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### Openness, Transparency and the Right of Access to Documents in the EU

*in-depth analysis*

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**DOI**

[10.2861/126821](https://doi.org/10.2861/126821)

**Publication date**

2016

**Document Version**

Final published version

[Link to publication](#)

**Citation for published version (APA):**

Curtin, D., & Leino-Sandberg, P. (2016). *Openness, Transparency and the Right of Access to Documents in the EU: in-depth analysis*. European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs. <https://doi.org/10.2861/126821>

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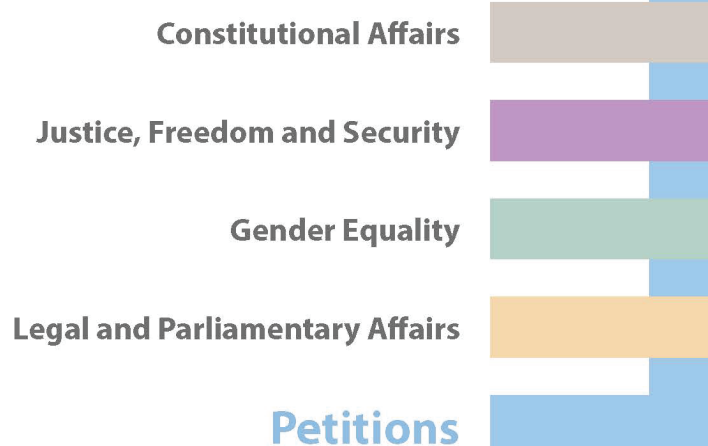
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DIRECTORATE-GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT** **C**  
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**Openness, Transparency  
and the Right of Access  
to Documents in the EU**

In-depth analysis for the PETI committee





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND  
CONSTITUTIONAL AFFAIRS**

**PETITIONS**

# **Openness, Transparency and the Right of Access to Documents in the EU**

**IN-DEPTH ANALYSIS**

## **Abstract**

Upon request of the PETI Committee, the Policy Department on Citizens' Rights and Constitutional Affairs commissioned the present analysis, which examines the situation in relation to openness, transparency, access to documents and information in the EU. Case law and developments in the jurisprudence of the CJEU are examined, notably for legislative documents, documents relating to administrative proceedings, to Court proceedings, infringement proceedings and EU Pilot cases, protection of privacy and international relations. Current and future challenges, as well as conclusions and policy recommendations are set out, in order to ensure compliance with the Treaties' and Charter of Fundamental Rights' requirements aimed at enhancing citizens' participation in the EU decision-making process, and consequently stronger accountability and democracy in the EU.

## **ABOUT THE PUBLICATION**

This research paper was requested by the European Parliament's Committee on Petitions and commissioned, supervised and published by the Policy Department for Citizens' Rights and Constitutional Affairs.

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## **LINGUISTIC VERSIONS**

Original: EN

Manuscript completed in June, 2016  
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## 1. OPENNESS, TRANSPARENCY AND THE RIGHT TO ACCESS DOCUMENTS IN THE EU

The Treaty of Lisbon, in force since December 2009, includes a number of reforms emphasising open-decision making, citizen participation and the role of transparency and good administration in building up the democratic credentials of the European Union (EU). As regards democratic decision-making and transparency in particular, a specific Title in the Treaty on the European Union (TEU) now includes a number of core provisions on democratic principles, applicable in all areas of Union action. They underline the principle of representative democracy through the European Parliament, representing the citizens directly at Union level, and through the governments forming the European Council and the Council and that are democratically accountable either to their national parliaments, or to their citizens.<sup>1</sup> Even participatory democracy enjoys a pivotal role in the new Treaty framework; in order to guarantee the right of 'every citizen' to 'participate in the democratic life of the Union', the Treaty establishes that '[d]ecisions shall be taken as openly and as closely as possible to the citizen' and that both citizens and representatives should be given opportunities to 'make known and publicly exchange their views in all areas of Union action'.<sup>2</sup> These provisions have a linkage both with the new citizens' initiative<sup>3</sup> and with Article 15 TFEU, which places the legislature under an obligation to act publicly, and establishes that citizens have the right to access documents held by all Union institutions, bodies and agencies. The right of access to documents, and its nature as a fundamental right, is further emphasised by Article 42 of the EU Charter of Fundamental Rights, which now enjoys 'the same legal value as the Treaties'.<sup>4</sup>

In practice, open decision-making is to a large extent realised through the right of the general public to access documents. Regulation No 1049/2001 on public access to documents held by the EU institutions (Access Regulation),<sup>5</sup> builds on the principle of 'widest possible access', and has together with case law been instrumental in operationalising the right of citizen access by establishing procedures and standards for the exercise of their democratic rights. All documents held by the European Parliament, Council and Commission are public, as the main principle, but certain public and private interests are protected through specific exceptions under Article 4. But as exceptions derogate from the principle of the widest possible public access to documents, they must, according to established case-law, be interpreted and applied narrowly.<sup>6</sup>

Article 15(3) TFEU extends the public right of access to documents of all the Union institutions, bodies, offices and agencies. The Court of Justice, the European Central Bank and the European Investment Bank are subject to this provision only when exercising their administrative tasks. The original 2001 Regulation only directly applies to the European Parliament, the Council, and the Commission. However, its application has been extended to the agencies by virtue of a specific provision in their respective founding acts. Furthermore, a number of institutions and bodies have adopted voluntary acts laying down rules on access to their documents which are identical or similar to Regulation No 1049/2001.

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<sup>1</sup> Article 10(1) and (2) TEU.

<sup>2</sup> Article 10(3) TEU, Article 11 TEU.

<sup>3</sup> See Regulation No 211/2011 on the citizens' initiative, OJ L [2011] 65/1.

<sup>4</sup> Article 6(1) TEU.

<sup>5</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145/43.

<sup>6</sup> See e.g. C-280/11 P *Council v Access Info Europe* para 30 and the case law quoted in the paragraph.

It has been 15 years since the adoption of Regulation No 1049/2001. In the same time frame the Commission and the Council set about adopting internal rules based on their rules of procedure on security and other classifications for documents. Such rules continue to exist in amended form today and exist alongside the legislative rules on access to documents.

Discussions on the reform of Regulation No 1049/2001 have been pending since 2008.<sup>7</sup> While one would think that the tendency was – in line with the recent Treaty reforms – to strengthen the rights of citizens further, in fact the opposite seems to be the case, with discussions on reform mainly circulating around new ways to limit citizen access,<sup>8</sup> many of them in rather fundamental ways that seem to be at odds with the letter of the Treaties. These discussions bear witness to what seems to be a change of paradigm and priorities. The tendency since the Treaty of Maastricht has been to strengthen the rights of citizens,<sup>9</sup> now this objective seems less squarely at the forefront of either the policy agenda or actual institutional practice. Staffan Dahllöf, a journalist specialising in freedom of information, describes the situation as follows:

*The voices asking for openness and citizen's involvement are today weaker and fewer than they were when the present rules were decided in 2001 - at least amongst the Member State governments, and definitely in the Commission. It's more like the Empire strikes back.*<sup>10</sup>

Since there is a complete impasse in the legislative procedure (already for a very long time) on amending the 2001 Regulation, the role of the CJEU is very much centre-stage with litigants attempting to challenge a range of embedded secretive practices across a range of institutions and tasks.<sup>11</sup> From a democratic point of view this can be considered problematic as it shifts responsibility from the EU legislator to the courts who cannot re-design the system in the required manner but deal with issues on a case by case basis, as and when they are brought before it. The same applies to the European Ombudsman, although her work is increasingly significant in bringing specific secretive practices to light and tackling them both on a case by case basis and more structurally through a growing number of own initiative enquiries. Keeping in mind Dahllöf's accurate observation quoted above, opening negotiations on the reform of Regulation No 1049/2001 naturally brings with it a risk of discussions leading to a further tightening of the EU transparency regime. The current Commission is not necessarily positively disposed to increasing transparency (as evidenced in legal observations before the CJEU in particular), and it has the backup of the majority of Member States in the Council. Despite this, we think that there should be an open discussion about the possibilities of increasing openness. If this proves to be impossible, the Parliament can always block any reform that could result in negative outcomes or a levelling down.

In this note we discuss recent developments in jurisprudence and the challenges that currently exist in the application of the Regulation No 1049/2001 with a focus on public access by citizens. We conclude with a number of policy recommendations for consideration.

<sup>7</sup> See e.g. Ian Harden, 'The Revision of Regulation 1049/2001 on Public Access to Documents', 15(2) European Public Law (2009) 239-256.

<sup>8</sup> See the open letter by Beatrice Ask, Minister for Justice, Sweden and Anna-Maja Henriksson, Minister of Justice, Finland, published at <http://www.wobbing.eu/sites/default/files/Open%20letter.pdf>.

