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ARTICLES

Restoring Faith in Government: Transparency Reform in the United States and the European Union

Amanda Frost*

On the surface, the transparency reform movements in the United States and the European Union appear to have much in common: both the US and the EU have embraced transparency as a means of bolstering public confidence in governance, and the EU's recently issued access regulation shares many features with the US Freedom of Information Act. The similarities end there, however. The goals of the EU reform movement are far more ambitious than those of the US. US reformers hoped that sunlight would put an end to the corruption and abuse of power that plagued the executive branch in the late 1960s and early 1970s, but they did not seek to change the decision-making process itself. In contrast, the EU has latched onto transparency reform as a means of democratizing and legitimizing EU governance. Unfortunately, reformers in the EU have yet to link transparency reforms with democratization of the legislative process. Although transparency is an invaluable tool with which the public can monitor EU governance, transparency alone, without concomitant increases in public opportunities to influence EU decision-making, cannot ameliorate the EU's infamous 'democratic deficit'. Increased transparency must be coupled with public participation rights before reformers can accomplish their ambitious goal of bringing EU decision-making closer to Europeans.

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Introduction

Faced with a crisis of public confidence, the government responds by opening up formerly secretive decision-making to public view. Politicians acknowledge that their constituents are ‘disillusioned’ and have become ‘suspicious’ of their leadership, and they express the hope that a new transparency law granting the public a right to obtain government information will reverse the public’s ‘cynical distrust of governmental institutions and public officials’. The law, it is universally hoped, will mark the ‘end of excessive Government secrecy that has eroded public confidence in Government, politics and politicians’.

A European reader might assume that the above paragraph refers to the European Union’s new regulation on access to information, which went into effect on 3 December 2001. In fact, the quotations are by a US Congressman speaking out nearly thirty years ago in support of the Freedom of Information Act in the United States. A comparison of the legislative history of transparency laws in the US with the statements of support for the EU’s new regulation illustrates that US and EU transparency reforms share at least one basic goal: to improve public confidence in government by opening up policy-making to public view. However, a closer examination of the crisis of public confidence in the EU with that facing the US thirty years ago reveals far more differences than similarities and, as a result, the goals of open government in the US are far removed from the ambitions for reform in the EU.

In the early 1970s, Americans began to lose faith in their government – in particular, the executive branch – as they learned of the secret escalation of the war in Vietnam and the executive abuse of power that came to be known as ‘Watergate’, and as they observed federal agencies catering to the industries they were assigned to regulate. Concluding that abuse of power, corruption and mismanagement could only be eradicated if the public had a direct view of the workings of their government, Congress enacted the United States Freedom of Information Act and other open government legislation to give the public the tools with which to monitor and check the actions of the executive branch.

In contrast, the crisis of confidence in the EU arose from a less scandalous, but nonetheless disturbing, series of events. In 1992, the Danish voted against the Maastricht Treaty and the French, British and Germans expressed dissatisfaction as well, which forced the EU to acknowledge that it lacked the broad public support

2 Ibid.
4 Croley and Funk, op. cit., note 3, p. 460.
previously taken for granted. The problem was not simply that Europeans distrusted the EU, they expressed a degree of alienation, disaffection and disinterest that called European integration into question. As has now been widely recognized, the EU had failed to establish itself as a legitimate governing force in Europe because it exercised power without having received a mandate from the people to do so. Thus, pressure for open government reforms in the EU come not from a desire to improve the quality of decision-making, as in the US, but rather from a need to improve the democratic legitimacy of the decision-making process itself.

The EU may be asking too much of transparency. Although transparency is a vital element of good governance, it is doubtful that opening up decision-making processes to public view can by itself legitimize undemocratic, or weakly democratic, governing institutions. Much of the value of open government lies in the ability of citizens to use their access to government information to influence government decision-making. Yet the EU provides little opportunity for non-governmental actors and the general public to participate in decision-making, particularly at the all-important policy-formation stage. Although transparency is an important tool with which to democratize the EU, transparency reform will likely fail in its ambitious task if it is not coupled with measures allowing for greater public participation and influence over EU decision-making.

The first part of this article summarizes the history of US open government laws and briefly describes the ways in which they have been put to use over the last thirty years. The second part undertakes a similar review of the efforts to improve transparency in the EU. In the third part, the role of open government laws in the US is contrasted with the intended role of the EU’s new transparency regulation. This comparison illustrates that, although transparency reform is a vital step towards eliminating the EU’s infamous ‘democratic deficit’, it cannot by itself legitimize European-wide governance, but must instead be accompanied by reforms that give the public a role in EU decision-making.

