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Transparency, Participation and EU Institutional
Practice: An Inquiry into the Limits of the 'Widest
Possible'

Päivi Leino

European University Institute
Department of Law

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An Inquiry into the Limits of the ‘Widest Possible’**

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Abstract

The recent years have witnessed a growing concern in the EU institutions for the ways in which openness and citizen participation are believed to distract efficient decision-making. Various examples of such attitudes can be easily identified, demonstrating how the EU institutions still fail to possess a deeper understanding of the role of transparency in legitimate governance. This paper discusses the ways in which the right of public access often turns into institutional politics with the institutions and the Member States in fact buttressing their own interests. This has serious consequences for the understanding of citizens' rights to participate in democratic decision-making. These questions are examined in the areas of legislative matters and international relations. The problems identified are then placed in the context of wider administrative culture in the relevant EU institutions, reflected in their responses to the citizens' concerns. The paper concludes with a few remarks on the wishes of the European Council to create greater legitimacy for the Economic and Monetary Union, and the role of openness in that discussion.

Keywords

Democracy, Transparency, Legislative Process, International Agreements, EU Institutions

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TRANSPARENCY, PARTICIPATION AND EU INSTITUTIONAL PRACTICE: AN INQUIRY INTO THE LIMITS OF THE ‘WIDEST POSSIBLE’

Päivi Leino

Introduction

The Treaty of Lisbon, in force since December 2009, includes a number of much celebrated reforms emphasising open-decision making, citizen participation and the role of transparency and good administration in building up the democratic credentials of the European Union (EU). The Lisbon Treaty has been marketed as a triumph for citizens; as a win-win scenario: not only do the institutions function better, but the citizens are much happier with them. However, in the recent *EU Citizens Opinion Poll – What Citizens Want from Brussels*¹ many of the key findings related specifically to lack of transparency in EU decision-making: for example, 85% of the respondents felt that full information about Member States’ negotiations should be open to the public and 74% of citizens believe it is important that citizens have access to the legal advice which underpins EU decision-making. In the current contribution, the limits and possibilities of democratic decision-making post-Lisbon are examined in particular from the point of view of public access and open government.

As regards democratic decision-making and transparency in particular, a specific Title in the Treaty on the European Union (TEU) now includes a number of core provisions on democratic principles, applicable in all areas of Union action. They underline the principle of representative democracy through the European Parliament, representing the citizens directly at Union level, and through the governments forming the European Council and the Council and that are democratically accountable either to their national Parliaments, or to their citizens.² Even participatory democracy enjoys a pivotal role in the new Treaty framework; in order to guarantee the right of ‘every citizen’ to ‘participate in the democratic life of the Union’, the Treaty establishes that ‘[d]ecisions shall be taken as openly and as closely as possible to the citizen’ and that both citizens and representatives should be given opportunities to ‘make known and publicly exchange their views in all areas of Union action’.³ These provisions have a natural linkage both with the new citizens’ initiative⁴ and with Article 15 TFEU, which places the legislature under an obligation to act publicly, and establishes that citizens have the right to access documents held by all Union institutions, bodies and agencies. The Right of access to documents, and its nature as a fundamental right, is further emphasised by Article 42 of the EU Charter of Fundamental Rights, which now enjoys ‘the same legal value as the Treaties’.⁵

In practice, open decision-making is to a large extent realised through the right of the general public to access documents, which forms a precondition of following decision-making and being able to express one’s opinion on pending matters. Regulation No 1049/2001 on public access to documents held by

¹ The Citizens’ Report Participation, Ethics and Transparency: What citizens want from Brussels. Madrid, January 2013 January 2013, available at http://www.access-info.org/documents/Access_Docs/Advancing/EU/EN_ONLINE_Citizens_Report.pdf. The EU Citizens Opinion poll was commissioned by the EU Citizens Project Partners and was conducted in six EU Member States.

² Article 10(1) and (2) TEU.

³ Article 10(3) TEU, Article 11 TEU.

⁴ See Regulation No 211/2011 on the citizens’ initiative, OJ L [2011] 65/1.

⁵ Article 6(1) TEU.

the EU institutions,⁶ builds on the principle of ‘widest possible access’, and has together with case law been instrumental in operationalising the right of citizen access by establishing procedures and standards for the exercise of their democratic rights. All documents held by the EU institutions are public, as the main principle, but certain public and private interests are protected through specific exceptions. But as such exceptions derogate from the principle of the widest possible public access to documents, they must, according to established case-law, be interpreted and applied narrowly.⁷

Discussions on the reform of Regulation No 1049/2001 have been pending since 2008.⁸ While one would think that the tendency was – in line with the recent Treaty reforms – to strengthen the rights of citizens further, in fact the opposite seems to be the case, with discussions on reform mainly circulating around new ways to limit citizen access,⁹ many of them in rather fundamental ways that seem to be at odds with the letter of the Treaties as they stand. The discussions of the past five years witness of a change of paradigm and priorities: while the tendency since the Treaty of Maastricht has been to strengthen the rights of citizens,¹⁰ now this objective seems to be something from the past. Staffan Dahllöf, a journalist specialising in freedom of information, describes the situation as follows:

The voices asking for openness and citizen's involvement are today weaker and fewer than they were when the present rules were decided in 2001 - at least amongst the Member State governments, and definitely in the Commission. It's more like the Empire strikes back.¹¹

In today's Europe, there seems to be nothing shameful in arguing that citizens are outsiders, and that openness and citizen participation distract efficient decision-making in the institutions. Various examples of such attitudes in recent years can be easily identified, demonstrating that after years of high-sounding Treaty preambles, the EU institutions still fail to possess a deeper understanding of the role of transparency in legitimate governance.

As Douzinas has demonstrated, human rights can be both a ‘triumph and a disaster’; simultaneously something significant and something problematic.¹² This might be what is happening with the right of public access; it is a triumph that it has finally secured a place in the Treaties, but being open-ended as rights tend to be, often delivers less than expected when it becomes a part of institutional politics and is implemented in practice. Four years after the entry into force of the Lisbon Treaty it is therefore the proper time to ask what the institutions are actually delivering when implementing the Treaty. I will examine this through three topical questions, demonstrating that often the right of public access turns into institutional politics with the institutions and the Member States in fact buttressing their own interests. This has implications for the understanding of democratic governance in the EU. First, I will discuss the role of openness in legislative matters and how this is understood in particular by the

⁶ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145/43.

⁷ See e.g. C-280/11 P *Council v Access Info Europe* para 30 and the case law quoted in the paragraph.

⁸ See e.g. Ian Harden, ‘The Revision of Regulation 1049/2001 on Public Access to Documents’, 15(2) *European Public Law* (2009) 239-256.

⁹ See the open letter by Beatrice Ask, Minister for Justice, Sweden and Anna-Maja Henriksson, Minister of Justice, Finland, published at <http://www.wobbing.eu/sites/default/files/Open%20letter.pdf>.

¹⁰ For one account of the EU's transparency development so far, see Deirdre Curtin, ‘Judging EU Secrecy’, *Cahiers de Droit Européen*, 2012 (2) 459 – 490.

¹¹ Staffan Dahllöf, ‘Guide to the battle of transparency – UPDATED’, 09/06/2012, available at the EU wobbing website <http://www.wobbing.eu/news/guide-battle-transparency-%E2%80%93-93-updated>. On the varying positions of the Member States to the reform process, see M.Z. Hillebrandt, D.M. Curtin and A.J. Meijer, ‘Transparency in the EU Council of Ministers: An Institutional Analysis’, 20(1) *European Law Journal*, 2014, 1-20.

¹² Costas Douzinas, ‘Six Theses on the End(s) of Human Rights’, XI *Finnish Yearbook of International Law* (2000), 201-219.

Council, which tends to argue that it should be left to legislate in secrecy so as not to hamper the effectiveness of its procedures and be able to avoid pressure from the public opinion, which is seen as detrimental to its functioning. Second, I will consider the recent jurisprudence relating to the international relations exception in Regulation No 1049/2001 and the possibility that the public interest in openness might occasionally be greater than the need for secrecy. Third, I will reflect on the question of administrative culture when the institutions are replying to the citizens' concerns. Finally, I will conclude with a few remarks on the recent wishes of the European Council to create greater legitimacy for the Economic and Monetary Union, and the role of openness in that discussion.

Access to legislative documents

The main principle in the Treaty of Lisbon is clear: the Council and the European Parliament are to legislate in the open. For the Council's part this means that it meets 'in public when it deliberates and votes on a draft legislative act', in practice through the Council's internet site 'by audiovisual means, notably in an overflow room and through broadcasting in all official languages [...] using video-streaming'.¹³ Open meetings have a linkage with access to documents, since documents submitted to the Council open sessions and the relevant minutes are made public. The last sentence of Article 15 TFEU also places the European Parliament and the Council under an obligation to ensure the publication of the documents relating to the legislative procedures. Under the Treaty of Lisbon, legislative matters are defined with reference to the applicable decision-making procedure, either the ordinary or special legislative one,¹⁴ and not the effects or title of the acts.

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

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

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

it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming [...] from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Those considerations are clearly of particular relevance where the Council is acting in its

¹³ Council Decision of 1 December 2009 adopting the Council's Rules of Procedure, OJ L 325/35. See in particular, Article 7 'Legislative procedure and openness'.

¹⁴ Article 289 TFEU.

legislative capacity [...]. Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.¹⁵

The Court set the threshold high in referring to ‘all the information which has formed the basis for a legislative act’: it is clearly not only quantity that is of relevance, but quality. The legislature needs to provide access to information concerning the key elements on the legislative agenda while the relevant process is on-going and there is a chance to influence it. However, the institutions, and the Council in particular, have had difficulties with maintaining this standard and turned to a vast number of excuses that risk to water down the right in rather fundamental ways. These practices continue despite the clear objective in the Lisbon Treaty to strengthen access to legislative documents further.