<sup>9</sup> For one account of the EU's transparency development so far, see Deirdre Curtin, 'Judging EU Secrecy', Cahiers de Droit Européen, 2012 (2) 459 – 490.

<sup>10</sup> Staffan Dahllöf, 'Guide to the battle of transparency – UPDATED', 09/06/2012, available at the EU wobbing website <http://www.wobbing.eu/news/guide-battle-transparency-%E2%80%93updated>. On the varying positions of the Member States to the reform process, see M.Z. Hillebrandt, D.M. Curtin and A.J. Meijer, 'Transparency in the EU Council of Ministers: An Institutional Analysis', 20(1) European Law Journal, 2014, 1-20.

<sup>11</sup> For a discussion, see Päivi Leino, 'Transparency, Participation and EU Institutional Practice: An Inquiry into the Limits of the "Widest Possible"', EUI Working Paper (LAW 3/2014).



## 2. CASE LAW AND DEVELOPMENTS IN JURISPRUDENCE

An analysis of the case law of the CJEU over the past decade can largely be positive with a number of very key judgments finding in favour of those challenging secretive practices, with the Court adopting a constitutional and wide democratic perspective on the salience of the principle of access to documents for citizens. In its case-law, the CJEU has in principle required that documents should be examined one-by-one in accordance with the basic principle of the Regulation stemming from Article 4(6). When assessing possible harm to the interests protected by the Regulation, the risk of that interest being undermined must be reasonably foreseeable and not purely hypothetical.<sup>12</sup>

Another significant question discussed in recent case law relates to the 'public interest' test included in the exceptions under Article 4(2) and 4(3) of the Regulation<sup>13</sup> requiring the institution to balance the possible harm with the public interest in disclosure and consider whether access could still be granted despite some harm to the protected interests. The Court has constructed a three-stage test requiring the institution to first identify and verify the parts of the document that contain information covered by an exception; then examine whether disclosure of the parts of the document would undermine an interest; and thirdly, when a public interest test applies to the exception if there is an overriding public interest justifying the disclosure.<sup>14</sup> However, it is difficult to identify a case where the Court would have been convinced about the existence of a public interest in disclosure that would have effectively reversed the outcome, even if attempts have been made for example in relation to environmental matters (*LPN* case), the use of public funds (*Dennekamp*), the protection of public health (*Spirlea*) and constitutional issues (*Besselink*). Therefore, the difference to the exceptions laid down by Article 4(1), where no public interest test is required, is not particularly remarkable. In relation to the Article 4(1) exceptions the Court has stood very firm that no consideration of a possible public interest in disclosure needs to be considered.<sup>15</sup> Recent case law includes in particular examples relating to the protection of privacy and international relations, to be further discussed below.

The CJEU in recent case law is re-enforcing a questionable distinction between documents relating to legislative procedures and other documents. In addition to legislative documents, our focus in this briefing note is on administrative documents (including documents relating to infringement and EU Pilot procedures), Court pleadings and documents relating to international relations. In addition, we consider the balance between transparency and data protection in the Courts' recent case law. The institutions under challenge, in particular the Commission and the Council have continued to resist efforts to get them to change practices and to challenge (and even re-challenge) cases they lose at first instance or even on appeal.

Court jurisprudence also demonstrates that in many instances the Access Regulation, intended to secure the right of the general public to gain access to documents held by the institutions, is in practice frequently used by parties to individual administrative or judicial proceedings. This demonstrates that privileged access – which parties should enjoy in relation to their own file and specifically protected under Article 41 of the Charter of Fundamental

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<sup>12</sup> Ibid, paras 37-38, 40 and 44.

<sup>13</sup> The Article 4(2) exceptions involving the public interest test include the protection of commercial interests of a natural or legal person, including intellectual property; court proceedings and legal advice; and the purpose of inspections, investigations and audits. In addition, the Article 4(3) 'space to think' exception includes the test.

<sup>14</sup> Joined Cases C-39/05 P and C-52/05 P Sweden and Turco v Council EU:C:2008:374, para 43, in relation to legal advice.

<sup>15</sup> The Article 4(1) exceptions include the public interest as regards public security, defence and military matters, international relations, the financial, monetary or economic policy of the Community or a Member State; and the privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

Rights is currently not secured in Union legislation. This matter should be addressed on a horizontal basis by the Regulation on Administrative Procedure to be adopted on the basis of Article 298 TFEU.<sup>16</sup>

## 2.1. Legislative documents

The main principle in the Treaty of Lisbon is clear: the Council and the European Parliament are to legislate in the open. The last sentence of Article 15 TFEU also places the European Parliament and the Council under an obligation to ensure the publication of the documents relating to the legislative procedures. Under the Treaty of Lisbon, legislative matters are defined with reference to the applicable decision-making procedure, either the ordinary or special legislative one, and not the effects or title of the acts. For the Council's part this means that it meets 'in public when it deliberates and votes on a draft legislative act', in practice through the Council's internet site 'by audiovisual means, notably in an overflow room and through broadcasting in all official languages [...] using videostreaming'.<sup>17</sup> Open meetings have a linkage with access to documents, since documents submitted to the Council open sessions and the relevant minutes are made public.

Regulation No 1049/2001 has not been updated since the entry into force of the Lisbon Treaty, but it does include some references to legislative documents. Article 12 relates to direct access in electronic form or through a register. Its paragraph 2 establishes that '[in particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible'. In practice this entails that legislative documents should become accessible automatically, and not only following a specific request. Article 12 of the Regulation links with paragraph 6 of the preamble, which stipulates that

*Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.*

These provisions were subject to the Court's jurisprudence already pre-Lisbon, most notably in its landmark ruling in *Turco*, which clearly lays down the main principle of public access and its linkage with the principle of democracy:

*it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming [...] from increased openness, in that this 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. Those considerations are clearly of particular relevance where the Council is acting in its legislative capacity [...]. Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations*

<sup>16</sup> See P Leino, "Efficiency, citizens and administrative culture. The politics of good administration in the EU", 4 *European Public Law* (2014) 681-710.

<sup>17</sup> Council Decision of 1 December 2009 adopting the Council's Rules of Procedure, OJ L 325/35. See in particular, Article 7 'Legislative procedure and openness'.

*underpinning legislative action is a precondition for the effective exercise of their democratic rights.*<sup>18</sup>

The Court expressly stated that 'Regulation No 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process' (para 68 of the ruling). According to the Court, access can be denied in exceptional cases if the advice is 'of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question'. However, even then the refusal needs to be reasoned in detail and be only applied 'for the period during which protection is justified on the basis of the content of the document' (paras 69-70). However, the Council continues to limit access to legal service opinions given in the context of the legislative procedure,<sup>19</sup> in line with its Rules of Procedure, which have not been updated to reflect the Turco jurisprudence.

Post-Lisbon, the Court has had the opportunity to interpret the relevance of the 'space to think' exception in Article 4(3), relating to situations where a decision has not yet been taken by the institution, in the legislative context. Access Info Europe, an NGO promoting freedom of information in the EU, requested access to a legislative document including footnotes indicating the positions of individual Member States. The central question was whether access to Member State positions negatively impacts the effectiveness of decision-making and if yes, which one should take priority, effectiveness or openness. The Council lost the case in the General Court and appealed to the Court of Justice<sup>20</sup> arguing that the General Court's reading had attached 'undue and excessive weight to the transparency of the decision-making process, without taking any account of the needs associated with the effectiveness of that process'. It moreover disregarded the balanced approach laid down both in primary law and secondary law to the relationship between the two objectives. The Council argued that 'its legislative process is very fluid and requires a high level of flexibility on the part of Member States so that they can modify their initial position, thus maximising the chances of reaching an agreement'. In the Council's view, identifying the delegations was not necessary for ensuring a democratic debate.

The CJEU rejected this with reference to how full access can be limited only if there is a genuine risk that the protected interests might be undermined. The high standard of proof required to establish that level of harm makes it almost impossible to rely on Article 4(3) in this context. In particular, according to the Court,

*...the various proposals for amendment or re-drafting made by the four Member State delegations which are described in the requested document are part of the normal legislative process, from which it follows that the requested documents could not be regarded as sensitive – not solely by reference to the criterion concerning the involvement of a fundamental interest of the European Union or of the Member States, but by reference to any criterion whatsoever (para 63).*

Access to legislative documents continues to occupy the Court. Emilio De Capitani, the previous head of the LIBE Committee Secretariat, has lodged an appeal against the European Parliament's decision to refuse full access to documents relating to a legislative proposal, in particular as regards documents relating to trilogues.<sup>21</sup> De Capitani argues in essence that granting access to them would not specifically, effectively and in a non-hypothetical manner

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<sup>18</sup> Joined Cases C-39/05 P and C-52/05 P *Kingdom of Sweden and Maurizio Turco v the Council*, paras 45-46

<sup>19</sup> This is also reflected in jurisprudence, see e.g. T-452/10 *ClientEarth v Council*; T-303/13 *Miettinen v the Council*; T-395/13 *Miettinen v Council*.