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6 I define ‘democratic legitimacy’ to mean the right of citizens to participate in governance, either directly or through their representatives. See Renaud Dehousse, ‘Institutional reform in the European Community: Are there alternatives to the majoritarian avenue?’, EUI Working Paper RSC No. 95/4, European University Institute Florence, 1995, p. 2 (democracy ‘entails among other things the possibility for citizens to choose their rulers and to sanction them if their action is deemed inadequate. It also implies the possibility for voters to control what political leaders do’); Jurgen Neyer, ‘Justifying comitology: The promise of deliberation’, in Karlheinz Neunreither and Antje Wiener (eds.), European Integration After Amsterdam, Oxford University Press, Oxford, 2000, p. 121 (‘the concept of democracy can be understood as referring to a set of political institutions backed by accepted (or even constitutionalized) norms which are aimed at enabling a collective of individuals to rule itself’); and Deidre Curtin, Postnational Democracy, Kluwer Law International, The Hague, 1997, p. 33 and n. 152 (noting that major international treaties define democracy in these terms).
7 See below.
Open Government Reform in the United States

Efforts to enact a right-to-information law in the US began in 1955, but did not come to fruition until 1966, when the original Freedom of Information Act (or FOIA, as it is widely known) was enacted. The statute established the presumption that all records of governmental agencies are accessible to the public unless FOIA or another statute specifically exempts them from disclosure. To accomplish this goal, FOIA sets up a tripartite system for providing public access to government information:

First, FOIA establishes that agencies must publish basic information about themselves – such as their organizational structure, rules of procedures, and the substantive rules and statements of policy they have issued – in the Federal Register, a government publication that is available to all.\(^8\) Second, FOIA mandates that agencies make available for public inspection and copying certain basic agency records, such as final opinions in agency adjudications, statements of policy and interpretations not published in the Federal Register, and staff manuals that affect the public.\(^9\) Third, all records that are neither published in the Federal Register nor made available in reading rooms can be requested by members of the public, and the agency can only refuse to provide the records requested if they fall within one of FOIA’s narrow exemptions.\(^10\) The procedure for requesting records is designed to be as simple as possible: anyone can write to a federal agency asking for copies of records held by that agency. The requester need not be a US citizen, and need not give any reason for wanting the records.\(^11\)

FOIA was far from an immediate success. Not a single executive department or federal agency representative testified before Congress in support of FOIA before it was passed in 1966. After FOIA was enacted, the federal bureaucracy expressed its hostility by systematically refusing to comply with the law.\(^12\) In 1974, over President Ford’s veto, Congress amended FOIA to give it the teeth needed to overcome the executive branch’s opposition.\(^13\) Among the more significant changes, agencies were given deadlines by which they had to comply with requests\(^14\) and courts were granted authority to award attorneys’ fees and costs if an agency’s failure to provide the

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\(^8\) 5 USC 552(a)(1).
\(^9\) 5 USC 552(a)(2).
\(^10\) 5 USC 552(a)(3).
\(^11\) As part of a series of amendments in 1996, commonly referred to as ‘E-FOIA’, agencies are now required to publish a register of all the records in their possession. *Ibid.*
\(^12\) As a 1972 congressional report complained: ‘The efficient operation of the Freedom of Information Act has been hindered by five years of foot-dragging by the Federal bureaucracy. The widespread reluctance of the bureaucracy to honor the public’s legal right to know has been obvious in parts of two administrations.’ House Committee on Government Operations, Administration of the FOIA, House Report 92-1419, 92nd Congress, 2nd Session, 1972, pp. 8–9.
\(^13\) PL 93-502.
\(^14\) 5 USC 552(a)(6)(A)(i).
records requested was not legally justified.\textsuperscript{15} In addition, Congress sought to increase the number of requests by providing that requesters would not be charged if disclosure was in the public interest.\textsuperscript{16}

After invigorating FOIA, Congress enacted other open government laws mandating public access to government decision-making. First came the Federal Advisory Committee Act (known as FACA), which regulates agencies' use of committees of non-governmental experts to assist them in formulating policy.\textsuperscript{17} As federal agencies' jurisdiction expanded into increasingly complex areas (such as air quality, nuclear power and drug safety), they began to rely on panels of outside experts to advise them on substantive policy issues (such as how to measure clean air, what type of safety procedures to establish for nuclear power plants, and whether or not to approve new drugs).\textsuperscript{18} Agencies were criticized for failing to disclose the composition of the committees, the substance of the committees' recommendations, or even the materials the committees relied upon to reach those recommendations.\textsuperscript{19} Most troublesome was the agencies' habit of choosing experts for such committees who themselves had a stake in the outcome of the decisions they were helping to make.\textsuperscript{20}

