the access to information decisions.[44]

In widening the principle's application, the Court of First Instance has repeatedly stressed that all exceptions to public access must be narrowly construed "so as not to frustrate application of the general principle of giving the public 'the widest possible access to

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37. *Bavarian Lager Co.*, [1999] 3 C.M.L.R. at 547 (citing Code of Conduct 93/730/EC concerning Public Access to Council and Commission Documents, 1993 O.J. (L 340) 41).

38. *See* EC Treaty, *supra* note 15, art. 255(3). Note, however, that Article 255 of the EC Treaty refers only to institution documents, thus extending its protection only to Community-produced documentation. *See id.*

39. *See* Treaty of Amsterdam, *supra* note 10, Declaration No. 35.

40. *See* Jacob Söderman, Rapport général, *Le Citoyen, l'Administration et le Droit Européen*, vol. III, XVIII FIDE Conference, 1998, 313.

41. Actions for judicial review under article 230 of the EC Treaty brought by private individuals or companies, but not by Community institutions or Member States, fall under the jurisdiction of the Court of First Instance. *See* Council Decision 88/591, 1989 O.J. (C 215) 1, *as amended by* Council Decision 93/350, 1993 O.J. (L 144) 21.

42. *See* TEU, *supra* note 9, art. 46.

43. Case T-14/98, Heidi Hautala v. Council, [1999] 3 C.M.L.R. 528, 536.

44. *See id.* at 536 (citing Case T-174/95, Svenska Journalistförbundet v. Council, 1998 E.C.R. II-2289, 2316).

documents.'"[45] Arguably, even discretionary decisions of the competent organs should err on the side of access rather than its denial. The CFI has even indicated a preference for allowing partial access, because the important element is the information contained in a specific document and not the document as such.[46]

Article 4 of the Code of Conduct provides for two categories of public access exceptions: (1) mandatory exceptions purporting to protect the interests of the general public or third parties and (2) discretionary exceptions protecting exclusively the interests of the Community.[47] Under the public interest exception, an institution will refuse access to any document where disclosure could undermine: (1) the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections, and investigations); (2) the protection of the individual and his or her privacy; (3) the protection of commercial and industrial secrecy; and (4) the protection of confidentiality as requested by the natural or legal persons that supplied the information or as required by the legislation of the Member State that supplied the information.[48] In addition, under the confidentiality exception, an institution may refuse access in order to protect its interest in the confidentiality of its proceedings.[49]

Under either exception, the institution must decide, in light of information available to it at the time, whether the disclosure of a particular document is likely to undermine the interests meriting protection. Thus, although the CFI has indicated that "the confidentiality which the Member States are entitled to expect of the Commission in ... circumstances [involving the possible opening of an infringement procedure] warrants ... a refusal of access to [relevant] documents,"[50] it made clear in the case of *Bavarian Lager* that not all documents linked to infringement proceedings are automatically covered by the public interest exception.[51]

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45. Case T-309/97, Bavarian Lager Co. v. Commission, 3 C.M.L.R. 544, 555; *see also* Case T-105/95, World Wide Fund U.K. v. Commission, 1997 E.C.R. II-313, 343; Case T-83/96, Gerard van der Wal v. Commission, 1998 E.C.R. II-545, 563; Case T-124/96, Interporc v. Commission, 1998 E.C.R. II-231, 247.

46. *See Heidi Hautala*, 3 C.M.L.R. at 543.

47. *See* Commission Decision 93/731/EC, 1993 O.J. (L 340) 43.

48. *See id.*

49. *See id.*

50. *World Wide Fund U.K.*, 1997 E.C.R. at 345; *see also* Madeleine de Leeuw, *WWF (UK) v. Commission of the European Communities*, 3 EUR. PUB. L. 339, 346 (1997).

51. *See Bavarian Lager Co.*, 3 C.M.L.R. at 556.

The margin of appreciation with regard to the second exception is naturally wider, although the institution is again obligated to seek a balance between the citizen's interest in obtaining access to this particular information and the institution's interest in maintaining the confidentiality of its internal proceedings.[52] The Court of First Instance, however, has made it abundantly clear that any person may request access to any Commission or Council document without being required to give his reasons for such a request.[53] Moreover, in further compliance with their general duty to justify their actions, the Community institutions are obligated to give their reasons for any refusal.[54] In both *World Wide Fund*[55] and *Interporc*,[56] the CFI annulled decisions of the Commission refusing access to its documents, concluding that the Commission provided inadequate reasons for such refusal.[57]

The general and vague nature of the exceptions to access allowed by the Code of Conduct has been cause for concern on the part of interested parties, especially environmental organizations. The relevance of access to environmental information is particularly relevant to infringement proceedings. Noncompliance with environmental regulations is usually brought to the attention of the Commission by private parties through the complaint procedure. Upon a finding of noncompliance, the Commission then engages in correspondence with the Member State with a view to having the situation redressed or otherwise to initiate proceedings under Article 226 of the EC Treaty.[58] The final decision rests entirely upon the discretion of the Commission. If the Court does not intervene, restricting the application of the confidentiality exception and allowing the relevant documentation—and thus any commitments

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52. *See* Case T-194/94, John Carvel & Guardian Newspaper Ltd. v. Council, 1995 E.C.R. II-2765, 2766; *see also* E. Chiti, *Further Developments of Access to Community Information: Kingdom of the Netherlands v. Council of European Union*, 2 EUR. PUB. L. 563-69 (1996); K. Armstrong, *Citizenship of the Union? Lessons from Carvel and the Guardian,* 58 MOD. L. REV. 582 (1996).