<sup>20</sup> C-280/11 P *Council v Access Info Europe*.

<sup>21</sup> Case T-540/15, *De Capitani v European Parliament*.

undermine the legislative decision-making process, and that notably after the Lisbon Treaty, legislative preparatory documents are subject to the principle of widest possible access.

The General Court has also recently had the opportunity in *ClientEarth* to address the question of whether documents relating to impact assessments produced before the adoption of a Commission legislative procedure should be public or not.<sup>22</sup> The Commission had refused access with reference to how disclosure would restrict its room for manoeuvre and reduce its ability to reach a compromise, and create external pressures hindering delicate decision-making processes. The Commission invoked a 'general presumption' of secrecy (see below). The Court accepted that a general presumption was indeed necessary, 'having regard to the rules governing the preparation and development of policy proposals by the Commission, including, where appropriate, proposals for legislative acts' (para 78). For this reason,

*This is all the more important in order to preserve the essence of the power of initiative conferred on the Commission by the Treaties and its capacity to assess, wholly independently, the appropriateness of a policy proposal. More specifically, it is important to protect that power of initiative from any influences exerted by public or private interests which would attempt, outside of organised consultations, to compel the Commission to adopt, amend or abandon a policy initiative and which would thus prolong or complicate the discussion taking place within that institution (para 95).*

Consequently, the Court accepted that it could presume, without carrying out a specific and individual examination of each of the documents drawn up in the context of preparing an impact assessment, that the disclosure of those documents would, in principle, seriously undermine its decision-making process developing a policy proposal as long as the Commission has either adopted or abandoned the policy initiative, regardless of whether the proposal is legislative or other in nature (paras 97-100). The Court referred to the *Turco* principles quoted above but stressed that despite the Commission's right of legislative initiative, the legislative functions are allocated on the Parliament and the Council. Therefore, when preparing and developing a proposal for a legislative act, the Commission is not acting in a legislative capacity (paras 102-103). An appeal in *ClientEarth* is pending. In addition, there are a number of pending cases brought by Philip Morris involving Commission impact assessments and other preparatory documents predating the adoption of a formal legislative proposal.<sup>23</sup>

## 2.2. Documents relating to administrative proceedings

Emphasising the special character of legislative matters has created tempting opportunities for the institutions to draw clear lines in the sand for matters that fall outside this category as strictly defined. The implication is that the right to public access is less fundamental when exercised in the administrative context than in the legislative one.<sup>24</sup> In our view, this reasoning is fundamentally erroneous and ignores in a self-interested fashion the original and leading purpose of public access legislation, namely to ensure that administrations open up. Legislative processes are usually not even addressed by public access legislation in national

<sup>22</sup> T-424/14 and T-425/14 *ClientEarth v. the Commission*.

<sup>23</sup> See Cases T-18/15 *Philip Morris v Commission*; Case T-520/13 *Philip Morris Benelux v Commission*; Case T-796/14 *Philip Morris v Commission*; Case T-800/14 *Philip Morris v Commission and the Order of the Court in Case C-520/13 Philip Morris Benelux v Commission*.

<sup>24</sup> See eg case T-403/15 *MyTravel v Commission* [2008] ECR II-02027 at [49].

contexts. While it is certainly fundamental that secret legislative processes open up, this is usually done outside the scope of public access legislation altogether.<sup>25</sup>

The relevant exceptions used for administrative matters (the exceptions relating to investigations and the 'space to think' exception) both include the 'public interest' test, but it seems that the Courts have struggled with elaborating what the general public interest in guaranteeing openness in EU administration might be. This matter is however directly addressed by the Preamble of the Regulation: '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 in administrative matters is something that the CJEU has also acknowledged as a matter of principle in its ruling in *MyTravel*.

*it is true that, as the Court has already stated, the administrative activity of the Commission does not require as extensive an access to documents as that concerning the legislative activity of a Union institution. However, that does not in any way mean [...] that such an activity falls outside the scope of Regulation No 1049/2001. Suffice it to note in that respect that Article 2(3) of that regulation states that the latter applies to all documents held by an institution, that is to say drawn up or received by it and in its possession, in all areas of Union activity.*<sup>26</sup>

But in practice this principle has been watered down in its jurisprudence concerning 'general presumptions' in administrative matters.

The distinction between legislative and administrative matters is something that the CJEU referred to for the first time in *TGI* as a justification to reinforce the arguments introducing this doctrine; a strand of case law that permits the institutions to rely in relation to certain categories of administrative and court documents on a general presumption that their disclosure would undermine the purpose of the protection of an interest protected by the Regulation.<sup>27</sup> As a result, the institutions are freed from examining the requested documents individually. The practical implication of the general presumptions doctrine is that the burden of proof is shifted from the institution, which may rely on non-disclosure unless the applicant is able to demonstrate that there will be no harm to the interest protected by the Regulation and thus that a document is not covered by a general presumption. This is difficult in practice given that the applicant has not seen the document. The logic driving the development is most likely that administrative procedures usually only involve individual litigants, and the direct public dimension is thus weaker.

General presumptions of secrecy have now been confirmed in case law, at the request of the Commission, for documents relating to state aid, mergers, court proceedings, cartels and infringement proceedings with two more cases involving presumptions pending.<sup>28</sup> These were initially introduced in the context of very broad requests to files that related to private interests rather than public ones, but have since then been broadened to cover even narrow requests in matters where a public interest to publicity might be easily identifiable (see Section 2.3. below). This is a matter that has been raised in several appeals, but to which

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<sup>25</sup> Deirdre Curtin, 'Judging EU Secrecy', *Cahiers de Droit Européen*, 2012 (2) 459 – 490 at 481.

<sup>26</sup> Case C-506/08 P *Sweden v the Commission* (paras 87-88).

<sup>27</sup> Case C-139/07 P *Commission v Technische Glaswerke Ilmenau* EU:C:2010:376, paras 60-61. For an analysis of the development of the general presumptions doctrine see P Leino 'Just a Little Sunshine in the Rain: The 2010 case law of the European Court of Justice on Access to Documents' (2011) 48 *CML Rev* 1215.

<sup>28</sup> See case C-139/07 P *Commission v Technische Glaswerke Ilmenau* EU:C:2010:376; Case C-404/10 P *Commission v Éditions Odile Jacob* EU:C:2012:393; Case C-514/07 P *Sweden and Others v API and Commission* EU:C:2010:541; Case C-365/12 P *Commission v EnBW* EU:C:2014:112 and Joined Cases [C-514/11](#) P and [C-605/11](#) P *LPN and Finland v Commission* EU:C:2013:738. Two appeals are pending concerning the EU-Pilot procedure (Case C-562/14 P *Sweden v Commission*) and Commission impact assessment documents (C-57/16 P *ClientEarth v Commission*).



the Court has only been responsive in one case, the one brought by Carl Schlyter MEP,<sup>29</sup> which involved a detailed opinion of the Commission concerning a draft Order relating to the annual declaration of nanoparticle substances, notified by the French authorities to the Commission in accordance with the provisions of Directive 98/34/EC, and which the Commission refused to release. The procedure was essentially one aimed at providing information between the Member States and the Commission relating to national initiatives for technical standards. While the relevant acts could constitute legislative acts at national level, at the EU level the procedure was an administrative one, managed by the Commission, and since the Commission found that the procedure could potentially result in infringement proceedings, it could be covered by the exception in Regulation No 1049/2001 relating to investigations. The Court rejected this argument with reference to its *Turco* jurisprudence. It ruled that the Commission's detailed opinion delivered under the Directive 98/34 procedure 'is a factor which will be taken into consideration by the national legislature when adopting the draft technical regulation' and thus 'the possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights'. Therefore, 'the necessity of ensuring that a Member State is willing to cooperate with the Commission in a spirit of mutual trust does not constitute a legitimate reason for limiting transparency in the process for the adoption of a technical rule' (para 72). An appeal by the French Government is however pending before the CJEU.<sup>30</sup>

The Court has justified its doctrine of general presumptions with reference to how the Commission is not required to base its decision on that general presumption – instead, it 'may always carry out a specific examination of the documents covered by a request for access and provide such reasons'. And in case the matter involved 'is of a nature which permits the full or partial disclosure of the documents in the file, it is obliged to make that disclosure'. However, the Court stresses,

*the requirement to ascertain whether the general presumption in question actually applies cannot be interpreted as meaning that the Commission must examine individually each document requested in the case. Such a requirement would deprive that general presumption of its proper effect, which is to permit the Commission to reply to a global request for access in a manner equally global.*<sup>31</sup>

The on-going expansion of the general presumptions doctrine eradicates the core principles of the Regulation on individual examination and widest access with strictly interpreted exceptions established in the early case law. This undermining takes place despite the fact that the Court itself acknowledges that:

*the possibility of relying on general presumptions applying to certain categories of documents, instead of examining each document individually and specifically before refusing access to it, is no insignificant matter. The effect of such presumptions is not only that they restrict the fundamental principle of transparency laid down in Article 11 TEU, Article 15 TFEU and Regulation No 1049/2001, but also that they limit in practice access to the documents in question. Accordingly, the use of such presumptions must be founded on reasonable and convincing grounds.*<sup>32</sup>

The presumptions in practice remove a large bulk of administrative documents from the scope of public access under the Regulation without any clear basis in EU legislation, and in practice create access-free zones within the Commission, where its officials have the opportunity to administer in the fairly certain knowledge that most of their work will never

<sup>29</sup> Case T-402/12 *Carl Schlyter v the Commission*.

