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THE EVOLUTION OF A PUBLIC RIGHT TO ACCESS TO DOCUMENTS¹

Abstract

Since the *Treaty of Maastricht* (which entered into force 1993), the EU has committed itself to bringing about a more transparent Union in order to strengthen the democratic nature of the institutions and ultimately, to bring about a "Community closer to its citizens" by improving the access to information. The legal implementation of this commitment has taken place in various steps since 1993 and is currently in the process of changing yet again with the revision of the current *Regulation 1049/2001* regarding public access to European Parliament, Council and Commission documents.²

Thus, during the past sixteen years of incremental supranational rule-making and competences, there is now a considerable amount of case law on and practical experience with institutions' policies to implement what is increasingly seen as a fundamental right of European citizens to access information.

It will be argued that progress has not been steady and that new initiatives of the institutions have always been triggered by outside pressures, which has not yet led to a full incorporation of the principle of transparency in the administrative culture of the EU. The recent revision of the Regulation may in fact consolidate a right to access that is more conservative than has been interpreted in recent Court judgments, while it is argued that a limitation of efforts on a public right to access to documents will not suffice to remedy the EU's lack of transparency.

1. Introduction

Secrecy of negotiations has long been the default within the organization that has grown into today's version of the European Union. Gradual steps towards less secrecy in decision-making coincided with a broadening of the competences of the EU to include justice and home affairs (1993) and an increase in the European Parliament's powers (1993 and 1997 respectively). However, they certainly did not come about “naturally”, but were driven to a large extent by external challenges and has been coined greatly by the continued pressure exerted by civil society organizations such as Statewatch or the European Journalists Federation, aided by some (mainly Northern European) Member States, the Community Courts and the European Ombudsman.³

The issue of a right to access to documents did not become salient until the deliberations on the *Maastricht Treaty*. The Dutch Council Presidency had proposed introducing a new Article into the Treaty that would give the Council the competence to adopt a Regulation on the right to access to Community documents. The majority of Member States, however, did not consider it necessary to create such a legal basis within the Treaty structure, so *Declaration Nr. 17* (recommending that steps be taken to improve the public access to information) was attached to the Final Act of the *Maastricht Treaty*. The Treaty subsequently included provisions establishing European citizenship and the European Ombudsman. Its ratification process, however, was overshadowed by the shock of the Danish rejection in 1992, a very close French referendum and negative press coverage of a *Draft Council Regulation*⁴ concerning the access to classified information (which was later dropped) coinciding with it (Bunyan, 2002).⁵

In 1993, the Council and the Commission adopted a Code of Conduct, (hereafter “the Code”) according to which the institutions' rules of procedure were adapted.⁶ From this time on, the existence of a right to access to EU documents was no longer questionable and the European Ombudsman subsequently effectuated the broadening of its application to almost all other bodies of the Community (Peers, 2002: 3). In 1997, the *Amsterdam Treaty* brought about the codification of the principle of openness, when it stipulated in Article I TEU that decisions in all three Pillars of the EU were to be taken “as openly as possible”. Also, this time a provision on access to information was included into the Treaty structure by means of Article 225 TEC, which accorded a right of access to European Parliament, Council and

Commission documents to any citizen of the EU. The second indent of the Article provided for the adoption of secondary legislation within two years.⁷

In 2001, *Regulation 1049/2001 of the European Parliament and of the Council regarding the public access to European Parliament, Council and Commission documents* (hereafter “the Regulation”) implemented the provisions of Article 225 TEC.⁸ It clearly linked the access to documents to citizen participation in decision-making processes and the legitimacy of the democratic system (see for example preamble recital 2). Notably, the new Regulation also for the first time makes an explicit reference to human rights (Peers, 2002: 5). At the same time, however, a backwards trend to more secrecy was the result of the broadening of classification and security rules with the establishment of a common European Security and Defense Policy in 1999 limiting the right to access (Meltzian, 2004: 60). This was mainly driven by the need to satisfy NATO demands concerning the handling of classified information (Curtin, 2003; Reichard, 2006).

After ratification, Article 15 of the consolidated *Treaty on the Functioning of the European Union* (TFEU, also referred to as the *Lisbon Treaty*) would introduce transparency of Union proceedings as a matter of “good governance”.⁹ A further recent indication of a gradual “constitutionalization” of a fundamental right to access to information is the inclusion of this right within the *Charter of Fundamental Rights* (notably under the part on “citizens’ rights”), complemented with the new right to good administration and a European Ombudsman (in Articles 41, 42 and 43 respectively). The most recent crisis that has accompanied ratification has yet again led the EU to concentrate on the issue of transparency and “re-connecting” with citizens *inter alia* by means of a so-called *Transparency Initiative*¹⁰ and proposing a new Communication Policy (Commission of the European Communities, 2006). Currently, *Regulation 1049/2001* is in the process of being revised.

Here, the choice to begin with an investigation into the right to access to documents is largely corresponding to the sequence of decisions, which have accompanied the incremental recognition that access to information more generally ought to be seen as a fundamental right of European citizens (Curtin, 2000). So, during what Curtin (2004a: 3) has identified as the first time period of this development, the construction of a right to access to certain categories of documents by the public was at the center of efforts to have the Union's democratic credentials keep up with its increasing competences. Especially during

this initial stage, the judges of the Community Courts and the European Ombudsman played an important role in specifying legitimate limitations.¹¹ Below, the historical development of the adoption of European access rules will be briefly described in order to clarify the political context in which they have developed. Subsequently, a critical analysis of their interpretation by Courts and implementation by EU institutions will be put forward in order to evaluate the development and current status of a right to information.

2. The structure of the Code of Conduct

Under the 1993 Code, as exemplified in the Council Decision implementing it, citizens were entitled to make written applications to access documents, defined as “any written text, whatever its medium, containing existing data and held by the Council”.¹² Exceptions to access were detailed in Article 4(1) of the Council Decision, which provided for mandatory refusal of access, where “disclosure could undermine” the protection of (1) the public interest, (2) the individual and privacy, (3) commercial and industrial secrecy, (4) the Community's financial interests and (5) confidentiality as requested by the natural or legal person who supplied any of the information contained in the document or as required by the legislation of the Member State which supplied any of that information.

Perhaps most problematically, Article 4(2) introduced a discretionary exception providing that “a Council document *may* be refused in order to protect the confidentiality of the Council's proceedings” - this exception was to become the focal point of many arguments defending the so-called “space to think” within the EU's institutions in order to maintain a degree of secrecy for the sake of internal decision-making.¹³ In addition, there were a number of “covert means of refusing access”, such as requiring applicants to consult documents on location instead of sending them copies¹⁴, rejecting “repeat applications” (even if for different documents, covering the same topic) or “very large numbers of documents” and the requirement to address applications directly to the author of requested documents (the so-called “authorship rule”) (Bunyan, 2002).

2.1. Laying the ground rules for access: case law of the Community Courts¹⁵

Famously, in the first Court of First Instance (CFI) case concerning the Code, also known as the so-called *Guardian* case¹⁶, journalist Carvel had requested access *inter alia* to preparatory reports, minutes, attendance and voting records of the EU Committee of

Permanent Representatives (COREPER) and decisions of both the Council of Ministers for Social Affairs and of the Council of Ministers for Justice, as well as minutes of the Council of Ministers for Agriculture. The partial rejection of the application by the Council was based - among other reasons - on the Council's contention that some of the documents "refer[ed] directly to the deliberations of the Council and its preparatory instances". This, it argued would mean that "if it did allow access, the Council would fail to protect the confidentiality of its proceedings" since "the documents in question contain[ed] confidential information relating to the position taken by the members of the Council during its deliberations".¹⁷ Here, the Court pronounced on the distinction between mandatory and discretionary exceptions. It concluded that the Council had wrongly refused access on such a categorical basis and established the rule that when a document fell within the exception of Article 4(2) concerning the protection of the "confidentiality of its proceedings", the non-mandatory nature of the provision meant that the institution was required to balance its interests against those of the applicant.¹⁸ Thus, the Court considered it unacceptable to automatically exclude whole categories of documents. Notably, it now stressed the legal position of the individual that was created by a self-obligation and which the Council had failed to respect (Meltzian, 2004: 69).¹⁹

When in 1997 the Intergovernmental Conference took place in Amsterdam, a series of complaints lodged with the European Ombudsman by Statewatch had further contributed to making the issue of transparency and openness gain a firm place on the agenda.²⁰ The *Amsterdam Treaty* affirmed the right to put complaints before the European Ombudsman on justice and home affairs issues and introduced the new Article 255 into the *EC Treaty*, which contained a positive right of access to European Parliament, Council and Commission documents.²¹ In effect, this meant that the three institutions had to agree on secondary legislation establishing common rules before May 1999 – this was to become *Regulation 1049/2001*. In the meanwhile, the Court continued interpreting the scope of exceptions in the existing rules on access establishing a number of important principles and guidelines that would also affect the interpretation of the later Regulation.²² In retrospect, it may be said that the Community Courts employed a "teleological reasoning" that put the existing rules into the larger context of a democratic rationale and thus effectively developed a "constitutional perspective on access to information provisions" even *before* the *Amsterdam Treaty* (Curtin, 2004a: 4; Naômé, 2002: 191).

So, by the time the Regulation was adopted, there was already a considerable amount of case law interpreting the prior rules on access and the scope and application of its exceptions. For example, in a second major case brought forward by journalists, in 1998 the Swedish Journalist Union *Svenska Journalistförbundet* won a case against the Council concerning access to documents, which primarily concerned Europol.²³ In its judgement the Court unequivocally put the Council's rules on access in relation to the purpose of “strengthening the democratic character of the institutions and the trust of the public in the administration”.²⁴ It went on to point out that merely indicating – without giving reasons – that disclosure of documents would prejudice the protection of the public interest (*in casu* public security) and that they relate to proceedings of the Council, including the views of its members, and thus fall under the confidentiality rule was not a satisfactory statement of reasons.²⁵

Yet more decisions still referring to the old rules of the Code were to be pronounced after the adoption of the Regulation (see list of cases below). The assumption has widely been that this case law would remain valid as a guideline for the application of the 2001 Regulation, since it is explicitly meant to “consolidate the initiatives that the institutions have already taken with a view to improving the transparency of the decisionmaking process” (third recital of the preamble).²⁶ So, by the time, the first case interpreting the new rules under *Regulation 1049/2001* was decided, the Court had already introduced a number of important principles including the requirement of the institutions to balance their respective interests against those of the applicant²⁷, to consider partial access²⁸ and to scrutinize each document separately²⁹. It further established the leading principle that exceptions should to be “construed and applied strictly, in a manner which does not defeat the application of the general rule”.³⁰ Also, the Court broadened the application of access rules to the policy areas of Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (CJHA)³¹ as well as to the “comitology” committees³² and specified the criteria for a statement of reasons³³ (for an overview of the most important case law interpreting the Code and later the Regulation, see list of cases).

Gradually the Court thus moved from explaining *what* was the meaning of the obligation to grant access (Carvel) to *how* the institutions had to apply the rules concerning access (*WWF, Inteporc I, Svenska Journalistenförbundet*) and eventually to increase the

obligation of the institutions to consider partial access (*Hautula*) and to state reasons considering an applicant's objections (*Kuijer*) (Naômé, 2002: 184).

3. Regulation 1049/2001

“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.”
(Regulation 1049/2001, second recital of the preamble)

Following the Amsterdam commitment in May 2001, the institutions adopted a new legally binding instrument concerning access to documents, *Regulation 1049/2001 on access to European Parliament, Council and Commission documents*, which entered into force on 3 December 2001. First, however, the rocky path preceding the adoption of the Regulation will be considered here in order to put the new rules into the political context that brought them about.

3.1. The process

Before the emergence of a Common Foreign and Security Policy (CFSP) in 1999 there had been little need for European institutions to have a special regime for the handling of sensitive information. It soon became obvious, however, that a European CFSP depended highly on cooperation with NATO, which in turn required the exchange of sensitive information. Thus, the rules that have since been adopted have been thoroughly influenced by NATO's broad and strict standards on the security of information that developed in the context of the Cold War and the McCarthy era (for a detailed analysis, see Reichard, 2006).

Concerning the Commission, a Decision of 1994 was to introduce rules concerning the handling of classified information.³⁴ Only in 1995 did the Council introduce three classification categories: SECRET, CONFIDENTIEL and RESTREINT.³⁵ In October of 1999, Javier Solana, who had served as Secretary General of NATO from 1995 to 1999, took over the General Secretariat of the Council of the European Union. He immediately set about to adjust the Council's rules regarding classified documents to satisfy NATO requirements.³⁶ The new classification category TOP SECRET and a “hard” originator control³⁷ that extended to third parties (giving third parties a *de facto* veto over a broad range of EU documents)

were introduced.³⁸ On 26 July 2000 the General Secretariat of the Council concluded an interim Agreement on the Security of Information with NATO, which had clearly been prepared before hand.³⁹ Not even a month later, the Council adopted another Decision which exempted all documents starting from the level of CONFIDENTIEL as well as those documents “on matters concerning the security and defence of the Union, or one of its Member States or on military or non-military crisis management”.⁴⁰ Also, it was stipulated that none of the documents covered by the exception should even be mentioned in the public register.

This so-called “Solana Decision” resulted in massive and widespread criticism from Member States with a more open tradition (such as the Netherlands, Denmark, Sweden and Finland), the Green Party in the European Parliament (EP) and civil society organizations (prominently Statewatch and the European Federation of Journalists). The Netherlands as well as the EP filed an action under Article 230 TEC challenging the legal basis of the rules which had prevented their adoption under co-decision.⁴¹ Also inter-institutional relations suffered from the unexpected manner in which the Council introduced its new rules and the Commission’s reaction, which incorporated this development while already drafting the Regulation.⁴²

New Security Regulations were adopted as a so-called “A point”⁴³ by the Council on 19 March 2001.⁴⁴ In a number of important ways, this new Decision went even further. Importantly, its application was to extent not only to the policy area of European Security and Defence, but to *all* activities of the Council.⁴⁵ Its scope was also not confined to the security of the EU and its Member States, but also included that of other international organizations and third countries (Reichard, 2006: 337). Also, it considerably broadened the application of the lowest classification category (RESTREINT).⁴⁶ Thereby, the new Security Regulations exemplified “the most direct importation of NATO’s security standards that the EU had yet experienced” (Idem: 334). While the effect of “contaminating” other EU policy areas with security standards required for military secrecy was one of the main criticisms against the decision, also the timing of the decision gave rise to much concern (see for example, Bunyan, 2002). Even though the Council had treated this as a purely internal matter, the wider implications of the act for the application of the later Regulation were obvious (see below).⁴⁷ So, even though the introduction of Article 255 into primary law clearly pointed to the intention that the conditions and limitations of access to documents

were no longer to be determined outside of the co-decision procedure, shortly before the rules were adopted a series of amendments following the “Solana Decision” considerably impacted the access to documents rules in order to enable cooperation between the EU and NATO as a consequence of European engagement in a security and defence policy.

On 30 May 2001, *Regulation 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents* was adopted. The process of its adoption, however, had been coined by an ironic lack of prior consultation and public debate on a measure that was supposed to boost democratic participation and the legitimacy of the EU. Five-month long so-called “trilogue” meetings had eventually resulted in a compromise - if clearly biased towards the wishes of the Council (Meltzian, 2004: 190) - that left many issues unsettled.⁴⁸ This was seen by civil society observers as “not only inappropriate (...) but also substantially weaken[ing] the nature and purpose of the co-decision procedure as such and Parliament’s function in that respect” (Open Letter from Civil Society on the New Code of Access to Documents of the EU Institutions, 2 May 2001).

3.2. *The proposed revision*

The revision of the Regulation seven years after its adoption has come about partly because the adoption of the *Århus Convention*⁴⁹ concerning access to environmental information since the Regulation⁵⁰ that implemented its provisions into European law at least partly overlapped with the general *Regulation 1049/2001 on access to documents*.⁵¹ On the other hand, again it seems to have been external pressures that have led the EU to make a move. In November 2005 – just six months after the referenda in France and the Netherlands had effectively stopped the ratification of the *European Constitutional Treaty* – the Commission decided to launch the so-called *Transparency Initiative*, which contained a review of the Regulation in a proclaimed move towards more transparency.

As a first step the Commission published a Green Paper (2007), which formed the basis for a public consultation. A year later the Commission published its proposal for the new Regulation (2008b). At the time of writing, the amended Regulation has still to be adopted by the Parliament and the Council under co-decision.

Article 2(1) of the current Regulation reaffirms the principled right of “any citizen of the Union, and any natural or legal person residing or having its registered office in a

Member State” to “access to documents of the institutions”. The second indent of the same Article makes it an option for institutions to grant access to any other natural or legal persons that does not fulfil those conditions. The proposed revision would confer this right to *all* natural and legal persons.⁵²

Concerning the addressees of the Regulation, these are explicitly the three main institutions, whereas extension to other bodies is clearly referred to in the preamble (see eighth recital). The European Council and the ECJ are to date the only two bodies not applying the Regulation to their documents. The consolidated *Treaty on the Functioning of European Union* and the Charter, however, already refer to “community institutions and bodies”. Including this wider scope will in the view of the Commission, however, have to wait until ratification of the new Treaty.

3.2. What is a document?

Article 2(3) states that the Regulation applies to “all documents held by an institution”, thus “documents drawn up or received by it and in its possession, in all areas of activity of the European Union”. This provision effectively abolished the earlier limitation of the Code to documents “authored by” an institution (the “authorship rules”). Concerning documents originating from third parties and Member States, the Regulation did however introduce specific provisions (see below).

A document was subsequently defined widely in Article 3(a) as:

any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility.

