

Costa, M. (2015). Accountability through Transparency and the Role of the Court of Justice. Paper presented at the CELS Lunchtime Seminar, 28-01-2015 - 28-01-2015, Cambridge, UK.



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Original citation: Costa, M. (2015). Accountability through Transparency and the Role of the Court of Justice. Paper presented at the CELS Lunchtime Seminar, 28-01-2015 - 28-01-2015, Cambridge, UK.

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Accountability Through Transparency and the Role of the Court of Justice

Dr Marios Costa

Abstract

This paper assesses transparency, an integral part of accountability, through the access to documents rules. Transparency is viewed here as an ongoing process capable of securing, through a set of binding rules, open performance in the decision-making process. Seen from this perspective, access to documents is considered to be an essential accountability component, since without information on what basis decisions are being taken, and by whom, it is impossible for the various accountability forums to hold the actors to account. The paper reviews transparency and freedom of information in the European Union (EU) by taking a holistic approach to the past 20 years. The aim is to explore transparency by means of access to “government” information and to investigate a twofold question: How open can the Union’s decision-making be and is it possible for citizens to participate in the decision-making process of institutions, bodies, offices and agencies? This paper concludes that accountability deficits in the field of access to documents have been filled, to a certain extent, by the EU Courts’ imposition of boundaries on some of the broad derogations to the right. Nevertheless, this has come at the cost of introducing a set of general presumptions against access which effectively change the default position from the widest access to non-disclosure.

Introduction

This paper takes as its focal point the problematic aspects of the access to documents regime and the interrelationship with accountability. It is often alleged that the EU’s decision-making is insufficiently transparent and that accountability deficits are even growing, something which compromises the Union’s overall legitimacy.¹ Given that the EU has now developed into a political Union with policies that go far beyond the original aims of eliminating the barriers to cross border economic activities, it becomes pressing to secure for a sufficient degree of transparency that enables monitoring of the EU’s decision-making. This paper therefore assesses, from a historical perspective, the contribution of the EU’s institutions in the area of transparency.

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¹ M. Bovens, D. Curtin and P. Hart, *The Real World of EU Accountability, What Deficit?* (Oxford University Press, 2010); A. Arnull and D. Wincott (eds), *Accountability and Legitimacy in the EU* (Oxford: Oxford University Press, 2002).

The paper starts by examining the efforts introduced by the Maastricht Treaty in 1992² for the recognition of a “right” to access official information. It then reviews the Code of Conduct regarding access to documents established in 1993. Finally, the paper examines the developments of Regulation 1049/2001 (hereafter the Regulation) on access to documents of the European Parliament (EP), the Council and the Commission.³ A significant part of this historical analysis covers the jurisprudence of the EU Courts over the past 20 years and assesses whether they have contributed to openness and, if so, to what extent, by increasing the transparency standards of a Union which supposedly belongs to EU citizens.

A detailed investigation of the abovementioned developments reveals that access to documents of EU institutions, bodies, offices and agencies has been increased to a considerable extent, especially when one compares the situation which existed before 1992 when secrecy and closed doors were the norm.⁴ Yet, had the Regulation been construed in a more liberal way by the Courts, the EU’s decision-making could have been more transparent. In what follows, the developments to date are described so that the question of what remains to be done can be addressed. In the end, the process to recast the existing Regulation is reviewed to illustrate whether the EU is ready to adopt a measure which would support citizens’ participation in the decision-making process.

Overview of the legislative background

The problems that arose during the process of ratification of the Maastricht Treaty⁵ emphasised the extent to which the EU has become disconnected from its citizens. There was a widespread notion that the Union’s decision-making process lacked accountability and legitimacy.⁶ For these reasons, the EU’s institutions had to consider alternatives that would rectify this public disinterest and would bring the Union closer to the citizens. Access to documents was seen as the solution and has been at the core of transparency efforts.⁷

² Treaty on EU (“TEU” or Maastricht Treaty), signed on 7 February 1992 and entered into force on 1 November 1993.

³ Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

⁴ *BEVC v Commission* (C-170/89) [1991] E.C.R. I-5709; U. Oberg, “Public Access to Documents After the Entry into Force of the Amsterdam Treaty: Much Ado About Nothing?” (1998) 2 E.I.O.P.; D. Curtin and H. Meijer, “The principle of open government in Schengen and the European Union: democratic retrogression?” (1995) 32 C.M.L. Rev., 391; T. Bunyan, *Secrecy and Openness in the European Union* (Kogan Page, 1999).

⁵ The negative response from the Danish electorate and also the very near to the majority of the electorate voting in the referendum in 1992 chose to reject France’s ratification of the Maastricht Treaty. The long discussions occurred in the UK Parliament and the challenge of the German ratification in the German Constitutional Court.

⁶ S. Peers, “The New Regulation on Access to Documents: A Critical Analysis” (2002) 21 Y.E.L. 385; I. Osterdahl, “Openness v. Secrecy: Public Access to Documents in Sweden and the European Union” (1998) 23 E.L. Rev. 4, 336.

⁷ For an overview of the theoretical framework of transparency and openness in EU law see A. Alemanno, “Unpacking the Principle of Openness in EU Law Transparency, Participation and Democracy” (2014) 39 E.L. Rev. 72. It must be noted here that the majority of the

The initial step which was proved to be the cornerstone of the public's fundamental right to information was a Declaration on transparency attached to the Final Act of the Maastricht Treaty. This provided:

"The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions."⁸

Declaration No. 17, quoted above, illustrated the willingness for the establishment of a "right" of access to information and is commonly considered as the beginning of a transparent era in the EU.⁹ This political statement, technically not binding, constitutes a type of soft law and not a rule of law of higher order which the previous rules would be deemed invalid for not complying with.¹⁰ In response to the Declaration and with the aim of bringing the Union closer to the citizens, the Commission first surveyed national law on access to documents and then released a communication on the issue.¹¹ In 1993, transparency was emphasised by the inter-institutional Declaration on Democracy, Transparency and Subsidiarity.¹² Finally, in the

Member States, with the notable exception of Cyprus, have regulated the issue and introduced provisions on public access either at Constitutional or at legislative level. Constitutional provisions exist in Sweden, Spain, the Netherlands, Austria, Portugal, Belgium, and Finland. Legislative provisions regulating access to documents exist in France, Denmark, Portugal, Ireland, Greece, Italy, Germany, the United Kingdom, Luxembourg, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Slovak Republic, Slovenia. A comparative analysis of the Union's public access to documents rules with public access legislation in the Member States reveals that the issue had already been regulated at the national level years before the EU legislation on the issue was introduced. See for example H. Kranenborg and W. Voermans, *Access to Information in the European Union: A Comparative Analysis of EC and Member State Legislation* (Europa Law Publishing, 2005).

⁸ Declaration No. 17, Treaty of the European Union, Maastricht, 7 February 1992.

⁹ S. Peers, "From Maastricht to Laeken: The Political Agenda of Openness and Transparency in the EU" in V. Deckmyn (ed.), *Increasing Transparency in the European Union* (Maastricht: EIPA, 2002); A. Tomkins, "Transparency and the Emergence of a European Administrative Law" (1999/2000) 19 Y.E.L. 220; D. Curtin and H. Meijer, "The principle of open government in Schengen and the European Union: democratic retrogression?" (1995) 32 C.M.L. Rev. 391.

¹⁰ The non-binding effect and the choice of a declaration and not a binding measure can be understood if one considers that secrecy rather than openness was the rule in the Union's decision-making prior to 1993, see S. Peers, "The New Regulation on Access to Documents: A Critical Analysis" (2002) 21 Y.E.L. 385; Declarations attached to the Treaties, apart from expressing political statements, can be used to provide assistance in order to clarify the provisions of the Treaty as long as they do not amend any explicit stipulations. This approach is in line with the case law which confirms that Declarations can be used as a basis for interpretation of Treaty provisions. See, *Agrana Zucker und Stärke v Commission* (T-187/99) [2001] E.C.R. II 1587, and order of the Court in *Agrana Zucker und Stärke v Commission* (C-321/01 P) [2002] E.C.R. I 10027.

¹¹ [1993] OJ L 156/5 and [1993] OJ L 166/4.

¹² Bulletin of the European Communities, 1993, no 10, 118-120.

same year the Code of Conduct¹³ on access to documents was adopted and shortly afterwards implemented by the Council¹⁴ and the Commission.¹⁵

The pre-Regulation regime: The Code of Conduct

The basic principle enshrined in the Code was the “widest possible access to documents”¹⁶ and the narrowest interpretation of the exceptions, since the latter is a corollary of the former¹⁷ and “a fundamental standard of legal interpretation”.¹⁸ The Code provided for access to be denied where disclosure could undermine the protection of certain public and private interests. The exceptions covered:

- The protection of the public interest (exemplified by public security, international relations, monetary stability, Court proceedings, inspections and investigations);
- the protection of the individual and of privacy;
- the protection of industrial and commercial secrecy;
- the protection of the Union’s financial interests; and
- the protection of confidentiality as requested by the natural or legal persons who supplied the information or as required by the legislation of the Member State that supplied the information.