<sup>30</sup> Case C-331/15 P.

<sup>31</sup> Joined Cases [C-514/11](#) P and C-605/11 P *LPN and Finland v Commission* EU:C:2013:738.

<sup>32</sup> Case T-306/12 *Spirlea v the Commission* para 52.

be in the public eye. What this access-free zone does to the administration is a matter that should be of public concern.

### 2.3. Documents relating to Court proceedings

Article 15 TFEU currently establishes that the Court of Justice is subject to the ordinary access to documents provisions only when exercising its administrative tasks. In August 2003, API – a non-profit-making organization of foreign journalists based in Belgium – applied to the Commission under Regulation 1049/2001 for access to the written pleadings lodged by the Commission before the General Court or the Court of Justice in proceedings relating to fifteen cases at different stages including the *Open Skies* cases. The Commission granted access only in respect of the pleadings lodged in two preliminary ruling cases. Access to two pleadings was refused essentially because the cases were pending. The same exception applied also to the pleadings of a closed case that was closely connected with another pending case. The *Open Skies* cases, again, were closed, but they concerned infringement proceedings and could thus, in the view of the Commission, be protected under the relevant exception. Finally, the Commission found that there was no overriding public interest in disclosure.<sup>33</sup> The documents applied for clearly did fall within the scope of application of Regulation 1049/2001, in that they were documents either drawn up or received by the Commission and in its possession, and belonged to an area of activity of the European Union.

However, the Court of Justice confirmed in its ruling that an institution may base its decisions on general presumptions which apply to certain categories of documents. For the Court,

*It is clear, both from the wording of the relevant provisions of the Treaties and from the broad logic of Regulation No 1049/2001 and the objectives of the relevant EU rules, that judicial activities are as such excluded from the scope, established by those rules, of the right of access to documents (para 79).*

While the exclusion of the documents from the scope of public access was, in principle, acceptable, the Court argued for a temporal limitation:

*the exclusion of judicial activities from the scope of the right of access to documents, without any distinction being drawn between the various procedural stages, is justified in the light of the need to ensure that, throughout the court proceedings, the exchange of argument by the parties and the deliberations of the Court in the case before it take place in an atmosphere of total serenity. (para 92)*

For this reason, it judged it appropriate that there should be 'a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings ... while those proceedings remain pending'. (para 94). In the Court's view, 'disclosure would flout the special nature of that category of documents and would be tantamount to making a significant part of the court proceedings subject to the principle of transparency.' Consequently, 'the effectiveness of the exclusion of

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<sup>33</sup> In Joined Cases C-514/07 P, C-528/07 P and C-532/07 P (*Association de la presse internationale ASBL (API)*). For a discussion, see P Leino 'Just a Little Sunshine in the Rain: The 2010 case law of the European Court of Justice on Access to Documents' (2011) 48 *CML Rev* 1215. See too, D Curtin, 'Judging EU Secrecy', *Cahiers de Droit Européen*, 2012 (2) 459 – 490 at 481.

the Court of Justice from the institutions to which the principle of transparency applies ... would be largely frustrated' (para 95).

As regards pleadings that had been lodged in closed cases, the Court pointed out that once proceedings have been closed by a decision of the Court, there are no longer grounds for presuming that disclosure of the pleadings would undermine the judicial activities of the Court and the 'general presumption' thus no longer applied. The Court then pointed out that the procedures provided for under 258 and 260 TFEU constitute two distinct procedures, each with its own subject-matter. Accordingly, as the General Court had found, it could not be presumed that disclosure of pleadings lodged in a procedure which ultimately led to the delivery of a judgment under Article 258 TFEU undermines investigations which could lead to proceedings being brought under Article 260 TFEU (para 122).

The Court's conclusion in *API* deferred to public pressure with reference to equality of arms: 'if the content of the Commission's pleadings were to be open to public debate, there would be a danger that the criticism levelled against them, whatever its actual legal significance, might influence the position defended by the Commission before the EU Courts' (*API*, para 86). Moreover, the Court proceedings themselves would be at risk:

*Disclosure of the pleadings in question would have the effect of exposing judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings* (para 93).

As a matter of principle, the existence of yet another 'general presumption' in the *API* case is of course again significant and yet, it was the least astonishing: it is hardly surprising that the Court's interest in transparency was lacking when it came to its own documents. The *API* case was a case of mere institutional politics: the main question was about who should rule on access to documents relating to Court proceedings and not about the harm that granting access to the documents *API* had applied for might cause – even if assessing this harm ought to have been at the core of the case.

After the entry into force of the Treaty of Lisbon, the Court has adopted a decision establishing rules concerning public access to the documents held by it in the exercise of its administrative functions.<sup>34</sup> The rules only apply to documents relating to the Court's administrative functions, which entails that there is no legal channel for citizens to apply for Court pleadings through the Court itself. The status of Court pleadings held by the other EU institutions – and more indirectly, those held by Member State authorities – remains to be assessed based on the *API* guidelines. There is currently an appeal pending before the CJEU concerning a Commission claim that unlike the Commission's own submissions, a Member State's written submissions must be regarded as documents of the Court of Justice and thus falling outside transparency rules under Article 15(3) TFEU and as such covered by the specific rules relating to access to judicial documents. According to the Commission, '[a]ny interpretation allowing access to a Member State's written submissions would render both the fourth subparagraph of Article 15(3) TFEU and the specific rules relating to access to judicial documents meaningless'.<sup>35</sup>

As Advocate General Maduro noted in his Opinion in *API*, the practice of various international tribunals suggests that there is no reason to fear that disclosure of documents relating to

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<sup>34</sup> Decision of the Court of Justice of the European Union of 11 December 2012 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (2013/C 38/02).

<sup>35</sup> Case T-188/12 *Breyer v the Commission*, para 66. For the appeal, see Case 213/15 P.



judicial proceedings will undermine the judicial process: all submissions are public unless there are exceptional reasons for keeping them confidential.<sup>36</sup> Moreover, disclosure of procedural documents is possible in a number of Member States and that it is also provided for, as regards documents lodged with the European Court of Human Rights, in the ECHR. This approach would seem to coincide with the basic principle of Regulation No 1049/2001. In this respect, Advocate General Maduro also notes the 'tendency seems to be that the more remote the judicial body, the greater its concern with the transparency of its judicial proceedings' (para 26). This might not be a bad perspective to consider for the Court of a Union constantly struggling with challenges relating to a democratic deficit.

## 2.4. Infringement proceedings and EU Pilot cases

General presumptions against disclosure are particularly troublesome in the context of infringement documents and documents relating to EU Pilot procedures, which are matters addressed in the rulings in *LPN* and *Spirlea*. While infringement and EU Pilot files are often initiated following information received from private claimants, these procedures are more broadly related to the implementation of EU legislation, which is matter of general concern. In practice, infringement and EU Pilot files can be expected to build on national legislative documents, such as government proposals relating to the implementation of EU legislation, much of which is already in the public domain. This is specifically the point raised in the appeal in the *LPN* case: that general presumptions could not be transferred to documents relating to an infringement procedure: and that these procedures differ as regards their material content, scope, the sensitivity of the case and the legitimate interest in gaining access to information relating to it.