As regards the Council, these difficulties are not without connection to its way of functioning. First, formal Council settings consisting of government ministers do not negotiate the main bulk of legislation. Instead, most questions are effectively closed at the working party level between civil servants or at the latest in Coreper between the ambassadors. Therefore, the relevant question is, should the provisions on open sessions when meeting in the Ministers’ composition be interpreted strictly and if not, to what extent should the lower levels of decision-making within the Council be covered by corresponding access rules? What is the role of the Council’s General Secretariat? Second, questions of competence and legal basis often tend to figure in the discussions, since the EU legal construction is atypical, and the limits of EU competence affect the final outcome of the legislative process in rather fundamental ways. In the discussions within the Council, the Council Legal Service is a major player and exercises comprehensive institutional powers – but its ‘correct’ readings of the state of law are also a source of fierce political debate. In practice, the Council receives many requests for access relating to these opinions every year.¹⁶ When forming a part of a political decision-making process and a key factor in discussions concerning the ‘legally possible’, should the position of the Legal Service and the alternatives it offers be open to public scrutiny? And third, many Member States do not wish for their positions to become public, often because their constitutional arrangements for informing their national parliaments are not too generous and they feel uncomfortable with the idea that information should become public through the EU. Should the EU deal with this problem or leave access to Member State positions to national constitutions to settle? Finally, how is a ‘legislative matter’ to be understood? These questions demonstrate the issues that have proved particularly contentious post-Lisbon as far as legislative matters are concerned, and will be addressed below. In general, the Council politics has been to refer to the need to guarantee the efficiency of its decision-making and consequently deny access. Instead of deciding on a proactive policy in line with the Treaty of Lisbon, the Council has maintained a strict policy on direct access,¹⁷ largely left these questions to the Court to settle following appeals, and subsequently seen its core arguments defeated.

Access to Legal advice

Questions relating to the transparency of competence considerations were already addressed by the Laeken declaration,¹⁸ which preceded the reform process leading to the adoption of the Lisbon Treaty

¹⁵ Joined Cases C-39/05 P and C-52/05 P *Kingdom of Sweden and Maurizio Turco v the Council*, paras 45-46

¹⁶ See e.g. the Council Annual Report on access to documents 2012, available at www.consilium.europa.eu/media/.../web_en_access_to_doc_2013.pdf.

¹⁷ See ANNEX II to the Council Rules of Procedure on ‘Specific provisions regarding public access to Council documents’, Article 11.

¹⁸ Laeken declaration on the future of the European Union, adopted by the European Council on 15 December 2001.

and described the expectations of citizens and possible scenarios for responding to them. The objective of clarifying, simplifying and adjusting the division of competence between the EU and Member States was elaborated by the declaration, stressing its connection with the aim of making this division more transparent for the public. Legal advice given by the institutions' legal services in the context of legislative procedures often relates specifically to this particular question: the opinions tend to discuss the proposed legal basis, and the existence of Union competence and its nature. Legal advice, however, is also given in other contexts, such as relating to cases before the EU Courts, the negotiation of international agreements, or the relations between Union institutions. In this context, it is also useful to note that many opinions of the legal services include descriptions of relevant case law and existing Union legislation, which is not legal advice *per se*.

Regulation 1049/2001 includes a specific exception relating to legal advice in Article 4(2):

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

[...] - court proceedings and legal advice,

[...] unless there is an overriding public interest in disclosure.

But the Council has also tended to invoke another exception, Article 4(3) relating to the institution's 'space to think':

Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

For the Council and its legal service, legal advice has been traditionally understood in categorical terms: legal advice irrespective of the context in which it is given has been understood as being 'internal' to the Council and thus worthy of highest possible protection. Thus it has been automatically harmful to hand out legal advice, and equally difficult to identify a public interest that would overcome this harm. In practice the Council positions are prepared by its legal service, which is effectively put in the position of finding excuses for why it should be entitled to conduct its work outside public scrutiny.

The CJEU has addressed the interpretation of this exception in the context of legislative procedures in the *Turco* ruling quoted above, where it rejected the fears and excuses raised by the Council (and the Commission which intervened on its side) regarding the implications of disclosure of legal opinions one by one, establishing that,

it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole.¹⁹

The CJEU rejected the Council's argument that the independence of its legal service would be compromised by possible disclosure of legal opinions issued in the course of legislative procedures. The Court pointed out the existence of a specific exception aimed at protecting an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice. However, many of the excuses relied on by the Council 'were in no way substantiated by detailed arguments' and thus, the Court could see 'no real risk that is reasonably foreseeable and not purely hypothetical of that

¹⁹ Para 59.

interest being undermined' (para 63). As regarded the Council's concerns relating to public pressure on its legal service, the Court established that:

As regards the possibility of pressure being applied for the purpose of influencing the content of opinions issued by the Council's legal service, it need merely be pointed out that even if the members of that legal service were subjected to improper pressure to that end, it would be that pressure, and not the possibility of the disclosure of legal opinions, which would compromise that institution's interest in receiving frank, objective and comprehensive advice and it would clearly be incumbent on the Council to take the necessary measures to put a stop to it.²⁰

In this context, the Court also rejected the Commission argument concerning the claimed difficulties of an institution's legal service which has initially expressed a negative opinion regarding a draft legislative act to defend its lawfulness later. In any case, the risk to the independence of the Council legal service

would have to be weighed up against the overriding public interests which underlie Regulation No 1049/2001. [...]such an overriding public 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 [...].²¹

Following this, the Court established 'in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process'. However, it remained possible to refuse to

disclose a specific legal opinion, given in the context of a legislative process, but being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question. In such a case, it is incumbent on the institution concerned to give a detailed statement of reasons for such a refusal.²²

Such protection does not cover the document as a whole, but the legal advice contained in it only for the period during which protection is justified on the basis of its substance.

Ideally, a Court ruling entails that uncertainties are settled and that implementation becomes easier. But this was not the case here. For the Council (and to a lesser extent to the Commission) the *Turco* ruling has proved immense difficulties to live with. The horror scenario informing Council position-building would seem to consist of the possibility that an institution might ultimately approve legislation that its own legal service might have found unconstitutional as far as the EU Treaties are concerned; a fact that should not in its view be public knowledge. But if this is the case – as it sometimes might be – should not such an institutional choice and its justification be publicly available? In fact, whether a matter is known by the wider public seldom has consequences for whether a matter ends up before the Court or not. Annulment claims tend to originate primarily from the Member States or the other institutions, and the Member States and the Commission not only have access to the opinions anyway, but also employ their own reserve of EU lawyers capable of producing similar analyses. The latter point also applies to the EP. The Council Legal Service has no monopoly of EU legal advice, even if its findings are of a particular institutional importance. Annulment cases are everyday occurrences in EU institutional politics and often follow as a consequence of the

²⁰ Para 64. See, however, also joined cases C-528/07 P and C-532/07 P *Sweden and Others v API and Commission* [2010] ECR I-8533 para 93, where the CJEU is worried about the effect that disclosure of Court pleadings, 'exposing judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings'.

²¹ Para 66-67.

²² Para 69.

previous decision-making procedure, and this has been the case already before and irrespective of the *Turco* ruling. At the same time one could think, that if and when serious doubts exist about the constitutionality of an EU act, it would be even extremely positive if the Court would indeed look into the matter and settle the question – this was for example the case in relation to the Article 136 TFEU amendment debate.²³ In practice, however, the Council has chosen not to hand out the opinions of its legal service automatically²⁴ and only considers access to them following specific requests from the public. In its replies, it has tended to rely heavily on the – according to the CJEU – rare *Turco* exception of an opinion being 'of a *particularly* sensitive nature or having a *particularly* wide scope' (emphasis added), even if the CJEU seemed to have an exceptionally high threshold in mind when stressing that sensitivity and wide scope should exceed the ordinary.

The mind-set of the Council (legal service) is nicely illustrated in Case T-452/10 *ClientEarth v the Council*, an appeal brought by ClientEarth, an NGO working to protect the environment through advocacy, litigation and research, before the General Court following the Council's refusal to grant – ironically enough - more than an extremely limited partial access to a legal service opinion relating to the reform of Regulation No 1049/2001 on public access to documents.²⁵ In its reply, the Council argued that as to its contents, the legal advice given was 'particularly sensitive in nature':

Were it to be released to the public and thus to the European Parliament, the Legal Service's analysis of the European Parliament's amendments – intended to solely facilitate internal discussions within the Council on the legal matters referred to above – is likely to prompt divergences with the European Parliament and could negatively impact on the upcoming negotiations²⁶.

We are thus to understand that disclosure of documents to the public – in this case a well-known and solid non-governmental organisation representing civil society - cannot take place if the institutions are of a different opinion of a matter – even if one would think that differences of opinion are a rather natural part, even a precondition, of functioning democracy. The task of civil society is to influence the positions of the institutions, and it is difficult to do that without knowing what those positions are, and what they are based on.

But this is not the only argument used by the Council, and sadly so. In its reply, the Council illustrates an alarming scenario where disclosure of the requested advice could lead the Council to stop requesting written opinions from its Legal Service; something that would prejudice its 'ability, in general, to carry out its tasks as co-legislator'. It might be slightly difficult to see how public access to a particular piece of legal advice would have such a very general outcome, unless this argument is exactly of the kind of 'mere assertions [...] in no way substantiated by detailed arguments' and with 'no real risk that is reasonably foreseeable and not purely hypothetical' which the Court has repeatedly rejected.²⁷ But in the Council's view, public access would also undermine the capacity of the Legal Service to present and defend the Council's position in court proceedings. And this is not all: would the Legal Service need to consider the mere possibility that its internal legal advice in 'such a delicate area [as public access to documents] might be released to the public', then this could 'prejudice the

²³ For a discussion, see Päivi Leino and Janne Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?', 9 *European Constitutional Law Review (EuConst)* 3/2013 451–479.

²⁴ See Annex II to the Council Rules of Procedure, Article 11(4)(b), which specifically excludes 'Legal Service opinions and contributions'.

²⁵ For the Council's reply to ClientEarth, see <http://register.consilium.europa.eu/pdf/en/10/st12/st12068.en10.pdf>

²⁶ Para 8 of the reply.

