

EGMONT PAPER 50

**PUBLIC ACCESS TO DOCUMENTS:
JURISPRUDENCE BETWEEN PRINCIPLE AND PRACTICE
(Between jurisprudence and recast)**

TINNE HEREMANS



September 2011



ACADEMIA PRESS

The Egmont Papers are published by Academia Press for Egmont – The Royal Institute for International Relations. Founded in 1947 by eminent Belgian political leaders, Egmont is an independent think-tank based in Brussels. Its interdisciplinary research is conducted in a spirit of total academic freedom. A platform of quality information, a forum for debate and analysis, a melting pot of ideas in the field of international politics, Egmont’s ambition – through its publications, seminars and recommendations – is to make a useful contribution to the decision-making process.

* * *

President: Viscount Etienne DAVIGNON
Director-General: Marc TRENTESEAU
Series Editor: Prof. Dr. Sven BISCOP

* * *

Egmont – The Royal Institute for International Relations

Address Naamsestraat / Rue de Namur 69, 1000 Brussels, Belgium
Phone 00-32-(0)2.223.41.14
Fax 00-32-(0)2.223.41.16
E-mail info@egmontinstitute.be
Website: www.egmontinstitute.be

© Academia Press

Eekhout 2
9000 Gent

Tel. 09/233 80 88

Fax 09/233 14 09

Info@academiapress.be

www.academiapress.be

J. Story-Scientia NV Wetenschappelijke Boekhandel

Sint-Kwintensberg 87

B-9000 Gent

Tel. 09/225 57 57

Fax 09/233 14 09

Info@story.be

www.story.be

All authors write in a personal capacity.

Lay-out: proccess.be

ISBN 978 90 382 1845 8

D/2011/4804/244

U1678

NURI 754

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the permission of the publishers.

Table of Contents

Executive Summary	3
Introduction.	7
1. Situating the Public Access to Documents debate.	9
1.1. Objectives and development of the right of public access to documents	9
1.2. Framework for a critical review of the case law.	12
2. Jurisprudence interpreting the exceptions	15
2.1. General principles	15
2.2. Mandatory exceptions (Art. 4(1))	18
2.2.1. Public Interests	19
2.2.2. Private Interests – Privacy and the Integrity of the Individual	24
2.3. Discretionary exceptions (Art. 4(2)).	31
2.3.1. Protection of Commercial Interests Exception.	31
2.3.2. Court proceedings exception	34
2.3.3. Legal Advice exception	39
2.3.4. Exception protecting the purpose of inspections, investigations and audits	50
2.4. Exception relating to the protection of the decision-making process (Art. 4(3))	57
2.4.1. Administrative and other non-legislative decision-making processes	57
2.4.2. Legislative decision-making processes	62
2.4.3. Analysis.	66
2.5. Exception relating to the protection of the authority of Member States (Art. 4(5))	73
2.5.1. Analysis.	75
3. General Observations	79
3.1. General tendencies in the case law.	79
3.1.1. Transparency for general policy measures unless conflicting fundamental values	79
3.1.2. Special versus general access to documents regimes.	80
3.1.3. Ongoing versus ended procedures	81

3.1.4. Standard and burden of proof	82
3.1.5. General assumptions/categories of documents versus specific examination	84
3.2. The Regulation: some more general reflections	84
3.2.1. Regulation is very often not used for its original goal	84
3.2.2. Are we dancing around the “elephants in the room”?	85
3.2.3. “Best can be the enemy of the good” – optimal instead of maximal transparency	87
Conclusion – a plea for ‘optimal’ as opposed to ‘maximal’ transparency	89
Table of Cases	91



EXECUTIVE SUMMARY

While jurisprudence is not usually something which tends to arouse the interest of policy-makers, in the debate regarding the revision of Regulation No 1049/2001 on Public Access to Documents it is nonetheless of great importance. Indeed, since the entry into force of Regulation No 1049/2001 ten years ago, the Court has had to rule on a multitude of issues raised by requests for access to documents. In thus interpreting the Regulation, the Court of Justice of the European Union has produced a sizeable – not uncontroversial – body of case law which shapes to an important extent the right of public access to documents within the EU. Hence, when decision-makers eventually manage to move beyond the current political deadlock, they will simply be obliged to take into account and respond to these jurisprudential interpretations.

With this in mind, this paper provides an overview and critical analysis of the case law on Regulation No 1049/2001. In addition, by clarifying the important considerations underlying the debate on public access to documents, the author hopes to raise policy-makers' awareness of the crucial interests at stake in this seemingly "marginal" political dossier. Far from questioning the necessity and value of transparency of legislative and administrative processes in a democracy, this paper pleads in favour of "*optimal*" as opposed to "*maximum*" openness.

Probably the most controversial issue within the access to documents debate concerns the need and justifiability of a so-called "**space to think**" for policy-makers. Whereas the Regulation contains a specific exception aimed at protecting decision-making processes from being "seriously undermined" by the disclosure of documents, the Court has become less and less inclined to accept its applicability. From its recent case law¹, it can be inferred that the Court requires, on principle, complete openness of *legislative* processes, even if these are still ongoing. Likewise, the Court has made it considerably tougher to prove that disclosure of internal documents that were part of a *finalized administrative* decision-making process might harm the institution's decision-making capacity.² Yet, it is argued in this paper that excessive transparency demands could very well harm the specific deliberation and negotiation process within the Council, lead to the use of more informal working methods detrimental to the functioning of any institution, deprive the Commission of "frank expert advice" in domains with large financial interests at stake, limit administrations' capacity to organize a free exchange of ideas and opinions that are given the time to mature without the constraints of self-censure, etc.

1. Case T-233/09, *Access Info Europe/Council* [n/r] (on appeal: pending Case C-280/11 P, *Council/Access Info Europe*); Joined cases C-39/05 P and C-52/05 P, *Sweden and Turco/Council* [2008] ECR I-4723.

2. Case C-506/08 P *Sweden/MyTravel and Commission*, paras 89, 97-98, 100.

A related contentious matter is the degree of public access to be granted to **legal advice** provided by the institutions' internal legal services. Since *Turco* it is clear that legal opinions in *legislative* procedures are to be made public even if the procedure is still ongoing, unless it is proven that a *specific* legal opinion is of a "particularly sensitive nature" or "particularly wide scope [going] beyond the context of the legislative process in question".³ Whereas in *MyTravel* the General Court (EGC) had given more leeway to the institutions to refuse the disclosure of legal advice provided in the context of *administrative* procedures, the Court of Justice (ECJ) (partially) reversed this judgment⁴ and concluded in essence that also legal opinions delivered in the context of administrative procedures need to be made public *once that administrative process has ended*.⁵ However, contrary to the ECJ's findings in respect of both legislative and administrative procedures, it does not seem "purely hypothetical"⁶ that such publicity could prejudice the institutions' legal services' *frankness and independence* when asked for their opinion, or even cause them to resort to expressing these opinions *orally*. For the Council in particular, such a *loss of frank, written legal opinions*, aside from reducing rather than increasing transparency, would be detrimental to the quality of decision-making, given the Council context of seeking agreement between 27 Member State delegates, with differing backgrounds, who have to communicate back and forth with their capitals.

As regards **Member State documents** in the possession of the EU institutions, the Court has limited the Member State's discretion in refusing their disclosure. Whereas *a priori (dis)agreement* of the Member State is still, in principle, binding on the EU institution confronted with the demand for disclosure this does not confer an unconditional and general veto right on those Member States.⁷ Indeed, the Member State is required to *state reasons* for its refusal, and, more importantly, these reasons should be able to fall under the *exceptions set out in Art. 4(1)-(3) of the Regulation* or relate to the specific protection accorded to *sensitive documents (Art. 9)*. The Court further clarified that, regardless of whether this refusal followed the assessment and application of these exceptions by the institution itself or by a Member State, the Community judicature should conduct a *complete judicial review* (as opposed to a mere *prima facie* review) to review whether the refusal was validly based on those exceptions.⁸ Yet, up to now, the Court has not yet clarified the *nature of the institutions' oversight* over

3. *Sweden and Turco*, para. 69.

4. Since some of the Commission's arguments, in particular as regards the exception on the protection of the purpose of inspections, investigations and audits, had not been examined by the General Court, the matter was referred back for a new judgment

5. Case C-506/08 P, *Sweden/MyTravel and Commission* [nry].

6. *Sweden and Turco*, para. 63. *Mytravel*

7. *Sweden/Commission (IFAW I)*

8. *IFAW II*,

the Member State's arguments. Hence, the ECJ left the question as to whom, the institution or the Member State, has the *final word* unresolved.

An important recent trend in the ECJ's case law is its willingness to accept that **specialized legislation or rules** organizing access to documents in a specific domain, for example the rules on state aid review procedures, should be *presumed* to prevail over the more general rules on access.⁹ Hence, if these specialized rules do not grant access to the documents at hand, there will be a *rebuttable general presumption* against disclosure. This jurisprudence breaks with the Court's traditionally strict stance on the requirement of a concrete case-by-case analysis, and its rejection of arguments based on *categories of* rather than individual documents. Yet, the fact that Regulation No 1049/2001 affects such a wide variety of domains and situations, characterized by a multitude of conflicting interests, does indeed seem to plead in favour of relying on the legislator's *specific* balancing act conducted in a *specific* policy context. Whereas a general exemption of situations governed by specific access rules from the scope of application of Regulation No 1049/2001 would in theory be a better solution, this would arguably require a revision of those sectorial regimes to ensure that they adequately take into account the *public* interest in transparency. Since this is unlikely to happen soon, the application of general presumptions that remain rebuttable on the basis of an overriding public interest in transparency is probably the best option. Indeed, it has the potential to relieve the institutions from the burden of having to establish in respect of every single document (from files which often contain thousands of pages) the risk of harm from disclosure, in domains where specific rules of access exist and the applicants are mainly motivated by other reasons than increased accountability or democracy.