The Court's decision in *LPN* is particularly worrying considering the context in which it was established: in an infringement procedure related to conservation of the environment, keeping in mind that environmental information is also governed by the regulation on the application of the Århus Convention.<sup>37</sup> The application was brought by LPN, a Portuguese environmental NGO, which requested two documents relating to pending infringement proceedings, which concerned the compatibility of a dam construction project with the EU Habitats Directive (92/43/EEC). The Commission refused to grant access to the documents with reference to how in an infringement procedure a climate of mutual trust was needed between the Commission and the relevant Member State in order to start a process of negotiation and compromise with a view of reaching an amicable settlement of the dispute and avoiding litigation. The General Court had acknowledged that the Commission review under infringement proceedings fell within its administrative function, and the latter enjoyed wide discretion.<sup>38</sup>

The CJEU was not convinced. In its view, 'infringement procedures are regarded [...] as a type of procedure which, as such, has characteristics precluding full transparency being granted in that field and which therefore has a special position within the system of access to documents' (para 55). In addition, the Court argued, the infringement procedure has characteristics which are comparable to those of a State aid review procedure where it had previously confirmed the existence of a general presumption: both are procedures initiated in respect of the Member State responsible, either for granting aid for alleged infringement of EU law. Moreover, under neither of the two procedures the interested parties with the exception of the relevant Member State enjoy a right to consult the documents on the

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<sup>36</sup> A.G. Maduro's Opinion in *API*, para 26.

<sup>37</sup> Joined Cases C-514/11 P and C-605/11 P *LPN and Finland v the Commission*.

<sup>38</sup> Case T-29/08 *LPN v Commission*.

Commission's administrative file, and that granting access to them would call the system into question (paras 56-59). The Court referred to its settled case-law that the 'purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under European Union law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission' (para 62):

*The disclosure of the documents concerning an infringement procedure during its pre-litigation stage would, in addition, be likely to change the nature and progress of that procedure, given that, in those circumstances, it could prove even more difficult to begin a process of negotiation and to reach an agreement between the Commission and the Member State concerned putting an end to the infringement alleged, in order to enable European Union law to be respected and to avoid legal proceedings (para 63).*

Finally, the Court established that the documents relating to the pre-litigation stage of an infringement procedure constitute a single category of documents for the purposes of applying the abovementioned general presumption.

After the success in *LPN*, it was no surprise that the Commission subsequently moved to invoke a general presumption of secrecy in the context of an EU Pilot procedure, and the General Court accepted its existence in *Spirlea*.<sup>39</sup> An appeal is pending before the CJEU.<sup>40</sup> The General Court acknowledged that the EU Pilot Procedure

*is a procedure which precedes the commencement of the pre-litigation stage of infringement procedures under Article 258 TFEU. It may address the proper application of EU law or the compatibility of national legislation with provisions of EU law. It may be initiated as a result of a complaint made by a citizen or on the Commission's own initiative. If, during an EU Pilot procedure, information comes to light which indicates an infringement of EU law, the Commission may send requests for information to the Member State concerned and may even call on it to put an end to the irregular situation or indeed request the Member State to adopt appropriate measures to ensure compliance with EU law. The objective of the EU Pilot procedure is to help resolve possible infringements of EU law by the Member States swiftly and effectively and, where possible, without having recourse to infringement proceedings under Article 258 TFEU (para 55) .*

For this reason, the Court acknowledged that the '*ratio decidendi* adopted by the Court in *LPN v Commission* [...] and the similarities between the EU Pilot procedure and infringement procedures under Article 258 TFEU militate in favour of the recognition of that presumption': therefore,

*the element unifying the Court's reasoning in all of the judgments concerning access to documents in investigation procedures in which a general presumption of refusal of access was recognised is that access is wholly incompatible with the proper conduct of those procedures and is likely to jeopardise their outcome [...] That unifying element is equally applicable to EU Pilot procedures, in which a general presumption is, essentially, dictated by the need to ensure the proper conduct of such procedures and to ensure that their purpose is not undermined (para 57).*

While the two procedures are not identical and the EU Pilot procedure is not expressly acknowledged by the Treaties, their purposes are the same, and an EU Pilot procedure may well lead to an infringement procedure:

<sup>39</sup> Case T-306/12 *Spirlea v the Commission*.

<sup>40</sup> Case C-562/14 P *Sweden v the Commission*.

*Since the preservation of confidentiality during the pre-litigation phase of an infringement procedure has been recognised in the case-law, that same confidential treatment is justified, a fortiori, in EU Pilot procedures, the sole purpose of which is to avoid the lengthier and more complex infringement procedure and, where appropriate, the necessity of bringing an action for failure to fulfil obligations. Consequently, the Court must conclude that, when the institution concerned invokes the exception relating to investigations provided for in the third indent of Article 4(2) of Regulation No 1049/2001, it may rely on a general presumption in order to refuse access to the documents relating to an EU Pilot procedure, that procedure constituting a stage prior to the possible formal initiation of an infringement procedure (para 62-63).*

What is particularly troublesome with these two general presumptions is that they are matters that influence national practices, and have the potential of moving matters that have already been in the public domain back under a secrecy regime. The attitude of the Commission has already provoked discussion in Sweden, and there is a ruling by the Finnish Supreme Administrative Court which builds on the Commission interpretation and denies access to EU Pilot documents following the Commission position on the matter.<sup>41</sup> In both of these countries, infringement and EU Pilot files have previously been treated as broadly public under national FOI legislation.

## 2.5. Protection of privacy

There are two main pieces of legislation that try to strike a balance between public information and the protection of privacy. Article 4(1)(b) of Regulation No 1049/2001 establishes that an exception to public access is to apply 'where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data'. In addition, Regulation No 45/2001, adopted on the basis of ex Article 286 EC (now replaced, in substance, by Art. 16 TFEU), includes a number of provisions on the matter. The two regulations were negotiated simultaneously and acknowledge each other's existence.<sup>42</sup> However, the two regulations have also certain provisions that conflict: while Regulation No 1049/2001 does not mention any requirement of consent by the data subject, grants universal access to the released information, and specifically denies any need to reason one's request, Regulation 45/2001 requires the consent of the data subject, grants access only to the applicant, and requires reasons for the application. The Court's rulings in *Bavarian Lager*, *Schecke* and *Dennekamp II* concern this specific question.

The *Bavarian Lager* dispute pre-dates Regulation No 1049/2001, since the first access request was made based on the earlier Code of Conduct concerning public access to Council and Commission documents.<sup>43</sup> Before the entry into force of Regulation No 1049/2001 the request had already resulted in a case before the General Court<sup>44</sup> and the European

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<sup>41</sup> See the decision of the Finnish Supreme Administrative Court of 23 January 2014.

<sup>42</sup> Recital 15 of Regulation No 45/2001 indicates that access to documents, including those containing personal data, is governed by Art. 255 EC, while Recital 11 of Regulation No 1049/2001 underlines that the institutions should take account of the principles in Community legislation concerning the protection of personal data in all areas of activity of the Union. For a discussion of the two regulations, see Kranenborg, "Access to documents and data protection in the European Union: on the public nature of personal data", 45 CML Rev. (2008), 1079-1114.

<sup>43</sup> O.J. 1993, L 340/41.

<sup>44</sup> Case T-309/97, *Bavarian Lager v. Commission* [1999] ECR II-3217. For a discussion, see P Leino 'Just a Little Sunshine in the Rain: The 2010 case law of the European Court of Justice on Access to Documents' (2011) 48 CML Rev 1215.

Ombudsman.<sup>45</sup> It concerned access to the names of persons acting in their professional capacity who had participated in a meeting organized by the Commission with an interest group and UK Government officials on 11 October 1996 in the context of infringement proceedings. The question later addressed by the CJEU following a further request for access was whether the process to be followed in granting such access was that of Regulation No 1049/2001 – under which the request was made – or under the relevant data protection rules, since the requested documents included personal data, in particular the names of the persons attending the meeting. The Court cases concerned five names that had been blanked out from the minutes of the meeting, following two express refusals by persons to consent to the disclosure of their identity and the Commission's failure to contact the remaining three attendees. In the Commission's view, Bavarian Lager had not established an express and legitimate purpose or need for the disclosure. In any case, the Commission argued that it would need to refuse to disclose the other names so as not to compromise its ability to conduct inquiries.

In its ruling, the Court of Justice notes that the two regulations do not contain any provisions granting one regulation primacy over the other. In principle, 'their full application should be ensured' (para 56, emphasis added). However, when a request based on Regulation 1049/2001, in fact, 'seeks to obtain access to documents including personal data, the provisions of Regulation No 45/2001 become applicable in their entirety' (para 63). For the ECJ, it was enough that the names included in the relevant documents enabled the persons concerned to be identified. The Court pointed out that Bavarian Lager could have access to all the information concerning the meeting, including the opinions which those contributing expressed in their professional capacity, and that the Commission had sought the agreement of all the participants to the disclosure of their names. In the view of the Court, the Commission had been right to verify whether the data subjects had given their consent to the disclosure of personal data concerning them (para 75): 'By releasing the expurgated version of the minutes of the meeting of 11 October 1996 with the names of five participants removed therefrom, the Commission did not infringe the provisions of Regulation No 1049/2001 and sufficiently complied with its duty of openness' (para 76). The CJEU also concluded that as Bavarian Lager had not provided 'any express and legitimate justification or any convincing argument in order to demonstrate the necessity for those personal data to be transferred', the Commission had not been able to weigh up the various interests of the parties concerned. Nor was it able to verify whether there was any reason to assume that the data subjects' legitimate interests might be prejudiced, as required by Article 8(b) of Regulation No 45/2001" (para 78). Consequently, the Commission was right to reject the application for access to the full minutes of the meeting of 11 October 1996.