²⁷ See *Turco* para 63.

possibility of the Legal Service to express its views in a free and independent manner²⁸. One would think that in a regime building on 'widest possible access' such a possibility would need to be considered anyway, especially since the Court's Grand Chamber expressly rejected these arguments in *Turco*.²⁹ It is unclear what the Council believes that it will gain in terms of public credibility by repeating such arguments, especially when the Treaty framework has since then further developed to emphasise the public nature of legislative matters.

It is generally believed that the General Secretariat of the Council 'does not have strong interests in substantive policies' but instead, aims at 'workable' solutions.³⁰ Access to documents questions might, however, be different. The position of the Council Secretariat is particularly strong considering that it not only deals with the first round of applications and prepares draft replies to confirmatory ones,³¹ also chairs the Council preparatory body that handles the requests. This can partly be explained by how these matters seldom raise serious political interest in the Member States or at the level of the Council, and can thus be perceived as technical questions that can properly be allocated to the Secretariat. But believing that the solutions are politically innocent might not be a sustainable conclusion – in fact, these questions have close connections with the fundamentals of democratic governance. The political responsibility for these arguments is with the Council, but most Member States simply leave it to the Secretariat to run the show. Public scrutiny of these arguments would be of a particular importance especially since most of the negative decisions are never appealed.

The institutional interest of the Council's own legal service is nicely illustrated by the negotiations on the reform of Regulation No 1049/2001, and in particular the legal advice exception quoted above. The Commission 2008 proposal, which was given before the *Turco* ruling, did not include a proposal to reform the specific exception relating to legal advice.³² After the ruling, the Council identified this question as a matter requiring quick rectification, and proposed to introduce a new Article 4a(1), which received the support of a sufficient majority in the Council to be included in the mandate given to the Danish Presidency:

Access to legal advice relating to issues which are the subject of a decision-making process until the relevant act becomes definitive or regarding a question of law which has not been decided, in last instance, by the Court of Justice, shall be presumed to undermine the protection of legal advice. The applicant may demonstrate that there is an overriding public interest justifying the disclosure of the documents.³³

This was linked to a new paragraph 3 in the same Article, which constitutes a rather apparent and desperate attempt to fight back *Turco*: 'For the purpose of this article, the principles underlying this regulation do not in themselves constitute such an overriding public interest.'

²⁸ Paras 9-10 of the reply.

²⁹ See *Turco*, paras 61-67.

³⁰ See Derek Beach, 'The Facilitator of Efficient Negotiations in the Council: the Impact of the Council Secretariat', in Daniel Naurin and Helen Wallace (Eds.), *Unveiling the Council of the European Union. Games Governments Play in Brussels* (Palgrave Studies in European Politics 2010) 225.

³¹ For further details, see Annex II to the Council Rules of Procedure: Specific provisions regarding public access to Council documents.

³² See Proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents COM(2008) 229 final .

³³ The text is available on the Statewatch website. This consolidated version (Statewatch: 4.6.12) of the Council's proposed amendments to Regulation 1049/2001 is based on its document no: 9441/12 and has been up dated to include the revised Article 4a (agreed by COREPER) <http://www.statewatch.org/foi/observatory-access-reg-2008-2009.htm> .

Fortunately, this proposal gained no particular admiration in the European Parliament or the more transparency-minded Member States, and was one of the reasons for the negotiations to crash for the second time in June 2012. Commenting on the situation, Jean-Claude Piris, the former head of the Council Legal Service, told *EUobserver* that the transparency proponents were wrong, and that the demands concerning publicity of legal advice would only lead to such advice being given orally, which would amount to 'a loss for the good legal application of the EU treaties,' since written advice is drafted more carefully, translated into 23 EU languages and circulated to all levels of the hierarchy in EU capitals and in Brussels.³⁴ Disclosure of legal opinions would only result in confusion because they are non-binding and pertain to fast-changing texts. Outsiders would mistakenly see them as a legal judgment by a court or a tribunal. Piris concluded: 'There is no government in the world that does this [publishes internal legal opinions] [...] and I think it should be the same here.'³⁵ Despite being biased, the statement is also somewhat inaccurate. It is true that many national systems grant high protection to legal professional privilege especially in the context of litigation – but there are also Member States where no particular protection is granted to such documents, in particular as far as legislative matters are concerned.

It is also useful to consider how the *sui generis* nature of the EU legal order affects the demands concerning the transparency of its competence discussions. The starting point of the Laeken Declaration quoted above was that the matters generally covered by legal service opinions, such as division of competence between the Union and its Member States, and closely connected to this, the choice of applicable procedure have a direct connection with the legitimacy and acceptability of the Union. It is difficult to think of matters that would, as the general rule, merit greater publicity. As Ms Jätteenmäki MEP argued in her application for a Council Legal Service opinion on the draft energy efficiency directive, questions of legal basis and the scope of the Union competence are matters of public concern, and knowledge of them is necessary to enable citizens to participate in the decision-making process.³⁶ But the Council was not convinced by her arguments either and found that access to the substance of the advice could be denied *inter alia* since the decision-making process was on-going and relevant legal basis was new, not yet well defined, and a question not yet addressed by the Court; there seemed to a 'strong likelihood' that the Directive would be challenged before the Courts; and because the issues examined were of a general horizontal nature. In the Council's view, Article 10(3) TEU on the citizens' right to participate in the Union's democratic life and the main principle of decisions to be taken 'as openly as possible' 'cannot be given a meaning which would *de facto* modify the provisions of Regulation 1049/2001'.³⁷ The Council also made the point of repeating the familiar arguments from *Turco*, moved then to reject Ms Jätteenmäki's point concerning the public nature of certain fundamental legal facts, since they 'would apply to a significant proportion of legal advice, and which would empty of its *effet utile* the exception' [sic, relating to the protection of legal advice].³⁸ The Council seems to forget that if a public access regime builds on the idea of 'widest possible access' then the exceptions to this principle should only apply in exceptional cases. A particular concern involving legal advice therefore relates to how the Council interprets the *Turco* ruling. This impression one gets from browsing the recent practice of the Council is that legal advice given in the

³⁴ "Talks collapse on access to EU documents", *EU observer*, published on 13.06.12 @ 16:17. Available at <http://euobserver.com/institutional/116609>.

³⁵ *Ibid.*

³⁶ See Confirmatory application No 05/c/01/12.

³⁷ Para 13 of the Council's reply.

³⁸ Para 11 of the Council's reply.

context of legislative procedures tends to be as a rule ‘particularly sensitive and particularly wide in scope’ justifying a denial to grant access to anything of interest.³⁹ This was hardly the intention.

On-going legislative procedures and Member State positions

In its reply to Ms Jäätteenmäki MEP quoted above, the Council made a specific reference to Article 16(8) TEU and Article 15(2) TEU ‘stipulating the publicity of the Council’s meeting when deliberating and voting on draft legislative act’ and pointed out that ‘the requested legal opinion has not been submitted to the Council for the preparation of the latter’s deliberation or voting on the draft Directive’.⁴⁰ This raises the rather fundamental question of the relevance of the stage of decision-making for the application of legislative transparency. In arguing this, the Council would also seem to engage in a project of depriving a principle of its *effet utile*; If the publicity of legislative documents was indeed limited to only those documents that are issued a couple of days before a formal Council meeting where a legislative file is to be deliberated or approved, perhaps without any discussion, then access to documents relating to a legislative file would too often be limited to one document placed on the Council agenda, generated at the point when the file is to be closed and the process is over, and exclude all the documents produced during the time when the majority of questions are settled at lower levels and between the institutions.

The relevant provision in Regulation No 1049/2001 in this regard is the ‘space to think’ exception in Article 4(3) quoted above, relating to situations where a decision has not yet been taken by the institution. In the context of post-Lisbon discussions, the Parliament has repeatedly voiced the argument that the said exception in Article 4(3) is outdated as far as legislative matters are concerned,⁴¹ and suggested both that no exception would ever apply to ‘documents transmitted within the framework of procedures leading to a legislative act or a non-legislative act of general application’ but also the deletion of Article 4(3) altogether.⁴² This is a far-reaching proposal that might benefit from further reflection considering that the exception has been used for varying purposes. But the EP also tends to be rather liberal when it comes to information held by the other institutions, and far more restrictive when a matter concerns itself and something that it itself perceives as ‘internal’.⁴³ But there are also certain difficulties in signing up to the Council’s logic too, also visible in its correspondence with ClientEarth. In the reply quoted above,⁴⁴ the Council made a particular point of referring to the

³⁹ Recent practice includes the replies given to two applications by Samuli Miettinen, a researcher at the University of Helsinki, concerning legal advice relating to pending legislative procedures, which the Council refused based on a reasoning very similar to the one used in *Turco*: a risk to the legal service’s ability to conduct its work; and that the requested documents were both particularly sensitive and wide in scope. The applicant argued that the Council’s theory of harm is purely hypothetical and that the public interest test under Article 4(3) had been misapplied. Case T-395/13 *Miettinen v Council* is still pending before the General Court while Case T-303/13 *Miettinen v Council* was closed with an Order of the General Court on 14 January 2014.

⁴⁰ *Ibid.* The only consolation seems to be that the reply to Ms Jäätteenmäki did not receive the unanimous support of the Council, but six Member States voted against it, that is, the Danish, Estonian, Dutch, Slovenian, Finnish and Swedish delegations who stated that they could not concur with the interpretation of *Turco* or with the arguments concerning the effect of the Lisbon Treaty on the importance of openness in the legislative process. Ms Jäätteenmäki never appealed the decision.

⁴¹ The ‘Hautala / Sargentini report’, Public access to documents 2009-2010 European Parliament resolution of 14 September 2011 on public access to documents (Rule 104(7)) for the years 2009-2010 (2010/2294(INI)) P7_TA(2011)0378.

⁴² Public access to European Parliament, Council and Commission documents (recast), P6_TA(2009)0114 A6-0077/2009 .

⁴³ See e.g. T-82/09 *Dennekamp v Parliament* and Case T-115/13 *Dennekamp v Parliament*, which both concern access to the names of the Members of the European Parliament to the additional pension scheme; and Case T-471/08. *Ciarán Toland v European Parliament*, which concerns an audit report on the parliamentary assistance allowance.