More generally, an argument is made for reorienting Regulation No 1049/2001 towards its **core business** of increasing the accountability and democratic legitimacy of the EU. Indeed, given that a non-negligible (and increasing) amount of requests for access come from lawyers seeking access to large quantities of documents to support their clients' case in e.g. infringement or competition law cases, it seems that a lot of people and resources are being invested for reasons that do not correspond to the ones which inspired the adoption of the Regulation. Hence, in a world of limited resources it makes sense to rely on the specific rules on access for these situations and redirect the Regulation to its original purpose. Moreover, some of these **transparency efforts** could be usefully **redirected** towards the remaining obscurity of phenomena such as lobbying and, to some extent, trialogues. Furthermore, while transparency should be consciously defended against "old boys"-club reflexes, institutionalised bureaucratic attitudes, etc., it should also be defended against a self-defeating **dogmatic pro-**

9. Case C-139/07P, *Technische Glaswerke Ilmenau*; API, Bavarian Lager...

transparency attitude. Though “fear” of *evasion* practices should not dictate transparency policy, these far from “purely hypothetical” practices should nonetheless be taken into account when striving for an “optimal” rather than “maximum” level of transparency. Hence, the Court should avoid imposing a *de facto* “prohibitive” *standard of proof* on the parties who argue for the need for some degree of ‘space to think and negotiate’ and who point out the risk of evasion practices. Indeed, if not, it risks to harm the specific deliberation and negotiation process within the Council, to deprive the Commission of ‘frank expert advice’ as well as of a free exchange of ideas and opinions that are given the time to mature without the constraints of self-censure, etc.

INTRODUCTION

An important ongoing debate regarding the recast of Regulation No 1049/2001¹⁰ on Public Access to Documents has managed to somewhat « sail under the radar » of European public and political debate. Although lingering for the last three years in the stage of first reading at the European Parliament,¹¹ it is clear that this is a dossier which concerns all actors on the European scene and should be followed closely. Indeed, for European *citizens* this debate impacts upon their fundamental right of public access to documents, their capacity to hold government accountable as well as their democratic participation rights. As regards the European *institutions*, public access to documents influences their democratic legitimacy, public perception, internal functioning, administrative and legislative decision-making processes and capacity, etc. Lastly, EU access to documents-policies affect the *Member States* when participating in Council meetings or transferring “national” documents to the institutions.

Irrespective of the difficult legislative reform process, the Court of Justice of the European Union (hereafter ‘the Court’)¹² has over the last couple of years been increasingly called upon to interpret the provisions of Regulation No 1049/2001. The result of which is a fast-growing, not uncontested, body of case law. Moreover, owing to this legislative “state of limbo”, the Court is at present the main “evolutionary force” in the EU’s access to documents’ policy. Considering that any future legislative breakthrough will need to take into account this jurisprudence, this paper aims to provide a critical overview of the main cases and the reasoning adopted by the Court. More specifically, it seeks to evaluate the extent to which the case law is likely to *de facto* contribute to the objectives pursued by the right of public access to documents and what might be the practical impact on the Union’s overall functioning that needs to be taken into account.¹³

10. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] O.J. L 145/43; European Commission, Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, 30 April 2008, COM(2008)229 final.

11. Because the recast process is taking such an exceptionally long time, the Commission has in the meantime adopted a proposal extending the rules on public access to documents to all EU institutions, bodies, offices and agencies so as to bring the bring current rules into line with the Lisbon Treaty. European Commission, Proposal for a Regulation of the European parliament and of the Council amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, 21 March 2011, COM(2011) 137 final.

12. The Court of Justice of the European Union is the overarching name for the institution which consists of the: Court of Justice (ECJ), the General Court (EGC) and Civil Service Tribunal.

13. Note that this contribution only deals with the general right of access to documents as implemented by Regulation No 1049/2001, and not with the privileged rights of access granted by certain specific regulations as well as interinstitutional agreements. For example Arts 27, 28 & 30 of regulation (EC) No 1/2003 concerning competition; Articles 6(7) and 14(2) of Regulation (EC) No 384/96 (antidumping); Articles 11(7) and 24(2) of Regulation (EC) No 2026/97 (anti-subsidy); Article 6(2) of Regulation (EC) No 3285/94 (safeguards); Article 5(2) of Regulation (EC) No 519/94 (safeguards against non-WTO members); Interinstitutional agreement of 20 November 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy [2002] O.J. C298/1.

While an in-depth study of the existing empirical research about the impact of transparency on political and administrative processes was beyond the scope of this paper, a modest attempt is nonetheless made to transcend a pure consistency-based or “dogmatic” pro-transparency scrutiny of the case law and include more pragmatic considerations into the cost-benefit analysis.¹⁴

Dr. Tinne Heremans
Senior Research Fellow, Egmont

14. For a laudable effort to lift the analysis beyond the somewhat dogmatic “maximum transparency”-standard found in much of the legal literature: see KRANENBORG, H.R., “Tien jaar Eurowob: reden voor een feestje?”(2011) *SEW*, Issue 5, 217-230, who screens the recent case law using the objective benchmark of “the effectiveness of the right of access to documents” from the citizen’s perspective.

1. SITUATING THE PUBLIC ACCESS TO DOCUMENTS DEBATE

Before diving into this sizeable body of case law, the objectives, development and potential pitfalls of the principle of transparency and public access to documents are briefly set out. These are then discussed more in-depth throughout the case law analysis.

1.1. Objectives and development of the right of public access to documents

Transparency serving regulatory *accountability* and *democracy* – Traditionally, transparency of government action is primarily advocated as a means to ensure the *regulatory accountability* of that government, i.e. to facilitate the *control* of as well as the *quality* of government action.¹⁵ Yet, in the *sui generis* European legal order, transparency has been accorded a much more prominent role in strengthening *democracy* at large.¹⁶ Indeed, as the substantial expansion of EU competences and domains of action by the Single European Act and, in particular, the Maastricht Treaty, intensified the criticism on the democratic deficit of the EU institutions, the call for more transparency became “incontournable”. Hence, the principle of transparency was embraced as a key instrument in the quest for more *democratic legitimacy*. Moreover, with the idea of deliberative democracy gaining ground in the context of the EU, transparency was deemed crucial in ensuring citizens’ capacity to participate in the political process or, in other words, their *democratic participation rights*.¹⁷

In response, a Declaration of Transparency was attached to the Maastricht Treaty¹⁸ which was then followed by the adoption of a Code of Conduct¹⁹ con-

15. See, among others, VERHOEVEN, A., “The Right to Information: A Fundamental Right?”, presentation at the EIPA Seminar on “An Efficient, Transparent Government and the Right of Citizens to Information”, 29-30 May 2000, Maastricht, The Netherlands, 2, available at: <http://publications.eipa.eu/en/details/&tid=1722>

16. FROST, A., “Restoring Faith in Government: Transparency Reform in the United States and the European Union” (2003) *EPL*, Volume 9, Issue 1, 87-104. For a discussion of the evolution of the role of transparency in the EU, see Opinion of Advocate General Poiares Maduro of 18 July 2007 in Case C-64/05 P, *Sweden/Council* [2007] ECR I-11389, paras 37-47.

17. VERHOEVEN, A., “The Right to Information: A Fundamental Right”, 5; Opinion of Advocate General Poiares Maduro in *Sweden/Council*, para. 41.

18. Declaration No. 17 on the right of access to information, where it was stated that “The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration”.

19. Code of Conduct of December 6, 1993 concerning public access to Council and Commission documents, [1993] O.J. L340/41 (*corrigendum* in [1993] O.J. L23/34); Council Decision 93/731/EC of December 20, 1993 ([1993] O.J. L340/43), Council Decision 2001/320/EC of April 9, 2001 ([2001] O.J. L111/29) and Commission Decision 94/90/ECSC, EC, Euratom of February 8, 1994 ([1994] O.J. L46/58)

cretizing the rules on public access to Council and Commission documents. In 2001 this Code was replaced by the current Regulation No 1049/2001.

Hence, beyond its traditional role as a means to ensure regulatory accountability²⁰, the principle of transparency has been accorded the additional function of conveying democratic legitimacy on the Union's actions.²¹ Although the principle of transparency is multifaceted, within the EU the principle of public access to documents (Art. 15(3) TFEU) functions as an important proxy.²² Given the special role accorded to transparency in the EU democratic process, public access to documents is being interpreted as a "*participation right*" for citizens. It should however be noted that from its inception, EU transparency policy has struggled to reconcile the significant differences in viewpoints among the Member States.

Status of the access to documents right – While never formally recognized as such by the Court²³, it seems that public access to documents should nonetheless be regarded as a *general principle* of EU law²⁴, in particular in view of its codification in Art. 42 of the Charter of fundamental rights. In addition, while the legal implications remain to be clarified, it is notable that the Lisbon Treaty has inserted the provisions on the right of access to documents at the beginning of the TFEU among those provisions having general application.²⁵ Furthermore, with the Charter of fundamental rights having "officially" been granted binding legal effect, the entry into force of the Lisbon Treaty has firmly established the *fundamental right status* of the right of access to documents.²⁶ This recognition

20. See for an account of the more « limited role » played by the principle of transparency in the USA, i.e. greater accountability, increased efficiency, and other improvements in government output, FROST, A., "Restoring Faith in Government: Transparency Reform in the United States and the European Union" (2003) *EPL*, Volume 9, Issue 1, 87-104.

21. See Art. 1, para. 2 TEU: "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen"; Art. 10(3) TEU: "Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen"; Art. 15 TFEU: "1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible. 2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act. 3. Any 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's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph. [...] The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph."