FACA was intended to control and regulate advisory committees by requiring that all such meetings of outside experts be approved by Congress, meet publicly, provide a public record of their recommendations, and be composed of impartial experts. FACA also requires that the public be granted an opportunity to express their views to agencies, either through the submission of written comments or through oral presentations at public meetings.\textsuperscript{21}

Completing the triumvirate of open government legislation, Congress then passed the Government in the Sunshine Act, which grants the public access to – although no ability to participate in – the meetings of all multi-member federal agencies.\textsuperscript{22} Thus, the heads of these agencies cannot debate policy outside of public view.

These open government laws were enacted and amended during a period when Americans had lost faith in their government due to a series of unilateral illegal actions by the executive branch and the subsequent attempt to cover up wrongdoing. The public had also come to distrust the federal agencies that were playing an increasingly significant role in implementing federal legislation, at least in part because the relationship between agencies and industry had evolved into a collegial partnership in which agencies tended to defer to industry at the expense of the public interest ("agency capture").\textsuperscript{23}

\textsuperscript{15} 5 USC 552(a)(4)(E).
\textsuperscript{16} 5 USC 552(a)(4)(A)(iii).
\textsuperscript{17} 5 USC App. 1 \textit{et seq.}
\textsuperscript{18} Croley and Funk, \textit{op. cit.}, note 3, pp. 458–9.
\textsuperscript{19} \textit{Ibid.}, p. 459.
\textsuperscript{20} \textit{Ibid.}
\textsuperscript{21} \textit{Ibid.}, pp. 460–1.
\textsuperscript{22} 5 USC 552b.
\textsuperscript{23} Croley and Funk, \textit{op. cit.}, note 3.
Open government legislation was intended to improve the performance of the executive branch by opening up agency decision-making to public view, which, it was hoped, would increase accountability, reduce corruption and abuse of power, and solve less serious problems such as inefficiency and mismanagement in law-implementation. Thirty-five years later, FOIA is still viewed in much the same way, at least by law-makers. The House Report accompanying the 1996 amendments to FOIA described FOIA’s role in US political life as follows:

FOIA access to unpublished agency records has resulted in many disclosures of waste and fraud in the Federal Government. The Act reflects the view that the full disclosure of information to the public about government wrongdoing and other mistakes will ultimately generate appropriate corrective responses. Such revelations may have a certain degree of preventive effect, prompting a higher degree of probity and conscientiousness in the performance of government operations.\(^\text{24}\)

In the words of political scientist Fritz Scharpf, transparency legislation in the US is ‘output-oriented’ in that it seeks to restore public faith in government by improving the effectiveness of government policies in promoting the common welfare.\(^\text{25}\) Proponents of open government did not claim that these laws would change the essential process by which decisions were reached. Again to use Scharpf’s terminology, open government was not an ‘input-oriented’ legitimizing tool that would make government decision-making better reflect the will of the people.\(^\text{26}\) US transparency laws were intended to be output-oriented because they were enacted in response to abuses of power concerning the execution of the law, rather than to a crisis of legitimacy concerning the law-making process itself, as illustrated by the fact that they apply only to information held by the executive branch in its role as implementor of federal laws.

In recent years, however, US transparency laws have exceeded law-makers’ modest expectations as the public learned to harness their right to information to enhance their pre-existing rights to participate in government decision-making.\(^\text{27}\) For example, under the Administrative Procedure Act, enacted in 1946, businesses, non-governmental organizations and even unaffiliated members of the public have formal channels of access to agencies that permit them to play a role in policy development. Thus, before promulgating a regulation, a US federal agency must publish its proposal, take public comment on that proposal, and then justify the policy choices taken in its final rule.\(^\text{28}\) With increasing frequency, comments on

\(^{24}\) House Committee Report No. 104-795, 104th Cong., 2nd Session, 1996.


\(^{26}\) Ibid.

\(^{27}\) Public access to government decision-making was already in place at the time that FOIA, FACA and the Government in the Sunshine Act were enacted. Those open government laws were mainly concerned with providing the public with access to government information with which they could monitor the executive branch. However, FACA did go further by providing interested citizens with a right to submit comments and/or participate at advisory committee meetings.