An interesting characteristic of the case is that the CJEU's ruling goes directly against the view of the European Data Protection Supervisor, who had consistently supported the applicant and the reading of the General Court and held that the Commission took too strict an approach. According to the EDPS, actual harm to privacy should always be a necessary threshold to justify refusal of access to documents containing personal details.<sup>46</sup> The ruling in *Bavarian Lager* affects a great number of applications: after all, many documents include some kind of personal data. And as the European Data Protection Supervisor has pointed out, the effects of the approach will be difficult to administer, since a name is seldom included

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<sup>45</sup> Reference 713/98/IJH. In his special report of November 2000, the Ombudsman recommended that the Commission should inform the applicant of the names of the CBMC delegates who had attended the meeting and of companies and persons in the 14 categories identified in the original request.

<sup>46</sup> See "Review of relationship between transparency and data protection more urgent after Court ruling on Bavarian Lager", press release by the European Data Protection Supervisor, 30 June 2010. Available on the EDPS website at [www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/PressNews/Press/2010/EDPS-2010-11\\_ECJ\\_Bavarian\\_Lager\\_EN.pdf](http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/PressNews/Press/2010/EDPS-2010-11_ECJ_Bavarian_Lager_EN.pdf)

in a document on its own, but is linked to other data. It is highly doubtful whether particular data can be considered in isolation.<sup>47</sup> The Court's Grand Chamber later delivered another similar ruling in *Schecke*<sup>48</sup> in which the CJEU declared void those provisions that required the publication of names of natural persons that receive agricultural aid. The justification given for this far-reaching conclusion is that these provisions were in conflict with the right of private life and protection of personal data included in the EU Charter. There was, yet again, no consideration of the harm caused, nor of the fact that the data was already legally in the public domain.

Finally, in *Dennekamp II* the General Court rejected the applicant's arguments regarding the necessity of having the names of MEPs participating in the Parliament's additional pension scheme transferred in order to inform the public and enable participation in the debate on the legitimacy of the scheme, while accepting the applicant's arguments regarding the necessity of bringing to light possible conflicts of interest of the MEPs. The Court confirmed the need to demonstrate the necessity of the transfer of personal data.<sup>49</sup> Even though the Court granted that Article 4(1)(b) does not prohibit the justification of the transfer of data on the basis of a general objective such as the public's right to information, in practice the threshold for establishing the necessity was set quite high and the public's right to information was not considered enough to satisfy the criterion. The GC emphasized the need to evaluate the appropriateness and proportionality of the transfer of the data in relation to the applicant's objective.<sup>50</sup>

But from the perspective of Regulation No 1049/2001, quite crucially, the Court jurisprudence does not give any consideration to whether granting access to the requested names in fact constituted an infringement of privacy. After all, everyone present at the famous *Bavarian Lager* meeting of 11 October 1996 was there in a public capacity, and one could assume that very little that could be characterized as 'private' affecting the participant's integrity took place at the meeting. The same applies to *Schecke*, which does not seem to involve a situation where a person's personal integrity would seem to be seriously at risk. The same argument could be made in *Dennekamp*: it is unclear whether the case concerned privacy or integrity of the individual at all given that the data related to persons in public life acting in their public roles and the use of public funds.

There is some new case law where the Court has accepted that the applicants have indeed been able to demonstrate the 'necessity' of processing personal data, with reference to 'the existence of a climate of suspicion of EFSA, often accused of partiality because of its use of experts with vested interests due to their links with industrial lobbies, and on the necessity of ensuring the transparency of EFSA's decision-making process'.<sup>51</sup> The Court accepted that

*the disclosure of that information was, in that context, necessary to ensure the transparency of the process of adoption of a measure likely to have an impact on the activities of economic operators, in particular, in order to appreciate how the form of participation by each expert in that process might, through that expert's own scientific opinion, have influenced the content of that measure (para 55).*

The Court referred to its *Turco*, *MyTravel*, *Access Info* and *In't Veld* case law and argued that

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<sup>47</sup> Opinion of the European Data Protection Supervisor on the Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents O.J. 2009, C 2/03, para 48.

<sup>48</sup> Joined cases Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v. Land Hessen.

<sup>49</sup> Case T-115/13 *Dennekamp v European Parliament (Dennekamp II)* EU:T:2015:497, para 63.

<sup>50</sup> *Ibid*, paras 59 and 68.

<sup>51</sup> Case C-615/13 P *ClientEarth and PAN Europe v EFSA*.



*The transparency of the process followed by a public authority for the adoption of a measure of that nature contributes to that authority acquiring greater legitimacy in the eyes of the persons to whom that measure is addressed and increasing their confidence in that authority (para 56).*

The Court accepted that 'obtaining the information at issue was necessary so that the impartiality of each of those experts in carrying out their tasks as scientists in the service of EFSA could be specifically ascertained' and subsequently set aside the General Court ruling. While the ruling is important from a transparency point-of-view, it is noteworthy that it still builds entirely on the interpretation of the data protection rules.

## 2.6. International relations

Recently there has been case law relating to the interpretation of the international relations exception. The first case concerned a Council Legal Service opinion on the proposed legal basis of the draft Council decision to authorise the Commission to launch negotiations for the SWIFT agreement brought by Sophie In't Veld, MEP<sup>52</sup> The document contained legal advice concerning the choice of legal basis and EU competence. In't Veld received partial access.<sup>53</sup> The Council lost the case in General Court and appealed to the CJEU, which delivered its ruling in July 2014,<sup>54</sup> dismissing the Council appeal in its entirety. Both Courts rejected the Council's arguments concerning the sensitivity of its legal advice in a similar way as when the Council presented them in the legislative context. Both Courts acknowledged that the considerations relating to citizen participation and the legitimacy of administration are of a particular relevance where the Council is acting in its legislative capacity. However, the General Court stressed that the importance of transparency could not 'be ruled out in international affairs, especially where a decision authorising the opening of negotiations involves an international agreement which may have an impact on an area of the European Union's legislative activity' (para 89). The General Court particularly emphasised the substance of the envisaged agreement, which concerned the processing and exchange of information in the context of police cooperation, with potential effects on the protection of personal data, which is a fundamental right, and something that the Council was obliged to consider when establishing whether the general interest relating to greater transparency justified the full or wider disclosure of the requested document (para 92). The CJEU confirmed that the fact that a document does not relate to a legislative procedure does not entail that no examination would be necessary, keeping in mind that the non-legislative activity of the institutions also falls under the scope of the Regulation. The General Court also considered specifically the effect of the on-going procedure for concluding the international agreement and established that this was not conclusive in ascertaining whether an overriding public interest justifying disclosure existed:

*Indeed, the public interest in the transparency of the decision-making process would become meaningless if, as the Commission proposes, it were to be taken into account only in those cases where the decision-making process has come to an end (para 101).*

In conclusion, both Courts stressed the importance of protecting those elements that could reveal the strategic objectives pursued by the EU in the negotiations but established that

<sup>52</sup> Case T-529/09, *Sophie in 't Veld v the Council* supported by the Commission (*In 't Veld I*).

<sup>53</sup> Paras 10 and 15 of the contested Council decision.

<sup>54</sup> Case C-350/12 P *Council v Sophie in't Veld*.

outside these parts, the Council had not demonstrated how, 'specifically and actually', harm to the public interest in the field of international relations existed.

The second case brought by Sophie in 't Veld concerned a Commission decision to refuse access to certain documents relating to the famous draft international Anti-Counterfeiting Trade Agreement,<sup>55</sup> which the EP later refused to give its consent to and criticised for a lack of transparency in the negotiation process.<sup>56</sup> The appeal by Sophie In't Veld in this case related more clearly to documents produced during the international stage of negotiations and not merely internal decision-making within the EU. Consequently, the General Court proved more responsive to the Commission concerns. The General Court emphasised the 'particularly sensitive and essential nature of the interests' relating to international relations, which gives the decisions on access 'a complex and delicate nature which calls for the exercise of particular care' and presumes 'some discretion' (para 108).