53. *See John Carvel & Guardian Newspaper Ltd.*, 1995 E.C.R. at 2766.

54. *See* EC Treaty, *supra* note 15, art. 253.

55. Case T105/95, World Wide Fund U.K. v. Commission, 1997 E.C.R. II-1.

56. Case T-124/96, Interporc v. Commission, 1998 E.C.R. II-231.

57. *See World Wide Fund U.K.*, 1997 E.C.R. II-1; *Interporc*, 1998 E.C.R. II-231.

58. Article 226 of the EC Treaty reads as follows:

> If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

EC Treaty, *supra* note 15, art. 226.

undertaken by the Member State—to be released into the public domain, the private individuals who have started the whole process have no other means of reviewing the outcome of their efforts. Given the clear refusal of the ECJ to entertain even a slight relaxation of the very strict *locus standi* rules,[59] which allow public interest litigation in environmental matters,[60] the importance of access to information is commensurably increased.[61]

2. A Right Addressed to the Member States

The link between access to information and judicial guarantees of environmental protection was acknowledged in the preamble of Council Directive 90/313/EEC (the Directive) on access to information relating to the environment.[62] The Directive safeguards the right of citizens to request access to information held by public authorities in the EC Member States.[63]

According to Article 1 of the Directive, its aim is to "ensure freedom of access to, and dissemination of, information on the environment held by public authorities."[64] Consequently, Member States are required to perform a dual task. They are to: (1) provide individuals with environmental information upon request and (2) make available general information on the state of the environment voluntarily.[65] The conditions under which information is made

59. *See* Case C-321/95 P, Stichting Greenpeace Council (Greenpeace Int'l) & Others v. Commission, [1998] 3 C.M.L.R. 1; *see also* Case T-585/93, Stichting Greenpeace Council & Others v. Commission, 1995 E.C.R. II-2205; Frédérique Berrod, *Case C-321/95 P,* Stichting Greenpeace Council (Greenpeace International) and others v. Commission, *Judgment of 2 April 1998, ECR [1998] I-1651. Order of the Court of First Instance in Case T-585/93,* Stichting Greenpeace Council (Greenpeace International) and others v. Commission, *[1995] ECR II-2205*, 36 COMMON MKT. L. REV. 635 (1999); Silvia Schikhof, *Direct and Individual Concern in Environmental Cases: The Barriers to Prospective Litigants*, 7 EUR. ENVTL. L. REV. 276 (1998) (arguing that a strict approach to standing is detrimental to the protection of the environment); V. Christianos & S. Meintanopoulos, *L'Action Populaire Environnementale du Droit Communautaire N'est Pas Pour Demain*, 51 REVUE HELLENIQUE DE DROIT INTERNATIONAL 603-09 (1998).

60. *See, e.g.*, PUBLIC INTEREST LITIGATION BEFORE EUROPEAN COURTS (Hans-W. Micklitz & Norbert Reich eds., 1996); Philippe Sands, *Access to Environmental Justice in the European Community: Principles, Practice and Proposals*, 3 REV. OF EUR. COMMUNITY & INT'L ENVTL L. 206, 208-13 (1994) (discussing the restrictions on *locus standi* requirements).

61. *See* Sionaidh Douglas-Scott, *Environmental Rights in the European Union: Participatory Democracy or Democratic Deficit?*, *in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION, 109, 109-28 (A. Boyle & M. Anderson eds., 1996).

62. 1990 O.J. (L 158) 56; *see also* Ludwig Krämer, *La Directive 90/313/CEE sur l'Accès à L'information en Matière d'Environnement: Genèse et Perspectives d'Application*, REVUE DU MARCHE COMMUN 866 (1991).

63. *See id.*

64. *Id.* art. 1.

65. *See id.*

available on request are laid down in Articles 3 through 6 of the Directive. Thus, information shall be freely available to those who submit such requests without having to prove an interest.[66] Indeed, the Council has rejected the suggestion put forth by the Economic and Social Committee that the applicant be obligated to state reasons for seeking the information requested.[67] However, the Directive includes an extensive and vague list of exceptions, permitting the Member State to refuse a request for information affecting:

> the confidentiality of the proceedings of public authorities, international relations and national defence; public security; matters which are, or have been, *sub judice*, or under enquiry (including disciplinary enquiries), or which are the subject of preliminary investigation proceedings; commercial and industrial confidentiality, including intellectual property; the confidentiality of personal data and/or files; material supplied by a third party without that party being under a legal obligation to do so; material the disclosure of which would make it more likely that the environment to which such material related would be damaged.[68]

Moreover, Article 3(3) provides that "[a] request for information may be refused where it would involve the supply of unfinished documents or data or internal communications, or where the request is manifestly unreasonable or formulated in too general a manner."[69] In light of these numerous exceptions, any competent national administrator should be able to come up with a decent justification to refuse a request. The Member States, in transposing the Directive into their domestic legal orders, have kept all these loopholes and have interpreted them even more broadly.[70]

It is probably a sign of the times that in the few occasions the ECJ had an opportunity to review the application of the Directive by national authorities, it showed a distinct tendency to restrict these exceptions and safeguard the principle of general access to environmental information. In the first case brought before it, a preliminary ruling upon reference by the Schleswig-Holsteinisches Oberverwaltungsgericht under Article 234 of the EC Treaty, the ECJ

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66. *See id.* art. 3. This is the fundamental difference between general access to administrative information, which in most national legislations is granted only to persons having a legitimate interest, and access to environmental information, which requires no such personal link. *See* Gerd Winter, *Freedom of Environmental Information*, *in* EUROPEAN ENVIRONMENTAL LAW: A COMPARATIVE PERSPECTIVE 81, 87-88 (Gerd Winter ed., 1996).