\(^{28}\) Administrative Procedure Act, 5 USC 553.
proposed rules cite information obtained through FOIA or other open government laws to support their arguments about whether and how rules should be changed before being finalized.\textsuperscript{29} Likewise, transparency reforms have made it easier for the public to participate effectively in the legislative process. Individuals invited to testify before Congress frequently rely on information obtained under FOIA, the Government in the Sunshine Act or FACA when presenting their views on proposed legislation.\textsuperscript{30} Because the US Congress holds centre-stage in US law-making (in contrast to the European Parliament’s still subservient role to the Council and Commission), public participation in Congressional hearings can have a significant impact on Congress’ legislative choices.

Thus, FOIA and other right-to-information laws in the US have gained stature, taking on an input-legitimating role in US civic life, because they arm interest groups and citizens with the information they need to contribute to the decision-making process. Without access to government information through US transparency laws, these channels of influence would be far less useful. By the same token, access to government information alone would be of less value if not accompanied by a right to petition and be heard by the government. Only after being coupled with participation rights was transparency elevated from improving the output of executive branch decision-making to promoting democracy in government decision-making in the US.

**Transparency Reform in the European Union**

Like other intergovernmental organizations, the EU has operated in a culture of secrecy for most of its existence. The EU has been largely the project of diplomats, and diplomats are unaccustomed to inviting the public to participate in their endeavours.\textsuperscript{31} Accordingly, for much of the EU’s history, the public was purposefully kept at arm’s length from the decision-making process.\textsuperscript{32} From time to time the EU issued summaries of its activities that more closely resembled public

\textsuperscript{29} See e.g. Center for Auto Safety v. National Highway Traffic Safety Administration, 93 F Supp 2d 1 (2000) (the plaintiff sought information under FOIA from the NHTSA and auto manufacturers to formulate comments to the NHTSA’s proposed rule regarding airbags); Lead Industries Association v. Environmental Protection Agency, 647 F 2d 113 at 167 (DC Cir. 1980) (noting that parties use FOIA as a discovery device in rule-making proceedings).

\textsuperscript{30} See e.g. the testimony of Nadine Strossen, President of the American Civil Liberties Union, submitted to the Senate Judiciary Committee Department of Justice Oversight, 4 December 2001, www.aclu.org/congress/1120401a.html.


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relations materials than objective reporting on EU activities. The actual documents relied upon in EU decision-making were released only to those journalists and academics who were sympathetic to the EU. Moreover, the Treaties that lay down the framework for the EU – the constitutive documents of the EU – are negotiated in nearly complete secrecy. Thus, the most important decisions about EU governance have always been made behind closed doors, without public participation and out of public view.

As a result, the EU is frequently criticized for being insulated from, and unaccountable to, the people it serves. Decisions in the EU are mostly made by unelected officials in the Council and Commission. The European Parliament is the only body whose members are directly elected by the peoples of Europe, and thus it is the institution with the greatest democratic legitimacy. However, until recently, the Parliament has been viewed as the weakest of the three institutions because it had only a limited consultative role in the legislative process and lacked the authority to check the Council and Commission. Parliament’s powers have expanded by the Single European Act and Treaty amendments; it is now co-decision-maker with the Council in some areas of legislation, must give its approval of appointees to the Commission, and can censure the Commission. These changes are slowly transforming Parliament into a more powerful actor on the European stage. Nonetheless, major policy decisions continue to be made in obscure comitology committees staffed by unelected bureaucrats, and thus bypass oversight by either the Council or Parliament. The EU’s process of enacting legislation is so complicated and diffuse that it is difficult for the average citizen to understand where the real decisions are made, and thus impossible to try to affect their outcomes.

The expansion of the EU’s jurisdiction in the late 1980s and throughout the 1990s raised questions about its authority to enact legislation affecting the daily lives of

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34 Ibid.


38 Neyer, *op. cit.*, note 6, p. 119.

Europeans. European integration took significant steps forward during this period, first with the Single European Act in 1986 and then with the Treaty on European Union in 1992, but failed to generate public enthusiasm for its development. The EU's closed-door diplomatic style of decision-making, which had sufficed when its sphere of power was limited, became unacceptable after Member States ceded significant competences to EU institutions. Ireland’s reluctance to ratify the Single European Act was the first sign of trouble, but European leaders did not heed that warning when they chose to reject a Dutch proposal to include a right of public access to EU documents in the Treaty on European Union in 1992.

Transparency did not get taken seriously until the Maastricht Treaty met with significant opposition. Denmark rejected outright the Treaty, and France came close to doing so as well. Polls in the UK and Germany revealed that the Treaty might have been defeated there as well had ratification been necessary. Reflecting the public sentiment against the EU, the UK parliament took nearly a year to approve the Treaty, and a lengthy court challenge in Germany threatened its implementation in that country. European leaders were made painfully aware that even though citizens of Member States lacked direct control over EU institutions and decision-makers, they could still exercise the ultimate threat of halting European integration. Out of necessity, then, the EU began to consider measures to improve its popularity.