A particular characteristic of this case related to the agreement among the various negotiating partners that matters would remain confidential, and whether the Commission in fact had the right to consent to such a solution, keeping in mind the transparency obligations it has under the Treaties. This question has been raised both before the General Court and the European Ombudsman. The Court did not address the appropriateness of confidentiality agreements, but accepted that the confidentiality commitment had not been specifically invoked by the Commission, that its refusal had been legally based on Article 4(1)(a), and that the disclosure of EU positions in international negotiations could indeed damage the protection of the public interest as regards international relations. This could happen by indirectly disclosing the positions of other parties to the negotiations. Alternatively, EU positions are

*by definition, subject to change depending on the course of those negotiations, and on concessions and compromises made in that context by the various stakeholders. As has already been noted, the formulation of negotiating positions may involve a number of tactical considerations of the negotiators, including the European Union itself. In that context, it is possible that the disclosure by the European Union, to the public, of its own negotiating positions, even though the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating position of the European Union (para 125).*

The Court also held that the unilateral disclosure of positions by one party may be likely to seriously undermine the mutual trust which is essential to the effectiveness of negotiations, the maintenance of which is a very delicate exercise in the context of international relations (para 126). Finally, since the international relations exception was mandatory and thus involved no public interest test, 'any argument based on an overriding public interest in disclosure must be rejected as ineffective' (para 131). The ruling in *In't Veld II* is extremely detailed, following the Court's examination of the requested documents and ruling on the parts that the Council should have handed out.

The third and final case involving an international agreement was brought by Professor Leonard Besselink concerning a draft negotiating mandate, the draft Council Decision authorising the Commission to negotiate the EU Accession Agreement to the European Convention of Human Rights (ECHR).<sup>57</sup> The Court found that the Council had interpreted the exceptions too broadly. It could not be used to justify a refusal to hand out the negotiation directive, which concerned the protocols to which the EU was seeking to accede, especially

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<sup>55</sup> Case T-301/10, *Sophie in 't Veld v the Commission* (In 't Veld II).

<sup>56</sup> See European Parliament written declaration 12/2010 on the lack of a transparent process for the Anti-Counterfeiting Trade Agreement (ACTA) and potentially objectionable content.

<sup>57</sup> Case T-331/11, *Leonard Besselink v the Council*.

since the matter was not subject to negotiations and the contents of the said directive had been communicated to the EU's negotiating partners. But the Court accepted that even if some parts of the other negotiating directives had been published, their precise content had not been previously disclosed, and could have been exploited by the EU's negotiating partners, thus establishing a risk to the EU's international relations. The Court did not discuss the fact that unlike in the ACTA case described above, the EU's negotiating partner, the Council of Europe, had in fact been exceptionally open and placed all its negotiating directives on the internet, which should have had some effect on the need to maintain a climate of confidence. But the Court did establish that those parts of the directives which merely referred to the principles that should govern the relevant negotiations, such as those contained in Article 6(2) TEU and Protocol 8, or the list of questions to be addressed in the negotiations should have been handed out.

Overall the existing jurisprudence demonstrates that both the Council and the Commission have seen the international relations exception as a broad one. The Court has shown sensitivity to these claims and acknowledged that a certain discretion in applying the exception exists, but also as a rule established that the institutions have implemented the provision too broadly, in particular in *In't Veld I* and *Besselink*. Finally, an important feature of this jurisprudence concerns the substance of all of the relevant agreements. They are fundamentally important international agreements that have implications for the life of individual citizens, which should have implications for the applicable transparency requirements. A key element in the recent jurisprudence is the General Court's recognition that even if international relations do not fall under legislative matters, transparency still has a function and its requirements must be taken into account. These cases have also demonstrated that international relations should not as a policy field be treated as a categorical exception, and that there are matters where – despite the fact that they formally fall under international relations – it should be possible to take into account the public interest relating to transparency, especially if the possible harm of disclosure seems limited or rather hypothetical.



### 3. CURRENT AND FUTURE CHALLENGES

In the context of this short briefing note we have raised a number of core issues in terms of fundamental changes that have occurred since the adoption of the Access Regulation some fifteen years ago in the legal context of openness at the level of the EU, in particular in the provisions of the Treaty of Lisbon. At the same time we have highlighted through a number of core issues some, at times conflicting strands, in the case law of the Courts in Luxembourg that have enabled litigants to raise issues that they have encountered in practice especially over the course of the past seven years since the Treaty of Lisbon entered into force. This is by no means meant to be an exhaustive overview but is necessarily selective.

Our approach in this penultimate section is to summarise a number of key themes that can be considered as both current and future challenges. At the same time we raise a number of other challenges both in terms of procedure, scope and substance that are in our view of primordial importance in trying to take the issue of openness in the EU further at this particularly crucial stage in its evolution.

It is helpful at this stage in our view to go back to first principles. Access to documents or freedom of information legislation is generally designed to enable the public in one form or another to gain access to documents from the administration about its more general rule-making functions (as opposed to privileged party access in specific individual case, which is guaranteed by Article 41 CFR and should be secured by EU legislation). This was the original motivation for three institutions –the Commission, the Council and the European Parliament– to voluntarily assume access to documents rules after the adoption of the Maastricht Treaty in 1992. Even at that time – some 24 years ago– these three institutions operating at the supranational level had not only differing degrees of administration but also were all involved in different stages of the legislative process as such. From the very beginning the access to documents provisions were meant to apply to both documents in the realm of administration as well as in the realm of legislation.

One of the distinguishing features of the supranational level compared to the national level is that EU legislative processes have been notoriously closed. This had to do with the fact that traditionally the Council of Ministers adopted EU legislation by negotiating behind closed doors between the representatives of the Member States. It was only since 1992 that the European Parliament has gradually acquired a stronger and more equal role in the legislative process, reaching its pinnacle in the Treaty of Lisbon with a full and equal power of co-decision (with limited exceptions). One way that the European Parliament has contributed in recent years to establishing the outer limits of access to legislative documents, in particular of the Council and the Commission, has been through cases brought by individual MEPs under the existing Access Regulation (including *Hautala*, *Turco*, *In 't Veld* and *Schlyter*). This has been supplemented by 'test cases' brought by NGO's or individuals (*Access Info Europe*, *LPN*, *ClientEarth*, *Besselink* and *De Capitani*).

The reason may well be that in the vacuum of a failure to agree the terms of revision of the access Regulation (and in particular the perceived attempted 'watering down' of the existing status quo by the Commission and the Council in particular) there was no other way for individual MEPs to challenge denials of access to documents in general legislative processes or quasi-legislative processes than through the Courts and the direct route provided in the Access Regulation in particular. Many of these cases (in particular *In't Veld*) also illustrate failures to guarantee the Parliament interinstitutional (privileged) access to Council and Commission documents when this would be necessary for the Parliament to exercise its Treaty-based functions.

These cases have emphasised the fundamental nature of access to documents that are part of the legislative process and in particular in *Turco* and *Access Info Europe* the Court has

been categorical as to the democratic foundations of the right of access to documents in this context. It does not follow however that access to documents of an administrative nature are not covered by the Access Regulation. This is a key challenge in the coming period as the CJEU faces appeals from rulings of the General Court that conclude otherwise. This issue is particularly important in the context of access to Commission documents where many of the activities of the Commission are 'administrative' and managerial in nature and may well involve contacts with Member States, including in particular infringement cases and EU pilot procedures, where the Courts' recent case law creates presumptions of secrecy for documents that have already been lawfully in the public domain and are related to the legislative procedure at either EU or national level or both.

The implication in some of the recent case law is the assumption that there is a lesser public interest in openness when it comes to administrative activities as opposed to legislative activities. Public access to documents of a public administration concerns matters that are in the general public interest and does not just involve a bilateral relationship between the administration and the person or organization seeking access. This is a particularly important challenge in the context of the varied nature of the (non-legislative) administration by the Commission in particular which stretches well beyond the more familiar terrain of infringement actions, state aids, competition law to more novel areas of administration at the supranational level (for example in the context of the European Semester or of migration or other data-bases).

Another challenge (that is being appealed at present) relates to legislative impact assessments and public access in that regard. Impact assessments are a decisive stage with major implications for legislative outcomes. In our view it is the public interest in access that should be leading when there is no compelling reason for secrecy. Moreover, there should be no presumption of secrecy but of openness and any compelling need for secrecy should be construed as narrowly as possible and also limited in time.

Challenges remain also in the arena of public access to documents in the legislative sphere. Most prominently these relate to early stage agreements (trilogues) which is being litigated before the CJEU at present as well as being subject to an Ombudsman own initiative enquiry. One of the challenges for the future is for the European Parliament to pro-actively make available online the documents under discussion in this context, both in real time and ex post facto. The new Interinstitutional agreement (IIA) on better regulation places the three institutions under an obligation to 'ensure the transparency of legislative procedures, on the basis of relevant legislation and case-law, including an appropriate handling of trilateral negotiations' (para 38). It also refers to the need to develop 'platforms and tools to that end, with a view to establishing a dedicated joint database on the state of play of legislative files'. This is one of the areas where the Parliament can lead by doing.