The very wide non-exhaustive list of mandatory exceptions,¹⁹ quoted above, changed the balance from positive rights with negative exceptions to a text

¹³ 93/730/EC, Code of Conduct concerning public access to Council and Commission documents, OJ L340/41, 31 December 1993.

¹⁴ Decision 93/731, [1993] OJ L 340/43.

¹⁵ Decision 94/90, [1994] OJ L 340/41.

¹⁶ *Swenska Journalistförbundet v Council* (T-174/95) [1998] E.C.R. II-2289 at [110]; *WWF v Commission* (T-105/95) [1997] E.C.R. II-313 at [56]; *Interporc (I) v Commission* (T-124/96) [1998] E.C.R. II-231 at [49]; Case T-211/00, *Kuijter (II) v Council* (T-211/00) [2002] E.C.R. II-485 at [55]; *Swenska Journalistförbundet v Council* (T-174/95) [1998] E.C.R. II-2289 at [110]; *WWF v Commission* (T-105/95) [1997] E.C.R. II-313, at [56]; *Interporc (I) v Commission* (T-124/96) [1998] E.C.R. II-231 at [49]; *Kuijter (II) v Council* (T-211/00) [2002] E.C.R. II 485 at [55]; B. Vesterdorf, “Transparency-not just a vogue word” (1999) 22 *Fordham Int’l. L. J.* 902.

¹⁷ Peers, see fn. 6.

¹⁸ P. Cabral, “Access to Member State documents in EC law”, (2006) 31 *E.L. Rev.*, 378 at 381.

¹⁹ *Carlsen v Council* (T-610/97) [1998] E.C.R. II-485, at [48] whereas the President of the Court ruled that the mandatory exceptions regarding the protection of the public interest were not exhaustive and that an exception relating to the stability of the Community legal order which covers also the legal advice given by the legal service of the institutions existed whereas the President of the Court ruled that the mandatory exceptions regarding the protection of the public interest were not exhaustive and that an exception relating to the stability of the Community legal order which covers also the legal advice given by the legal service of the institutions existed.

which treated access as the exception.²⁰ That the Code's exceptions were dangerously restrictive was understood immediately by the Netherlands²¹ and in a Court case the legal basis of the Code was questioned. It was posited that the Council relied incorrectly on measures of internal organisation to regulate the fundamental democratic right of access. The same approach was taken by the Advocate General Tesauro, who concurred that the public's right to access the official documents is based on democracy which constitutes one of the cornerstones of the Union. The Court of Justice, however, held that the institutions were entitled to have access rules based solely on their internal rules of procedure.²²

Even after the enactment of the Code there was dissatisfaction with the state of openness.²³ The Council and the Commission, based on a system of secrecy, were reluctant to implement the Code in favour of openness.²⁴ This led to the consistent refusal of various documents. As a result, the EU Courts handed down several judgments interpreting the Council's and the Commission's decisions denying access under the Code. The contribution of the Courts has been, to a greater or lesser extent, significant in supporting a culture of openness and accountability in the EU.²⁵ The Court of First Instance, now the General Court, held, for instance, that the institutions after having adopted internal rules on access were abiding by them and any exceptions to the principle of the widest access must be justified on objective grounds and be applied strictly in a manner that did not defeat the application of the widest possible access.²⁶ More importantly, the Courts ruled that

²⁰ M. de Leeuw, "The Regulation on Public Access to European Parliament, Council and Commission Documents in the European Union: Are Citizens Better Off?" (2003) 28 E.L. Rev. 324.

²¹ The Netherlands, Denmark, Sweden, and Finland have consistently hard-pressed for greater openness within the Union gaining strong inspiration from their national laws where the notion of citizens' rights is underscored.

²² *Netherlands v Council* (C-58/94) [1996] E.C.R. I 2169; See also U. Oberg, "The EU citizens' right to know: the improbable adoption of a European Freedom of Information Act" (1999) 2 CYELS 303. It must be noted here that it was only in 1997 that the EP adopted rules regarding access to its documents.

²³ D. Curtin, "The Fundamental Principle of Open Decision-making and EU (Political) Citizenship" in P. Twomey and D. O'Keefe (eds), *Legal Issues of the Amsterdam Treaty* (Oxford: Hart Publishing, 1999), at p.72.

²⁴ A. Alemanno and O. Stefan, "Openness at the Court of Justice of the European Union: Toppling a taboo" (2014) 51 C.M.L. Rev. 97; D. Curtin, "Official secrets and the negotiation of international agreements: Is the EU executive unbound?" (2013) 50 C.M.L. Rev. 423; C. Harlow, *Accountability in the European Union*, (Oxford: Oxford University Press, 2002); See also the open letter addressed to the Secretary General of the Council by the European Federation of Journalists dated 30 April 1996 mentioning "grave reservations about the Council's interpretation and practice of the Code of Conduct concerning access to documents"; H. Brunmayr, "The Council's Policy on Transparency" in V. Deckmyn and I. Thomson, *Openness and Transparency in the European Union* (Maastricht: EIPA, 1998); D. Curtin, *Executive Power of the European Union* (Oxford: Oxford University Press, 2011).

²⁵ H. Ragnemalm, "The Community Courts and Openness within the European Union" (1999) 2 CYELS 29.

²⁶ *WWF v Commission* (T-105/95) [1997] E.C.R. II 313 at [55]. This was the first judgment on access to documents rules concerning the Commission. It established that although the internal institutional rules on access to documents are capable of conferring rights on citizens and imposing obligations on the Commission. The General Court also ruled for the first time on the public interest exception concerning inspections and investigations and ruled that the

abstract and general justifications could not be accepted and that the institutions were obliged to carry out a concrete and individual assessment of the requested documents before deciding whether or not to release them.²⁷

During the early case law, the protection of confidentiality proved to be the most widely used exception. Pursuant to art. 4.2 of Council Decision 93/731, “access to a Council document may be refused in order to protect the confidentiality of the Council’s proceedings”.²⁸ In *Carvel*,²⁹ the application was rejected on the grounds that the documents “refer directly to the deliberations of the Council and its preparatory instances. If it did allow access, the Council would fail to protect the confidentiality of its proceedings”.³⁰ In holding that the Council had erred, the Court ruled that when an applicant requests documents that fall under the confidentiality exception, the institution needs to genuinely balance its own interest in preserving the secrecy of its deliberations against the citizen’s countervailing interest. When the protection of confidentiality outweighs the citizen’s interest, access is denied. Clearly, a blanket refusal to grant access to a class of documents infringes art. 4(2).

The institutions were required to examine concretely and individually the documents requested and to state reasons based on the exceptions in respect of each of the requested documents if access was to be refused.³¹ The risk of the public or private interest being undermined must be reasonably foreseeable and not purely hypothetical.³² The Court of First Instance ruled in *Kuijer (II)*³³ that the Council had wrongly applied the exception of the international relations. The Council failed to consider whether there was a risk that would prejudice the Union’s relations with third countries. Instead of making this specific examination, refusal was based on general statements and assumptions rather than on an analysis of factors which effectively may undermine the exception. Yet, in limited circumstances, the requirement of one by one examination can be abandoned under the “administrative burden rule” and the institutions can balance the work that they will have to bear against the public interest in gaining access. In other words, excessive administrative work caused by a request may allow the institution to derogate from the principle of widest access.³⁴ Not surprisingly, practice provides

documents relating to investigations which may lead to an infringement procedure according to art. 226 EC Treaty, now art. 258 TFEU, satisfy the conditions that must be met by the Commission in order to rely on the public interest exception according to art. 4(1) of the Code of Conduct. *Netherlands v Council* (C-68/94) [1996] E.C.R. I-2169; *Netherlands and Van der Wal v Commission* (C-174/98 P & 189/98 P) [2000] E.C.R. I-1 at [27] and *Hautala v Council* (C-353/99 P) [2001] E.C.R. I-9565 at [25]; RW. Davis, “The Court of Justice and the right of public access to Community-held documents” (2000) 25 E.L. Rev. 303.

²⁷ *Svenska Journalistförbundet v Council* (T-174/95) [1998] E.C.R. II-2289 at [112].

²⁸ See fn. 14.

²⁹ *Carvel v Council* (T-194/94) [1995] E.C.R. II-2765.

³⁰ See fn. 29, at [22].

³¹ *Van der Wal v Commission* (T-83/96) [1998] E.C.R. II-545, at [43]; *Interporc (I) v Commission* (T-124/96) [1998] E.C.R. II-231 at [52].