Transparency reform became the leading candidate for improving the EU’s image among its constituents. The EU’s secrecy was identified as a major factor in Denmark’s rejection of the Maastricht Treaty. The addition to the Union of Sweden and Finland – countries with long-standing traditions of open government – also pushed such reforms to the forefront. Moreover, as discussed at greater length below, transparency plays a key role in almost any theory on how to improve the democratic legitimacy and popularity of the EU, and thus it has gained a wide range of supporters.

In December 1993, the Council and the Commission agreed on a Code of Conduct that formalized the public’s right to access information. Treaty recognition for such a right was still several years away, however. The issue was raised again at the 1996 Intergovernmental Conference, and a right to information Treaty recognition for such a right was still several years away, however. The issue was raised again at the 1996 Intergovernmental Conference, and a right to information

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42 ibid., pp. 5–6.
43 ibid., p. 6.
46 Decision 93/731/EC and Decision 94/90/ECSC, EC, Euratom.
provision was finally included in the Amsterdam Treaty, signed in June 1997. The EU Council adopted a regulation implementing that provision in May 2001 which went into effect on 3 December 2001.\footnote{Regulation (EC) No. 1049/2001, OJ 2001 No. L149/43, 31 May 2001.}

The Amsterdam Treaty contains two statements concerning transparency. First, Title 1, Article 1 states broadly that:

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.

Then, in Article 255, the Treaty specifically provides that:

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

Article 255 differs from the US FOIA in two significant ways. First, it is not limited to documents related to the EU’s executive functions, but rather grants the public a right to obtain documents held by all three major EU institutions. Second, it grants access rights only to residents and citizens, whereas FOIA can be used by any individual, regardless of citizenship or country of residence. Thus, many people directly affected by EU policies and procedures have no right to obtain information. In practice, this distinction is not that significant, because an EU resident or citizen can make an information request on behalf of an individual who would otherwise be denied access. Symbolically, however, the limitation serves to carve out a special privilege reserved for EU members and citizens, perhaps with the intention of enhancing a sense of European citizenship and community.

Article 255 establishes a broad right of public access to EU information, the contours of which are set out in Regulation (EC) No. 1049/2001, which was enacted by the Council and Parliament on proposal from the Commission.\footnote{Ibid.} Interestingly, the regulation does more than simply set up the rules for access to documents, it declares that improved transparency will democratize the EU. The first paragraph of the regulation states that the Treaty on European Union ‘marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen’. The second paragraph of the regulation goes further, tying openness to the democratic legitimacy of the EU itself:

Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid
down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

The rhetoric in the preamble to the EU's access regulation goes far beyond official US Government statements on the role of FOIA in US civic life. In enacting FOIA, the US Congress discussed greater accountability, increased efficiency, and other improvements in government output, but FOIA was not viewed as a vehicle for enhancing the democratic legitimacy of government decision-making.

The EU's pronouncements on the value of transparency are thus somewhat at odds with the content of the regulation itself, which is quite similar to FOIA. Like FOIA, the EU's regulation establishes a presumption in favour of disclosure of all records held by the covered institutions, but then creates a number of exceptions to that rule. The regulation prohibits disclosure of records that would undermine (1) public security; (2) defence and military matters; (3) international relations; (4) financial, economic or monetary policy; and (5) privacy. Disclosure of records that could injure commercial interests or hinder court proceedings or investigations is permitted only when the injury is outweighed by a greater public interest. Documents reflecting the institutions' deliberative processes will be disclosed unless doing so would 'seriously undermine the Institution's decision-making processes' and there is no overriding public interest in disclosure. Finally, 'sensitive documents' – defined as documents originating from institutions, agencies, Member States, international organizations or other countries that are classified as secret and concern public security, defence and military matters – can be handled only by authorized persons and can be released only with the consent of the originator of the document.

The regulation devotes significant attention to the problem of disclosure of documents produced by third parties. Transparency advocates have always pushed for disclosure of documents received by EU institutions that were drafted by individuals or institutions outside the EU. The regulation comes down on the side of disclosure, but establishes procedures to protect third parties should there be a legitimate reason to keep the documents secret. If a requester seeks access to a document drafted by a third party and it is not immediately clear whether the document should, or should not, be disclosed, the EU institutions must consult the third party to determine whether the document qualifies for one of the exceptions to disclosure. The regulation is even more protective of documents drafted by Member States. If a Member State created the requested document, the institution may not disclose that document without its prior approval. Thus, Member States with restrictive disclosure policies may prevent the public from accessing their documents even when no listed exception to disclosure would apply.

