



KATHOLIEKE UNIVERSITEIT LEUVEN

FACULTY OF LAW

Academic year 2013 - 2014

**THE TENSION BETWEEN FREEDOM OF INFORMATION  
AND THE SECURITY OF THE EUROPEAN UNION AND ITS  
ORGANS**

Supervisor: Prof. dr. Geert DE BAERE

Co-supervisor: Janek NOWAK

Master's thesis, submitted by

**Hendrik DENYS**, s0213851,

as part of the final examination for the

degree of MASTER IN DE RECHTEN



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## **ABSTRACT**

The right of access to documents constitutes a fundamental right of EU citizens. This right can however conflict with the EU's equally important task of serving the public interest as regards public security. This Master's thesis analyses the EU's legislative framework and case law on this issue and their implementation by the Union institutions, in order to investigate to what extent this tension has grown at EU level and what its implications are.

Questions are raised whether enough safeguards are at hand to ensure that citizens can exercise their right of access to documents. By making a comparison with the relevant legislation in some of the EU's Member States and the USA, it is investigated whether the EU can draw lessons out of it in this regard. Attention is paid to the pivotal role that rests with the Union courts in striking the balance between the right to freedom of information and the protection of public security. A suggestion is made on how such a balance is to be achieved and also other possible control mechanisms, by way of the European Parliament and Ombudsman are taken into account.

## ACKNOWLEDGEMENTS

With the submission of this Master's thesis, I am concluding my legal studies at the Katholieke Universiteit Leuven. I would like to acknowledge the Professors at this world-renowned institution who have introduced me to the fascinating world of Law and enthusiastically enhanced my interest in it over the past five years.

The Faculty of Law has given me the incredible opportunity of spending the first semester of my Master's studies on exchange at the University of Sydney Law School. This has been a life-changing experience that has made me gain maturity as a Law student and for which I will be forever grateful. In this respect, I would also like to thank the Professors in Sydney for providing feedback on the written works which I have produced during my semester on exchange, thus allowing me to perfect my English writing skills.

Given the interest in European Law that I have developed during my Bachelor's studies, I have decided to write my thesis within the area of European Institutional Law. I have found this to be an interesting and rewarding experience, which left me wanting for further specialization in International and European Law. Hence, I have applied for an LL.M. in the United States earlier in the academic year. I would like to seize the opportunity to thank all those who have supported and advised me during this application process, which has resulted in my admission to the LL.M. in International Legal Studies at New York University School of Law.

Many thanks go to Professor dr. Geert De Baere and Janek Nowak, who have guided me from the moment I embarked upon the challenging quest that was the writing of this Master's thesis. By following up on my work with great commitment and enthusiasm, they have encouraged me to carry on with my research ever vigorously. The insightful comments and suggestions which they have given after reading previous drafts have proven to be invaluable for the final result and were much appreciated.

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Hendrik Denys  
Leuven, 2 May 2014

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## LIST OF ABBREVIATIONS

### 1 EUROPEAN UNION

AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
CFI	Court of First Instance of the European Union
CJEU	Court of Justice of the European Union
Coreper	Committee of Permanent Representatives
CSDP	Common Security and Defence Policy
EC	European Community
ECJ	European Court of Justice
ECR	European Court Reports
ECSC	European Coal and Steel Community
EEAS	European External Action Service
EEC	European Economic Community
EGC	European General Court
EU	European Union
EUCI	European Union Classified Information
Euratom	European Atomic Energy Community
Europol	European Police Office
Eurojust	European Union's Judicial Cooperation Unit
OJ	Official Journal of the European Union
PJCC	Police and Judicial Cooperation in Criminal Matters
Regulation 1049/2001	Regulation European Parliament and Council (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, <i>OJ</i> L 145, 31.5.2001, 43.
SIS II	Second generation Schengen Information System
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

## 2 OTHER STATES AND ORGANISATIONS

BS	Belgisch Staatsblad (Belgium)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe)
ECtHR	European Court of Human Rights (Council of Europe)
FOIA	Freedom of Information Act (USA)
NATO	North Atlantic Treaty Organisation

## 3 JOURNALS

C.D.E.	Cahiers de droit européen
C.M.L.Rev.	Common Market Law Review
C.P.S.	Comparative Political Studies
C.A.J.	Crime and Justice
C.V.	Cultural Values
E.L.J.	European Law Journal
E.L.R.	European Law Review
J.E.I.	Journal of European Integration
J.O.P.	The Journal of Politics
UCLA L.Rev.	University of California, Los Angeles Law Review
Z.Vgl.Polit.Wiss.	Zeitschrift für vergleichende Politikwissenschaften

## 4 MISCELLANEOUS

Art.	Article
<i>Cfr.</i>	<i>Confer</i>
Ed(s).	Editor(s)
<i>E.g.</i>	<i>Exempli gratia</i>
<i>Etc.</i>	<i>Et cetera</i>
<i>Ibid.</i>	<i>Ibidem</i>
<i>I.a.</i>	<i>Inter alia</i>
<i>I.e.</i>	<i>Id est</i>
Para.	Paragraph

## INTRODUCTION

*"The only sure bulwark of continuing liberty is a government strong enough to protect the interests of its people, and a people strong enough and well informed enough to maintain its sovereign control over its government."*

U.S. President Franklin D. Roosevelt, 'fireside chat' radio address, 1938.

1. Freedom of information, in particular access to documents held by the institutions of the European Union, constitutes a fundamental right of every EU citizen. However, the public interest as regards public security requires that not all documents held by the EU institutions should be disseminated freely among citizens, given the highly sensitive nature of certain information. Therefore, the fundamental right of access to documents cannot be absolute and must be made subject to certain restrictions, for the sake of effectively protecting public security. On the other hand, attributing a very large scope to the exceptions on the right of access to documents poses the risk that this right may be undermined to a considerable extent. These considerations indicate that it is not imaginary for the right to freedom of information and the adequate protection of public security to conflict and the fundamental importance of both principles, as described in the above quote, dictates that a *modus vivendi* between the two is reached. Therefore, the thread of this Master's thesis will be formed by the following research question: What forms a good balance between transparency in the EU's activities and the protection of public security of the EU and its organs and how can this balance be achieved?

2. To obtain a satisfactory answer to this research question, a response to several subquestions related to it will be sought first. It is necessary to investigate what the principle of transparency entails and where its importance lies for the EU. The same goes for the need to protect public security at EU level and why it might justify the right of access to documents to be impinged upon. Secondly, it will be investigated how both principles can conflict, i.e. the tension between them will be clearly defined and the problems which it entails will be highlighted. Thirdly, the EU legal framework on transparency will be scrutinized, in order to determine whether it offers sufficient legal protection for the right of EU citizens of access to documents held by the EU institutions on the one hand and leaves enough tools to those

institutions for protecting public security on the other. In doing so, it will become clear to what proportion the tension between the two principles has grown at EU level. After this, we will have a look at the implementation of the relevant legislation and case law in the daily practices of the institutions. This is done in order to investigate how they deal with the tension between the two principles and to make an attempt at distinguishing which principle each of them favours. This will be followed by reflecting on whether this attitude is preferable, bearing the importance of both freedom of information and the protection of public security in mind.

**3.** Then, by making a comparison between the EU, its Member States and the USA, research will be conducted on how these States' legal frameworks deal with the difficult balance which has to be struck between freedom of information and the protection of public security. This is done in order to determine whether the EU can draw lessons from the laws of the Member States and the USA on this issue, so as to arrive at the crux of the Master's thesis' analysis: assessing how the tension between freedom of information and the protection of public security in the EU could be abated and determining what would constitute a good and feasible balance between the two principles. When looking for the balance described in the central research question, all interests which are at stake have to be identified, examining which ones are to outweigh others and what would be the reasons for this. Apart from determining the contours of the balance, the question also arises who is to assess whether the balance has been struck correctly and which correction mechanisms should apply when an error has been made. Therefore, it is necessary to investigate whether the existing control mechanisms are suitable to safeguard the proposed balance and whether there is room for improvement.

**4.** In the aftermath of the numerous international surveillance scandals that have erupted recently, it is important to rethink the relationship between freedom of information and public security requirements. Transparency, including access to documents, is one of the democratic cornerstones on which the EU is founded and it is in the interest of all EU citizens to investigate to what extent their fundamental right to freedom of information can justifiably be trumped by security considerations, lest it become a purely hypothetical right. Apart from this concern, such an assessment is of course also relevant in the light of protecting public security, which just as well constitutes a legitimate interest of both the institutions and the citizens of the Union. It is also in the institutions' interest to assess the justifiable leeway which they have at their disposal in this respect, since this will clarify what their possibilities

are of classifying documents and thus refusing to disclose them, in order to protect public security. This will also cause the institutions to enjoy greater legitimacy in exercising their task of protection and enhance legal certainty.

## I TRANSPARENCY AND PUBLIC SECURITY

### 1 THE PRINCIPLE OF TRANSPARENCY

5. Democracy is a value which the European Union feels very strongly about.<sup>1</sup> The fact that it is mentioned in the Preamble to the TEU and Art. 2 of that Treaty makes it one of the essential principles on which the EU is based.<sup>2</sup> With the purpose of reinforcing the democratic legitimacy of the Union, the Treaty of Lisbon intended to make the legislative process more open.<sup>3</sup> For this reason, the principles of representative democracy and transparency were further developed.<sup>4</sup> In this respect, transparency and open government can be understood as characteristics of governance that enable citizens not only to access the information upon which the decision-making is based but also understand the content of that information, so as to gain better insight into the structure and functioning of the entities by which they are governed.<sup>5</sup> Indeed, “*transparency embraces not only ‘openness in government’ but also includes concepts such as simplicity and comprehensibility*”.<sup>6</sup>

6. The importance of the principle of transparency and the role which it has to play in a democratic society were already recognised by the classic utilitarians. Bentham, for instance, emphasized the virtues of governmental openness when he considered publicity to be the most fundamental of checks against abuse of power.<sup>7</sup> In his illustrious essay *On Liberty*, Mill

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<sup>1</sup> Art. 10(1) and 21 TEU; Preamble to the Charter of Fundamental Rights of the European Union, signed at Strasbourg, of 12 December 2007, *OJC* 326, 26.10.2012, 391.

<sup>2</sup> A. KACZOROWSKA, *European Union Law*, London, Routledge, 2011, 40.

<sup>3</sup> *Ibid.*, 183.

<sup>4</sup> *Ibid.* 185-186.

<sup>5</sup> H. VAN MEERTEN, *Een Europese Unie: efficiënt, transparant en democratisch – Beschouwingen over een Europese Unie met tenminste 27 lidstaten*, Rotterdam, Kluwer, 2004, 10-11.

<sup>6</sup> A. VERHOEVEN, “The Right to Information: A Fundamental Right?”, lecture at European Institute for Public Administration Conference: An Efficient, Transparent Government and the Rights of Citizens to Information, Maastricht, 2000, <http://aei.pitt.edu/573/1/Amaryllis.pdf>, 1.

<sup>7</sup> “*Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity ... Without publicity, all other checks are fruitless: in comparison to publicity, all other checks are of small account.*”: J. BENTHAM, “Bentham’s Draught for the Organization of Judicial Establishments, Compared with That of the National Assembly, with a Commentary on the Same” in J. BOWRING (ed.), *The*

emphasized the benefits which society can draw from citizens who are capable of freely exchanging their opinions<sup>8</sup> in public debate.<sup>9</sup> The importance of expressing an opinion lies in the content of that opinion itself and how it can contribute to a discussion. Transparency in the activities of the administration is a fundamental prerequisite for the ability of citizens to take a well-informed stand on the merits and flaws of their government, thereby providing them with the necessary tools for effective public scrutiny. In *Considerations on Representative Government*, Mill fiercely made a case for transparency and open discussion, by explicitly connecting them to participatory democracy.<sup>10</sup>

7. Also at EU level, incorporating the principle of transparency in the institution's activities ensures effective and meaningful participation of the European public in the decision-making process.<sup>11</sup> Openness “*guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system*”<sup>12</sup> and thus strengthens the democratic character of the Union.<sup>13</sup> Since lack of information and debate undermine the legitimacy of the decision-making process<sup>14</sup>, it is necessary for the EU to

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*Works of Jeremy Bentham*, Vol. 4, Edinburgh, William Tait, 1838, (305) 316-317. Bentham made these observations while reflecting on the judiciary, but they go just as well for the other branches of government.

<sup>8</sup> “[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”: J. MILL, *On Liberty* (1859), London, Walter Scott Publishing Co., 1900, 31.

<sup>9</sup> “[W]here the discussion of the greatest questions which can occupy humanity is considered to be closed, we cannot hope to find that generally high scale of mental activity which has made some periods of history so remarkable.”: *Ibid.*, 63.

<sup>10</sup> “As between one form of popular government and another, the advantage in this respect lies with that which most widely diffuses the exercise of public functions; ... by opening to all classes of private citizens, so far as is consistent with other equally important objects, the widest participation in the details of judicial and administrative business; as by ... the utmost possible publicity and liberty of discussion, whereby not merely a few individuals in succession, but the whole public, are made, to a certain extent, participants in the government, and sharers in the instruction and mental exercise derivable from it”: J. MILL, *Considerations on Representative Government*, London, Parker, Son and Bourn, West Strand, 1861, 109-110. Note that Mill was only in favour of popular participation “so far as is consistent with other equally important objects”, thereby recognizing that this principle cannot be absolute.

<sup>11</sup> Recital (1-3) in Preamble to Regulation 1049/2001; J. STIGLITZ, “On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life”, Oxford Amnesty Lecture, 1991, <http://www.internationalbudget.org/wp-content/uploads/On-Liberty-the-Right-to-Know-and-Public-Discourse-The-Role-of-Transparency-in-Public-Life.pdf>, 7; *Ibid.*, 5.

<sup>12</sup> Recital (2) in Preamble to Regulation 1049/2001; A. VERHOEVEN, “The Right to Information: A Fundamental Right?”, lecture at European Institute for Public Administration Conference: An Efficient, Transparent Government and the Rights of Citizens to Information, Maastricht, 2000, <http://aei.pitt.edu/573/1/Amaryllis.pdf>, 2.

<sup>13</sup> ECJ, Case C-41/00 P *Interporc Im- und Export GmbH v Commission* [2003] ECR I-02125, para. 39.

<sup>14</sup> “The information deficit, acknowledged by the citizens themselves, means that they are ill informed about the reasons, the goals and the achievements of European policies, laws and measures. Ignorance brings disregard for the obscure phenomenon.”: N. MOUSSIS, *Access to the European Union – Law, Economics, Policies*,

attach enough importance to its transparency policies, in order to ensure true acceptance of its actions by the citizens.<sup>15</sup>

8. On the other hand, it is a fundamental characteristic of a democratically organised political system that it integrates transparency in its method of governance.<sup>16</sup> If the EU truly wants to call itself democratic and tackle the perceived democratic deficit with which it is said to be tainted<sup>17</sup>, it has every interest in ensuring that its activities are sufficiently transparent. Since democracies are more likely to embrace openness than authoritarian regimes<sup>18</sup>, the quality of a political system's legal framework on transparency is an indicator for its overall democratic nature and correlates with it.<sup>19</sup> If the EU genuinely attaches as much importance to democracy as Art. 2 TEU indicates, a logical consequence is then that it must strive for extensive implementation of the principle of transparency in its policies.

9. The citizen's right of access to documents is a key chain in the maze of the EU's transparency scheme. "[I]n the interest of transparency and more open government" it is desirable to put mechanisms in place additional to the mandatory publication or notification of EU legislative and non-legislative acts, as laid down in Art. 297 (2) and (3) TFEU, in order to ensure that any category of document not envisaged by those provisions is made publicly available.<sup>20</sup> This is where the right of access to documents of EU citizens comes in. Free

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Cambridge, Intersentia, 2013, 247. In order to tackle the described information deficit, this author suggests to establish a "common information and communication policy": *ibid.*, 256-258.

<sup>15</sup> ECJ, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-04723; L. WOODS and P. WATSON, *Steiner & Woods EU Law*, Oxford, Oxford University Press, 2012, 76.

<sup>16</sup> "Publicity and discussion ... are a natural component of any, even nominal, representation": J. MILL, *Considerations on Representative Government*, London, Parker, Son and Bourn, West Strand, 1861, 73; J. STIGLITZ, "On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life", Oxford Amnesty Lecture, 1991, <http://www.internationalbudget.org/wp-content/uploads/On-Liberty-the-Right-to-Know-and-Public-Discourse-The-Role-of-Transparency-in-Public-Life.pdf>, 13.

<sup>17</sup> C. KRATZ, "Transparency and the European Union", *C.V.* 1999, (387) 387; J. KARP, S. BANDUCCI and S. BOWLER, "To Know is to Love it?: Satisfaction with Democracy in the European Union", *C.P.S.* 2003, (271) 272-273; B. KOHLER-KOCH and B. RITTBERGER, "Charting Crowded Territory: Debating the Democratic Legitimacy of the European Union" in B. KOHLER-KOCH and B. RITTBERGER (eds.), *Debating the Democratic Legitimacy of the European Union*, Lanham, Rowman & Littlefield, 2007, (1) 6-9; D. CHALMERS, G. DAVIES and G. MONTI, *European Union Law*, Cambridge, Cambridge University Press, 2010, 125-135; R. SCHÜTZE, *European Constitutional Law*, Cambridge, Cambridge University Press, 2012, 74-77; N. MOUSSIS, *Access to the European Union – Law, Economics, Policies*, Cambridge, Intersentia, 2013, 239.

<sup>18</sup> J. HOLLYER, B. ROSENDORFF and J. VREELAND, "Democracy and transparency", *J.O.P.* 2011, (1191) 1195-1197 and 1202-1203.

<sup>19</sup> M. BÜHLMANN, W. MERKEL, L. MÜLLER, H. GIEBLER and B. WESSELS, "Demokratiebarometer: ein neues Instrument zur Messung von Demokratiequalität", *Z Vgl Polit Wiss* 2012, (115) 128.

<sup>20</sup> Opinion of AG Sharpston in ECJ, Case C-345/06 *Heinrich* [2009] ECR I-01659, point 56.



access to documents held by the EU institutions is a fundamental prerequisite to achieve the described goals of openness and involvement of the citizens. After all, citizens can only give their informed opinion on the policy of the Union and be effectively involved in the decision-making process if they are enabled to obtain sufficient information on the matters concerned.<sup>21</sup> Therefore, those responsible for the various proposals in the European decision-making process “*must, in a system based on the principle of democratic legitimacy, be publicly accountable for their actions... If citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information.*”<sup>22</sup>. This consideration is also important for the citizen’s initiative enshrined in Art. 11 (4) TEU, which intends to enhance the political participation of the EU citizens in the legislative process of the Union.<sup>23</sup> This also requires citizens to have access to all the relevant information necessary for meaningful participation.

## 2 PROTECTION OF PUBLIC SECURITY

**10.** The concern for safety and protection can be traced back to the origins of mankind itself. Throughout human history, people have been looking for means to protect themselves, their families and their assets against natural and man-made threats. As the nature of those threats became increasingly complex, individual security requirements have eventually come to be addressed at the level of the wider community.<sup>24</sup> This is how the State became the main provider of protection<sup>25</sup> and the notion of public security came into being. When looking at

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<sup>21</sup> The General Court has acknowledged this specifically with regard to access of the European public to documents drafted in the context of discussions held in the Council about the amendment of Regulation 1049/2001 and containing the identity of the Member States which launched proposals for this amendment: “*It is in the nature of democratic debate that a proposal for amendment of draft regulation, of general scope, binding in all of its elements and directly applicable in all the Member States, can be subject to both positive and negative comments on the part of the public and media.*”: EGC, Case T-233/09 *Access Info Europe v Council* [2011] ECR II-01073, para. 78. The appeal was recently dismissed in ECJ, Case C-280/11 P *Council v Access Info Europe* [2013] ECR I-0000.

<sup>22</sup> EGC, Case T-233/09 *Access Info Europe v Council* [2011] ECR II-01073 para. 69.

<sup>23</sup> Regulation European Parliament and Council (EU) No 211/2011 of 16 February 2011 on the citizen’s initiative, OJ L 65, 11.03.2011, 1; A. KACZOROWSKA, *European Union Law*, London, Routledge, 2011, 184 and 187.

<sup>24</sup> T. RICKS, B. TILLET and C. VANMETER, *Principles of Security*, Cincinnati, Anderson Publishing Co., 1988, 1-22.

<sup>25</sup> B. DUPONT and J. WOOD, “The Future of Democracy” in B. DUPONT and J. WOOD (eds.), *Democracy, Society and the Governance of Security*, Cambridge, Cambridge University Press, 2006, (241) 241. For the sake of conciseness, this Master’s thesis is only concerned with the protection of public security by the State in the strict sense, without taking into account the range of private actors which have become active in this field on behalf of the State over the past decades. For a discussion of the latter, *cfr.* C. SHEARING and P. STENNING,

today's legal and political context, that Hobbesian social contract can now be called the TEU and TFEU and the envisaged Leviathan<sup>26</sup> has taken the form of the European Union.

11. Since the end of the Cold War, the threats to public security and States' responses to them have been characterised by an increasingly transnational and multidimensional component.<sup>27</sup> In order to face these threats in a more effective way, the EU Member States have combined their efforts by engaging in closer cooperation on security issues. For this purpose, they have established the AFSJ<sup>28</sup> and CFSP<sup>29</sup>. They have integrated the Schengen *acquis*<sup>30</sup> into the EU legal framework<sup>31</sup>, replacing the internal borders with a single external one and coordinating their activities in the field of customs and the fight against transnational crime.<sup>32</sup> The Schengen Borders Code<sup>33</sup> has established common rules on movements across the internal borders and external border control. Key to the implementation of the Schengen *acquis* is SIS

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“Modern Private Security: Its Growth and Implications”, *C.A.J.* 1981, 193-245; L. JOHNSTON, “Transnational security governance” in B. DUPONT and J. WOOD (eds.), *Democracy, Society and the Governance of Security*, Cambridge, Cambridge University Press, 2006, 33-51 and P. SINGER, *Corporate Warriors - The Rise of the Privatized Military Industry*, Ithaca, Cornell University Press, 2011, 6-18 and 49-70.

<sup>26</sup> T. HOBBS, *Leviathan, or the matter, forme and power of a commonwealth ecclesiasticall and civil* (1651), New York, Simon and Schuster, 2008, 132-133

<sup>27</sup> J.-P. BRODEUR, P. GILL and D. TÖLLBORG, “Introduction” in J.-P. BRODEUR, P. GILL and D. TÖLLBORG (eds.), *Democracy, Law and Security – Internal security services in contemporary Europe*, Aldershot, Ashgate, (1) 4- 5.

<sup>28</sup> Preamble to the TEU, Art. 3 (2) TEU and Part Three, Title V TFEU.

<sup>29</sup> Title V, Chapter 2 TEU. The CSDP forms and integral part of the CFSP: Art. 42 (1) TEU; A. DASHWOOD, M. DOUGAN, B. RODGER, E. SPAVENTA and D. WYATT, *Wyatt and Dashwood's European Union Law*, Oxford, Hart Publishing, 2011, 905.

<sup>30</sup> The Schengen *acquis* is the existing body of law which has been adopted on the basis of the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, *BS* 29.04.1986, 5946 (Dutch and French version).

<sup>31</sup> Protocol, annexed to the EU Treaty and to the EC Treaty, integrating the Schengen *acquis* into the framework of the European Union; Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, *OJL* 239, 22.09.2000, 13.

<sup>32</sup> The UK and Ireland do not fully participate in the Schengen *acquis*, while Denmark has a special position: Protocol No. 19, annexed to the TEU, on the Schengen *acquis* integrated into the framework of the European Union; Protocol No. 22, annexed to the TEU, on the position of Denmark; N. MOUSSIS, *Access to the European Union – Law, Economics, Policies*, Cambridge, Intersentia, 2013, 233-234; [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/133020\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/133020_en.htm).

<sup>33</sup> Regulation European Parliament and Council (EC) No 562/2006 of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ L* 105, 13.04.2006, 1. The Code was last amended by Regulation European Parliament and Council (EU) No 265/2010 of 25 March 2010 amending the Convention Implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa, *OJ L* 85, 31.03.2010, 1. Also see Decision Council 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ L* 111, 04.05.2010, 20.

II<sup>34</sup>, an information system facilitating the exchange of information on persons and objects, thereby contributing to the maintenance of a high level of security within the AFSJ.<sup>35</sup> Since cooperation with NATO regarding security issues is indispensable, an Agreement has been concluded in 2003 on the protection and exchange of classified information between the two organisations.<sup>36</sup>

**12.** Maintaining a high level of protection of public security serves the general interest and is therefore an important way for the EU to legitimise itself and its activities towards the citizens. However, maintaining public order is not enough in this respect, since otherwise even authoritarian regimes could be considered to be legitimate, as long as they are acting in defence of public security.<sup>37</sup> In order to be truly legitimate, democratic principles ought to form the basis of any system that is designed to protect public security and ultimately democracy itself: “[d]emocratic praxis imposes its own limitations on the measures necessary for its own preservation ... any measures taken by security institutions which violate democratic praxis are themselves contrary to national security and therefore unacceptable”.<sup>38</sup> Incorporating the principle of transparency, including the right of access to documents, in its security policies is an effective way for the EU of assuring that those policies actually contribute to safeguarding a high level of democracy in its activities.

### 3 THE TENSION BETWEEN TRANSPARENCY AND THE PROTECTION OF PUBLIC SECURITY

**13.** Transparency, including access by EU citizens to documents held by the Union institutions<sup>39</sup>, is one of the democratic cornerstones on which the EU is based. Increased openness contributes to fundamental values such as trust and democratic accountability,

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<sup>34</sup> Regulation European Parliament and Council (EC) No 1987/2006 of 20 December 2006 on the establishment, operation and use of the second-generation Schengen Information System (SIS II), OJ L 381, 28.12.2006, 4.