Rather unexpectedly, this definition of a “document” turned out to be one of the major points of contestation during the recent revision of the Regulation and positioned the European Ombudsman and Commissioner Wallström into juxtaposed positions, when the former submitted his analysis that the Commission's proposal “would mean access to fewer not more documents” (Nikiforos Diamandouros, 2008). He clearly took most of his fervour from the Commission proposal to amend the definition of a “document” in a new Article 3(a) to be:

any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) drawn-up by an institution and *formally transmitted* to one or more recipients *or otherwise registered*, or received by an institution; data contained in electronic storage, processing and retrieval systems are documents if they can be extracted in the form of a printout or electronic-format copy using the available tools for the exploitation of the system. (*emphasis added*)

The main criticism this “clarification” has drawn concerns the fact that no application could be made for a document if it has not been “formally transmitted” or “otherwise registered”. Together with an unchanged Article 11 - requiring documents to be registered “without delay” - in the case of a document that has not been formally transmitted outside of the institution and not yet registered (thus at that point not falling within the scope of the Regulation), this would *de facto* grant the institution a wide margin to decide exactly which kind of documents would be covered by the Regulation in the first place. Also, informal circulation of a document within a circumscribed circle of recipients would then be possible without a possibility for external parties to rely on the Regulation to demand access.

In addition, even though a legal precedent is still missing from jurisprudence, the current definition could be easily argued to accommodate databases as documents.⁵³ The present proposal, however, explicitly deals with databases and limits their being a document under the Regulation to situations when “data [...] can be extracted in the form of a printout or electronic-format copy using the *available tools* for the exploitation of the system”.

Thus, if tools for exploitation are not “available” to the institution, data contained in electronic databases are not documents and cannot be accessed under the Regulation. The question of when such tools are – or indeed would have to be – available is problematic given budgetary considerations of the institutions or simply technical expertise that may be required to deal with applications properly. As Alfter (2008) has pointed out, this could lead to a situation that access to information, contained in documents which would be available under the Regulation (such as country reports on farm subsidies supplied in spread sheets), once fed into a database could subsequently be denied on technical grounds (since no tools to distract this information is available once it is uploaded). Given that the use of complex databases is likely to increase with technological developments makes this provision of pivotal importance for the practical use of the legislation. This issue has prompted the European Ombudsman to come forward with a special report, in which he made another

pertinent point: due to technological developments, much information that is accessible and used by the institutions today is in fact contained in databases “held” by third parties, public or private (European Ombudsman, 2008a: 17). While the fact that an institution may have access to such information may not warrant its inclusion within the scope of the Regulation, it may be an option to consider such information as subject to EU legislation if it is in fact being used by an institution. After all, the Ombudsman emphasizes, such information may have previously been received in written form, so the mere change from paper to electronic storage ought not be a sufficient reason to exclude it from the reach of the public right to access.

3.3. *Third party documents*

Under the Code the Court had made clear that the rules on access did not apply to documents originating from third parties or Member States.⁵⁴ The Regulation, however, provided for a new procedure when it comes to documents originating from third parties. Article 4(4) stipulates that “the institution shall consult the third party [...] *unless it is clear that the document shall or shall not be disclosed*” (*emphasis added*). This provision is frequently used in proceedings connected to the protection of commercial interests (see below). The insertion of “unless it is clear” is the outcome of a compromise between the Council and the Parliament, which makes the application of the provision vulnerable to abuse since it is not specified which kind of cases are “clear” and the institution is the actor that decides this.⁵⁵

In two recent decisions, the CFI made clear that any view third parties may express will not be binding on the institution.⁵⁶ If an institution is asked to refuse access by a third party, it will thus still be obliged to “assess the justification for that view and the applicability of one of the exceptions provided for under Article 4(1) to (3) of Regulation No 1049/2001”.⁵⁷ The specific case of sensitive documents should be noted, however (see below).

3.4. *Member State documents*

The Regulation also provides for the protection of documents originating from Member States. Article 4(5) provides that “a Member State may request the institution not to disclose a document originating from that Member State without its prior agreement”.⁵⁸ This

provision contains a major problem since it is not made clear whether a refusal would be binding on the institution and thus results in a *de facto* power to veto disclosure of any document from a Member State. Again here, the Community judges have played an important role in interpreting and applying a provision, which was the outcome of deep division between the Member States.

Initially, the interpretation put forward by the Commission and the early Court decisions affirmed a *de facto* right to veto on the side of Member States holding a requested document.⁵⁹ No other interests could be considered that could challenge a Member State's refusal. The reasoning was based on the interpretation that Article 4(5) would have to be seen as a *lex specialis* mirroring Declaration Nr. 35 annexed to the *Amsterdam Treaty*.⁶⁰ The provision would thus mean that Member States were to be excluded from the duty to justify their request for non-disclosure and the obligation to examine whether it was justified (Labayle, 2008: 39).

In its most recent decision, however, the ECJ explicitly rejects the view that the scope of the requirement for the Member State's prior agreement could result in a right of veto since, after all, the "authorship rule" had been abolished.⁶¹ Special emphasis is placed on the fact that allowing such a veto right would significantly undermine the useful effect of the Regulation.⁶² It thereby included documents originating from Member States in the scope of the Regulation, including the exceptions to the right to access it provides. This means that requiring a prior agreement of the Member State "resembles not a discretionary right to veto but a form of assent confirming that none of the grounds of exception under Article 4(1) to (3) is present".⁶³

Procedurally, this case law means that when an institution is requested to disclose a document originating from a Member State, the former must notify the latter and "commence without delay a genuine dialogue concerning the possible application of the exceptions laid down in Article 4(1) to (3)".⁶⁴ So, in case a Member States wants to keep a document from public view, it will now have to reason within the exceptions provided for in the Regulation and thus justify its position. If a Member State fails to do so, the institution will have to express its decision on the application of the exceptions and explain them to the applicant. If it does, the applicant will also have to be informed not only of the Member States' opposition but its reasons in terms of the exceptions. The Court made another important clarification: in a case where a Member State refuses access on the basis of the

exceptions of the Regulation and the institution subsequently rejects the application, “the person who has made that request enjoys judicial protection”.⁶⁵ Thereby, the Community judge assumes competence to review a decision to refuse access to a document by an institution, “regardless of whether the refusal results from an assessment of those exceptions by the institution itself or by the relevant Member State”.⁶⁶

Regarding Member State documents, the Commission now has proposed to move the provision on Member State documents into a new Article 5, which concerns “consultations” (as opposed to “exceptions”, thereby recognizing the procedural nature of the provision as has been put forward by the ECJ). It also proposed an amendment of current Art. 4(5) which would provide that the

institution holding the document shall disclose it unless the Member State gives reasons for withholding it, based on the exceptions referred to in Article 4 *or* on specific provisions in its own legislation preventing disclosure of the document concerned.

(proposed Art. 5(2), *emphasis added*).

This is very noteworthy, because it introduces the option to rely on *national* legal rules *alternatively* to the exceptions contained in the Regulation as legitimate limitations to the right to access documents that had previously not existed. In the light of the recent Court interpretation in *Sweden v Commission*, this seems like an inappropriate amendment. In fact, this may result in a return to the prior situation, giving Member States a *de facto* veto on the basis of national legislation (instead of solely on the basis of Article 4). On the other hand, the Article also provides that “the institution shall appreciate the adequacy of reasons given by the Member State insofar as they are based on exceptions laid down in this Regulation”, thus limiting the potential use of national legislation somewhat. Also, the revised Article 3(c) would exclude documents relating to the adoption of legal acts from the scope of the exception concerning Member State documents, which would mitigate the above to the extent of documents considered most crucial for the democratic function of access to documents.

3.5. The case of “sensitive documents”

The Regulation – in contrast to the earlier Code - establishes a separate regime concerning sensitive documents, as specified by the internal rules of the institutions. While it is stated explicitly that these regimes are not to prejudice Article 255 TEC or the Regulation, there is

still some room for doubt as to the extent to which the right to access to documents will be adequately safeguarded under the rules established under Article 9 of the Regulation dealing with this category of documents. “Sensitive” documents are defined as those documents, which have been classified as “VERY SECRET/TOP SECRTE”, “SECRET” or “CONFIDENTIEL” according to the rules of the concerned institution. As De Leeuw has rightly emphasized, “this Article, though not listed as one, amounts in reality to an exception to the right of access to documents” (2003: 338). The third indent of the Article further introduces a “hard” originator control, which includes not only the power to veto disclosure of a document, but also its mere listing in the public register. The fourth indent further supplements this control by requiring the institution to formulate its refusal in a manner “which does not harm the interests protected in Article 4” (Idem). Together, these provisions amount to a legal obligation of institutions to deny the very existence of a document, even though the applicant may be aware of its existence (Reichard, 2006: 341). Even if an institution would come to the conclusion that a sensitive document should be released on the basis of the exceptions, Article 9(3) confers to the originator of sensitive documents an effective veto power when it comes to registration and disclosure, which will not have to be based on the exceptions of the Regulation.

The issue was one of the most contentious points during the drafting process of the Regulation (see for example Bunyan, 2002). Deliberations resulted in a compromise, the result of which has been aptly described as an “abnormal situation”: the statutory definition of “sensitive document” does not match the document classification system drawn up by the security rules of the Council and the Commission⁶⁷ (Labayle, 2008: 43). So, whereas the preamble of the Regulation stipulates that “in principle, all documents of the institution should be accessible to the public”, it also emphasizes the duty of EU institutions to “respect its security rules”. Whereas it should be pointed out, that this does not mean that the category of “sensitive documents” is as such excluded from the scope of the Regulation (Peers, 2002), in Reichard's analysis, this still amounts to conferring *lex specialis* character to those security rules *vis-a-vis* the Regulation (2006: 340). This situation is yet more problematic since there are no provisions in the Council and Commission's security rules that would allow scrutiny of decisions on classification of documents (De Leeuw, 2003: 339). The consequences for the procedure of granting access to sensitive documents is that only those

persons who have a right to access the documents (“vetted personnel”) will be able to handle the application.

Given that it is in the institution's hands to decide on classification of a document and third party originators remain free to deny even the existence of “sensitive documents”⁶⁸, the significance of this provision can hardly be overstated. The underlying assumption that even mentioning the existence of such a document by listing its number in the registers would potentially threaten public security has been described as “sheer paranoia” (Peers, 2002: 24). In sum, Article 9 could be seen as “an amended version of the “Solana Decision” which deteriorated the right to access as it had stood before (De Leeuw, 2003: 340; Peers, 2002: 24).

3.6. *Partial access*

Article 4(6) codifies the case law on partial access and specifies that “if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released”. This provision is of special importance when considering the breadth of the exceptions, which could potentially apply to any document. The CFI had ruled earlier that the option of partial access would have to be considered but that excessive work for an institution could be a legitimate reason not to grant it.⁶⁹ In *Mattila*, the Court made a somewhat worrisome qualification of this right, however, when it ruled that partial access could be refused when this would be “meaningless”, so in case the information that could be disclosed would be “of no use” for the applicant.⁷⁰ Obviously, the problematic part of this rule is that the decision of whether or not certain information would be useful for the applicant is left to the institution, which in turn cannot know the reasons to seek access in the absence of any obligation to motivate applications.

Also, as Reichard emphasizes, as a consequence of regarding the institutions' security rules as *lex specialis*, the provision on partial access could be undermined by the provision on collective classification⁷¹ in the Council's Security Regulations, which applies to a large amount of sensitive EU documents (2006: 341). Even though there are good arguments against such an interpretation (see for example Peers, 2002), in the absence of case law on the issue, this point remains potentially problematic.⁷²

3.7. Procedural rules

The principle of access is further conditioned by Article 6(3), which provides for an informal consultation procedure to come to a “fair” arrangement in the case of applications for a “very long” or a “very large number” of documents. The institution is not obliged to engage in consultation to reach a fair arrangement and decides alone when an application concerns “very long” or a “very large number” of documents, which causes legal uncertainty by leaving an overly wide margin of appreciation. The Court recently clarified, however, that where a fair solution cannot be found, the institution may not simply deny access or “limit the scope of the examination which it is normally required to carry out in response to a request for access”.⁷³ Only in “exceptional circumstances” that would “paralyse” the institution's functioning could derogation from the duty to examine concretely and individually the documents covered by a request for very large documents be acceptable.⁷⁴

A time period of 15 working days (which translates into three weeks) was set for a reaction to an initial application, which in practice however is not consistently met (Labayle, 2008: 15).⁷⁵

In the currently proposed revision, the time period to react to confirmatory applications would be extended from 15 to 30 days (Article 8). The Regulation also provides for an internal review of any refusal to provide access as well as the opportunity to appeal to the Court or the European Ombudsman respectively. Article 6(1) provides that applicants do not need to give reasons for their applications – this is in harmony with earlier case law.⁷⁶ According to Article 4(7) the exceptions provided for in Article 4(1), (2) and (3) can only apply as long as the contents of the documents warrant an upholding of secrecy, with a maximum length of thirty years.⁷⁷

4. The new exceptions regime

Under the Code all but one of the exceptions had been mandatory. The Court required a so-called “harm test” in order to justify the application of such an exception.⁷⁸ Thus, the risk of a public interest being undermined must be “reasonably foreseeable and not purely hypothetical”.⁷⁹ The one discretionary exception concerned the confidentiality of the proceedings of the Commission and the Council. When applying this exception, the institution was obliged to “genuinely balance the interest of the citizen in gaining access to

its documents against any interest of its own in maintaining the confidentiality of its deliberations".⁸⁰

In contrast, the exceptions to the general principle of access in the Regulation are all formulated in a mandatory way ("the institution shall").⁸¹ Nonetheless, the exceptions under Article 4 are split into those which would in any case oblige the institution to refuse access and those that allow for an overriding public interest to be considered.

Mirroring some of the mandatory exceptions of the Code, the exceptions of public interest (Article 4(1)(a)) which includes the protection of public security, defence and military matters, international relations and the financial, monetary or economic policy of the Community or a Member State) remain subject to a harm test ("would undermine") while no public interest override is considered. The same is true for the exception of privacy and the integrity of the individual, which is now protected separately in Article 4(1)(b). These exceptions will be referred to as "absolute exceptions" below, since they do not entail a public interest override.

The second indent of Article 4 (concerning the protection of commercial interests, court proceedings and legal advice and the purpose of inspections, investigations and audits) is also subject to a harm test, but here, an overriding public interest can still enable disclosure. Thus, also commercial secrecy and inspections and investigation are now subjected to a public interest override and the institution will have to effect a balancing of interests. Nonetheless, the Regulation's exception is far broader than the earlier equivalent in the Code, which risks turning "the default from disclosure to non-disclosure" (Flanagan, 2007: 607).⁸² Also, the negative formulation of the exception should be noted: "the institution shall refuse access [...] unless there is an overriding public interest in disclosure". Opting for this formulation instead of the positive version of "the institution shall disclose [...] unless there is an overriding public interest in non-disclosure" the Regulation determines the burden of proof accordingly (Meltzian, 2004: 218).

What used to be the only discretionary exception of the Code – concerning the confidentiality of the institution's proceedings – is now also formulated as a mandatory exception. However, the exception in Article 4(3) of the Regulation is now subject to a more stringent harm test ("would *seriously* undermine") than those in Article 4(2). Also here, there is now a public interest override provision.

4.1. Absolute grounds for refusal

In general, the Court has established the principle that when it comes to the application of Article 4(1), the mandatory nature of its formulation means that no room for discretion is left to the institutions once the relevant circumstances for Article 4(1) to apply have been shown to exist.⁸³ The exceptions in Art, 4(1)(a) deal with the core elements of public interest that would be undermined by disclosure. These elements are (1) public security, (2) *defense and military matters*, (3) *international relations* and (4) *monetary and economic policy*.⁸⁴

The absolute exception concerning *defense and military matters* has so far not given rise to any Court decision. Also in the practice of the Council and the Commission only slightly more than 2% of initial requests have been refused on the basis of this exception (Council of the European Union, 2008; Commission of the European Communities, 2008a). Another mandatory exception which has given rise to considerable case law is that of protecting *international relations*. MEP Heidi Hautula's case is instructive. When the Council refused to disclose a report on the export of conventional weapons, the ECJ confirmed the earlier CFI decision that the restriction of the principle of public access, even in the name of the protection of a public interest, would have to be proportional.⁸⁵ The strict interpretation of the exceptions also means that partial access would have to be granted if possible considering the specific content of the requested document. When Dutch academic Aldo Kuijer requested a document concerning persons to be contacted about asylum matters, the Court further found that there is an obligation of the institution to examine, for each document, whether disclosure can be expected to interfere with one of the public interests protected by Article 4(1).⁸⁶ In a subsequent case⁸⁷ brought forward by Mr. Kuijer regarding documents concerning the asylum situation in third countries, the Council had refused access on the basis of the exception for international relations since it considered that the content of the requested reports could have been construed as criticism of third countries regarding their human rights situation.

In its decision the CFI clarified that "the mere fact that certain documents contain information or negative statements about the political situation, or the protection of human rights, in a third country does not necessarily mean that access to them may be denied".⁸⁸ The ECJ reaffirmed the obligation to consider granting partial access when it set aside the decision of the CFI and the decisions of the Commission and the Council that had refused

Mr. Mattila⁸⁹ access to documents regarding the relations between the EU and the Russian Federation and Ukraine.

Concerning the protection of *public security*, in its early case law the Court specified that

the concept of public security does not have a single and specific meaning. Thus, the concept covers both the internal security of a Member State and its external security [...], as well as the interruption of supplies of essential commodities such as petroleum products which may threaten the very existence of a country [...]. The concept could equally well encompass situations in which public access to particular documents could obstruct the attempts of authorities to prevent criminal activities.⁹⁰

Since then, the aftermath of the attacks on the Twin Towers in New York has triggered a series of counter-terrorism measures and an emphasis on public security in the international political discourse. The events of 9/11 have led many governments around the world to “embark on a path of secrecy unprecedented in recent years” (Curtin, 2003: 102). As Lodge has argued, “a series of measures taken together in the name of security, challenge the sustainability, realization, and tangibility of values espoused by and forming part of the nascent EU democratic political culture” (2003: 111). Examples, many of which have been taken outside parliamentary scrutiny, would include the gradual expansion of the mandate of Europol, enhanced cooperation between the EU and the US to combat international terrorism to include international crime and border control or the *European Arrest Warrant*. In response to two Resolutions of the UN Security Council following the events of 9-11, the EU also introduced the practice of terrorism blacklisting freezing the funds of suspected terrorists and their financiers. Due to the secretive nature of producing the lists, which relies heavily on secret intelligence and negotiation within the Council, defendants, their lawyers and ultimately the courts are left ignorant of the basis for their listing (for more detail, see Hoffmann, 2008).