The regulation also establishes the procedures for requesting EU documents. Applications must be written, sent either by regular letter or by e-mail, and must be in one of the EU's official languages. The application must be sufficiently precise to enable the institution to identify the document sought. Absent exceptional circumstances, within fifteen business days of registering an application, the institution must either grant access to the document requested or provide a written
response stating the reasons for total or partial refusal and informing the applicant of his or her right to appeal that decision to a higher authority within the institution. If the institution continues to deny access to some or all of the documents, it must inform the applicant, in writing, of the applicant’s right to institute court proceedings and/or file a complaint with the ombudsman. Where the institution grants access, the applicant must pay for the costs of producing and sending copies.

To aid the public in locating records, each institution must post on the Internet a register of their documents. Registered document are to be listed with a reference number, indication of subject-matter, a short description of the document’s content and the date on which it was received, drawn up and recorded in the register. To as great an extent as possible, the institutions must make documents directly accessible to the public in electronic form or through the register, especially for documents received in the course of the legislative process and documents relating to the development of policy or strategy. The access regulation added to the categories of documents that shall be published in the Official Journal. In addition, the regulation requires that EU institutions inform the public of their access rights, and requires Member States to cooperate with the institutions in providing information to citizens.

Notably, the access regulation establishes no right of public participation in EU decision-making. It does not provide the public with a right to notice and comment on EU rule-making, or guarantee the public a right to be heard before legislation is enacted. The access regulation improves the public’s ability to gain information about EU decision-making, but does nothing to bring the public ‘closer’ to the decision-makers themselves.

The European Parliament, Council and Commission adopted rules of procedure to implement the access regulation. Each institution’s rules elaborate on the requirements of the access regulation and provide information on procedural issues not addressed by that regulation. For example, the European Parliament’s rules of procedure establish that its register will include not only the data mandated by the regulation, but also the identity of the institutional author of each registered document, the languages in which it is available, and the document’s status, category and storage location. However, documents drawn up under the legislative process or for other parliamentary business will not be entered in the register until after they have been tabled or made public, a surprising restriction that denies the public information about these documents until it is too late to influence the legislative process. Once the documents are tabled or made public, Parliament’s procedures require that documents concerning legislation must be directly accessible to citizens in electronic form, and that all documents relating to the drafting of policy or strategy be made directly accessible ‘as far as possible’. Finally, Parliament established rules of procedure for handling sensitive documents and documents originating from third parties.49

Unlike Parliament, the Council’s rules of procedure make clear that it is the final decision-maker regarding disclosure of documents originating from third parties. Thus, even if the third party does not agree, the Council will release the document after informing the third party of its intention to do so. The Council’s rules also list the categories of documents that shall be made directly accessible to the public, and provide that its public register will include notations as to which documents drawn up after 1 July 2000 have already been released to the public.50

The Commission’s rules of procedure grant non-EU citizens access to its documents on the same terms as apply to EU citizens and residents of Member States. Although the EU’s access regulation states that the institutions may provide similar levels of access to non-EU citizens, they are not required to do so, and the Commission is the only institution that stated it intended to treat all requesters equally. The Commission is also the only institution to publish a guide to inform the public of their rights under the EU’s access regulation.51

As this summary of the EU’s access regulation and the institutions’ rules of procedure makes clear, the EU’s access regime resembles FOIA. Like the US, the EU has established a presumptive right of public access to its records, has instituted a policy of providing direct access to as many of its documents as possible, and has created simple procedures through which the public can obtain documents that are not directly accessible. Yet the missions of the US and EU transparency legislation differ significantly. The primary motivation for transparency reform in the EU is not to improve the output of EU decision-making, as it was in the US. To the contrary, the main argument against transparency is that it will result in the deterioration of the speed and quality of EU decision-making by eroding the spirit of community and cooperation between representatives of Member States.52 Greater openness, some fear, will bring out the more selfish instincts of Member State executives who will have to justify their actions to their constituents at home, and thus will not feel free to sacrifice their national interests for the good of Europe as a whole.53 One academic noted the common perception ‘that it is only behind closed doors and with a limited number of actors with defined interests that the kind of package deals which characterize these constitutive decisions can be reached’.54 That view was confirmed by Hans Brunmayr, a Deputy Director-General in the Council, who described the Council’s deliberations as ‘taking place behind closed doors in a remarkable spirit of solidarity and respect of mutual interests which enables the Council to decide on most issues by consensus’.55

54 Hoskyns, op. cit., note 33, p. 184.
55 Brunmayr, op. cit., note 31, p. 69.
Opponents of transparency fear that openness will at the very least slow down the decision-making process, and possibly even destroy the spirit of cooperation that the EU has striven to foster among the Member States.