22. Alongside the obligation of publicity of legislative debates set out in Art. 15(2) TFEU.

23. Opinion of Advocate General Poiares Maduro in *Sweden/Council*, para. 38

24. BROBERG, M., "Access to Documents: A General Principle of Community Law" (2002) *E.L.Rev.* 194-205.; LENAERTS, K., "In the Union We Trust": Trust-Enhancing Principles of Community Law" (2004) *C.M.L.Rev.* 317, 324; See also the Advocate General Opinions pleading in favor of such recognition: Opinion of Advocate General Tesouro of 28 November 1995 in Case C-58/94 *Netherlands/Council* [1996] ECR I-2169, para. 19; Opinion of Advocate General Léger of 10 July 2001 in Case C-353/99 P *Council/Hautala* [2001] ECR I-9565.

25. GODIN, G., "Recent Judgments Regarding Transparency and Access to Documents in the Field of Competition Law: Where Does the Court of Justice of the EU Strike the Balance?" (2011) *Journal of European Competition Law & Practice*, Vol. 2, No. 1, 11.

26. For a sketch of the evolution of the status of the access to documents right, see Opinion of Advocate General Poiares Maduro in *Sweden/Council*, paras 37-40.

is very likely to influence the interpretation of the scope, limitations, etc., of the access to documents right.²⁷

Recast-attempt – As mentioned in the introduction, over the last 3-4 years an attempt to recast the Regulation has found itself in a political deadlock. Indeed, whereas in a 2006 Resolution²⁸ the European Parliament had called upon the Commission to present a proposal for a revision of the Regulation and had itself formulated recommendations to that end, the Commission opted for the more restrained “recast-technique”. According to the relevant interinstitutional agreement, the legislative recast-technique is designed to avoid the proliferation of isolated amending acts around frequently amended legal acts, and therefore allows for a repeal and replacement of the whole act.²⁹ Its use in respect of Regulation No 1049/2001, which has never been amended since its inception, is however questionable and likely more inspired by strategy than good practice. Indeed, the procedural rules of the European Parliament stipulate that, as regards a recast-proposal, the scope of the debate and the potential amendments introduced should be confined to those parts of the legal act for which the Commission has proposed changes.³⁰ Hence, by using the recast-technique, the Commission effectively curtailed the Parliament’s aspiration to drive through much more ambitious revision-plans. In response to the Commission’s “manoeuvre” the European Parliament ignored these limitations and adopted a total of 92 amendments concerning all aspects of the Regulation and beyond. The Council, however, refused to consider those EP amendments which transgressed the “recast-mandate”.³¹ The European Parliament reacted by refusing to adopt its 1st reading position and sought to induce the Commission to bring forward a revised proposal to bring the political stalemate to an end. However, the Commission did not “take the bait” and confined itself to proposing, in March 2011, a very limited revision to adapt the Regulation to the Lisbon Treaty.³²

27. See already Opinion of Advocate General Poiares Maduro in *Sweden/Council*, paras 38-42.

28. European Parliament resolution with recommendations to the Commission (P6_TA(2006)0122), 4 April 2006.

29. Interinstitutional agreement of 28 Nov 2001 on a more structured use of the recasting technique for legal acts. ([2002]O.J. C 77/1); It can rightfully be questioned whether it was the appropriate technique to use given that the Regulation had remained unchanged since its adoption and the Commission’s proposal diverged strongly from the Parliament’s recommendations. (see also HARDEN, I., “The Revision of Regulation No 1049/2001 on Public Access to Documents” (2009) *European Public Law* 15(2), 245).

30. Art. 80 of the European Parliament’s Rules of procedures.

31. See for the opinion of the Council’s Legal Service: <http://www.statewatch.org/news/2009/may/eu-access-reg-council-table-7791-09.pdf>

32. European Commission, Proposal for a Regulation of the European parliament and of the Council amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, 21 March 2011, COM(2011) 137 final.

1.2. Framework for a critical review of the case law

Tension between principle and practice – It seems that the main difficulty in this debate stems from the fact that whereas the “*theoretical case*” for maximum transparency with the widest possible public access to documents is clear, the “*practical case*” based on the true impact and effects of such wide access rights is more blurry. Indeed, it is difficult not to be in favour of the *principle of government transparency* allowing citizens to hold their governors accountable as well as to have the opportunity to participate in their democracy as informed actors. Hence, at the “level of principles”, which is arguably the most natural habitat of courts, the case for maximum openness and access to documents is a very strong one. Yet, at the level of the actual practical implications of full transparency of government, in particular in terms of public access to its documents, the picture becomes mistier.³³

Several factors render such an evaluation of the practical effect extremely complicated. For one, there does not seem to exist much *empirical research* capable of underpinning any sort of general conclusion as regards the impact of increased transparency.³⁴ Secondly, when relying on the *practical experiences* of the different actors (“anecdotal evidence”), it is clear that these experiences will be different for each actor and institution, and that each of them, including the Court, is susceptible to its own type of “institutional bias”. Thirdly, the particular *cost-benefit analysis* of the public access to documents-obligation differs greatly as between institutions and across policy domains.

Transparency as a means or a goal – Especially in view of its evolution into a fundamental right it might seem that public access to documents has outgrown its instrumental role as serving democracy and accountability. Yet, if transparency becomes a goal in itself, there is a risk that it could in the end trump its own “raison d’être”. Indeed, “*too much transparency can kill transparency*” by triggering a variety of evasive practices. Moreover, an excessive focus on the operational proxies like public access to documents can also distract attention from those real “*elephants in the room*” such as the pervasiveness and secrecy of

33. See already VERHOEVEN, “The Right to Information: A Fundamental Right?”, 2-5, who, though strongly in favour of transparency, admits that (1) excessive transparency could lead to “legalism” and “risk aversion”, thereby undermining effective decision-making; and that (2) the result of an effective participation of citizens in EU governance on the basis of increased access to information remains contested given the experience in the US where the freedom of information act has “more often than not been used by commercial interests seeking to gain competitive advantages which is hardly related to participation of citizens in government”. See also the fragment in Opinion of Advocate General Póiaros Maduro in *Sweden/Council*, para. 41: “If one wished to be provocative, one could doubtless question the alleged relationship between transparency and democracy. [...] There is, moreover, a risk that transparency will not be used in the same manner by all citizens and that it will serve to promote privileged access to the political system for certain interest groups.”

34. See for example MEADE, E. and STASAVAGE, D., “Two Effects of Transparency on the Quality of Deliberation” (2006) *Swiss Political Science Review* 12(3), 123-124, who note the lack of systematic empirical research on the behavior of public officials in transparent versus secretive environments as well as, more generally, the scarce research on the costs as opposed to the benefits of public deliberation between government officials.

lobbying in the EU decision-making process. Likewise, it could divert attention and resources away from *more effective means* to achieve the ultimate goals of greater accountability, legitimacy³⁵ and democratic participation. For example, despite the enthusiasm in EU doctrine, it should be clear that transparency is a necessary yet insufficient condition for strengthening the so-called participatory democracy³⁶, and other routes such as reinforcing the formalised consultation processes of citizens and civil society deserve equal if not more attention.

In conclusion, though the right of public access to documents is a necessary instrument to correct the natural tendency of administrators and political leaders towards secrecy, it should be exercised in a balanced manner taking into account opposing interests.

35. For a critical appraisal of the naive assumptions underlying the “great expectations” in relation to transparency in the EU, see CURTIN, D. and MEIJER, E.J., “Does transparency strengthen legitimacy?” (2006) *Information Polity* 11, 109-122.

36. See in that sense CURTIN and MEIJER, “Does transparency strengthen legitimacy?”, 120.

2. JURISPRUDENCE INTERPRETING THE EXCEPTIONS

Since most cases on access to documents turn on the interpretation of one of the grounds of exceptions to access provided for in the Regulation, this will be the focal point of this case law overview.

2.1. General principles

Substantive scope: documents – Regulation No. 1049/2001 applies to “all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union”. A document is defined broadly 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” (Art. 3(a)). Probably the most controversial amendment in the Commission’s recast proposal is precisely the reformulation of what constitutes “a document” for the purposes of the Regulation, suggesting that a document “means any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) *drawn-up by an institution and formally transmitted* to one or more recipients *or otherwise registered, or received by an institution*; data contained in electronic storage, processing and retrieval systems are documents if they can be extracted in the form of a printout or electronic-format copy using the available tools for the exploitation of the system”.³⁷ This is clearly a renewed attempt by the Commission to limit the publicity of its internal decision-making process, seeking to safeguard some type of “space to think”.³⁸ Arguably, rather than introducing such a vague and unclear criterion of “formal transmission”³⁹, the

37. Proposed Art. 3 (emphasis added); As regards electronic databases HARDEN notes that there is no simple solution to the conceptual and practical difficulties in defining a public access right with regard to the content of databases. Though the Commission’s proposal is based on its long experience and current practice, its reliance on the “available tools for the exploitation of the system” without any requirement to adapt the design and operation of these electronic databases which were developed in the context of internal information management to the new reality of increased public access is unsatisfactory. (HARDEN, I., “The Revision of Regulation No 1049/2001 on Public Access to Documents” (2009) *European Public Law* 15(2), 246)

38. See already the Commission’s initial Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents ([2000] OJ C177E/70) “document” shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording); only administrative documents shall be covered, namely documents concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility, excluding texts for internal use such as discussion documents, opinions of departments, and excluding informal messages”, Art. 3(a).