67. *See* Case C-217/97, Commission v. Germany, [1999] 3 C.M.L.R. 277, 284 (op. of Advocate General Fennelly).

68. Council Directive 90/313/EEC, 1990 O.J. (L 158) 56, art. 3(2).

69. *Id.* art. 3(3).

70. *See* ACCESS TO ENVIRONMENTAL INFORMATION IN EUROPE: THE IMPLEMENTATION AND IMPLICATIONS OF DIRECTIVE 90/31/EEC (Ralph Hallo ed., 1996).

considered the aims of the Directive and concluded that the exception of "preliminary investigation proceedings . . . covers exclusively proceedings of a judicial or quasi-judicial nature, or at least proceedings which will inevitably lead to the imposition of a penalty if the offence (administrative or criminal) is established."[71] Therefore, an administrative procedure, such as the one included in Article 7(1)(2) of the German *Umweltinformationgesetz*, will fall under the confidentiality exception only if it immediately precedes "contentious or quasi-contentious proceedings and which arises from the need to obtain proof or to investigate a matter" prior to the opening of the actual procedure.[72]

In an effort to mitigate extensive derogation from the general rule of access to information, the Directive instructs Member States to supply information even in part, after first removing passages liable to cause injury to the interests protected by the exceptions.[73] The ECJ held that national legislation providing for partial access must be drafted in such a way as to guarantee "in a manner sufficiently clear and precise to ensure compliance with the principle of legal certainty and to enable persons who may submit a request for information to know the full extent of their rights."[74] The practicalities of sorting out what is to be kept confidential and what may be released to the public would presumably remain at the discretion of the state authorities. However, the European Court of Justice, while interpreting access to information by Community institutions under the Code of Conduct, has given an indication of the appropriate balance sought. Thus, in the *Hautala* case, the Court of First Instance stated that, in the absence of an express provision for partial access in the Code of Conduct, the competent authority must make every effort to uphold the principle of general access even through partial disclosure.[75] Removal of information liable to cause injury to the interests protected under Article 4 is therefore subject only to the principle of proportionality.[76] The Council is required, in the interests of good administration, "in particular cases where the volume of the document or the passages to be removed would give rise to an unreasonable

71. Case C-321/96, Mecklenburg v. Pinneberg, 1998 E.C.R. I-3809, 3835.
72. *Id.* at 3836.
73. *See* Council Directive 90/313/EEC, 1990 O.J. (L 158) 56, art. 3(2).
74. Case C-217/97, Commission v. Germany, [1999] 3 C.M.L.R. 277, 298.
75. *See* Case T-14/98, Hautala v. Council, [1997] 3 C.M.L.R. 528, 542.
76. *See id.*

amount of administrative work, to balance the interest in public access to those fragmentary parts against the burden of work so caused."[77]

For the most part, the same conditions apply to the provision for voluntary disclosure of environmental information by public authorities. Article 7 of the Directive obligates Member States to "take the necessary steps" with a view to ensure that relevant information becomes available in the public domain, mostly through the periodic publication of state-of-the-environment reports.[78] The vague nature of this instruction is justified both by the format of the Directive itself[79] and the administrative peculiarities of each Member State. The existence of several registers where environmental information, often of a very technical nature, is listed constitutes a standard feature of most domestic legal orders. Thus, for example, in the United Kingdom almost all major environmental statutes—the Control of Pollution Act 1974, the Water Resources Act 1991, the Environmental Protection Act 1990, the Environmental Protection Act 1995—have established a separate registry.[80] In Spain, Article 6 of Law 38/1995[81] stipulates that public authorities shall publish general information on the state of the environment in the form of periodic reports as well as gather and publish information relevant to requests for information received.[82] In Germany, the Federal Environmental Agency also produces both an annual general report and several sectoral ones.[83] The scope of application of the Directive covers

> any available information in written, visual, aural or data-base form on the state of water, air, soil, fauna, flora, land and natural sites, and on activities (including those which give rise to nuisances such as noise) or measures adversely affecting, or likely so to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes.[84]

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77. *Id.* at 542-43.

78. Council Directive 90/313/EEC, 1990 O.J. (C 137) 47, art. 7.

79. Article 249 of the EC Treaty provides: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." EC Treaty, *supra* note 15, art. 249.

80. *See* J. Rowan-Robinson et al., *Public Access to Environmental Information: A Means to What End?*, 9 J. OF ENVTL. L. 19 (1996).

81. Ley 38/1995 de 12 de diciembre sobre el derecho de acceso a la información en materia de medio ambiente, Boletin Oficial del Estado 297, 13 diciembre 1995, 35708 (Spain).