³² *Kuijer (II) v Council* (T-211/00) [2002] E.C.R. II-485 at [56].

³³ *Kuijer (II) v Council* (T-211/00).

³⁴ *Hautala v Council* (C-353/99 P) [2001] E.C.R. I-9565 at [30]; *Hautala v Council* (T-14/98) [1999] E.C.R. II-2489 at [86]; *Kuijer v Council* (T-188/98) [2000] E.C.R. II-1959 at [55-56]; *Kuijer v Council(II)* (T-211/00) [2002] E.C.R. II-485 at [57]. See e.g. J. Helliskoski and P.

evidence that this is open to abuse by the institutions. (See section about administrative burden post Regulation).

The “authorship rule”, contained in the Code of Conduct and in the corresponding Council and Commission Decisions, constituted a significant limitation from the standpoint of someone who wanted to access certain documents. Pursuant to this rule, access to documents which each of the two institutions did not draw up shall be denied and must be directed to the author. The rule was confirmed by the early case law of the EU Courts. In *Rothmans*,³⁵ the then Court of First Instance ruled for the first time on the authorship rule by holding that requests regarding documents prepared by third persons must be directed to those persons and that the institutions had no authority to disclose them. The Court highlighted that this exception constituted a restriction to the right of access and must be treated as such and be interpreted and applied strictly. Thus, for the purposes of the access rules and by applying the general principle of the widest possible access to documents, the Court ruled that comitology committees assisting the Commission in implementing the legislation are part of the Commission and not separate entities.³⁶ The validity of the authorship rule was upheld by the Court of First Instance in *Interporc II*.³⁷

The Treaty of Amsterdam

The accession of Austria, Finland and Sweden³⁸ in 1995 and the fact that domestic legislation of most Member States recognises, at Constitutional or legislative level, the right of access, impacted positively on transparency in the EU. The Treaty of Amsterdam provided that decisions need to be taken as openly and closely *as possible* to the citizen (art.1 TEU) and hence prevented openness from being an absolute right.³⁹ Additionally, under art. 255 EC any EU citizen and any natural or legal person residing or having its registered office in a Member State could have access to EP, Council and Commission documents. Access was to be denied for the protection of public and private interests to be determined by the Council under the then co-decision

Leino, “Darkness at the Break of Noon: The Case Law on Regulation No. 1049/2001 on Access to Documents” (2007) 43 C.M.L. Rev. 735; A. Flanagan, “EU Freedom of Information: Determining where the Interest Lies” (2007) 13 E.P.L. 595.

³⁵ *Rothmans v Commission* (T-188/97) [1999] E.C.R. II-2463 at 56-62; C. Bergstrom, *Delegation of Powers in the European Union and the Committee System* (Oxford: Oxford University Press, 2005); M. Bovens, “Analysing and Assessing Accountability: A conceptual Framework” (2007) 13 E.L.J. 454; A. Türk, “Transparency and comitology”, in C. Demmke and C. Engel, *Continuity and Change in the European Integration Process* (Maastricht: EIPA, 2003).

³⁶ *Rothmans v Commission* (T-188/97) [1999] E.C.R. II-2463 at [56-62]; Peers, S. and Costa, M. “Accountability for Delegated and Implementing Acts after the Treaty of Lisbon” (2012) 18 E.L.J. 427.

³⁷ *Interporc Im- und Export GmbH v Commission (“Interporc II”)* (T-92/98) [1999] E.C.R. II-3421.

³⁸ Due to their long legal and cultural heritage on openness

³⁹ A. Guggenbuhl, “A Miracle Formula or an Old Powder in New Packaging? Transparency and Openness after Amsterdam” in V. Deckmyn and I. Thomson, *Openness and Transparency in the European Union*, (Maastricht: EIPA, 1998); R.W. Davis, “Public access to community documents: a fundamental human right?” (1999) 3 E.I.O.P. 8.

procedure. For this reason, art. 255 set a time limit: within two years after the entry into force of the Treaty for the access to document rules to be adopted.⁴⁰ These Treaty amendments provide with a clear evidence of the political consensus to incorporate the principle of transparency in the EU. What is less clear, however, is the exact status of transparency in the EU legal due to the national divergences on openness. On 30 May 2001, the Union adopted Regulation 1049/2001, which entered into force on 3 December 2001 and forms the legislation on access to the documents of the EP, Council and the Commission. Unfortunately, this welcome development has had only limited legal effect, as the then Court of First Instance held that art. 1 TEU and art. 255 EC had no direct effect and that the latter could not be used for the interpretation of the pre-Regulation rules.⁴¹ That political consensus is also apparent from the Treaty of Lisbon which provided with additional contributions in favour of transparency. Pursuant to art. 15(1) TFEU “[i]n order to promote good governance and ensure the participation of civil society, the Union’s institutions, bodies, offices and agencies shall conduct their work as openly as possible. Therefore, there is now a generic obligation upon all the EU organs to function openly: a completely distinct duty from the specific rules on access to documents rules.

Regulation 1049/2001 and its case law

Regulation 1049/2001 governs the fundamental⁴² right of citizens and residents in the EU to access, in principle, all the documents drawn or held by the EP, Council and Commission.⁴³ The adoption of this measure was seen as a real triumph for the advocates of transparency in the EU.⁴⁴ For the first time in the history of European integration, EU law set out the binding requirements for securing the democratic right of an informed citizenry. This formal ability of the public to participate, influence and monitor the decision-

⁴⁰ European Ombudsman’s speech, “Transparency as a Fundamental Principle of the European Union”, Humboldt University, Berlin on 19 June 2001 available at <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/312/html.bookmark>; J. Soderman, speech given to European Law Conference, Stockholm, 10-12 June 2001, “The citizen, the rule of law and openness”.

⁴¹ *Petrie v Commission* (T-191/99) [2001] E.C.R. II-3667 at [34-38].

⁴² Legal scholars (and applicants before the Courts) have repeatedly argued on the fundamental nature of the access right. See for example D. Curtin, “Citizens’ fundamental right of access to EU information: an evolving digital passepartout?” (2000) 37 C.M.L. Rev. 7; M. Bromberg, “Access to Documents: A General Principle of Community Law”, (2002) 27 E.L. Rev. This discourse constitutes now a discussion for the past. Post Lisbon, art. 6 TEU recognizes the Charter of Fundamental Rights as legally binding granting it the same legal value as the Treaties. The Charter includes in art. 42 a right of access to documents. In addition art. 15 TFEU which is the equivalent of the ex art. 255 EC Treaty is significantly widened. For example it covers the Union institutions, bodies, offices and agencies and also the Court of Justice, the European Central Bank and the European Investment Bank are covered by this provision for their administrative tasks.

⁴³ Although in principle the beneficiaries of the right of access to documents are EU citizens and residents, art. 2(2) of the Regulation grants discretion to the EU institutions bound by it to grant access to any natural or legal person not residing or not having its registered office in a MS. The institutions responded positively to this option. See Decision 2001/840 of the Council (OJ 2001, L313/40, Decision 2001/937 of the Commission (OJ 2001, L 345/94 and the Decision of the EP (OJ 2001, L 374 /I).

⁴⁴ I. Harden, “Citizenship and Information”, (2001) 7 E.P.L. 165.

making process increased the state of accountability in the EU and played a significant role in giving the access regime a fundamental force. There are a number of ambiguously unclear provisions within the Regulation, which highlight the significant level of political disagreement over the exact status of transparency in the EU legal order. This imposes an extra task on the judiciary to establish the right balance amongst the various interests at stake. The pre-Regulation case law has, to a large extent, been incorporated into this Regulation and the interpretation of the old rules is still applicable unless clearly stated otherwise.⁴⁵ This is justified by Recital 3 of the Regulation's Preamble, which states that the Regulation "consolidates the initiatives which the institutions have already taken".

The jurisprudence towards the right of access has developed two attitudes. The first one was described as "marginal review", whereas the second was called as the "foreseeability standard".⁴⁶ The former approach relates to the fact that the institutions exercise wide discretion when they apply the exceptions⁴⁷ and the latter confirms the requirement for the widest possible access so long as the risk to harm the protected interest is not merely hypothetical. In practice, the nature of the requested documents results in different judicial treatment. While the case law significantly increased public access as regards legislative documents, it has set the default position in regards to administrative and judicial documents to non-disclosure. These fundamental discrepancies, as to the nature of documents, firstly question the attribution of the Courts and secondly highlight that the state of transparency in the EU is still problematic.

The Courts have consistently applied the marginal review standard,⁴⁸ since judicial review is "limited to verifying whether the procedural rules have been complied with, the contested decision is properly reasoned, and the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or misuse of powers".⁴⁹ According to settled case law and in view of the objectives of the Regulation, certain basic principles were

⁴⁵ Peers, see fn. 6; H. Kranenborg, "Is it Time to Revise the European Regulation on Public Access to Documents?" (2006) 12 E.P.L., 251; *Franchet and Byk v Commission* (T-391/03 & T-70/04) [2006] E.C.R. II-2023 at [82] and [88] whereas the court applied and further developed the prior jurisprudence concerning the exceptions of the access rules.