<sup>35</sup> N. MOUSSIS, *Access to the European Union – Law, Economics, Policies*, Cambridge, Intersentia, 2013, 234-235.

<sup>36</sup> Decision Council 2003/211/CFSP of 24 February 2003 concerning the conclusion of the Agreement between the European Union and the North Atlantic Treaty Organisation on the Security of Information, OJ L 80, 27.03.2003, 35. The text of the Agreement is attached to the Decision.

<sup>37</sup> L. LUSTGARTEN, “National Security and Political Policing - Some Thoughts on Values, Ends and Law” in J.-P. BRODEUR, P. GILL and D. TÖLLBORG (eds.), *Democracy, Law and Security – Internal security services in contemporary Europe*, Aldershot, Ashgate, (319) 319-320.

<sup>38</sup> *Ibid.*, 320-321.

<sup>39</sup> P. CRAIG and G. DE BÚRCA, *EU Law - Text, cases and materials*, Oxford, Oxford University Press, 2011, 543.

which bring about enhanced legitimacy of the institutions.<sup>40</sup> However, if unlimited access to documents of the Union institutions would be granted to the EU citizens, the risk may arise that Member States or third countries and organisations like NATO will not be easily inclined to provide sensitive information to the EU and to maintain profound relations with its institutions, knowing that those data are very likely to be disclosed to the European public. This can weaken the EU's position on the international forum to a very large extent, which can eventually start to pose a real threat to the public security of the Union and its organs. Also on the internal level, the need to effectively protect public security dictates that not all information on security measures, for example envisaged counter-terrorism policies, are freely disseminated among citizens. Therefore, it is necessary that certain restrictions are put on the right of access to documents, for the sake of protecting public security.

**14.** The uneasy relationship between increased administrative openness and the effective protection of public security is a challenge which many States and organisations are facing today. The two are equally valid principles worthy of protection: “*both secrecy and openness are indispensable components of a successful democracy*”<sup>41</sup>. This also gives them the potential to collide and often makes it difficult to strike the right balance between the two. The implications of this perceived tension are clearly formulated in the Preamble to American President Obama's Executive Order 13526, laying down the rules for classification of documents in the interest of national defence and foreign policy under the Freedom of Information Act<sup>42</sup>: “*This order prescribes a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism. Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information both within the Government and to the American people. Nevertheless, throughout our history, the national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations. Protecting information critical to our Nation's security and demonstrating our commitment to open*

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<sup>40</sup> M. ZBIGNIEW HILLEBRANDT, D. CURTIN and A. MEIJER, “Transparency in the EU Council of Ministers: An Institutional Analysis”, *E.L.J.* 2014, (1) 4.

<sup>41</sup> A. SAMAHA, “Government Secrets, Constitutional Law, and Platforms for Judicial Intervention”, *UCLA L.Rev.* 2006, (909) 976.

<sup>42</sup> The Freedom of Information Act of 5 June 1967, 5 USC § 552, <http://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-2012-title5-section552&f=treesort&fq=true&num=0>.

*Government through accurate and accountable application of classification standards and routine, secure, and effective declassification are equally important priorities.”<sup>43</sup>*

15. These considerations go for the EU as well as the USA and reveal that there are good reasons to oppose an absolute right of EU citizens to get access to documents and to “*strive for optimal rather than maximal transparency*”<sup>44</sup>, by making it subject to a number of well-defined restrictions. Such limitations are provided for by Regulation 1049/2001. The first indent of Art. 4 (1) (a) of the Regulation states that access to a document will be refused by the Union institutions, i.a. “*where disclosure would undermine the protection of the public interest as regards public security*”<sup>45</sup>. This provides some discretion to the Union institutions when assessing the danger that disclosure of documents might create for public security.

16. However, if they are granted too much discretion when deciding on disclosure, the risk arises that the Union institutions would abuse their power by unjustifiably refusing access to a considerable number of documents, under the pretext of this being necessary for the protection of public security. This would reduce the right of EU citizens of access to documents to a purely theoretical right. This consideration obviously reveals the tension between transparency and the protection of public security in the EU. The concern of enhancing the EU’s democratic character is a legitimate ground to oppose secrecy at EU level, even when this secrecy is necessary to protect public security.

17. On the other hand, “[d]emocracy depends upon secret intelligence for its survival”<sup>46</sup>. To a certain extent, secrecy seems to be necessary to ensure effective protection of public security<sup>47</sup>, something from which democracy itself would benefit. Increased transparency might just as well contribute to maintaining a high level of public security. As stated above, governmental openness results in greater legitimacy of the administration vis-à-vis the citizens. This also applies to public acceptance of measures taken in the interest of public security, which are often far-going. By being transparent about the nature and purpose of such

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<sup>43</sup> Executive Order 13526 of 29 December 2009 on Classified National Security Information, <http://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information>.

<sup>44</sup> M. ZBIGNIEW HILLEBRANDT, D. CURTIN and A. MEIJER, “Transparency in the EU Council of Ministers: An Institutional Analysis”, *E.L.J.* 2014, (1) 5.

<sup>45</sup> First indent of Art. 4 (1) (a) Regulation 1049/2001.

<sup>46</sup> R. JEFFREYS-JONES, *The CIA and American Democracy*, New Haven, Yale University Press, 1989, 1.

<sup>47</sup> Preamble to the Johannesburg Principles of 1 October 1995 on National Security, Freedom of Expression and Access to Information, <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>; J. LODGE, “EU Homeland Security: Citizens or Suspects?”, *J.E.I.* 2004, (253) 272.

activities, the EU is more likely to gain popular support for them.<sup>48</sup> As a result, there will be less need for restraint of the EU in taking certain necessary but sensitive measures, leaving it with more options in this regard. From this point of view, incorporating the principle of transparency in the EU's policies can serve the purpose of protecting public security instead of being an impediment to it.

18. Given the above considerations, it has to be investigated how far the discretion of the Union institutions as regards the classification of documents reaches exactly. By doing this, the aforementioned tension is clearly framed. If it would turn out that the discretion of the institutions significantly undermines the fundamental right of the EU citizens of access to documents, it is necessary to investigate how it can be curtailed. This is done in order to find a good and feasible balance between transparency and the protection of public security of the EU and its institutions, with due respect for the fundamental importance of both principles.

## II THE EU LEGAL FRAMEWORK ON TRANSPARENCY

19. In the early 1990's, the Union's political and judicial organs were not yet used to demands of information by citizens. Hence, transparency was not considered to be an important feature of governance, resulting in the absence of any legally binding participation rights of the EU citizens.<sup>49</sup> However, growing concerns about distrust of government by European citizens and the emergence of civil society and non-governmental organizations, which started to serve as a new powerful check on government behaviour gave rise to the acknowledgement that the transparency of the decision-making process had to be increased not only at national but also at the European Community level.<sup>50</sup> As a result, the conviction grew that citizens must have access to the documents held by the Community institutions, either because those institutions have received them or drafted them themselves, so that the EC could really call itself transparent.

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<sup>48</sup> Report of the discussion on Public Access to Documents and Security at the Conference Transparency in Europe II – Public Access to Documents in the EU and its Member States, hosted by the Netherlands during its chairmanship of the EU Council at 25 and 26 November 2004 in P. STOLK, A. TUNOVIC, H. KRANENBORG and W. VOERMANS (eds.), *Transparency in Europe II- Public Access to Documents in the EU and its Member States*, Artoos, Rijswijk, 2004, (107) 109.

<sup>49</sup> P. CRAIG, *The Lisbon Treaty – Law, Politics and Treaty reform*, Oxford, Oxford University Press, 2013, 67; M. ZBIGNIEW HILLEBRANDT, D. CURTIN and A. MEIJER, “Transparency in the EU Council of Ministers: An Institutional Analysis”, *E.L.J.* 2014, (1) 9.

<sup>50</sup> K. LENAERTS, “ ‘In the Union we Trust’: Trust Enhancing Principles of Community Law”, *C.M.L.Rev.* 2004, (317) 318.

20. This view was reflected in Declaration No. 17 on the right of access to information, annexed to the Treaty of Maastricht, which underlined that “*transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration*”<sup>51</sup> and acknowledged the necessity of establishing rules on public access to documents held by the Community institutions. Ever since, the EC (now EU) has gradually incorporated the principle of transparency in its activities and has by now developed an extensive legal framework on the matter.

## 1 TREATIES

21. Following Declaration No. 17, the Council and the Commission jointly adopted a Code of Conduct<sup>52</sup> setting out the rules for public access to their documents. The Code set forth the general principle that the public would have “*the widest possible access to documents*”<sup>53</sup>, subject to a number of exceptions like the protection of the public interest as regards public security. Both the Council and the Commission adopted decisions to implement the Code in their policies.<sup>54</sup> The fact that exceptions to the right of access to documents were established in the Code of Conduct indicates that already in the early days of EU transparency legislation, the institutions were confronted with the need to strike a balance between the principle of transparency and other essential public and private interests that require protection.<sup>55</sup> Hence, it was clear from the start that a policy of full access to documents is not desirable. Access to documents was later legally entrenched as a full-fledged right of all EU citizens in the Treaty of Amsterdam<sup>56</sup> and was also laid down in the Constitutional Treaty, together with provisions

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<sup>51</sup> Treaty on European Union - Declaration 11992M/AFI/DCL/17 on the right of access to information of 7 February 1992, *OJ C* 191, 29.7.1992, 101.

<sup>52</sup> Code of Conduct Council and Commission 93/730/EC concerning public access to Council and Commission documents, *OJ L* 340, 31.12.1993, 41.

<sup>53</sup> *Ibid.*

<sup>54</sup> Decision Council 93/731/EC of 20 December 1993 on public access to Council documents, *OJ L* 340, 31.13.1993, 43; Decision Commission 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents, *OJ L* 46, 18.02.1994, 58.

<sup>55</sup> J. THOMSEN and W. VAN DE RIJ, “How to Strike the Balance between Transparency and Confidentiality” in P. STOLK, A. TUNOVIC, H. KRANENBORG and W. VOERMANS (eds.), *Transparency in Europe II- Public Access to Documents in the EU and its Member States*, Artoos, Rijswijk, 2004, (93) 94.

<sup>56</sup> Art. 2 (39) and (45) Treaty of Amsterdam amending the Treaty on European Union, the treaties establishing the European Communities and related acts, signed at Amsterdam, of 2 October 1997, *OJ C* 340, 10.11.1997, 1; Art. 207 (3), second subpara. EC; Art. 255 EC; A. KACZOROWSKA, *European Union Law*, London, Routledge, 2011, 186; K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet and Maxwell, 2011, 602.

on public meetings of the European Parliament and the Council and on openness of the Union institutions, bodies, offices and agencies in general.<sup>57</sup>

**22.** The Union's endorsement of the principle of transparency is now reflected in many articles of the TEU and TFEU. Art. 1, second subpara. TEU provides that the decisions of the Union institutions are taken “*as openly as possible and as closely as possible to the citizen*”<sup>58</sup>, i.e. according to the principle of transparency.<sup>59</sup> Also Art. 298 TFEU requires openness of the European administration in supporting the Union's institutions, bodies, offices and agencies in carrying out their tasks.

**23.** The principle of transparency was further developed in Art. 15 TFEU. The first paragraph imposes an obligation on the institutions, bodies, offices and agencies of the EU to conduct their work as openly as possible, “*[i]n order to promote good governance and ensure the participation of civil society.*”<sup>60</sup> Even more important is Art. 15 (3), first subpara. TFEU, which embeds the fundamental<sup>61</sup> right of every EU citizen and every natural or legal person residing or having its registered office in a Member State of access to documents of the institutions, bodies, offices and agencies of the Union.<sup>62</sup> This right is also granted by Art. 42 of the Charter of Fundamental Rights of the European Union.<sup>63</sup> The rules on access to documents have been laid down in Regulation 1049/2001, which is discussed further in detail below.

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<sup>57</sup> Art. I-50 Treaty establishing a Constitution for Europe, signed at Rome, of 29 October 2004, *OJ C* 310, 16.12.2004, 1.

<sup>58</sup> Art. 1, second subpara. TEU; ECJ, Case C-28/08 P *Commission v Bavarian Lager* [2010] ECR I-06055, para. 53; K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet and Maxwell, 2011, 601.

<sup>59</sup> A. KACZOROWSKA, *European Union Law*, London, Routledge, 2011, 187.

<sup>60</sup> Art. 15 (1) TFEU.

<sup>61</sup> On the idea of the right of access to documents being a fundamental right of the EU citizens: CFI, Joined Cases T-3/00 and T-337/04 *Pitsiorlas v Council and ECB* [2007] ECR II-04779, para. 231. Opinion of AG Tesouro in ECJ, Case C-58/94 *Netherlands v Council* [1996] ECR I-02169, point 16; Opinion of AG Léger in ECJ, Case C-353/99 P *Council v Hautala* [2001] ECR I-09565, points 77, 78 and 86; Opinion of AG Cruz Villalón in ECJ, Case C-280/11 P *Council v Access Info Europe* [2013] ECR I-0000, points 63, 68 and 71 (seeing it as a *condition sine qua non* for democratic political debate); European Parliament Directorate-General for Internal Policies-Policy Department C: Citizens' Rights and Constitutional Affairs, *Openness, transparency and access to documents and information in the EU*, 2013, [http://www.europarl.europa.eu/RegData/etudes/note/join/2013/493035/IPOL-LIBE\\_NT\(2013\)493035\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/493035/IPOL-LIBE_NT(2013)493035_EN.pdf), 5; D. ADAMSKI, “How wide is “The Widest Possible”? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited”, *C.M.L.Rev.* 2009, (521) 524.

<sup>62</sup> K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet and Maxwell, 2011, 602.

<sup>63</sup> Art. 42 Charter of Fundamental Rights of the European Union, signed at Strasbourg, of 12 December 2007, *OJ C* 326, 26.10.2012, 391



24. Furthermore, Art. 15 (3), third subpara. TFEU prescribes that “[e]ach institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents”<sup>64</sup>. This has to be done in accordance with the general provisions and limitations set out in Regulation 1049/2001.<sup>65</sup> For the Court of Justice of the European Union, the European Central Bank and the European Investment Bank, this obligation is limited to documents which they hold in the exercise of their administrative tasks<sup>66</sup>, although they are allowed to grant access to other documents on their own initiative.<sup>67</sup> Finally, Art. 15 (3), fifth subpara. TFEU states that the European Parliament and the Council have to ensure publication of the documents relating to the legislative procedure, under the terms laid down in Regulation 1049/2001.

25. Also, it is apparent that Art. 10 TEU attaches a lot of importance to the expression of the will of the citizens of the Union.<sup>68</sup> Art. 10 (1) TEU mentions that “*the functioning of the Union shall be founded on representative democracy*”.<sup>69</sup> This implies i.a. that every citizen has the right to participate in the democratic activities of the Union and that decisions are taken “*as openly and as closely as possible to the citizen*”.<sup>70</sup> The obligation of transparency set out in Art. 10 TEU is further specified in Art. 11 TEU<sup>71</sup>, which states that the institutions have to offer the opportunity to the citizens and representative associations to express their opinions on all aspects of Union action, with room for public discussion.<sup>72</sup> In order to do so, “[t]he institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.”<sup>73</sup> Besides that, Art. 11 (3) TEU requires the European Commission to carry out broad consultations with parties concerned, in order to ensure the coherence and transparency of the Union’s actions.<sup>74</sup>

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<sup>64</sup> Art. 15 (3), third subpara. TFEU.

<sup>65</sup> *Ibid.*

<sup>66</sup> Art. 15 (3), fourth subpara. TFEU.

<sup>67</sup> A. KACZOROWSKA, *European Union Law*, London, Routledge, 2011, 187.

<sup>68</sup> Art. 10 (4) TEU.

<sup>69</sup> Art. 10 (1) TEU.

<sup>70</sup> Art. 10 (3) TEU.

<sup>71</sup> R. STREINZ, *EUV/AEUV-Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union*, München, Beck, 2012, 383.

<sup>72</sup> Art. 11 (1) TEU.

<sup>73</sup> Art. 11 (2) TEU.

<sup>74</sup> A. KACZOROWSKA, *European Union Law*, London, Routledge, 2011, 187.

## 2 REGULATION 1049/2001

**26.** As mentioned above, Art. 15 (3), first subpara. TFEU encompasses the fundamental right of every EU citizen and every natural or legal person residing or having its registered office in a Member State of access to documents of the institutions, bodies, offices and agencies of the Union. Art. 15 (3) TFEU is the successor of Art. 255 EC<sup>75</sup>, which stated that the Council had to determine the general principles and limits on grounds of public or private interest governing the right of access to documents.<sup>76</sup> For this purpose, Regulation 1049/2001 was adopted, “*which also applies to bodies with legal personality established pursuant to the Treaties*”<sup>77</sup> and to the agencies that have been established by the institutions.<sup>78</sup>

**27.** Regulation 1049/2001 entrenches the general provisions and limits concerning the right of citizens of the EU of access to documents held by the Union institutions, either because the latter have received them or drafted them themselves. The Preamble reveals that the Regulation has the explicit purpose of guaranteeing this right to the fullest possible extent.<sup>79</sup> Hence, the general rule is that in principle all documents of the Union institutions have to be fully accessible to the public.<sup>80</sup> Moreover, it is specified that “[w]ider access should be granted to documents in cases where the institutions are acting in their legislative capacity...while at the same time preserving the effectiveness of the institutions’ decision-making process”.<sup>81</sup> With respect to the public security of the Union, it has to be mentioned that the essential right of access to documents also applies to files relating to the CFSP and to PJCC.<sup>82</sup> In this respect, each institution has to abide by its own security rules.<sup>83</sup> The fact that a requested document concerns the CFSP does not affect the jurisdiction of the Union Courts to rule on a refusal to grant access to it either.<sup>84</sup>

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<sup>75</sup> P. CRAIG and G. DE BÚRCA, *EU Law- Text, cases and materials*, Oxford, Oxford University Press, 2011, 543. Art. 255 EC lacked direct effect: CFI, Case T-191/99 *Petrie and others v Commission* [2001] ECR II-3677.

<sup>76</sup> Art. 15 (3), second subpara. TFEU.

<sup>77</sup> K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet and Maxwell, 2011, 602.

<sup>78</sup> Recital (8) in Preamble to Regulation 1049/2001; K. LENAERTS, “ ‘In the Union we Trust’: Trust Enhancing Principles of Community Law”, *C.M.L.Rev.* 2004, (317) 321-322; P. CRAIG and G. DE BÚRCA, *EU Law-Text, cases and materials*, Oxford, Oxford University Press, 2011, 543.

<sup>79</sup> Recital (4) in Preamble to Regulation 1049/2001.

<sup>80</sup> *Ibid.*, Recital (11).

<sup>81</sup> *Ibid.*, Recital (6).

<sup>82</sup> *Ibid.*, Recital (7).

<sup>83</sup> *Ibid.*

<sup>84</sup> CFI, Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289, paras. 81-82.

28. Regulation 1049/2001 confirms the fundamental right of every citizen of the Union and each natural or legal person residing or having its registered office in a Member State of access to documents of the institutions of the Union.<sup>85</sup> ‘Document’ is defined as “*any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility*”.<sup>86</sup>

29. Although public access to documents held by EU institutions is conceived as the general rule, Regulation 1049/2001 also acknowledges the need to provide for exceptions to this rule, in order to protect certain public and private interests and to ensure that the institutions can effectively keep on carrying out their tasks.<sup>87</sup> In other words, the right of access to documents cannot be considered to be an absolute right.<sup>88</sup> Especially documents with a highly sensitive content “*should be given a special treatment*”<sup>89</sup>. One of the public interests of which it is deemed necessary to protect them is public security. Art. 4 (1) (a) Regulation 1049/2001 provides that the Union institutions have to refuse access to a document “*where disclosure would undermine the protection of the public interest as regards public security*”<sup>90</sup>, “*defence and military matters*”<sup>91</sup> or “*international relations*”<sup>92</sup>. When looking at the Council annual reports on access to documents<sup>93</sup>, it becomes clear how important these exceptions are in daily practice.

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<sup>85</sup> Art. 1 (a) and Art. 2 (1) Regulation 1049/2001. Also comitology committees have a right of access to documents: CFI, Case T-188/97 *Rothmans v Commission* [1999] ECR II-02463.

<sup>86</sup> Art. 3, (a) Regulation 1049/2001.

<sup>87</sup> *Ibid.*, Recital (11) in the Preamble.

<sup>88</sup> Opinion of AG Geelhoed in ECJ, Case C-266/05 P *Sison v Council* [2007] ECR I-1233, point 24; Opinion of AG Cruz Villalón in ECJ, Case C-280/11 P *Council v Access Info Europe* [2013] ECR I-0000, point 55; G. DE BAERE, “Access to documents and data protection in the European External Action Service”, *Leuven Center for Global Governance Studies Working Paper Series* March 2013, WP 103, [http://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp101-110/wp103-de-baere.pdf](http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp101-110/wp103-de-baere.pdf), 5.

<sup>89</sup> Recital (9) in Preamble to Regulation 1049/2001.

<sup>90</sup> First indent of Art. 4 (1) (a) Regulation 1049/2001.

<sup>91</sup> *Ibid.*, second indent. The exception of the protection of the public interest as regards defence and military matters was not yet contained in the 1993 Code of Conduct on public access to Council and Commission documents.

<sup>92</sup> Third indent of Art. 4 (1) (a) Regulation 1049/2001.

<sup>93</sup> In 2011, with regard to full refusal by the Council of access to documents at the initial stage of application, the exception of international relations was the 2<sup>nd</sup> most invoked ground for refusal (21,2%; 24,3% in 2010) and the exception of public security was in 3<sup>rd</sup> place (8,9%; 7% in 2010). With regard to full refusal at the confirmatory stage, the exception of international relations was the most invoked ground (78,9%; 55,5% in 2010) and the one of public security the 2<sup>nd</sup> most (15,8%; 38,1% in 2010). Protecting international relations was the 2<sup>nd</sup> most invoked ground for partial refusal of access at the initial stage (29,3%; 11,9% in 2010) and the most invoked ground at the confirmatory stage (40%; 26,2% in 2010). In 2012, the protection of international relations and public security were respectively the 2<sup>nd</sup> and 3<sup>rd</sup> most invoked ground for refusal for access or partial access. In more than 15% of the cases where access was fully refused, both exceptions were invoked together (4,8% in 2011 and 14,4% in 2010): Council annual report on access to documents 2010,

**30.** Unlike the documents mentioned in Art. 4 (2-3) Regulation 1049/2001, access to documents falling under Art. 4 (1) cannot be obtained even when an overriding public interest is at stake.<sup>94</sup> An institution has to deny an application for access to a document as soon as it finds that granting such access would undermine<sup>95</sup> one or more of the interests set out in this paragraph. As a result, with regard to the applicability of Art. 4 (1), the institution concerned merely conducts “*a harm test*”.<sup>96</sup> The exceptions of Art. 4 (1) apply for as long as protection of the document on the basis of its content is justified, with a maximum of 30 years.<sup>97</sup> In the case of sensitive documents, the protection can last for an even longer period.<sup>98</sup> If only parts of the requested document are covered by one or more of the exceptions, the remaining parts have to be disclosed.<sup>99</sup> If a request for access is denied, the institution addressed must give the specific reasons for which it considers one of the exceptions of Regulation 1049/2001 to be applicable.<sup>100</sup> In this respect, it is to be pointed out that a decision for refusal can only be validly made when it is based on one of the legally defined exceptions on the right of access

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[http://www.consilium.europa.eu/uedocs/cms\\_data/librairie/PDF/EN\\_ACC\\_web-2011.pdf](http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/EN_ACC_web-2011.pdf), 14; Council annual report on access to documents 2011, [http://www.consilium.europa.eu/uedocs/cms\\_data/librairie/PDF/OCAF1200EN.pdf](http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/OCAF1200EN.pdf), 14-15; Council annual report on access to documents 2012, [http://www.consilium.europa.eu/media/2063344/web\\_en\\_access\\_to\\_doc\\_2013.pdf](http://www.consilium.europa.eu/media/2063344/web_en_access_to_doc_2013.pdf), 14.

<sup>94</sup> P. CRAIG and G. DE BÚRCA, *EU Law- Text, cases and materials*, Oxford, Oxford University Press, 2011, 545.

<sup>95</sup> Note the difference with the exception laid down in Art. 4 (3), on the basis of which disclosure can only be refused if it would *seriously* undermine the interests protected therein.

<sup>96</sup> J. THOMSEN and W. VAN DE RIJ, “How to Strike the Balance between Transparency and Confidentiality” in P. STOLK, A. TUNOVIC, H. KRANENBORG and W. VOERMANS (eds.), *Transparency in Europe II- Public Access to Documents in the EU and its Member States*, Artoos, Rijswijk, 2004, (93) 100-101; D. ADAMSKI, “How Wide is “The Widest Possible”? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited”, *C.M.L.Rev.* 2009, (521) 522.

<sup>97</sup> Art. 4 (7) Regulation 1049/2001.