When expansion of CFSP had already led the EU to restrict access to classified information, after 9/11 the law continues to be implemented in a “restrictive fashion with wide derogations that are used to give priority to internal security concerns” (Curtin, 2003: 103).

In their first rulings on the international relations and public security exceptions under the Regulation, the CFI and later also the ECJ have applied a very restrictive interpretation of

these exceptions to justify non-disclosure. Mr. Sison who was included on one of the terrorism blacklists had relied on *Regulation 1049/2001* in order to gain knowledge of the reasons of his being targeted and the authors of the documents that had led to his placement on the list.⁹¹ The Council had decided to refuse access on the grounds of public security. In fact, not even the identity of the State that had requested Mr. Sison's listing was revealed to him. Given the fact that Article 4(1)(a) was mandatory, the CFI had ruled that the Council had not erred when it did not consider the applicant's interests in disclosure in order to have access to a judicial remedy against his listing.⁹²

It held that the specific *private* interest of the applicant could not be considered when relying on a Regulation which has as purpose to guarantee *public* access to documents.⁹³ In any case, the Court reiterated, the absolute nature of the exception in Article 4(1) entails that there was no need for the Council to balance the interests at stake. The ECJ confirmed the CFI's judgement including its interpretation that the Council has wide discretion when determining whether the disclosure of requested documents could undermine one of the interests protected by the absolute exceptions of Article 4(1).⁹⁴ This approach also means that judicial review of such a decision will be limited to verifying

whether procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of power.⁹⁵

In casu, the ECJ further opined that even providing a specific statement of reasons could have undermined the purpose of the exception and thus considered the Council justified in relying on its assertion that the disclosure of the documents could undermine counter-terrorism efforts.⁹⁶

This decision is remarkable in a number of respects. Firstly, it seems to extent its limited review of the Council's decisions to *any* of the mandatory exceptions, while in its earlier rulings in *Hautula* and *Kuijer*, judicial deference had been established only concerning the exception of international relations. More remarkably, however, even in the latter two cases had the Court not "just rubber stamp[ed] the institution's analysis", but had examined the decisions to refuse and required the institutions to consider partial access (Flanagan, 2007: 615).⁹⁷ In Sison's case then, the Court seems to have employed a rather "broad brush approach to the review and deference accorded the institutions in determining the

application of the mandatory exceptions” and thereby lowered the standard for the institutions’ application of all the absolute exceptions under Article 4(1) (a) (Idem: 614).

Concerning the exceptions for the protection of *financial, monetary and economic policy*, in a recent decision the Court had to answer the question whether the Council could refuse the disclosure of documents concerning the state of the multilateral negotiations on "Sustainability and Trade" to be conducted within the framework of WTO.⁹⁸ The Council had refused access on the grounds that disclosure would undermine the EU’s commercial interests and would also be prejudicial to its economic relations with third countries, thus relying on Article 4(1)(a), third and fourth indent. The Court concurred with the Council’s decision, also referring to the refusal to grant partial access. In this case, the Court also had to elaborate on the issue of the distinction between a right to access to documents and a broader right to information.⁹⁹ Since the CFI confirmed that the scope of the Regulation was limited to access to documents (as opposed to information in general)¹⁰⁰, the core issue became whether or not an institution was under an obligation to draw up documents of information it possesses in the first place. While the Court recognized that the requirement of transparency means that institutions can not “rely on the fact that documents do not exist in order to avoid the application of that regulation”, it limited the duty to record information to the extent that it is “possible and in a non-arbitrary and predictable manner”.¹⁰¹

The second absolute category of exceptions is contained in Art. 4(1)(b) and concerns the protection of privacy. Being also an absolute exception, its protection is thought to be so important that even the fundamental right of access cannot outweigh it. This absolute reasoning is in itself open to criticism, but maybe especially when it comes to the protection of privacy, which in some cases may be considered secondary to a public interest in disclosure. So, for example using this latter provision to refuse the disclosure of names of lobbyists who meet with Commission officials seems difficult to justify in a generally applicable manner (Hayes, 2005). So while clearly the importance to consider Community legislation¹⁰² regarding the protection of personal data is not to be discarded, *a priori* giving precedence to it in a Regulation that is supposed to enhance democratic accountability seems at least somewhat counter-intuitive. Again, it was the Courts that had to reconcile the textual provisions.

In the *Bavarian Lager* case¹⁰³ the Commission had refused to disclose a recommendation concerning British legislation on the distribution of imported beer on the grounds that the

identity of the persons taking part in the survey had to be protected. Notably, *in casu*, the European Ombudsman and the European Data Protection Supervisor both assigned priority to the right to access rather than the right to privacy (Labayle, 2008: 22). In an important clarification, the judges pointed out that the fact that the right to the protection of personal data is protected as an element of the right to respect for private life “does not mean that *all* personal data necessarily fall within the concept of ‘private life’”, which means that “not all personal data are by their nature capable of undermining the private life of the person”.¹⁰⁴ So, the Court stated that the exception under Article 4(1)(b) concerned only personal data that is capable of “actually and specifically” undermining the protection of privacy and the integrity of the individual. In general it can be said that in the exercise of professional functions the privacy of the person is mostly not intruded upon. While the impact of disclosure on the person concerned should be considered (e.g. on the basis of Article 10 of *Regulation 45/2001* concerning data related to racial or ethnic origin, religious or philosophical belief and data related to health or sexual life), the data subject’s right to oppose disclosure does not automatically apply when it comes to access to documents.¹⁰⁵ An appeal by the Commission is currently pending.¹⁰⁶

When it comes to the disclosure of names of scientific experts that advise the Commission, on 11 March 2009 the CFI ruled that:

by stating, in the contested decision, that disclosure of the experts’ identities and of the opinions they expressed in the course of the meeting would clearly undermine their integrity by exposing them to undue external pressure, the Commission made its decision on the basis of general grounds which are incapable of substantiating the existence of such a risk.¹⁰⁷

Looking at the Commission proposal for a revised Regulation the judgement in the *Bavarian Lager* case is explicitly referred to as justification of the new Article 4 (5) on personal data, which provides that

personal data shall be disclosed in accordance with the conditions regarding lawful processing of such data laid down in EC legislation on the protection of individuals with regard to the processing of personal data.

As the European Ombudsman has pointed out (Nikiforos Diamandouros, 2008) this formulation suggests that access to documents which contain personal data should in the future be considered under *Regulation 45/2001* instead of *Regulation 1049/2001*. This, indeed, would be in opposition of what the CFI decided in *Bavarian Lager* and even the view

of the European Data Protection Supervisor. During the public hearing on the revision, the latter had pointed out that the mere referral to the *Data Protection Regulation* in the new Article 4(5) would not be a solution to the problem of balancing the two fundamental rights, since the latter could be of no help when determining the necessity of disclosure (Hustinx, 2008). In its *Bavarian Lager* decision, the CFI had explicitly stated that personal data of officials must be released if disclosure would not “actually and specifically undermining the privacy and integrity of the persons concerned”.¹⁰⁸ The Court then specified that disclosing the identity of persons taking part in Commission meetings to lobby was not capable of having such an effect.¹⁰⁹ This was enough for the Court to decide in favour of disclosure. As Statewatch (2008) has pointed out, however, the current proposal would not incorporate this decision of the Court, but instead broaden the basis for refusal. As Webber (2008) further emphasizes, the Commission proposal would make privacy a much broader exception based completely on the data protection legislation. Such a change could result in excluding almost any document which contains individual names from the right to access.¹¹⁰

4.2. Exceptions with public interest override

Article 4(2) also lists the protection of a number of interests which mandate an institution to refuse access to documents. These interests include (1) commercial interests, including intellectual property¹¹¹, (2) court proceedings and legal advice and (3) the purpose of inspections, investigations and audits. All three exceptions under the Regulation have been addressed by the Court by now. As opposed to the absolute exceptions dealt with above, they are, however, subject to a public interest override. According to the Court, also these exceptions will have to be interpreted and applied strictly.¹¹² Furthermore, apart from the public interest that could override a refusal, the protection of these interests too will have to be subject to a “harm test”.¹¹³

As Labayle points out, the scope of these exceptions may not be as vital as that of the absolute exceptions given that refusal of access can be overcome when public interest prevails (2008: 24). However, this assertion is mitigated by the fact that to date, only one (!) applicant that has challenged a refusal of access by an institution on the basis of an overriding public interest has been successful (see below).

Commercial interests

When the current Regulation was adopted there had been no available case law or Ombudsman decision concerning the earlier exception under the Code that could have served as a guideline. The new exception on commercial interests has been criticized for being unnecessarily broader than the prior provision that had merely covered “commercial and industrial secrecy” and the “confidentiality” of information supplied (see for example Peers, 2002, Meltzian, 2004: 230). On the other hand, the introduction of a public interest override seemed to balance this somewhat. For the first time now, documents of third parties are within the scope of the access rules, since the authorship rules has been abolished.¹¹⁴

The *Terezakis* case¹¹⁵ provided the most recent opportunity for the CFI to interpret this provision. Access to contract documents relating to the construction of a new airport in Athens had been refused by the Commission on the basis of the protection of a third party’s commercial interests. The Court here specified that it was for the institution at hand to decide whether the document fell within the scope of the exceptions, whether its disclosure would undermine the protected interest and whether partial access was possible.¹¹⁶ Examining the requested contract, the Court found that “substantial passages in the contract clearly did not in any event concern the ‘specific cost components related to the project’ to which the Commission refers in the contested decision”.¹¹⁷

It concluded that while,

it clearly cannot be denied that those passages contain information about the contracting parties and their business relations, that finding is not [...] sufficient to conclude that their disclosure would *specifically and actually* undermine the commercial interests of those parties.¹¹⁸

The Commission was not in a position to convince the Court to that end.¹¹⁹ So, *in casu*, the mere finding that the documents contained precise information relating to the cost structure of the project, the contracting parties and their business relations was not considered sufficient to refuse access.

Having conducted the public consultation concerning the revision of the Regulation concerning this provision, the Commission concluded that the

public authorities and the corporate sector feel that the current rules strike the right balance [...] However, journalists, NGOs and a majority of individual citizens claim that more weight should be given to the interest in disclosure.

From this, the Commission decided not to propose any changes to the current exception. This has led to some degree of cynicism concerning the Commission's interpretation. As Tony Bunyan has put it: "government and big business did not want any changes, just the rest of us" (Statewatch, 2008).

Court proceedings

When it comes to the protection of court proceedings the access to documents may be legitimately limited in order to ensure the right of a fair hearing before an independent court.¹²⁰ In *Van der Wal*, the Courts had already made clear that the purpose of this exception included the protection of the interests of the parties in the context of specific court proceedings, but also the "procedural autonomy of national Community courts".¹²¹ Still, the Court has acknowledged the need to broaden access rights as much as possible even in the face of the requirements of court proceedings. It has interpreted the meaning of "court proceeding" to cover the protection of documents drawn up by the Commission "solely for the purpose of specific court proceedings".¹²²

In a decision brought by the *Verein für Konsumenteninformation* the Court confirmed that "where an institution receives a request for access [...] it is required, in principle, to carry out a concrete, individual assessment of the content of the documents referred to in the request" to determine whether an exception applies to each document and whether partial access is possible.¹²³ The Court went on, however, to find that in "exceptional cases" this individual examination "would entail an unreasonable amount of administrative work"¹²⁴ and thus justify derogation from the obligation where the administrative burden "proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required".¹²⁵

In a yet more recent decision, the *Association de la presse internationale* (API), an organization of foreign journalists based in Belgium, applied to the Commission for access to all the written submissions made by the Commission to the CFI or the ECJ in a number of cases. It was affirmed that

the Community legislature did not intend to exclude the institutions' litigious activities from the public's rights of access, but that it provided, in that regard, that the institutions are to refuse to disclose documents relating to

court proceedings where such disclosure would undermine the proceedings to which those documents relate.¹²⁶

Thus, the mere fact that a document would fall within the scope of the exception does not justify refusal of access. The Court further introduced an important distinction between applications relating to pending and closed procedures.¹²⁷ The Court pointed out that once a case has been adjudicated, at least a summary will have become part of the public realm and thus refusing access on the grounds that the same argument contained in the document would still be discussed in another pending case would be “to negate the general principle of granting the widest possible access”.¹²⁸ So, even if cases are “connected”, the Court did not see this fact alone as sufficient justification to refuse access.

The Courts still partly upheld the decision to refuse access. It was pointed out that before pleadings had reached the hearing stage, “the refusal to disclose those pleadings must be considered to cover *all* aspects of the information contained therein”.¹²⁹ This means that the Commission may refuse access without carrying out a concrete examination of the content of each document, since the Court, referring to the earlier *Verein für Konsumenteninformation* decision, opined that

[concrete, individual] examination may not be necessary where, owing to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted. Such a situation could arise, for example, if certain documents were (i) manifestly covered in their entirety by an exception to the right of access or, conversely, (ii) manifestly accessible in their entirety, or, finally, (iii) had already been the subject of a concrete, individual assessment by the Commission in similar circumstances.¹³⁰

In casu, the Court considered that written submission to the Courts were “manifestly covered” by the exception concerning court proceedings before an oral hearing has taken place.¹³¹ It thereby considered that the Commission must be enabled to present and debate its position free from external influences such as could be the result of public debate, “especially since the position which it defends is in principle designed to ensure the proper application of Community law”.¹³²

The above notwithstanding, it pointed out that

after the hearing has been held, the Commission is under an obligation to carry out a concrete assessment of each document requested in order to ascertain, having regard to the specific content of that document, whether it

may be disclosed or whether its disclosure would undermine the court proceeding to which it relates.¹³³ (*emphasis added*)

When it considered the question of an overriding public interest that could justify disclosure even if it was detrimental to the court procedure, the Court finds the institution to have an obligation to weigh the interests and consider, “where appropriate”, the arguments voiced by the requesting party.¹³⁴ The Court did state that such an overriding public interest must

as a rule, be distinct from the general principles of transparency which underlie the regulation [but that] (...) the invocation of those same principles may, in the light of the particular circumstances of the case, be so pressing that it overrides the need to protect the documents in question.¹³⁵

In sum, the Court has now firmly established the rule that before a hearing has taken place, pleadings lodged are covered by the exception and therefore do not have to be examined to justify refusal of access. However, when the hearing has already taken place or, in the case of infringement proceedings (see below), the judgement has already been handed down, there is an obligation to assess the applicability of the exception for each document. An appeal is currently pending.

The proposed revision of the Regulation includes two provisions which are noteworthy here. Firstly, Art. 4(2)(c) provides that “the institutions shall refuse access to a document where disclosure would undermine the protection of [...] court, arbitration and dispute settlement proceedings”. The latter seems to incorporate the application of the exception of court proceedings to procedures such as the WTO dispute settlement procedure. As the Ombudsman has pointed out, this is a considerable broadening compared to the earlier exception (Nikiforos Diamandouros, 2008).

Secondly, the proposed Regulation would exclude from its scope all “documents submitted to Courts by parties other than the institutions” (Article 2 (5)).¹³⁶ This would mean that more documents would be excluded from the scope of the Regulation than those documents “drawn up solely for the purpose of specific court proceedings” (which the Court has so far consistently referred to).¹³⁷ In addition, this exclusion would in any case exclude the possibility to consider potential public interests that could warrant disclosure. As Alfter (2008) has pointed out, the current general exclusion would newly affect the possibility to “cross check” documents even *after* a case has been closed.

Legal advice

The protection of legal advice aims at the advice given to institutions by their legal services and the exchange between lawyers and their clients. The provision has long been interpreted to justify withholding documents drawn up by the EU's own legal services even *after* decisions had been taken (Hayes, 2005). In its early case law, the Court had followed the argumentation of the institutions, which consider the non-disclosure of legal advice of their legal services necessary in order to secure legal certainty, the stability of the Community legal order and the ability to collect independent legal advice.¹³⁸ Again, it is questionable whether such reasoning is appropriate in the light of the purpose of the Regulation to enhance the democratic quality of the EU. After all, citizens have a legitimate interest in knowing whether or not the institutions adhere to Community law in their activities and whether or not the legislation that is produced is lawful or not.¹³⁹ The assertion that disclosure could lead to "uncertainty" could just as well be reformulated in a more positive way when considering that disclosure of different opinions concerning certain legal actions could stimulate public debate about European issues and thus contribute to the democratic quality of the decisions taken subsequently.