⁴⁴ For the Council’s reply to ClientEarth, see <http://register.consilium.europa.eu/pdf/en/10/st12/st12068.en10.pdf> .

early stage of the legislative process, namely first reading, during which the Council felt that the 'disclosure of the opinion of the Legal Service would adversely affect the efficiency of negotiations'.⁴⁵ Even this argument signifies a rather odd understanding of the meaning of participatory democracy as it seems to suggest that public access can safely be granted only when the legislative process is over or nearly over. A major part of legislative files are closed at first reading. For example in 2009-2013, 83 % of legislative files were closed at first reading, 8 % during early second, 7 % at second, and only 3 % at third.⁴⁶ Still, the Council seems to believe that satisfactory points for democratic style can be secured by granting access after the process is closed or reaching closure. While there might still be a historical interest in gaining at that point, it is one with a clearly lesser bearing on democratic rights. There is little doubt what the Court would think of many of the arguments raised by the Council in relation to applicants, would the latter be, as a rule, blessed with the means to bring their cases before it.

A related hot issue involving the interpretation of Article 4(3) came to fore when Access Info Europe, a European NGO specialising in freedom of information, requested access to certain information contained in a note of 26 November 2008 from the Secretariat General of the Council to the Working Party on Information, set up by the Council and consisting of Member States' civil servants, again concerning the reform of Regulation No 1049/2001. The requested document included footnotes indicating the positions of individual Member States. The Council practice has been that when Member States participate in the work of the Council and its committees and bodies, they form a part of the latter, and thus the positions expressed and recorded in this context form a part of Council documents.⁴⁷ The general Council practice has been to grant access to such documents, but deleting the relevant Member State symbols first⁴⁸ as 'the only legally defensible option' that guarantees 'a right balance between transparency and the protection of the Council's deliberations'.⁴⁹ This practice has gained criticism from the European Parliament:

there are several worrying Council and Commission practices in place which de facto hide the real content of Member States' positions in the Council/Commission preparatory bodies such as: - the growing number of working documents which are not timely cited in the institution's register (for example, the Council Meeting Documents (MD or SD) which are diffused only afterwards); - the fact of systematically hiding the names of Member States in the outcome of proceedings (when available) that makes it impossible to understand what kind of majority/minority is taking shape in the Council/Commission committees.⁵⁰

The question has natural linkages with the Member States' national arrangements as well, and the way in which their positions are publicly available in national arena.

Access Info won its case against the Council in the General Court,⁵¹ but the ruling was appealed by the Council to the CJEU, which has recently rejected the appeal. The central question was whether access to Member State positions distracts the effectiveness of decision-making and if yes, which one should take priority, effectiveness or openness in decision-making. In the Council's view, the General Court's

⁴⁵ Para 11 of the Council reply.

⁴⁶ The figures can be found on the Parliament's website http://www.europarl.europa.eu/code/about/statistics_en.htm.

⁴⁷ Public access to documents - Issues of principle, Council document number 6203/02, Brussels, 1 March 2002.

⁴⁸ Item 3b of the agenda: Requests for access to documents concerning draft legislative acts, Council document 10425/03, Brussels, 13 June 2003.

⁴⁹ Public access to documents - Issues of principle, Council document number 6203/02, Brussels, 1 March 2002.

⁵⁰ Working document (1) on the Annual Report on public access to documents (Rule 104(7) of the Rules of Procedure) for 2009-2010 Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Heidi Hautala, PE456.867v01-00.

⁵¹ Case T-233/09 *Access Info Europe v. the Council*.

reading had attached ‘undue and excessive weight to the transparency of the decision-making process, without taking any account of the needs associated with the effectiveness of that process’, and disregarded the balanced approach laid down both in primary law and secondary law between the two objectives. The Council, supported by the Czech Republic, Greece and Spain, argued that ‘its legislative process is very fluid and requires a high level of flexibility on the part of Member States so that they can modify their initial position, thus maximising the chances of reaching an agreement’. This presumes ensuring a ‘negotiating space’ enabling Member States maximum room for manoeuvre in the discussions and thereby preserving the effectiveness of the legislative process: ‘That room for manoeuvre would be reduced if the identity of the delegations were disclosed too early in the procedure, in that it would have the effect of triggering pressure from public opinion’ (para 24). In the Council’s view, identifying the delegations was not necessary for ensuring a democratic debate.

The CJEU rejected this and confirmed the General Court’s finding that ‘Regulation No 1049/2001 aims to ensure public access to the entire content of Council documents’, including Member State positions. Full access can be limited only if there is a genuine risk that the protected interests might be undermined. The Council argued that the requested document was of a particularly sensitive nature à la *Turco*. In its view, the General Court had wrongly construed that Article 4(3) was applicable only where a fundamental interest of the European Union or of the Members States is involved. The CJEU rejected both of these arguments:

there is nothing in the wording of that provision or in other parts of the regulation to support that interpretation; nor is it borne out by *Sweden and Turco v Council*. Moreover, that interpretation, together with the high standard of proof required by the General Court to establish that level of harm, makes it almost impossible to rely on that provision.⁵²

The Council also referred to the ‘impasse over the legislative dossier’, which in its view was at least partially attributable to the unauthorised disclosure of Member State positions: ‘In particular, the delegations from those States which wanted to propose amendments that could be perceived by the public as restricting the right of public access were unwilling to do so’ (para 50). As a result, the level of detail in the reports for the legislative file was lowered: delegations were no longer identified but, instead, referred to as ‘a certain number of delegations’ and ‘other delegations’ (para 50). In other words, demands for transparency and participation from the civil society in the discussions concerning the EU’s future transparency regime had, in fact, resulted in less transparency. But the CJEU remained unconvinced by the argument and argued that the Council had not demonstrated the accuracy of this premiss. The General Court’s conclusion had been correctly

based, rather, on the finding that the various proposals for amendment or re-drafting made by the four Member State delegations which are described in the requested document are part of the normal legislative process, from which it follows that the requested documents could not be regarded as sensitive – not solely by reference to the criterion concerning the involvement of a fundamental interest of the European Union or of the Member States, but by reference to any criterion whatsoever.⁵³

Following the ruling, access was granted to this particular document in full. But the decision is likely to affect the future Council policy of recording positions. While existing documents can no longer be manipulated or redrafted at the stage when a request for public access is received, the option of not creating documents that can cause problems in the future always exists. The Council’s response has not been impressive, and claims for more transparency are usually responded with how ‘more’ might in fact result in ‘less’:

⁵² Para 40.

⁵³ Para 63.

However, recent increased pressure for full release of all documentation relating to ongoing negotiations in the legislative area, could eventually have an adverse effect on the availability of information and lead to less and not more transparency in the decision-making process of the EU institutions. Academic researchers have already been confronted with the phenomenon of extremely succinct or non-existing records when consulting national archives. It is very much to be hoped that academics and the public at large will not experience similar problems, when consulting the Historical Archives of the European Union in the future.⁵⁴

If one looks at figures it is clear that a great number of documents become public every year, at the institutions' own initiative. In this respect, there has been enormous progress since 2001. The Council's work is to a very large extent to the public, at least if mere figures are to be trusted. In 2012 75,8% of the 1.475.392 documents recorded in the Council's register were available to the public.⁵⁵ But as always, the key question might not be the quantity but the quality of public information, and the time when it becomes publicly available. In this regard, Annex II to the Council Rules of Procedure would require some serious updating to be in line with the most recent jurisprudence, since it currently excludes both legal service contributions and Member State positions from direct access. Access to legislative documents continues to be hampered by blind spots and biases, which have effects on the way democracy can function in the EU. The relevance of these considerations for the EU's persisting democratic deficit has so far not been sufficiently addressed.

The Commission has tended to defend the Council arguments in this area. As regards documents created during the legislative procedure, the Commission services might be hampered to a slightly lesser extent, even if they are in possession of various documents produced during the legislative process by being a participant in the relevant debates. However, some discussion has so far taken place concerning access to Commission documents during the preparatory stages of the legislative procedure. There is a case brought by the *Nickel Institute* concerning a Commission refusal to grant access to certain 'internal documents, in particular to opinions of the Commission's Legal Service, drawn up in the context of two consecutive procedures which resulted in the classification of, inter alia, certain nickel carbonate compounds in Annex I to Council Directive 67/548/EEC'.⁵⁶ Similarly, regarding the early stages of legislative procedures, the appeal brought by Carl Schlyter MEP concerned an application for the Commission opinion and observations issued in response to notification 2011/673/f relating to the content and submission conditions of annual declarations of nanoparticle substances, made by the French Republic under Directive 98/34/EC.⁵⁷ While there might therefore be some general acknowledgement of the need to treat legislative documents more generously than other documents, many matters remain open to interpretation. For the Commission, the relevant question illustrated by these two cases seems to relate to what actually counts as a legislative procedure and where it begins – and where it ends. Transparency in the context of infringement proceedings, the Commission tool for monitoring Member States' compliance with EU legislation, has also recently been subject to case law, and the CJEU has accepted that they merit less openness,⁵⁸ even if infringement proceedings constitute a continuation of the legislative procedure, and many of the key considerations could be exactly the same, even if the Commission wishes to see

⁵⁴ Jakob Thompsen, 'Public Access to Documents. The Council's Transparency Policy and Practice from Maastricht to Lisbon', paper presented at the Conference on Transparency and Access to the Records and Archives of the EU Institutions, Florence 25 January 2013, 13. In file with author.

⁵⁵ *Ibid.*

⁵⁶ Case T-180/10 *Nickel Institute v Commission*.

⁵⁷ Case T-402/12 *Schlyter v Commission*.