Transparency reformers are willing to accept some loss in efficiency and supranational spirit in return for expected gains in the democratic legitimacy of EU decision-making. In the aftermath of Maastricht, the EU was widely criticized as being undemocratic (in Scharpf’s terminology, for lacking ‘input-legitimacy’), resulting in a psychological distance between Brussels and the citizens of Europe. Even before Maastricht, commentators concluded ‘the shortcomings of the Community lie in the feelings of remoteness and lack of influence and involvement on the part of many of its citizens’. Transparency, it is widely hoped, will serve to bridge the gap between the ‘bureaucrats in Brussels’ and the Europeans whom they serve. Illustrating this sentiment, the access regulation’s statement of purpose claims that openness ‘enables citizens to participate more closely in the decision-making process’ and ‘guarantees’ that the EU will enjoy ‘greater legitimacy’.

Thus, transparency reform in the EU comes with high expectations. Commentators have come to view transparency as a ‘constitutive principle’ of the EU, and its exalted status is symbolized by its placement in Article 1, Title 1 of the Treaty on European Union. The Treaty drafters appear to have agreed with Advocate-General Tesauro, who wrote in 1996 that ‘the basis for the individual’s right to information should be sought in the principle of democracy, which constitutes one of the cornerstones of the Community edifice’. The soaring rhetoric that accompanies transparency reform in the EU is striking when compared to the rather mundane view of open government legislation in the US. Where the US perceives open government to be just another nuts-and-bolts practice of good government, the EU has ordained it a constitutional prerequisite to democracy.

**Rhetoric Versus Reality: A US Perspective on the EU’s Transparency Reforms**

Transparency reform in the EU leaves the US observer with conflicting impressions.
EU reformers promoted their cause by proclaiming transparency as a constitutional necessity, rather than merely an element of good government. EU officials claim transparency reform can improve the democratic legitimacy of the EU. Yet the EU has focused on providing public access to information without expanding channels of access to EU decision-makers that would enable interested members of the public to participate in policy formation and implementation. In the US, the legitimacy of policy-making has been enhanced first and foremost by participation rights; transparency plays an important, but nonetheless secondary, role. To the American observer, then, it appears that the EU has mistakenly focused on transparency as the key to legitimacy, even though transparency can do little to improve legitimacy in the absence of a public right to be heard during the policy-formation process.

Under almost any theory of democracy, citizens must be guaranteed not only the right to know what their government is up to, but also a right to influence government decision-making, either directly or through their representatives. Scores of academics and EU observers have forwarded ideas about how to restructure the EU to eliminate its ‘democratic deficit’, all of which require greater public access to, and influence over, decisions and decision-makers. Although an over-simplification, it is nonetheless possible to categorize prevailing views on how to democratize the EU into three camps.

One set of thinkers proposes that the EU follow a supranational majoritarian model, which seeks to legitimize the EU by redesigning its institutions to realize the preferences of European-wide majorities. A reform in this direction came in 1979, when Europeans were granted the right to elect directly members of Parliament. Over the last decade, the European Parliament has been granted additional powers that give it a bigger role in the legislative process and in overseeing the Commission. Majoritarians continue to press for enlargement of Parliament’s powers and other reforms, such as referendums, that would ensure that the Council and Commission are more sensitive to the preferences of European-wide majorities.

The intergovernmental model seeks to legitimize the EU by making it more responsive to the Member States. Intergovernmentalists contend that the EU’s authority to make European-wide decisions derives from the authority of each Member State to make decisions for its own constituents, and they seek to protect the role of the states in EU decision-making. The Council is the EU institution that represents the interests of Member States, but it is often entirely left out of the rule-making that is necessary to implement legislation. Comitology committees of experts work with the Commission to create the implementing rules for legislation; only if

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62 Giandomenico Majone suggests that the expression ‘democratic deficit’ can actually be defined as a set of problems, one being insufficient public participation. Majone, op. cit., note 35, p. 14; see also Dehousse, op. cit., note 6.


the Commission and the committees disagree with one another—a rare event—does the Council play a role in the process. Moreover, the Council represents only the executive branch of each Member State, and thus some intergovernmentalists also advocate the integration of national parliaments into the EU decision-making apparatus. In sum, intergovernmentalists search for reforms that will rein in the EU's supranational institutions and place them under the direct control of the Member States.