Under *Regulation 1049/2001*, an "overriding public interest" was introduced that can now mandate disclosure. Recently, the Courts have had the opportunity to interpret the scope of the exception. The *Turco* case¹⁴⁰ concerned advice to the Council from its legal service concerning a proposed directive which defined minimum standards to accept asylum seekers. The CFI had confirmed the Council's decision to refuse access, accepting its arguments concerning the risk of creating "lingering doubts" about the lawfulness of legislative acts and the independence of legal advice.¹⁴¹

Mr. Turco had relied *inter alia* on the argument that disclosure would be mandated by the public interest in openness. Importantly, however, the Court held that the overriding public interest that could mandate disclosure would have to be distinct from the principles underlying the Regulation in general.¹⁴² On this latter point, it added that even though the institutions may itself identify an overriding public interest in disclosure, "it is for the applicant who intends to rely on such an interest to invoke it in his application so as to invite the institution to give a decision on that point".¹⁴³

While the CFI had concluded that the Council had fulfilled its obligations when it refused access the ECJ, ruling on the appeal brought by Mr. Turco and Sweden, later

reversed the earlier decision. It was pointed out that the CFI had erred when it based its judgement on the existence of a general need for confidentiality as regards legal advice concerning the legislative process.¹⁴⁴ On the contrary, the judges established that there was in principle “an obligation to disclose the opinions of the Council’s legal service relating to a legislative process”.¹⁴⁵ The judges of the ECJ then sided with the argument that even though doubts could arise about the lawfulness of certain acts, it was precisely the opportunity to discuss different opinions that would confer greater legitimacy on the institutions, which is currently doubted by citizens precisely *because* there is a lack of information.¹⁴⁶

Also the Council's argument that public debate would lead to political pressure on its lawyers and thereby adversely affect their independence was dismissed as a legitimate reason to refuse access by the ECJ. After all, the Court opined, it would not be disclosure of the legal opinion but the pressure that would affect independence. The Council would thus have to see to limit the impact of the latter.¹⁴⁷ Thus, the Court concluded, there appeared to be “no real risk that is reasonably foreseeable and not purely hypothetical of that interest being undermined”.¹⁴⁸

Concerning the public interest that should be weighed against the risk of detriment to the independence of legal advice – and which would be incumbent on the Council to do¹⁴⁹ - the Court specified that such an interest is constituted by the fact that

disclosure of documents containing the advice of an institution’s legal service on legal questions arising when legislative initiatives are being debated increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act.¹⁵⁰

It thus dismissed the CFI's assertion that reference to the general principles underlying the Regulation could not be relied upon¹⁵¹ and thereby remedied one of the most worrying problems in jurisprudence on the issue of public interest override so far: that it had so far been basically inconceivable how a public interest could be successfully invoked by an applicant. After all, if the interest relied upon was too specific, this would be seen as a private interest which would not be considered¹⁵², while on the other hand, general principles such as “openness” had been considered not specific enough.¹⁵³ In the proposed text of the Commission, the exception concerning legal advice remains unchanged.

Inspections, investigations and audit

Another exception concerns the protection for the purposes of inspection, investigation and audit activities.¹⁵⁴ This category catches a wide variety of activities, prominently including European anti-fraud office (OLAF) enquiries and infringement procedures, which are of obvious relevance for many applicants.¹⁵⁵ Although less frequently invoked in 2007, this is still the exception most relied upon by the Commission (23.48% of refusals, as against 30.72% in 2006, Commission of the European Communities, 2008a). Concerning this exception the Courts have produced a considerable body of case law.¹⁵⁶

Also here, the principle is that the fact that a document concerns an inspection, investigation or audit is required but not sufficient to be covered by the exception.¹⁵⁷ For the exception to be applicable, the requested document must potentially “endanger the completion of inspections, investigations or audits”, since it is the purpose of these investigations (not the investigation per se), which is sought to protected.¹⁵⁸

When environmental NGO *WWF* tried to gain insight into an infringement procedure concerning EC environmental law that had been discontinued, it was the first time an access to documents case concerned the Commission. The Court considered that Member States can expect confidentiality of the Commission in the case of potential infringement proceedings. The public interest in inspections thus could justify non-disclosure even in cases where the investigation had already ended.¹⁵⁹ While in *WWF*, the infringement procedure had never materialized, in *Bavarian Lager (I)*, it was in fact initiated but later shelved. The Court here specified the possibility to refuse access in order to keep the door open for an amicable resolution by means of negotiations between the Commission and the Member State concerned and limited the application of the exception to the time during which this is still possible.¹⁶⁰

In *Petrie*, the Commission had already lodged a case under Article 226 TEC. In this case, the Court for the first time ruled on the time frame for the application of this exception, which it extended to (but not beyond) a decision of the ECJ.¹⁶¹ This time ruling on the basis of the Regulation, this time frame has been recently confirmed in the *API* judgement.¹⁶²

So, in the case of infringement proceedings, the Court has established a firm, if not absolute, protection of the “confidentiality which the Member States are entitled to expect from the Commission in such circumstances” which may extent even beyond the closure of

an investigation until a judgement of the ECJ.¹⁶³ However, the Court noted, this does not mean that access could be refused “until the follow-up action to be taken has been decided” since this would “make access (...) dependent on an uncertain, future and possibly distant event, depending on the speed and diligence of the various authorities”.¹⁶⁴

Similarly, when it comes to inspections, the Court found that having finalized a specific inspection on location does not mean that the inspection process as such can be seen as having ended. Thus, in *Denkavit*, the Commission had been justified in refusing access to requested documents in order to preserve the climate of trust necessary. Like in *Bavarian Lager (I)*, it was confirmed that the scope of the exception extends over the whole procedure until a decision has been taken concerning consequences. So once the exception applies, documents can be withheld even if the specific investigation to which it relates has already been finished.¹⁶⁵

The recent Commission proposals would lead to a considerable change. Proposed Article 2(6) provides that

Without prejudice to specific rights of access for interested parties established by EU law, documents forming part of the file of law enforcement proceedings leading to an administrative act of individual scope are *not accessible* to the public until such act has become definitive. Information obtained from undertakings in the framework of such proceedings is *not accessible* to the public. (*emphasis added*)

This amendment again seems to be at odds with the case law of the Community Courts who have long deemed the application of an exception to documents assessed by reference to categories rather than the actual information contained in those documents to be insufficient.¹⁶⁶ As has been pointed out by Statewatch (2008), while the Court has indeed stated that the institution did not need to give a full statement of reasons for each document when it was “manifestly clear”¹⁶⁷ that access would have to be refused, excluding the whole category of “documents forming part of the files of law enforcement proceedings leading to an administrative act of individual scope” from the scope of the Regulation before such an act had become definite goes clearly beyond the Court’s reasoning. In fact, in a recent case the Court had pointed out that the Commission had not been entitled to draw “such a general conclusion”¹⁶⁸ when it took the position that documents relating to a pending competition proceeding had to be refused. In its latest decision, the CFI had just reiterated that the “risk of a protected interest being undermined must be reasonably

foreseeable and not purely hypothetical”, which means that the institution must carry out a specific examination for each document, which can enable the consideration of partial access and which must be evident from the statement of reasons.¹⁶⁹

This is aggravated by the fact that Article 2(6) explicitly excludes “information obtained from undertakings in the framework of such proceedings” from access. In his contribution to the public hearing the Ombudsman accordingly voiced his disapproval with this provision especially on the grounds that while probably most of the concerned documents would already be covered by one or more exceptions, by excluding them explicitly from the scope of the Regulation also removes the possibility to consider any public interest that may override the interest in non-disclosure (Nikiforos Diamandouros, 2008).¹⁷⁰

Given that the underlying principles of the Regulation include the widest access possible, evaluation of potential harm and a balancing of interests on a case-to-case basis, it seems hard to reconcile this categorical exclusion of documents from the access rules. The same argument has been brought forward against the proposed amendment concerning documents submitted to the Courts by third persons (see above).

Protection of EU decision-making process

Not surprisingly, also the so-called “space to think” issue¹⁷¹ is being dealt with in the Regulation. Article 4(3) provides that access to documents created for “internal use” or received by an institution where a decision has not yet been taken will be refused if revelation “would *seriously* undermine the institution’s decision-making process” – “unless there is an overriding public interest in disclosure”. When considering an application, the question whether there is an “overriding public interest” in disclosure or a “serious” undermining of internal decision-making will remain in the judgement of the institution. Moreover, the second paragraph of Article 4(3) provides for non-disclosure, if “opinions for internal use” are included in the document even *after* the decision has been taken “if disclosure of the document would *seriously* undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure”.¹⁷²

So, there is a two-fold effect of this provision concerning the disclosure of documents before and also after decision-making has taken place. Since the Article covers “non-legislative” and “internal” documents (which are not clearly defined) it also excludes many

preparatory texts, evaluations and studies from being disclosed unless there is an “overriding public interest in their disclosure” (Hayes, 2005).¹⁷³

When it comes to the second paragraph of the Article, it is being used for a variety of documents. For example, the Commission has used it for documents concerning comitology committees, refusing access to internal notes, internal evaluations and recruitment competition documents or draft minutes (Driessen, 2008: 92). Ironically, it has also used the provision to refuse access to documents concerning deliberations on the current revision of the Regulation itself.¹⁷⁴ As De Leeuw has rightly criticized, the article thus not only frustrates participation on the basis of arguments being discussed when discussions are still ongoing but may also “hinder *ex-post* accountability” by denying the public the opportunity to know the reasons that underlie a decision that has been taken (2003: 335).

When it comes to the Council, it is especially submissions from Member State delegations to specific legislative files (which under the Council’s interpretation of Art. 4(3) become Council documents) which give rise to political sensitivities. On the one hand, the Regulation does not provide for an exception to protect the respective positions of Member States. On the other hand, the release of those positions may effectively limit the space to maneuver of national delegations and thus obstruct finding a compromise within the Council. In practice, as described by Driessen (2008: 90), upon receipt of a request for a national contribution the Member State is asked whether the document has already been published under national law (which varies). If so, the assumption will be that there is no reason to apply Article 4(3).

When faced with refusals of access on the basis of this exception, early on the Court made clear that the point of the exception was to protect the interests of the institutions rather than those of the public or third persons. This protection includes the institutions’ interest in effective deliberations by enabling open and thorough discussion.¹⁷⁵ The Court has also clarified that an institution enjoys a certain measure of discretion when it comes to granting access to documents relating to its proceedings, while it had to strike “a genuine balance, on the one hand, the interest of the citizen in obtaining access to those documents and, on the other, its own interest in protecting the confidentiality of its deliberations”.¹⁷⁶ This reasoning also extends to any “committees” which are involved in the institutions’ work.¹⁷⁷

In a case brought before the Court by British American Tobacco, the Court clarified that the exception of maintaining the “confidentiality” of institution proceedings could not be interpreted to justify blacking out the positions of Member States even *after* deliberations on an issue had been concluded.¹⁷⁸ Significantly, it further specified that if an institution is aware of a private interest in disclosure, these interests must be considered.¹⁷⁹ Here, the CFI thus held that a particular interest could only be considered if it has been raised by the applicant, even though there is no obligation to provide a reason for an application.

In a recent case¹⁸⁰, now based on the Regulation, the CFI interpreted the exception contained in Article 4(3) of the Regulation for the first time in the context of an administrative procedure. The case concerned a request for access to internal Commission documents that were used to decide whether to appeal a case in which the CFI had struck down a decision concerning competition law. It ruled that the Commission was justified to refuse access to its internal documents on the basis of the Regulation since disclosure of the report of the working party that was to advise the Commission

would mean that the authors of a report of such a kind would take that risk of disclosure into account in the future, to the point when they might be led to practise self-censorship and to cease putting forward any views that might involve the addressee of the report being exposed to risk.¹⁸¹

This, the CFI concluded would deprive the Commission of “a constructive form of internal criticism”.¹⁸² It put special emphasis on the fact that

the interest of the public in obtaining access to a document [...] does not carry the same weight in the case of a document drawn up in an administrative procedure [...], as in the case of a document relating to a procedure in which the Community institution acts in its capacity as legislator.¹⁸³

Most recently, the CFI comprehensively rejected the Commission's reliance on Art. 4(3) when it refused to disclose documentation of a meeting of scientific experts that were to advise the Commission in the course of adopting legislation on the classification of chemical substances according to their ability influence human fertility.¹⁸⁴ Its conclusion is worth to be cited here at some length:

It follows that scientific opinions obtained by an institution for the purpose of the preparation of legislation must, as a rule, be disclosed, even if they might

give rise to controversy or deter those who expressed them from making their contribution to the decision-making process of that institution. The risk, relied upon by the Commission, that public debate born of the disclosure of their opinions may deter experts from taking further part in its decision-making process is inherent in the rule which recognises the principle of access to documents containing opinions intended for internal use as part of consultations and preliminary deliberations, which obviously include consultations of experts. It cannot, however, be inferred from the existence of such a risk that any disclosure of a scientific opinion with significant consequences, particularly economic or financial, for the economic operator concerned, will have a deterrent effect as regards its author or, even if that were shown, that the risk is such as seriously to undermine the institution's decision-making process, as would be the case if that institution were to find it impossible to consult other experts.

In this case, the Commission justifies its refusal in a general and abstract way without specifying how the disclosure of the written documents and sound recordings would concretely and effectively undermine the process by which it decides on the classification of the substances in question. In fact, the risk of external pressure and the reluctance of experts to express their opinions freely and frankly, relied upon by the Commission, are based on mere assertions, unsupported by any properly reasoned argument.

Since it has not been shown that the Commission's decision-making process would be undermined, the criterion of seriousness of such an undermining has certainly not been met. The Commission therefore wrongly based its refusal to disclose the documents in question on the exception in the second subparagraph of Article 4(3) of Regulation No 1049/2001

In the Commission proposal for a revised Regulation, access shall be refused to *any* document the disclosure of which would seriously undermine the decision-making process of the institution relating to a matter where the decision has not been taken. This is a broadening of the exception compared to the earlier version, where only documents drawn up for internal use or received by an institution are covered by this provision. As the Ombudsman has pointed out, "that would allow the Commission, for example, to claim exemption for a document drawn up for purposes of external consultation with a limited circle of people" (Nikiforos Diamandouros, 2008: 3). Also documents "containing opinions for internal use as part of deliberations and preliminary consultations within the institutions concerned, shall be refused even *after* the decision has been taken" (*emphasis added*).

Unfortunately, the Commission has not incorporated the EP's recommendation to specify what would constitute an overriding public interest that could revoke the exceptions under 4(2) and (3).

4.3. *Concluding remark on exceptions with public interest override*

It must be applauded that with the transition from the Code of Conduct to the Regulation a number of exceptions have been made subject to a public interest override. Relying on any public interest override has, however proven to be exceedingly difficult for applicants. The tricky part when it comes to exceptions with a public interest override is that such an interest would have to be shown by an applicant, who does not have access to the relevant documents in the first place. Clearly, this is a circular reasoning, which places a structural disadvantage on the side of citizens seeking information.

Under the Code, when a request for access had to be considered which could fall within the “confidentiality” exception, the public's interest in gaining access had to be balanced against the institution's right in confidentiality.¹⁸⁵ While applicants are not obliged to give reasons for their application, the institutions were expected to consider any such reasons when aware of it.¹⁸⁶ So, in this early case law the particular interest of the applicant had been “clearly connected to the exercise of fundamental democratic rights” such as the right to petition to government or the freedom of expression (Flanagan, 2007: 602). As Flanagan has argued in detail, however, it is not entirely clear, whether this case law is still applicable under the Regulation (2007: 598). So, for example, in *Franchet and Byk* the CFI did not even mention *British American Tobacco* nor applied *WWF* where it had been held that an institution was obliged to consider a private interest in disclosure.¹⁸⁷ On the contrary, the Court reasons that since the applicants had a private interest in disclosure they could not posit a more general public interest in a fair trial.¹⁸⁸ It consequently did not elaborate on how a balance between a public interest in fair trial could be weighed up against the interest protected by the exception.

Also in *Sison*, this time concerning an absolute exception, the Court has affirmed that the Regulation was clearly not meant to serve any particular private interests in access to documents and dismissed the applicant's argument.¹⁸⁹

By way of analogy and specifically referring to *Sison*, in *My Travel*, the CFI pointed out that “individual or private interests do not constitute an element which is relevant to the weighing up of interests provided for by the second subparagraph of Article 4(3) of the regulation”.¹⁹⁰

This discrepancy and seeming break with earlier case law is not only hard to argue (see Flanagan, 2007 for more detail) but also highly regrettable from the point of view of

citizens since it may in fact decrease the level of access compared to the earlier rules and render an appeal to the public interest override a very tricky balancing act. Either an applicant's interest could be considered as particular as opposed to public or as too broad to be relied upon.¹⁹¹ Also, in *Turco* the CFI had stipulated that it was for the applicant to raise any public interest to be considered, whereas the Regulation clearly provides that no reasons need to be given for requests for access.

Only with the recent *Turco* appeal judgement does there seem to be a reasonable chance for applicants to successfully appeal to the public interest in disclosure in the absence of knowing the content of the documents in question. It has now been clarified that the transparency of the legislative process and the strengthening of the democratic rights of European citizens are public interests that can override the exceptions for the protection of legal advice. In what way this decision will find its way into the interpretation of the other exceptions will be a highly interesting issue to be followed.¹⁹²

The Regulation itself does not contain any meaningful guidance for the Courts concerning what constitutes an overriding public interest or what should be balanced in what way. Despite many observers (for example Statewatch; European Citizen Action Service, 2006) pointing to the weak spot that the ill-defined public interest override has proven to be and the EP's explicit recommendation on this point, the Commission proposal would not remedy this shortcoming.