⁵⁸ See joined cases C-514/11 P and C-605/11 P *LPN and Finland v. the Commission*, ruling of 14 November 2013.

the monitoring the application of EU law as separate from drafting it.⁵⁹ In addition, the Commission has tended to defend its 'space to think':

When a matter is being considered for decision, there is often a need to keep internal deliberations and discussions confidential in order to allow for a free and frank discussion, which is essential for sound decision-making. Premature disclosure of such internal discussions could affect the objectivity of decision making. This requirement applies in particular to the legal opinions.⁶⁰

Another interesting case study would be constituted by the cases in which the Commission operates under delegated powers.⁶¹ Under the standard rules of procedures, drafted to form a basis for all committee work, all committee discussions are confidential, and so subsequently the documents submitted to members of the committee, experts and representatives of third parties shall be confidential. This is difficult to combine with the preamble of Regulation 1049/2001, which states that

Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.⁶²

The European Parliament tends to compare in favourable terms against the two culprits, the Council and the Commission, since during most of the major stages of the legislative process documents are made public automatically. Some exceptions to this rule exist, including documents created in shadow meetings and in the so-called trilogues, as noted in the 2011 Hautala Report relating to the implementation of Regulation No 1049/2001:

Emphasises that trialogues [sic] and the conciliation procedures (as explicitly listed in Article 294 TFEU) are a substantial phase of the legislative procedure, and not a separate 'space to think'; believes especially that the current procedures as regards trilogues prior to a possible first reading agreement fail to ensure a satisfactory level of legislative transparency and access to documents both internally, to the Parliament, and externally in relation to citizens and public opinion; requests, therefore, that documents created in their framework, such as agendas, summaries of outcomes and the 'four column' documents drawn up for facilitating negotiations, should not in principle be treated differently from other legislative documents, and that they should be made public as regards trialogues [sic] prior to a possible first reading agreement; consequently instructs its competent bodies to standardise this procedure, and calls on other institutions to do the same;⁶³

These questions have been on the agenda during the reform of Regulation No 1049/2001, but since it currently seems unlikely that the reform process would be closed during any time soon their destiny remains unclear. However, these are matters that could be addressed through practical means.

It seems that all three key institutions involved in the legislative process have at least some difficulties with living up to the standards, and that it is mainly up to the Court to safeguard democratic rights; a task it has so far been willing to do, and set up higher standards that the legislature itself would have adopted. On the whole, however, it would seem that legislative transparency is nothing but secured

⁵⁹ Marc Maes, 'Transparency and access to documents: practice in the European Commission', paper presented at the Conference on Transparency and Access to the Records and Archives of the EU Institutions, Florence 25 January 2013, 7. In file with author.

⁶⁰ *Ibid.*, 8.

⁶¹ See the Standard rules of procedures for committees. Rules of Procedure for the [name of the Committee] committee, published in OJ 2011 C 206/6.

⁶² Preamble, para 6.

⁶³ The 'Hautala / Sargentini report', Public access to documents 2009-2010 European Parliament resolution of 14 September 2011 on public access to documents (Rule 104(7)) for the years 2009-2010 (2010/2294(INI)) P7_TA(2011)0378, para 29.

post-Treaty of Lisbon and remains just as much contested as before. Despite the opposite claims, things do not seem greatly improved by the 'new' Treaty, and in fact, even the opposite might be the case. There is of course an obvious difficulty in defining a regime for legislative documents that should be even more generous than the Union's general principle of 'widest possible access'. At the same time, emphasising the special character of legislative matters also creates tempting opportunities for making opposite claims about matters that fall outside this strictly defined category, and that the right to public access might be less fundamental when exercised in the administrative context than in the legislative one. As Curtin has recently demonstrated, this comprehension is based on an imperfect understanding of the purpose of public access legislation in the first place, which is designed to ensure that administrations open up. Legislative processes are usually not even addressed by public access legislation. While it is certainly fundamental that secret legislative processes open up, this is usually done outside the scope of public access legislation altogether.⁶⁴ Against this background, it is necessary to reflect whether it is useful that the recent jurisprudence stresses so clearly the specific requirements of openness that apply to the legislative process.

International agreements

How should one relate to international agreements, keeping in mind that their effects in the EU legal order are comparable to those of legislative acts? There are a number of significant questions that under the Lisbon rules fall outside the scope of legislative matters, and subsequently come under another transparency regime in particular as far as the Council is concerned. Under Article 8(1) of the Council Rules of Procedure,⁶⁵ 'internal measures, administrative or budgetary acts, acts concerning interinstitutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions)' are defined as non-legislative even when 'legally binding in or for the Member States', and thus constitute an exception to open Council sessions. So far, several cases on access to documents relating to international agreements have been addressed by the General Court post-Lisbon. The relevant exception in Article 4(1)(a) of the Regulation establishes: 'The institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] international relations'. Most notably, unlike the exceptions under Article 4(2) of the regulation, the exceptions under Article 4(1) include no 'public interest' test requiring the institution to balance the possible harm with the public interest in disclosure and consider whether access could still be granted despite some harm to the protected interests.

Two of the recent cases illustrate the difference between two forms of access: public and interinstitutional. Public access under Regulation No 1049/2001 is granted on a universal basis: if access to a document is granted based on an individual application, it is simultaneously made available to the public at large and comes without conditions concerning the use of information contained. Interinstitutional access belongs in principle under a different regime, can be granted for a particular purpose and be linked to confidentiality requirements. This is a matter that has been particularly topical post-Lisbon⁶⁶ noting the new powers of the European Parliament in the conclusion of international agreements under Article 218 TFEU and the fact that it is usually not directly involved in the negotiations, and thus has access to considerably less information than the Commission and the Council. At the same time, the EP has traditionally not been willing or able to undertake serious

⁶⁴ Deirdre Curtin, 'Judging EU Secrecy', *Cahiers de Droit Européen*, 2012 (2) 459 – 490 at 481.

⁶⁵ Council Decision of 1 December 2009 adopting the Council's Rules of Procedure, OJ L 325/35. See in particular, Article 8 "Other cases of Council deliberations open to the public and public debates".

⁶⁶ For a discussion, see also Deirdre Curtin, 'Official secrets and the negotiation of international agreements: is the EU executive unbound?' 50(2) *CML Rev* (2013). 423-457.

confidentiality obligations, and its legal avenues for gaining access to information have subsequently been limited.

Two of the recent cases are appeals brought by Sophie In't Veld MEP against the Council under Regulation No 1049/2001 for public access to documents relating to pending negotiations on agreements where the flow of information to the EP, its Committees and their rapporteurs had been less than satisfactory and it was felt that this lack of information had prevented the EP from exercising its powers of consent under Article 218 TFEU. The first case concerned a Council Legal Service opinion on the proposed legal basis of the draft Council decision to authorise the Commission to launch negotiations for an agreement to make available to the United States Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing (the so-called SWIFT agreement).⁶⁷ In't Veld received partial access, with the Council invoking the international relations exception quoted above, and the exception relating to court proceedings and legal advice, since in the view of the latter, first, disclosure 'would reveal to the public information relating to certain provisions in the envisaged Agreement ... and, consequently, would negatively impact on the [European Union]'s negotiating position and would also damage the climate of confidence in the on-going negotiations''.

The requested document related to the internal decision-making between the EU institutions: it contained legal advice concerning the choice of legal basis and EU competence. In the Council's view this 'sensitive issue, which has an impact on the powers of the European Parliament in the conclusion of the Agreement, has been [the] subject of divergent positions between the institutions'. In those circumstances, '[d]ivulcation of the contents of the requested document would undermine the protection of legal advice, since it would make known to the public an internal opinion of the Legal Service, intended only for the members of the Council within the context of the Council's preliminary discussions on the envisaged Agreement'. Furthermore, the Council 'concluded that the protection of its internal legal advice relating to a draft international Agreement ... outweighs the public interest in disclosure'.⁶⁸ The General Court's reaction to the Council's arguments concerning the sensitivity of its legal advice was similar to the Courts' reaction to the arguments when presented in the legislative arena. The General Court established that

such a threat cannot be presumed from the existence of a legal debate as to the extent of the powers of the institutions with regard to the international activity of the European Union. Indeed, any confusion as to the nature of its powers, liable to weaken the European Union in defending its position in international negotiations, which may arise from the failure to indicate a legal basis, can only be made worse in the absence of a prior objective debate between the institutions concerned regarding the legal basis of the action envisaged (paras 52-53).

The Court stressed the importance of protecting 'those elements of the requested document which concern the specific content of the envisaged agreement or the negotiating directives, which could reveal the strategic objectives pursued by the European Union in the negotiations' but argued that that outside these parts, the Council had not demonstrated how, 'specifically and actually, wider access to that document would have undermined the public interest in the field of international relations' (para 58). Many of the Council's arguments were again familiar from *Turco*, and the Court rejected them again as 'not substantiated by any specific, detailed evidence which could establish the existence of a reasonably foreseeable and not purely hypothetical threat to the Council's interest in receiving frank, objective and comprehensive advice' (para 70). While the Court recognised the wide discretion given

⁶⁷ Case T-529/09, *Sophie in 't Veld v the Council* supported by the Commission (*In 't Veld I*).

⁶⁸ Paras 10 and 15 of the contested Council decision.

to the institutions in applying the international relations exception, as regards the legal advice exception,

the Council cannot reasonably rely on the general consideration that a threat to a protected public interest may be presumed in a sensitive area, in particular concerning legal advice given during the negotiation process for an international agreement. Nor may a specific and foreseeable threat to the interest in question be established by a mere fear of disclosing to EU citizens differences of opinion between the institutions regarding the legal basis for the international activity of the European Union and, thus, of creating doubts as to the lawfulness of that activity.⁶⁹

Like in *Turco* and *MyTravel*⁷⁰ earlier, the Court confirmed that the risk that the 'disclosure of legal advice relating to a decision-making process could give rise to doubts concerning the lawfulness of the adopted acts is not sufficient to constitute a threat to the protection of legal advice' was 'in principle, transposable to the field of the international activity of the European Union, because the decision-making process in that area is not exempt from the application of the principle of transparency' (para 76). Also the Council claim that its Legal Service would face difficulties defending a position on which it had issued a negative opinion in later court proceedings was of an argument that was of 'such a general nature', 'as the Court has observed on a number of occasions' that it could not be used as a legitimate excuse for denying access (para 78-79).