<sup>98</sup> *Ibid.*

<sup>99</sup> Art. 4 (6) Regulation 1049/2001; CFI, Case T-188/98, *Kuijer v Council (Kuijer I)* [2000], ECR II-01959, para. 54. This obligation emanates from the principle of proportionality, which “*requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view*”. Consequently, if only some of the information contained in a document is covered by one of the exceptions of Regulation 1049/2001, “*a refusal to grant partial access would be manifestly disproportionate for ensuring the confidentiality of the items of information covered by one of those exceptions*”: ECJ, Case C-353/99 P *Council v Hautala* [2001] ECR I-09565, paras. 28 and 29 (which concerned the application of the exceptions laid down in Art. 4 (1) Decision Council 93/731/EC of 20 December 1993 on public access to Council documents, *OJ L* 340, 31.13.1993, 43, but the reasoning is transferable to the application of Regulation 1049/2001). Also see ECJ, Case C-353/01 P *Mattila v Council and Commission* [2004] ECR I-01073, paras. 29-34: failure by a Union institution which is processing a request for access to a document to assess whether partial access can be granted has the result that its ensuing decision to refuse access must be annulled as being vitiated by an error of law. In Case T-211/00 *Kuijer v Council (Kuijer II)* [2002] ECR II-00485, para. 57, the Court of First instance held that “*[i]n exceptional cases, a derogation from the obligation to grant partial access might be permissible where the administrative burden of blanking out the parts that may not be disclosed proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required*”.

<sup>100</sup> CFI, Case T-105/95 *WWF UK v Commission* [1997] ECR II-00313, paras. 64, 66 and 74; CFI, Case T-124/96 *Interporc Im- und Export GmbH v Commission* [1998] ECR II-00231, para. 53; CFI, Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289, para. 116.

to documents<sup>101</sup> and if an institution fails to refer to the exception that constitutes the ground for its refusal, it can no longer invoke it before the Union courts.<sup>102</sup>

**31.** ‘Sensitive documents’ are defined by Regulation 1049/2001 as “*documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as ‘TRÈS SECRET/TOP SECRET’, ‘SECRET’ or ‘CONFIDENTIEL’ in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4 (1) (a), notably public security, defence and military matters.*”<sup>103</sup> The fact that documents are classified “*in accordance with the rules of the institution concerned*” implies that the applicable rules are those of the organization or State from which the document originates, even when these rules might turn out to be stricter than the corresponding EU rules.<sup>104</sup> Whether or not an institution considers classified information to be sensitive depends on its own understanding of sensitivity.<sup>105</sup> This leaves open the possibility for institutions to arbitrarily classify information and make it subject to the special treatment of sensitive documents, which is not optimal from a transparency point of view.

**32.** The rules on the classification of documents are laid down in Decision 2011/292/EU of the Council<sup>106</sup>, which contains the minimum security standards and basic principles for the protection of ECUI<sup>107</sup>. ECUI is defined as “*any information or material designated by an EU security classification, the unauthorised disclosure of which could cause varying degrees of prejudice to the interests of the European Union or of one or more of the Member States*”<sup>108</sup>. The Decision allows for four levels of classification (TOP SECRET, SECRET,

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<sup>101</sup> CFI, Case T-211/00 *Kuijter v Council (Kuijter II)* [2002] ECR II-00485, para. 55 (concerning the applicability of Decision Council 93/731/EC of 20 December 1993 on public access to Council documents, *OJ L 340*, 31.12.1993, 43); J. THOMSEN and W. VAN DE RIJT, “How to Strike the Balance between Transparency and Confidentiality” in P. STOLK, A. TUNOVIC, H. KRANENBORG and W. VOERMANS (eds.), *Transparency in Europe II- Public Access to Documents in the EU and its Member States*, Artoos, Rijswijk, 2004, (93) 97.

<sup>102</sup> ECJ, Case C-41/00 P *Interporc Im- und Export GmbH v Commission* [2003] ECR I-02125, para. 55; CFI, Case T-105/95 *WWF UK v Commission* [1997] ECR II-00313, para. 65.

<sup>103</sup> Art. 9 (1) Regulation 1049/2001.

<sup>104</sup> G. DE BAERE, “Access to documents and data protection in the European External Action Service”, *Leuven Center for Global Governance Studies Working Paper Series* March 2013, WP 103, [http://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp101-110/wp103-de-baere.pdf](http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp101-110/wp103-de-baere.pdf), 6.

<sup>105</sup> R. WESSEL, “Good Governance and EU Foreign, Security and Defence Policy” in D. CURTIN and R. WESSEL (eds.), *Good Governance and the European Union – Reflections on Concepts, Institutions and Substance*, Antwerp, Intersentia, 2005, (215) 233.

<sup>106</sup> Decision Council 2011/292/EU of 31 March 2011 on the security rules for protecting EU classified information, *OJ L 141*, 27.5.2011, 17.

<sup>107</sup> *Ibid.*, Art. 1 (1).

<sup>108</sup> *Ibid.*, Art. 2 (1).

CONFIDENTIAL and RESTRICTED), which may be applied to information and material the unauthorized disclosure of which could “*cause exceptionally grave prejudice*”, “*seriously harm*”, “*harm*” or “*be disadvantageous*” to the essential interests of the European Union or of one or more of the Member States (which include the protection of public security) respectively.<sup>109</sup> EUCI is a concept with a wider scope than sensitive documents within the meaning of Art. 9 (1) Regulation 1049/2001, since it also comprises information which has been classified as RESTRICTED and does not have to concern one of the interests envisaged in Art. 4 (1) Regulation 1049/2001 nor originate from the institutions or agencies established by them, a Member State, third country or an international organisation.<sup>110</sup> Access to a classified document that does not meet the requirements for being a sensitive document within the meaning of Art. 9 (1) Regulation 1049/2001 can nevertheless just as well be refused if one of the exceptions of Art. 4 of that Regulation is deemed to be applicable.

**33.** Classified information can only retain its designated classification level for as long as is necessary.<sup>111</sup> Prior written consent of the originator is required before EUCI can be downgraded or declassified or before the designated classification marking can be removed or modified.<sup>112</sup> Apart from the classification standards, the Decision also contains strict rules for the protection of EUCI<sup>113</sup>, its management<sup>114</sup>, security clearance procedures for authorised access to it<sup>115</sup> and its dissemination to third States and international organisations.<sup>116</sup> Breach of the security rules can give rise to disciplinary sanctions against those responsible, while compromising or losing EUCI can also result in legal action.<sup>117</sup>

**34.** The Decision applies to those instances in which the Council, its preparatory bodies or its General Secretariat have to deal with EUCI.<sup>118</sup> It is also applicable to the EU agencies, bodies and crisis management operations and their personnel established under the CFSP, Europol,

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<sup>109</sup> *Ibid.*, Art. 2 (2).

<sup>110</sup> J. THOMSEN and W. VAN DE RIJT, “How to Strike the Balance between Transparency and Confidentiality” in P. STOLK, A. TUNOVIC, H. KRANENBORG and W. VOERMANS (eds.), *Transparency in Europe II- Public Access to Documents in the EU and its Member States*, Artoos, Rijswijk, 2004, (93) 100.

<sup>111</sup> Art. 3 (1) Decision Council 2011/292/EU of 31 March 2011 on the security rules for protecting EU classified information, OJ L 141, 27.5.2011, 17.

<sup>112</sup> *Ibid.*, Art. 3 (2).

<sup>113</sup> *Ibid.*, Arts. 4, 5, 8, 10 and 11 and Annex II, IV and V.

<sup>114</sup> *Ibid.*, Art. 9 and Annex III.

<sup>115</sup> *Ibid.*, Art. 7 and Annex I.

<sup>116</sup> *Ibid.*, Art. 12 and Annex VI.

<sup>117</sup> *Ibid.*, Art. 13 (5).

<sup>118</sup> *Ibid.*, Recital (2) in the Preamble.

Eurojust, EU Special Representatives and the members of their teams.<sup>119</sup> Member States are to afford an equivalent level of protection to EUCI, in accordance with their national laws and regulations.<sup>120</sup> In the Decision, the Council indicates that the Commission is committed to apply equivalent levels of security standards for the protection of EUCI<sup>121</sup> and underlines the importance of associating the other institutions, bodies, offices and agencies of the Union with those standards.<sup>122</sup>

**35.** The Decision specifically determines that it does not prejudice Art. 15 TFEU, which contains the right of access to documents, and the instruments which implement it, such as Regulation 1049/2001.<sup>123</sup> This means that the Council still has to consider requests for access to EUCI and grant full or partial access whenever this is possible.<sup>124</sup> The fact that the document concerned is classified implies that the Council has originally found one of the exceptions to the right of access of Art. 4 Regulation 1049/2001 to be applicable.<sup>125</sup> This does not exclude the possibility however that it might reconsider its position and find that the exception is no longer applicable. In such a case, the documents will be declassified before access is granted.<sup>126</sup>

**36.** With regard to the special treatment given to sensitive documents, the Court of Justice and the General Court have held that the mere fact that a document has been classified according to the rules of an institution and/or is considered to be a sensitive document within the meaning of Art. 9 (1) Regulation 1049/2001 does not suffice as a justification for that institution to refuse access to the document concerned on the basis of Art. 4 (1) (a) of that Regulation.<sup>127</sup> On the other hand, the sensitive nature of a document does not imply either that

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<sup>119</sup> *Ibid.*, Recitals (6-8) in the Preamble.

<sup>120</sup> *Ibid.*, Art. 1 (2).

<sup>121</sup> *Ibid.*, Recital (4) in the Preamble.

<sup>122</sup> *Ibid.*, Recital (5) in the Preamble.

<sup>123</sup> *Ibid.*, Recital (6) in the Preamble.

<sup>124</sup> J. THOMSEN and W. VAN DE RIJT, “How to Strike the Balance between Transparency and Confidentiality” in P. STOLK, A. TUNOVIC, H. KRANENBORG and W. VOERMANS (eds.), *Transparency in Europe II- Public Access to Documents in the EU and its Member States*, Artoos, Rijswijk, 2004, (93) 99.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> ECJ, Case C-576/12 P *Jurašinović v Council* [2013] ECR I-0000, para. 46; CFI, Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429, para. 73; EGC, Case T-529/09 *In 't Veld v Council* [2012] ECR II-0000, para. 21.

access to it can only be refused on the basis of Art. 4 (1) (a) after it has been classified within the meaning of Art. 9.<sup>128</sup>

**37.** Sensitive documents require permission of the originator before they can be recorded in the register of documents or released<sup>129</sup> and applications to obtain access to them can only be processed by authorized persons.<sup>130</sup> If an institution refuses to disclose a sensitive document, it has to justify this decision in such a way that it does not harm the interests set out in Art. 4 of the Regulation, which include the protection of the public interest as regards public security and international relations.<sup>131</sup> Also the Member States have to honour these interests when handling an application for access to a sensitive document.<sup>132</sup> The institutions have to make public their rules concerning sensitive documents.<sup>133</sup> Furthermore, the Commission and the Council have to inform the European Parliament about such documents. Also references in the register of documents<sup>134</sup> have to be made with attention for the protection of the interests set out in Art. 4 of the Regulation.<sup>135</sup>

**38.** In principle, legislative documents have to be even more directly accessible than other documents.<sup>136</sup> Nevertheless, this enhanced accessibility is also subject to Articles 4 and 9 of the Regulation.<sup>137</sup> Those provisions also have to be respected when publishing documents in the OJ.<sup>138</sup> Finally, each institution has to report annually on the number of cases in which it has refused to grant access to a document, the reasons for those refusals and the number of sensitive documents that have not been recorded in the register of documents.<sup>139</sup> The rules of Regulation 1049/2001 have been implemented by the Union institutions into their own Rules of Procedure<sup>140</sup>.

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<sup>128</sup> ECJ, Case C-576/12 P *Jurašinović v Council* [2013] ECR I-0000, para. 41 and 47 (with respect to the protection of the public interest as regards international relations).

<sup>129</sup> Art. 9 (3) Regulation 1049/2001. This Article covers both documents originating in Member States and in non-member countries: ECJ, Case C-266/05 P *Sison v Council* [2007] ECR I-01233, para. 75.

<sup>130</sup> Art. 9 (2) Regulation 1049/2001.

<sup>131</sup> *Ibid.*, Art. 9 (4); CFI, Case T-105/95 *WWF UK v Commission* [1997] ECR II-00313, para.65.

<sup>132</sup> Art. 9 (5) Regulation 1049/2001.

<sup>133</sup> *Ibid.*, Art. 9 (6).

<sup>134</sup> *Ibid.*, Art. 11 (1).

<sup>135</sup> *Ibid.*, Art. 11 (2).

<sup>136</sup> *Ibid.*, Recital (6) in the Preamble.

<sup>137</sup> *Ibid.*, Art. 12 (2).

<sup>138</sup> *Ibid.*, Art. 13 (1).

<sup>139</sup> *Ibid.*, Art. 17 (1).

<sup>140</sup> Decision Commission 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure (notified under document number C(2001) 3714), *OJ L* 345, 29.12.2001, 94; Decision Council 2004/338/EC, Euratom of 22 March 2004 adopting the Council's Rules of Procedure, *OJ L* 106, 15.4.2004, 22. The rules on public access to Council documents, which apply *mutatis mutandis* to documents of the European Council, can



**39.** The EEAS is a body that supports the High Representative of the Union for Foreign Affairs and Security Policy<sup>141</sup> in the exercise of her tasks,<sup>142</sup> working in cooperation with the diplomatic services of the Member States.<sup>143</sup> Following Decision 2010/427/EU of the Council, the rules on access to documents held by the EU institutions, as set out in Regulation 1049/2001, are also applicable to the EEAS.<sup>144</sup> Access to documents held by the EEAS is governed by Decision 2011/C 243/08 of the High Representative of the Union for Foreign Affairs and Security Policy.<sup>145</sup> The scope of the Decision is the same as that of Regulation 1049/2001.<sup>146</sup> The Decision set outs the procedure for requiring access to documents<sup>147</sup> and states that the reasons for a refusal have to be given in accordance with the exceptions provided for by Regulation 1049/2001, even when the response to an application is only partly negative.<sup>148</sup> Third parties have to be consulted when access is sought to a document that originates from them, unless it is clear that such a document shall not be disclosed, in light of the exceptions laid down in Regulation 1049/2001.<sup>149</sup> The third party does not have to be consulted either when the document has already been made public by its author or under Regulation 1049/2001 or similar provisions.<sup>150</sup>

**40.** In any case, the third party has to be consulted if the document is a sensitive document, as defined by Art. 9 Regulation 1049/2001, or if the document originates from a Member State which has requested the EEAS, in writing, not to disclose the document without its prior agreement under Art. 4 (5) Regulation 1049/2001.<sup>151</sup> If the third party has not replied within a reasonable time limit or is unidentifiable or untraceable, the EEAS decides on the application in light of the exceptions set out in Regulation 1049/2001, taking into account the legitimate

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now be found in Annex II Decision Council 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure, *OJL* 325, 11.12.2009, 35; Art. 10 (2) Decision European Council 2009/882/EU of 1 December 2009 adopting its Rules of Procedure, *OJL* 315, 2.12.2009, 51.

<sup>141</sup> Art. 27 (1) TEU: The High Representative contributes to the development of the CFSP.

<sup>142</sup> Art. 2 (1) Decision Council 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, *OJL* 201, 3.8.2010, 30.

<sup>143</sup> Art. 27 (3) TEU.

<sup>144</sup> Art. 11 (1) Decision Council 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, *OJL* 201, 3.8.2010, 30.

<sup>145</sup> Decision High Representative of the Union for Foreign Affairs and Security Policy 2011/C 243/08 of 19 July 2011 on the rules regarding access to documents, *OJ C* 243, 20.8.2011, 16.

<sup>146</sup> *Ibid.*, Art. 1.

<sup>147</sup> *Ibid.*, Art. 2-4

<sup>148</sup> *Ibid.*, Art. 5.

<sup>149</sup> *Ibid.*, Art. 6 (1).

<sup>150</sup> *Ibid.*, Art. 6 (2).

<sup>151</sup> *Ibid.*, Art. 6 (3).

interests of the third party on the basis of the information which the EEAS has at its disposal.<sup>152</sup>

**41.** Nevertheless, the EEAS can also disclose a document against the will of the third party from which it originates. The third party must then be informed of the EEAS' intention to give access to the document within the deadline applicable under Regulation 1049/2001 and of the remedies available to it for opposing disclosure.<sup>153</sup> Member States can consult the EEAS when they have received an application for access to a document which originates from it, after which the EEAS shall give its opinion promptly.<sup>154</sup> By analogy with Regulation 1049/2001, applications for access to sensitive documents, classified under that Regulation or under the EEAS' security rules, can only be handled by authorized persons.<sup>155</sup> If access to such documents is refused, the reasons for this refusal have to be given in accordance with the exceptions of Regulation 1049/2001.<sup>156</sup> If this is not possible, the document has to be declassified before it is sent to the applicant.<sup>157</sup> Finally, the EEAS is to maintain an online register of its documents.<sup>158</sup>

**42.** During the first two years of its existence, the EEAS has received a total of 389 requests for access to documents, of which 208 (53,47%) came from the academic sector.<sup>159</sup> In 71,72% of the cases (279 requests), full access was granted following initial application. Partial access was given to 6,43% of the initial applications (25 requests) and 12,08% of the cases (47 requests) were subject to a full refusal. Concerning these 72 requests that were answered by partial or total refusal for access, the exception of Regulation 1049/2001 relied on most frequently was the protection of the public interest as regards international relations (in 87,50% of the cases, i.e. 63 requests). The exceptions concerning public security and defence and military matters were only applied in 4,17% (3 requests) and 1,39% (1 request) of the cases respectively.<sup>160</sup> One confirmatory request was lodged in 2011, for which the decision to

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<sup>152</sup> *Ibid.*, Art. 6 (5).

<sup>153</sup> *Ibid.*, Art. 6 (6).

<sup>154</sup> *Ibid.*, Art. 7.

<sup>155</sup> *Ibid.*, Art. 8 (1)

<sup>156</sup> *Ibid.* Art. 8 (2)

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*, Art. 10.

<sup>159</sup> Report European External Action Service EEAS (2013) 1141825 of 13 May 2013 on access to documents for the years 2011 and 2012, [http://www.eeas.europa.eu/documents/pdf/report\\_access\\_to\\_documents\\_2011-12\\_en.pdf](http://www.eeas.europa.eu/documents/pdf/report_access_to_documents_2011-12_en.pdf), 3.

<sup>160</sup> *Ibid.*, 3-4.

refuse access was confirmed on the basis of protecting the public interest as regards international relations. No such request was lodged in 2012.<sup>161</sup>

#### 4 CASE LAW

**43.** In their earliest case law on the principle of transparency, the Court of Justice and the Court of First Instance (now the General Court) were quite favourably disposed towards this principle indeed, yet this did not drive them to deducing a general right of transparency or access to documents from it.<sup>162</sup> The Union courts only recognised citizen's rights to participation in the legislative process if these were expressly provided by the Community legislation pertaining to that process.<sup>163</sup> Initially, this made it possible for the Union institutions to adhere to an assumption of confidentiality.<sup>164</sup> However, in *Carvel v Council*<sup>165</sup>, the Court of First Instance ruled that the Council could not automatically refuse access to documents, without balancing the interests that could have been undermined by disclosure against the right of the EU citizens to see the document.<sup>166</sup> Hence, the Council could not assume that all of its documents are confidential just like that. In *Netherlands v Council*, The Court of Justice stressed that, as long as the Community legislature had not adopted general rules on the right of public access to documents held by the institutions, the latter had to adopt measures themselves to deal with requests for access, by virtue of their power of internal organization.<sup>167</sup> These measures had to be in conformity with the interests of good administration.<sup>168</sup>

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<sup>161</sup> *Ibid.*, 5.

<sup>162</sup> See ECJ, Case C-353/99 P *Council v Hautala* [2001] ECR I-09565, para. 31, in which the ECJ did not find it necessary to address this question; P. CRAIG and G. DE BÚRCA, *EU Law- Text, cases and materials*, Oxford, Oxford University Press, 2011, 544.

<sup>163</sup> ECJ, Case C-104/97 P *Atlanta v Commission* [1999] ECR I-6963, paras. 35-39; P. CRAIG, *The Lisbon Treaty – Law, Politics and Treaty reform*, Oxford, Oxford University Press, 2013, 67-68.

<sup>164</sup> ECJ, Case C-58/94 *Netherlands v Council* [1996] ECR I-02169, para. 36; L. WOODS and P. WATSON, *Steiner & Woods EU Law*, Oxford, Oxford University Press, 2012, 75.

<sup>165</sup> CFI, Case T-194/94 *Carvel v Council* [1995] ECR II-02765, para. 64-65.

<sup>166</sup> However, this balance did not have to be struck when the Council wanted to apply one of the mandatory exceptions of Art. 4 (1) Decision Council 93/731/EC of 20 December 1993 on public access to Council documents, OJ L 340, 31.13.1993, 43 (which included the protection of the public interest as regards public security), in which case access had to be denied once the relevant circumstances had been shown to exist: *ibid.*; CFI, Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289, para. 111; P. CRAIG and G. DE BÚRCA, *EU Law- Text, cases and materials*, Oxford, Oxford University Press, 2011, 544; L. WOODS and P. WATSON, *Steiner & Woods EU Law*, Oxford, Oxford University Press, 2012, 75.

<sup>167</sup> ECJ, Case C-58/94 *Netherlands v Council* [1996] ECR I-02169, para. 37.

<sup>168</sup> *Ibid.*; P. CRAIG and G. DE BÚRCA, *EU Law- Text, cases and materials*, Oxford, Oxford University Press, 2011, 544.

44. Later case law has made clear that the exceptions on the right of access to documents have to be interpreted narrowly<sup>169</sup>, since they derogate from the default principle of the widest possible public access to documents held by the institutions.<sup>170</sup> This has sparked a change in attitude, with the result that access to documents has become the norm rather than the exception.<sup>171</sup> After all, “*it is precisely openness...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.*”<sup>172</sup> It is considerations like these that reveal the importance of construing the exceptions to the right of access to documents in a strict way.

45. Concerning Regulation 1049/2001, the Court of Justice has ruled that a possible application of an exception from that Regulation has to be assessed by examining, in each individual case, whether the requested document has to be protected by such an exception.<sup>173</sup> Therefore, a document cannot automatically fall under an exception from the Regulation simply because it can be classified under a specific category that is mentioned in the

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<sup>169</sup> ECJ, Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal v Commission* [2000] ECR I-00001, para. 27; ECJ, Case C-353/99 P *Council v Hautala* [2001] ECR I-09565, para. 25; ECJ, Case C-266/05 P *Sison v Council* [2007] ECR I-01233, para. 63; ECJ, Case C-64/05 P *Sweden v Commission* [2007] ECR I-11398, para. 66; ECJ, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-04723, para. 36; CFI, Case T-105/95 *WWF UK v Commission* [1997] ECR II-00313, para. 56; CFI, Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289, para. 110; CFI, Case T-20/99 *Denkavit Nederland v Commission* [2000] ECR II-3011, para. 45; CFI, Case T-211/00 *Kuijjer v Council (Kuijjer II)* [2002] ECR II-00485, para. 55; EGC, Case T-233/09 *Access Info Europe v Council* [2011] ECR II-01073, para. 55, 56 and 69; Opinion of AG Léger in ECJ, Case C-353/99 P *Council v Hautala* [2001] ECR I-09565, point 86. Restrictive interpretation is required for all exceptions “*to the normal obligation of transparency and accessibility of information*”, so also outside of the access to documents framework: Opinion of AG Sharpston in ECJ, Case C-345/06 *Heinrich* [2009] ECR I-01659, point 114; J. THOMSEN and W. VAN DE RIJDT, “How to Strike the Balance between Transparency and Confidentiality” in P. STOLK, A. TUNOVIC, H. KRANENBORG and W. VOERMANS (eds.), *Transparency in Europe II- Public Access to Documents in the EU and its Member States*, Artoos, Rijswijk, 2004, (93) 96 and 103; P. CRAIG and G. DE BÚRCA, *EU Law-Text, cases and materials*, Oxford, Oxford University Press, 2011, 545; L. WOODS and P. WATSON, *Steiner & Woods EU Law*, Oxford, Oxford University Press, 2012, 75; G. DE BAERE, “Access to documents and data protection in the European External Action Service”, *Leuven Center for Global Governance Studies Working Paper Series* March 2013, WP 103, [http://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp101-110/wp103-de-baere.pdf](http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp101-110/wp103-de-baere.pdf), 5.

<sup>170</sup> Set out by Art. 1 Regulation 1049/2001 and Recital (11) in the Preamble to that Regulation; ECJ, Case C-266/05 P *Sison v Council* [2007] ECR I-01233, para. 61.

<sup>171</sup> EGC, Case T-233/09 *Access Info Europe v Council* [2011] ECR II-01073, para. 69; Opinion of AG Tesouro in ECJ, Case C-58/94 *Netherlands v Council* [1996] ECR I-02169, point 15; L. WOODS and P. WATSON, *Steiner & Woods EU Law*, Oxford, Oxford University Press, 2012, 75.

<sup>172</sup> ECJ, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-04723, para. 59.

<sup>173</sup> *Ibid.*, 76.

Regulation.<sup>174</sup> Furthermore, the Court of First Instance has specified that an institution, with which an application for access to its documents is lodged, has to perform an individual assessment of every requested document, unless it is obviously clear that access has to be granted or denied.<sup>175</sup>

#### 4.1 The *Turco* case

**46.** Concerning the right of EU citizens of access to documents, account has to be taken of the *Turco*<sup>176</sup> case, in which the Court of Justice was called upon to clarify the scope and application of the second indent of Art. 4 (2) of Regulation 1049/2001, i.e. the obligation of the institutions to refuse access to a document when its disclosure would undermine the protection of legal advice.<sup>177</sup> The Court of Justice determined how the Council ought to examine whether the exception regarding the protection of legal advice can be invoked.