82. *See* María de la Torre & Cliona Kimber, *Access to Information on the Environment in Spain*, 6 EUR. ENVTL. L. REV. 53, 59 (1997).

83. *See* Umweltinformationsgesetz, v.8.7.1994 (BGBl. I S. 1490); *see also* Schomerius et al., *Umweltinformationsgesetz: Kommentar*, (Nomos Verlag 1995).

84. Council Directive 90/313/ECC, 1990 O.J. (L 158) 56, art. 2(a).

In the *Mecklenburg* case, the European Court of Justice had occasion to reiterate the widest possible reading of this already general definition.[85] Affirming that "[t]he wording of the provision makes it clear that the Community legislature intended to make that concept a broad one, embracing both information and activities relating to the state of those aspects,"[86] the ECJ proceeded to note that "the use in Article 2(a) of the Directive of the term 'including' indicates that 'administrative measures' is merely an example of the 'activities' or 'measures' covered by the Directive."[87]

What is even more interesting is the Court's intervention regarding the costs of the provision for environmental information. Both the Directive[88] and the Code of Conduct[89] allow for a "reasonable sum" or "reasonable cost" to be charged to the requesting party, especially if consultation on the spot is not possible and copies of the relevant documentation must be made. The question becomes crucial when the information requested consists of highly technical material, such as a digital map, the reproduction of which involves significant expense. The ECJ made very clear that the general principle of access shall not be frustrated by the imposition of high costs and instructed the Member States to engage in a type of "social dumping":

> [T]he term "reasonable" for the purposes of Article 5 of the Directive must be understood as meaning that it does not authorize Member States to pass on to those seeking information the entire amount of the costs, in particular indirect ones, actually incurred for the State budget in conducting an information search.[90]

The Community institutions have themselves opted for a rather moderate fixed amount plus an additional charge for larger documents.[91]

III. INTERNATIONAL ASPIRATIONS

The most comprehensive way to describe the exact content of the right of access to environmental information in Europe today, as well as its prospects for practical development in the future, is to refer to

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85. *See* Case C-321/96, Mecklenburg v. Pinneberg, 1998 E.C.R. I-3809.
86. *Id.* at 3833.
87. *Id.*
88. Council Directive 90/313/ECC, 1989 O.J. (C 137) 47.
89. Code of Conduct 93/730/EC concerning public access to Council and Commission documents, 1993 O.J. (C 340).
90. Case C-217/97, Commission v. Germany, [1999] 3 C.M.L.R. 277, 300.
91. *See* Commission Decision 96/567/ECSC/EC/Euratom, 1996 O.J. (L 247).

the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus, Denmark in 1998 by thirty-nine states and the EC[92] under the auspices of the United Nations Economic Commission for Europe.[93] The Aarhus Convention is currently not in force but the signatories affirmed their strong support for it in their first meeting in Chisinau, Republic of Moldova, on April 19-20, 1999.[94] Hopefully, by the end of the year 2000, at least twenty-three states will have ratified the Convention.

The general format of the Aarhus Convention follows closely both the Code of Conduct and the Directive on access. Once again, information is to be made public upon request, "without an interest having to be stated," preferably in the form requested.[95] Such requests may be refused on a number of grounds, the list of which comprises all instances included in Community legislation.[96] The principle of partial access is also reiterated.[97] Payment of a "reasonable amount" may again be possible and the public authorities of the contracting parties are further instructed to "make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge."[98]

The collection and dissemination provisions of the Aarhus Convention seem particularly strong. States parties to the Convention are requested to set up proceedings with a view to ensure an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment,[99] so that:

> [i]n the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or

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92. It is of course a typical mixed agreement complete with a rather enthusiastic EC declaration. For a discussion of mixed arguments, see Phoebe N. Okowa, *The European Community and International Environmental Agreements*, 15 Y.B. OF EUR. L. 169-92 (1995).

93. *See* Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, *adopted* June 25, 1998, U.N. Doc. ECE/CEP/43 (1998), *available at* (visited June 10, 2000) <http://untreaty.un.org/English/notpubl/notpubl.asp> [hereinafter Aarhus Convention].

94. *See* U.N. ECE, *"Environment for Europe" Process* (visited June 10, 2000) <http://www.unece.org/env/europe/homepage.htm>.

95. Aarhus Convention, *supra* note 93, art. 4(1)(a), (b).

96. *See id.* art. 4(3), (4).

97. *See id.* art. 4(6).

98. *Id.* art. 4(8).

99. *See id.* art. 1(1)(b).

> mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.[100]

This is in fact a very accurate description of the prerequisites for the elaboration of contingency plans within the context of an environmental impact assessment exercise. Non-availability of such information would eventually render impossible the obligation of the source state under Article 7 of Directive 97/11/EC on environmental impact assessment[101] and the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context.[102] The Espoo Convention considered the transboundary effects of any project about to be undertaken through consultation with the affected states and their public[103] and the exchange of information.

Indeed, the close interdependence between the environmental impact assessment procedure and the general principle of access to environmental legislation cannot be underestimated. More often than not, the accusation against incomplete environmental impact assessment arrangements is that they are restricted to a simple exchange of environmental information. In effect, all procedural obligations in the context of environmental law both presuppose and entail such an exchange.[104]

The dissemination of the information collected is also subject to detailed provisions. The contracting parties have undertaken the obligation to progressively set up electronic databases, easily accessible to the public through public telecommunications networks, which would include: regular national reports on the state of the environment; texts of legislation on or relating to the environment; policies, plans, and programs related to the environment as appropriate, as well as environmental agreements; and any other

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100. *Id.* art. 5(1)(c).