The Court acknowledged that the considerations relating to citizen participation and the legitimacy of administration are of a particular relevance where the Council is acting in its legislative capacity, and that when initiating and conducting negotiations in order to conclude an international agreement the Council was not doing so (para 89). However, the importance of transparency could not 'be ruled out in international affairs, especially where a decision authorising the opening of negotiations involves an international agreement which may have an impact on an area of the European Union's legislative activity' (para 89). The Court stressed that the envisaged agreement concerned the processing and exchange of information in the context of police cooperation, with potential effects on the protection of personal data, which is a fundamental right, and something that the Council was obliged to consider when establishing whether the general interest relating to greater transparency justified the full or wider disclosure of the requested document (para 92). The Council had failed to do so, which contributed to a failure to consider the public interest required for weighing the opposing interests (para 95).

As regards the stage of negotiations, the Court considered the effect of the on-going procedure for concluding the international agreement and established that this was not conclusive in ascertaining whether an overriding public interest justifying disclosure existed: 'Indeed, the public interest in the transparency of the decision-making process would become meaningless if, as the Commission proposes, it were to be taken into account only in those cases where the decision-making process has come to an end' (para 101). The Court acknowledged that the Council had established the risk of a threat to the public interest in the field of international relations concerning those elements which relate to the specific content of the envisaged agreement or the negotiating directives and that could reveal the strategic objectives pursued by the European Union in the negotiations (para 111). This finding only applied to a part of the redacted passages of the document. Even if the ruling seems rather balanced, the Council was not happy with the outcome and has appealed the case, which is currently pending.⁷¹ Advocate General Sharpston has recently delivered her Opinion in the case and suggests the Court should reject the Council's appeal, stressing that in her view it should not be determinative

⁶⁹ Paras 74-75.

⁷⁰ Case C-506/08 P *Sweden v MyTravel and Commission*.

⁷¹ Case C-350/12 P *Council v In 't Veld*.

whether an institution acts in a legislative, executive or administrative capacity. Instead, the key factor is the need to conduct a careful and objective assessment and provide a detailed and specific reasoning.⁷²

The second case brought by Ms in 't Veld concerned a Commission decision to refuse access to certain documents relating to the famous draft international Anti-Counterfeiting Trade Agreement (ACTA),⁷³ which the EP later refused to give its consent to. This appeal related more clearly to documents produced during the international stage of negotiations and not merely internal decision-making within the EU. Consequently, the General Court proved more responsive to the Commission concerns. Again, the General Court emphasised the 'particularly sensitive and essential nature of the interests' relating to international relations, which gives the decisions on access 'a complex and delicate nature which calls for the exercise of particular care' and presumes 'some discretion' (para 108). A particular characteristic of the case related to the agreement among the various negotiating partners that matters would remain confidential, and whether the Commission in fact had the right to consent to such a solution, keeping in mind the transparency obligations it has under the Treaties. The Court did not address this question specifically, and this is a pity: if the practice of signing up to confidentiality commitments is more wide-spread then it is certainly problematic if individual civil servants see it as their task to set aside the transparency obligations that flow from the EU Treaties. Instead of examining the practice, however, the Court seemed to approve many of the explanations provided by the Commission: that the confidentiality commitment had not been specifically invoked by the Commission, that its refusal had been legally based on Article 4(1)(a), and that the disclosure of EU positions in international negotiations could indeed damage the protection of the public interest as regards international relations. This could happen by indirectly disclosing the positions of other parties to the negotiations. Alternatively, EU positions are

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

The Court also held that the unilateral disclosure of positions by one may be likely to seriously undermine the mutual trust which is essential to the effectiveness of negotiations, the maintenance of which is a very delicate exercise in the context of international relations (para 126). Finally, since the international relations exception was mandatory and thus involved no public interest test, 'any argument based on an overriding public interest in disclosure must be rejected as ineffective' (para 131).

The third and final case involving an international agreement was brought by Professor Besselink concerning a draft Council Decision authorising the Commission to negotiate the EU Accession Agreement to the European Convention of Human Rights (ECHR),⁷⁴ a matter which – according to the applicant, and it is difficult to disagree – was of a constitutional nature and also supported by the freedom of expression provision in the Charter. The General Court declared these points inadmissible since they had, in its view, been presented in an 'extremely laconic and summary way' preventing the Court from exercising its power of review. Even if the argument concerning constitutional nature were

⁷² See the Opinion of Advocate General Sharpston, delivered on 13 February 2014.

⁷³ Case T-301/10, *Sophie in 't Veld v the Commission* (In 't Veld II).

⁷⁴ Case T-331/11, *Leonard Besselink v the Council*.

approved, the Court argued, this was irrelevant, since the real question addressed by the Council decision was not whether the Union will accede to the ECHR, but the applicable procedure and strategic objectives. As to its contents, therefore, the document fell under the international relations exception.

The Court found that the Council had interpreted the said exception too broadly. It could not be used to justify a refusal to hand out the negotiation directive, which concerned the protocols to which the EU was seeking to accede, especially since the matter was not subject to negotiations and the contents of the said directive had been communicated to the EU's negotiating partners. But the Court accepted that even if some parts of the other negotiating directives had been published, their precise content had not been previously disclosed, and could have been exploited by the EU's negotiating partners, thus establishing a risk to the EU's international relations. The Court did not discuss the fact that unlike in the ACTA case described above, the EU's negotiating partner, the Council of Europe, had in fact been exceptionally open and placed all its negotiating directives on the internet, which should have had some effect on the need to maintain a climate of confidence. But the Court did establish that those parts of the directives which merely referred to the principles that should govern the relevant negotiations, such as those contained in Article 6(2) TEU and Protocol 8, or the list of questions to be addressed in the negotiations which were not specifically answered should, according to the General Court, have been handed out. The Court left the identification of these parts to the Council itself. The case was – exceptionally – not appealed, and after reconsideration the Council decided in January 2013 that the applicant could have access to the document in its entirety.⁷⁵

As regards the recent case law on international agreements it is clear that all three rulings derive from the General Court and two appeals are pending, making it somewhat premature to attempt any very general conclusions. However, so far, the claims relating to the need to protect legal advice in this context have not proved successful. Both the Council and the Commission have seen the international relations exception as a wide one, following the rationale that secrecy makes better decisions, both in internal and external affairs.⁷⁶ The Court has shown sensitivity to these claims and acknowledged that a certain discretion in applying the exception exists, but also as a rule established that the institutions have implemented the provision too broadly, in particular in *In't Veld I* and *Besselink*. The ruling in *In't Veld II* differs somewhat in being extremely detailed, examining the requested documents and ruling on the parts that the Council should have handed out.⁷⁷ Reading the ruling makes one wonder whether it really is a task for the Court to do the institution's job on its behalf, or should it perhaps simply limit itself to examining whether it has been done correctly and establishing the core parameters like in *Besselink*. As regards the two *In't Veld* cases, the Court has properly treated them as public access requests – after all, they were made under the Regulation No 1049/2001 regime. And this is of course not the first time that MEPs realize their institutional ambitions by challenging Council and the Commission measures before the EU Courts under Regulation No 1049/2001.

⁷⁵ See Council document 5022/14.

⁷⁶ Deirdre Curtin, *supra* note 64 at 471.

⁷⁷ The Court annulled the Commission Decision of 4 May 2010, reference SG.E.3/HP/psi – Ares(2010)234950, in so far as it refuses to grant access to documents 21 and 25 of the list annexed to that decision and to the following redactions made on other documents of that list:

- document 45, page 2, under the heading 'Participants', second paragraph, last sentence;
- document 47, page 1, under 'Participants' second paragraph, last sentence;
- document 47, page 2, under '1. Digital Environment (including Internet)', second paragraph, last sentence;
- document 48, page 2, the paragraph under Section 4, end of sentence.

Finally, an important feature of this jurisprudence concerns the substance of all of the relevant agreements. They are fundamentally important international agreements that have implications for the life of individual citizens, which should have implications for the applicable transparency requirements. A key element in the recent jurisprudence is the General Court's recognition that even if international relations do not fall under legislative matters, transparency still has a function and its requirements must be taken into account. These cases have also demonstrated that international relations should not as a policy field be treated as a categorical exception, and that there are matters where – despite the fact that they formally fall under international relations – it should be possible to take into account the public interest relating to transparency, especially if possible harm is limited. The *Besselink* case is an excellent example of the latter point: it is difficult to see the harm to mutual trust or the environment of confidence when the Union's negotiating party (the Council of Europe) had already published all its own positions. Harm of disclosure is not an automatic consequence of the matter falling under international relations. But once harm is established, the way that the international relations exception is currently drafted, its formulation does not formally enable the consideration of public interest in openness, and the Court has interpreted this choice strictly. In the context of the reform process of the Regulation the EP has voiced the possibility of introducing the public interest test into all the exception, and the recent jurisprudence demonstrates that this might indeed be a good idea. Similar experiences also exist from the other Article 4(1) exceptions, in particular relating to the protection of privacy personal integrity.⁷⁸ However, in the Court jurisprudence also the 'overriding public interest' being referred to in the Regulation has in fact remained a ghost concept and largely undefined in Court jurisprudence:⁷⁹ it is difficult to identify a case where the Courts would have been convinced about the existence of such an interest, be it in relation to the environment⁸⁰ or the use of public funds, which would both appear as rather obvious candidates. Similarly, the Council has recently failed to see that there would be a public interest in information concerning the protection of the climate: the Council refused to see 'how access to the requested document would impact the policies in this field' and concluded that 'the applicant has not demonstrated that an overriding public interest in disclosure exists'.⁸¹ It would seem that the institutions do their utmost to conclude that the existence of an 'public interest' under Regulation No 1049/2001 is in fact never established.

Transparency and governance

The success of individual applications is of course greatly affected by institutional attitudes relating to access to documents requests. In practice, such requests seldom come in handy for the administration that is under an obligation to deal with them; without a recognition of the 'greater purpose' served by the obligation the task obviously seems burdensome and occasionally out of proportion,⁸² and the Commission and the Council have tended to argue that this administrative burden is a threat to the 'interests of good administration'.⁸³ During the last years the emphasis has been strongly on the need to guarantee efficiency as the overarching value of EU administration. This should, however, not be

⁷⁸ See e.g. T-82/09 *Dennekamp v Parliament*.