⁴⁶ D. Adamski, "How wide is "the widest possible"? Judicial interpretation of the exceptions to the right of access to official documents revisited", (2009) 46 C.M.L. Rev. 521.

⁴⁷ *Kuijter v Council (Kuijter II)* (T-211/00) [2002] E.C.R. II-485 at [53]: "When the Council decides whether the public interest may be undermined by realising a document, it exercises a discretion which is among the political responsibilities conferred on it by provisions of the Treaties"; *Sison v Council* (C-266/05 P) [2007] E.C.R. I-1233: "in areas covered by the mandatory exceptions to public access to documents, provided for in Art. 4(1) (a) of Regulation 1049/2001, the institutions enjoy a wide discretion"; *Hautala v Council* (T-14/98) [1999] E.C.R. II-2489 at [44].

⁴⁸ M. De Leeuw, "The Regulation on public access to EP, Council and Commission Documents in the European Union: Are citizens better off?" (2003) 28 E.L. Rev. 324; F. Mancini and D. Keeling, "Democracy and the European Court of Justice", (1994) 57 M.L.R. 175.

⁴⁹ *Hautala v Council* (T-14/98) [1999] E.C.R. II-2489 at [72]. This has been confirmed as regards the Regulation see *Sison v Council*, (T-110/03, T-150/03 & T-405/03) [2005] E.C.R. II-1429 at [46].

established and as a result the exceptions set out in art. 4 must be interpreted and applied strictly. It follows from this, that when the institution decides to rely on any of the exceptions “it must explain how access to that document could specifically and effectively undermine the interest protected by an exception”.⁵⁰ This balancing task has been deemed essential and access cannot be denied without firstly appraising the requested documents on a case-by-case basis. Despite this careful and consistent emphasis in support of transparency, there is a parallel development of a set of general presumptions (against openness) which fits unwell and to a certain extent defeats the very purpose of the widest access emphasised categorically during the past 20 years.⁵¹ More fundamentally, this approach reveals that the EU Courts have taken a rather limited line on openness which necessarily contributes to the debate about the lack of accountability in the EU. The following, therefore, sets out the basic provisions of the Regulation and reconsiders at length the role played by the Courts in giving the access regime force in order to enhance the citizens’ ability to access information in the context of legislative, administrative and judicial documents.

The purpose of the Regulation, as set out in art. 1, is “to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission documents ... in such a way as to ensure the widest possible access to documents ... to establish rules ensuring the easiest possible exercise of this right ... and to promote good administrative practice on access to documents”. To ensure for this, any European citizen and any natural or legal person residing or having its registered office in any of the Member States can apply to access any documents.⁵²

The Regulation reflects the overall intention, specified in the second subparagraph of art. 1 TEU, to mark a new stage in the process of creating an even closer Union among the peoples of Europe, in which decisions are taken as openly and as closely as possible to the citizen. It is noted in the Recital 2 of the Regulation’s Preamble that there is a direct causal link to the fundamental right of European citizens and residents to have access with the democratic nature of the EU institutions.

Art. 2 of the Regulation sets out the basic provisions and its wording is very similar to that of art. 255(1) EC Treaty, now art. 15 TFEU, whereas art. 2(3) defines the scope of the Regulation. This provides:

“This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activities of the European Union”.

This marks a huge change to the pre-Regulation regime. Under the Code of Conduct, documents held by the institutions but authored by third parties and Member States needed to be directed to them since they were not covered by

⁵⁰ *Borax v Commission* (T-121/05) [2009] E.C.R. II-27.

⁵¹ See *LPN and Finland v Commission* (C-514/11 P) not yet reported.

⁵² art. 2(2) of the Regulation.

the access rules. This broader access constitutes undoubtedly the most important obvious step forward in respect of the former situation.⁵³ Yet, the institutions continuously rely on art. 4 to deny access.

There are four types of exceptions: mandatory, “discretionary”⁵⁴, the protection of the decision-making process and, finally, documents originating from third parties and Member States. Art. 4(1) is written in mandatory terms and provides that:

“the institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) 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;

(b) privacy and the integrity of the individual, in particular in accordance with the Community legislation regarding the protection of personal data”.

This category of exception precludes access to any of the documents falling within it and calls for no balancing of interests at stake. If the institutions can prove that the documents fall into this category, refusal is automatically justified.⁵⁵

The second category of exceptions, set out in art. 4(2) and written again in mandatory terms, requires a balancing exercise of the protected interests *vis-à-vis* disclosure. This provides:

“[t]he institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure”.

⁵³ Peers, see fn. 6; De Leeuw, see fn. 20.

⁵⁴ The inverted commas highlight my view that this category of exceptions is not really discretionary since it is written in the same mandatory way as the exceptions in Art. 4(1) but subject to a public interest override in favour of disclosure.

⁵⁵ H. Kranenborg, “Access to documents and data protection in the European Union: On the public nature of personal data” (2008) 45 C.M.L. Rev. 1079; *Sison v Council*, [2005] E.C.R. II-1429; *Kuijjer (II) v Council* (T-211/00, T-110/03, T-150/03 & T-405/03) [2002] E.C.R. II-485; *Hautala v Council*, (T-14/98) [1999] E.C.R. II-2489; *Sweden and Others v API and Commission* (C-514/07 P, C-528/07 P & C-532/07 P) [2010] E.C.R. I-8533; *Commission v Technische Glaswerke Ilmenau* (C-139/07 P) [2010] E.C.R. I-5885.

The latter clause constitutes an “exception to the exception”⁵⁶ and if applicable the documents need to be released. The same balancing test is required for the decision-making process exception, the equivalent of the confidentiality exception provided by the Code of Conduct. The first indent of art. 4(3) provides that: “Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused”. In addition, the second indent of art. 4(3) states that documents “containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken”. Consequently, post decision only documents drawn and not merely possessed by the institution cannot be disclosed.⁵⁷ This type of exception may be invoked when it additionally passes a “stricter”⁵⁸ test according to the final part of art. 4(3): “disclosure of the document would seriously undermine the institution’s decision-making process”.

The application of the exceptions regarding legislative, administrative and judicial documents, as per settled case law, is discussed below.

Legislative Documents

In *Turco*,⁵⁹ the applicant requested access to an opinion of the Council’s legal service relating to a proposal for a Council Directive laying down the minimum standards for the reception of applicants for asylum in Member States.⁶⁰ The General Court, in keeping with prior case law, reiterated that denial of access must be based on concrete and individual examination. But nevertheless, the Council’s generality was justified by the fact that giving additional information would deprive the exception relied upon of its effect.⁶¹ The rationale behind the legal advice exception, according to the Court, is to avoid uncertainty by raising doubts over the legality of EU legislation,⁶² to secure independence of the legal service and to protect the interest of institution to receive independent and frank legal advice.⁶³ In essence, the Court ruled that the legal advice exception should escape the well-established duty, incumbent on institutions, to carry out the one by one assessment of the requested documents and that the public interest override will never apply. This is because it would be impossible to conceive a different scenario than the *Turco*’s factual background which would advocate for successful acceptance of the override.

⁵⁶ H. Kranenborg and W. Voermans, *Access to Information in the European Union: A Comparative Analysis of EC and Member State Legislation*, (Groningen: Europa Law Publishing, 2005).

⁵⁷ *Batchelor v Commission* (T-250/08) [2011] E.C.R. II-2551.

⁵⁸ Kranenborg and Voermans, see fn. 56.

⁵⁹ *Turco v Council* (T-84/03) [2004] E.C.R. II-4061

⁶⁰ *Turco v Council* (T-84/03) at [4].

⁶¹ *Turco v Council* (T-84/03) at [74].

⁶² *Turco v Council* (T-84/03) at [74].

⁶³ *Turco v Council* (T-84/03) at [79].