**47.** First, the Council has to determine which parts of the requested document actually relate to legal advice and are thus able to be covered by the exception of Art. 4 (2) Regulation 1049/2001.<sup>178</sup> To reach this conclusion, it does not suffice that the document concerned is headed ‘legal advice/opinion’.<sup>179</sup>

**48.** Secondly, the Council must assess whether disclosing the parts of the document concerned that relate to legal advice would arise to undermining the protection of that advice<sup>180</sup> and a reasoned decision has to be given when access to a document is refused.<sup>181</sup> This means that

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<sup>174</sup> ECJ, Case C-64/05 *Sweden v Commission* [2007] ECR I-11389; ECJ, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-04723, para. 35, 36 and 39; J. THOMSEN and W. VAN DE RIJ, “How to Strike the Balance between Transparency and Confidentiality” in P. STOLK, A. TUNOVIC, H. KRANENBORG and W. VOERMANS (eds.), *Transparency in Europe II- Public Access to Documents in the EU and its Member States*, Artoos, Rijswijk, 2004, (93) 97.

<sup>175</sup> CFI, Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-01121; P. CRAIG and G. DE BÚRCA, *EU Law- Text, cases and materials*, Oxford, Oxford University Press, 2011, 545.

<sup>176</sup> ECJ, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-04723.

<sup>177</sup> *Ibid.* para. 2.

<sup>178</sup> *Ibid.* para. 38.

<sup>179</sup> *Ibid.* para. 39.

<sup>180</sup> *Ibid.* para. 40.

<sup>181</sup> *Ibid.*, para. 48; The requirement of the statement of reasons was already stressed by the ECJ in Case C-195/80, *Michel v Parliament* [1981] ECR I-02861, para. 22: “However, it must be remembered in that regard that the requirement that a decision adversely affecting a person should state the reasons on which it is based is intended to enable the Court to review the legality of the decision and to provide the person concerned with details sufficient to allow him to ascertain whether the decision is well founded or whether it is vitiated by an error which will allow its legality to be contested. It follows that the statement of reasons must in principle be notified to the person concerned at the same time as the decision adversely affecting him and that a failure to

the Council, when refusing access to a document which it has been asked to disclose, has to explain “*how access to a document could specifically and effectively undermine the interest protected by an exception laid down in Article 4 of Regulation No 1049/2001 relied on by that institution*”<sup>182</sup>. Hereby, the Court specified that “[*t*]he risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical.”<sup>183</sup>. This is what Adamski calls the “*the reasonable foreseeability standard*”.<sup>184</sup> The mere fact that a document concerns an interest protected by an exception from Regulation 1049/2001 cannot suffice as a means of justifying the application of that exception.<sup>185</sup>

**49.** In the last stage of its examination of the situations envisaged in Art 4 (2-3) of Regulation 1049/2001, the Council has to ascertain whether or not there is an overriding public interest that would nevertheless justify disclosure of the document.<sup>186</sup> Hereby, it is allowed to base its decisions on general presumptions that are normally applicable to the category of documents to which the requested document belongs, as long as it ascertains in each individual case that those presumptions are in fact applicable to the specific document of which disclosure is

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*state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the Court.*” In the context of access to documents, these considerations were repeated by the ECJ in Case C-353/01 P *Mattila v Council and Commission* [2004] ECR I-01073, para. 32, but it added that a reasoned decision has to be given for a refusal to grant access, “*except in exceptional cases*”; ; P. CRAIG and G. DE BÚRCA, *EU Law- Text, cases and materials*, Oxford, Oxford University Press, 2011, 543; L. WOODS and P. WATSON, *Steiner & Woods EU Law*, Oxford, Oxford University Press, 2012, 76.

<sup>182</sup> ECJ, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-04723, para. 49.

<sup>183</sup> *Ibid.* para. 43. These requirements have been repeated in later case law, with regard to the applicability of other exceptions enshrined in Regulation 1049/2001 than the one concerning the protection of legal advice: ECJ, Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-05885, para. 53; ECJ, Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, *Sweden and Others v API and Commission* [2010] ECR I-08533, para. 72; ECJ, Case C-506/08 P *Sweden v MyTravel and Commission* [2011] ECR I-6237, para. 76; ECJ, Case C-576/12 P *Jurašinović v Council* [2013] ECR I-0000, para. 45 (in this last case, different terminology has been used: “*specifically and actually*” instead of “*specifically and effectively*”). They have also been imposed by the Court of First Instance/General Court: CFI, Case T-166/05 *Borax Europe v Commission* [2009] ECR II-00028, summary publication, para. 50; EGC, Case T-233/09 *Access Info Europe v Council* [2011] ECR II-01073, para. 60. Hereby, it seems to have taken a stricter approach than it had done before in CFI, Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289, para. 112 and CFI, Case T-211/00 *Kuijjer v Council (Kuijjer II)* [2002] ECR II-00485, para. 56, in which the Court held that the institution concerned has to assess, for every document to which access is sought, whether disclosure “*is in fact likely*” to undermine one of the protected interests (these cases concerned the application of the exceptions laid down in in Art. 4 (1) Decision Council 93/731/EC of 20 December 1993 on public access to Council documents, *OJ L 340*, 31.13.1993, 43). Also *cfr.* CFI, Case T-123/99, *JT's Corporation v Commission* [2000] ECR II-03269, para. 64 and CFI, Case T-191/99 *Petrie and others v Commission* [2001] ECR II-3677, para. 78, concerning the application of Decision Commission 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents, *OJ L 46*, 18.02.1994, 58.

<sup>184</sup> D. ADAMSKI, “How Wide is “The Widest Possible”? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited”, *C.M.L.Rev.* 2009, (521) 525.

<sup>185</sup> CFI, Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-01121, para. 69; EGC, Case T-233/09 *Access Info Europe v Council* [2011] ECR II-01073, para. 59.

<sup>186</sup> ECJ, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-04723, para. 44 and 49.

being sought.<sup>187</sup> Therefore, there is no such thing as a general need for confidentiality to justify the refusal to disclose a document which contains legal advice that relates to legislative questions.<sup>188</sup>

**50.** Ascertaining whether an overriding public interest is at hand means that the particular interest which the Council seeks to protect by not disclosing the requested document<sup>189</sup> has to be balanced against, *inter alia*, the public interest in getting access to the document concerned. Hereby, it has to be borne in mind that public access to documents gives rise to increased openness, closer participation of citizens to the decision-making process and greater legitimacy, accountability and effectiveness of the EU administration in a democratic system.<sup>190</sup> Thus, the fundamental principles of transparency and democracy which underlie Regulation 1049/2001 can, in themselves, constitute the overriding public interest that justifies the disclosure of a document.<sup>191</sup>

**51.** The Court found that the balance which has to be struck is even more relevant when the Council is acting in its legislative capacity. If this is the case, wider access has to be granted to documents<sup>192</sup>, since this allows citizens to scrutinize all the information which has led to the adoption of a legislative act and thus leads to enhancing the democratic character of the Union.<sup>193</sup> By making this consideration, the Court of Justice clearly emphasized the link between transparency and democracy<sup>194</sup>, as it had already done in previous judgments.<sup>195</sup>

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<sup>187</sup> *Ibid.* para 50.

<sup>188</sup> *Ibid.*, para. 71, 78 and 79.

<sup>189</sup> In the *Turco* case, this involved the Council's interest to "receive frank, objective and comprehensive advice" by protecting the independence of the Council's legal service: *Ibid.*, para. 44 and 67.

<sup>190</sup> *Ibid.*, para. 45 and 67. These advantages, stemming from increased openness, are recognised in recital (2) in the Preamble to Regulation 1049/2001 and attention has also been drawn to them in other cases: ECJ, Case C-41/00 P *Interporc Im- und Export GmbH v Commission* [2003] ECR I-02125, para. 39; ECJ, Case C-28/08 P *Commission v Bavarian Lager* [2010] ECR I-06055, para. 54; ECJ, Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] ECR I-11063, para. 68; EGC, Case T-233/09 *Access Info Europe v Council* [2011] ECR II-01073, para. 56.

<sup>191</sup> ECJ, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-04723, para. 74, 75 and 78.

<sup>192</sup> Recital (6) in Preamble to and Art. 12 (2) Regulation 1049/2001.

<sup>193</sup> ECJ, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-04723, para. 46.

<sup>194</sup> L. WOODS and P. WATSON, *Steiner & Woods EU Law*, Oxford, Oxford University Press, 2012, 76.

<sup>195</sup> See, *i.a.*, ECJ, Case C-58/94 *Netherlands v Council* [1996] ECR I-02169, para. 31-36; ECJ, Case C-353/99 P *Council v Hautala* [2001] ECR I-09565, para. 24; In his opinion in *Netherlands v Council*, also AG Tesouro stressed that "the existence of informed public opinion constitutes an essential part of any democratic system": Opinion of AG Tesouro in ECJ, Case C-58/94 *Netherlands v Council* [1996] ECR I-02169, point 16; Also the Court of First Instance has held that the principle of transparency contributes to enhanced democracy and respect for fundamental rights in CFI, Case T-211/00 *Kuijter v Council (Kuijter II)* [2002] ECR II-00485, para. 52; P. CRAIG and G. DE BÚRCA, *EU Law- Text, cases and materials*, Oxford, Oxford University Press, 2011, 544.

**52.** In paragraph 68 of the *Turco* judgment, the Court of Justice considered “*that Regulation 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council’s legal service relating to a legislative process.*” Thus, the Court confirmed that access to documents has to be considered as the fundamental principle, to which secrecy is the exception. However, it was accepted that different treatment can be given to specific legal opinions that, although they are given in the context of the legislative process, must nevertheless be regarded as “*being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question.*”<sup>196</sup> Hence, the protection of legal advice entails that the obligation of disclosure does not apply to such types of legal opinions, as long as the institution which refuses to grant access to them gives a detailed statement of the reasons for this refusal.<sup>197</sup>

#### 4.2 The *Sison* Case

**53.** With respect to the exceptions of the protection of the public interest as regards public security and international relations, entrenched in Art. 4 (1) (a) Regulation 1049/2001, the *Sison*<sup>198</sup> judgment is of great importance. In this case, the Court of Justice specified that the scope of judicial review of the legality of a decision by which the Council refuses to disclose a document to the public on the basis of one of the exceptions as regards the public interest, mentioned in Art. 4 (1) (a), is very limited.

**54.** By a Council Decision, implementing a Regulation which contained restrictive measures against certain persons and entities, in the context of the fight against terrorism, Mr. Sison’s name was included on a list of persons whose funds and financial assets were to be frozen.<sup>199</sup> Under Regulation 1049/2001, he sought to obtain access to all the documents that had led to the Decision that had included him on the list and to later Decisions, by which his name had been retained on that list<sup>200</sup>. Moreover, Sison wished to be informed on the identity of the Member States that had provided the Council with the documents concerned.<sup>201</sup>

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<sup>196</sup> ECJ, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-04723, para. 69.

<sup>197</sup> *Ibid.*

<sup>198</sup> ECJ, Case C-266/05 P *Sison v Council* [2007] ECR I-01233.

<sup>199</sup> *Ibid.*, para. 10.

<sup>200</sup> Including the report of the proceedings of the Permanent Representatives Committee (Coreper) concerning one of those Decisions: *Ibid.*

<sup>201</sup> *Ibid.*



55. The Council refused access to each of the documents requested, stating that the information that formed the basis of the Decisions establishing the list at issue was to be found in the reports of Coreper<sup>202</sup> proceedings.<sup>203</sup> Since these reports had been classified as “*CONFIDENTIEL UE*”<sup>204</sup>, the information requested could not be disclosed. For this refusal, the Council relied on the exception of protecting the public interest as regards public security and international relations<sup>205</sup>, claiming that public access to information on counter-terrorism measures could seriously jeopardise the efforts made in this field by the Member States’ authorities, leading to the public security being undermined.<sup>206</sup> Furthermore, the Council contended that disclosing the information concerned would also undermine the protection of the public interest as regards international relations, since the international fight against terrorism also involved actions by third States’ authorities.<sup>207</sup> Granting partial access to the information concerned was not possible either, as was revealing the identity of the Member States which had provided the information.<sup>208</sup> Sison called upon the CFI to have the decisions of the Council refusing access to the documents concerned annulled. The CFI dismissed<sup>209</sup> his application, after which Sison brought an appeal before the Court of Justice.

56. The Court started by pointing out that the EU institutions enjoy a wide discretion in areas where they have to make political, economic and social choices and undertake complex assessments.<sup>210</sup> Therefore, “*the legality of a measure adopted in those fields can be affected only if the measure is manifestly inappropriate having regard to the objective which the*

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<sup>202</sup> The Committee of Permanent Representatives of the Member States or Coreper (short for Comité des représentants permanents) is an assisting body of the Council, comprising the heads of each Member States’ Permanent Representation with the Communities: Art. 16 (7) TEU; G. VERMEULEN and W. DE BONDT, *EU Justice and Home Affairs – Institutional and policy development*, Antwerp, Maklu, 2014, 54.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.*

<sup>205</sup> First and third indent of Art. 4 (1) (a) Regulation 1049/2001.

<sup>206</sup> ECJ, Case C-266/05 P *Sison v Council* [2007] ECR I-01233, para. 10.

<sup>207</sup> *Ibid.*

<sup>208</sup> Given their objection to this disclosure, according to Art. 9 (3) Regulation 1049/2001: *Ibid.*

<sup>209</sup> CFI, Joined Cases T-110/03, T-150-03 and T-405/03 *Sison v Council* [2005] ECR II-1429.

<sup>210</sup> ECJ, Case C-266/05 P *Sison v Council* [2007] ECR I-01233, para. 33. The CFI had already emphasised that the political responsibilities of the Council confer on it a wide discretion when assessing the harm which disclosure of documents could cause to the Union’s international relations: “*the Council’s discretion is connected with the political responsibilities conferred on it by Title V of the Treaty on European Union. It is on that basis that the Council must determine the possible consequences which disclosure of the contested report may have for the international relations of the European Union*”: CFI, Case T-14/98 *Hautala v Council* [1999] ECR II-02489, para. 71. A similar reasoning was later found in CFI, Case T-211/00 *Kuijter v Council (Kuijter II)* [2002] ECR II-00485, para. 53, which like *Hautala* concerned the application of the exception of the public interest as regards international relations, laid down in Art. 4 (1) Decision Council 93/731/EC of 20 December 1993 on public access to Council documents, *OJ L 340*, 31.13.1993, 43: “[*W*]hen the Council decides whether the public interest may be undermined by releasing a document, it exercises a discretion which is among the political responsibilities conferred on it by provisions of the Treaties.”.

*competent institution is seeking to pursue.*”<sup>211</sup> This consideration led the Court to uphold the CFI’s reasoning that, in respect of the exceptions relating to the public interest provided for in Art. 4 (1) (a) Regulation 1049/2001, “*the Council must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest.*”<sup>212</sup> The role of the EU Courts in reviewing the legality of a decision whereby the Council refuses public access to a document, based on one of the exceptions of Art. 4 (1) (a) Regulation 1049/2001, is therefore confined to “*verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers*”.<sup>213</sup> This “*marginal review standard*”<sup>214</sup> concerning the application of the exceptions set out in Art. 4 (1) (a) was already subscribed to by the Union Courts before Regulation 1049/2001 came into being and has also been applied in other matters.<sup>215</sup>

**57.** The Court granted this wide margin of appreciation because of the sensitive and essential nature of the interests protected by Art. 4 (1) (a), which in any case renders decisions on this matter complex and delicate. Therefore, some caution necessarily had to be taken.<sup>216</sup> Moreover, the Court pointed out that the criteria set out in Art. 4 (1) (a) Regulation 1049/2001 are of a general nature<sup>217</sup> and noticed that proposals to define these criteria more precisely had not been accepted at the time when the Regulation was adopted.<sup>218</sup> These general provisions provide the institutions with a large discretion and consequently, the role given to the EU courts in reviewing the legality of a decision by which an institution denies access to a

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<sup>211</sup> ECJ, Case C-266/05 P *Sison v Council* [2007] ECR I-01233, para. 33.

<sup>212</sup> *Ibid.*, para. 34 and 64.

<sup>213</sup> *Ibid.*

<sup>214</sup> D. ADAMSKI, “How Wide is “The Widest Possible”? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited”, *C.M.L.Rev.* 2009, (521) 524.

<sup>215</sup> See, *i.a.*, the early judgments in ECJ, Case C-42/84 *Remia BV v Commission* [1985] ECR I-2545, para. 34 (concerning the application by the Commission of Art. 85 (1) of the EEC Treaty, now Art. 105 (1) TFEU) and CFI, Case T-14/98 *Hautala v Council* [1999] ECR II-02489, para. 72.

<sup>216</sup> *Ibid.*, para. 35.

<sup>217</sup> *Ibid.*, para. 36.

<sup>218</sup> *Ibid.*, para. 37-38; A clarification contained in the proposal for Regulation 1049/2001, which intended to limit the scope of application of those exceptions to situations where disclosure “*could significantly undermine*” the protection of the interests envisaged in that provision, including the public interest as regards public security and international relations, was rejected: Art. 4 (a) Proposal COM(2000) 30 final-2000/0032(COD) of 28 January 2000 for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, OJ C 177E, 27.6.2000 70. The 30<sup>th</sup> amendment to that proposal, contained in the legislative proposal in the Report of the Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs of the European Parliament (A5-0318/2000), which was also rejected, had suggested that access would be refused on the basis of Art. 4 where disclosure of a document could “*significantly*” undermine public security or a “*vital interest*” relating to the Union’s international relations.

document, on the basis of Art. 4 (1) (a) Regulation 1049/2001, cannot be considered to be very extensive.

**58.** Furthermore, the Court reconfirmed that, although documents which have been drawn up in the course of a legislative procedure should normally be made directly accessible<sup>219</sup>, this obligation is still subject to Arts. 4 and 9 Regulation 1049/2001. Hence, access to a document still has to be refused when this would undermine the interests protected by Art. 4 (1) (a) Regulation 1049/2001, even when the document concerned is a ‘legislative document’ within the meaning of Art. 12 (2) Regulation 1049/2001.<sup>220</sup>

**59.** The wording of Art. 4 (1) Regulation 1049/2001 clearly requires that disclosure of documents has to be refused as soon as this can prejudice the interests protected by that provision.<sup>221</sup> This precludes the need to balance the requirements that arise from the protection of those interests against those that result from possible other interests which might be at stake.<sup>222</sup> Moreover, the Court clarified that the purpose of Regulation 1049/2001 is to establish a right of access to documents of the EU institutions for the general public, rather than for specific individuals, who might have a particular interest in acquiring access to those documents.<sup>223</sup> These considerations urged the Court to conclude “*that the particular interest of an applicant in obtaining access to documents cannot be taken into account by the institution called upon to rule on the question whether the disclosure to the public of those documents would undermine the interests protected by Article 4 (1) (a) of Regulation No 1049/2001 and to refuse, if that is the case, the access requested.*”<sup>224</sup>

**60.** Apart from this strict interpretation of Art. 4 (1) (a) Regulation 1049/2001, the Court also held that documents of public authorities that concern persons or entities, suspected of terrorist activities, and which can be considered as ‘sensitive documents’ within the meaning of Art. 9 of the Regulation, must not be made available to the public, since this might imperil

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<sup>219</sup> Art. 12 (2) Regulation 1049/2001.

<sup>220</sup> ECJ, Case C-266/05 P *Sison v Council* [2007] ECR I-01233, para. 41.

<sup>221</sup> *Ibid.*, para. 35 and 46.

<sup>222</sup> *Ibid.*, para. 46.

<sup>223</sup> As is apparent from Articles 2 (1), 6(1) and 12 (1) Regulation 1049/2001, the title of that Regulation and Recitals (4) and (11) in its Preamble. Furthermore, proposals to oblige the institutions to take into account more specific interests of designated persons when assessing an application for access to their documents have not been included in the final version of Regulation 1049/2001: *Ibid.*, para. 43-45.

<sup>224</sup> ECJ, Case C-266/05 P *Sison v Council* [2007] ECR I-01233, para. 47.

the effectiveness of those authorities' fight against terrorism and eventually undermine the protection of public security.<sup>225</sup>

**61.** With respect to the reasons given by the Council for refusing access to the documents requested, the Court accepted that, although this reasoning was brief, it was still adequate, given the context of the case and sufficient to allow the appellant to identify the reasons for the refusal and the Union Courts to examine the legality of it.<sup>226</sup> This brevity was justified by the need not to indirectly undermine the sensitive interests which Art. 4 (1) (a) Regulation 1049/2001 seeks to protect, by revealing the content of the particular document when stating the reasons for refusing access to it.<sup>227</sup> Articles 9 (4) and 11 (2) Regulation 1049/2001 demonstrate that this was also a point of concern of the Union legislature.

**62.** Finally, the Court of Justice clarified that Art. 9 (3) Regulation 1049/2001, which requires the consent of the originator of a sensitive document before such a document can be released or recorded in the register, allows the originator to object disclosure not only of that document's content but even of its very existence.<sup>228</sup> Should the existence of the document nevertheless be revealed, the originating authority still has the right to oppose disclosure of its own identity.<sup>229</sup> This is justified by the special nature of the documents envisaged in Art. 9 (1) Regulation 1049/2001, which have a highly sensitive content, even when this makes it very difficult, if not practically impossible, for an applicant to find out the State of origin of the requested document.<sup>230</sup> Hence, the Council had stated its reasons for refusing to disclose the identity of the States from which the documents requested by Sison originated in a satisfactory way, by making clear that these were sensitive documents and that the States concerned had opposed to their identity being disclosed.<sup>231</sup> This mere opposition sufficed as a ground for refusal by the Council, without a duty for this institution to scrutinise the grounds for this opposition or to state whether and in what way the interests protected by Art. 4 (1) (a) Regulation 1049/2001 would be undermined by disclosing the identity of the opposing States.

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<sup>225</sup> *Ibid.*, para. 66.

<sup>226</sup> *Ibid.*, para. 81.

<sup>227</sup> *Ibid.*, para. 82 and 83.

<sup>228</sup> *Ibid.*, para. 101.

<sup>229</sup> *Ibid.*, para. 102.

<sup>230</sup> *Ibid.*, para. 103.

<sup>231</sup> *Ibid.*, para. 106.

**63.** When analysing Regulation 1049/2001, together with the *Sison* case and the judgment in *Turco*, questions arise whether the case law of the Union courts sufficiently safeguards the right of access to documents of the EU citizens. In *Turco*, the ECJ required the institution called upon to disclose a document to assess whether an overriding public interest is at hand before it can invoke the exceptions set out in Art 4 (2-3) Regulation 1049/2001, whilst it does not have to do this if it intends to apply Art. 4 (1) of the Regulation. Neither Art. 4 (1) Regulation 1049/2001 nor Art. 4 (2-3) require an institution with which a request for access to documents is lodged to take into account the particular interests which an individual might have in obtaining access to the document concerned. As far as Art. 4 (1) is concerned, this is clear from the text of the provision, which does not mention any overriding interest at all and was said in so many words by the ECJ in para. 47 of *Sison*. With respect to Art. 4 (2-3), this appears from the wording of the provision and its interpretation in *Turco*, which only mention an overriding “public”<sup>232</sup> interest.

**64.** The former consideration implies that the institution which an individual applicant addresses is not under any circumstances obliged to take his personal interests into account when refusing access to a document.<sup>233</sup> As a result, the applicant will then always be confronted with the much more burdensome task of demonstrating that an abstract public interest is served by disclosure and that this overrides the need for protecting one of the interests set out in Art. 4 (2-3) (provided that the refusal is based on one of these paragraphs, because if Art. 4 (1) is invoked then even proof of an overriding public interest will not be of any use to the applicant, no matter how grave or demanding it may be<sup>234</sup>). One can wonder whether this requirement does not trump the *effet utile* of every individual EU citizen’s right of access to documents. After all, in practice, a request for access to documents will never be lodged by ‘the public’ in general, but by an individual applicant who wishes to exercise his individual right of access and has personal motives to do so.

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<sup>232</sup> ECJ, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-04723, para. 44.

<sup>233</sup> Report of the discussion on Public Access to Documents and Security at the Conference Transparency in Europe II – Public Access to Documents in the EU and its Member States, hosted by the Netherlands during its chairmanship of the EU Council at 25 and 26 November 2004 in P. STOLK, A. TUNOVIC, H. KRANENBORG and W. VOERMANS (eds.), *Transparency in Europe II- Public Access to Documents in the EU and its Member States*, Artoos, Rijswijk, 2004, (107) 108-109.

<sup>234</sup> D. ADAMSKI, “How Wide is “The Widest Possible”? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited”, *C.M.L.Rev.* 2009, (521) 522.

### 4.3 The *Heinrich* case

**65.** The tension between transparency and the protection of public security is not only clear in the area of the citizens' right of access to documents, but also occurs in a wider context. An illustration of this is offered by the *Heinrich*<sup>235</sup> case. After his security screening at the Viennese international airport, Mr. Heinrich was refused to board his flight on the ground that he was carrying tennis racquets in his luggage. The Austrian authorities based their action on a list of prohibited items that was contained in an Annex to a Regulation<sup>236</sup>, as amended<sup>237</sup> by an Annex to a Commission implementing Regulation<sup>238</sup>. Proceedings were brought before the national court, which observed that the Annex to the implementing Commission Regulation had not been published in the *OJ*, although it set out specific obligations for individuals. Hence, a reference for preliminary ruling was made to the ECJ.<sup>239</sup>

**66.** The ECJ emphasized that a Regulation, be it from the Council or the Commission, has to be published in the *OJ*, according to art. 297 (2), third subpara. TFEU and that it cannot have any legal effect in the absence thereof.<sup>240</sup> After all, the principle of legal certainty implies that an individual can only acquaint himself with the obligations set out in Union legislation if the latter is properly published.<sup>241</sup> This requirement also goes for Member States' legislation which seeks to implement rules adopted by the Union institutions and thereby imposes obligations on individuals.<sup>242</sup> The publication of the corresponding Union legislation then also ensures that natural and legal persons can adequately determine the source of the national measures which make them subject to specific obligations.<sup>243</sup> Otherwise, citizens would not be able to invoke the inapplicability of the national implementing legislation for non-compliance with Union legislation.<sup>244</sup>

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<sup>235</sup> ECJ, Case C-345/06 *Heinrich* [2009] ECR I-01659.