39. The House of Lords European Union Committee considers the unclear criterion of “formal transmission” not to be a suitable way to balance the competing interests in protection and disclosure. (House of Lords, European Union Committee, 15th Report of Session 2008-2009, “Access to EU Documents”, 18 June 2009, 31-32, available at: <http://www.publications.parliament.uk/pa/ld200809/ldselect/lducom/108/108.pdf>)

Commission would be better advised to maintain the current broad definition and pursue its objective of “effective administration and policy-formulation” via the route of exceptions. It should nonetheless be noted that the Commission is not alone in seeking to limit access via exemptions from the substantive scope of the Regulation. Indeed, notably Sweden restricts the public’s right of access to “official documents” thereby excluding certain internal documents and preparatory documents.⁴⁰

Personal scope – Although in line with the wording of ex Art. 255 EC the Regulation only explicitly applies to access to documents of the Commission, Council and European Parliament, the institutions adopted a Joint Declaration demanding that also agencies and similar bodies adopt analogous rules on access to documents.⁴¹ Though the Lisbon Treaty explicitly expands this right of access to documents held by “the Union’s institutions, bodies, offices and agencies” – thereby requiring a revision of the Regulation – it nonetheless provides that the Court of Justice, the ECB and the EIB are subject to this right of public access to documents only to the extent that they are exercising administrative tasks (Art.15(3), para. 4, TFEU).⁴²

Beneficiaries: public with no need to show interest – “Subject to the principles, conditions and limits defined in this Regulation” a right of access is guaranteed to “any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State”⁴³. (Art. 2(1) & (3)) In line with the Regulation’s philosophy that transparency *per se* serves the public interest since “openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen”, a person seeking access to a document will not need to state any reasons justifying his request (Art.6(1)) and will thus not need to demonstrate any particular interest in having access to documents beyond the public interest in transparency.

Applying the exceptions – The basic principle underlying the application and interpretation of Regulation No 1049/2001 is that of the *widest possible access to documents*.⁴⁴ Hence, the exceptions to public access provided for in the Reg-

40. For more information: see Articles 7 & 9 of the Swedish Freedom of Press Act; MENDEL, T., *Freedom of Information: A Comparative Legal Survey*, (Unesco, Paris 2008), 101-103, available at www.unesco.org/web-world/en/foi; see also DRIESSEN, B., *Transparency in EU institutional law: a practitioner's handbook* (Cameron May, London, 2008), 13.

41. Joint Declaration relating to Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 [2001] OJ L173/5.

42. It would seem useful to adopt a clear-cut definition of what is understood by such “administrative tasks”.

43. Although de facto no limitation was ever used.

44. Art. 1 of the Regulation dealing with its ‘purpose’. Case T-174/95, *Svenska Journalistförbundet /Council* [1998] ECR II-2289, para. 66; Case T-211/00, *Kuijjer/Council (Kuijjer II)* [2002] ECR II-485, para. 55; Case C-266/05 P, *Sison/Council* [2007] ECR I-1233, para 61.

ulation are to be interpreted and applied as restrictively as possible.⁴⁵ More precisely, the Court requires any request for access to documents to be subjected to a *concrete and individual examination*.⁴⁶

This requirement of a *concrete or specific examination* means that the institutions need to examine “in a concrete manner” for each document whether its disclosure is likely to “specifically and actually” undermine one of the interests protected via the exceptions.⁴⁷ This *risk of harm* to the protected interest should be *reasonable foreseeable and not purely hypothetical*⁴⁸. Such a concrete examination will thus necessarily need to go beyond the mere constatation that a document “concerns” a particular interest based on⁴⁹, for example, the “nature”⁵⁰ and “title” of the document, and examine whether there is a reasonably foreseeable risk that the interest would be “specifically and actually” undermined when the document were to be disclosed. Moreover, in line with the proportionality principle, wherever possible, *partial access* should be granted to those parts of the requested document(s) which do not endanger the protected interest (Art. 4(6)). Nonetheless, certain circumstances, like an excessive administrative burden of having to blank out a multitude of confidential paragraphs, can discharge the institution from this duty of partial disclosure.⁵¹

The obligation to conduct an “*individual assessment*” requires the institution to separately assess for *each* document the possibility to grant the requested access.⁵² Hence, in principle, it cannot refuse access to a “group”, “class” or “category” of documents. However, as we will see, in a couple of very recent cases the Court accepted that the institution can base its decision on certain *general presumptions* regarding a category of documents.⁵³ Moreover, where the size of the request⁵⁴ would be such that a concrete and individual examination of the documents would entail an *unreasonable amount of administrative work* risking paralyzing the proper working of the institution, the institution is

45. Case C-353/99 P, *Council/ Hautala* [2001] ECR I-9565, para. 25; *Kuijjer II*, para. 55.

46. *Kuijjer II* para. 36; Case T-2/03, *Verein für Konsumenteninformation/ Commission* [2005] ECR II-1121, para. 69.

47. *Verein für Konsumenteninformation*, para. 69.

48. *Kuijjer II*, para. 56; Case T-403/05, *MyTravel Group plc./Commission* [2008] ECR II-2027, para. 73

49. Joined cases T-391/03 and T-70/04, *Franchet and Byk/Commission* [2006] ECR II-2023, paras 105&115.

50. *Franchet and Byk*, para. 130.

51. Case T-14/98, *Hautala/Council* [1999] ECR II-2489, para. 86; Case C-353/99 P, *Council v. Hautala* [2001] ECR I-9565, para. 30; Case T-211/00, *Kuijjer/Council (Kuijjer II)* [2002] ECR II-485, para. 57. It is however uncertain whether this still applies under the regime of Regulation No 1049/2001.

52. *Verein für Konsumenteninformation*, para. 70; *Franchet and Byk*, para. 116; Case T-237/05, *Éditions Jacob/Commission* [nyr], para. 42.

53. Joined cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden/API and Commission* [nyr], para. 73; *Technische Glaswerke Ilmenau* in respect of documents regarding an ongoing state aid investigation (Case C-139/07P, *Commission/Technische Glaswerke Ilmenau (TGI)* [nyr], para. 61). Although in these cases reference is made to the *Turco*-judgment, the ECJ had added an important qualification to its theoretical acceptance of the reliance on general considerations by requiring the institution to “establishes that these considerations are also applicable to the particular document at hand”, Joined cases C-39/05 P and C-52/05 P, *Sweden and Turco/Council* [2008] ECR I-4723, para. 50.

54. With 30.000 to 40.000 pages not being an exception in requests for access to competition law files.

in principle allowed to balance the interest in public access against the need to safeguard the interests of good administration.⁵⁵ Although in line with the spirit of Art. 6(3) of the Regulation allowing the institution to seek “a fair solution” with the applicant in the event of a “very long document” or a “very large number of documents”⁵⁶, the Court has emphasized that such foregoing of an individual and concrete examination on the basis of the size of a request should only happen in very exceptional cases and after the institution has investigated all other conceivable options.⁵⁷

Furthermore, the institutions are under the *obligation to state the reasons* for their decision in a manner which allows the applicant, as well as potentially the Court, to ascertain the concrete and individual nature of the assessment of their request.⁵⁸ The line is nonetheless drawn at the point where further explanation would in fact undermine the protection of the interests in Article 4.⁵⁹

In the next titles the differences in the application of these principles in the framework of the various types of exceptions will be looked at more closely.

2.2. Mandatory exceptions (Art. 4(1)⁶⁰)

A first category of exceptions set out in Art. 4(1) of Regulation No 1049/2001 are the so-called “mandatory exceptions”. The interests protected by these exceptions are deemed to be of such importance that once a likely risk of harm is established, the institutions are under the obligation to refuse access, without them having any remaining discretion to weigh up these interests against the interest in public access.⁶¹ In other words, the assessment is limited to a so-called harm-test excluding any balancing-test.⁶²

These mandatory exceptions are further divided into public and private interests.

55. *Verein für Konsumenteninformation*, paras 101-102; Case T-42/05, *Williams/Commission* [2008] ECR II-156*, Summ.pub., para. 85.

56. The Regulation also allows an institution to extend the term for deciding on a request in case of, eg. a very long document or a very large number of documents (Arts. 7(3) and 8(2)).

57. *Verein für Konsumenteninformation*, paras 103-115; *Williams*, para. 86. Hence, this argument has never been accepted in concreto.

58. The EGC ruled that the presence of a concrete and individual examination is not proven merely by providing a detailed list of documents, nor by the “categorization” of documents along the lines of the different exceptions, nor by disclosing some of the documents. *Éditions Jacob* para. 84.

59. Case T-105/95, *WWF UK/Commission* [1997] ECR II-313, para.65; Case C-266/05 P *Sisón*, paras 81-82.

60. These are sometimes also referred to as «absolute exceptions».

61. Case T-264/04, *WWF European Policy Programme/Council* (“*WWF EPP*”) [2007] ECR II-911, para 44.

62. ADAMSKI, D., “How Wide Is “The Widest Possible”? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited” (2009) *C.M.L.Rev.* 46, 521-549.

2.2.1. *Public Interests*

Art. 4(1)(a) protects *four types of public interests*: (1) public security, (2) defense and military matters, (3) international relations, (4) the financial, monetary or economic policy of the Community or a Member State.⁶³

a. Essence of case-law

The case law has made it clear that the institutions enjoy a *wide discretion* when establishing the presence of a public interest ground which mandates the refusal of public access.⁶⁴ The exercise of this discretion is deemed to be part of the institutions' "political responsibilities" conferred by the Treaty provisions.⁶⁵ Hence, the Court only conducts a *limited or marginal review* of those decisions.⁶⁶ Such marginal review consists in ascertaining whether (1) the procedural rules have been complied with, (2) the duty to state reasons has been satisfied; (3) the facts have been accurately stated and (4) the institution has not made a manifest error of assessment or misused its powers.⁶⁷

However, notwithstanding this wide discretion, the institutions still need to establish in respect of each document to which access is refused, that there is a *reasonably foreseeable and not purely hypothetical risk* that disclosure would undermine the protected public interest.⁶⁸ Moreover, given that exceptions to the general principle of public access should be interpreted as restrictively as possible, the possibility of granting *partial access* in line with Art. 4(6) should always be examined.⁶⁹

Public security – Until now, the Court has been called upon only once to evaluate the application of the *public security* exception under the Regulation regime.⁷⁰ In *Sison* the applicant was refused access to Council documents, which had been qualified as 'sensitive documents' (see below), on the basis of which the applicant had been included on a list of persons whose funds and financial assets were to be frozen as part of the fight against terrorism.⁷¹ The Court con-

63. Note that the Recast proposal would add environmental protection to this list: "(e) the environment, such as breeding sites of rare species."