⁷⁹ For a discussion, see Dariusz Adamski, 'Approximating a Workable Compromise on Access to Official Documents: The 2011 Developments in the European Courts', 49 *CML Rev* (2012) 521-558.

⁸⁰ See joined cases C-514/11 P and C-605/11 P, *LPN and Finland v the Commission*, paras 91-93.

⁸¹ For the application, see <http://register.consilium.europa.eu/pdf/en/12/st13/st13306-re02.en12.pdf>

⁸² For a discussion, see Päivi Leino, 'Just a little sunshine in the rain: The 2010 case law of the European Court of Justice on access to documents', 48 *Common Market Law Review* (2011) 1215-1252.

⁸³ Päivi Leino, 'Efficiency, citizens and administrative culture. The politics of good administration in the EU', forthcoming in *European Public Law* (2014).

the only value guiding the institutions. The Preamble of Regulation 1049/2001 elegantly explains why open administration is so dreadfully important:

Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.⁸⁴

The idea behind this formulation is that by being transparent, EU institutions in fact help to buttress their own legitimacy and serve a democratic function - presuming that they refrain from silly things. But it would seem that many institutions have not really grasped this. A rather fundamental lack of understanding concerning the significance of transparency in democratic society has seldom been more evident than in the comments to EU Observer by the Commission spokesperson in June 2012, calling for a tightening up of EU freedom of information rules because corporate lawyers and NGOs abuse the system.⁸⁵ This was because most requests to see internal EU documents come from 'lawyers for big corporations' and 'nutty NGOs' instead of concerned EU citizens. Stressing the point,

Nutty NGOs say things like: 'Please send us details of every email, every phonecall or note ever written at any level on this subject from 2001 to 2006' ... When a desk officer writes a paper, they want to see it after he's written the first sentence before going on his coffee break.

The Commission often claims that transparency is being misused. It receives around 6000 applications per year, and 80% of applications are granted. For the Commission, such misuse is presented by how many of these applications are 'submitted by the academic world, law firms, lobbyists, NGO's or by persons or organisations with a specific interest in obtaining the documents in the context of litigation. The Regulation is thus mainly used by professionals of EU affairs rather than by citizens.'⁸⁶ However, among these groups there are many representatives of civil society. On the whole, an overwhelming majority of applications seem to come from citizens, NGOs, researchers and journalists,⁸⁷ demonstrating that public access is functioning exactly the way it should.

How easy or difficult transparency is to manage in practice is also affected by how the institutions organise themselves. The relevant question often is whether technical choices should affect transparency. The European Central Bank has recently claimed that access to documents does not apply in case the requested information is contained in a database – an argument that the General Court rightly rejected.⁸⁸ In the case of the *Nickel Institute* quoted above, the Commission argued that since its Legal Service had given its approval only by the IT system CIS-net, there was no document corresponding to Nickel Institute's request for access.⁸⁹ The Court never considered the validity of this suspicious claim.

⁸⁴ Regulation 1049/2001, preamble, para 2.

⁸⁵ Brussels hits out at 'nutty NGOs' and corporate sharks, EU observer 07.06.12 @ 09:27 <http://euobserver.com/institutional/116533>

⁸⁶ Marc Maes, 'Transparency and access to documents: practice in the European Commission', paper presented at the Conference on Transparency and Access to the Records and Archives of the EU Institutions, Florence 25 January 2013, 7. In file with author.

⁸⁷ The exact figures can be found in the institutions' annual reports concerning access to documents applications.

⁸⁸ Case T-436/09, *Julien Dufour v the ECB*.

⁸⁹ Case T-180/10 *Nickel Institute v Commission*.

Legal Service opinions were also at stake when the WWF – another well-known non-governmental organisation - attempted to have a public dialogue with the Council⁹⁰ concerning the practice of the latter to adopt objectives for global climate change talks based on consensus, even if the Treaties establish qualified majority voting as the applicable voting rule in the relevant policy areas; a choice of decision-making procedure that has the practical effect of watering down some of these EU objectives. In order to highlight the practice, the WWF requested ‘access to a document or documents describing the basis on which the Council adopts conclusions’. The Council initially replied that it had not been able to identify such documents. Following this initial refusal, the Council Secretariat then contacted the applicant to inform him that there indeed was a Legal Service opinion on this specific question, one to which only very limited partial access had been previously granted. After this communication, the Council, however, adopted a reply arguing that ‘[a]fter a thorough enquiry, the Council could not identify any specific document or documents describing the basis on which the Council adopts conclusions’⁹¹ – a reply that against the Secretariat’s direct communication with the applicant did little to enhance the Council’s public credibility. Neither did the fact that the Council replied to a more or less identical written question by a number of MEPs in a much more eloquent manner.⁹² The WWF then naturally applied for the Legal Service opinion identified by the Council Secretariat, but only gained access to the introductory paragraph of it. The Council found that since the legal advice contained in the requested document had not been given in the context of any specific decision-making process, the principle of wider access to legislative documents did not apply⁹³:

The requested document contains legal advice. It examines in an abstract way the applicable procedure for the adoption of Council conclusions, based on different scenarios. Consequently, and as underlined in the initial reply, the legal advice is of a very general nature and its scope is exceptionally broad. Moreover both the subject-matter of conclusions and the issues relating to their adoption can be matters of great sensitivity.⁹⁴

The Council again made a point of referring to the *Turco* arguments of the Member States and the Council being deterred from requesting advice and that Council conclusions ‘could become subject to litigation before Union Courts’, in which case the relevant Legal Service opinion could, if it was publicly released, be invoked in such proceedings, and thus negatively affect the Council’s capacity to defend its position by providing the other party with a procedural advantage.⁹⁵ Somehow, hearing the same Council arguments over and over again do not make them more convincing.

Finally, the Council found it necessary to emphasise that

Regulation No 1049/2001 does not oblige the institution concerned to enter into argumentation on matters of substance or - as the applicant seems to imply - to undertake an expansive research in order to uncover any document which may be of relevance to that argumentation, when not

⁹⁰ http://www.wwf.eu/media_centre/?206707/Council-cover-up-over-voting-methods

⁹¹ <http://register.consilium.europa.eu/pdf/en/12/st13/st13306-re02.en12.pdf>

⁹² See Parliamentary questions 13 September 2012 E-008085/2012. Question for written answer to the Council

(Rule 117) by Chris Davies (ALDE) , Gerben-Jan Gerbrandy (ALDE) , Jo Leinen (S&D) , Satu Hassi (Verts/ALE) , Bas Eickhout (Verts/ALE) and Linda McAvan (S&D). The Council replied: ‘1. Conclusions are usually the means by which the Council expresses its position when not exercising a power to act conferred by the Treaties. To the extent that they constitute political commitments falling outside the scope of the Treaties’ procedural rules, and are not legal acts provided for in the Treaties, they are adopted by consensus. 2. The basis on which the Council adopts any position in relation to the UN Framework Convention on Climate Change will necessarily depend on the nature and content of the position concerned.’ The reply is published in OJ C 308 E, 23/10/2013.

⁹³ Para 8 of the Council’s reply to the WWF.

⁹⁴ Para 10-11 of the Council’s reply.

⁹⁵ Para 13 of the Council’s reply.

covered by the wording of the initial request. For the same reason the Council will not address the arguments put forward under the heading of the confirmatory application entitled "Treaty requirements upon the Council".⁹⁶

It is also of interest that in relation to Ms Jäätteenmäki, MEP, quoted above, the Council found time to discuss the relevant provisions, but in relation to an NGO this did not seem too urgent. While Regulation No 1049/2001 might not explicitly require the institutions to engage in discussion, the Treaty in general, and Article 298 TFEU on good, open and efficient Union administration, and the Charter of Fundamental Rights providing a right of citizens to good administration, in fact, might encourage to think about the appropriateness of such a very impolite attitude. Regulation No 1049/2001 is a relatively rare piece of EU legislation in that it establishes a detailed administrative process for handling individual applications, including applicable deadlines and means of redress. Whether similar procedural guarantees would be needed in other procedures as well continues to be a source of debate.⁹⁷ While the Commission⁹⁸ at least remains unconvinced about the need to improve the quality of administration in the Union institutions through the adoption of a Regulation on good administration by the Union institutions, then the Council has done its best, in the *WWF* case to name just one example, to demonstrate that it has no clear vision of how to serve the citizens and be service-minded. What is also of concern is the idea of the Council that very often public access can be usefully realised through granting access to the title of a document and one or two introductory paragraphs, which state nothing of interest for anyone. In the Council records granting partial access has a more attractive appearance than total refusal, even if nothing of substance would have been handed out. This is another suspicious and widely spread practice.

Another worrying and evolving practice with little connection to good administration relates to the way in which the Commission and the Council refuse applications, but hand out the documents at the point in time when they learn that their negative decision has been appealed. This is of course an efficient way of saving time in the first round by not examining documents properly, but also a clever institutional strategy for cutting one's losses and avoiding potential negative rulings which might prove horizontally applicable and difficult to implement. There are many examples of the Commission doing exactly this, and the *Nickel Institute* case quoted above belongs to this category: during the Court proceedings the Commission granted full access to the requested documents and then asked the General Court to rule that there was no longer any need to adjudicate on the action and that the Nickel Institute were ordered to pay the costs relating to the action. The latter gave its agreement to closing the case but requested the Commission to pay the costs. The Court agreed that the dispute was now devoid of purpose, noting that the applicant had agreed with the decision,⁹⁹ but ordered the Commission to bear its own costs and cover half of the costs of the Nickel Institute.¹⁰⁰ Similarly in the first *Miettinen* case quoted above,¹⁰¹ the Council suddenly changed its position:

⁹⁶ <http://register.consilium.europa.eu/pdf/en/12/st14/st14526-re01.en12.pdf>. It is also of interest that in relation to Ms Jäätteenmäki, MEP, quoted above, the Council found time to discuss the relevant provisions, but in relation to an NGO this did not seem too urgent.