In relation to legislative matters, this case law can no longer be considered as good law. The Court of Justice, in the joined cases of *Sweden and Turco v Council*,⁶⁴ invalidated the General Court's reasoning, upheld the appeal and ruled that the legal advice exception given in the remit of legislative proceedings must be released. The judgment addressed how institutions should deal with disclosure requests relating to legal advice. It was held that when institutions are asked to disclose such a document, they must carry out a specific three-stage procedure that corresponds to the three criteria outlined in the provision.⁶⁵ Firstly, the institution must consider and satisfy itself that the document does relate to legal advice and whether any parts are covered by the exception.⁶⁶ The second stage is the requirement to consider whether disclosure of any parts of the document would undermine the protection of the advice.⁶⁷ The Court noted that the exception must be understood in the light of the purpose of the Regulation. Under this, the exception "must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice".⁶⁸ Finally, it is incumbent on the institution to balance the interest in non-disclosure against any possible countervailing interest, bearing in mind the overall purpose to secure the widest possible access, giving a reasoned judgment.⁶⁹

What is most important for the interpretation given in *Turco* is the finding that that the General Court was erred in law to conclude that the *raison d'être* of the legal advice exception is not to fuel doubts over the legality of legislation. According to the wording of the judiciary, "it is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole".⁷⁰ Therefore, while the judgment increases public access as regards legal advice, it also more fundamentally places the access rules next to the principles of democracy and civil participation in the decision-making process. It does so in a way which highlights the ability of the citizenry to have access to information about the actions of the EU as one of its fundamental credentials.

By upholding the appeal, the Court of Justice reintroduced the cornerstone of the access regime in relation to the ability of the citizenry to assess the impact, comment upon and influence the development of policies and finally hold the "government" accountable, an activity which obviously cannot take place without maximum access to information. It follows clearly from the judgment that the EU is democratic because of the ability of the citizens to

⁶⁴ *Sweden and Turco v Council* (C-39/05P and C-52/05P) [2008] E.C.R. I-4723. See also A. Arnall, "Joined Cases C-39/05 P & C-52/05 P, *Sweden and Turco v. Council*, judgment of the Grand Chamber of 1 July 2008" (2009) 46 C.M.L. Rev. 1219; D. Adamski, "Approximating a workable compromise on access to official documents: The 2011 developments in the European courts" (2012) 49 C.M.L. Rev. 521.

⁶⁵ *Sweden and Turco v Council* (C-39/05P and C-52/05P) [2008] E.C.R. I-4723 at [37].

⁶⁶ *Sweden and Turco v Council* (C-39/05P and C-52/05P) at [38].

⁶⁷ *Sweden and Turco v Council* (C-39/05P and C-52/05P) at [40].

⁶⁸ *Sweden and Turco v Council* (C-39/05P and C-52/05P) at [42].

⁶⁹ *Sweden and Turco v Council* (C-39/05P and C-52/05P) at [44].

⁷⁰ *Sweden and Turco v Council* (C-39/05P and C-52/05P) at [59].

stay informed. Similarly, the overriding public interest pressing for disclosure of the legal advice needs to be no different from the principles of openness, transparency, democracy and civil participation in the decision-making process which already underlie the Regulation.⁷¹ The last limb of balancing is perhaps the greatest contribution of the Court in terms of accountability since it prioritises access amongst the countervailing interests at stake.

The validity of wider access in legislative matters was confirmed in *Access info*.⁷² The General Court ruled that the Council erred not to disclose the identity of countries taking positions on the reform of the EU's access to documents rules. In light of this, the Court stated that "in no way demonstrated"⁷³ how publication of the country names would "seriously undermine its decision-making process".⁷⁴ It finds further that "if citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process ... and have access to all relevant information".⁷⁵ The Court of Justice confirmed this approach and rejected the appeal lodged by the Council.⁷⁶ The Council, however, in practice continues not to publish the names of the national delegations and full access is confined to a successful request under the Regulation.

The approach taken in *Turco* was very promising in terms of transparency and was described as "spectacularly" progressive.⁷⁷ It has clearly provided with the foundations to disclose legal advice given also in the remit of the executive. This was recently upheld by the General Court and confirmed by the Court of Justice in *In't Veld*.⁷⁸ Yet, it is deemed necessary to revisit the wider contribution of *Turco*. A further and detailed examination indicates significant shortcomings of the judgment. In particular, the "general presumptions" line of reasoning undermines the fundamental nature of the access right. In this regard, the Court established that "[i]t is in principle, open to the Council to base its decisions [...] on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature."⁷⁹ The Court has effectively ruled that the Council, and by analogy all the other institutions, can deny access based on general considerations as opposed to the very well established rule for a specific and detailed examination. After the ruling, there now was every possibility that the institutions, the Commission in particular, would rely on general considerations to avoid carrying out a concrete appraisal of the requested documents. As a matter of principle, the Court after 15 years of construing the widest possible access reconsiders the essence of the right and finds that the institutions can now rely on general presumptions which by definition

⁷¹ *Sweden and Turco v Council* (C-39/05P and C-52/05P) at [74].

⁷² *Access Info Europe v Council* (T-233/09) [2011] E.C.R. II-1073.

⁷³ *Access Info Europe* (T-233/09) at [83].

⁷⁴ *Access Info Europe v Council* (T-233/09) [2011] E.C.R. II-1073 at [84].

⁷⁵ *Access Info Europe* (T-233/09) at [69].

⁷⁶ *Council v Access Info Europe* (C-280/11 P), not yet reported.

⁷⁷ Adamski, see fn. 46.

⁷⁸ *Sophie In't Veld v Commission* (T-301/10), not yet reported; *Council v Sophie In't Veld* (C-350/12 P), not yet reported.

⁷⁹ *Sweden and Turco v Council* (C-39/05P and C-52/05P) at [50].

constitute a threat to a properly reasoned decision. The later developments in the area of general presumptions provide sufficient evidence to revert what initially appears as spectacularly progressive. It has actually worsened the standards of accountability.

The development of general presumptions settles the law with the establishment of a clear distinction between legislative, administrative and judicial documents and confirms the widest possible access as regards legislative documents.⁸⁰ The later judgments in *TGI*,⁸¹ *API*,⁸² *Agrofert*⁸³ and *LPN*⁸⁴ show that the Court by citing *Turco* construed further the idea of presumptions and imposed unprecedented ramifications upon the access right and set the default position in relation to non-legislative documents to non-disclosure. The institutions can now offer a wide justification relating to the entire administrative file without even attempting to provide evidence that they have considered possible ways of dealing with the request. There is enough evidence which shows that the Commission denies access without even looking at the requested documents. Regrettably, they do so with the blessings of the Court. This is especially true in the light of the significant number of cases involving the application of general presumptions in relation to the administrative functions of the institutions. The following, therefore, considers this case law at length in this context and assesses the wider implications from the accountability perspective.

Administrative documents: the end of the one by one examination?

Despite the adoption of the Regulation, the state of transparency in the EU is still problematic. The institutions continuously rely on a culture of secrecy to deny access without even invoking the exceptions. This is clearly the case in regards to a large number of documents. In *Verein für Konsumenteninformation*,⁸⁵ a consumers' organisation, had sought access to the Commission's administrative file containing 47,000 pages. The Commission refused access to the entire file on the grounds that partial access "would have represented an excessive and disproportionate amount of work for it".⁸⁶ While art. 6(3) of the Regulation provides for an informal consultation aiming to find a fair solution, art. 7(3) provides that the time limit for handling an application can, under certain circumstances, be extended. The Regulation does not provide in any provision for the requirements of concrete and individual assessment to be abandoned under any circumstances. Similarly, the Court noted that in the absence of a fair solution mentioned in art. 6(3), the Regulation provides no ruling similar to the one

⁸⁰ *Commission v Technische Glaswerke Ilmenau* (C-139/07 P) [2010] E.C.R. I-5885; *Association de la presse internationale a.s.b.l. (API) v Commission* (T-36/04) [2007] E.C.R. II-3201; *Commission v Agrofert Holding a.s.* (C-477/10 P), not yet reported; *LPN and Finland v Commission* (C-514/11 P) not yet reported.

⁸¹ *Commission v Technische Glaswerke Ilmenau* (C-139/07 P) [2010] E.C.R. I-5885

⁸² *Association de la presse internationale a.s.b.l. (API) v Commission* (T-36/04) [2007] E.C.R. II-3201

⁸³ *Commission v Agrofert Holding a.s.* (C-477/10 P), not yet reported.

⁸⁴ *LPN and Finland v Commission* (C-514/11 P), (not yet reported).

⁸⁵ *Verein für Konsumenteninformation v Commission* (T-2/03) [2005] E.C.R. II-1121.