5. The public registers

If access to documents is considered to be a right of European citizens, then the registration and public accessibility of documents ought to be an obvious priority for institutions. Especially given the complexity and multi-layeredness of the EU a complete, easy-to-find and understandable public register is of the essence for the effective exercise of the right to access. Article 11 of the Regulation provides for an obligation of each institution to make available a register of documents. At the time of the adoption of the Regulation, the Council had already drawn up an online register while the Commission and the Parliament followed in 2002.¹⁹³

Problems with the provision include the fact that it is not specified which documents exactly have to be included or "directly accessible" (meaning hyper-linked to the full text) in such a register. Also, there is no obligation to at least list *all* documents of an institution. As a

consequence, in the registers there are documents, which are not accessible, while many documents which could be requested are not listed (European Parliament, 2008c). This makes it exceedingly difficult for citizens seeking access since they will first have to know what documents exist in the first place. As the EU Network of Independent Experts (2004: 137) has pointed out, in order for the right to partial access to be effective, the registers should also “*mention* any documents to which Article 4 of the Regulation may apply”. This means that even those documents, to which access may be denied on the basis of any exception, should still be registered and its *existence* made public. After all, the right to access cannot be effectively exercised if potential applicants are ignorant of the fact that a specific document exists and is held by an institution in the first place.¹⁹⁴ Since the Regulation does not specify which kind of documents have to be entered into the register, the institutions adhere to very different standards and thus a large number of documents are excluded from public view. As Labayle puts it, “the difficulty for the citizens to find their way in this absolute maze is a major obstacle” (2008: 16). This complexity may also explain why the majority of those that in fact do take advantage of the possibility to gain access are already specialists in European Union affairs (Idem). As EP rapporteur Marco Cappato concludes, more than a third of documents of the Council are not accessible on the register (European Parliament, 2008c: 2). In a recent Resolution, the European Parliament furthermore laments the Council's practice to consider certain documents to so-called “room documents” (mainly documents discussed by the Council working groups set up by COREPER) that are not registered and if so, misses an interinstitutional code which makes it complicated to associate documents with the procedure.¹⁹⁵

The Council register, which by means of an automatic archiving system now also lists provisional agendas of Council meetings and other preparatory documents, only lists non-sensitive documents unless the author of such a document agrees with placing a reference. According to the most recent annual report of the Council (2008: 9), of the 1 010 217 documents (all languages together), which were included in the register by December 2007, 724 338 (71,7 %) were publicly available for download or by request. Another 16 927 documents were partially accessible. Between 2002 and 2006, the Council has consistently offered more partial access than the other two institutions (European Parliament, 2008a: 3). Still, up to December 2007, 350 (original language) sensitive documents had been produced

in the period concerned, of which 26 were classified as SECRET UE and 324 as CONFIDENTIEL UE. In the register, merely three of the former and 61 of the latter were even *mentioned* in the register

The Commission is the institution with, in 2006, the smallest register of the institution, but at the same time the largest number of initial requests, the largest increase in requests the lowest disclosure rate at 76,8% and also received, between 2003 and 2006, the highest number of complaints of the three institutions (European Parliament, 2008a).¹⁹⁶ Clearly, the Commission is also the most criticized for the maintenance of its register (Bunyan, 2002; Hayes, 2005). In its first report on the implementation of the Regulation, the Commission notably assumed a position that seems to be in direct contradiction to the wording of the Regulation, when it decided to include in its register only “legislative” documents. As the EU Network of Independent Experts pointed out, “the distinction between legislative and other documents [...] has no role to play in the context of Article 11, which concerns the establishment of the register” (2004: 138) and goes on to call for all documents that are not classified as sensitive to be included in the register and made public without further delay. The introduction of a distinction between legislative and non-legislative measures in the new draft *Constitutional Treaty*, while the former should be made public and the later remain secret, has prompted concern among observers since in many areas of EU policy-making such “non-legislative” activity may just as well have far-reaching impact on policy as formally legislative documents.

As an illustrative example, Hayes (2005) cites the development of the EU law enforcement database Schengen Information System (SIS). Only after construction of its follow-up system had already started was the first legislative proposal concerning the so-called SIS II, which was based on informal agreements between the Council and the Commission before any formal legislation was drafted, released by the Commission (Idem). If the distinction between legislative and non-legislative documents was to be introduced as a rule to distinguish between documents to be made public and those to be kept secret, clearly a large amount of EU policy-making would fall outside the scope of the Regulation.

So, apart from the fact that the Commission seems to be regularly late with its annual reports on the implementation of the Regulation, it is held to maintain the “least comprehensive” register, which also excludes most of its preparatory work (European Parliament, 2008c: 3). One of the reasons for this may be the decentralized nature of the

institution and the sheer amount of documents that it produces (European Citizen Action Service (ECAS), 2006: 8). From the 73 708 documents it included in its register by the end of 2006, no “sensitive document” was listed (European Parliament, 2008c: 3).¹⁹⁷ Furthermore, the register mainly contains documents related to the work of Cabinets and committees, not those that relate to the work of its Directorates-General. This excludes much of the preparatory work of the institution. By the end of January of 2009, the Ombudsman consequently found maladministration in a decision on a complaint that had been lodged by Statewatch against the Commission concerning its “failure to register the vast majority of its documents” (European Ombudsman, 2009). The Commission had taken the view that the definition of “document” was “wide” and that it would thus not list all its documents (according to Article 11) but to “gradually expand” its register.¹⁹⁸ Whereas the Ombudsman disagreed and recommended the Commission comply with Article 11 and list all of its documents “as soon as possible”, the new proposals for a revised Regulation would simply change the definition of a “document” (see above).

ECAS has proposed having separate registers for each of the Commission's Directorates-General in order to alleviate this problem (2006: 8). At this point, however, the proliferation of registers may only add to the confusion. In order to follow a decision-making process, one must know quite a lot about the workings of the EU and navigate through the different registers in search of a trail of documents to reconstruct. Already in 2004, Michael Cashman (European Parliament, 2004) wrote a report in which he recommended to reorganize the registers to enable citizens to find the same functions in all three registers. Also the 2006 report of the ECAS emphasized the need to make the registers more user-friendly by inserting cross-references to documents in other registers and other stages of the decision-making process (ECAS, 2006). So, while the interoperability of registers has been deemed “exemplary” in a 2008 report to the European Parliament (European Parliament, 2008a: 9), it remains questionable whether the mere fact that registers are linked could be deemed sufficient to enhance usability by citizens. An EP recommendation to establish a “single access point to preparatory legislation” was applauded by the Commission but not transformed into a proposed change of the Regulation (Statewatch, 2008).

Article 12 of the Regulation makes provisions for direct access to documents, which means that the full-text of documents can be downloaded directly. The general principle was set out in Article 12(1): “The institutions shall as far as possible make documents directly

accessible to the public". Together with Art. 2(3) the Regulation gives special importance to making documents relating to the legislative procedure directly accessible (they "should" be made directly accessible). In 2006, 90% of the European Parliament and 96% of the Council's public documents were directly accessible on the Internet (European Parliament, 2008a: 5) – no precise numbers exist for the Commission (Commission of the European Communities, 2008a).

The proposed amendment to Article 12 now would on the one hand strengthen the public's right to direct access ("shall" be made directly accessible, subject to Articles 4 and 9). However, the proposal has been criticised for at the same time removing the general principle of current Article 12(1) and thus *limit* public access to full-text document to legislative ones only (Statewacht, 2008).

In addition, the new proposal would oblige institutions to define categories of document to be directly accessible. Again, this is an ambiguous provision. On the one hand it could enhance the speed of access by making it clearer what documents should be made directly accessible in the rules of procedure (see for example Nikiforos Diamandouros, 2008). On the other hand, leaving the decision of what other documents will be directly accessible to the institution is clearly opening up the door for abuse (see for example Statewatch, 2008).

6. Concluding remarks

A lot has happened since the Declaration Nr. 17 of the *Maastricht Treaty* and from what had been a legal vacuum, a right of citizens has successively been given shape.¹⁹⁹ Much has been achieved, even though mainly as a consequence of struggles between Member States, external challenges via the Courts or the Ombudsman and political panic in the face of negative public referendums.

The adoption of the *Charter of Fundamental Rights* has elevated the status of the right to access to documents to the status of a fundamental right (Article 42). The current draw back of the *Constitutional Treaty*²⁰⁰ has yet again given momentum to a move towards more transparency. Together with the ongoing *Transparency Initiative*, this provides the framework within which future developments will have to take place. All together, a gradual progression²⁰¹ has brought about a right to access to documents, which the CFI has brought into connection with a "principle of transparency"²⁰² and which Advocate-General Maduro

recently referred to as a “fundamental right of constitutional import linked to the principles of democracy and openness”.²⁰³ Nonetheless, in his 2007 report, the European Ombudsman constituted a record number of inquiries (28%) concerning the lack of transparency in the EU institutions, including the refusal of information or documents (European Ombudsman, 2008*b*: 10).

In practice, despite of the Council's recent moves to open up its meetings²⁰⁴, amendments of the rules on access to documents and drawing up written proceedings that would include ministers' comments during open meetings are still missing (Peers, 2008*a*: 3). As the European Parliament has emphasized, while the Council now holds parts of its meetings and votes in public, this “still constitutes a marginal part of the legislative decision-making procedure”, thus the Council should “hold public meetings and make accessible all the documents in their entirety also at working group level when a legislative procedure is followed” (European Parliament, 2007: 4). In effect, many issues of public interest are still easily obscured from the public eye which makes it the terrain of specialists and dedicated academics or advocates to pursue the most pressing issues by requesting access to documents under the Regulation. In addition, the problem of so-called “trilogue” meetings (first-reading agreements negotiated between EU institutions in co-decision procedures) remains high on the agenda of those seeking to understand and follow the decision-making processes under co-decision.²⁰⁵ While an increase in informal negotiations between the EP and the Council may improve the efficiency of decision-making, the practice is clearly not contributing to enhancing democratic scrutiny or accountability (Lodge, 2008: 6). Given that a majority of co-decision “deals” is being agreed at first reading, which makes it practically impossible for outsiders, including national parliaments, to work out whether first-reading negotiations are underway, what stage negotiations are at, and what drafts are under discussion” (Peers, 2008*a*: 5). After agreements have been made, the time to react before a text is adopted is often very short. Also the comitology procedure remains subject to criticism, since the draft implementation measures that are produced there are generally not made public before adoption by the Commission (Idem: 3). Furthermore the increase in *ad hoc* bodies, committees and autonomous agencies that are delegated executive powers with low visibility and party still outside the reach of access to documents rules should not be overlooked (Lodge, 2008; Curtin, 2004*b*). This impedes citizens' right to know who takes decision on their behalf, why, when, how and with what outcome and impairs opportunities

to actively seek to influence decision-making processes. This may be especially important at the stage where out of innumerable potential issues a specific one is chosen to come onto the agenda of Union decision-making bodies.

Looking at the recent case law of the Community Courts, it must be noted that they have recently rendered a number of crucial decisions that could serve to further solidify the public's right to access to documents when it comes to Member State documents and legal advice. However, the recent limitations of this right when it comes to anti-terrorism measures are posing a major obstacle to a further development into this direction.²⁰⁶ At the time of writing, the proposals for a revision of the Regulation put forward by the Commission do not seem to suffice to constitute a major leap forward, but instead have the potential to broaden the grounds for refusal of access by Member States on the basis of national law, the exclusion of entire categories of documents from the scope of the Regulation and the categorical prevalence of privacy protection above the public interest in following the decision-making process, all of which seem to constitute a step backwards in comparison with recent Court interpretations. In addition, the amendments concerning the definition of a document and the limitation of full text access to legislative documents in the public registers could mean that many more documents could be excluded from access in the future and may keep critical citizens at arm's length.

The Regulation also remains insufficient when it comes to a right of access to documents that concern public functions that are performed by private bodies, which is an increasingly problematic omission. The right to access has developed as a right to access to *public* documents. While most countries in the world exclude private bodies from their freedom of information legislation, there is now also an increasing realization that in times when implementation of policies is increasingly being delegated to non-public bodies (Curtin, 2004b) and much relevant information is held by private bodies (for example as a consequence of data-mining, privatization of security services) this is a problem (Mendel, 2003; Lodge, 2008).

Ultimately, the success of a *European Transparency Initiative*, and especially the right to access to documents will depend on the institutional culture in the context of which rules are being applied.²⁰⁷ It is the "spirit of freedom of information" that will have to enter into the realms of institutional power at the EU level, if accountability is to be realized (Lodge,

2008: 7).²⁰⁸ The practice of the institutions when it comes to access to documents remains different, mirroring their distinct functions.²⁰⁹ In general, however, there may have been another unintended consequence of the progressive move towards more transparency that has so far been under-researched. This concerns the question of the impact of the regime on the content of documents that are made up in the first place.²¹⁰

At the time of writing, no decision has been made concerning the final text for a revised Regulation and negotiations will have to solve a number of open questions. On a hopeful note, the EP has called for the launch of a “European Year of Transparency” and a campaign to be promoted in 2009 to make citizens more aware of their rights at the level of the EU as well as Member States.²¹¹ This latter point might be of crucial importance, given that the problem often already starts with citizens being unable to “see through” national structures (Flanagan, 2007).

Finally, it has to be pointed out that even a revised Regulation will in any case merely give effect to a right to access to documents, not a larger right to information. This is problematic from the view of increasing broader legitimacy of EU decision-making since the current system presupposes a very high degree of expertise and prior knowledge of applicants and is potentially time-consuming even if applicants know what they are looking for since many documents are not online and have to be specifically requested, thereby rendering its potential to increase transparency on a broader scale limited (Hayes, 2005: 3). The exclusivity of the group of citizens actually making use of the current system is evident from recent statistics provided in the annual reports of the institutions. So, for example, initial applications to Council documents came mainly from students and researchers (40 %), lawyers (8,8 %), industry and commerce and pressure groups (14,2 %) were also high on the list of social and professional categories represented (Council of the European Union, 2008: 13).²¹² Looking at applications to all three institutions, it is clear that request also mostly come from the most populated Member States, especially from Belgium from where between 17% and 20% of applications originated (European Parliament, 2008c: 4). Thus, it is a deplorable fact that “the legal arena of rights and principles has only to a very limited extent empowered the 'public' in any meaningful sense” (Curtin, 2004a: 5). Also, the imbalance in the use of the right of access by citizens and organized interest groups remains problematic, while the groups which are “already aware of the EU (...) are those who take advantage of the possibilities of access” (Hériter, 2003: 3).

European legislation on the issue is often compared with that of its Member States and the issue of how the EU can or ought to be ranked is much discussed (see for example Kranenborg & Voermans, 2005). In the light of the EU's unique challenges and political make-up, it is questionable, however, whether it is useful to make such comparisons or to argue against more transparency on the basis of the argument that nation-states also do not seem to be willing to institute "total transparency" (Driessen, 2008).²¹³ Quite simply put, the EU is not a nation-state and it can rightly be asked whether

a sophisticated international organization such as the EU, which is replacing (by means of supranational law) constitutional and legislative provisions on all kinds of fundamental issues at the national level (from constitutional rights of access to information to the laws on extradition between Member States or the laws on terrorism et cetera), [should] adopt the lowest common denominator or a high standard of protection, given the more difficult legitimacy crisis faced by the EU than by any Member Nation State.

Curtin (2003: 103)

If access to information is of crucial importance for citizens within the national context (as Bovens (2002) has convincingly argued), this is even more pressing when it comes to the EU, which is yet another step removed from citizens' daily lives and far more complex. Accordingly, this situation may require an even stronger *right to information* of citizens, which may then have to be complemented by a proactive policy to make relevant information available in an intelligible and timely manner and to actively distribute such information.²¹⁴ Certainly, the availability of Information and Communication Technology (ICT) has considerably simplified such a policy and has brought new opportunities for informing citizens in a timely, easy and affordable manner (while it must be remembered that even within the EU there remains a considerable digital divide).

The Courts have always made a clear distinction between the public right to access to documents and the right to information. Only the former is granted under the Regulation. Clearly, though, the European Union could choose to adopt a more active attitude when it comes to information instead of being content with the current regime, which confines the right to access to documents to experts and renders its purpose to enhance democratic involvement and legitimacy unattained. So, for example, one may ask why not all documents which can be applied for and to which access could be granted are made directly accessible in the first place. A conceivable move would be to introduce a more explicit right to information, which would move beyond the public right to access to document as it has

developed so far. In fact, in a Resolution of 14 January 2009, the European Parliament called for further steps to be taken towards what it calls an "EU Freedom of Information Act".²¹⁵ Such a shift would include a more active duty of institutions to locate information (as opposed to reacting to specific requests for certain documents, which presupposes a rather extensive knowledge of applicants in the first place), to compile documents, to provide relevant information more pro-actively and the right to access information by private organizations that execute public tasks. This could enhance the usability of the system for ordinary citizens and be a powerful symbol for a European commitment to change.²¹⁶ As Stie (2007) proposes, "openness" of EU institutions would also have to entail the easy accessibility of information and its presentation that would allow citizens to easily obtain an overview of the main issues at stake as well as active communication of political authorities to present competing visions and options in an understandable way. So, a number of additional requirements would be of importance to give flesh to a right to information within the EU.²¹⁷

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¹ This study was last updated in March 2009. It includes court decisions until 11 March, but not proposed amendments by the EP put forward on 11 March 2009.

² Regulation (EC) 1049/2001 of the European Parliament and of the Council of 29 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, 43.

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- ³ Curtin (2004: 6) points out examples of the concerted strategy of mounting challenges of the Council through the Ombudsman, which Statewatch adopted during the late 90s that prompted the Council to maintain an extensive and publicly available register of its document on the Internet. She also refers to the initiatives of MEP Jens Paper Bonde, whose continuing efforts have resulted in the Commission providing a complete list of all its working groups in 2004.
- ⁴ Proposal for a Council Regulation on the security measures applicable to classified information produced or transmitted in connection with European Economic Community and Euratom activities (*COM(92) 56 final*), Brussels, 26 February 1992.
- ⁵ Ironically, in this climate of disaffection with the EU, Declaration Nr. 17 was pointed out to show the Community was committing to more openness and transparency, while it had been the lack of political will to do just that which had kept this commitment outside the Treaty structure in the first place (Meltzian, 2004: 61).
- ⁶ See Decisions 93/731/EC of the Council and 94/90/ECSC, EC, Euratom of the Council and the Commission respectively. The Netherlands had voted against the Code as well as the two subsequent Council and Commission Decisions, but had been outvoted. In a case before the European Court of Justice (ECJ), the Netherlands challenged the legal basis of the measures claiming that the right to access was a fundamental right in a democratic order, the limits of which could as such not be left to the discretion of each of the institutions (Case C-58/94 *Netherlands v Council* (30 April 1996). The ECJ decided against the Dutch position and raised, but did not answer, the question whether or not the right to access to documents was to be considered a general principle of Community law. In fact, to this date, there has not been a decision by the Court recognizing the status of the right to access to documents as such a general principle of Community law, even though some observers argue for this status. This restrictive approach of the Courts, which is also reflected in follow-up case law, has been lamented for weakening the right to access and a resulting fixation on procedure on the side of judges (Meltzian, 2004: 66).
- ⁷ While this marks the entry of the “transparency principle” into the Treaties, at the same time Member States reserved the right to request that documents from them not be communicated to third parties without their prior agreement by means of Declaration No. 35.
- ⁸ Again, the institutions adapted their rules of procedure accordingly.
- ⁹ The Article includes a three-fold provision for 1) work to be conducted “as open as possibly” 2) meetings of the European Parliament and the Council in public when drafts of legislative acts are considered and voted on and 3) access to documents.
- ¹⁰ Launched by Commissioner Siim Kallas in 2005, the European *Transparency Initiative* comprises a number of different elements, including the opening of a (voluntary) register of lobbyists, publication of beneficiaries of EU funds (on the basis in the new 2006 Financial Regulation), codes of conduct for ethical behaviour and lastly, the public access to documents.
- ¹¹ While the Courts to this day cannot order the release of documents, their judgment can annul an institution's decision to refuse access, leaving it to the institution to take a new decision, possibly on other grounds.
- ¹² The Council was thus not obliged to *create* a document that did not exist beforehand.
- ¹³ Already in 1994, an internal note of the then Secretary-General Niels Erbsoll set out that access to documents could also be refused “if a document revealed the positions of individual member states” (Bunyan, 2002), which resulted in the absence of any information on Member States' positions also *after* decisions had been taken.