101. 1997 O.J. (L 73) 5, *revised* Council Directive 85/337/EEC, 1985 O.J. (L 175)40. *See generally* W.R. Sheate, *The Environmental Impact Assessment Amendment Directive 97/11/EC—A Small Step Forward?*, 6 EUR. ENVTL. L. REV. 235 (1997) (arguing that the amendment falls short of bringing the necessary changes).

102. *See* Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800 (1991) [hereinafter Espoo Convention] (concluded under the auspices of the U.N. Economic Commission for Europe with the participation of both Member States and the Community).

103. *See id.* art. 2(6) (requiring the state of origin to allow public participation for nationals of the affected state on the same terms as those accorded to its own nationals).

104. *See* Phoebe N. Okowa, *Procedural Obligations in International Environmental Agreements*, 1996 BRIT. Y.B. OF INT'L L. 275.

information that would facilitate the application of national law in the implementation of the Convention.[105]

Eventually, this wealth of information should be collated with a view for each party

> to establish progressively, taking into account international processes where appropriate, a coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting. Such a system may include inputs, releases and transfers of a specified range of substances and products, including water, energy and resource use, from a specified range of activities to environmental media and to on-site and off-site treatment and disposal sites.[106]

This Article of the Aarhus Convention sounds much more impressive than it actually is, however. Most European states have already made significant progress towards the establishment of these mechanisms of data gathering and information dissemination; the remainder of the relevant obligations are drafted in fairly innocuous language (i.e., "shall take steps to establish progressively").[107] The value of their inclusion in a conventional document of this kind rests in the harmonization of divergent national practices. An educational purpose, especially in the case of the new democracies in eastern Europe, should not be overlooked either.

The most characteristic example of the realities that creep into an otherwise triumphant document is the role accorded to non-governmental organizations. Information shall be made available to the "public," which is defined for the purposes of the Aarhus Convention as "one or more natural and legal persons, and, *in accordance with national legislation or practice*, their associations, organizations or groups."[108] Moreover, the meaning of "public concerned," the participation of which to the decision-making process is thus safeguarded, is defined as "the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and *meeting any requirements under national law* shall be deemed to have an interest."[109] In other words, the Aarhus Convention does not accord to

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105. *See* Aarhus Convention, *supra* note 93, art. 5(3).

106. *Id.* art. 5(9).

107. *Id.*; *see also* Katy Brady, *Aarhus Convention Signed*, 28 ENVTL. POL'Y & L. 171, 189 n.22 (1998).

108. Aarhus Convention, *supra* note 93, art. 2(4) (emphasis added).

109. *Id.* art. 2(5) (emphasis added).

non-governmental organizations rights and obligations, most of all *locus standi* in environmental public litigation,[110] if they do not already enjoy such privileges under the national legislation of the contracting parties. At most, the Convention shows a preference for such action, although demurely described in paragraph 4 of Article 3: "Each party shall provide for *appropriate* recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation."[111]

The limits of such recognition and support may be evidenced in the practices of the EC. Whereas the portals of the European Court of Justice are securely closed to non-governmental organizations and other third parties with no "direct and individual concern" over environmental affairs, the institutions are setting up Community action programs with a view to promote the activities of nongovernmental organizations.[112] Within the framework of this program, financial assistance will be provided "for activities which are of Community interest, contribute significantly to the further development and implementation of Community environmental policy and legislation and meet the principles underlying the fifth action programme."[113] One must presume that declarations of intent operate on a different level than the realities of implementation.

IV. A FUNDAMENTAL RIGHT OF ACCESS TO ENVIRONMENTAL INFORMATION

The positive attitude of the European Court of Justice towards the expansion of the scope of access to environmental information and the attempt to export the basic protective infrastructure to the "near abroad" of the European Union tend to obscure the fact that the right of access to information, and environmental information in particular, rests on a precarious basis. Belatedly included in the Treaty of Amsterdam, the provision of Article 255 of the EC Treaty establishes a fairly limited right of access to administrative documentation.[114] Prior to Article 255, the right to information was

110. *See id.* art. 9.

111. *Id.* art. 3(4) (emphasis added).

112. *See* Council Decision 97/872/EC, art. 2(2) (1997), *reprinted in* 7 EUR. ENVTL. L. REV. 62 (1998) (establishing a Community action program promoting non-governmental organizations (NGOs) primarily active in the field of environmental protection).

113. *Id.*

114. *See* EC Treaty, *supra* note 15, art. 255.

clearly not enshrined within the Community legal order.[115] Nor is it realistic to believe that such a right would be further safeguarded in the Rules of Procedure which the controlled institutions are expected to produce—after all, who would control the controllers?

In the absence of a strong, explicit stipulation of the right in the founding treaties, redress may be sought through appeal to the fundamental principles of the Community legal order, as set out in Article 6 of the TEU:

> 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
> 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.[116]

Having established the connection between these self-contained yet interlinked legal regimes,[117] it is necessary to explore the parameters of the fundamental human right of access to information.