⁸⁶ *Verein für Konsumenteninformation v Commission* (T-2/03) at [20].

developed through the jurisprudence of the Courts relating to the administrative burden.⁸⁷ The Court moved on to note that the principle of proportionality may justify refusal of a concrete and individual examination to avoid cases where a manifestly unreasonable number of documents is requested which could result in paralysis of the proper functioning of the institution.⁸⁸

According to the Court, art. 6(3) reflects the possibility that where a very large number of documents is requested the institution can “reconcile the interests of the applicant with those of good administration”.⁸⁹ As a result, there can be cases, in addition to the line of case law as regards general presumptions, according to which no individual examination is required. The Court observed that the possibility of non-concrete assessment must satisfy four requirements:

- i) The administrative burden entailed by concrete and individual examination must be heavy and exceed the limits of what may be reasonably required.
- ii) The burden of proof rests within the institution relying on its unreasonableness.
- iii) The institution must consult with the applicant in order to ascertain his interest and consider how it might adopt a measure less onerous than a concrete and individual examination.
- iv) The institution must prefer the most favourable option to the applicant’s right of access.⁹⁰

With great respect to the judgment, the validity of the criteria quoted above can be questioned. The requirements lack proper foundation on the legislation. Had the legislature wanted to incorporate the pre-Regulation case law on administrative burden it would have had every opportunity to do so. The legislature did not incorporate the pre-Regulation case law because they could not see how this restriction could fit with the principle of the widest possible access and with the requirement to interpret the exceptions narrowly. This approach in conjunction with the set of presumptions against openness questions the role of the Court in giving the access regime force. Both appear in contrast to what would seem to be more appropriate in order to safeguard the fundamental nature of the access regime.

*LPN*⁹¹ is the first case of the Court of Justice in relation to the applicability of “general presumptions” line of case law to infringement proceedings. *TGI*⁹² has effectively made the documents relating to the administrative functions of

⁸⁷ *Verein für Konsumenteninformation v Commission* (T-2/03) at [96].

⁸⁸ *Verein für Konsumenteninformation v Commission* (T-2/03) at [101].

⁸⁹ *Verein für Konsumenteninformation v Commission* (T-2/03) at [101].

⁹⁰ *Verein für Konsumenteninformation v Commission* (T-2/03) at [112-115].

⁹¹ *LPN and Finland v Commission* (C-514/11 P), (not yet reported).

⁹² *Commission v Technische Glaswerke Ilmenau GmbH (Technische Glaswerke)* (C-139/07 P) [2010] E.C.R. I-5885 at [60].

the institutions essentially exempted from the one to one assessment since the Commission denied access without even looking at them and acknowledged that the public interest override will never apply unless particularly pertinent. Therefore, *LPN*⁹³ guidance in relation to the application of general presumptions to infringement proceedings and the extent to which the override cannot be applied becomes more significant.

Citing *TGI* and *Turco*, the Court confirmed the existence of a general presumption in the administrative file, in what appears to be a new development, to cover infringement proceedings, and held that to grant access to the file would endanger their protection (para 126 et seq. of the General Court). On appeal, the applicants, *LPN* and Finland, argued that the Commission denied access without carrying out, in violation of settled case law, a concrete and individual assessment of the requested documents.⁹⁴ The Court ruled "... that it can be *presumed* (emphasis added) that the disclosure of the documents concerning an infringement procedure during its pre-litigation stage risks altering the nature of that procedure and changing the way it proceeds and, accordingly, that disclosure would in principle undermine the protection of the purpose of investigations, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001".⁹⁵

The approach taken in *LPN* is fairly contentious, vague and in direct contrast with the Treaty framework, in particular with the requirements to take decisions as openly as possible pursuant to art. 1 TEU as well as with the overall wording of the Regulation. The Regulation provides with no basis for the establishment of general presumptions. The Court of Justice's position regarding the administrative functions of the institutions and the applicability of a presumption against openness has significant constitutional ramifications on the fundamental aspect of the access right and incorporates limitations without the required level of explanation and clarity. Additionally, the Court fails to take into account the overriding public interest in the area. Overall, the judgment makes one to wonder if such an override cannot be established in an area where possible violations of EU law by Member States might take place then remains difficult to conceive a scenario where the override would ever be accepted by the Court.

As a consequence, *LPN* confirms the applicability of a general presumption against openness in infringement proceedings. It treats in a rather paradoxical way a respectable non-governmental organisation as a mere "busybody" unable to invoke successfully the override. We see the Court to confirm categorically that openness secures public oversight of the EU's decision-making describing it as one of the fundamental credentials of the Union's democratic society. Yet, we have evidence that the same Court provides with little or no contribution in relation to the opening up of the administrative functions of the institutions. The judgment significantly decreases public access and leaves intact the possibility of the Commission, and by analogy the other institutions, to refuse access as regards to the whole of the

⁹³ *LPN and Finland v Commission* (C-514/11 P), (not yet reported).

⁹⁴ *LPN and Finland v Commission* (C-514/11 P), at [35].

⁹⁵ *LPN and Finland v Commission* (C-514/11 P), at [65].

administrative file without even looking at them, leaving aside the generic obligation to appraise on a document-by-document basis.

Equally restrictive is the approach of the Court in relation to its own documents. Currently, it is presumed that disclosure of judicial documents is capable of causing harm, in a foreseeable way, to the outcome of court proceedings. In *API*,⁹⁶ a non-profit-making organisation of foreign journalists, made a request to have access to the Commission's submissions regarding, *inter alia*, a number of ongoing cases and one which, although closed, was related to an open case.⁹⁷ The General Court ruled that the Commission could provide with a blanket refusal in relation to all written documents so long as the oral argument had not yet been presented. The rationale is to protect the interest of the litigant from external pressure until the case reaches the final stage of the hearing.⁹⁸

With great respect, the Court's ruling was simply wrong to find that the Commission was in a position to refuse access to the whole category of judicial documents without following a concrete and individual examination and without stating its detailed reasons. The blanket refusal accepted by the Court, justified only by the fact that the litigant needs to protect its litigious interest and stay free from external pressure, seems to misunderstand the rationale of the access to documents regime.⁹⁹ More importantly, it leaves the access to documents regime at a vulnerable stage. The mere fact that a document referred to in the application for access concerns an interest protected by an exception does not necessarily justify application of that exception. The exceptions are applicable only if the institution had previously assessed whether access to the document would specifically and actually undermine the protected interest and, if so, there was no overriding public interest under art. 4(2) and (3). The risk of the protected interest being undermined must not be purely hypothetical. Consequently, the examination which the institution must undertake needs to be carried out in a concrete manner and be apparent from the reasons given. Only a concrete and individual examination, as opposed to an abstract, overall examination, would enable the institution to assess the possibility of granting the applicant partial access pursuant to art. 4(6) of the Regulation. The institution's obligation to undertake this type of assessment is applicable to all the exceptions found in paragraphs 1 to 3 of art. 4.

⁹⁶ *Association de la presse internationale a.s.b.l. (API) v Commission* (T-36/04) [2007] E.C.R. II-3201

⁹⁷ *Honeywell International v Commission* (T-209/01) [2005] E.C.R. II-5527 and *General Electric v Commission* (T-210/01) [2005] E.C.R. II-5575; *Airtours v Commission* (T-342/99) [2002] E.C.R. II-2585; *Commission v Austria* (C-203/03) [2005] E.C.R. I-935; *Commission v United Kingdom* (C-466/98) [2002] E.C.R. I-9427; *Commission v Denmark* (C-467/98) [2002] E.C.R. I-9519; *Commission v Sweden* (C-468/98) [2002] E.C.R. I-9575; *Commission v Finland* (C-469/98) [2002] E.C.R. I-9627; *Commission v Belgium* (C-471/98) [2002] E.C.R. I-9861; *Commission v Luxembourg* (C-472/98) [2002] E.C.R. I-9741; *Commission v Austria* (C-475/98) [2002] E.C.R. I-9797; and *Commission v Germany* ("the Open Skies cases") (C-476/98) [2002] E.C.R. I-9855.

⁹⁸ *Association de la presse internationale a.s.b.l. (API) v Commission* (T-36/04) [2007] E.C.R. II-3201 at [99].

⁹⁹ 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 C.M.L. Rev. 1215.

On appeal, the Court reiterated that the institutions may base their decisions on general presumptions since considerations of a similar kind are likely to apply to documents of the same nature.¹⁰⁰ The Court confirmed that judicial documents are covered by a general presumption against openness and that disclosure of the pleadings would undermine their protection, covered by the exception of the second indent of art. 4(2), while those proceedings remain pending.¹⁰¹ As a result, the Commission bears no obligation “to carry out a concrete assessment of each document requested in order to determine whether, given the specific content of that document, its disclosure would undermine the court proceedings to which it relates”.¹⁰²

With this judgment, the Court of Justice significantly curtailed the already limited, public access as regards Court proceedings. Post *API*, the burden of proof to rebut the general presumption of non-disclosure rests on the applicant, whereas previously the institutions had the burden to prove that concrete and individual examination was not necessary.¹⁰³ This is deeply unsatisfactory for the state of transparency and openness and in conjunction with the finding that the overriding public interest in transparency can only be taken into account as long as it is particularly pertinent leaves with no access right as regards judicial documents.¹⁰⁴ Consequently, the decision of the Court comprises of poor jurisprudence in terms of accountability mainly for two reasons. Firstly, it decreases dramatically public access as regards judicial documents and sets the default position to non-disclosure and more fundamentally, it has the effect of transforming judicial activities from a discretionary to a mandatory category which results automatically to non-disclosure.