A third camp envisions an EU more closely modelled on civic republicanism than standard representational democracy. These 'deliberative supranationalists' argue that the public should be allowed to participate directly in decision-making itself. The hope would be to encourage 'civil society'—non-governmental organizations and other public-minded interest groups—to play a larger role in the decisions made by the EU. Ideally, these reforms would transform the EU into a deliberative democracy in which all those affected by decisions would be able to participate in the deliberative process in which the policies are made.

Each model of reform has its strengths and weaknesses which have been discussed at length by other academics and will not be repeated here. Rather, the focus in this paper is on what they all have in common: all three insist that the EU become more transparent, but none can accomplish its goals through transparency alone. For example, reforms empowering European majorities require not only that European citizens have greater access to information about the EU, but also that they have tighter control over the actions of their representatives in Parliament, and that those representatives in turn play a more significant role in the passage and implementation of EU legislation than they currently do. Under the intergovernmental model, Member States' executives must not only be capable of observing the actions of their

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66 Dehousse, op. cit., note 6, p. 3 (quoting French Foreign Minister Roland Dumas' contention that strengthening intergovernmental organs like the European Council would alleviate the European Community's democratic deficit, since that institution is the 'emanation of the democratic legitimacy of the States').


68 Neyer, op. cit., note 6, p. 123.

representatives, but must also be able to participate through those representatives in all phases of legislation and rule-implementation – a process that is currently controlled by obscure comitology committees and expert working groups that operate behind closed doors. Likewise, national parliaments must be provided both with information and a voice with which to participate in EU decision-making.70 And, under the deliberative democracy model, civil society must be granted access to information underlying EU decision-making so as to participate more effectively in all stages of that process. Thus, although all three sets of reforms require the EU to become more transparent, all intend transparency to serve the greater purpose of enabling various constituencies to participate effectively in EU decision-making.

Of course, providing the public with meaningful access to EU decision-makers is more complicated than simply granting the public access to information, and thus it is not surprising that the EU has created information rights but not participation rights. Two aspects of the transparency debate indicate that meaningful public influence over EU decision-making may be a long time coming.

First, EU officials do not think that their decision-making process need undergo any fundamental changes. Not only do EU elites believe that the EU is performing well, they actually fear the effects of greater public involvement on the quality of EU decision-making, particularly on the ability of the EU to maintain its cooperative, consensus-based supranational decision-making. Thus, EU leaders lack motivation to forward reforms that will significantly affect the decision-making process.

Second, the rhetoric surrounding transparency reform in the EU has made transparency a goal in and of itself. The statement of purpose in the EU’s new access regulation and the declarations in the Amsterdam Treaty assume that greater transparency alone will lead directly to more legitimate government. Simply providing European citizens with a right to access EU records, it is hoped, will give them a sense of civic belonging and ownership over the EU that is now lacking. Experience with US open government laws, however, suggests that without channels of access to EU decision-makers, access to EU documents alone may be a rather empty right.

**Conclusion**

US transparency reforms were intended to improve oversight of law-execution, but ultimately pluralized the policy-making process itself by enhancing pre-existing rights to participate in law- and rule-making. The US experience illustrates that,

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although transparency can improve government output by preventing and uncovering fraud, mismanagement and abuse of power, it cannot serve an input-legitimating function unless coupled with channels of access to government decision-making. Transparency is a useful tool, but standing alone it cannot be expected to democratize governance. In short, transparency reform is a necessary but insufficient element with which to transform the EU from a politically insulated bureaucracy to a pluralistic democracy.

Although the EU’s recent embrace of transparency should be viewed as a positive step in the process of bringing European citizens closer to their government, it should not be considered an end unto itself. Until the public has increased rights to participate in EU policy-making, the new access regulation will likely be infrequently used and will do little to ameliorate the EU’s image as an insular and byzantine bureaucracy. Unfortunately, the rhetoric surrounding transparency reform in the EU suggests that the EU will stop at transparency reform because it is unwilling to take the admittedly more difficult step of providing for greater public participation in the decision-making process itself.

However, transparency reform in the EU should be allowed the time it needs to mature and develop before it is declared either a success or a failure in bringing citizens closer to EU governance. Open government laws were not an immediate success in the US. Congress was forced to amend FOIA over an executive veto before it began working effectively. Agencies did not comply with FACA until forced to do so by the courts. And the American public is still in the process of discovering how to harness the power of transparency. Open government is only just beginning to work well in the US because agencies have reluctantly begun to follow its command, and because the public has seen the value of using government information to oversee and participate in government decision-making. The US experience demonstrates that open government does not bring a quick end to public distrust of government. Rather, it merely provides the means by which the public can begin the long process of taking back governance for itself.