A. Two Complementary Worlds

Once the Strasbourg *acquis* has been thus incorporated within the Community legal order,[118] the two institutions, the European Court of Human Rights in Strasbourg and the European Court of Justice in Luxembourg may refer freely to each other's jurisprudence.[119] So far,

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115. *See* Frédérique Lafay, *L'accès aux documents du Conseil de l'Union: contribution à une problématique de la transparence en droit communautaire*, 33 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 37 (1997); Patrick Wachsmann, *Les Droits de l'Homme*, 33 REVUE TRIMESTRIELLE DE DROIT EUROPÉENNE 883, 901 (1997).

116. TEU, *supra* note 9, art. 6(1), (2).

117. *See* Bruno Simma, *Self-Contained Regimes*, 16 NETH. Y.B. OF INT'L L. 111, 123 (1985).

118. The Court itself opposed the accession of the Community to the European Convention of Human Rights, thus putting an end to a raging debate. *See* Giorgio Gaja, *Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 33 COMMON MKT. L. REV. 973 (1996); *see also* A.G. Toth, *The European Union and Human Rights: The Way Forward*, 34 COMMON MKT. L. REV. 491 (1997) (examining options open to the Community after the Court of Justice's Opinion 2/94 on accession to the European Convention on Human Rights).

119. The European Convention on Human Rights (ECHR) was adopted on November 4, 1950, and came into force on September 3, 1953. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. At the same time, on April 18, 1951, the European Coal and Steel Community was established. All members of the European Communities were already members of the Council of Europe and bound by the ECHR. Originally the ECHR established a two-tiered system of judicial review, whereby individual applicants could bring a claim for breach of the Convention against a state

the European Court of Human Rights has refused to review Community actions because it considers the protection accorded under Community law to be equivalent to that granted under the European Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights (ECHR).[120] On the other hand, the Court declared, in *Matthews v. United Kingdom*:

> The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be "secured." Member States' responsibility therefore continues even after such a transfer. . . .
>
> The United Kingdom, together with all the other parties to the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention . . . for the consequences of that Treaty.[121]

However, in view of the existence of a Community system of judicial control, the European Court of Human Rights seemed inclined to adhere to its previous line of thought,[122] according to which the Member States cannot be held collectively and individually responsible for acts of another legal entity, namely the Community.[123]

On the other hand, the ECJ reviews regularly whether specific Community acts conform to ECHR provisions, using the Strasbourg

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party that had consented to this procedure, first before the European Commission on Human Rights and on a second level of adjudication before the European Court of Human Rights. A major reshuffle, through Protocol 11 to the ECHR, which abolished the Commission and made an individual appeal incumbent upon states parties, created the present system of a unique judicial instance, the European Court of Human Rights. *See* 213 U.N.T.S. 221, *amended by* Protocol 11 to the European Convention on Human Rights, May 11, 1994, 33 I.L.M. 943; *see also* H.G. Schermers, *The Eleventh Protocol to the European Convention on Human Rights*, 19 EUR. L. REV. 367-84 (1994); Olivier de Shutter, *La Nouvelle Cour Européenne des Droits de l'Homme*, *in* CAHIERS DE DROIT EUROPEEN 319-52 (1998).

120. *See* M & Co. v. Germany, 64 Eur. Comm'n H.R. Dec. & Rep. 138 (1990). For instance, the European Court of Human Rights, in examining whether the extraordinary lengthy proceedings before the Greek courts and the European Court of Justice exceeded the "reasonable time" provided for in Article 6 of the ECHR, refused to take into consideration the two years and eight months the case was pending in Luxembourg, which would have adversely effected the preliminary rulings system instituted by Article 234 of the EC Treaty. *See* Pafitis v. Greece, 27 Eur. H.R. Rep. 566 (1998); *see also* H.G. Schermers, *Matthews v. United Kingdom*, *judgment of 18 February 1999*, 36 COMMON MKT. L. REV. 673, 674-75 (1999).

121. Matthews v. U.K., 28 Eur. H.R. Rep. 361, 396 (1999).

122. *See* P. PESCATORE, LA COUR DE JUSTICE DES COMMUNAUTES ET LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME, PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION, ESSAYS IN HONOUR OF G.J. WIARDA, 448 (1998). *But see* Catherine Turner, *Human Rights Protection in the European Community: Resolving Conflict and Overlap Between the European Court of Justice and the European Court of Human Rights*, 5 EUR. PUB. L. 453, 460 (1999).

123. *See* Confédération Française Démocratique du Travail v. European Communities, 13 Eur. Comm'n H.R. Dec. & Rep. 231 (1978); *M & Co.*, 64 Eur. Comm'n H.R. Dec. & Rep. 138 (1990).

jurisprudence as guidance.[124] In the *van der Wal* case, the ECJ reviewed the exceptions stipulated in Article 4 of the Code of Conduct attached to Decision 94/90 on public access to Commission documents, especially those referring to the conduct of court proceedings.[125] The Court linked the confidentiality of documentation held by judicial authorities to the right of every person to a fair hearing by an independent tribunal, the latter defined as an institution enjoying procedural autonomy.[126]

B. A Fundamental Right of Access to Environmental Information?

The right of access to information is considered an aspect of the right to freedom of expression, guaranteed under Article 10 of the ECHR,[127] and is directly linked to the democratic ideal.[128] The basic premise that democratic decision-making cannot be achieved without adequate information being available to the public, which lies in the heart of the Community regulation of access to information, is expressly acknowledged by the Strasbourg organs: "Considering the importance to the public in a democratic society of adequate information on public issues . . . everyone shall have the right to obtain, on request, information held by public authorities."[129]

Such a right does not necessarily mean that a citizen may obtain unlimited access to all administrative documentation. In the case of *Leander v. Sweden*,[130] the European Court of Human Rights held that Article 10 did not provide the applicant with the right of access to confidential government files, even though it was on the basis of such

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124. *See generally* Florence Zampini, *Convention européenne des droits de l'homme et droit communautaire de la concurrence*, 432 REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPÉENNE 628 (1999).