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- ¹⁴ Although it seems that this exception has only been used once against Mr. Bunyan, editor at Statewatch, himself.
- ¹⁵ For an overview of case law between 1995 and 2001 see Naômé (2002).
- ¹⁶ Case T-194/94, *Carvel v Council* [1995] ECR II-2765.
- ¹⁷ *Idem*, para. 72.
- ¹⁸ *Idem*, para. 64-65.
- ¹⁹ While the Court annulled the decision to refuse access, it should be noted that it did (and could) not order the Council to grant access, but merely to explicitly consider it. In the end, John Carvel was provided with all but three of the requested documents. Tellingly, however, this took a court case, another threat of a court case in the face of more delays and more than two years of persistence (Bunyan, 2002). From a journalistic perspective, such a time lapse further clearly renders the information almost irrelevant, which is especially lamentable when considering the lost opportunity of achieving a meaningful public debate about highly relevant issues such as immigration and asylum policies and the extension of the mandate of a Europol Drugs Unit (as later was revealed by the documents that had been requested).
- ²⁰ These complaints resulted in another set of specifications including the obligation to keep agendas, make available on a more regular basis lists of measures adopted, the provision of specific reasons as to why access had been refused, the application of the 'authorship' rules (the rules on access also apply if the Council is only "co-authoring" documents) and the interpretation of 'repeat applications' (which according to the Ombudsman had been misconstrued to include applications by the same person for different documents, as cited in Bunyan, 2002). This more "overtly political phase" is identified as the second stage in the development of transparency in the EU in which "transparency is perceived not only as a goal in itself but also as a tool for a more democratic way of working and reaching decisions" (Curtin, 2004a: 6).
- ²¹ Which, however, has no direct effect and is thus greatly determined by reference to Community law. Case T-191/99, *Petrie v Commission* [2001] ECR II-3677, para. 34-38.
- ²² For reasons of scope, the case law on the "authorship rule" will not be considered here in detail, since it was dropped in the later Regulation and as such has no significant influence on the current access regime. For a more detailed account see Meltzian (2004).
- ²³ Case T-174/95, *Svenska Journalistförbundet v Council* [1998] ECR II-545. The case illustrated also a more general issue, which concerns the discrepancies and tensions between some of the EU Member States and the EU institutions (especially the Commission and the Council). When the Swedish Journalist Union had requested twenty Council documents about Europol from the Swedish government, it was granted access to eighteen of the requested documents, while some sections had been blacked out. When the Journalist Union requested the same documents from the Council, only two of the twenty requests were instantly honoured while a 'confirmatory application' (a kind of appeal) resulted in another four documents being released (Bunyan, 2002).
- ²⁴ *Idem*, para. 66.
- ²⁵ *Idem*, para. 118. As in the *Carvel* case before, however, it is important to note that the refusal to provide the requested information and the subsequent court case delayed journalists' access during two years, during which there was thus no publicity surrounding the extension of the remit of the European Drugs Unit.
- ²⁶ Even though, a certain degree of dissonance can be seen in recent decisions, which may cast a doubt on this continuing applicability (Flanagan, 2007), the below analysis will regard the cumulative body of case law that has been established since the Code of Conduct. This choice is

not only based on the fact that the Courts continue to base their argumentations when interpreting the Regulation on earlier decisions under the Code, but also on the more pragmatic consideration that there is to date a rather limited body of case law interpreting the Regulation.

- ²⁷ Case T-194/94 *Carvel v Council* [1995] ECR II-2765.
- ²⁸ Case T-14/98 *Hautala v Council* [1999] ECR II-2489; Case T-188/98 *Kuijjer (I) v Council* [2000] ECR II-1959; Case T-204/99 *Mattila v Council and Commission* [2001] ECR II-2265 and C-353/01 *Mattila v Commission* [2004] ECR I-1073.
- ²⁹ Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-545; Case T-188/98 *Kuijjer (I) v Council* [2000] ECR II-1959; Case T-123/99 *JT's Corporation v Commission* [2000] ECR II-3269; Case T-191/99 *Petrie v Commission* [2001] ECR II-3677.
- ³⁰ Case T-105/95 *WWF v Commission* [1997] ECR II-313, para. 56.
- ³¹ Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-545; Case T-14/98 *Hautala v Council* [1999] ECR II-2489; Case T-188/98 *Kuijjer (I) v Council* [2000] ECR II-1959; Case T-204/99 *Mattila v Commission and Council* [2001] ECR II-2265.
- ³² Case T-188/97, *Rothmans v Commission* [1999] ECR II-2463, para. 55.
- ³³ Case T-105/95, *WWF v Commission* [1997] ECR II-313.
- ³⁴ *Commission Decision of 30 November 1994 on the security measures applicable to classified information produced or transmitted in connection with the activities of the European Union* (C(94)3282), European Commission Security Office, Brussels, 1 March 1995. Again, Reinhard points out striking resemblances between NATO's and EU policies (2006: 326). To clarify the concepts used here: the "authorship rule" refers to the rule in the Code of Conduct that required application to the author of a documents directly.
- ³⁵ *Council Decision No 24/95 on Measures for the Protection of Classified Information applicable to the General Secretariat of the Council*. The decision also contained a provision on "collective classification". Three years later, the Council's rules were supplemented to enable enhanced cooperation with the WEU in *Council Decision of 27 April 1998 relating to the procedure whereby officials and employees of the General Secretariat of the Council may be allowed access to classified information held by the Council* (98/319/EC), OJ L 140/12 of 12 May 1998. Now, the need-to-know principle (personnel is not entitled to certain information solely on the basis of rank but are only provided with information that is crucial for their functioning) and procedures for personnel security screening were introduced. Still, the decision's preamble contained a "positive conflict clause in favour of the transparency principle" (Reichard, 2006: 235). See also *Decision 2000/23/EC on the improvement of information on the Council's legislative activities and the public register of Council documents*.
- ³⁶ In a secret Note for the Committee of Permanent Representatives regarding the Security Plan for the Council of 30 June 2000, he pronounced the necessity to amend existing legislation to this end and the intention of concluding security agreements with NATO "as soon as possible". Council Doc. SN 3328/1/00 REV, available online at: (<http://www.statewatch.org/secret/solana1.htm>). [Retrieved on 10 Oct 2008].
- ³⁷ "Soft originator control" refers to the provision that a third party who is the originator of a document can ask that document not be disclosed, while "hard originator control" means a provision that documents originating from a third party will not be disclosed without prior consent of the third party.

- ³⁸ Decision of the Secretary-General of the Council/High Representative for the Common Foreign and Security Policy on measures for the protection of classified information of 27 July 2000, 2000/C239/01, OJ C 239, 23. 08. 2000, 1.
- ³⁹ Curiously, there is a discrepancy concerning the registered chronology of the exchange of letter between Solana and the NATO SG Robertson According to the stamp on the letters, Mr. Solana seems to have replied to the letter even before he had received him. See for more detail: (<http://www.statewatch.org/news/2002/mar/16solana.htm>). [Retrieved on 14 October 2008]. When the EP invited NATO to a working seminar, the organization declined. So, as Reichard points out, “at a time when [NATO] was already exchanging [classified] information with the Council, it declined even to discuss the subject with the EP on a formal level” (2006: 333).
- ⁴⁰ Council Decision of 14 August 2000 (2000/527/EC), OJ L 212,23.08.2000, 9. This exception also related to documents which facilitated “conclusions to be drawn regarding the content of classified information”. Notably, the latter provision was criticised for including documents from other policy areas, which mentioned thus classified documents, to fall within the exception. Statewatch Analysis of the Decision of 14 August 2000 to amend the 1993 code of access to EU documents, available online at: (<http://www.statewatch.org/newcode3.htm>). [Retrieved on 12 October 2008].
- ⁴¹ Case C-369/00, *Netherlands v Council* [2006] ECR I-2169. Case C-387/00, *Parliament v Council*, OJ C 355, 9.12.2000, 15. Both were removed from the register in 2002. OJ C 144, 15.6.2002, 30.
- ⁴² As Reichard (2006: 340) points out, in earlier drafts before the “Solana Decision” the notion of “sensitive documents” could not be found, while exceptions had to be established on a case-to-case basis instead of exempting whole categories of documents and no “originator control” (except in its “soft” form requiring Member States to explicitly demand non-disclosure of certain documents). Tellingly, when Statewatch requested copies of the drafts that were considered by COREPER before the second Decision had been issued, the Council argued its refusal on the basis that publishing these documents “could fuel public discussion on the subject and raise questions among the Council’s partners as to the latter’s reliability”. Council letter to Tony Bunyan on 14 August 2000, available online at: (<http://www.statewatch.org/news/2001/mar/3105.htm>). [Retrieved on 13 October 2008].
- ⁴³ This means without debate or a vote. The EP was not consulted.
- ⁴⁴ *Council Decision 2001/264/EC of 19 March 2001 adopting the Council’s security regulations*, OJ 101, 11. 04. 2001, 1. For example, they included provisions on “collective classification”, more elaborate provisions on the need-to-know principle and encryption (for more detail see Reichard, 2006). The Commission was to amend its own security rules copying this decision on 29 November 2001 with Decision 2001/844/EC, ECSC, Euratom, OJ L 317, 03. 12. 2001, p.1. In 2002, an interinstitutional agreement between the EP and the Council provided for the access of the former to sensitive information in the field of security and defence policy held by the latter. OJ C 298, 30.11.2002: 1.
- ⁴⁵ See (<http://www.statewatch.org/news/2001/oct/11Aepsecreg.htm>). [Retrieved on 15 October 2008].
- ⁴⁶ Appendix 3 explained the highest classification category (TRES SECRET UE) to concern information the disclosure of which could cause “exceptionally grave prejudice to the essential interests of the European Union or one of its member states”. The classification requirements decrease for each of the lower markings. See (<http://www.statewatch.org/news/2001/oct/11Aepsecreg.htm>). [Retrieved on 15 October 2008].

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- ⁴⁷ The Security Regulations had been based on Article 307(3) TEC and Article 24 of its Rules of Procedure, while in its complaint before the ECJ the European Parliament would later argue that the proper legal basis of the act would have had to be Article 308 TEC, which would have made consultation necessary. Also, it should have waited for the Regulation to be adopted before adopting its Security Regulations. Case C-260/01, *Parliament v Council*. The case was withdrawn from the register on 11 December 2002. As Meltzian (2004: 167) further points out, especially the fact that the new rules were to impact on Member States by “requiring” (legally speaking, this is not binding, but on the basis of Art. 10 EC Member States may be expected not to deviate too much for the Council rules) them to adapt their rules leaves the measure clearly not a merely internal matter.
- ⁴⁸ For a more detailed account of the process see Meltzian (2004). For a detailed comparison of the three institutions’ proposals see Moser (2001).
- ⁴⁹ *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in environmental Matters*, Århus, Denmark, on 25 June 1998.
- ⁵⁰ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Århus Convention to Community institutions and bodies, OJ L 264, 25.9.2006: 13.
- ⁵¹ For the review process, it had been the question whether or not to “align” the new Regulation with the *Århus Convention*, which a majority of respondents during consultations backed. There are now two new Articles proposed (Art. 4(1)(e) and 4(2)), which would make the environment, in particular “breeding sites of rare species” a mandatory exemption and that would deny the application of the exception concerning the protection of commercial interests when it comes to “information on emissions which is relevant for the protection of the environment”. In the meanwhile, also all EU Member States have signed the Convention that required implementation via national laws and, as Banisar (2008) notes, “many of them took the opportunity to adopt broader laws at the same time”. In the subsequent analysis, the specific rules for access to environmental information will not be considered here due to reasons of scope. For more information see de Abreu Ferreira (2008). A major court decision has been the judgement of the Court of Justice in Case C-552/07 *Commune de Sausheim v Pierre Azelvandre*, in which it was clarified that Member States cannot rely on a public order exception in order to prevent locations of release of genetically modified organisms to be made public.
- ⁵² It can be pointed out here that this is not a major change since the prior limitation had in practice not been used by the institutions and would not have been effectively enforceable anyway in times of modern ICT.
- ⁵³ So, for example, an ordinary excel spreadsheet could be conceived of as a document, organized in columns and rows that could easily be adapted to enable access to the information that an applicant is interested in. On the other hand, an institution could argue that is it not obliged to create any documents that do not exist at the time of the application. At what point extracting information from a database becomes creating a document would then remain open to interpretation, which eventually would have to be decided by the Ombudsman or the Courts.
- ⁵⁴ Case T-92/98 *Interporc (II) v Commission* [1999] ECR II-3521, the appeal was rejected by the ECJ in Case C-41/00 P, *Interporc (II) v Commission* [2003] ECR I-2125.
- ⁵⁵ In T-170/03 *BAT v Commission* (pending) the applicant contends that the Commission did not have to consult Member States concerning the release of the documents at stake given that only in cases where it is not clear whether a document shall or shall not be released Member States would have to be consulted.

- ⁵⁶ Case T-168/02 *IFAW Internationaler Tierschutz-Fonds v Commission* [2004] ECR II-4135, para. 56. Case T-380/04 *Terezakis v Commission* (30 January 2008), para. 60.
- ⁵⁷ Case T-380/04 *Terezakis v Commission* (30 January 2008), para. 61.
- ⁵⁸ According to Statewatch this Article seems to have created a routine procedure, in which all negotiating positions are blacked out of documents (Hayes, 2005).
- ⁵⁹ Case T-76/02 *Messina v Commission* [2003] ECR II-3203; Case T-168/02 *IFAW v Commission* [2004] ECR II-4135, para. 58; Case T-187/03 *Scippacercola v Commission* [2005] ECR II-1029, para. 62; this again reiterated in Case T-380/04, *Terezakis v Commission* (30 January 2008), para. 39.
- ⁶⁰ The provision in the Regulation can be traced back to Declaration Nr. 35 relating to Article 255 that was attached to the *Amsterdam Treaty* and provided that “a Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without prior agreement”. Case T-168/02 *IFAW Internationaler Tierschutz Fonds v Commission* [2004] ECR II-4135, para. 57. It was furthermore considered that Art. 4(5) may not even require an institution to disclose to an applicant the identity of an originating Member State. See also Joined Cases T-110/03, T-150/03, T-405/03 *Sison v Council* [2005] ECR II-1429.
- ⁶¹ Case C-64/05 P *Sweden v Commission* [2007] ECR I-0000, para. 59.
- ⁶² *Idem*, para. 44.
- ⁶³ *Idem*, para. 76.
- ⁶⁴ *Idem*, para. 86.
- ⁶⁵ *Idem*, para. 90.
- ⁶⁶ *Idem*, para. 94.
- ⁶⁷ In practice, interinstitutional agreement between the Parliament, the Commission and the Council means that sensitive documents are held by either of the two latter institutions (Labayle, 2008: 42).
- ⁶⁸ It should be pointed out here that in cases of third party originators, according to the Council's security rules, also classification of a document will be set by these third party originators (Peers, 2002: 24).
- ⁶⁹ Case T-14/98 *Hautula v Council* [1999] ECR II-2489; Case T-188/98 *Kuijjer (I) v Council* [2000] ECR II-1959; Case T-211/00 *Kuijjer (II) v Council* [2002] ECR II-485, para. 57.
- ⁷⁰ Case T-204/99 *Mattila v Commission and Council* [2001] ECR II-2265, para. 69. The ECJ did later not elaborate on the evaluation of when information would be “worthwhile” or not, since it annulled the CFI decision already on the grounds that Council and Commission had evidently not even considered the possibility of partial access. Case C-353/01P *Mattila v Council and Commission* [2004] ECR I-1073.
- ⁷¹ When document of different classifications are held together, the document of the highest classification will determine the status of the whole.
- ⁷² In Case C-266/05 P *Sison v Council* [2007] ECR I-1233, this issue was not addressed since the ground of refusal of disclosure had been based on the exceptions of Art. 4(1) and partial access had been considered. Also, given an originator of a sensitive document is entitled to oppose the registration of such a document, the right to partial access in those cases is effectively non-existent.
- ⁷³ Case T-2/03, *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, para. 96.
- ⁷⁴ *Idem*, para. 100-103.