<sup>236</sup> Regulation European Parliament and Council (EC) No 2320/2002 of 16 December 2002 establishing common rules in the field of civil aviation security, *OJ* L 355, 30.12.2002, 1.

<sup>237</sup> ECJ, Case C-345/06 *Heinrich* [2009] ECR I-01659, para. 55.

<sup>238</sup> Regulation Commission (EC) No 622/2003 of 4 April 2003 laying down measures for the implementation of the common basic standards on aviation security, *OJ* L 89, 5.4.2003, 9.

<sup>239</sup> ECJ, Case C-345/06 *Heinrich* [2009] ECR I-01659, para. 3-24.

<sup>240</sup> *Ibid.*, para. 42; ECJ, Case C-161/06, *Skoma-Lux* [2007] ECR I-10841, para. 33.

<sup>241</sup> ECJ, Case C-345/06 *Heinrich* [2009] ECR I-01659, para. 43-44; ECJ, Case C-161/06, *Skoma-Lux* [2007] ECR I-10841, para. 37.

<sup>242</sup> ECJ, Case C-345/06 *Heinrich* [2009] ECR I-01659, para. 45.

<sup>243</sup> *Ibid.*, para. 46.

<sup>244</sup> ECJ, Case C-230/78 *Spa Eridania- Zuccherifici nazionali* [1979] ECR I-02749, para. 34; *Ibid.*, para. 47.

**67.** Although Regulation 2320/2002 *prima facie* addresses the competent authorities of the Member States, the ECJ considered that it clearly also imposes obligations on individuals, since it obliges them to undergo a security screening when travelling by airplane and prohibits them to take certain articles into the security restricted areas and on board.<sup>245</sup> The Annex to the Commission implementing Regulation, which had amended the original list of prohibited articles, had not been published in the *OJ*.<sup>246</sup> The Commission could not justify this lack of publication by availing itself of the confidentiality clause contained in Regulation 2320/2002<sup>247</sup>, setting out certain categories of measures and information which could be kept secret and therefore did not have to be published.<sup>248</sup> Hence, the ECJ held that the Annex to the Commission implementing Regulation could not have binding force in so far as it imposed obligations on individuals.

**68.** In this case, the Commission's desire to keep the list of prohibited items contained in the Annex to its Regulation secret was trumped by the requirements of the principle of legal certainty. This indicates that the tension between transparency and the protection of public security covers a wide range of possibly affected general principles of Union Law and is therefore not confined to the issue of citizens' rights of access to documents. Concerning the latter aspect of this tension, the ECJ did not address in *Heinrich* the question whether acts which are legally binding on individuals and are therefore required to be published in the *OJ*, pursuant to Art. 297 (2), third subpara. TFEU, can be considered to be 'documents' within the meaning of Art. 2 (3) Regulation 1049/2001.<sup>249</sup> This is an important question because if so, this would imply that a request for access to such acts, supposing they have not been published, could be made subject to one of the exceptions set out in Regulation 1049/2001, including the protection of public security.

**69.** Unlike the ECJ, AG Sharpston did discuss this issue in her Opinion<sup>250</sup> in the *Heinrich* case. She argued that the obligation to publish the Commission implementing Regulation, including its Annex, directly flowed from Art. 297 (2), second subpara. TFEU, rendering the question whether its text was capable of being considered to be a 'document' under

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<sup>245</sup> ECJ, Case C-345/06 *Heinrich* [2009] ECR I-01659, para. 51.

<sup>246</sup> *Ibid.*, para. 54-54.

<sup>247</sup> Art. 8 Regulation European Parliament and Council (EC) No 2320/2002 of 16 December 2002 establishing common rules in the field of civil aviation security, *OJ* L 355, 30.12.2002, 1.

<sup>248</sup> ECJ, Case C-345/06 *Heinrich* [2009] ECR I-01659, para. 58-59.

<sup>249</sup> *Ibid.*, para. 24.

<sup>250</sup> Opinion of AG Sharpston in ECJ, Case C-345/06 *Heinrich* [2009] ECR I-01659.

Regulation 1049/2001 moot.<sup>251</sup> According to her, Regulation 1049/2001 is supposed to provide access to documents which do not have to be made public anyway due to a specific obligation laid down elsewhere in the Treaties.<sup>252</sup> Since “*secondary legislation, enacted under [Art. 15 (3), second subparagraph]<sup>253</sup> is not necessary to obtain ‘access’ to a document that is subject to mandatory publication in the Official Journal under [Art. 297 (1) or (2) TFEU]<sup>254</sup>”, the Commission’s refusal to publish the Annex could under no circumstances be justified by having recourse to Regulation 1049/2001 because the latter was simply not applicable.<sup>255</sup> By this analysis, AG Sharpston has interestingly tried to demonstrate that the rules on access to documents contained in Regulation 1049/2001 have to be seen as complementary to the mandatory publication and notification rules of Art. 297 TFEU. Hence, she argued that Regulation 1049/2001 is applicable to every document that is not already subject to Art. 297 TFEU and cannot be used to restrict access to documents which are.<sup>256</sup>*

**70.** Therefore, since it insisted on keeping the information contained in the Annex secret<sup>257</sup>, a better approach for the Commission would have been to implement Regulation 2320/2002 by way of a decision addressed to all Member States. Such a decision does not have to be published but merely notified to every Member State in order to produce legal effects.<sup>258</sup> If the Commission then were to have been confronted with a request for access to the decision, it would have been able to claim it was a sensitive document under Art. 9 Regulation 1049/2001 or to invoke one of the exceptions of Art. 4 (1) (a), notably the protection of public security, to keep the information concerned secret. Also, it then would have been able to rely on Art. 13 (2) (c) Regulation 1049/2001<sup>259</sup> to ensure that the decision in question would not be published.<sup>260</sup>

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<sup>251</sup> *Ibid.*, points 59 and 62-67.

<sup>252</sup> *Ibid.*, points 58 and 129: “*Publication in the Official Journal already guarantees the widest possible access*”. Also see CFI, Order in Case T-106/99, *Meyer v Commission* [1999] ECR II-3273, para. 39: “*It is not the purpose of Decision 94/90 [which preceded Regulation 1049/2001] to make accessible to the public, by establishing a right of access with which the Commission must comply, documents which are already accessible by reason of their publication in the Official Journal.*”

<sup>253</sup> *I.e.*: Regulation 1049/2001.

<sup>254</sup> Opinion of AG Sharpston in ECJ, Case C-345/06 *Heinrich* [2009] ECR I-01659, point 58.

<sup>255</sup> *Ibid.*, points 128 and 133.

<sup>256</sup> *Ibid.*, points 130 and 132.

<sup>257</sup> Presumably because it genuinely related to the functioning of airport security measures: *Ibid.*, point 116.

<sup>258</sup> Art. 297 (2), third subpara. TFEU.

<sup>259</sup> Since it only allows for publication of such a decision “*as far as possible*”.

<sup>260</sup> Opinion of AG Sharpston in ECJ, Case C-345/06 *Heinrich* [2009] ECR I-01659, point 119.



## 5 GENERAL PRINCIPLE OF UNION LAW

71. The opinions in the legal doctrine are divided on the question whether the principle of transparency constitutes a general principle of Union Law. Woods and Watson are not so sure about this, since the Court of Justice found it unnecessary to decide on this matter in *Council v Hautala*<sup>261</sup>. Even before the entry into force of the Treaty of Lisbon, Lenaerts was already convinced that the principle of transparency formed a general principle of Community Law. He drew this conclusion from the fact that the Treaty of Amsterdam has enshrined the right of access to documents in Art. 255 EC, which has been implemented through Regulation 1049/2001. Thus, this Regulation on access to documents held by the EU institutions was no longer a measure adopted pursuant to the power of internal organization of these institutions but had an EC Treaty provision as its direct legal basis.<sup>262</sup> Furthermore, Lenaerts argues that the incorporation of the right of access to documents in the Charter of Fundamental Rights of the European Union<sup>263</sup> has incontrovertibly ‘upgraded’ this right to a fundamental right.<sup>264</sup> De Baere agrees with Lenaerts, saying that “*after Lisbon, the right of access to documents is a general principle of EU Law, applicable throughout the EU legal order, including in its external action.*”<sup>265</sup> He refers to Art. 42 of the Charter of Fundamental Rights of the European Union, Art. 15 (3) TFEU (ex Art. 255 EC) and the Opinion of AG Léger in *Council v Hautala*<sup>266</sup>.

72. Also Craig and De Búrca seem to attribute the character of general principle of Union Law to the principle of transparency, referring to “*the ECJ’s greater willingness to read EU legislation as subject to transparency, even where there is no explicit mention of this principle*”

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<sup>261</sup> ECJ, Case C-353/99 P *Council v Hautala* [2001] ECR I-09565, para. 31; L. WOODS en P. WATSON, *Steiner & Woods EU Law*, Oxford, Oxford University Press, 2012, 77.

<sup>262</sup> K. LENAERTS, “ ‘In the Union we Trust’: Trust Enhancing Principles of Community Law”, *C.M.L.Rev.* 2004, (317) 321-322; P. CRAIG and G. DE BÚRCA, *EU Law- Text, cases and materials*, Oxford, Oxford University Press, 2011, 549.

<sup>263</sup> Art. 42 Charter of Fundamental Rights of the European Union, signed at Strasbourg, of 12 December 2007, *OJ C* 326, 26.10.2012, 391.

<sup>264</sup> K. LENAERTS, “ ‘In the Union we Trust’: Trust Enhancing Principles of Community Law”, *C.M.L.Rev.* 2004, (317) 322; P. CRAIG and G. DE BÚRCA, *EU Law- Text, cases and materials*, Oxford, Oxford University Press, 2011, 549.

<sup>265</sup> G. DE BAERE, “Access to documents and data protection in the European External Action Service”, *Leuven Center for Global Governance Studies Working Paper Series* March 2013, WP 103, [http://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp101-110/wp103-de-baere.pdf](http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp101-110/wp103-de-baere.pdf), 4.

<sup>266</sup> Opinion of AG Léger in ECJ, Case C-353/99 P *Council v Hautala* [2001] ECR I-09565, points 38-95.

*in the relevant articles of the legislation*<sup>267</sup>. However, the authors point out that, even when the principle of transparency would be considered to be a general principle of Union Law, the impact of it on the citizens will heavily depend on the precise meaning accorded to this principle.<sup>268</sup> Hence, a lot depends on how the Treaty Articles dealing with transparency are interpreted politically and legally.<sup>269</sup>

73. In its judgment in *Volker und Markus Schecke and Eifert*<sup>270</sup>, the Court of Justice held that, by aiming to increase transparency (in this case: by way of a Regulation that provided more clarity on the use of funds in the context of the Common Agricultural Policy), “*an objective of general interest recognised by the European Union*”<sup>271</sup> is pursued. This however does not yet amount to saying that the principle of transparency constitutes a general principle of Union law, so further elucidation of this issue is required in the future.

### III THE TENSION AS IT EXISTS IN INSTITUTIONAL PRACTICE

74. Between 1992 and 2006, the Council, influenced by countries which are traditionally strongly focussed on openness, like Sweden, has made a radical “*transparency shift*”, by significantly enhancing access to its documents.<sup>272</sup> This was made possible i.a. by the accession of transparency-minded countries like Sweden and Finland in 1995 and the 2004 enlargement, since an expansion of the EU correlated with the need for increased transparency, in order to safeguard the Union’s legitimacy and effectiveness.<sup>273</sup> Furthermore, the development of information technologies, facilitated new ways of shaping a transparency policy and enabled citizens to exercise control more rapidly and effectively.<sup>274</sup> Also, extensive litigation on the application of the often ambiguous provisions of Regulation 1049/2001 served as a powerful catalyst for a policy that favoured transparency, through a rapidly developing body of judge-made law on the matter.<sup>275</sup>

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<sup>267</sup> P. CRAIG and G. DE BÚRCA, *EU Law- Text, cases and materials*, Oxford, Oxford University Press, 2011, 549.

<sup>268</sup> *Ibid.*

<sup>269</sup> *Ibid.*

<sup>270</sup> ECJ, Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] ECR I-11063.

<sup>271</sup> *Ibid.*, para. 71.

<sup>272</sup> M. ZBIGNIEW HILLEBRANDT, D. CURTIN and A. MEIJER, “Transparency in the EU Council of Ministers: An Institutional Analysis”, *E.L.J.* 2014, (1) 1, 2, 6 and 7.

<sup>273</sup> *Ibid.*, 13.

<sup>274</sup> *Ibid.*, 7, 8 and 11.

<sup>275</sup> *Ibid.*, 13-14; D. ADAMSKI, “How Wide is “The Widest Possible”? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited”, *C.M.L.Rev.* 2009, 521-549.

75. However, since the start of negotiations on the revision of Regulation 1049/2001 in 2007, other Member States, plagued by a form of “*transparency fatigue*”,<sup>276</sup> have started to underline more vigorously the importance which they attach to other values like privacy and effective decision-making. Furthermore, in the aftermath of the wave of terrorist attacks in Europe and the USA, which had begun with those of 11 September 2001, the international climate had become much more favourable for curtailing the rights of citizens, including transparency, for the sake of adequately protecting public security. This encouraged transparency-sceptic countries to push their agenda and as a result, the pro-transparency countries in the Council were reduced to a minority.<sup>277</sup> This led to a stagnation of the proceedings and a perceived lack of transparency results from the current deadlock.

76. The objection of some Member States to increasing transparency can also be explained by the fact that the Council has traditionally had a predominantly intergovernmental character.<sup>278</sup> Transparency is often seen as a form of government communication, a favour which the administration is free to grant or not and many Member States are reluctant to share the bits of information which they exchange in the Council deliberations, since this impinges on their national autonomy.<sup>279</sup> However, it were the same Member States which decided to stress the democratic cornerstones of the EU and the need for transparency of its institutions in the Treaties and the Charter of Fundamental Rights. There are no good reasons to assume that transparency has to be strived for by the other institutions but not by the Council and it is up to the Member States to practice as they preach. Deliberations in the Council, which has an important legislative role in an increasingly political Union, can no longer be considered as mere diplomatic negotiations and hence an enhanced need for democratic legitimation calls for renewed initiatives of further developing its transparency policies.<sup>280</sup>

77. Also the Court of Justice has not yet reached an optimal level of transparency, since the scope of the rules governing access to documents held by the Court is limited to documents

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<sup>276</sup> M. ZBIGNIEW HILLEBRANDT, D. CURTIN and A. MEIJER, “Transparency in the EU Council of Ministers: An Institutional Analysis”, *E.L.J.* 2014, (1) 15.

<sup>277</sup> *Ibid.*, 2, 7 and 8.

<sup>278</sup> *Ibid.*, 2.

<sup>279</sup> *Ibid.*, 2 and 5.

<sup>280</sup> *Ibid.*, 9.

which it holds as part of the exercise of its administrative functions.<sup>281</sup> In this respect, it can be questioned whether it is preferable that for the Court of Justice of the European Union, the European Central Bank and the European Investment Bank the obligation of Art. 15 (3), third subpara. TFEU<sup>282</sup> is limited to documents which these institutions hold as part of the exercise of their administrative tasks<sup>283</sup> (although they are allowed to grant access to other documents on their own initiative).<sup>284</sup> In this respect, the incorporation of the principle of transparency in these institutions' policies will mainly depend on the criteria that are used to distinguish their administrative from their non-administrative tasks.<sup>285</sup>

**78.** Concerning the classification of documents, it is to be pointed out that the majority of EUCI concerns the CSDP.<sup>286</sup> This indicates that secrecy mainly applies to public security matters. Furthermore, the rules regarding the classification of information and the treatment of sensitive documents, as described above, leave a wide discretion in this regard to the EU institutions. The fact that they are free to decide whether or not to classify information and the restrictive approach which the ECJ has taken on this issue in *Sison*<sup>287</sup>, leaves a lot of leeway to the institutions in this regard. The same goes for the application of the exceptions of Art. 4 (1) (a) Regulation 1049/2001, which are moreover not restricted to documents drafted in the context of foreign policy, public security and defence matters but also apply to international relations in general and the financial, monetary or economic policy of the EU or a Member State.<sup>288</sup> Hence, the classification rules and the exceptions laid down in Art. 4 (1) (a)

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<sup>281</sup> Art. 1 (1) Decision Court of Justice of the European Union 2013/C 38/02 of 11 December 2012 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions, *OJ C* 38, 9.2.2013, 2.

<sup>282</sup> As mentioned before, this paragraph states that “[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium” and that for this purpose “[e]ach institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents”, in accordance with Regulation 1049/2001.

<sup>283</sup> Art. 15 (3), fourth subpara. TFEU.

<sup>284</sup> A. KACZOROWSKA, *European Union Law*, London, Routledge, 2011, 187.

<sup>285</sup> A. ALEMANNI, “Unpacking the Principle of Openness in EU Law - Transparency, Participation and Democracy”, *E.L.R.* 2014 (forthcoming), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2303644](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2303644), (1) 7.

<sup>286</sup> J. THOMSEN and W. VAN DE RIJ, “How to Strike the Balance between Transparency and Confidentiality” in P. STOLK, A. TUNOVIC, H. KRANENBORG and W. VOERMANS (eds.), *Transparency in Europe II- Public Access to Documents in the EU and its Member States*, Artoos, Rijswijk, 2004, (93) 99.

<sup>287</sup> Cfr. ECJ, Case C-266/05 P *Sison v Council* [2007] ECR I-01233, paras. 34 and 64 in which the ECJ did say that it verifies whether there has been a “manifest error of assessment or misuse of powers”, but started by pointing out as a general principle the EU institutions must enjoy a wide discretion in areas where they have to make political, economic and social choices and undertake complex assessments: *ibid.*, para. 33.

<sup>288</sup> Art. 4 (1) (a) Regulation 1049/2001; Art. 9 (1) Regulation 1049/2001; G. DE BAERE, “Access to documents and data protection in the European External Action Service”, *Leuven Center for Global Governance Studies Working Paper Series* March 2013, WP 103, [http://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp101-110/wp103-de-baere.pdf](http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp101-110/wp103-de-baere.pdf), 6.

Regulation 1049/2001 have a wide scope of application. Moreover, the reasons given for restricting or denying access to documents are still quite vague, which allows for broad interpretations.<sup>289</sup> All this raises the question whether enough safeguards remain for the fundamental right of EU citizens of access to documents.

79. However, although the possibility of EU institutions abusing their right of classifying documents certainly exists theoretically, it is said that this risk has to be nuanced when looking at the institutions' practices. Given the very strict security rules for dealing with classified documents<sup>290</sup>, which exist in the Council and apply *mutatis mutandis* to the EEAS<sup>291</sup>, EU officials will not be easily inclined to classify a document, especially not as TOP SECRET or SECRET.<sup>292</sup> Also the Council itself has indicated that is not in favour of over-classification since it puts an unnecessary burden on the processing of information, which brings about unnecessary costs.<sup>293</sup> Furthermore, classifying information by way of routine can result in the legitimacy of the whole classification system being undermined.<sup>294</sup> This position of the Council has resulted in the adoption of guidelines on downgrading and declassifying documents<sup>295</sup> by its Security Committee<sup>296</sup> in 2011. The Council has

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<sup>289</sup> G. DE BAERE, "Access to documents and data protection in the European External Action Service", *Leuven Center for Global Governance Studies Working Paper Series* March 2013, WP 103, [http://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp101-110/wp103-de-baere.pdf](http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp101-110/wp103-de-baere.pdf), 6.

<sup>290</sup> Arts. 9, 10, 12, 15 and Annex III to Decision Council 2011/292/EU of 31 March 2011 on the security rules for protecting EU classified information, *OJ L* 141, 27.5.2011, 17.

<sup>291</sup> Since the High Representative has not adopted rules for protecting classified information equivalent to those set out by the Council on this matter yet. Furthermore, the High Representative has to take all necessary measures to implement those rules in the activities of the EEAS: Art. 3 (1) Decision of the High Representative of the Union for Foreign Affairs and Security Policy 2011/C 304/05 of 15 June 2011 on the security rules for the European External Action Service, *OJ C* 304, 15.10. 2011, 7.

<sup>292</sup> This view was expressed by Bart Driessen, who works at the Legal Service of the Council, during the Master's Seminar on transparency held in Brussels on 4 May 2013.

<sup>293</sup> Answers given by the Council to Parliamentary Questions in the European Parliament on 10 December 2012, E-008395/2012, <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-008395&language=EN>.

<sup>294</sup> This was emphasized in Part II, Section III (6) Decision Council 2001/264/EC of 19 March 2001 adopting the Council's security regulations, *OJ L* 101, 11.04.2001, 1, which preceded Decision Council 2011/292/EU of 31 March 2011 on the security rules for protecting EU classified information, *OJ L* 141, 27.5.2011, 17; J. THOMSEN and W. VAN DE RIJT, "How to Strike the Balance between Transparency and Confidentiality" in P. STOLK, A. TUNOVIC, H. KRANENBORG and W. VOERMANS (eds.), *Transparency in Europe II- Public Access to Documents in the EU and its Member States*, Artoos, Rijswijk, 2004, (93) 99.

<sup>295</sup> Council document 14845/11 of 28 September 2011, containing Guidelines on downgrading and declassifying documents, Council <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%2014845%202011%20INI>

<sup>296</sup> The Security Committee examines and assesses any security matter that falls within the scope of the Council's Decision on the security rules for protecting EUCI and makes the necessary recommendations to the Council: Art. 16 (1) Decision Council 2011/292/EU of 31 March 2011 on the security rules for protecting EU classified information, *OJ L* 141, 27.5.2011, 17.

nevertheless also underlined the dangers of under-classification, which can cause unauthorized persons to acquire sensitive information.<sup>297</sup>

**80.** Curtin points out that the Council, the Commission and the Court of Justice still have to take important steps with respect to transparency.<sup>298</sup> She argues that secrecy of documents is more often based on mere discretion of the Union institutions than a demonstrated necessity for this secrecy.<sup>299</sup> To strengthen her argument, she mentions that the EU system of classification of documents does not only comprise the four formal forms of classification (“*Top Secret, Secret, Confidential and Restricted*”<sup>300</sup>), but also an informal form, i.e. “*Limited*”<sup>301</sup>. According to her, “[t]hese classification rules constitute a type of (non-legislative) meta-regulation with a purely internal and discretionary legal basis.”<sup>302</sup> Curtin thinks that the current system does not offer sufficient internal control over the over-classification of documents.<sup>303</sup> Control is only exercised by the courts and then only when they actually have to deal with a case that is brought before them.<sup>304</sup> She contends that the over-classification of documents, with the result of a lot of unnecessary secrecy, is a wrong evolution, stressing the virtues which increased transparency brings about: democratic self-government, accountability and informed debate.<sup>305</sup> She believes that an essential role in countering this evolution lies with the European courts.<sup>306</sup>

**81.** The foregoing analysis clearly demonstrates that the tension between transparency and the protection of public security at EU level is real. Concerning public security issues, like the

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<sup>297</sup> Answers given by the Council to Parliamentary Questions in the European Parliament on 10 December 2012, E-008395/2012, <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-008395&language=EN>.

<sup>298</sup> D. CURTIN, “Judging EU Secrecy”, *C.D.E.* 2012, (459) 461-462 en 489; L. WOODS and P. WATSON, *Steiner & Woods EU Law*, Oxford, Oxford University Press, 2012, 75.

<sup>299</sup> D. CURTIN, “Judging EU Secrecy”, *C.D.E.* 2012, (459) 462.

<sup>300</sup> *Ibid.*, 465.

<sup>301</sup> *Ibid.* Compare this to Sec. 1.2 (b) of Executive Order 13526 of 29 December 2009 on Classified National Security Information, <http://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information>, containing the rules on the classification of information by U.S. federal authorities for the purpose of protecting national security, according to which “[e]xcept as otherwise provided by statute, no other terms shall be used to identify United States classified information” than the ones prescribed by Sec. 1.2 (a) (1-3), i.e. TOP SECRET, SECRET or CONFIDENTIAL.

<sup>302</sup> D. CURTIN, “Judging EU Secrecy”, *C.D.E.* 2012, (459) 465.

<sup>303</sup> *Ibid.*, 489.

<sup>304</sup> *Ibid.*

<sup>305</sup> *Ibid.*, 490.

<sup>306</sup> *Ibid.*

CFSP decision-making in the Council<sup>307</sup>, it seems that the result of the balance still turns out too often in favour of secrecy of documents rather than of transparency. Especially the Council and the Commission<sup>308</sup> are in need of more transparency, including wider access of the public to documents which they have in their possession. For instance, even though the Commission has tried to enhance citizen's consultation in relation to its legislative or policy proposals, it is rather unfortunate that it has done so through measures which are not legally binding<sup>309</sup> instead of granting legally enforceable participation rights.<sup>310</sup> The Commission has justified this by referring to "*the need for timely delivery of policy*", whereby the possibility of challenging a proposal in court would be the result of an "*over-legalistic approach*" that focuses on procedures rather than substance.<sup>311</sup>

**82.** However, one must bear the importance of strong consultation procedures for enhancing the democratic character and legitimacy of the European decision-making process in mind<sup>312</sup> and this objective is most effectively served by providing a legally binding framework for such procedures. Furthermore, since the Treaty of Lisbon, Art. 11 TEU provides that the institutions are to "*give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action*"<sup>313</sup> and to "*maintain an open, transparent and regular dialogue with representative associations and civil society*"<sup>314</sup>, whereby the Commission is to "*carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent*"<sup>315</sup>. The mandatory language

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<sup>307</sup> R. WESSEL, "Good Governance and EU Foreign, Security and Defence Policy" in D. CURTIN and R. WESSEL (eds.), *Good Governance and the European Union – Reflections on Concepts, Institutions and Substance*, Antwerp, Intersentia, 2005, (215) 228.