64. Case T-14/98, *Hautala/Council*, para. 72; Joined cases T-110/03, T-150/03 and T-405/03, *Sison/Council* [2005] ECR II-1429, para. 46; C-266/05 P, *Sison/Council*, paras 34 & 64.

65. Case T-14/98, *Hautala/Council*, para. 71; *Kuijjer II*, para. 53.

66. *Kuijjer II*, para. 53.

67. Case T-14/98, *Hautala/Council* para. 72; Joined cases T-110/03, T-150/03 and T-405/03, *Sison/Council*, para. 47; C-266/05 P, *Sison/Council*, para. 34; *WWF EPP*, para. 40.

68. *Kuijjer II*, para. 56; *WWF EPP*, para. 39.

69. Case T-14/98, *Hautala/Council*, paras 83-86; *Kuijjer II*, para. 57.

70. In its proposal for a recast, the Commission extended the wording of this exception to "*public security including the safety of natural or legal persons*" It is unclear whether this will affect the current state of the case law, see PEERS, S., "Statewatch Analysis June 2008: Proposal on access to documents: Article-by-Article commentary", 6, available at: <http://www.statewatch.org/foi/sw-analysis-docs-june-2008.pdf>.

71. More precisely, the applicant sought access to Decision 2002/848 EC implementing Art. 2(3) of Regulation (EC) No 2580/2001.

firmed the Council’s refusal considering that “the effectiveness of the fight against terrorism presupposes that information held by the public authorities on persons or entities suspected of terrorism is kept secret so that that information remains relevant and enables effective action to be taken” and disclosure would thus “necessarily have undermined the public interest in relation to public security.”⁷² As regards the brevity of the statement of reasons given by the Council, the EGC deemed that this was acceptable in light of the fact that providing more information, in particular concerning the content of the documents, would negate the purpose of the exception.⁷³ Moreover, the applicant’s *particular* interest in disclosure based on his need to prepare his defence against being included on that list could not be taken into account by the institutions when under the obligation to apply a mandatory exception.⁷⁴

Military and defence matters and protection of international relations – Whereas the protection of the public interests as regards *military and defence matters* have never formed the object of litigation before the European Court, the interpretation of the *protection of international relations* has generated somewhat more case law. In essence, the exception can be invoked if it is *clear* that disclosure would *harm* the EU’s international relations with third countries⁷⁵ and international organizations, complicate international negotiations⁷⁶, undermine its position in international negotiations⁷⁷, endanger international cooperation in matters like the fight on terrorism⁷⁸, etc. In *Kuijjer II* – still decided under the Code of Conduct regime – the General Court found that the Council had made a manifest error of assessment when deciding to refuse access to “a group” of reports on the basis of their common features without having conducted a specific analysis of each individual report.⁷⁹ The fact that some of these reports drafted by Heads of Mission on the situation of asylum seekers returning to their country possibly contained sensitive information on the local political, economic and social situation of a country, and could harm the Community’s relations with these third countries, did not free the Council from its duty to screen them *individually*. Indeed, before refusing access, it had to estab-

72. Joined cases T-110/03, T-150/03 and T-405/03, *Sison/Council*, para. 77; confirmed in case C-266/05 P, *Sison/Council* [2007] ECR I-1233.
para. 66

73. Joined cases T-110/03, T-150/03 and T-405/03, *Sison/Council*, para. 62, 84. C-266/05 P, *Sison/Council*, paras 82-83.

74. Joined cases T-110/03, T-150/03 and T-405/03, *Sison/Council*, paras 51-52; C-266/05 P, *Sison/Council*, paras 43 & 46. Yet, whereas such an individual interest cannot be taken into account under Regulation No 1049/2001 which concerns the *public* right of access to documents, it can obviously be of importance in respect of other possible privileged rights of access. Hence, in a subsequent case before the General Court the applicant in *Sison* managed to obtain access on the basis of his *individual* right of defence. Case T-47/03, *Sison/Council*, (2007) E.C.R. II-73.

75. *Kuijjer II*

76. *WWF EPP*, para. 41

77. *WWF EPP*, para. 41

78. Joined cases T-110/03, T-150/03 and T-405/03, *Sison/Council*, paras 79-81.

79. *Kuijjer II*, paras 60-61, 70.

lish whether, in view of its content and context, *each* report at hand indeed contained sensitive information which was not yet dated or publicly known.⁸⁰ After having ordered production of those reports and having analyzed them itself, the General Court concluded that much of their content was unlikely to cause tensions with the third countries and the Council should thus have granted partial access.⁸¹ In *WWF EPP* the General Court accepted that disclosure of a note, which concerned the follow-up to the Cancun Summit on Sustainable Development and analysed the positions of third countries as well as the negotiating options for the Community, could harm the EU's international relations. Indeed, it could reasonably be thought to risk undermining the difficult ongoing negotiations by straining the Community's relations with third countries as well as by jeopardizing its negotiating position.⁸² Likewise, in *Sison*, the General Court confirmed that international cooperation in the fight against terrorism falls under this exception, allowing even the identity of the third states involved to be kept secret.⁸³

Financial, monetary or economic policy of the Community or a Member State

– As regards the protection of the public interest in the *financial, monetary or economic policy of the Community or a Member State* the scarce case law indicates that once again the same principles apply, thus providing only for a marginal judicial review.⁸⁴ However, one case which concerned a document in the possession of the ECB and which was thus governed by that institution's specific rules on access to documents rather than those of Regulation No 1049/2001, introduced some confusion into the debate. Indeed, when assessing the ECB's duty to state reasons *by analogy with* the case law on the general duty under Art. 253 EC⁸⁵, the Court asserted that “it is not clear from [the ECB's] decision that the applicant's interests had been weighed against the public interest constituted by monetary stability”.⁸⁶ Such weighing of interests would however seem to be against the general stance taken by the Court in respect of mandatory exceptions.⁸⁷ It is also interesting to note that in a recent case the General Court confirmed that although the refusal to disclose Member States documents is in

80. *Ibid*, Paras 60-70.

81. *Kuijer II*, paras 69-71.

82. *WWF EPP*, para. 41.

83. Joined cases T-110/03, T-150/03 and T-405/03, *Sison/Council*, paras 79-81. It should be noted however that on appeal the ECJ established that the EGC had misinterpreted the facts and that the documents emanated from *other Member States* rather than *third states* thereby excluding the application of the international relations exception. The judgment was nonetheless upheld since the EGC had also based its decision on the public security exception. C-266/05 P, *Sison/Council*, paras 67-76.

84. *WWF EPP*, paras 40-41. Case T-362/08, *IFAW Internationaler Tierschutz-Fonds/Commission (IFAW II)* [nyr], paras 87 & 107.

85. Joined cases T-3/00 and T-337/04, *Pitsiorlas/Council and ECB* [2007] ECR 2007, II-4779, 263.

86. *Pitsiorlas*, paras 271-272. However, the actual annulment decision of the ECB's decision was based on the fact that it had neglected to state any ground for rejection, i.e. monetary stability, in its refusal of access addressed to the applicant.

87. See ADAMSKI, D., “How Wide Is “The Widest Possible”? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited” (2009) *C.M.L.Rev.* 46, 527.

principle subject to complete judicial review, the Member State's reliance on the protection of its economic policy falls within Art. 4(1)(a) and is thus only subject to marginal judicial review.⁸⁸

Sensitive documents – Unlike the earlier Code of Conduct⁸⁹, Regulation No 1049/2001 contains a specific provision regarding the treatment of requests for access to 'sensitive classified documents'. These are documents which have received a confidentiality classification⁹⁰ to ensure the protection of the essential interests of the European Union or one of its Member States in the domains covered by Art. 4(1)(a), especially public security, defence and military matters. According to Art. 9(3) these documents can only be recorded in the register or released *if consent* is obtained from the originator. Moreover, when giving reasons for a refusal of access, the institution needs to ensure that its statement of reasons does not affect the interests protected in Art. 4. (Art. 9(4))

Up to now only one case has required the Court to interpret Art. 9 and clarify how sensitive documents are to be treated in the context of Regulation No 1049/2001. In *Sison*, both the General Court (EGC) and the Court of Justice (ECJ) affirmed that the originator of a sensitive document could refuse not only the disclosure of the document's *content* but also its very *existence*.⁹¹ In addition, the *identity* of the Member States from which the documents originated, could be kept secret.⁹²

As regards the obligation to *state reasons* for refusing access, both courts accepted that the Council had satisfactorily fulfilled this duty by communicating to the applicant that its refusal was based on the fact that (1) its request concerned sensitive documents falling under Art. 9(3), and that (2) the documents' originators had refused their disclosure.⁹³ The Council did not need to carry out an assessment of the grounds on which the originating Member States refused disclosure, nor did it need to explain why disclosure of the Member States' identity would undermine the interests protected by Art. 4(1)(a).⁹⁴

Furthermore, the EGC considered that the Council had sufficiently proven that a *concrete* examination to establish whether disclosure was likely to undermine

88. *IFAW II*, paras 87 & 107.

89. DRIESSEN notes however that such documents were equally protected via the Code's exception allowing the institutions to 'refuse access in order to protect the institution's interest in the confidentiality of its proceedings' combined with the authorship rule, see DRIESSEN, *Transparency in EU institutional law*, 116-117.

90. Three classification categories are used for such sensitive documents: 'EU Top Secret', 'EU Secret' and 'EU confidential'.

91. Joined cases T-110/03, T-150/03 and T-405/03, *Sison/Council*, para. 95; C-266/05 P, *Sison/Council*, para. 101.

92. Joined cases T-110/03, T-150/03 and T-405/03, *Sison/Council*, para. 96; C-266/05 P, *Sison/Council*, para. 102.

93. Joined cases T-110/03, T-150/03 and T-405/03, *Sison/Council*, paras. 64-65; C-266/05 P, *Sison/Council*, para. 86 & 106.