⁹⁷ Päivi Leino, *supra* note 83.

⁹⁸ See the reply by Mr Barroso, President of the Commission, to a written question by Ms Jäätteenmäki, MEP; Parliamentary questions 17 January 2012, E-011125/2011. For a discussion, see Päivi Leino-Sandberg, 'Enforcing citizens' right to good administration: time for action', available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/eav_lawofadminprocedure_/EAV_LawofAdmin_procedure_EN.pdf.

⁹⁹ Order of the General Court of 6 September 2012 in Case T-180/10 *Nickel Institute v Commission*.

¹⁰⁰ *Ibid.*

¹⁰¹ Case T-303/13 *Miettinen v Council*.

Following the action for annulment pursuant to Article 263 TFUE lodged before the General Court (case T-303/13) and notified to the Council on 12.6.2013 the Council has reconsidered this confirmatory application.[...] In the light of those subsequent factual circumstances which occurred following the adoption of the contested decision, the Council has therefore considered it appropriate to re-assess the request for access in full consideration of the principles underlying Regulation (EC) No 1049/2001 and the aim of ensuring the widest possible public access to documents.

The Council came to the conclusion that full public access could now be granted, and decided that the 'General Court will be accordingly informed of the disclosure of the requested document in its entirety'.¹⁰² There are at least two relevant considerations in this regard: first, noting that in the *Nickel Institute* the applicant agreed to a closing of the file, what would happen if the applicant objected to it, and second, the question of dividing the costs, which are actually caused by a more than potentially unlawful refusal in the first place. The General Court has recently given an order in the *Miettinen* case, finding that there is no longer a need to adjudicate on the action and ordering the Council to cover the costs.¹⁰³ Even if it is evident that the Courts approach these cases on an individual bases, it would be necessary to identify a framework for addressing this institutional policy in a wider context, as a part of an less than admirable administrative practice.

A similar lack of understanding relating to the function of transparency and service principle is also visible by the repeated practice of the Council and the Commission to appeal court rulings when they lose in first instance, most recently the *In 't Veld* case.¹⁰⁴ This practice seems especially unfair keeping in mind the litigation costs involved, and the fact that most of the applicants in these cases are citizens and civil society organisations exercising their democratic rights. Good and efficient administration is not about trying to secure one's power at any cost,¹⁰⁵ but also involves the element of being responsive to the wishes of the governed. Another example of something less than good, responsive administration is the *Bavarian Lager* saga¹⁰⁶ where the Commission spent 14 years arguing, against the advice of both the European Ombudsman and the European Data Supervisor, and even appealing the case to the CJEU, about access to five names in a meeting protocol with a company that had reasonably solid grounds for having access to them. Good, open and responsive administration is not something that requires considerably more time or resources, but a different attitude, that just might in the end save the institutions from further litigation, presuming that their decisions are soundly justified and also understandable from the applicants' point of view. From this perspective, it does not help that many of the refusals and the accompanying justifications by the institutions are so clearly below any standard that they simply do not make any sense. It would seem that the limits of 'widest possible openness' have been construed far too strictly in institutional politics. If the current Regulation is not

¹⁰² See Council document 13334/13, - Re-examination of confirmatory application made by Mr Samuli Miettinen (No 04/c/01/13).

¹⁰³ See the Order of the General Court of 14 January 2014 in Case T-303/13, *Miettinen v Council*.

¹⁰⁴ In Case T-529/09, *Sophie in 't Veld v the Council*, which concerned access to the opinion of the Council's Legal Service concerning a recommendation from the Commission to the Council to authorise the opening of negotiations between the European Union and the United States of America for an international agreement to make available to the United States Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing. For the Council appeal, see Case C-350/12 P *Council v In 't Veld*. See also the Council appeal in C-280/11 P *Council v Access Info Europe*.

¹⁰⁵ "Minding the Gap in European Administrative Law: On Lacunae, Fragmentation and the Prospect of a Brighter Future", A study ordered by the European Parliament Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affaires, April 2011, available at <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=36231>

¹⁰⁶ C-28/08 P, *Commission v Bavarian Lager*.

sufficiently detailed to limit institutional discretion and to live up to the Court jurisprudence, then there might be a reason to clarify the Regulation, in particularly since the matter involves the implementation of citizens' rights.

Conclusion

My final point concerns the role allocated to openness and transparency in the attempts to tackle Europe's economic crisis, which hit the EU soon after the entry into force of the new Treaty, and the relationship of these measures with the pro-transparency moves in the new Treaty framework.¹⁰⁷ In June 2012 the European Council adopted a report setting out 'four essential building blocks' for the future Economic and Monetary Union (EMU): an integrated financial framework, an integrated budgetary framework, an integrated economic policy framework and, finally, strengthened democratic legitimacy and accountability. The European Council invited its President to develop, together with three wise men including the President of the Commission, the President of the Eurogroup and the President of the ECB, a 'specific and time-bound road map for the achievement of a genuine Economic and Monetary Union'. The Final Report, published on 5 December 2012, has been discussed by the European Council,¹⁰⁸ which stressed that:

Throughout the process, the general objective remains to ensure democratic legitimacy and accountability at the level at which decisions are taken and implemented. Any new steps towards strengthening economic governance will need to be accompanied by further steps towards stronger legitimacy and accountability.¹⁰⁹

It is striking that while the European Council has repeatedly expressed its concern about the legitimacy problems of the EMU and its possible development, the tools proposed for tackling these problems are extremely modest, and build on strengthening the role of the European Parliament and the national parliaments in their respective spheres. At the same time, the Treaty of Lisbon would offer a number of solid tools that were specifically aimed at tackling the Union's well-known problems relating to democratic legitimacy, through improved openness and wider citizen participation in decision-making. None of these reforms are as much as mentioned in any of the high-level reports – written with practically no direct democratic participation – prepared for the European Council, or the Conclusions adopted by it.

In addition to the EP, which is usually presented as the primary source of democratic accountability in the EU in these debates, it would be useful to keep in mind that the current Treaty framework allocates a clearly democratic role to the Council and the European Council as well. Against this background, many aspects of decision-making especially in the European Council could be improved, in particular when taking into account its role as a quasi-legislative body that in practice dictates many of the outcomes more or less single-handedly without any prior public discussion. These questions remain completely unaddressed by the recent Reports.¹¹⁰ At the same time, the preparations of the European

¹⁰⁷ For a more thorough discussion, see Päivi Leino and Janne Salminen, *supra* note 23..

¹⁰⁸ Towards a Genuine Economic and Monetary Union. A report prepared by Herman Van Rompuy, President of the European Council in close collaboration with José Manuel Barroso, President of the European Commission; Jean-Claude Juncker, President of the Eurogroup and Mario Draghi, President of the European Central Bank, 5 December 2012. See also European Council conclusions on completing EMU adopted on 14 December 2012.

¹⁰⁹ See European Council conclusions on completing EMU adopted on 14 December 2012, para 14; European Council conclusions on completing EMU, adopted on 18 October 2012, para 15.

¹¹⁰ This does not mean that the words 'transparency' or 'openness' would not have been mentioned during the process: In October 2012 the European Council took the opportunity to stress that '[t]he process towards deeper economic and monetary union should build on the EU's institutional and legal framework and be characterised by openness and

Council where most decisions aiming at curing Europe's economic crisis have been taken are characterised by a lack of transparency where proposals are made too late; this sets clear limitations on national discussions,¹¹¹ as well, which is conditioned by the fear that the EU would – in particular in case national debates proved substantial and required amendments - not be capable of taking the necessary decisions in a timely manner. In today's Europe many voices speak against the EU institutions. Thinking how many of Europe's current problems, and the long shadows currently cast over the Union, are connected with a lack of transparency when making past decisions,¹¹² one would think that European decision-makers would now hurry to do what they can to improve openness. Still, even the more minor steps are still to be taken, such as the extension of the legal basis regulating the right of public access to cover documents held by the European Council in the Treaty of Lisbon; however, four years after the entry into force of the new Treaty, the extension is still to be made.¹¹³ This is to be regretted, since never before has the role of European Council been as important for EU-decision-making as it has been during the past four years, and consequently, never before has the importance of securing openness in its work been greater. This is a question that has received extremely limited attention in the Reports written for the European Council so far – and that should be easiest to address since it concerns the methods of working of the European Council itself.

These recent examples demonstrate how very intertwined fundamental rights are in institutional politics; how very little independent value a fundamental right has, and how much their meaning is attached to a particular context, and what kind of politics we are making.¹¹⁴ Currently, the politics of access to documents in the EU institutions might not be an example of good politics, and should be subject to critical and public examination. The evident reluctance to give effect to rights of public access seems difficult to understand especially in times when the Union is facing something of an existential crisis. The Treaty of Lisbon provides us with a number of solid tools to address these challenges. Would it not be time to put them to some use?

(Contd.)

transparency towards Member States which do not use the single currency and by respect for the integrity of the Single Market'. Openness and transparency are thus, it needs to be pointed out, not directed at decision-making in relation to citizens, but to countries that are currently not in the euro. European Council conclusions on completing EMU; Adopted on 18 October 2012, para 3. A similar reference can be found in the recent December European Council Conclusions, para 4.

¹¹¹ See Päivi Leino and Janne Salminen, *supra* note 23.

¹¹² For an example of such discussion, see Case T-590/10 *Gabi Thesing and Bloomberg Finance LP v the European Central Bank*, which concerned access to information concerning the Greek government deficit and debt.

¹¹³ Current Regulation No 1049/2001 only applies to the European Parliament, Council and the Commission. See, however, Proposal for a Regulation amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, Brussels, 21.3.2011, COM(2011) 137 final, 2008/0090 (COD).

¹¹⁴ For a more detailed discussion, see Päivi Leino, *Particularity as Universality. The Politics of Human Rights in the European Union*. The Erik Castrén Institute Research Reports 15/2005 (Hakapaino, Helsinki 2005).