While it might reasonably be argued that non-disclosure of judicial documents might harm the particular sensitive nature and serenity of the proceedings, it is still apparent that the case law has narrowed the constitutional nature of the right without adequate explanation and clarity and has set the default position for judicial documents to non-disclosure. This interpretation applies to all of the executive powers of the Commission, for instance under the state aid and merger control procedures where the Court has established that a clear distinction should be made between legislative and administrative documents. In *TGI*,¹⁰⁵ the Court confirmed the “settled case law” in relation to “...the existence of a general presumption that disclosure of documents in the

¹⁰⁰ *Sweden and Others v API and Commission* (C-514/07 P, C-528/07 P & C-532/07 P) [2010] E.C.R. I-8533 at [74].

¹⁰¹ *Sweden and Others v API and Commission* (C-514/07 P, C-528/07 P & C-532/07 P) at [94].

¹⁰² *Sweden and Others v API and Commission* (C-514/07 P, C-528/07 P & C-532/07 P) at [104].

¹⁰³ *Verein Fur Konsumentinformation v Commission* (T-2/03) [2005] E.C.R. II-1121.

¹⁰⁴ *Sweden and Others v API and Commission* (C-514/07 P, C-528/07 P & C-532/07 P) at [157].

¹⁰⁵ *Commission v Technische Glaswerke Ilmenau* (C-139/07 P) [2010] E.C.R. I-5885; *Commission v Agrofert Holding a.s.* (C-477/10 P), not yet reported; *Commission v Editions Odile Jacob SAS* (C-404/10 P) not yet reported; *Guido Strack v Commission* (T-392/07) not yet reported.

administrative file in principle undermines protection of the objectives of investigation activities”.¹⁰⁶ Before examining the ongoing procedure to recast the existing Regulation and its problematic aspects, an overview of the application of the Member States’ documents and the role played by the Court in interpreting this final exception is discussed below.

Art. 4(5) of the Regulation: documents originating from Member States

This section reviews the nature of the documents regulated by art. 4(5)¹⁰⁷ which provides that “[a] Member State may request the institution not to disclose a document originating from that Member State without its prior agreement”. Pursuant to Recital 15 of the Regulation, the Member States’ legislation on access to official documents shall be unaffected since “it is neither the object nor the effect of that Regulation to amend national legislation on access to documents”.¹⁰⁸ These provisions reflect what was agreed in Declaration No.35, annexed to the final Act of the Treaty of Amsterdam.

The General Court in the *Messina*¹⁰⁹ case did not rule explicitly that art. 4(5) grants the Member States a power of veto. It did so with its later rulings in the *IFAW*¹¹⁰ and *Scippacercola*¹¹¹ cases. In *IFAW*, the General Court ruled that documents drafted by third parties can only be disclosed with the consent of the author, unless it is obvious that they can or cannot be disclosed. In the words of the judiciary, “consultation of the third party is, as a general rule, a precondition for determining whether the exceptions to the right of access provided for in art. 4(1) and (2) of the Regulation are applicable in the case of third-party documents”.¹¹² As a result, when a Member State requests an institution not to disclose its own documents, the institution cannot do otherwise: “a request made by a Member State under Article 4(5) ... [is] an instruction to the institution not to disclose the document in question”.¹¹³ The Court held that if institutions were entitled to disclose the documents despite a Member State’s objection this would risk the *lex specialis* of art. 4(5) becoming a dead letter.¹¹⁴ More regrettably, the General Court ruled that “[t]he Member State is under no obligation to state the reasons for any request made by it under Art. 4(5) of the regulation and, once it has made

¹⁰⁶ *Commission v Technische Glaswerke Ilmenau* (C-139/07 P) [2010] E.C.R. I-5885 at [61].

¹⁰⁷ Prior to the delivery of the *IFAW* appeal it was argued in the legal literature that the Court was correctly interpreted that Art. 4(5) confers on a Member State the power to request the institution not to disclose the documents originating from it without its agreement. See B. Driessen, “Access to Member State documents in EC law: a comment”, (2006) 31 E.L. Rev., 906; For a criticism of this approach see: Cabral, see fn. 18 at 381.

¹⁰⁸ *Sweden v Commission* (C-64/05 P) [2007] E.C.R. I-11389 at [47].

¹⁰⁹ *Messina v Commission* (T-76/02) [2003] E.C.R. II-3203.

¹¹⁰ *IFAW Internationaler Tierschutz-Fonts GmbH v Commission* (T-168/02) [2004] E.C.R. II-4135.

¹¹¹ *Scippacercola v Commission* (T-187/03) [2005] E.C.R. II-1029

¹¹² *Scippacercola v Commission* (T-187/03) at [55].

¹¹³ *Scippacercola v Commission* (T-187/03) at [58].

¹¹⁴ *IFAW Internationaler Tierschutz-Fonts GmbH v Commission* (T-168/02) [2004] E.C.R. II-4135.

such a request, it is no longer a matter for the institution to examine whether non-disclosure of the document in question is justified...”.¹¹⁵

Interpreting “request” to the effect that Member States have a veto power is, however, not in line with the distinction between art. 4(5) and art. 9(3). The latter directly provides for the release of sensitive documents subject to the originator’s consent.¹¹⁶ Had the legislator wanted to grant a veto power to the Member States, it would have had every opportunity to do so by adopting a similar wording as to the originator’s consent in art. 9(3). The different wording adopted cannot justify similar treatment. The General Court ruled that if “request” was interpreted to mean that institutions were required to take into account the opinion of the Member State without necessarily following such an opinion, this would have resulted in equalising documents originating from any other third parties under art. 4(4)¹¹⁷ with art. 4(5) and, as such, rendering the provision of the latter a dead letter.¹¹⁸ This argument, however, seems to be no less problematic. Under art. 4(5), Member States always have the possibility of expressing their views, even in cases where institutions consider it obvious that access must be given or denied. On the contrary, this is not the case for third parties’ documents.

The Court of Justice ruled in the *IFAW*¹¹⁹ appeal that Member States are obliged, under the duty of loyal cooperation, not to jeopardise the EU rules on access to documents. The Court has clarified that art. 4(5) does require joint implementation and cooperation amongst the administrations of the Member States and EU institutions. When the institution receives an application for access to a document drafted by any Member State, then a dialogue must take place in order to decide whether access must be granted. If the Member State objects, then it is required to do so within the time limits of art. 7(1) of the Regulation and justify the objection upon art. 4 (1) to (3).¹²⁰ By not doing so, the institution is obliged to grant access, unless it considers that refusal must be denied following an assessment of art. 4. If the Member State provides a reasoned refusal, then the institution is obliged to incorporate it into its decision on access, allowing for the judicial review or the complaint procedure to the EU Ombudsman to take place.¹²¹

The Court of Justice held that a Member State may also rely on its national rules on access to documents, since “there is nothing in the Regulation to exclude the possibility that compliance with certain rules of national law ... could be regarded as an interest deserving protection on the basis of the

¹¹⁵ *IFAW Internationaler Tierschutz-Fonts Gmbh v Commission* (T-168/02) at [58-59]

¹¹⁶ Peers, see fn. 6.

¹¹⁷ art. 4(4) of the Regulation provides that the documents drafted by third parties shall be disclosed after consulting the originators unless it is clear that they shall or shall not be disclosed.

¹¹⁸ *IFAW Internationaler Tierschutz-Fonts Gmbh v Commission* (T-168/02) at [58].

¹¹⁹ *Sweden v Commission* (C-64/05 P) [2007] E.C.R. I-11389. See also P. Leino, “Case C-64/05 P, Kingdom of Sweden v. Commission of the European Communities and Others, Judgment of the European Court of Justice (Grand Chamber) of 18 December 2007” (2008) 45 C.M.L. Rev. 1469.

¹²⁰ *Sweden v Commission* (C-64/05 P) at [88].

¹²¹ *Sweden v Commission* (C-64/05 P) at [89-90].

exception laid down by that Regulation”.¹²² As a matter of principle, the finding that the exception does not provide Member States with an unconditional right of veto to object to the disclosure is of course again significant in terms of transparency. The judgment increased significantly public access as regards Member State documents and ruled that denial can only be justified by reference to art. 4(1) to (3) of the Regulation. In any case, contrary to what has been previously decided, a request given by any of the Member States cannot be interpreted as an absolute and unqualified power to prevent access regarding documents drafted by Member States. It is now clear from the judgment that the Court is prepared to apply a more stringent standard of judicial review as regards Member States’ documents. This approach is important from the accountability perspective since a significant number of the decided cases concern refusals under art. 4(5).