94. Joined cases T-110/03, T-150/03 and T-405/03, *Sison/Council*, para. 64; C-266/05 P, *Sison/Council*, para. 107.

the protected public interests under Art. 4(1)(a) had been carried out. Indeed, as discussed above, the Council did not make a manifest error of assessment when considering that the interests in public security and international relations could be undermined by disclosure of those documents relating to the fight against terrorism. Moreover, such a concrete assessment was seemingly taken to be “inherent” in the procedure regarding access to sensitive documents since it allows both the officials and the Member State delegations to examine the documents and express their views, and demands, at the end of the process, a unanimous approval of the refusal decision by the Council.⁹⁵

It can thus be concluded that as regards access to sensitive documents the institutions are awarded a wide discretion on which the Court exercises only marginal judicial review.

b. Analysis: examination standard and deferent judicial review

The freedom enjoyed by the institutions in relying on one of the public interest grounds to refuse disclosure of certain documents has been criticized by many.⁹⁶ Although recognizing that a certain degree of discretion might be justified in respect of protecting interests like public security and international relations,⁹⁷ the Community judicature’s choice to conduct only a *marginal judicial review*, is considered as being too lenient towards the institutions.⁹⁸

However, recalling that “the Community legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part” and where it has to “undertake complex assessments”, the ECJ considered that “the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) [...], combined with the fact that access must be refused [...] if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care [thus requiring] a

95. Joined cases T-110/03, T-150/03 and T-405/03, *Sison/Council*, para. 83. For strong criticism on this “categorical exclusion” of sensitive documents from the duty to carry out a concrete and individual examination, see; HELISKOSKI, J. & LEINO, P., “Darkness at the Break of Noon: the Case Law on Regulation No. 1049/2001 on Access to Documents” (2006) *C.M.L.Rev.* 43, 735-781. ADAMSKI however, seems more open to the idea that in respect of sensitive classified documents such a reasonably foreseeable risk that disclosure would undermine a protected interest is quite probable given the fact that they have gone through the “classification-process”, ADAMSKI, “How Wide Is “The Widest Possible”?”, 525.

ADAMSKI, “How Wide Is “The Widest Possible”?”, 525

96. ADAMSKI, “How Wide Is “The Widest Possible”?”, 524; HELISKOSKI, J. & LEINO, P., “Darkness at the Break of Noon”, 735-781.

97. ADAMSKI, “How Wide Is “The Widest Possible”?”, 525.

98. Indeed, according to ADAMSKI, the practice of a marginal judicial review has been developed in the context of economic cases where the Court is thought to lack the necessary expertise to substantively evaluate the economic assessments conducted by the institutions. Yet, he argues, such reticence is inappropriate in respect of judicial review in cases concerning a fundamental right such as the right of access to documents, and a more “inquisitive judicial control” is required so as to check the acclaimed special nature of the documents at hand. ADAMSKI, “How Wide Is “The Widest Possible”?”, 526

margin of appreciation”⁹⁹. Put more clearly by Advocate General Geelhoed: “[the] decision whether or not to grant access to a document which has a bearing on [the interests protected by the exceptions provided for in Article 4(1)(a)] necessarily depends on policy considerations and must be taken on the basis of information which is available only to the competent political authorities. As the efficacy of policy in this area in many cases depends on confidentiality being observed, the Community institutions involved must have complete discretion in respect of determining whether one of the interests listed in Article 4(1)(a) could be undermined by disclosure of documents”.¹⁰⁰ Hence, “it would transcend the nature of the judicial function for the Community courts to replace the assessment of the responsible political institutions by its own judgment” and judicial review should thus in principle be restricted.¹⁰¹

2.2.2. *Private Interests – Privacy and the Integrity of the Individual*

a. *Borax – expert meetings*

In *Borax*, the EGC rejected the Commission’s claim that disclosure of the identity of experts – or recordings which would allow for indirect deduction of their identity – who took part in an expert meeting organised by the Commission to obtain advice regarding the potential qualification of certain substances as dangerous, would expose them to external pressure and harm their privacy, integrity as well as potentially career.¹⁰²

The Commission argued that disclosure of the identity and opinions of the experts would clearly undermine their *integrity* by exposing them to external pressure.¹⁰³ The Court deemed however that *no specific evidence* had been provided “which would corroborate the existence of pressure or a risk of pressure on the participants in the meeting at issue, particularly on the part of Borax or on its initiative” and held that such a *general* claim would apply to all expert meetings held by the Commission.¹⁰⁴

99. C-266/05 P, *Sison/Council*, para. 35

100. Opinion of Advocate General Geelhoed of 22 June 2006 in case C-266/05 P, *Sison/Council*, para. 30.

101. *Ibid.*, para. 31

102. Case T-166/05, *Borax Europe/Commission* [2009] ECR II-28, Summ.pub.

103. As regards a *confidentiality promise* undertaken by the Commission, the General Court held that it could not be invoked against third parties like *Borax* and did in any case not figure in the exhaustive list of exceptions included in the Regulation. (para. 34) Moreover, in respect of its argument that disclosure would harm the experts’ *privacy* and infringe the *Data Protection Regulation No 45/2001* (Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, [2001] O.J. L 8/1), the Commission had failed to give a sufficient statement of reasons in its contested decision. Indeed, having relied only marginally on the Data Protection Regulation in the refusal decision itself, it was only in the proceedings before the Court – and thus too late – that the Commission presented the grounds on which it considered that disclosure of the experts’ identities would infringe their privacy as well as the Data Protection Regulation. (paras 38-41)

104. *Borax*, para. 44

Conceding that it could not provide precise or case-specific information as to the risk of pressure in the particular case at hand, the Commission asserted that “it was [nonetheless] clear from the evidence of persons participating in that type of meeting that, when significant interests were at stake, as in this case, pressure was exerted and the experts were approached or criticised”.¹⁰⁵ Nonetheless, the General Court considered that such a general claim did not prove that there was more than a *purely hypothetical risk* of the experts’ integrity being undermined.¹⁰⁶

Yet the Commission did add more concretely that “the personal inquiries carried out by [Borax], in the past, and the criticisms which it made in respect of the experts’ qualifications could be regarded as evidence of undue external pressure exerted on them” and should thus be accepted by the Court as tangible evidence.¹⁰⁷ In support of this, the Commission also produced a letter sent to it by Borax on the date of adoption of the contested decision, and in which Borax explained that, “in view of the fact that the summary record did not reveal the qualifications of the experts who had participated in the meeting, it made some inquiries which had clearly shown that certain experts had no qualifications in respect of reproductive toxicity”.¹⁰⁸ However, the EGC noted that the legality of a contested measure is to be assessed based on the facts and the law as they stood *at the time of its adoption*, and considered that the Commission did not prove that it took into account this letter, which moreover dated from the same day as the contested decision, when adopting the refusal decision. Hence, the letter could not be taken into account for the purposes of the examination of the present action.¹⁰⁹ Furthermore, in the EGC’s opinion the letter did not prove that *actual* pressure had been exerted on any of the experts nor that there was any *intention* to do so.¹¹⁰

Moreover, the Commission’s claim that an expert’s reputation or career could be affected by the revelation of an opinion contrary to a company’s interests, was also deemed to be a purely hypothetical risk.¹¹¹

Notwithstanding the potentially far-reaching practical consequences of this judgment in respect of expert consultation, it should be noted that a seemingly important factor in the EGC’s decision was the Commission’s persistent refusal to disclose even after “Borax amended its initial request by accepting that the information sought be limited to transcripts of the recordings, from which the experts’ names and countries of origin would be omitted”, whereas the EGC

105. *Ibid.*, para. 45.

106. *Ibid.*, para. 45

107. *Ibid.*, para. 46

108. *Ibid.*, para. 47

109. *Ibid.*, paras 47-48.

110. *Ibid.*, para. 49.

111. *Ibid.*, para. 50.

deemed such an amended “application [...] apt to remove any possible risk of undermining the protection of the experts’ privacy and integrity”.¹¹²

b. Bavarian Lager – relationship with Personal Data Regulation 45/2001 for documents containing personal data

Other than in *Borax*, the EGC had to pronounce itself in *Bavarian Lager* on the long debated issue of the relationship between Regulations 45/2001 (Personal Data Protection) and 1049/2001 (Public Access to Documents).¹¹³

In this case *Bavarian Lager* sought access to the full minutes of a meeting held in the context of an infringement procedure against the UK; a procedure which had followed on from a complaint lodged by *Bavarian Lager* itself. The meeting was attended by Commission officials, UK officials and representatives of a brewers trade organization at EU level; yet despite its request, *Bavarian Lager* had not been invited. The Commission agreed to disclose the substance of the document yet blanked out the names of the five EU trade organization representatives whom had not given their consent for disclosure.¹¹⁴ To justify its decision, the Commission relied on Regulation 45/2001 and stated that the applicant had failed to establish an express and legitimate purpose or need for such disclosure as Art. 8 of that Regulation prescribed. Hence, based on the exception for the protection of the private life and integrity of those participants contained in Art. 4(1)(b) of Regulation No 1049/2001, the Commission refused to grant access.

After pointing out the distinct objectives of Regulations Nos 1049/2001 and 45/2001¹¹⁵, the General Court examined the relationship between them. It found, firstly, that recital 15 of the Personal Data Regulation explicitly declares that access to documents containing personal data should be governed by Regulation No 1049/2001¹¹⁶, and, secondly, that the exception in Art. 4(1)(b) protecting the privacy and integrity of the individual explicitly asserts that the provisions of the Personal Data Regulation should be taken into consideration¹¹⁷.

Looking into the Personal Data Regulation’s provisions, the EGC found that names fall under the concept of “personal data” and that the making public of those names amounts to the “processing of personal data”.¹¹⁸ In order for processing to be lawful under the Personal Data Regulation, the data subject must have given its consent *unless* such processing is necessary for the perform-

112. *Ibid.*, para. 51

113. Case T-194/04, *Bavarian Lager/Commission* [2007] ECR II-4523.

114. Two of whom had explicitly refused and three which the Commission had failed to reach.

115. *Bavarian Lager/Commission*, para. 98.