- ⁷⁵ Noteworthy is the conceptualization of a lack of response by an institution as a refusal of access in the Regulation, which is clearly juxtaposed to its purpose of granting widest possible access. Especially in the light of Article 21 (3) TEC, which contains the right to a response, a lack of response by an institution should be sanctioned.
- ⁷⁶ Case T-124/96 *Interporc (I) v Commission* [1998] ECR II-231, para. 48; Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-545, para. 65-67.
- ⁷⁷ Concerning the protection of privacy, commercial interests and sensitive documents, no such maximum is specified.
- ⁷⁸ Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-545, para. 112.
- ⁷⁹ Case T-211/00 *Kuijjer (II) v Council*, [2002] ECR II-485, para. 56. In its decision, the CFI explained that when refusing access the Council was obliged to consider for each document whether its disclosure would in fact be likely to undermine one of the protected interests.
- ⁸⁰ Case T-194/94, *Carvel v Council* [1995] ECR II-2765, para. 65.
- ⁸¹ This choice seems to have been motivated by the difficulties of implementing the requirement drawn up in *Carvel* concerning the discretionary exception (Meltzian, 2004: 219; Flanagan, 2007: 608).
- ⁸² As she points out, for example, the concept of “commercial interests” is far broader than the notion of “trade secrets” protected under the Code.
- ⁸³ See e.g. Case T-264/04, *WWF European Policy Programme v Council* [2007] ECR II-0000, para. 44.
- ⁸⁴ In accordance with the earlier decisions concerning the implementation of the Code, the CFI has reiterated that these exceptions must be “construed and applied strictly” so as not to “defeat the application of the rule”, which means that “the risk of the public interest being undermined must [...] be reasonably foreseeable and not purely hypothetical”. *Idem*, para. 39; see also Case C-353-99, *Council v Hautula* [2001] ECR I-9565.
- ⁸⁵ Case C-353/99P, *Council v Hautula* [2001] ECR I-9565.
- ⁸⁶ Case T-188/98, *Kuijjer (I) v Council* [2000] ECR II-1959, para. 41. The Court thus annulled a Decision of the Council in which it had merely indicated that certain documents contained sensitive information that could undermine the international relations of the EU and had failed to grant partial access to those parts of the documents which did not fall within the scope of the exception.
- ⁸⁷ Case T-211/00, *Kuijjer (II) v Council* [2002] ECR II-485.
- ⁸⁸ *Idem*, para. 60. Having examined the reports at issue it furthermore found that “neither the nature nor the content of the reports is consonant with the reasons put forward by the Council” and thus held that “disclosure of a large part of their contents clearly cannot be regarded as likely to give rise to tension with the third countries concerned”. *Idem*, para. 64-69.
- ⁸⁹ Case C-353/01P *Mattila v Council and Commission* [2004] ECR I-1073
- ⁹⁰ Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-545, para. 121.
- ⁹¹ This blacklist included the name of those whose funds and financial assets were frozen pursuant to Decision 2002/848/EC implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.
- ⁹² It affirmed that the “particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of *Regulation 1049/2001*, combined with the fact that access must be refused by

the institution [...] if disclosure [...] would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care, (...) [which] requires, therefore, a margin of appreciation". Joined Cases T- 110/03; T-150/03 & T-405/03, *Sison v Council* [2005] ECR II-1429, para. 35.

⁹³ *Idem*, para. 51;

⁹⁴ *Idem*, para. 46; Case C-266/05 P *Sison v Council* [2007] ECR I-1233, para. 34, 43.

⁹⁵ Case C-266/05 P *Sison v Council* [2007] ECR I-1233, para. 34

⁹⁶ *Idem*, para. 80-87.

⁹⁷ As Flanagan (2007) further elaborates, in contrast to the CFI, the ECJ further relies on other bases to limit its review. It essentially accepts categorical refusal, fairly vague reasons provided and the mere assertion that partial access had been considered. Even though the language of the Code and the Regulation concerning refusal when a document "could undermine" the protection of "public security" is virtually the same, after 15 years of construing the same language, the Court resorts to the legislative history of the Regulation to interpret its own role. It concludes with finding that the choice against adopting the proposed formulation of "significantly undermine", which would have given it greater scope for review, in favour of "undermine" justified its inability to exercise more power. Case C-266/05 P *Sison v Council* [2007] ECR I-1233, para. 37-38.

⁹⁸ Case T-264/04 *WWF European Policy Programme v Council* [2007] ECR II-0000.

⁹⁹ In its early case law the CFI had already established that the Code contained merely a right to documents (Case T-106/99, *Karl L. Meyer v Commission of the European Communities* [1999] ECR II-3273). However, in *Hautala*, the duty to consider partial access had been reasoned on the basis that any request for documents was essentially a request for information (Case C-353/99 P *Hautala v Council* [2001] ECR I-9565). Clearly, however, this reasoning cannot be construed to deduce an obligation of institutions to grant access to information in case where no document has been drawn up that contains such information (Case T-264/04 *WWF European Policy Programme v Council* [2007] ECR II-0000). This interpretation has been recently confirmed by the Court in *Terezakis* (Case T-380/04 *Terezakis v Commission* (30 January 2008) para. 154). It has been rightly pointed out, however, that proving the existence of a document may be extremely difficult for applicants, who holds the burden of proof in these cases (De Abreau Ferreira, 2008: 192).

¹⁰⁰ Case T-264/04 *WWF European Policy Programme v Council* [2007] ECR II-0000, para. 75-76.

¹⁰¹ *Idem*, para. 61.

¹⁰² Article 286 TEC as well as Article 8 of the *Charter of Fundamental Rights* guarantee the protection of personal data. Also Article 16(1) of the TFEU takes this into account. Concerning secondary legislation there is *Regulation 45/2001 on the protection of natural persons regarding personal data processing by the Community institutions and bodies and the free flow of such data*. There is no hierarchy between the two Regulations. For a more detailed discussion of the tension between the protection of personal data and the right to access to documents see Kranenborg (2007).

¹⁰³ Case T-194/04, *Bavarian Lager (II) v Commission* ECR II-3201.

¹⁰⁴ *Idem*, para. 118, 119.

¹⁰⁵ *Idem*, para. 109.

¹⁰⁶ Case C-28/08 P, *Commission v Bavarian Lager*. Another notable case, which has been submitted to the European Ombudsman concerns a request made by a Maltese journalist concerning the details of allowances received by members of the European Parliament. The Ombudsman has criticized the EP's decision not to release this information on the basis of data protection.

Interestingly, even the European Data Protection Supervisor had taken the view that the information should be released, while the EP merely agreed to publish some general information on its website and indicated its willingness to reconsider the situation after the election in 2009. The Ombudsman's inquiry is still ongoing at the time of writing. See (http://rss.xinhuanet.com/newsc/english/2008-07/15/content_8551424.htm) [Retrieved on 06 November 2008].

- ¹⁰⁷ Case T-121/05, *Borax Europe Ltd v Commission* (11 March 2009), para. 44.
- ¹⁰⁸ Case T-194/04 *Bavarian Lager (II) v Commission* [2007] ECR II-3201, para. 120
- ¹⁰⁹ *Idem*, para. 126.
- ¹¹⁰ Another proposal, which relates to personal data is the introduction of a whole new category of documents, which would be excluded from the scope of the new Regulation concerning "staff proceedings". Given the Court's insistence so far, that no entire category of documents ought to be *a priori* excluded from the right to access, the legal validity of this new exception seems doubtful.
- ¹¹¹ As Flanagan (2007: 607) has pointed out, including intellectual property here could change the default to non-disclosure since most documents can have copyright protection. Also, third parties could use this provision as an independent ground to seek non-disclosure, even if the content of a document would not fall under any other exception.
- ¹¹² Case T-309/97 *Bavarian Lager (I) v Commission* [1999] ECR II-3217, para 39; Case T-191/99 *Petrie v Commission* [2001] ECR II-3677, para. 66.
- ¹¹³ As the Court reiterates the requirements of prior case law in *Terezakis* (para. 86): "(...) the examination required for the purpose of processing a request for access to documents must be specific. First, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception (see, to that effect, Case T-20/99 *Denkavit Nederland v Commission* [2000] ECR II-3011, paragraph 45). Such application may, in principle, be justified only if the institution has previously determined (i) that access to the document would specifically and actually undermine the protected interest and (ii) in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, that there is no overriding public interest in disclosure. Second, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical (see, to that effect, Case T-211/00 *Kuijjer v Council* [2002] ECR II-485, paragraph 56). Consequently, the examination which the institution must undertake in order to apply an exception must be carried out in a specific manner and must be apparent from the reasons for the decision (see, to that effect, Case T-14/98 *Hautala v Council* [1999] ECR II-2489, paragraph 67; Case T-188/98 *Kuijjer v Council* [2000] ECR II-1959, paragraph 38; and Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraph 69)".
- ¹¹⁴ Especially in cases where private entities have an interest in gaining information about competitors the application of this exception will be important. Under Article 287 TEC the institutions are obliged to maintain confidentiality and will at least give a company the opportunity to be heard before disclosing potential commercial secrets (Meltzian, 2004: 230).
- ¹¹⁵ Case T-380/04, *Terezakis v Commission* (30 January 2008).
- ¹¹⁶ *Idem*, para. 88.
- ¹¹⁷ *Idem*, para. 96.
- ¹¹⁸ *Idem*, para. 97 (*emphasis added*).
- ¹¹⁹ *Idem*, para. 104-105.

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- ¹²⁰ Case T-83/96, *Van der Wal v Commission* [1998] ECR II-545, para. 47.
- ¹²¹ *Idem*, para. 48. In its appeal judgement in *van der Wal* the ECJ specified a distinction between general opinions by the Commission and opinions based on information provided specifically by national courts (including analysis of that information). Joined Cases C-174/98 P and C-189/98 P, *Netherlands and Van der Wal v Commission* [2000] ECR I-0001. Only in the latter case can the Commission refuse access on the basis of national court rules and even then only after the national court has objected to disclosure. See also the more recent Joint Cases T-391/03 and T-70/04, *Franchet and Byk* [2006] ECR II-2023.
- ¹²² These document meaning “not only the pleadings or other documents lodged, internal documents concerning the investigation of the case before the court, but also correspondence concerning the case between the Directorate-General concerned and the Legal Service or a lawyers’ office”. Case T-92/98, *Interporc (II) v Commission* (7 December 1999), para. 41. Thus, documents which have been drawn up in connection with a purely administrative matter are clearly not covered by the exception. See also the exclusion of OLAF documents from the exception of “court proceedings” in Joined Cases T-391/03 and T-70/04, *Franchet & Byk v Commission* [2006] ECR II-2023.
- ¹²³ Case T-2/03, *Verein für Konsumenteninformation v. Commission* (13 April 2005), para 74. The requirement to assess documents individually instead of by referring to categories of documents had already been established under the Code of Conduct (Case T-123/99 *JT's Corporation v Commission* [2000] ECR II-3269). In *WWF*, the Court had however decided that an institution is „required to indicate, at the very least by reference to categories of documents, the reasons for which it considers that the documents detailed in the request received by it“ are related to a category of information covered by an exception (Case T-105/95 *WWF v Commission* [1997] ECR II-313, para. 64).
- ¹²⁴ Case T-2/03, *Verein für Konsumenteninformation v. Commission* [2005] ECR II-1121, para. 102-103.
- ¹²⁵ *Idem*, para. 112. The burden of proof of the unreasonableness of the administrative burden lies with the institution, which subsequently is obliged to “try to consult with the applicant in order, on the one hand, to ascertain or to ask him to specify his interest in obtaining the documents in question and, on the other, to consider specifically whether and how it may adopt a measure less onerous than a concrete, individual examination of the documents” (para. 114). So, the Commission does not need to give full reasons for a refusal for each individual document in case it is “obvious” that access must be refused under the particular circumstances of the application (para. 75). Thus, having “genuinely investigated all other conceivable options and explained in detail in its decision the reasons for which those various options also involve an unreasonable amount of work” an institution may derogate from its obligation to a concrete and individual examination. Case T-2/03, *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, para. 115.
- ¹²⁶ Case T-36/04 *Association Internationale de la Presse ASBL (API) v Commission* (12 September 2007) para. 59.
- ¹²⁷ The Commission had *inter alia* asserted the disclosure of certain documents could not be granted even when they concerned cases that had been closed since the arguments contained in the Commission documents would still be relevant for similar cases still pending.
- ¹²⁸ Case T-36/04 *Association Internationale de la Presse ASBL (API) v Commission* (12 September 2007), para. 106.
- ¹²⁹ *Idem*, para. 82.

¹³⁰ *Idem*, para. 58.

¹³¹ *Idem*, para. 82.

¹³² *Idem*, para. 81.

¹³³ *Idem*, para. 82.

¹³⁴ Even where a party does not invoke such an interest, however, it would not be justified not to weigh up the interests at stake (para. 97).

¹³⁵ *Idem*, para 97.

¹³⁶ It is worth noting that the Court of Justice is excluded from the right of public access under Article 255 of the *EC Treaty* and that the *Lisbon Treaty* extends this right to the Court of Justice but only to documents relating to its administrative activities.

¹³⁷ e.g. Case T-36/04 *Association Internationale de la Presse ASBL (API) v Commission* (12 September 2007), para. 61. It would also mean that even *after* a hearing has taken place, only an institution's *own* documents could be revealed to the public. This also clearly goes well beyond current case law, as exemplified in the recent API decision, which did not explicitly limit the possibility to grant access after a hearing in such a way (see above).

¹³⁸ Thus, the Court has been criticized for turning this exception into a *de facto* mandatory ground for refusal (Labayle, 2008: 25).

¹³⁹ Also, suggesting that publication of legal advice would necessarily undermine its independence seems to reflect rather low expectations of the professionalism of staff of the institutions' legal services.

¹⁴⁰ Case T-84/03, *Turco v Council* (23 November 2004), Joint Cases C-C-39/05 P and C-52/05 P, *Sweden and Turco v Council* (01 July 2008).

¹⁴¹ Case T-84/03 *Turco v Council* [2004] ECR II-4061, para. 78.

¹⁴² *Idem*, para. 83. See also Case T-36/04 *Association Internationale de la Presse ASBL (API) v Commission* (12 September 2007).

¹⁴³ Case T-84/03, *Turco v Council* [2004] ECR II-4061, para. 84.

¹⁴⁴ Joint Cases C-C-39/05 P and C-52/05 P, *Sweden and Turco v Council* (01 July 2008), para. 78.

¹⁴⁵ *Idem*, para. 68.

¹⁴⁶ *Idem*, para. 59. Furthermore, the Court considered that the risk for serious doubts in case an unfavourable opinion had not been followed by an institution could be remedied by providing a convincing statement of reasons (para. 60).

¹⁴⁷ *Idem*, para. 64.

¹⁴⁸ *Idem*, para. 63.

¹⁴⁹ *Idem*, para. 44-45.

¹⁵⁰ *Idem*, para. 67.

¹⁵¹ *Idem*, para. 74-75.

¹⁵² as for example in Joined Cases T-110/03, T-150/03, T-405/03 *Sison v Council* [2005] ECR II-1429; Joined Cases T-391/03, T-70/04 *Franchet & Byk v Commission* [2006] ECR II-2023.

¹⁵³ Even though the ECJ swept away most of the central arguments that had been relied upon to justify the confidentiality of legal advice so far and underlined the principle of access especially

when it comes to legislative procedures, it did acknowledge that under certain circumstances, refusing disclosure could still be justified. This could for example be the case when an advice would have an exceptionally wide scope or particularly sensitive nature. These reasons would then have to be detailed in the statement of reasons. In that case, the passing of time may become relevant again when considering whether or not the exception would still justify non-disclosure. Joint Cases C-C-39/05 P and C-52/05 P, *Sweden and Turco v Council* (01 July 2008), para. 45-47; para. 69-70.

- ¹⁵⁴ The initial Commission proposal for the first version of *Regulation 1049/2001* had explicitly included “infringement proceedings, including the preparatory stages thereof”, but had later been deleted (Driessen, 2008: 84).
- ¹⁵⁵ A recent example for the relevance of this exception is the plea of the Swedish Journalist Union, who has accused the Commission of colluding with private media business against the system of press subsidies. Access to a number of documents submitted by private firm Bonniers to the Commission had been refused on the basis of this exception. For more detail see: (<http://www.thelocal.se/13172/>) [Retrieved on 03 March 2000].
- ¹⁵⁶ See *inter alia* Case T-105/95 *WWF v Commission* [1997] ECR II-313; Case T-309/97 *Bavarian Lager (I) v Commission* [1999] ECR II-3217; Case T-191/99 *Petrie v Commission* [2001] ECR II-3677; Case T-123/99 *JT's Corporation v Commission* [2000] ECR II-3269; Case T-20/99 *Denkavit v Commission* [2000] ECR II-3011; Case T-237/02 *Technische Glaswerke v Commission* (14 December 2006).
- ¹⁵⁷ Case T-20/99 *Denkavit v Commission* [2000] ECR II-3011, para. 45.
- ¹⁵⁸ Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2006] ECR II-2023, para. 109; see also the Court’s reasoning in Case T-36/04 *Association Internationale de la Presse ASBL (API) v Commission* (12 September 2007), para. 133. Even the possibility of infringement proceedings being opened on the basis of the requested document is per se not a sufficient reason to withhold it. Case T-105/95 *WWF v Commission* [1997] ECR II-313, para. 64; Case T-191/99 *Petrie v Commission* [2001] ECR II-3677, para. 79.
- ¹⁵⁹ Case T-105/95 *WWF v Commission* [1997] ECR II-313, para. 63. Here, the Court had also introduced the important principle that still guides its interpretation, which stated that exceptions to granting access would have to be “construed and applied strictly, in a manner which does not defeat the application of the general rule” (para. 56).
- ¹⁶⁰ Case T-309/97 *Bavarian Lager (I) v Commission* [1999] ECR II-3217, para. 46.
- ¹⁶¹ Case T-191/99 *Petrie v Commission* [2001] ECR II-3677, para. 68: “This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice”. As Meltzian (2004) points out, however, on exactly what basis the Court has been able to reach the conclusion that an interest in reaching an amicable solution outweighs the explicit principle of transparency and access to documents, as introduced in Articles 1(2) TEU and 255 TEU) remains unclear. After all, it is mentioned neither in the Treaties nor as an explicit aim of infringement procedures.
- ¹⁶² Case T-36/04 *Association Internationale de la Presse ASBL (API) v Commission* (12 September 2007), paras. 121-123; 132-133. Also, it clearly dismissed the further application of the exception on the basis of the Commission's argument that follow-up action on the basis of Art. 228 (2) EC maybe required in the case of non-compliance of the Member State with the Court judgment (para. 139).