<sup>308</sup> D. CURTIN and I. DEKKER, "Good Governance: the Concept and its Application by the European Union" in D. CURTIN and R. WESSEL (eds.), *Good Governance and the European Union – Reflections on Concepts, Institutions and Substance*, Antwerp, Intersentia, 2005, (3) 12-20.

<sup>309</sup> The issuing of comments was enabled on an *ad hoc* basis, with regard to specific legislative initiatives. Eventually, the Commission has streamlined the consultation procedure in its Communication on Consultation: Communication Commission COM (2002) 704 final of 11 December 2002 Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, [http://ec.europa.eu/governance/docs/comm\\_standards\\_en.pdf](http://ec.europa.eu/governance/docs/comm_standards_en.pdf). However, the inclusive approach which this document envisages only concerns consultation "*on major policy initiatives*": p. 16.

<sup>310</sup> P. CRAIG, *The Lisbon Treaty – Law, Politics and Treaty reform*, Oxford, Oxford University Press, 2013, 68-69.

<sup>311</sup> Communication Commission COM (2002) 704 final of 11 December 2002 Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, [http://ec.europa.eu/governance/docs/comm\\_standards\\_en.pdf](http://ec.europa.eu/governance/docs/comm_standards_en.pdf), p. 10.

<sup>312</sup> P. CRAIG, *The Lisbon Treaty – Law, Politics and Treaty reform*, Oxford, Oxford University Press, 2013, 70.

<sup>313</sup> Art. 11 (1) TEU.

<sup>314</sup> *Ibid.*, (2).

<sup>315</sup> *Ibid.*, (3).

which this article contains leaves little room for maintaining that citizens must not be able to rely on their right to be consulted before the court.<sup>316</sup>

**83.** There is no doubt that the Union institutions have made a lot of progress in increasing transparency.<sup>317</sup> Efforts have certainly been made to enhance the accessibility of documents, in terms of their availability as well as their comprehensibility.<sup>318</sup> For example, the 2004 Rules of Procedure of the Council still determined that the Council or Coreper had to decide unanimously, on a case-by-case basis, whether or not CFSP measures would be published in the *OJ*.<sup>319</sup> This implied that every Member State had a right to veto the publication of CFSP measures and thus to undermine transparency in public security issues.<sup>320</sup> In 2009, the Council has adopted new Rules of Procedure, which no longer contain a possibility to block the publication of CFSP measures.<sup>321</sup> The Council or Coreper can nevertheless still decide that initiatives presented to the Council relating to PJCC that are not initiatives for the adoption of a legislative act, will not be published.<sup>322</sup> Despite the efforts for increased administrative openness, the large public is still however not acquainted with finding, understanding and using EU texts.<sup>323</sup> The fact that so many decisions of the institutions not to release documents are being challenged, shows that we are still far from true openness at EU level.<sup>324</sup>

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<sup>316</sup> *Ibid.*: “A restrictive interpretation of Article 11 would therefore send a very negative message about the nature of participatory democracy in the EU, and risk turning a provision that was meant to convey a positive feeling about the inclusive nature of the EU and its willingness to engage with its citizenry, into one that carried the opposite connotation.”

<sup>317</sup> This was stressed by Commissioner for interinstitutional relations and administration Maroš Šefčovič, Vice-President of the Commission, during the Seminar on EU Transparency on 27 September 2013, organised at the European Parliament in Brussels by the European Ombudsman.

<sup>318</sup> Concerning documents held by the Council: M. ZBIGNIEW HILLEBRANDT, D. CURTIN and A. MEIJER, “Transparency in the EU Council of Ministers: An Institutional Analysis”, *E.L.J.* 2014, (1) 1-2.

<sup>319</sup> Art. 17 (3-4) Decision Council 2004/338/EC, Euratom of 22 March 2004 adopting the Council’s Rules of Procedure, *OJL* 106, 15.04.2004, 22.

<sup>320</sup> R. WESSEL, “Good Governance and EU Foreign, Security and Defence Policy” in D. CURTIN and R. WESSEL (eds.), *Good Governance and the European Union – Reflections on Concepts, Institutions and Substance*, Antwerp, Intersentia, 2005, (215) 229.

<sup>321</sup> Art. 17 (3) Decision Council 2009/937/EU of 1 December 2009 adopting the Council’s Rules of Procedure, *OJL* 325, 11.12.2009, 35.

<sup>322</sup> *Ibid.*, Art. 17 (2) (a).

<sup>323</sup> L. WOODS and P. WATSON, *Steiner & Woods EU Law*, Oxford, Oxford University Press, 2012, 75.

<sup>324</sup> *Ibid.*, 77.



## IV COMPARISON WITH OTHER LEGAL SYSTEMS

**84.** In order to adequately assess the quality of the EU legal framework on access to documents and transparency in general, it seems appropriate to compare it to that of some of its Member States and the USA. Just like the EU, these States have to face the difficulties that come along with attempting to strike a balance between the right of citizens of freedom to information and safeguarding other valuable interests, such as effectively protecting public security. By making a comparative analysis, one can perform a more proper examination of the progress which the EU has made in this field and determine whether there is still room for improvement, by scrutinizing whether there are things to be learnt from other legal systems.

### 1 EU MEMBER STATES

**85.** When looking at the legal framework of the EU Member States on transparency, three general traditions can be distinguished. First, there is the Anglo-American tradition, which takes as a starting point the basic distrust of citizens towards the government. This is reflected in the legislation on access to information, which primarily aims to ensure that individual liberties of the citizens are not curtailed by the government. Hence, enforceable rights to information are granted.<sup>325</sup> Secondly, there is the Continental tradition, in which the government is not necessarily regarded as a threat but as an authority that has to be trusted. The relationship between citizens and the government is built on mutual trust and access to information legislation intends not to over-emphasize the obligations of the government in granting access to the citizens.<sup>326</sup> Lastly, there is the Nordic tradition, in which the government acts as a partner to society and its citizens and governmental policies are developed on the basis of available information and informed trust. This idea, whereby the government is not necessarily trusted nor distrusted is also reflected in the corresponding access to information legislation.<sup>327</sup> Regulation 1049/2001 cannot be classified under one of the three traditions but contains elements of all of them.<sup>328</sup>

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<sup>325</sup> H. KRANENBORG and W. VOERMANS, *Access to Information in the European Union-A Comparative Analysis of EC and Member State Legislation*, Groningen, Europa Law Publishing, 2005, 25.

<sup>326</sup> *Ibid.*

<sup>327</sup> *Ibid.*, 26.

<sup>328</sup> *Ibid.*

## 1.1 Belgium

**86.** In Belgium, the right of access to documents is constitutionally entrenched<sup>329</sup> and implemented at the federal, regional and community level. Federal legislation on the matter is provided for by the Act of 11 April 1994 on the disclosure of information by the administration.<sup>330</sup> Just like Regulation 1049/2001, Art. 1, b), 2° of this Act defines ‘administrative document’ in a broad way as any information, in whatever format, that is at an administrative authority’s disposal. Art. 4 states that, just like at the EU level, the default rule is that every administrative document is freely accessible by the public, unless one of the exceptions applies.

**87.** These exceptions can be found in Art. 6, which contains mandatory exceptions, like the protection of privacy or the secrecy of deliberations of the federal government. They apply as soon as disclosure would undermine the interests contained therein.<sup>331</sup> Consequently, a mere harm test is performed. Public security is also a possible exception, but unlike Regulation 1049/2001, the Belgian Act does not prescribe this as a mandatory exception. Access to a document is only denied on the ground of protecting public security if the administrative authority considers that this interest outweighs the interest of the public in disclosure.<sup>332</sup> Accordingly, the administration addressed has to strike a balance between the competing interests, unlike a Union institution which is applying Regulation 1049/2001. If only part of the document is covered by the exception, partial access will be granted.<sup>333</sup> If a request for access is denied, the applicant can lodge a second request, denial of which can lead to a complaint with the Council of State.<sup>334</sup> The Act is however not applicable to information

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<sup>329</sup> Art. 32 Gecoördineerde Belgische Grondwet (Coordinated Belgian Constitution) of 17.02.1994, *BS* 17 February 1994, 4054, [http://www.dekamer.be/kvvcr/pdf\\_sections/publications/constitution/grondwetEN.pdf](http://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/grondwetEN.pdf).

<sup>330</sup> Wet van 11 april 1994 betreffende de openbaarheid van bestuur (Act on the disclosure of information by the administration) of 11 April 1994, *BS* 30.06.1994, 17 662, [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&table\\_name=wet&cn=1994041151](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=1994041151) (Dutch version).

<sup>331</sup> *Ibid.*, Art. 6, §2.

<sup>332</sup> H. KRANENBORG and W. VOERMANS, *Access to Information in the European Union-A Comparative Analysis of EC and Member State Legislation*, Groningen, Europa Law Publishing, 2005, 42.

<sup>333</sup> Art. 6, §4 Wet van 11 april 1994 betreffende de openbaarheid van bestuur (Act on the disclosure of information by the administration) of 11 April 1994, *BS* 30.06.1994, 17 662 [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&table\\_name=wet&cn=1994041151](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=1994041151) (Dutch version).

<sup>334</sup> *Ibid.*, Art. 8.

which has been classified as TOP SECRET, SECRET or CONFIDENTIAL for the purpose of protecting national security.<sup>335</sup>

## 1.2 United Kingdom

**88.** In the UK, rules on access to documents are laid down in the Freedom of Information Act of 30 November 2000<sup>336</sup>. For the Public Authorities of Scotland, the Freedom of Information Act of 28 May 2002<sup>337</sup> applies. Just like Regulation 1049/2001, the Act of 2000 prescribes the general right of access to information held by public authorities.<sup>338</sup> Transparency is considered as the rule, to which secrecy is the exception.<sup>339</sup> The Act contains mandatory exceptions<sup>340</sup>, concerning information to which access is in any case precluded<sup>341</sup> and exceptions whereby the interests which they seek to protect have to be balanced against the public interest in disclosure of the information. For the latter category, there are instances in which a harm test must be performed<sup>342</sup> and others where this does not have to be done.

**89.** National security constitutes an exception<sup>343</sup>, but the authority which is confronted with a request for access and wishes to apply the exception has to balance the need for the protection of national security against the public interest in disclosure, without the need for conducting a harm test. Just like in Belgium, protection of national security requires competing interests to be balanced against each other before access to information can be denied on this basis, as opposed to the situation at EU level. However, it is possible for a Minister of the Crown to identify the information which is to be covered by the exception.<sup>344</sup> This can be done by way of a general description<sup>345</sup> and the public authority addressed does not have to confirm or

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<sup>335</sup> Art. 3, 4 and 26 Wet van 11 december 1985 betreffende de classificatie en de veiligheidsmachtigingen, veiligheidsattesten en veiligheidsadviezen (Act concerning the classification and the security authorizations, security certificates and security advices) of 11 December 1998, *BS* 7.05.1999, 15 752, [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&cn=1998121161&table\\_name=wet](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1998121161&table_name=wet) (Dutch version).

<sup>336</sup> <http://www.legislation.gov.uk/ukpga/2000/36/contents>.

<sup>337</sup> <http://www.legislation.gov.uk/asp/2002/13/contents>.

<sup>338</sup> Section 1 (1) Freedom of Information Act of 30 November 2000, <http://www.legislation.gov.uk/ukpga/2000/36/contents>.

<sup>339</sup> H. KRANENBORG and W. VOERMANS, *Access to Information in the European Union-A Comparative Analysis of EC and Member State Legislation*, Groningen, Europa Law Publishing, 2005, 126.

<sup>340</sup> *Ibid.*, Section 2 (3).

<sup>341</sup> Such as court records: *ibid.*, Section 32.

<sup>342</sup> Such as defence and international relations: *ibid.*, Section 26 and 27.

<sup>343</sup> *Ibid.*, Section 24 (1).

<sup>344</sup> *Ibid.*, (3)

<sup>345</sup> *Ibid.*, (4).

deny the request when this is required for the purpose of safeguarding national security.<sup>346</sup> This is also different from the EU rules, since the institution addressed is always obliged to answer the request<sup>347</sup> and access to a document can never be refused merely because it can be classified under a category of information to which any of the exceptions of Regulation 1049/2001 applies.<sup>348</sup> If a request to information is denied, the applicant can address the Information Commissioner<sup>349</sup>, who can issue an enforcement notice to the public authority concerned if he considers that the latter has failed to fulfil his obligations under the Act.<sup>350</sup> If the authority refuses to comply with the enforcement notice, the Commissioner can bring the case before the court.<sup>351</sup>

### 1.3 Sweden

**90.** Sweden has a long tradition of citizen's rights of access to public records and serves as a benchmark for many other countries. Its legislation on access to documents is provided for by the world's oldest freedom of information act in the modern sense: the Freedom of the Press Act of 1766<sup>352</sup>, which forms part of the Swedish Constitution and is supplemented by the Public Access to Information and Secrecy Act of 30 June 2009<sup>353</sup>. Free access to documents is considered to be the general principle<sup>354</sup>, subject to only a few exceptions. Also in Sweden 'official document' is defined broadly as "*any written or pictorial matter or recording which may be read, listened to, or otherwise comprehended only using technical aids*"<sup>355</sup>. It is

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<sup>346</sup> *Ibid.* (2)

<sup>347</sup> Art. 7 (1) Regulation 1049/2001.

<sup>348</sup> ECJ, Case C-64/05 *Sweden v Commission* [2007] ECR I-11389; ECJ, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-04723, para. 35, 36 and 39.

<sup>349</sup> Section 50 (1) Freedom of Information Act of 30 November 2000, <http://www.legislation.gov.uk/ukpga/2000/36/contents>.

<sup>350</sup> *Ibid.*, Section 52.

<sup>351</sup> *Ibid.*, Section 54.

<sup>352</sup> Tryckfrihetsförordning (Freedom of the Press Act) of 2 December 1766, <http://www.riksdagen.se/en/How-the-Riksdag-works/Democracy/The-Constitution/The-Freedom-of-the-Press-Act/>.

<sup>353</sup> Offentlighets- och sekretesslag (Public Access to Information and Secrecy Act) of 30 June 2009, [http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Offentlighets--och-sekretessla\\_sfs-2009-400/](http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Offentlighets--och-sekretessla_sfs-2009-400/) (Swedish version).

<sup>354</sup> Chapter 2, Art. 1 Tryckfrihetsförordning (Freedom of the Press Act) of 2 December 1766, <http://www.riksdagen.se/en/How-the-Riksdag-works/Democracy/The-Constitution/The-Freedom-of-the-Press-Act/>; H. KRANENBORG and W. VOERMANS, *Access to Information in the European Union-A Comparative Analysis of EC and Member State Legislation*, Groningen, Europa Law Publishing, 2005, 121.

<sup>355</sup> Chapter 2, Art. 3, first subpara. Tryckfrihetsförordning (Freedom of the Press Act) of 2 December 1766, <http://www.riksdagen.se/en/How-the-Riksdag-works/Democracy/The-Constitution/The-Freedom-of-the-Press-Act/>.

official when it is held by a public authority, because the latter has received or drawn it up itself.<sup>356</sup>

**91.** National security constitutes one of the few exceptions on the grounds of which public access to documents may be restricted, but only in so far as this is necessary.<sup>357</sup> Furthermore, before a restriction can be invoked, it must be scrupulously specified in a special act of law, in another act of law to which such a special act refers or in an ordinance of the government.<sup>358</sup> This precludes any discretion on the side of the public authorities in deciding which documents have to be kept secret, which is an exclusive prerogative of the parliament. Also at the EU level, institutions dealing with a request for access to documents are only allowed to refuse access by having recourse to one of the exceptions set out by Regulation 1049/2001. With regard to circumstances, the parliament or the government may be permitted to release a particular document which is covered by an exception, if so authorized by one of such legislative acts.<sup>359</sup>

**92.** The most important act in this respect is the Public Access to Information and Secrecy Act. For most of the exceptions contained in the Freedom of the Press Act, the Public Access to Information and Secrecy Act describes very precisely under what conditions it can be applied. It is only when such clearly-defined conditions and circumstances are not laid down that an exception can be considered to be absolute.<sup>360</sup> One of those conditions is usually a requirement of damage, which implies that a harm test is to be conducted by the authority dealing with a request for access. This is the case for national security, to which a secrecy period of 40 years applies. This period can be extended in the case of special circumstances.<sup>361</sup> In the same way as the corresponding EU rules, the public authority which is facing a request for access to documents and wishes to apply the exception of national security does not have to balance the protection of this interest against an overriding public or individual interest of the applicant in disclosure. The only condition that is prescribed by the

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<sup>356</sup> *Ibid.*

<sup>357</sup> *Ibid.*, Art. 2, first subpara., (1).

<sup>358</sup> *Ibid.*, Art. 2, second subpara.

<sup>359</sup> *Ibid.*, Art. 2, third subpara.

<sup>360</sup> Ministry of Justice, Sweden, *Public Access to Information and Secrecy Act- Information concerning public access to information and secrecy legislation, etc.*, <http://www.government.se/content/1/c6/13/13/97/aa5c1d4c.pdf>, 29.

<sup>361</sup> Art. 15, §2 Offentlighets- och sekretesslag (Public Access to Information and Secrecy Act) of 30 June 2009, [http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Offentlighets--och-sekretessla\\_sfs-2009-400/](http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Offentlighets--och-sekretessla_sfs-2009-400/) (Swedish version).

Public Access to Information and Secrecy Act is that disclosure of the information requested can be assumed to constitute a threat to national security.

**93.** Exceptions to the right of access to documents can be applied for a period ranging from 2 to 70 years.<sup>362</sup> If only part of a document contains classified material, the rest has to be disclosed.<sup>363</sup> If a request for access is denied, the applicant is entitled to appeal to an administrative court of appeal. If his appeal is dismissed, he can go to the Supreme Administrative Court. Appeals against a decision by a Minister can be lodged with the government.<sup>364</sup> Complaints about a decision can also be made to the Parliamentary Ombudsman, whose decisions are, however, not binding.<sup>365</sup>

## 2 USA

**94.** In the USA, access to documents held by federal agencies is governed by the FOIA of 5 June 1967<sup>366</sup>. Additionally, the Privacy Act of 31 December 1974<sup>367</sup> sets out detailed rules on how federal agencies are to collect and use personal information.<sup>368</sup> The FOIA covers all agency records and thus has a general scope, while a person can only seek access to a document under the Privacy Act if it concerns himself.<sup>369</sup>

**95.** Under the FOIA, any person can require access to federal records. If this request reasonably describes the records sought and is made according to the applicable rules stating

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<sup>362</sup>Ministry of Justice, Sweden, *Public Access to Information and Secrecy Act- Information concerning public access to information and secrecy legislation, etc.*, <http://www.government.se/content/1/c6/13/13/97/aa5c1d4c.pdf>, 30.

<sup>363</sup> Chapter 2, Art. 12, second subpara. Tryckfrihetsförordning (Freedom of the Press Act) of 2 December 1766, <http://www.riksdagen.se/en/How-the-Riksdag-works/Democracy/The-Constitution/The-Freedom-of-the-Press-Act/>.

<sup>364</sup> *Ibid.*, art. 15.

<sup>365</sup> H. KRANENBORG and W. VOERMANS, *Access to Information in the European Union-A Comparative Analysis of EC and Member State Legislation*, Groningen, Europa Law Publishing, 2005, 123.

<sup>366</sup> The Freedom of Information Act of 5 June 1967, 5 USC § 552, <http://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-2012-title5-section552&f=treesort&fq=true&num=0>. The Act “only applies to federal agencies and does not create a right of access to records held by Congress, the courts, or by state or local governments. Any requests for state or local government records should be directed to the appropriate state or local government agency.”: <http://foia.state.gov/Learn/>.

<sup>367</sup> 5 USC § 552a, <http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title5-section552a&num=0&edition=prelim>.

<sup>368</sup> <http://www.usa.gov/Topics/Reference-Shelf/FOIA.shtml>.

<sup>369</sup> U.S. Department of Justice, Executive Office of the President- Office of Management and Budget and U.S. General Services Administration- Office of Citizen Services & Innovative Technologies- Federal Citizen Information Center, *Your Right to Federal Records-Questions and Answers on the Freedom of Information Act and the Privacy Act*, 2011, <http://publications.usa.gov/USAPubs.php?PubID=6080>, 16.

the time, place, fees and procedure to be followed, the records have to be made available promptly by the agency which has been addressed.<sup>370</sup> Hence, also in the USA free access to documents is regarded as the general principle, to which there are only a limited number of exceptions. With regard to public security, it is to be noted that records must not be made available by an agency that is an element of the intelligence community<sup>371</sup> to “any government entity, other than a State, territory, commonwealth, or district of the United States” or a representative thereof.<sup>372</sup>

**96.** The right of access to agency records is subject to a number of well-defined exceptions. One of these relates to classified information for national defence or foreign policy: government agencies are to withhold records concerning “*matters that are specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and... are in fact properly classified pursuant to such Executive order.*”<sup>373</sup> The criteria for classification of such records were first laid down in Executive order 10920<sup>374</sup>, issued by President Truman in 1951. The rules have subsequently been amended by later Presidents and the ones currently in force are set out in Executive Order 13526<sup>375</sup>, issued by President Obama in 2009.

**97.** This Executive order prescribes three possible levels of classification (TOP SECRET, SECRET and CONFIDENTIAL), which can be applied if the unauthorized disclosure of the information concerned reasonably could be expected to cause “*exceptionally grave damage*”, “*serious damage*” or “*damage*” to the national security respectively.<sup>376</sup> Furthermore, the original classification authority must be able to identify or describe the damage which unauthorized disclosure might cause.<sup>377</sup> In comparison, the corresponding rules set out by the

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<sup>370</sup> FOIA, 5 U.S.C §552 (a) (3) (A).

<sup>371</sup> As defined in section 3 (4) of the National Security Act of 26 July 1947, 50 USC §3003, [http://uscode.house.gov/view.xhtml?req=\(title:50%20section:3003%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title50-section3003\)&f=treesort&num=0&edition=prelim](http://uscode.house.gov/view.xhtml?req=(title:50%20section:3003%20edition:prelim)%20OR%20(granuleid:USC-prelim-title50-section3003)&f=treesort&num=0&edition=prelim).

<sup>372</sup> FOIA, 5 U.S.C §552 (a) (3) (E).

<sup>373</sup> FOIA, 5 U.S.C §552 (b) (1) (A) and (B).

<sup>374</sup> Executive Order 10290 of 24 September 1951 Prescribing Regulations Establishing Minimum Standards for the Classification, Transmission, and Handling, by Departments and Agencies of the Executive Branch, of Official Information Which Requires Safeguarding in the Interest of the Security of the United States, <http://www.presidency.ucsb.edu/ws/?pid=78426>.

<sup>375</sup> Executive Order 13526 of 29 December 2009 on Classified National Security Information, <http://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information>.

<sup>376</sup> *Ibid.*, Sec. 1.2 (a) (1-3).

<sup>377</sup> *Ibid.*

Council<sup>378</sup> concerning EUCI allow for four levels of classification (TOP SECRET, SECRET, CONFIDENTIAL and RESTRICTED), which may be applied to information and material the unauthorized disclosure of which could “*cause exceptionally grave prejudice*”, “*seriously harm*”, “*harm*” or “*be disadvantageous*” to the essential interests of the European Union or of one or more of the Member States (which include the protection of public security) respectively.<sup>379</sup> Apart from the concrete understanding of ‘harm’ or ‘damage’, the fact that at EU level information can already be classified as soon as it is considered to be ‘disadvantageous’<sup>380</sup> to the essential interests of the Union or the Member States indicates that it is more easy for the Council to classify information than it is for the U.S. federal authorities. As a result, there is also more room at EU level for secrecy of information, to the detriment of the principle of transparency.

**98.** If a request for access is denied, the applicant can file and administrative appeal with the head of the agency that has taken the decision to refuse access.<sup>381</sup> If unsatisfied with the agency’s response, he can seek mediation services from the Office of Government Information Services at the National Archives and Records Administration or lodge an appeal in federal court.<sup>382</sup> The court can prohibit the agency from improperly withholding records and can order their production itself. In such a case, it determines the matter *de novo* and may examine the content of the records concerned *in camera* in order to assess whether one of the exceptions to the right of free access has been correctly applied. In such a case, the burden of proof lies on the agency concerned.<sup>383</sup>

**99.** If the court orders production of records which have been improperly withheld from the applicant, it may find that the circumstances surrounding the withholding raise questions whether the agency personnel has acted arbitrarily or capriciously. In that case, the Special

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<sup>378</sup> Decision Council 2011/292/EU of 31 March 2011 on the security rules for protecting EU classified information, *OJL* 141, 27.5.2011, 17.

<sup>379</sup> *Ibid.*, Art. 2 (2).

<sup>380</sup> A notion that clearly points to a lower threshold than ‘harm’.

<sup>381</sup> FOIA, 5 U.S.C §552 (a) (6) (A) (i); U.S. Department of Justice, Executive Office of the President- Office of Management and Budget and U.S. General Services Administration- Office of Citizen Services & Innovative Technologies- Federal Citizen Information Center, *Your Right to Federal Records-Questions and Answers on the Freedom of Information Act and the Privacy Act*, 2011, <http://publications.usa.gov/USAPubs.php?PubID=6080>, 9.