116. *Ibid.*, para. 99-100.

117. *Ibid.*, paras 101-102.

118. *Ibid.*, paras 104-105.

ance of a task carried out in the public interest or for *compliance with a legal obligation to which the controller is subject* (Art. 5). The EGC concluded that Regulation No 1049/2001 constitutes such a legal obligation to grant access. Therefore, it considered that the obligation in Art. 8(b) of the Personal Data Regulation on a recipient - who is not a Community institution or body - to establish an interest in having access to those data, without there being any reason to assume that the data subject's legitimate interests might be prejudiced, did not apply.¹¹⁹ Likewise, the right of the data subject to object on compelling legitimate grounds (Art. 18) was deemed inapplicable since Art. 5 makes access to documents obligatory when there is a legal duty.¹²⁰

The General Court thus limited the rest of its evaluation to the question whether disclosure of the names of the participants to that meeting would *undermine the protection of their privacy and integrity within the meaning of Art. 4(1)(b) of Regulation No 1049/2001*.¹²¹ When investigating the potential undermining of this interest, the EGC relied on the ECtHR's case law in respect of what constitutes an "unjustified interference in the private life" within the meaning of Art. 8 ECHR.¹²² It concluded, however, that despite the broadness of the concept of "private life" not all personal data are necessarily covered and that not all personal data are capable by their nature of undermining the private life of the person concerned.¹²³ Hence, when assessing whether the sole disclosure of the names of the participants to a meeting, not including the specific opinions expressed by them, would actually and effectively undermine the protection of their privacy and integrity, the EGC concluded that such was not the case since they had attended that meeting in their *professional* capacity of representatives of a collective body.¹²⁴ It took the view that the mere participation of a representative of a collective body in a meeting held with a Community institution does not fall within the sphere of that person's private life so that the disclosure of minutes revealing his presence at that meeting cannot constitute an interference with his private life.¹²⁵ Hence, since there was no undermining of privacy, Art. 4(b)(1) did not apply and thus the provisions of Regulation 45/2001 including the obligation on the applicant to prove a necessity for the data transfer as well as the right for the data subject to object to disclosure, were also inapplicable.¹²⁶

On appeal, however, the ECJ found that the General Court had failed to respect the "equilibrium" which the legislator had sought to establish between both

119. *Ibid.*, para. 107.

120. *Ibid.*, para. 109.

121. Case T-194/04, *Bavarian Lager/Commission* [2007] ECR II-4523, para. 109-110.

122. *Bavarian Lager/Commission*, paras 111-119.

123. *Ibid.*, paras 118-119.

124. *Ibid.*, paras 124-126, 128, 132.

125. *Ibid.*, para. 131.

126. *Ibid.*, para. 138.

regulations.¹²⁷ Indeed, while the EGC had rightfully stressed that both Regulations have distinct purposes¹²⁸ it had erred in limiting the application of the privacy-exception under Art. 4(1)(b) to situations “in which the privacy or the integrity of the individual would be infringed for the purposes of Article 8 of the ECHR and the case law of the European Court of Human Rights, without taking into account the legislation of the Union concerning the protection of personal data, particularly Regulation No 45/2001”.¹²⁹ In doing so the General Court had negated the wording of Art. 4(1)(b) itself which explicitly requires conformity with the “[Union] legislation regarding the protection of personal data”.¹³⁰ Hence, the ECJ held that “Article 4(1)(b) of Regulation No 1049/2001 establishes a specific and reinforced system of protection of a person whose personal data could, in certain cases, be communicated to the public.”¹³¹ Thus, when, on the basis of Regulation No 1049/2001, public access is sought to documents which contain personal data, the *provisions of the Data Protection Regulation are applicable in their entirety*, including Arts 8 and 18.¹³²

Agreeing with the EGC that the communication of the full minutes of that meeting including the list of participants would amount to a “processing of personal data” within the meaning of Art. 2 of Regulation 45/2001, the ECJ examined whether on the basis of both Regulations the Commission could rightfully have granted access to that document including those five names.¹³³ The Court held that the Commission was right to seek the consent of the data subjects and to blank out those names where consent had not been given.¹³⁴ Given that the Commission had already disclosed the substance of the document and merely blanked out those five names, the ECJ concluded that the Commission had complied with its duty of openness and had not infringed Regulation No 1049/2001.¹³⁵ Furthermore, it was correct in asking Bavarian Lager to establish, in line with Art. 8(b) of Regulation No 45/2001, the *necessity* for transferring those five names.¹³⁶ Bavarian had failed however to provide any express and legitimate justification or any convincing argument demonstrating this necessity and had thereby deprived the Commission from the possibility to weigh up the different interests at stake.¹³⁷ Hence, the Commission had been right in refusing access to the full minutes of that meeting.¹³⁸

127. Case C-28/08 P, *Commission/Bavarian Lager* [nry], para. 65.

128. Case T-194/04, *Bavarian Lager/Commission* [2007] ECR II-4523, para. 98

129. Case C-28/08 P, *Commission/Bavarian Lager* [nry], para. 58

130. *Ibid.*, para. 59.

131. *Ibid.*, para. 60

132. *Ibid.*, para. 63. Art. 8 requires recipients to establish a need for disclosure; Art. 18 confers on a data subject the right to object to the processing of data concerning him/her at any time on compelling legitimate grounds relating to his or her particular situation.

133. *Commission/Bavarian Lager*, paras. 68-71.

134. *Ibid.*, para. 75.

135. *Ibid.*, paras 72 & 76.

136. *Ibid.*, para. 77.

137. *Ibid.*, 78.

138. *Ibid.*, 79.

c. *Analysis*

Standard of proof for a “risk” – Undoubtedly the EGC was right in *Borax* to condemn the Commission’s incomprehensible decision to uphold its refusal to disclose despite the fact that Borax had amended its application and any potential privacy or integrity risk had thereby effectively been removed. Nonetheless, the Court’s reasoning as regards the Commission’s failure to meet the required “standard of proof” seems to have inappropriately raised the bar for proving the presence of a *risk*. Indeed, the Commission’s claim that “it was clear from the evidence of persons participating *in that type of meeting* that, when significant interests were at stake, *as in this case*, pressure was exerted and the experts were approached or criticised”¹³⁹ was deemed by the General Court to be too general in nature and indicative of the Commission’s lack of “detailed information” as regards the *risk* of the experts’ integrity being undermined. Yet, even leaving aside the well-documented massive lobbying of the Brussels’ decision-making process, the Commission’s testimony of past experience with the pressurizing of experts by industry is far from “pure hypothesis”. The denial of this reality, even after having been confronted with a letter sent to the Commission by Borax in which it explained that “it [had] made some inquiries which had clearly shown that certain experts [who had participated in the meeting] had no qualifications in respect of reproductive toxicity”¹⁴⁰, would seem to bear witness to a dangerous naivety as regards industry’s motivation to protect its large financial interests at stake.

Moreover, given that a risk is *de facto* an event yet to happen and thus difficult to substantiate to a great degree of specificity, when reproaching the Commission for having failed to support its claim of a threat to the experts’ integrity “by the allegation of *any fact*, relevant to this case, which would corroborate the *existence* of pressure or a *risk* of pressure on the participants in the meeting at issue, particularly on the part of Borax or on its initiative”¹⁴¹, the EGC seems to come close to demanding proof of *actual harm*.

Relationship between Regulation No 1049/2001 and 45/2001 – Although the ECJ’s attempt to clarify the relationship between Regulation No 1049/2001 and the more specific Regulation 45/2001 in *Bavarian Lager* should be welcomed on principle, the implications of its analysis do not seem entirely satisfactory. Although the ECJ’s assessment in the particular case that by disclosing the substance of the discussion which took place at the meeting as well as the names of

139. *Borax*, 45, emphasis added.

140. *Borax*, para. 47; Although the EGC rejected this letter as evidence since the Commission could not prove that it had actually formed part of the grounds for its refusal, it still evaluated the content of the letter as failing to prove any exercise of or intention to exercise pressure. (para. 49)

141. *Borax*, para. 44, emphasis added.

the organisations present, the Commission had given sufficient transparency to its decision-making process to guarantee accountability, seems defensible, the strict application of the burden of proof set out in Art. 8(b) of Regulation 1045/2001 appears disproportionate in effect. Indeed, by requiring the applicant to provide an “express and legitimate justification” or “convincing argument” to establish the *necessity* of having these data disclosed (“transferred”)¹⁴², the ECJ seems to ignore the possibility that in several instances “the public interest in transparency” could in fact benefit from the disclosure of the identity of those persons who participate in the process of EU policy- and decision-making.¹⁴³

Recast – The Commission proposed to replace current Art. 4(1)(b) by the following: “Names, titles and functions of public office holders, civil servants and interest representatives in relation with their professional activities shall be disclosed unless, given the particular circumstances, disclosure would adversely affect the persons concerned. Other personal data shall be disclosed in accordance with the conditions regarding lawful processing of such data laid down in EC legislation on the protection of individuals with regard to the processing of personal data”. The European Data Protection Service however criticizes this proposal for (1) a too narrowly defined category of data which are to be disclosed (names, titles and functions), (2) the inclusion of a vague exception to the disclosure of those data, (3) the conservation of a reference to the data protection rules without further guidance and (4) the absence of an overriding public interest test.¹⁴⁴

142. *Commission/Bavarian Lager*, para 78.