125. van der Wal v. Commission, 1998 E.C.R. II-545, 565.

126. *See id.*

127. *See* ECHR, *supra* note 119, art. 10 ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."). Similar is the formulation of the same right under both the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights, which nevertheless refer to the "freedom to *seek*, receive and impart information." Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., art. 19, at 71, U.N. Doc. A/810 (1948) (emphasis added); *see also* G. Malinverni, *Freedom of Information in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights*, 3 HUM. RTS. L.J. 443 *(*1983).

128. *See* Martin Bullinger, *Freedom of Expression and Information: An Essential Element of Democracy*, 28 GERMAN Y.B. OF INT'L L. 88 (1985).

129. Recommendation No. R (81) 19 of the Committee of Ministers on the Access of Information Held by Public Authorities, Comm. of Ministers, app., at 7, Doc. No. H (82) 1 (1981).

130. 116 Eur. Ct. H.R. (Ser. A.) (1987), 9 Eur. H.R. Rep. 433 (1987).

documentation that the applicant was denied a job at a naval base.[131] The underlying assumption was that Article 10 of the ECHR imposes on the state a duty not to obstruct access to information which is already available under the precepts of domestic legislation; it does not create an obligation to make such information available.[132] The European Commission on Human Rights further elaborated on this point in *Clavel v. Switzerland*,[133] where it held that Article 10 did not confer a right of access to the land register of a commune since the register was not a generally accessible source under Swiss law.[134] The European Court of Human Rights, however, has proceeded in other cases to review whether the conditions under which domestic law grants access to administrative documentation might interfere with the right of public access to information.[135] In other words, the legislator may impose only such restrictions

> as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[136]

Therefore, the Strasbourg jurisprudence follows closely the general guidelines of Community provisions on access to information. It has certainly maintained the emphasis on an open system of access to information, with exceptions narrowly construed, as a *sine qua non* to the existence and proper functioning of democracy.[137] It has been hesitant, however, in expanding the scope of the protected right towards a more pro-active stance than the traditional first-generation approach of state nonintervention with fundamental rights. The question naturally arises whether this attitude of abstention would suffice for the effective safeguard of newly arising human rights, such as a right to a decent environment.

Both the European Commission on Human Rights and the European Court of Human Rights had occasion to address the matter

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131. *See id.*

132. *See id.*

133. App. No. 11854/85. Eur. Comm'n. H.R. Dec & Rep. (1987), *available at* (visited on June 10, 2000) <http://www.dhcour.coe.fr/hudoc>.

134. *See id.*

135. *See* X. v. Austria, App. No. 10392/83, 56 Eur. Comm'n H.R. Dec. & Rep. 13 (1988).

136. ECHR, *supra* note 119, art. 10(2).

137. *See* Michael O'Neill, *The Right of Access to Community-Held Documentation as a General Principle of EC Law*, 4 EUR. PUB. L. 403, 418-25 (1998).

in the case of *Anna Maria Guerra and 39 Others v. Italy.*[138] The applicants lived in the community of Manfredonia, Foggia, within the vicinity of a chemical plant.[139] Under Directive 82/501/EEC on risk of major accidents (the "Seveso" Directive),[140] Member States are obligated to inform the population at regular intervals of the risk imposed by the continued operation of such plants and of the security measures that have been adopted. Citizens are also to be informed of the existing contingency plans and precautionary measures that they must follow in case of emergency.[141] No such information was ever produced and made available to the applicants, although the plant ultimately ceased producing chemical material.[142]

The situation did not involve information held by the authorities but kept confidential, which would trigger the affirmation of a right of access as per the constant case law of the European Court of Human Rights.[143] Rather, the applicants wanted to see a positive act on behalf of the state, a campaign of information for the local population about the risks incurred by the operation of the plant in their vicinity and proposed methods of redress in case of an emergency.[144] The European Commission on Human Rights concurred in accepting that, although the previous jurisprudence of the Court imposed upon the states "essentially" a negative obligation of non-interference with the free exchange of information,[145] nothing in Article 10 of the ECHR excluded *a priori* the existence, under specific conditions, of positive obligations undertaken by the state with a view to safeguard the right to receive information.[146] The ultimate aim of such a formulation would be to safeguard a right to a clean environment, through the expansion of the right to information.

The ECHR, contrary to the inter-American system of human rights,[147] does not include a specific right to a clean environment.[148]

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138. App. No. 14967/89, 26 Eur. H.R. Rep. 357 (1998)(Eur. Ct. of H.R.).

139. *See id* at 362.

140. 1982 O.J. (L 230) 1. Yet again, the two legal orders get intermingled, even indirectly.

141. *See id.*

142. *See Guerra*, 26 Eur. H.R. Rep. at 362-63.