<sup>382</sup> FOIA, 5 U.S.C §552 (a) (4) (B) and (h) (3); U.S. Department of Justice, Executive Office of the President- Office of Management and Budget and U.S. General Services Administration- Office of Citizen Services & Innovative Technologies- Federal Citizen Information Center, *Your Right to Federal Records-Questions and Answers on the Freedom of Information Act and the Privacy Act*, 2011, <http://publications.usa.gov/USAPubs.php?PubID=6080>, 9.

<sup>383</sup> FOIA, 5 U.S.C §552 (a) (4) (B).



Counsel investigates whether disciplinary action is warranted. If he recommends to take corrective action, this is to be carried out by the administrative authority of the agency concerned.<sup>384</sup> In the event of noncompliance with the court order, the district court may punish the responsible agency employee for contempt.<sup>385</sup> The fact that the government official dealing with a request for agency records can be subject to specific sanctions serves as an additional deterrent and safeguard against arbitrary refusals. Together with the possibility for the court to investigate the content of the documents requested, this is something which may also prove to be beneficial at EU level and is certainly worthy of being taken into account during the revision process of Regulation 1049/2001.

## **V THE BALANCE BETWEEN TRANSPARENCY AND THE PROTECTION OF PUBLIC SECURITY**

### **1 SUGGESTION FOR A FEASIBLE BALANCE**

**100.** The foregoing analysis has made clear that transparency and public security are both equally valid principles worthy of protection. As a result, the search for a balance between the two appears to be quite daunting and cannot simply be reduced to a utilitarian calculus. The fundamental role which each of them plays in the legitimation of the EU has the result that one cannot clearly distinguish one that is to outweigh the other under all circumstances.

**101.** Perhaps, looking for a balance between the principle of transparency and the protection of public security is not a preferable approach for an attempt to abate the tension between them in the first place. Lustgarten argues that speaking of a ‘balance’ in this regard is based on a misconception, as if liberty and democracy, including freedom of information, on the one hand and the protection of public security on the other are mutually exclusive, whereby both are resting on opposing sides of a scale and have to be weighed off against each other.<sup>386</sup> This would result in the need to have recourse to a mathematical logic, whereby the gain to democratic *praxis* which a security measure entails would have to be twice as large as the

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<sup>384</sup> *Ibid.*, (a) (4) (F) (i).

<sup>385</sup> *Ibid.*, (a) (4) (G).

<sup>386</sup> L. LUSTGARTEN, “National Security and Political Policing - Some Thoughts on Values, Ends and Law” in J.-P. BRODEUR, P. GILL and D. TÖLLBORG (eds.), *Democracy, Law and Security – Internal security services in contemporary Europe*, Aldershot, Ashgate, (319) 321.

corresponding loss to freedom in order to be justifiable.<sup>387</sup> Evidently, it is impossible in practice to weigh the need to prevent a certain harm, by imposing restrictive security measures, against the democratic loss (to privacy, freedom of expression etc.) which it brings about under of a fixed standard of measurement.<sup>388</sup> Lustgarten thinks a better approach of dealing with the tension would be to conceptualise the principle of proportionality.<sup>389</sup> This implies that particular weight is given to the least restrictive measures: “[r]ather than attempt the hopeless, and truly arbitrary, exercise of trying to quantify the unquantifiable, it would be more useful to ask ... whether some infringement ... is necessary – not in the sense of whether it will be effective, but whether it is truly necessary because no other measure will work.”<sup>390</sup>

**102.** In 1995, a group of experts in International Law, human rights and national security, convened by ARTICLE 19<sup>391</sup>, together with the Centre for Applied Legal Studies of the University of Witwatersrand drafted the so-called Johannesburg Principles on National Security, Freedom of Expression and Access to Information.<sup>392</sup> These Principles recognise the fundamental importance of both freedom of information<sup>393</sup> and the protection of public security<sup>394</sup> in their Preamble. Under Principle 11, everyone has the right to freedom of information, including information that relates to public security.<sup>395</sup> With the purpose of discouraging national governments from imposing unjustified restrictions on the right to freedom of information, under the pretext of protecting public security, the Principles emphasize the need to recognise only a limited scope for such restrictions.<sup>396</sup> Therefore, they state that “[n]o restriction on freedom of expression or information on the ground of national

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<sup>387</sup> *Ibid.*

<sup>388</sup> *Ibid.*

<sup>389</sup> *Ibid.*, 322.

<sup>390</sup> *Ibid.*

<sup>391</sup> ARTICLE 19 is the International Centre Against Censorship. The name is derived from Art. 19 ICCPR, which contains the right to freedom of expression: <http://www.article19.org/>.

<sup>392</sup> Johannesburg Principles of 1 October 1995 on National Security, Freedom of Expression and Access to Information, <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>. The Principles “are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, inter alia, in judgments of national courts), and the general principles of law recognized by the community of nations.” They “have been endorsed by Mr. Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, in his reports to the 1996, 1998, 1999 and 2001 sessions of the United Nations Commission on Human Rights, and referred to by the Commission in their annual resolutions on freedom of expression every year since 1996.”: *Ibid.*: Acknowledgements and Endorsements.

<sup>393</sup> “[I]t is imperative, if people are to be able to monitor the conduct of their government and to participate fully in a democratic society, that they have access to government-held information”: *Ibid.*, Preamble. The right to freedom of information is laid down in Principle 1 (b).

<sup>394</sup> “[S]ome of the most serious violations of human rights and fundamental freedoms are justified by governments as necessary to protect national security”: *Ibid.*

<sup>395</sup> *Ibid.*, Principle 11.

<sup>396</sup> *Ibid.*, Preamble and Principle 12.

*security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government*<sup>397</sup>

**103.** The requirement of necessity in a democratic society for the protection of a legitimate national security interest implies that also the drafters of the Johannesburg Principles considered the principle of proportionality to be the most suitable way of dealing with the tension between transparency and effective protection of public security. The requirement of proportionality has been elaborated further in the Principles. Restrictions on the right to freedom of information can only be justified on the grounds of national security if they “*have the genuine purpose and demonstrable effect of protecting a legitimate national security interest*”.<sup>398</sup> The national security interest which is sought to be protected can only be legitimate if it concerns a “*country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external Source ... or an internal source.*”<sup>399</sup> A restriction can only be necessary if the government is able to demonstrate that the information requested “*poses a serious threat to a legitimate national security interest*”<sup>400</sup>, and that the restriction imposed, which has to be “*compatible with democratic principles*”<sup>401</sup>, is “*the least restrictive means possible for protecting that interest*”.<sup>402</sup>

**104.** Translated to the right of access to documents within the EU context, the call of attaching more importance to the principle of proportionality would require a paradigm shift of the institutions when handling a request for access. Rather than conducting a harm test, whereby they merely assess whether disclosure of the requested document would cause prejudice to the public security of the Union, they would have to investigate whether a refusal to grant access is absolutely necessary for protecting the public interest at hand, taking all specific circumstances into account and justify themselves when they consider this to be the

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<sup>397</sup> *Ibid.*, Principles 1 (d) and 11.

<sup>398</sup> *Ibid.*, Principle 1.2.

<sup>399</sup> *Ibid.*, Principle 2 (a). Consequently, a legitimate national security interest does not comprise “*interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest*”: *Ibid.*, Art. 2 (b).

<sup>400</sup> *Ibid.*, Principle 1.3 (a).

<sup>401</sup> *Ibid.*, Principle 1.3 (c).

<sup>402</sup> *Ibid.*, Principle 1.3 (b).

case. This would reduce the chance of having refusals that, although they can prevent harm to public security, are clearly disproportionate to the impairment of the right of access to documents, for instance because the foreseen harm cannot be expected to be of a substantial nature and because of compelling personal motives of the citizens who is requiring access.

**105.** Admittedly, this still results in the need to strike a balance between the right of access and public security concerns, which requires a certain amount of practically difficult quantification. Nevertheless, the adoption of a working standard of proportionality means that freedom of information cannot be trumped as soon as it would be detrimental to public security, limited as the potential harm may be. The result will be a more equitable and balanced relationship between transparency and the protection of public security.

## 2 CONTROL MECHANISMS

**106.** In order to assess whether striving for a more optimal balance between freedom of information and the protection of public security is manageable, it is necessary to determine which control mechanisms are and should be at hand for maintaining such a balance. Hereby, it has to be borne in mind that the EU's legislative framework on transparency, unlike that of many of the Member States, does not give a specific independent authority the guarantee of access to documents.<sup>403</sup> As a result, one cannot explicitly determine an organ that can fully serve as a supervisory body which citizens can turn to when they feel the institutions have misused the exceptions of Regulation 1049/2001 and thus violated their right of access to documents. Therefore, it has to be investigated whether the current control mechanisms are sufficient for exercising this function, paying attention to possible improvements and whether it is desirable to create new ones.

### 2.1 EU courts

**107.** In order for a their individual right of access to documents to be effective, it is required that citizens are able to enforce it before an independent authority in the case where a request for access has been denied. If it is to examine the reasons for denying access in a satisfactory

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<sup>403</sup> European Parliament Directorate-General for Internal Policies-Policy Department C: Citizens' Rights and Constitutional Affairs, *Openness, transparency and access to documents and information in the EU*, 2013, [http://www.europarl.europa.eu/RegData/etudes/note/join/2013/493035/IPOL-LIBE\\_NT\(2013\)493035\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/493035/IPOL-LIBE_NT(2013)493035_EN.pdf), 5.

way, this authority should have access itself to the information requested and, ideally, be able to order disclosure of the document in question or at least annul the decision by the competent authority has refused access.<sup>404</sup> These abstract considerations reveal the fundamental importance of a court in safeguarding the genuine enjoyment by citizens of their right of access to documents<sup>405</sup>, by serving as a powerful check on government behaviour in this matter. In striking the balance between transparency and confidentiality, the judiciary plays a pivotal role.<sup>406</sup>

**108.** Nevertheless, in the EU context, the Court of Justice and the General Court<sup>407</sup> generally seem to be very restrained when reviewing the legality of decisions by which the institutions refuse access to a document, on the basis of protecting the public interest.<sup>408</sup> As a rule, the lawfulness of a decision refusing access is “*assessed by reference to the reasons on the basis of which it was adopted rather than by reference solely to the content of the documents requested*”<sup>409</sup>. When examining these reasons, the EU courts are under no obligation to order production of the documents to which access has been denied if the applicant only challenges the merits of the reasons given and not the applicability of the exception of Regulation 1049/2001 which served as a basis for the institution concerned to refuse access, given the courts’ margin of discretion in the assessment of evidence.<sup>410</sup>

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<sup>404</sup> H. KRANENBORG and W. VOERMANS, *Access to Information in the European Union-A Comparative Analysis of EC and Member State Legislation*, Groningen, Europa Law Publishing, 2005, 26.

<sup>405</sup> Principle 1.1 (b) of the Johannesburg Principles of 1 October 1995 on National Security, Freedom of Expression and Access to Information, <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>.

<sup>406</sup> J. FITZPATRICK, “Introduction” in S. COLIVER, P. HOFFMAN, J. FITZPATRICK and S. BOWEN, *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information*, The Hague, Kluwer Law International, 1999, (XI) XI.

<sup>407</sup> Though the General Court appears to have taken a different approach in its more recent judgments, scrutinizing very thoroughly refusals of access to documents, by which the institutions invoke the exception of Art. 4 (1) (a) with respect to the protection of the public interest as regards international relations: EGC T-59/09 *Germany v Commission* [2012] published in the electronic Reports of Cases (Court Reports-general); EGC, Case T-529/09 *In ‘t Veld v Council* [2012] ECR II-0000; EGC, Case T-465/09 *Jurašinović v Council* [2012] ECR II-0000; EGC, Case T-63/10 *Jurašinović v Council* [2012], ECR II-0000 ; G. DE BAERE, “Access to documents and data protection in the European External Action Service”, *Leuven Center for Global Governance Studies Working Paper Series* March 2013, WP 103, [http://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp101-110/wp103-de-baere.pdf](http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp101-110/wp103-de-baere.pdf), 11-16.

<sup>408</sup> G. DE BAERE, “Access to documents and data protection in the European External Action Service”, *Leuven Center for Global Governance Studies Working Paper Series* March 2013, WP 103, [http://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp101-110/wp103-de-baere.pdf](http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp101-110/wp103-de-baere.pdf), 9-11.

<sup>409</sup> ECJ, Case C-576/12 P *Jurašinović v Council* [2013] ECR I-0000, para. 26.

<sup>410</sup> *Ibid.*, para. 27-30. Such an obligation does exist when the applicability of the exception relied on is contested, in order to safeguard the right to effective judicial protection of the applicant: ECJ, Case C-135/11 P *IFAW Internationaler Tierschutz-Fonds v Commission* [2012] ECR I-0000, para. 73-76.

**109.** Especially with regard to the exceptions set out in Art. 4 (1) (a) Regulation 1049/2001, the ECJ has granted a wide margin of appreciation to the institutions when assessing whether a document requires the protection given by that provision. The underlying logic for this limited judicial review used to be that the Union courts did not want to interfere in policy areas requiring complex assessment by the institutions, notably in the economic sphere, something which judges might not be in the best position for to do.<sup>411</sup> Hence, action would only be taken by the Courts if manifest errors were made. However, while the institutions might be more adequately suited to perform a complex economic analysis, the Union Courts' adherence to the marginal review standard raises the question whether the discretion granted is not too wide and whether enough guarantees remain for the EU citizens to be able to realize their right of access to documents held by the institutions.<sup>412</sup>

**110.** Another problematic implication of the discretion which has been granted is that the institutions are allowed to get away with very poorly-reasoned refusals to disclose a document on the basis of Art. 4 (1) (a) Regulation 1049/2001. However, one must bear in mind that judicial deference in this regard serves the purpose of protecting the public and private interests set out in the Regulation. It is important to realise that, by giving the reasons for refusing access in too much detail, the institutions might disclose the content of the documents in an indirect way and thereby deprive the exceptions of their essential purpose.<sup>413</sup> This is particularly true in the case of sensitive documents under Art. 9 (1).<sup>414</sup> As a result, “*statements of reasons tend toward marginal justification*”<sup>415</sup>. When assessing the underlying logic of said discretion, one should therefore also pay attention to the need for effective and

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<sup>411</sup> ECJ, Case C-42/84 *Remia BV v Commission* [1985] ECR I-02545, para. 34; D. ADAMSKI, “How Wide is “The Widest Possible”? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited”, *C.M.L.Rev.* 2009, (521) 524.

<sup>412</sup> D. ADAMSKI, “How Wide is “The Widest Possible”? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited”, *C.M.L.Rev.* 2009, (521) 524-525. According to this author, the marginal standard of review carries the risk of turning judicial review into “*mere fiction*” and the fundamentality of the right of access to documents into “*no more than lip-service*” or “*a policy choice of the Community institutions similar e.g. to choosing between different methods of calculating the dumping margin*”.

<sup>413</sup> ECJ, Case C-41/00 P *Interporc Im- und Export GmbH v Commission* [2003] ECR I-02125, para. 55; ECJ, Case C-353/01 P *Mattila v Council and Commission* [2004] ECR I-01073, para. 64; CFI, Case T-105/95 *WWF UK v Commission* [1997] ECR II-00313, para.65; CFI, Order of the President in Case T-610/97 R, *Fangel and others v Council* [1998], ECR II-00485, para. 39.

<sup>414</sup> For sensitive documents, Art. 9 (4) Regulation 1049/2001 specifically determines that “[*a*]n institution which decides to refuse access ... shall give the reasons for its decision in a manner which does not harm the interests protected in Article 4”. These interests include the protection of the public interest as regards public security; J. HELISKOSKI and P. LEINO, “Darkness at the Break of Noon: The Case Law on Regulation No. 1049/2001 on Access to Documents”, *C.M.L.Rev.* 2006, (735) 755-756.

<sup>415</sup> D. ADAMSKI, “How Wide is “The Widest Possible”? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited”, *C.M.L.Rev.* 2009, (521) 524-525.

extensive protection of, i.a., public security. The sensitive nature of the information requested explains why the Union Courts have taken a restrictive approach in such cases, out of concern not to neglect the fundamental importance of the interest protected.

**111.** Also Mendel, discussing the tension between freedom of information and the protection of public security outside of the EU context, thinks the high level of judicial deference to national security claims, which sometimes even appears to be absurd, can be attributed to the fact that *“the very nature of the legitimate interest at stake is a highly political matter, involving an assessment of a threat, often from external sources... The technical nature of many of the issues involved... makes it difficult for non-experts to accurately assess the risk”*, whereby courts often have to rely on tangential or circumstantial evidence.<sup>416</sup> The ensuing *“shroud of secrecy... that surrounds national security matters”*<sup>417</sup> can certainly be legitimate in some instances, but might as well lead to a situation *“where security claims may be accepted, even though they are completely unwarranted”*.<sup>418</sup>

**112.** To support his argument, Mendel points to the fact that very little of the evidence which was claimed by the US and UK to prove that Iraq was in the possession of weapons of mass destruction and which served as the basis for their intervention in 2003 has ever been made public, not even to the competent UN authorities. When it later turned out that no strong evidence for the presence of such weapons had ever been at hand, it became clear that national security claims had been unduly relied on in this case. The experienced *“information and technical understanding gap”* is not only faced by courts but also by civil society.<sup>419</sup> According to the author, *“[t]his acts as a brake on activism generally in this area and tends to perpetuate the culture of secrecy around national security.”*<sup>420</sup>

**113.** Even though the highly sensitive nature of the interests protected by Art. 4 (1) (a) Regulation 1049/2001 can certainly justify a broad institutional discretion in applying this provision, there nevertheless is a *“need for a more inquisitive judicial control, involving*

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<sup>416</sup> T. MENDEL, “National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles” in Campbell Public Affairs Institute-Maxwell School of Citizenship and Public Affairs, Syracuse University, *National Security and Open Government: Striking the Right Balance*, Syracuse, 2003, (1) 6-7.

<sup>417</sup> *Ibid.*, 7.

<sup>418</sup> *Ibid.*

<sup>419</sup> *Ibid.*

<sup>420</sup> *Ibid.*

*confrontation of allegations presented by the institution with source documents*<sup>421</sup>, so as to better avoid potential misuse by the institutions of this discretion. If they are to constitute a truly effective safeguard for citizens against over-classification of documents by the institutions, it seems to be essential for the Union Courts to take up a more active role when reviewing decisions by which the institutions refuse to grant access. This includes inspection by the Courts of the documents concerned under all circumstances. After all, “*full judicial review... is vital for protecting the fundamental nature of the access right, taking into account especially the unavoidable brevity of statements of reasons in access cases.*”<sup>422</sup> The Johannesburg Principles state that “[*t*]he reviewing authority must have the right to examine the information withheld.”<sup>423</sup> Instead of a right, an obligation to examine would be better to safeguard the fundamental right of access to documents.

**114.** Craig and De Búrca point out that the Union courts can determine i.a. the legal standard of judicial review, interpret the scope and legal meaning of the exceptions set out in Regulation 1049/2001 and assess whether the public interest requires disclosure of documents.<sup>424</sup> Also these authors argue that the courts do not use the juridical techniques which they have at their disposal in a way that is extensive enough. In this regard, they refer to the *Sison*<sup>425</sup> case, in which the Court of Justice made it very difficult for the claimant to obtain access to the documents he requested, since it granted a wide discretion to the Council in applying the exception of the protection of the public interest as regards public security laid down in Regulation 1049/2001 and, by doing so, considerably narrowed down the scope of judicial review in this matter.<sup>426</sup>

**115.** A painful example of the dangers which incomplete judicial review in access to documents cases can pose for the fundamental rights of an individual is provided for by the *Leander* case<sup>427</sup> of the ECtHR. After the negative outcome of a mandatory personnel control prescribed by law, Mr. Leander, a former member of the Swedish Communist Party, was

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<sup>421</sup> D. ADAMSKI, “How Wide is “The Widest Possible”? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited”, *C.M.L.Rev.* 2009, (521) 526.

<sup>422</sup> *Ibid.*, 548.

<sup>423</sup> Principle 14 Johannesburg Principles of 1 October 1995 on National Security, Freedom of Expression and Access to Information, <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>.

<sup>424</sup> P. CRAIG en G. DE BÚRCA, *EU Law-Text, cases and materials*, Oxford, Oxford University Press, 2011, 545.

<sup>425</sup> ECJ, Case C-266/05 P *Sison v Council* [2007] ECR I-01233.

<sup>426</sup> P. CRAIG and G. DE BÚRCA, *EU Law-Text, cases and materials*, Oxford, Oxford University Press, 2011, 545-546.

<sup>427</sup> ECtHR 26 March 1987, *Leander v Sweden*, No. 9248/81.



refused employment at a naval museum. The position which he aspired required him to have access to an adjacent naval base and he was told that, due to security reasons, the Commander-in-Chief of the Navy had opposed his employment. When he addressed the Swedish government in order to be informed of the exact reasons of the refusal and the secret information which had been recorded on him, this request was denied.<sup>428</sup> Before the ECtHR, Leander claimed that the personnel control, which entailed the secret collection of personal information and the subsequent refusal by the Swedish government to disclose this information to him amounted to a breach of his right to respect for private and family life (Art. 8 ECHR), his right to freedom of expression (Art. 10 ECHR) and his right to an effective remedy (Art. 13 ECHR).

**116.** The ECtHR held that the collection of information about Leander's private life, coupled with him being refused to refute it, constituted a breach of the right to respect for private life, as guaranteed by Art. 8, §1 ECHR.<sup>429</sup> Nevertheless, it found that the Swedish government pursued a legitimate aim with the personnel control system, *viz.* the protection of national security.<sup>430</sup> Furthermore, the interference with Leander's private life had occurred "*in accordance with the law*"<sup>431</sup> and could be considered to be "*necessary in a democratic society*" under Art. 8, §2 ECHR. 'Necessity' in this aspect implies that "*the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued*"<sup>432</sup>. *In casu*, there requirements were fulfilled, since national authorities enjoy a wide margin of appreciation in choosing the means for protecting national security, which constitutes a legitimate aim.<sup>433</sup> However, given "*the risk that a system of secret surveillance for the protection of national security poses of undermining or even destroying democracy on the ground of defending it*", there had to be adequate and effective safeguards against abuse.<sup>434</sup> Such safeguards were found to be present in the domestic law which prescribed the personnel control system.<sup>435</sup>

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<sup>428</sup> *Ibid.*, paras. 9-17.

<sup>429</sup> *Ibid.*, para. 48.

<sup>430</sup> *Ibid.*, para. 49.

<sup>431</sup> *Ibid.*, para. 57.

<sup>432</sup> *Ibid.*, para. 58.

<sup>433</sup> *Ibid.*, para. 59.

<sup>434</sup> *Ibid.*, para. 60.

<sup>435</sup> *Ibid.*, paras. 61-67.

**117.** These considerations led the Court to conclude that there had been no violation of Art. 8 ECHR.<sup>436</sup> There had been no violation of Leander’s right to receive information either, since Art. 10 ECHR “*does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.*”<sup>437</sup> As regards the alleged violation of Art 13 ECHR, the Court acknowledged that it is inherent to any system of personnel screening, occurring within the context of protecting national security, that only limited remedies can be available.<sup>438</sup> An “*effective remedy*” under this Article then means “*a remedy that is as effective as can be*”<sup>439</sup>. According to the Court, such remedies had been available to Leander, “*having regard to the restricted scope for recourse inherent in any system of secret surveillance for the protection of national security*”<sup>440</sup> Accordingly, there had been no violation of Art. 13 ECHR.<sup>441</sup>

**118.** An important lesson to be drawn from this judgment is that it is not preferable for a court to grant too much discretion to an authority in refusing to grant access to documents for the sake of protecting national security. Ten years after the case, the Swedish government formally acknowledged that the negative outcome of Mr. Leander’s security screening had solely been based on his political beliefs and that there had never been any direct indications for him posing a security threat which would have made him unsuitable to hold the position in the museum.<sup>442</sup> The government compensated him with 400 000 Swedish Crowns (approximately €44 000).<sup>443</sup> Important as the effective protection of public security may be, it can never be excluded that authorities infringe fundamental rights, including the right of access to documents, under this pretext without there being any justification to do so. It is up for the Union courts to engage in full judicial review of institutions’ refusals for access that are being challenged by requesters under all circumstances, such as to reduce the risk of these infringements occurring at EU level. There is no reason to assume that examination by the courts of the documents concerned would cause detriment to the public interest as regards

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<sup>436</sup> *Ibid.*, para. 68.

<sup>437</sup> *Ibid.*, para. 74.

<sup>438</sup> *Ibid.*, para. 78.

<sup>439</sup> *Ibid.*

<sup>440</sup> *Ibid.*, para. 84.

<sup>441</sup> *Ibid.*

<sup>442</sup> T. MENDEL, “National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles” in Campbell Public Affairs Institute-Maxwell School of Citizenship and Public Affairs, Syracuse University, *National Security and Open Government: Striking the Right Balance*, Syracuse, 2003, (1) 8.

<sup>443</sup> *Ibid.*

public security, since such examination can be done *in camera* like the federal courts are doing in the USA.

## 2.2 Non-judicial control

### 2.2.1 European Parliament

**119.** The European Parliament traditionally is a strong advocate of increased transparency in the activities of the Union institutions.<sup>444</sup> As early as 1984, when transparency was not yet considered to be a fundamental value by the other institutions, it called for legislation on the matter.<sup>445</sup> The role of the European Parliament as a co-legislator has gradually been expanded since the Treaty of Maastricht and the subsequent Treaty changes.<sup>446</sup> As a result, it is more and more able to assert political influence over the other institutions concerning their transparency policies and to directly affect transparency legislation, like it has done at the time of adoption of Regulation 1049/2001.