Legislative procedure to amend the Regulation

In April 2008, the Commission published a legislative proposal to recast the Regulation.¹²³ Following the publication of the Commission’s proposal, the EP adopted a number of amendments and, after the Parliament’s requests, the Commission adopted a later proposal.¹²⁴ On 15 December 2011, the EP approved the proposal. In light of these developments, this section reviews the most problematic aspects of the proposal and assesses whether the EU is about to enhance the existing *status quo*.¹²⁵ As we have seen, the weak points of the current regime stem predominantly from the exceptions enshrined in the Regulation. Thus, in the amendment process, emphasis must be based upon the task of clarifying or even eliminating the exceptions. Rather regrettably, the procedure to recast the current access regime provides evidence to the contrary and the proposal itself is far from securing transparency.

In particular, art. 2(6) of the Commission’s proposal reduces dramatically the current standards since it would leave outside the scope of the Regulation documents relating to individual decisions and investigations until the decision has been taken and the investigation has been closed or the act has become definitive. In addition, “documents containing information gathered or obtained from natural or legal persons by an institution in the framework of such investigations shall not be accessible to the public even after the closure of the investigation”. At present, art. 4(2) of the Regulation provides that the disclosure of documents which would undermine the protection of inspections, investigations and audits shall be refused, unless there is an overriding public interest following disclosure. In principle, however, in *TGI*,¹²⁶ the Court of Justice confirmed that there is a general presumption that the disclosure of

¹²² *Sweden v Commission* (C-64/05 P) at [84].

¹²³ Proposal for a Regulation regarding public access to European Parliament, Council and Commission documents, COM (2008) 229 final (April 30, 2008), 2008/0090(COD).

¹²⁴ Proposal for a Regulation regarding public access to European Parliament, Council and Commission documents, COM (2011) 137 final (March 30, 2011), 2011/0073(COD).

¹²⁵ For a general criticism of the Commission’s proposal see N. Diamandouros, ‘Contribution of the European Ombudsman to the public hearing on the revision of Regulation 1049/2001 on public access to documents’, speech delivered in the EP on 2 June 2008.

¹²⁶ *Commission v Technische Glaswerke Ilmenau* (C-139/07 P) [2010] E.C.R. I-5885.

investigation documents undermines their protection. If the proposed provision is adopted, in conjunction with *TGI*, this would constitute a step backwards in terms of the existing *status quo*, since this provision would not be protected by an overriding public interest in disclosure.

The proposal defines documents as “[a]ny content whatever its medium... drawn-up by an institution and formally transmitted to one or more recipients or otherwise registered, or received by an institution...”. This would exclude a substantial number of documents from the scope of the Regulation since a document drawn up by any of the institutions would not be accessible unless formally transmitted or otherwise registered. The institutions may intentionally avoid transmitting or registering a document to exclude them from the scope of the Regulation. This would support a culture of secrecy and be in direct contrast with settled case law, which provides that access is not confined to the documents but rather to the information contained in them.¹²⁷ Consequently, the proposed definition is far from enshrining transparency and openness required by art. 1 TEU.

Art. 4(2)(c) of the proposal would regulate legal advice and Court proceedings and reads as follows:

“The institutions shall refuse access to a document where disclosure would undermine the protection of:
(c) legal advice and court, arbitration and dispute settlement proceedings”.

This exception does not take into account *Turco*.¹²⁸ It should be amended to reflect that following a concrete and individual examination of the documents requested access to legal opinion should be rightly granted or denied. In addition, legal advice relating to procedures leading to a legislative act or a non-legislative act of general application should be excluded from the exception and therefore be disclosed.

Currently, according to art. 4(3) of the Regulation, a document drawn up for internal use or received shall, pending the making of a decision, shall be refused if disclosure would seriously undermine the institution’s decision-making process. Once the decision has been taken, the exception refers only to documents containing opinions for internal use as part of the deliberations and preliminary consultation. In either case, documents need to be disclosed if there is an overriding public interest in disclosure. These provisions apply to the negotiating position of the Member States and the Council in relation to legislative proposals. The proposed art. 4(3) would diminish standards dramatically to cover not only documents drawn up for internal use or received by an institution, but all documents. This is very disappointing because of the obligation to decide about legislation openly which constitutes enough justification to exclude the legislative activity from the scope of the exception. In order to do so and to improve current standards, this provision

¹²⁷ *Hautala v Council* (C-353/99 P) [2001] E.C.R. I-9565.

¹²⁸ *Sweden and Turco v Council* (C-39/05P and C-52/05P) [2008] E.C.R. I-4723.

must exclude documents relating to or leading to the adoption of a legislative act or a non-legislative act of general application.

Art. 4(5) would make clearer the relationship between access to documents and the protection of personal data. The general rule would be that personal data should only be disclosed in accordance with the conditions regarding lawful processing of such data under EU legislation. But one exception would be introduced: there would be a presumption that the names, titles and functions of public office holders, civil servants and interest representatives would be disclosed insofar as they are acting in their professional capacity.

The Commission has proposed to replace art. 4(1)(b) with a provision which would prevent disclosure if the person concerned could show that disclosure would “adversely affect” them. Such a ruling would constitute a drop in the current standards, as it would be very easy for the persons concerned to claim that they are adversely affected by the disclosure even though their privacy was not affected. The test proposed by the Commission and accepted by the EP regarding the “adverse effect” constitutes an additional requirement which would inevitably lead to abusive behaviour.

According to art. 5(2) of the proposal, the decision to release documents originating from Member States but relating to the adoption of a legislative act or a non-legislative act of general application shall be taken by the institution. As a result, there would be no special treatment for a non-sensitive document originating from a Member State which is transmitted in the framework of procedures leading to a legislative act or a non-legislative act of general application. This reflects the view that a document sent by a Member State to the Council in this context is to be treated as if it were a document of the Council. However, art. 5(2) would retain the requirement for consultation before disclosure for non-legislative and non-sensitive documents. Member States would either rely on the exceptions of the Regulation or on their national law. Pursuant to the last part of art. 5(2), the institution would have to accept the reasons given without being able to assess the weight of those reasons. Such a proviso would significantly constitute a step backwards as long as the institutions would be obliged to accept vague reasons not properly justified. Overall, it can be safely said, rather regrettably, that the ongoing procedure to recast the existing transparency Regulation does not enhance transparency standards at all and must be amended in order to incorporate the requirements provided by the Lisbon Treaty.

Conclusion

Access to documents is a crucial element for legitimacy and accountability in the EU since the ability of the citizenry to have access to information confirms the democratic aspect of the EU. It is rather impossible, without maximum access to the relevant information, for citizens to participate in the decision-making process, to monitor and finally to hold “governmental” actors accountable. In this way, transparency enhances awareness, illustrates understanding of the ultimate objectives that the decision-making processes aim to achieve and finally grants legitimacy on decision-making. The Treaty of

Lisbon has provided a sufficient framework capable of enhancing further transparency and access to documents. If one compares the pre-Regulation rules, where the General Court held for instance that decisions on access to documents could be based purely on an institution's Rules of Procedure, with the current situation, it can be safely argued that a fundamental right has been granted to the citizenry.¹²⁹

Similarly, the Regulation has improved the position governing access in several aspects. It has codified the exceptions and formally confirmed the widest possible access. The judiciary has also contributed, to a greater or lesser extent, in giving force to the right of access. It has achieved this in a more limited way by carefully avoiding to rule whether the right to access constitutes a general principle of EU law. Additionally, there are judgments that are fairly contentious, particularly in the area of administrative and judicial documents. This line of case law acknowledges the existence of general presumptions against openness and effectively sets the default position to non-disclosure. The paper illustrated that this is the most important limitation upon the fundamental aspect of the access regime. Nevertheless, the contribution of the judiciary should not be underestimated. A significant number of Council and Commission decisions denying access have been annulled by the EU Courts.

Clearly, the weak points of the access regime stem predominantly from the exceptions to the right of access and, during the amendment process, emphasis should be based on reducing or even eliminating them. Regrettably, the ongoing procedure to recast the existing legislation indicates that, in the years to come, we may be in a completely new situation, not necessarily a better one. There is still hope and time for the legislature to eliminate the exceptions in a way that would truly support citizens' participation in the decision-making process. Citizens need to be able to participate in a transparent decision-making process and be aware of what is happening in the EU institutions, bodies, offices and agencies, so that they can exercise their democratic right of holding decision-makers accountable. The EU can only be democratic if the decision-making process secures openness. As it stands, the ongoing procedure to recast the existing transparency Regulation constitutes a lost opportunity. It does not enhance the current standards but rather establishes a step backwards in relation to the current status quo. Still there is hope: the new Commission is required to amend the 2008 proposal, as a matter of urgency, by taking into account the requirements imposed by art. 15 TFEU and art. 42 of the Charter of Fundamental Rights.

¹²⁹ *Sweden and Turco v Council* (C-52/05 P) [2008] E.C.R. I-4723, Opinion of Advocate-General Maduro at [40].