143. *See id.* at 381 (citing Observer and Guardian v. U.K., App. No. 13585/88, 14 Eur. H.R. Rep. (ser. B) at 153 (1991) (Eur. Ct. of H.R.); Thorgeir Thorgeirson v. Iceland, App. No. 13778/88, 14 Eur. H.R. Rep. (ser. A) 843, 865 (1992) (Eur. Ct. of H.R.).

144. *See Guerra*, 26 Eur. H.R. Rep. at 381.

145. *See id*.

146. *See id*. (citing the decision by the European Commission on Human Rights of June 29, 1996).

147. *See* Additional Protocol to the Inter-American Convention on Economic, Social and Cultural Rights, Nov. 14, 1988, 28 I.L.M. 156; A.A. Candado Trindade, *La protection des droits économiques, sociaux et culturels. Évolution et tendances particulièrement à l'échelle régionale*, REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 913 (1990).

However, it has become evident, in the evolving case law of both the European Commission on Human Rights and the European Court of Human Rights, that there are sufficient conventional tools to provide for the protection of the environment;[149] among them are the right to life under Article 2, the right to privacy and family life under Article 10, and the right to property under Article 1 of the First Protocol to the ECHR. Thus, in *López Ostra v. Spain*, the European Court of Human Rights held that the continuous emissions of noise and odor from several tanneries and a water purification plant in the vicinity constituted a nuisance infringing the sanctity of the applicant's home, privacy, and family life; consequently a breach of Article 10 of the ECHR was upheld.[150] In the circumstances of the *Guerra* case, the Court considered it politic to avoid any repercussions on the right of the media to seek information that might ensue from a less restrictive reading of Article 10, and preferred to grant relief on the basis of the right to a family life under Article 8.[151]

The European Court of Human Rights clearly linked the right to environmental information with the wish of the applicants to address doubts and queries that might eventually affect the integrity of their family life. It was not the first time that recourse was made to this argument. For example, in the case of *McGinley & Egan v. United Kingdom*,[152] the Court held that the applicants had a right to certain documents regarding nuclear testing on Christmas Island in the 1950s, as their continued anxiety about the degree of exposure they might have sustained at that time presented a link sufficiently close "to their private and family lives within the meaning of Article 8."[153] In essence, what the European Court of Human Rights chose to do in the *Guerra* case was not to restrict the right to information under Article 10 of the ECHR, but rather to extend the scope of application of Article 8, making the obligation to provide environmental information an essential parameter of the right to privacy and family life.[154] The

148. *See* X & Y v. F.R.G., 5 Eur. Comm'n H.R. Dec. & Rep. 161 (1976).

149. *See* F. Sudre, *La protection du droit à l'environnement par la Convention européenne des droits de l'homme*, LA COMMUNAUTE EUROPEENNE ET L'ENVIRONNEMENT, LA DOCUMENTATION FRANÇAISE 212-13 (J.C. Maselet ed., 1997).

150. 20 Eur. H.R. Rep. 277 (1995).

151. *See* G. Cohen-Jonathan, *Article 10*, LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME. COMMENTAIRE ARTICLE PAR ARTICLE 373-74 (C.E. Pettiti, E. Decaux & P.H. Imbert eds., 1995); *see also* Richard Desgagné, *Integrating Environmental Values Into the European Convention on Human Rights*, 89 AM. J. INT'L L. 263, 288-90 (1995).

152. 27 Eur. H.R. Rep. 1, 44 (1998).

153. *Id.*

154. *See* Sandrine Maljean-Dubois, *La Convention européenne des droits de l'homme et le droit à l'information en matière d'environnement. A propos de l'arrêt rendu par la CEDH le 19*

protection requested was ultimately accorded and the means were decided by the Court with absolute discretion.[155]

V. CONCLUSIONS

How would one summarize the state of the law regarding access to environmental information in the context of the European Community today? A number of common threads may be identified and similar solutions are given to problems addressed in parallel ways by several administrations.

There exists in both the international and Community legal orders a fundamental right of access to environmental information, the core of which is closely linked to the democratic principle. This politically correct affirmation aside, the search for a concrete legal basis in the respective legal orders yields particularly scanty results. The actual implementation of the right is subject to extensive, general, and vague exceptions applied in most cases at the discretion of the authority providing the information. Effective judicial recourse can be envisaged only within the domestic legal order of the Member States, because both the European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg involve a slow, cumbersome and costly procedure of redress.

At the same time, only these august institutions may effectively expand both the scope of application and the intensity of implementation of the right required by the information-providing authorities. Their intervention contributes toward the creation of a new higher standard of access to environmental information, which may eventually crystallize into new conventional forms. This flurry of judicial activism is securely grounded on the basic principles of the founding treaties and the protection of human rights worldwide. If this period lasts for a sufficiently long time, the fundamental right of access to information would find a clement environment in which to flex its muscles and develop into a significant tool of environmental regulation.

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février 1998 en l'affaire Anna Maria Guerra et 39 autres c. Italie, 4 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 995, 1005 (1998).

155. *See* M. DEJEANT-PONS, *La Convention européenne des droits de l'homme et le droit à l'information en matière d'environnement*, LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME: DEVELOPPEMENTS RECENTES ET NOUVEAUX DEFIS 165-66 (J.F. Flauss & M. de Salvia eds., 1997).