In this context it is particularly important that the Parliament is also perceived as being led more by a presumption of openness rather than a presumption of secrecy. As far as the Council is concerned, case law now establishes that access to Member State positions and legal service opinions should be secured already while the legislative procedure is on-going, but the Council practice remains restrictive and its Rules of Procedure have not been updated to reflect the recent jurisprudence. The Council Register remains difficult to use and it is currently complicated to find documents relating to legislative procedures without detailed data about the relevant document. Without a comprehensive and well-function register with user-friendly search tools it is also difficult to get an overall picture of the proportion of legislative documents that are in fact subject to direct access under Article 12 of the Access Regulation.

In the context of creating a joint database on legislative files, the Parliament should also stress the importance of creating comprehensive registers even for other than legislative

matters. The fact that many institutions – in particular the Commission – do not have comprehensive and public registers makes making access to documents difficult for citizens, but also create an additional administrative burden by making it difficult to identify the requested documents.

In this context the Parliament should re-consider its own rules on its own documents and broaden their scope in particular as regards documents that are currently considered its internal documents and documents drawn up by individual Members or political groups, and that currently constitute 'Parliament documents' for the purposes of access to documents only if they are tabled under the Rules of Procedure. Such documents may be significant from policy development point of view, and should in that case be subject to public access rule and the principle of transparency unless their disclosure would cause harm.

The institutional scope of application of Regulation 1049/2001 should be updated to correspond to the requirements of the Treaty of Lisbon. The Treaty allows an access-free zone only in terms of the ECB and EIB in terms of their policy-making activities and the CJEU in terms of adjudication. That the Council currently proposes similar access-free zones for Eurojust and the European Public Prosecutors Office is in violation of the Treaty. These proposals are currently discussed in the Parliament and should be rejected.

We further question whether in the longer term it remains justified for the ECB to be excluded from the provisions of the Access Regulation with regard to its policy-making and other tasks; the need for secrecy in the different contexts within which it operates can be sufficiently justified on the basis of the exceptions to the general rule. We believe that this is an issue for the next Treaty amendment process as is the general exemption contained for the CJEU.

In the meantime, the CJEU should be encouraged to facilitate more pro-actively access to its own documents and the documents of intervening parties in a structured and transparent manner, except where the requirements of secrecy prevail. The right to a public and fair hearing is a right protected by key human rights instruments and Article 47 of the Charter of Fundamental Rights. We do not see grounds for categorically limiting access to documents relating to pending cases, also linked to the recent moves to allow secret evidence in the Court.

Both international relations and the protection of privacy and integrity currently constitute mandatory exceptions in the Access Regulation. Therefore the application of these exceptions does not formally enable taking into consideration the public interest relating to disclosure through balancing. The existence of mandatory exceptions is not in line with international standards, including the new Council of Europe Convention that the Member States are signatories to (and many have also ratified).

A major challenge lies in the area of international agreements both now and for the future. In recent years it has become obvious that international agreements can substitute legislation in many ways and in any event often have quasi-legislative effects for citizens. Progress has been made in this context both through Court challenges (eg *In 't Veld*) and through ongoing 'successes' by the European Ombudsman in this context (for example in the context of TTIP). However we recommend that in the context of amending the existing Access Regulation the categorical nature of the exemption for 'international relations' is reconsidered in view of the institutional practice of adopting far-reaching rights and obligations for citizens through the medium of international agreements (in particular with the United States in recent years).

The balance between transparency and data protection is currently too strongly tilted towards the latter and disregards the fact that transparency and openness are also fundamental rights that should override especially in situations where disclosure does not create harm for privacy. The need to re-consider this issue is imperative with the forthcoming entry into force of the new Data protection Regulation. Dialogue with the European Data Protection

Supervisor is crucial in striking the right balance between these two fundamental rights in a manner that does justice to the public interest as well as to specific private interests and account being taken of the public context in which persons (officials and others) operate.

Finally with new legislation on access to documents it is timely to consider EU wide legislation on secrecy with horizontal rules on classification of documents that would replace the current discretionary internal rules of different institutions, organs, bodies and agencies. A major ongoing challenge is the fact that internal discretionary rules on document classification apply to remove whole categories of documents from the public domain even when it is not clear in whose 'public' (Union?) interest that is. The large category of limited documents (unclassified but controlled) documents even prevent national parliaments from discussing their content in public – a concrete undermining of democratic representation and hamper the effectiveness of national access to documents regimes. This represents a considerable challenge and one that would benefit from an open public debate and the legal form of EU wide legislation.

## 4. CONCLUSIONS AND POLICY RECOMMENDATIONS

- **EU legislation on access to documents is seriously outdated** both in terms of the Treaty of Lisbon and framing institutional practices by a range of EU institutions, organs, bodies and agencies operating across a wide-range of policy fields. The scope and substance of the legal framework need to be adjusted in line with Article 15 TFEU and Article 10 TEU.
- The **status quo is structurally inadequate**. The CJEU is confronted with specific issues and outdated legislation on an ad hoc basis but cannot re-design the general system. Nor can the European Ombudsman, although her work is increasingly significant in bringing specific secretive practices to light and tackling them both on a case by case basis and more structurally through a growing number of own initiative enquiries. It is **the democratic responsibility of the EU legislator** to re-ignite the amendment of the legislative rules in line with the Treaty of Lisbon taking into account the changed institutional context to that which prevailed in 2008 when the Commission made its proposal. A new proposal is needed and the EP can lead the way in terms of substance. It can profitably do so by engaging in a dialogue in this regard with both the European Ombudsman and the European Data Protection Supervisor.
- **There should be no access-free zones** either in terms of personal scope or in terms of substance (policy area or stage of procedure) apart from those specifically established by the Treaty. The general presumption is of openness in line with the Treaty. The Treaty recognises no general presumptions of secrecy (such as those recently introduced by the Commission and confirmed by the Court), only exceptions to the principle of openness that should be articulated also in terms of an evolving understanding of public interest. The Treaty allows an access-free zone only in terms of the ECB and EIB in terms of their policy-making activities and the CJEU in terms of adjudication. The fact that the Council currently proposes similar access-free zones for Eurojust and the European Public Prosecutors Office is in violation of the Treaty.
- The institutional scope of application of Regulation 1049/2001 should be updated to correspond with the requirements of the Treaty of Lisbon. At the same time we question whether it remains justified for **the ECB** to be excluded from the provisions of the Access Regulation with regard to its policy-making and other tasks given the manner that these tasks have expanded both in law and in practice since 2008. We do not see why it requires a blanket exemption anymore – its justifiable need for secrecy in the different contexts within which it operates can be sufficiently guaranteed on the basis of the **existing exceptions to the general rules on public access**.
- **The CJEU** should be encouraged to facilitate more pro-actively the access to its own documents and the documents of intervening parties in a structured and transparent manner, except where the requirements of secrecy should prevail (in particular as regards deliberations among the judges) in the public interest.
- The **European Parliament** is in the best position **to lead efforts to re-start the legislative procedure** on reforming the Access Regulation. The drafting of a new proposal for a regulation could be undertaken by it and then forwarded to the Commission as a means of re-opening the debate. Formally it is the Commission that has to re-launch a (new) legislative procedure beyond the inadequate content of both its 2008 and its 2011 proposals for the reform of Regulation 1049/2001. The aim, almost seven years after the Treaty of Lisbon entered into force, should be more ambitious. It

should be to broaden significantly the scope of the existing Access Regulation after the Treaty of Lisbon as well as to re-consider the ongoing need for mandatory exceptions that are not balanced in some way against the public interest. The **scope of public interest in the contemporary EU needs some re-consideration** in particular since its articulation in Court jurisprudence has remained vague and not always consistent.

- The European Parliament could also lead by **pro-actively creating a website** that gathers documents that form part of early legislative procedures (trilogues) for public access and by encouraging the other institutions (especially the Commission) to set up comprehensive registers of documents.
- **Administrative documents** (including documents relating to infringement and EU Pilot procedures) and documents relating to **international relations** should explicitly be subject to the general principle of transparency and should be released unless their disclosure can be verified to cause harm to the protected interests.
- The **balance between transparency and data protection** is currently too strongly tilted towards the latter and disregards the fact that transparency and openness are also fundamental rights that should override especially in situations where disclosure does not create harm for privacy. The need to re-consider this issue is imperative with the forthcoming entry into force of the new Data protection Regulation and the subsequent need to update Regulation No 45/2001.
- With new legislation on access to documents it is timely to consider **EU wide legislation on secrecy** with horizontal rules on **classification of documents** that would replace the current discretionary internal rules of different institutions, organs, bodies and agencies.







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ISBN 978-92-823-9430-4 (paper)  
ISBN 978-92-823-9429-8 (pdf)

doi: 10.2861/126821 (paper)  
doi: 10.2861/21135 (pdf)