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- ¹⁶³ Case T-105/95 *WWF v Commission* [1997] ECR II-313; Case T-309/97 *Bavarian Lager (I) v Commission* [1999] ECR II-3217 Case T-191/99 *Petrie v Commission* [2001] ECR II-3677, Case T-36/04 *Association Internationale de la Presse ASBL (API) v Commission* (12 September 2007).
- ¹⁶⁴ Joined Cases T-391/03, T-70/04 *Franchet & Byk v Commission* [2006] ECR II-2023, para. 111.
- ¹⁶⁵ Case T-20/99 *Denkavit v Commission* [2000] ECR II-3011, para. 48; Joined Cases T-391/03 and T-70/04, *Franchet and Byk* [2006] ECR II-2023, para 110. Activities that were “ongoing” were further elaborated excluding the interpretation that follow-up action would already have to be taken to “end” an investigation. It also reinforced earlier case law stating that evaluation must be specific and carried out in a concrete manner and for each document, the risk to the protected interest must be reasonably foreseeable and not purely hypothetical and clear from the statement of reasons (para. 115-116). The Court subsequently partially annulled the decision to refuse access since no actual risk to the investigations had been made clear in the statement of reasons and how it applied to the whole of documents (para. 128).
- ¹⁶⁶ Case T-123/99 *JT’s Corporation v Commission* [2000] ECR II-3269, para. 46; *Verein für Konsumenteninformation v Commission*, para. 73; Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2006] ECR II-2023, para. 117
- ¹⁶⁷ See also Case T-36/04 *Association Internationale de la Presse ASBL (API) v Commission* (12 September 2007), para. 54-58.
- ¹⁶⁸ Case T-2/03 *Verein für Konsumenteninformation* [2005] ECR II-1121, para 82.
- ¹⁶⁹ Case T-403/05 *My Travel v Commission* (9 September 2008), para. 73, 74.
- ¹⁷⁰ Especially in cases that concern infringement proceedings, it has been pointed out, it is especially important to have such a potential public interest override since the initiation and conduct of infringement proceedings are “notoriously opaque” while the subject matter can be relevant for the exercise of citizens’ rights (Meltzian, 2004: 235, translation by the author). As the Ombudsman points out further, this amendment would also relieve the Commission of the obligation to “show concretely that harm to the protected interest would occur as a result of disclosure” and remove these documents from the public eye completely (even if the relevant information was but a small part of the document in question) and indefinitely (even though the legitimate reasons for non-disclosure may have disappeared with the passage of time).
- ¹⁷¹ As has been pointed out by many observers, the space to think, may, however, not mean merely intellectual freedoms for civil servants in the drafting processes. For example Bunyan (2000) notes: “It would also give them the “space to act”. Many of the documents hidden by this rule would concern the implementation of measures - the practice that flows from the policies. Officials would be unaccountable for their actions. Democracy is not just about information and participation in policy-making, it is crucially about the ways policies are put into practice. For example, police powers over the citizen are judged not just by formal laws but by how they treat people on the streets and in detention”. See also Hayes (2005).
- ¹⁷² Given the addition of “seriously” the institutions are clearly expected to conduct a more stringent assessment of potential harm than when it come to the “undermine” test in Art. 4(1) and (2). Clearly, it would be considered insufficient to show that decision-making would merely be complicated as a result of disclosure (Peers, 2002).
- ¹⁷³ As a practical example, the Commission has relied on the first paragraph of Art. 4(3) to refuse access to draft minutes claiming that their release “would create confusion about the discussions that took place during the meeting and thus seriously undermine the future stages of the [...] decision-making process” (as cited in Driessen, 2008: 89).

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- ¹⁷⁴ See application and the initial Commission response online at: (<http://www.access-info.org/?id=13>) [Retrieved on 02 April 2009].
- ¹⁷⁵ Case T-105/95 *WWF v Commission* [1997] ECR II-313, para. 60. Latest since the introduction of Art. 1(2) EU, however, it would be hard to uphold that secrecy of decision-making itself could be considered as an interest worth protecting.
- ¹⁷⁶ *Idem*, para. 65. See also Case T-174/95, *Svenska Journalistförbundet v Council* [1998] ECR II-545, para. 113.
- ¹⁷⁷ Case T-111 *British American Tobacco (I) v Commission* [2001] ECR II-2997, para. 52.
- ¹⁷⁸ *Idem*, para. 56. Current Council practice seems to be blanking out names of Member States when publishing preparatory docs with negotiating positions (Council of the European Union, 2008: 11).
- ¹⁷⁹ *Idem*, para. 45.
- ¹⁸⁰ Case T-403/05 *My Travel v Commission* (9 September 2008).
- ¹⁸¹ *Idem*, para. 52.
- ¹⁸² *Idem*, para. 52.
- ¹⁸³ *Idem*, para. 49.
- ¹⁸⁴ Case T-166/05, *Borax Europe Ltd v Commission* (11 March 2009), para. 92-102.
- ¹⁸⁵ Case T-194/94, *Carvel v Council* [1995] ECR II-2765, para. 65. Case T-105/95 *WWF v Commission* [1997] ECR II- 313, para. 58, 59.
- ¹⁸⁶ Case T-111/00, *British American Tobacco v Commission* [2001] ECR II-2997.
- ¹⁸⁷ *Idem*, para. 42-45, Case T-105/95 *WWF v Commission* [1997] ECR II-313, para. 57.
- ¹⁸⁸ Joined Cases T-391/03, T-70/04 *Franchet & Byk v Commission* [2006] ECR II-2023, para. 138-139.
- ¹⁸⁹ Case C-266/05 *P Sison v Council* [2007] ECR I-1233, para. 43. On an ironic note, it can be pointed out that in *API*, the CFI explicitly stated that the purpose of the exception of court proceedings was to protect “not only the interests of the parties in the context of court proceedings, but more generally the proper conduct of those proceedings” (Case T-36/04 *Association Internationale de la Presse ASBL (API) v Commission* (12 September 2007), para. 59-61, 63). So, the public interest in fair trial that is apparently referred to here is the very rationale for the limitation of access, while the same interest in fair trial was deemed to be particular and thus not to be considered in *Franchet and Byk* and *Sison*. The Regulation can thus be used to refuse access for the sake of protecting the right to a fair hearing by an independent tribunal (which constitutes a fundamental right under Article 6 ECHR) but not to gain access for the same reason.
- ¹⁹⁰ Case T-403/05 *My Travel v Commission* (9 September 2008), para. 65. See para. 67 for reference to *Sison*.
- ¹⁹¹ Case T-84/03 *Turco v Council* [2003] ECR II-24, para. 82-83.
- ¹⁹² Still, while the decision must be welcomed one could wonder whether there is in fact any reasonable justification to keep secret documents that relate to the preparation of legislative documents. In this vain, it has been suggested to dis-apply the exception for the decision-making process of the institutions when it comes to the legislative procedure (Peers, 2008b).
- ¹⁹³ However, it was soon to become clear that a large number of documents would never be mentioned in the Council register, when a note of then Secretary General of the Council leaked to Statewatch, which instructed that: “Confidential, Restraint, SN and non-paper documents will not be included in the public register. For this reason, from now on these documents will not be

mentioned in official Council documents (in particular; on provisional agendas and in outcomes of proceedings" (as cited in Bunyan, 2002).

- ¹⁹⁴ Thus, only such documents may be excluded from the public register that are considered sensitive in accordance with the definition of Article 9 of the Regulation, which provides that those documents shall be recorded in the register or released only with the consent of the originator (Idem: 138). This, however, must not be interpreted as legitimately removing those documents from public scrutiny altogether, even if it means that only citizens' representatives can access those documents. Article 9(7) provides that "the Commission and the Council shall inform the European Parliament regarding sensitive documents" (EU Network of Independent Experts, 2004: 138).
- ¹⁹⁵ A6-0459/2008, 20 November 2008. Available at (<http://www.statewatch.org/news/2009/jan/eu-access-cappato-report.pdf>). [Retrieved on 13 January 2009].
- ¹⁹⁶ The fact that the Council's increase in documents available in the register has gone in parallel with a 7% decrease in requests since 2002 may suggest that there is simply less necessity to request documents if the registers are used satisfactorily (European Parliament, 2008a: 2).
- ¹⁹⁷ In its 2006 report, ECAS summarizes the nature of Commission documents contained in the register to be "documents relating to its legislative and regulatory activities, i.e. agendas and minutes of meetings, as well as COM (proposals for acts), C (autonomous acts) and SEC (working papers and basic administrative) series documents" (ECAS, 2006: 7). Also, an additional register had been drawn up relating to the work of the committees in 2003. The register of the Council incorporates all documents submitted to one of its bodies (Working groups, COREPER and Council configurations). Beyond documents relating to parliamentary work the register of the EP also includes mail sent to the institution and to its President.
- ¹⁹⁸ For an overview of the procedure see (<http://www.statewatch.org/news/2009/jan/07sw-ombs-com-register-complaint.htm>). [Retrieved 16 February 2009].
- ¹⁹⁹ To date, however, the Community Courts have declined to pronounce the right to access to be a general principle of EU law or a fundamental right. So, for example, in *My Travel*, the CFI refers to the right of access to Commission documents existing "as a matter of principle" (Case T-403/05 *My Travel v Commission* (9 September 2008), para. 31). Meltzian reaches the conclusion that the right to access to documents does fulfill the criteria to be recognized as a general principle of Community law (2004: 325). However, he also rightly points out that there may not be any need to do so for the Courts anymore, since the right has been made explicit in primary and secondary legislation in the meanwhile.
- ²⁰⁰ The draft *Constitutional Treaty* went further to introduce the principle of transparency in Articles I-50(3) and II-102 (concerning specifically the access to documents). The consolidated amending *Lisbon Treaty* (TFEU) finally incorporated the substance of those provisions in Article 15(3). As Peers points out (2008), after ratification of the *Lisbon Treaty*, a number of changes would enable the institutions to take further steps to enhance the right of access. So, for example, the access rules would also apply to the European Council and administrative tasks of the ECJ, the Council would be obliged to hold all meetings publicly when they concern legislative acts (irrespective of the application procedure) and legislation could be adopted concerning administrative procedural rules of all EU bodies, making a freedom of information regime possible. Many of these changes could however already be implemented, regardless whether or not the Treaty is ever ratified. The lack of consideration of technological opportunities for better information sharing and improved visibility of the steps in the legislative process and also new threats to privacy and confidentiality in the *Lisbon Treaty*, however, has been sharply criticized as leaving the Treaty a "prisoner of its time" (Lodge, 2008: 5).

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- ²⁰¹ As Advocate General Maduro puts it, there has been a “slow but inexorable rise in the strengthening in Community law of the requirement of transparency in general, and of the right of access to documents of the institutions in particular”. Opinion of Advocate General Poiares Maduro Case C-64/05P *Sweden v Commission* (18 July 2007), para. 37.
- ²⁰² Case T-211/00 *Kuijter (II) v Council* [2002] ECR II-485, para. 52.
- ²⁰³ Opinion of Advocate General Poiares Maduro Case C-64/05P *Sweden v Commission* (18 July 2007), para. 42.
- ²⁰⁴ In 2005, the Council finally agreed to open its proceedings under co-decision. After much pressure from civil society, another special report by the Ombudsman and an EP vote, in June 2006 it opened up its meetings when acting in its legislative capacity (ECAS, 2006: 18).
- ²⁰⁵ EP rapporteur Cappato pronounced to want to “analyse [this problem] in the future” (European Parliament, 2007: 4).
- ²⁰⁶ For a more detailed discussion, see Hoffmann (2008).
- ²⁰⁷ The reluctance of institutions to change their ways may be partly to blame on the absence of serious consequences of non-compliance. After all, much of the “costs” of appealing a decision of non-disclosure are borne by applicants, who must acquaint themselves with procedures, make time, invest in legal advice and representation and wait for sometimes long periods of time even in cases, where it turns out that an application should have been honoured right away. In fact, a wrongful initial decision to reject applications may even be worth the risk for an institution in order to avoid future appeals by other legitimate applicants.
- ²⁰⁸ One way of initiating such a change may be the creation of an independent office that would focus exclusively on the processing of requests for access.
- ²⁰⁹ In a comparative analysis for the EP of the 2006 institutional annual reports on the access to documents, rapporteur Cappato draws an interesting overall picture of the institutional practice (European Parliament, 2008c: 4). Looking at the disclosure rates of the three institutions, in 2006 the European Parliament gave positive answers to 87% of requests in 2006, compared to 76,8% of the Council (considering partial access, this figure would be 87,7%). The number of requests has been increasing for both institutions, while the disclosure rates have remained about the same. In the case of the Commission, however, the implementation of the Regulation seems to have led to a decrease in disclosure rates compared to under the old rules from 80-90% to about 70%. The most common ground for refusal remains the protection of decision-making process (Council 43,2%, Commission 33,36% and EP 39%). Mirroring their different roles, the institutions rely on different other exceptions. So, while the EP relies more often on the exception for the protection of private life (24%) and juridical proceedings (24%), the Council more often invokes the protection as regards public security (17,1%), international relations (12,3%) and defence and military matters (4,5%). Not surprisingly then, the Commission relies heavily on the exception concerning inspections, investigations and audits (30,72%).
- ²¹⁰ An instructive example is given in a recent report to the European Parliament (2008a: 6): there may be a dilution of documents illustrated by the case of the minutes of highly controversial College discussion on CO2 emissions. There was no problem accessing the official minutes, which were however politically utterly unrevealing since they made no mention of any disagreement between Commissioners. At the end of the document, a reference to “special minutes” that would include the “other discussions” of the Commission on certain agenda items was made. The latter, however, have not been made available to the public.

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- ²¹¹ European Parliament resolution of 14 January 2009 on public access to European Parliament, Council and Commission documents (implementation of Regulation (EC) No 1049/2001 (2007/2154(INI)).
- ²¹² Most confirmatory applications also originated from students and researchers (56,2 %).
- ²¹³ Generally, it has been questioned whether more transparency is always preferable (e.g. Curtin, 2004a: 12). Clearly, there is no such categorical assumption. However, the limits of a right to know should be clearly and narrowly defined. Transparency has the purpose to enhance democratic accountability. Therefore it must be ensured that institutions are not able to “hide” behind secrecy rules when taking decisions that directly affect citizens.
- ²¹⁴ For example, the provision of appropriate and sufficient information turned out to have played a major role in the decision of those who decided not to turn out for the Spanish, Dutch and French referenda on one of the most important documents for Europe. Even concerning such an important document as the *Treaty establishing a Constitution for Europe*, an overwhelming number of people said they did not feel well informed enough to vote. According to the post-vote Flash Eurobarometer surveys, 51 % and 49% of those (of Dutch and French citizens respectively) who abstained from voting names the lack of information as the major reason. In Spain, the lack of proper information about the issue explains 62% of those who abstained, but only 32% of those who theoretically felt well-informed but nonetheless decided not to vote. Those, who did turn out to vote mostly confirmed having had all the information needed to make a decision (Eurobarometer 168, 171, 172). Bovens (2003) would refer to those rights as “secondary information rights”, which imply a duty of the State to support citizens in gaining access and to pro-actively distribute important information. This is also mirrored in a *Recommendation of the Committee of Minister of the Council of Europe*, which not only recognizes an individual right to gain access, but also a duty of authorities, without having been asked, to engage in the provision of information that is of public interest (Rec (2002) 2. Available at (www.coe.int/t/e/human_rights/media/4_documentary_resources). [Retrieved on 03 March 2009].
- ²¹⁵ European Parliament resolution of 14 January 2009 on public access to European Parliament, Council and Commission documents (implementation of Regulation (EC) No 1049/2001 (2007/2154(INI)). In reality there may already be a shift into this direction by granting the right to access to data from databases: if institutions will be obliged to extract certain data that have not as such been assembled in an earlier document this would amount to a *de facto* right to information, if a limited one. The European Ombudsman has anticipated such a shift and has accordingly suggested that the term “data” could possibly give rise to very narrow interpretations, according to which “data” does not necessarily equal “information”. In order to remove any doubt, Article 3 should ideally refer to “information” (2008a: 16).
- ²¹⁶ It has been suggested that such a Freedom of Information Act would also be used predominantly by large law firms to improve the position of corporate clients and to stretch Commission resources beyond a reasonable limit (Driessen, 2008: 238). However, it seems hard to argue that budgetary constraints or the risk that the “wrong” applicants may make use of freedom of information ought to guide debate about changes in policy in order to devote more resources and get more “ordinary” citizens to make use of the rules.
- ²¹⁷ These elements partly emanate from the arguments concerning the role of access to information for legitimizing decision-making with European governance. Another source are the “common traditions” of Member States, which serve as a basis for the process of European constitutionalization, and which imply that EU legislation on the issue could not have the effect of effectively restricting the guarantees provided for by national freedom of information laws. So access to information previously held by national authorities, which due to changed procedures

are now held at the European level, ought not to be more limited now as an effect of a transfer of competences. This, however, could be the risk for example concerning European procedures of medicines licensing, which effectively bar access to information that had previously been available to patients (Abraham & Lewis, 1998; Pimpinella & Bertini Malgarini, 2007).

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- Case T-83/96 *Van der Wal v Commission* [1998] ECR II-545
- Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-545
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- Case T-211/00 *Kuijter (II) v Council* [2002] ECR II-485
- Case T-311/00 *British American Tobacco (II) v Commission* [2002] ECR II-2781
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- Case T-47/01 *Co-Frutta v Commission* [2003] ECR II-4441
- Case T-84/03 *Turco v Council* [2004] ECR II-4061
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