**120.** The European Parliament certainly seems apt to serve as a supervisory body<sup>447</sup> to watch over the other institutions<sup>448</sup> concerning transparency issues. This is all the more so because it can address questions to the Council and the Commission, which have to be answered.<sup>449</sup> These include questions and recommendations issued by the Parliament to the Council in the field of the CFSP.<sup>450</sup> Twice a year, Parliament holds a debate on the progress in this field,

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<sup>444</sup> As evidenced by the statement on the European Parliament's website: "*Access to documents is an essential component of the policy of transparency being implemented by the European institutions... The European Parliament tries to ensure that its work has a high level of visibility. This concern is all the more important since Parliament seeks above all to act in the interests of the citizens of Europe, who have directly elected it.*": <http://www.europarl.europa.eu/aboutparliament/en/003a6f9886/Access-to-documents.html>.

<sup>445</sup> M. ZBIGNIEW HILLEBRANDT, D. CURTIN and A. MEIJER, "Transparency in the EU Council of Ministers: An Institutional Analysis", *E.L.J.* 2014, (1) 9.

<sup>446</sup> N. MOUSSIS, *Access to the European Union – Law, Economics, Policies*, Cambridge, Intersentia, 2013, 239.

<sup>447</sup> *Cfr.* already Mill on the role of the Legislature: "*Instead of the function of governing, for which it is radically unfit, the proper office of a representative assembly is to watch and control the government: to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which any one considers questionable*": J. MILL, *Considerations on Representative Government*, London, Parker, Son and Bourn, West Strand, 1861, 104.

<sup>448</sup> Especially the Commission: N. MOUSSIS, *Access to the European Union – Law, Economics, Policies*, Cambridge, Intersentia, 2013, 65-66.

<sup>449</sup> Art. 230, subpara. 2 TFEU; Rule 115-118 Rules of Procedure of the European Parliament, 7<sup>th</sup> Parliamentary term, March 2014, <http://www.europarl.europa.eu/sides/getLastRules.do?language=EN&reference=TOC>.

<sup>450</sup> Art. 36, subpara. 2 TEU.

including the CSDP.<sup>451</sup> It must be consulted by the High Representative of the Union for Foreign Affairs and Security Policy on the basic choices and main aspects of the CFSP and CSDP, whereby the Parliament's views must be duly taken into account.<sup>452</sup> This gives the Parliament the chance to assess how the right of access to documents has been integrated into the Union's security policies. There are however differences in how the procedures on parliamentary questions are applied to the Commission and to the Council.<sup>453</sup> As to the Commission, the relationship between it and the European Parliament “*is one of political supervision and cooperation*”<sup>454</sup>, whereas the relationship between the Parliament and the Council is one of partnership, giving rise to more of a dialogue between the two institutions.<sup>455</sup> In its vote on the five-year appointment of the Commission<sup>456</sup>, the Parliament can also take the future Commission's view on CFSP issues into account, irrespective of the minor role which the latter plays in this field.<sup>457</sup>

**121.** Additionally, the President of the Council is to report to the Parliament after each Council meeting<sup>458</sup> and the Parliament discusses the General Report on the activities of the Union, published annually by the Commission.<sup>459</sup> Parliament is also kept well-informed through the Commission's participation in the Parliamentary Committees.<sup>460</sup> Additionally, the Parliament can use its budgetary powers to supervise the CFSP activities of the Council.<sup>461</sup> The most extensive power of control which the Parliament has at its disposal is its possibility of dismissing the members of the Commission through a motion of censure<sup>462</sup> but it is of course very unlikely that such a motion would ever be tabled let alone carried out of Parliament's discontentment with the Commission's policy on access to documents.

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<sup>451</sup> *Ibid.*

<sup>452</sup> *Ibid.*, subpara. 1.

<sup>453</sup> P. MATHIJSEN and P. DYRBERG, *Mathijssen's guide to European Union Law*, London, Sweet & Maxwell, 2013, 95.

<sup>454</sup> *Ibid.*

<sup>455</sup> *Ibid.*

<sup>456</sup> Art. 17 (3) and (7) TEU.

<sup>457</sup> R. WESSEL, “Good Governance and EU Foreign, Security and Defence Policy” in D. CURTIN and R. WESSEL (eds.), *Good Governance and the European Union – Reflections on Concepts, Institutions and Substance*, Antwerp, Intersentia, 2005, (215) 221.

<sup>458</sup> Art. 15 (6) (d) TEU.

<sup>459</sup> Art. 233 TFEU.

<sup>460</sup> P. MATHIJSEN and P. DYRBERG, *Mathijssen's guide to European Union Law*, London, Sweet & Maxwell, 2013, 95-96.

<sup>461</sup> Art. 310 (1), second subpara. And Art. 314 TFEU; R. WESSEL, “Good Governance and EU Foreign, Security and Defence Policy” in D. CURTIN and R. WESSEL (eds.), *Good Governance and the European Union – Reflections on Concepts, Institutions and Substance*, Antwerp, Intersentia, 2005, (215) 224.

<sup>462</sup> Art. 234 TFEU: Rule 107 Rules of Procedure of the European Parliament, 7<sup>th</sup> Parliamentary term, March 2014, <http://www.europarl.europa.eu/sides/getLastRules.do?language=EN&reference=TOC>.

**122.** Apart from that, the European Parliament has a general right of inquiry in the case of “*alleged contraventions or maladministration in the implementation of [Union] law*”<sup>463</sup> by the other institutions and to make appropriate recommendations.<sup>464</sup> In this regard, it is to be noted that every EU citizen and “*any natural or legal person residing or having its registered office in a Member State*” has the right to petition the European Parliament “*on a matter which comes within the Union's fields of activity and which affects him, her or it directly*”.<sup>465</sup> This makes it possible for individuals to bring perceived misuse of the exceptions of Regulation 1049/2001 by the institutions to the Parliament’s attention. In the exercise of the right of inquiry, a temporary parliamentary committee can request access to any necessary information.<sup>466</sup> However, the institutions concerned do not have to provide such information where they are prevented from doing so “*by reasons of secrecy or public ... security arising out of [Union] legislation or rules*”.<sup>467</sup>

**123.** Furthermore, Art. 9 (6) Regulation 1049/2001 provides that the Council and the Commission are to inform the Parliament regarding sensitive information. This has led to the adoption of Annex II to the Framework Agreement on relations between the Parliament and the Commission<sup>468</sup>, regulating access by the Parliament to confidential information held by the Commission and the Interinstitutional Agreement on access by the European Parliament to sensitive Council information in the sphere of security and defence policy<sup>469</sup>.

**124.** The conclusion of the Interinstitutional Agreement has not been self-evident, since many Member States feel that the EU’s foreign and security policy, especially the CSDP, should retain its mainly inter-governmental character and have therefore been reluctant to allow for

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<sup>463</sup> Art. 2 (1), subpara. 1 Decision European Parliament, Council and Commission 95/167/EC, Euratom, ECSC of 19 April 1995 on the detailed provisions governing the exercise of the European Parliament's right of inquiry, *OJ* 19.05.1995 L 113, 1.

<sup>464</sup> *Ibid.*, Art. 4 (3); P. MATHIJSEN and P. DYRBERG, *Mathijssen's guide to European Union Law*, London, Sweet & Maxwell, 2013, 92-93.

<sup>465</sup> Art. 227 TFEU.

<sup>466</sup> Art. 3 (4) Art. 2 (1), subpara. 1 Decision European Parliament, Council and Commission 95/167/EC, Euratom, ECSC of 19 April 1995 on the detailed provisions governing the exercise of the European Parliament's right of inquiry, *OJ* 19.05.1995 L 113, 1.

<sup>467</sup> *Ibid.*

<sup>468</sup> Framework Agreement on relations between the European Parliament and the European Commission, *OJ* L 304, 20.11.2010, 47.

<sup>469</sup> Interinstitutional Agreement between the European Parliament and the Council 2002/C 298/01 of 20 November 2002 concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy, *OJ* C 298, 30.11.2002, 1.

parliamentary scrutiny in this respect.<sup>470</sup> Nevertheless, the Agreement has come into being and has proven to be an important instrument for the European Parliament to gain access to security-related information. It intends to regulate the exchange of sensitive documents, classified as TOP SECRET, SECRET or CONFIDENTIAL in accordance with Art. 9 (1) Regulation 1049/2001<sup>471</sup>, between the Council and the European Parliament in a manner that is inspired by best practices in the Member States, where there are “*specific mechanisms for the transmission and handling of classified information between governments and national parliaments*”.<sup>472</sup> Under this Agreement, the President of the European Parliament or the Chairman of the European Parliament's Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy can request sensitive information from the Council on the European security and defence policy<sup>473</sup>, “*in accordance with both institutions’ duties of sincere cooperation and in a spirit of mutual trust*”<sup>474</sup>. This information can only be conveyed to “*a special committee chaired by the Chairman of the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy and composed of four members designated by the Conference of Presidents*”<sup>475</sup> and cannot under any circumstances “*be published or forwarded to another addressee*”<sup>476</sup>.

**125.** Although these arrangements theoretically make it possible for the said special committee to assess whether the Council has unduly classified certain documents, this is not the primary purpose of the Agreement, since it only allows for access to sensitive information “*where it is required for the exercise of the powers conferred on the European Parliament by the Treaty on European Union*” in the field of security and defence policy.<sup>477</sup> These powers do not comprise the exercise of control over the classification of documents by the Council. Furthermore, the number of people that are allowed to consult the documents in question is very limited<sup>478</sup> and the information has to be handled with “*due regard for the interests which*

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<sup>470</sup> G. ROSÉN, “Can you keep a secret? How the European Parliament got access to sensitive documents in the area of security and defence”, *RECON Online Working Paper Series* October 2011, Working Paper 2011/22, [http://www.reconproject.eu/main.php/RECON\\_wp\\_1122.pdf?fileitem=5455980](http://www.reconproject.eu/main.php/RECON_wp_1122.pdf?fileitem=5455980), (1) 1.

<sup>471</sup> *Ibid.*, Recital (3) in the Preamble and Art. 1.1.

<sup>472</sup> *Ibid.*, Recital (4) in the Preamble.

<sup>473</sup> *Ibid.*, Art. 3.1.

<sup>474</sup> *Ibid.*, Art. 2.1.

<sup>475</sup> *Ibid.*, Art. 3.3.

<sup>476</sup> *Ibid.*

<sup>477</sup> *Ibid.*, Art. 2.2 and 3.3.

<sup>478</sup> Art. 5 Decision European Parliament 2002/C 298/02 of 23 October 2002 on the implementation of the Interinstitutional Agreement governing European Parliament access to sensitive Council information in the sphere of security and defence policy, *OJ C* 298, 30.11.2002, 4. This Decision has oddly been adopted before the Interinstitutional Agreement which it is meant to implement.

*classification is designed to protect, and in particular the public interest as regards the security and defence of the European Union or of one or more of its Member States or military and non-military crisis management*<sup>479</sup>. As a result, consultation of the sensitive information is regulated by a very strict procedure<sup>480</sup>, whereby breach of confidentiality can lead to disciplinary and/or judicial sanctions<sup>481</sup> and those which have access to it will not be easily inclined to confront the Council with what they feel is an unjustified classification of the documents concerned. Additionally, parliamentary scrutiny is excluded if the information concerned originates from other institutions, Member States, third countries or international organisations and the Council could not obtain consent in dissemination from the originator.<sup>482</sup>

**126.** The exchange procedure laid down in The Framework Agreement on relations between the European Parliament and the European Commission<sup>483</sup> can serve to facilitate parliamentary scrutiny of institutional practice concerning the classification of documents, since it regulates the forwarding of confidential information to the Parliament “*in connection with the exercise of Parliament’s prerogatives and competences*”<sup>484</sup>. Those prerogatives include the exercise by the Parliament of its right of inquiry concerning alleged instances of maladministration. The Agreement ensures “*a regular flow of relevant information*” between the Parliament and the Commission, given the “*special partnership*” that exists between both institutions.<sup>485</sup> They are to hold “*a constructive dialogue on questions concerning important administrative matters*”<sup>486</sup>, something which the issue of access to documents by the EU citizens can certainly be considered to be.

**127.** The scope of Annex II to the Framework Agreement, entitled “*Forwarding of confidential information to the Parliament*” is wider than the information exchange

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<sup>479</sup> Art. 2.1 Interinstitutional Agreement between the European Parliament and the Council 2002/C 298/01 of 20 November 2002 concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy, *OJ C* 298, 30.11.2002, 1.

<sup>480</sup> Art. 3-9 Decision European Parliament 2002/C 298/02 of 23 October 2002 on the implementation of the Interinstitutional Agreement governing European Parliament access to sensitive Council information in the sphere of security and defence policy, *OJ C* 298, 30.11.2002, 4.

<sup>481</sup> *Ibid.*, Art. 10-11.

<sup>482</sup> *Ibid.*, Art. 2. and Art. 1.2 Interinstitutional Agreement between the European Parliament and the Council 2002/C 298/01 of 20 November 2002 concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy, *OJ C* 298, 30.11.2002, 1.

<sup>483</sup> Framework Agreement on relations between the European Parliament and the European Commission, *OJ L* 304, 20.11.2010, 47.

<sup>484</sup> *Ibid.*, Art. 1.1.

<sup>485</sup> *Ibid.* Art. 11.

<sup>486</sup> *Ibid.*, Art. 20.

procedures governed by the Interinstitutional Agreement between the Parliament and the Council, since it entitles the Parliament to request access to both classified information<sup>487</sup> and “*other confidential information*”<sup>488</sup>. The exchange of information is again based on “*the mutual duties of sincere cooperation*” of both institutions, “*in a spirit of mutual trust*”.<sup>489</sup> Access to confidential information can be requested by “*the President of the Parliament, the chairs of the parliamentary committees concerned, the Bureau and the Conference of Presidents and the head of Parliament’s delegation included in the Union delegation at an international conference*”.<sup>490</sup>

**128.** However, in the exchange of information both institutions are to respect the interests of the Union, notably the protection of public security, defence and international relations at all times and a State, international organisation or institution is to give its consent in the dissemination of information originating from it.<sup>491</sup> Classified information can only be accessed by people who have undergone a personal security clearance or signed “*a solemn declaration that they will not disclose the contents of those documents to any third person*”<sup>492</sup>. Such access is governed by a strict procedure<sup>493</sup>, whereby non-compliance can lead to disciplinary sanctions.<sup>494</sup> These factors point to the conclusion that the existing procedures for the exchange of information do not truly enable the European Parliament to investigate possible over-classification of documents by the Commission.

**129.** On a more general note, there is no guarantee that increased inter-institutional oversight necessarily serves the purpose of public access.<sup>495</sup> Furthermore, the pressure which the European Parliament may exercise in this matter remains political and it cannot have recourse to strong enforcement mechanisms. Also, the idea that the Parliament will voluntarily take up the role of a supervisory body rests on the premise that it will continue to promote

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<sup>487</sup> Classified as TOP SECRET, SECRET, CONFIDENTIAL or RESTRICTED “*or bearing equivalent national or international classification markings*”: Art. 1.2.2 Annex II to the Framework Agreement on relations between the European Parliament and the European Commission, OJL 304, 20.11.2010, 47.

<sup>488</sup> E.g. information to which the obligation of professional secrecy applies: *Ibid.*, Art. 1.2.3.

<sup>489</sup> *Ibid.* Art. 1.1.

<sup>490</sup> *Ibid.*, Art. 1.4.

<sup>491</sup> *Ibid.*, Art. 2.1.

<sup>492</sup> *Ibid.*, Art. 2.5.

<sup>493</sup> *Ibid.*, Art. 3.1 and 3.2.

<sup>494</sup> *Ibid.* Art. 3.3.

<sup>495</sup> M. ZBIGNIEW HILLEBRANDT, D. CURTIN and A. MEIJER, “Transparency in the EU Council of Ministers: An Institutional Analysis”, *E.L.J.* 2014, (1) 13.



transparency in the future and thus be willing to exercise control over the other institutions, which is not self-evident.

**130.** Nevertheless, it is clear that the European Parliament is evolving towards such a supervisory role, since it has recently embraced its self-imposed task of trying to ensure that the institutions comply with the EU's legal framework on transparency, as it has been reshaped through the case-law of the EU courts, so that it is more coherent and effective. In its Resolution of 11 March 2014<sup>496</sup>, the Parliament has stressed the importance of increased openness for the EU and explicitly called upon the other institutions to enhance transparency in their daily activities. In doing so, it did not shy away from pointing out that “*the EU legislation on access to documents is still not being properly applied by the Union's administration*”, which according to the Parliament is applying the exceptions of Regulation 1049/2001 “*routinely rather than exceptionally*”.<sup>497</sup>

**131.** Such a Resolution is not binding but its provisions can nevertheless have a strongly persuasive effect on the other institutions and therefore serve as a powerful catalyst for increased transparency in the EU's activities. Furthermore, the Commission is obliged to report to the Parliament on action which it has taken in response to specific requests made in a parliamentary Resolution within three months after its adoption, even when it does not agree with the Parliament's views.<sup>498</sup> This ensures that the calls made by the Parliament are not the voice of one crying in the wilderness, giving them the potential of providing a real incentive for enhanced transparency.

### 2.2.2. European Ombudsman

**132.** Apart from the European Parliament, also the European Ombudsman is authorised to investigate possible maladministration in the activities of the institutions, bodies, offices or agencies of the Union<sup>499</sup> He can do so on his own initiative or following a specific

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<sup>496</sup> Resolution European Parliament T7-0203/2014 of 11 March 2014 on public access to documents (Rule 104(7)) for the years 2011-2013, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0203>.

<sup>497</sup> *Ibid.*, Recital (H) in the Preamble.

<sup>498</sup> Art. 16, subpara. 1 Framework Agreement on relations between the European Parliament and the European Commission, *OJ L* 304, 20.11.2010, 47.

<sup>499</sup> Art. 24 and 228 (1) TFEU; Publication European Parliament 96/C 157/1 on how to complain with the European Ombudsman, *OJ C* 157, 01.06.1996, 1; P. MATHIJSEN and P. DYRBERG, *Mathijssen's guide to European Union Law*, London, Sweet & Maxwell, 2013, 93.

complaint<sup>500</sup>. He cannot, however, conduct inquiries on facts that are or have been the subject of legal proceedings<sup>501</sup> or scrutinise the activities that have been carried out by the Court of Justice in the exercise of its judicial role.<sup>502</sup> Addressing the European Ombudsman constitutes an additional avenue for EU citizens who feel wronged by the way in which their application for access to documents has been processed to complain about their alleged mistreatment.

**133.** If the Ombudsman, who is to be completely independent at all times<sup>503</sup>, finds that maladministration has occurred, he will undertake an attempt at conciliation by trying to find “*a friendly solution*”.<sup>504</sup> If this fails he informs the institution, body, office or agency concerned, after which the latter has three months to inform him of its views on the matter.<sup>505</sup> After this, the Ombudsman sends a report to the European Parliament and recommendations to the organ concerned, whereby the person who has filed the complaint is informed of the outcome of his investigation.<sup>506</sup> Combined with the Ombudsman’s annual report<sup>507</sup>, such reports provide the European Parliament with additional tools for assessing administrative practices within the other institutions, including their implementation of the legal framework on access to documents and whether it is necessary to take political action.<sup>508</sup> The Ombudsman’s reports cannot produce legal effects vis-à-vis third parties<sup>509</sup> and citizens therefore cannot compel him to submit such a report by way of an action for failure to act.<sup>510</sup>

**134.** Reports of the Ombudsman are not binding however and compliance with his recommendations by the organ concerned depends on the amount of influence which he is

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<sup>500</sup> Such a complaint can be made by “*any citizen of the Union or any natural or legal person residing or having its registered office in a Member State*” directly or through a Member of the European Parliament: Art. 228 (1), first subpara. TFEU. In order to be admissible, “*all appropriate administrative steps*” must have been exhausted: Publication European Parliament 96/C 157/1 on how to complain with the European Ombudsman, *OJ C 157*, 01.06.1996, 1.

<sup>501</sup> Art. 228 (1), first subpara. TFEU.

<sup>502</sup> *Ibid.*, second subpara. This is however not very relevant within the context of the right of access to documents, since in any case this right only applies to documents which the CJEU holds in the exercise of its administrative tasks: Art. 15 (3), fourth subpara. TFEU.

<sup>503</sup> Art. 228 (3) TFEU.

<sup>504</sup> Publication European Parliament 96/C 157/1 on how to complain with the European Ombudsman, *OJ C 157*, 01.06.1996, 1

<sup>505</sup> Art. 228 (1) second subpara. TFEU.

<sup>506</sup> *Ibid.*; N. MOUSSIS, *Access to the European Union – Law, Economics, Policies*, Cambridge, Intersentia, 2013, 66.

<sup>507</sup> Art. 228 (1) third subpara. TFEU.

<sup>508</sup> [http://europa.eu/about-eu/institutions-bodies/ombudsman/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/ombudsman/index_en.htm).

<sup>509</sup> D. EDWARD and R. LANE *Edward and Lane on European Union Law*, Cheltenham, Edward Elgar, 2013, 130.

<sup>510</sup> CFI, Order in Case T-103/99, *Associazione delle Cantine Sociali Venete v Ombudsman and Parliament* [2000] ECR II-4165, para. 46.

able to exercise.<sup>511</sup> Nevertheless, the lack of binding force of the Ombudsman's recommendations might well be one his major strengths, since it allows him to scrutinise the institution's activities with a fair amount of audacity.<sup>512</sup> Furthermore, it is not unlikely for the institutions to voluntarily comply with his recommendations, since this provides them with an additional ground of defence should its maladministration result in a case before the Union courts.<sup>513</sup> Additionally, since the Ombudsman cannot impose his views on the institutions, his *soft law* approach will not easily meet fierce opposition by the latter, resulting in an increased inclination to grant concessions.<sup>514</sup> This is also due to the fact that the Ombudsman is completely independent. On the contrary, supervision by the European Parliament carries the risk of being perceived as unjustified interference with the other institutions' daily affairs, while all institutions are supposed to be equal partners. As a result, increased scrutiny by the European Ombudsman of the institutions' policies on access to documents might well be a more effective way of getting them to endorse the principle of open government and furthering the transparency cause.

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<sup>511</sup> S. KARAGIANNIS, "L'apport du médiateur à la protection des droits fondamentaux" in S. KARAGIANNIS and Y. PETIT (eds.), *Le médiateur européen : bilan et perspectives*, Brussels, Bruylant, 2007, (89) 97.

<sup>512</sup> *Ibid.*, 132.

<sup>513</sup> *Ibid.*

<sup>514</sup> *Ibid.*

## VI CONCLUSION

**135.** The importance for the EU of incorporating the principle of transparency in its activities can hardly be overestimated. Transparency increases legitimacy and accountability and thereby contributes to the overall democratic character of the EU. Access to documents held by the EU's institutions, bodies, offices and agencies is not only a fundamental right of the citizens of the Union but also an essential instrument for increasing transparency. Apart from ensuring that its activities are founded on democratic principles, another essential task of the EU is to effectively protect public security. Both notions can be mutually reinforcing but an analysis of the legislative framework and the case law on the matter, together with their implementation by the organs of the Union has revealed that there is clear tension between the two.

**136.** Questions have been raised whether the EU's legal framework on access to documents contains enough safeguards for citizens against potential abuse. When assessing the risk which disclosure of a requested document might pose for public security, the institution addressed merely has to perform a harm test without being obliged to take the applicant's personal interests, demanding as they may be, into account. The Union courts have granted a wide discretion to the institutions in this regard, given the often highly sensitive nature of the information concerned. Such leeway is also at the institutions' disposal concerning the classification of documents.

**137.** Even though the concern for the public interest as regards the protection of public security can justify the right to freedom of information to be impinged upon in some instances, the importance and fundamental nature of this right dictates that citizens can avail themselves of sufficient legal guarantees for its exercise. In this regard, a pivotal role lies with the Union courts. The *Leander* case of the ECtHR has demonstrated what dangers lie in a court that does not engage in full judicial review and provides an all too wide discretion to the administration in handling a request for access to documents. It is up to the EU courts to make complete use of the juridical techniques which they have at their disposal and demand to get access to the documents in question under all circumstances, so as to better rule out potential misuse.

**138.** An analysis of the freedom of information legislation in some of the EU's Member States and the United States has indicated some lessons to be drawn for the EU in this respect. Swedish legislation also imposes a harm test to be carried out by the administration that is confronted with a request for access, but the general principle in Belgium and the UK is that the need for protecting national security has to be balanced against an overriding public interest in disclosure. This raises the question whether it is absolutely necessary to have a regime on public security that is as strict as the one currently in force at EU and is certainly something to be taken into account by the EU legislature during the recast process of Regulation 1049/2001. Extending the regime of Art. 4 (2-3) Regulation 1049/2001 to the exceptions contained in Art. 4 (1) would certainly result in a more balanced relationship between the right of access to documents and the public interest as regards the protection of public security.

**139.** Another way of achieving such a more equitable and balanced relationship between the two concepts would be to impose a paradigm shift on the institutions in the way they process a request for access to documents, by applying the working standard of the least restrictive measure, based on the principle of proportionality. Rather than conducting a harm test, whereby they merely assess whether disclosure of the requested document would cause prejudice to the public security of the Union, they would have to investigate whether a refusal to grant access is absolutely necessary for protecting the public interest at hand, taking all specific circumstances into account and justify themselves when they consider this to be the case. This would reduce the chance of having refusals that, although they can prevent harm to public security, are clearly disproportionate to the impairment of the right of access to documents.

**140.** Apart from the Union courts, an important role in maintaining an optimal balance between freedom of information and the protection of public security also lies with the European Parliament and Ombudsman. The Parliament has a range of possible mechanisms at its disposal for exercising control over the other institutions, but a lot depends on its willingness to actually take up the role of a supervisory body. Although its current powers of control do not seem to enable it to exercise much control over over-classification by the other institutions, it certainly has the potential of serving as a strong catalyst for increased transparency in the EU's activities.

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