143. See in that sense KRANENBORG, H.R., “Tien jaar Eurowob: reden voor een feestje?” (2011) *SEW*, Issue 5, 227.

144. See EDPS, Comments on the current discussions in Parliament about the revision of Regulation (EC) No 1049/2001 relating to public access, 16 February 2009, at http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Comments/2009/09-02-16_Comments_public_access_EN.pdf, expanding on its Opinion of 30 June 2008, OJ 2008 C 2/7. The EDPS proposed the following alternative: “1. personal data shall not be disclosed, if such disclosure would harm the privacy or the integrity of the person concerned. Such harm does not arise:

(a) if the data solely relate to the professional activities of the person concerned unless, given the particular circumstances, there is a reason to assume that disclosure would adversely affect that person;
(b) if the data solely relate to a public person unless, given the particular circumstances, there is a reason to assume that disclosure would adversely affect that person or other persons related to him or her;
(c) if the data have already been published with the consent of the person concerned;

2. personal data shall nevertheless be disclosed, if an overriding public interest requires disclosure. In those cases, the institution or body shall have to specify the public interest. It shall give reasons why in the specific case the public interest outweighs the interests of the person concerned;”

2.3. Discretionary exceptions (Art. 4(2))

Art. 4(2) sets out a second group of exceptions which are of a “discretionary” nature¹⁴⁵ meaning that the institutions invoking them will need to *balance* the protected interest against a possible “overriding public interest in disclosure”. In principle, the institutions themselves will need to ascertain whether such an overriding public interest exists.¹⁴⁶ The question as to what type of interest could constitute such an “overriding public interest” has formed the object of much discussion. More precisely, there is considerable disagreement as to whether the interest of transparency itself could be adduced as overriding the exceptions included in the Regulation. Indeed, given that the Regulation in fact “emanates/concretizes” the principle of transparency and the exceptions included in that Regulation are thus conscious deviations from the basic principle of transparency, it has been argued that allowing the interest in transparency to nonetheless override those exceptions amounts to a circular argument.¹⁴⁷ Nevertheless, the Court has accepted that the public interests in transparency, openness and democracy underlying the Regulation are capable of overriding the Regulation’s exceptions.¹⁴⁸

2.3.1. Protection of Commercial Interests Exception

In the first case on the commercial interests exception, i.e. *Terezakis*¹⁴⁹, the applicant sought access to a contract for the construction of an International Airport in Athens, for which the Commission had granted financial support from the Cohesion Fund. Adopting a strict interpretation, the General Court

145. These are sometimes also referred to as “relative exceptions”. The Commission proposes to add a new exception aimed at protecting the “objectivity and impartiality of selection procedures”. In so far as this refers to the procedure for the award of contracts, HARDEN notes that the commercial interests of natural and legal persons are already protected, so this is presumably intended to make it easier for the institutions to refuse access to documents which might reveal their decision-making procedures (avoiding the more stringent harm test under Art. 4(3)) for the awarding of contracts. (HARDEN, I., “The Revision of Regulation No 1049/2001 on Public Access to Documents” (2009) *European Public Law* 15(2), 247) As regards procedures for the selection of staff, HARDEN notes that this new exception could in fact enhance transparency by clarifying that, contrary to the CFT’s case law treating the Staff regulations as a *lex specialis*, in principle, the work of Selection Boards falls within the scope of the Regulation. (247) The House of Lords is however critical of this additional exception since other exceptions (e.g. personal data & commercial interest) already apply to recruitment and public procurement, and considers that further justification for such an additional ground should be given. (House of Lords, European Union Committee, 15th Report of Session 2008-2009, “Access to EU Documents”, 18 June 2009, 67-68, available at: <http://www.publications.parliament.uk/pa/ld200809/ldselect/lducom/108/108.pdf>). Furthermore, the recast proposal includes a new exception aimed at protecting intellectual property rights (Art. 4(2)(b)). PEERS notes that intellectual property is already explicitly protected as an aspect of commercial interests, so the added value of this new exception is unclear. PEERS, S., “Statewatch Analysis June 2008: Proposal on access to documents: Article-by-Article commentary”, 6, available at: <http://www.statewatch.org/foi/sw-analysis-docs-june-2008.pdf>.

146. *Sweden and Turco*, para. 44; *Verein für Konsumenteninformation*, para. 69; *Éditions Jacob*, para. 41. Case T-471/08, *Toland/Parliament* [nry], paras. 29 & 83

147. Case T-84/03, *Turco/Council* [2004] ECR II-4061, paras 82-83. Note however that the General Court somewhat puzzlingly added that “[i]f that is not the case, it is, at the very least, incumbent on the applicant to show that, *having regard to the specific facts of the case, the invocation of those same principles is so pressing that it overrides the need to protect the document in question.* [emphasis added]”.

148. *Sweden and Turco*, para. 74; see also paras 45, 46 & 67.

149. Case T-380/04, *Terezakis/Commission* [2008] ECR II-11*, Summ.pub.

concluded that the argumentation relied on by the Commission was *too general and abstract* in nature and failed to show that it had conducted a *specific and individual examination* that could lead to its conclusion that disclosure would actually and specifically undermine the contracting parties' commercial interests. For one, the Commission's assertion that "the contract contains detailed information about the contracting parties, their business relations and specific cost components related to the project" could not qualify as such specific examination. The presence of detailed information about the contracting parties and their business relations would hold for any commercial contract.¹⁵⁰ As regards the "information on the specific cost components related to the project", the EGC considered that such information could indeed require confidentiality yet found after a noticeably detailed analysis that at least *partial access* should have been granted to the documents concerned since many passages did not contain such information.¹⁵¹ Moreover, much of that information had already been disclosed by Greece within the scope of its application for financial assistance from the Cohesion Fund.¹⁵²

In two recent cases involving documents from merger files, *Éditions Jacob* and *Agrofert*, the General Court adopted a strict stance and found that the Commission failed to prove that it had conducted a concrete and individual examination. It found that correspondence between the Commission and parties to a Merger investigation, respectively documents sent to the Commission in the framework of a Merger case, could not be *presumed* to be *manifestly* covered by the exception protecting commercial interests yet had to be subjected to a concrete and individual examination.¹⁵³ Moreover, in *Agrofert* the Commission stated in a *general and abstract manner* that the requested documents contained commercially sensitive information relating to the commercial strategy of the notifying parties, their sales figures, market shares or customers. Hence, its argumentation was based on the *nature* of the documents requested in a Merger notification procedure rather than an actual examination of the specific content of the documents at hand, and could thus apply to all documents supplied in merger control proceedings.¹⁵⁴ Contesting the Commission's claim that "it could not have been more precise as to the actual content of the documents in question, since that would have led it to disclose their content and would have deprived the exception of its purpose" the General Court considered that "it was entirely possible to draw up a list of the documents exchanged between the

150. *Ibid.*, paras. 93-94.

151. *Terezakis*, paras 95-105

152. *Terezakis* is one of those few cases in which the EGC requested to be transferred the documents at stake so as to assess itself whether such a risk of undermining the commercial interests could reasonably have been thought to be present. (paras 96-104.)

153. Case T-237/05, *Éditions Jacob/Commission* [nyr], paras 122-123; Case T-111/07, *Agrofert Holding/Commission* [nyr], paras 79-80.

154. *Agrofert*, paras. 63-64

Commission and the parties in the merger control proceedings in question and to describe the content of each document without thereby revealing information which had to remain confidential” and it should thus have conducted a “fuller and more individual demonstration”.¹⁵⁵

As regards the duty of professional secrecy set out in Art. 17(2) of the Merger Regulation and ex Art. 287 EC, the Court considered that this duty cannot be assumed to cover all information received during an investigation.¹⁵⁶ Hence, no legitimate expectations on the part of undertakings that none of the documents provided to the Commission will be disclosed could flow from this.¹⁵⁷ Rather, the degree of confidentiality required by a particular item of information needs to be based on *a balancing of the individual legitimate interest opposing disclosure (as protected by the specific provisions in the Merger Regulation) as against the public interest in transparency*.¹⁵⁸ More generally, “the rules on access to the file laid down by the Merger Regulation in no way release the Commission from carrying out a concrete examination of each document [...] in the context of a request for access under Regulation No 1049/2001”.¹⁵⁹

Furthermore, the argument that information gathered in the context of an Art. 17(1) Merger investigation could only be used for the purposes of that investigation (‘limited use’-argument) was found to form no obstacle for the public access to these documents.¹⁶⁰

On the contrary, in *Agapiou Joséphidès* the EGC accepted that the Education, Audiovisual and Culture Executive Agency’s (EACEA) decision to only partially disclose the requested documents for reasons of protection of commercial interests was based on an individual and concrete examination and did not surpass what was appropriate and necessary to protect that interest.¹⁶¹ In that case the applicant sought access to the demand for and agreement on a subsidy for the creation of a Jean Monnet Centre of Excellence at the University of Cyprus. As regards the project related budget, the EACEA could reasonably consider that elements relative to the cost structure of undertakings constitute business secrets the disclosure of which could harm the company’s commercial interests.¹⁶² Likewise, information regarding the university’s specific knowhow for such projects could be deemed confidential in view of future project applications.¹⁶³ The applicant failed to prove an overriding public interest since, on the one hand, the defence of its interest in using such information in a pending dispute with

155. *Agrofert*, para. 65-66

156. *Éditions Jacob*, Para. 124; *Agrofert*, paras 69 & 83.

157. *Agrofert*, para. 83.

158. *Ibid.*, para. 69.

159. *Ibid.*, para. 77

160. *Éditions Jacob*, para. 89; *Agrofert*, para. 88.

161. Case T-439/08, *Agapiou Joséphidès/Commission* [nyr], para. 129. Pending appeal case C-626/10.

162. *Agapiou Joséphidès*, para. 126; The EGC itself had requested the documents and checked their content.

163. *Ibid.*, paras 127-128.

the University is merely a private interest and, on the other hand, the interest in transparency, being more limited in an administrative procedure, is already sufficiently guaranteed by the many publicity requirements surrounding subsidy requests.¹⁶⁴

2.3.2. *Court proceedings exception*

One exception to the widest possible access principle which the Court has interpreted noticeably leniently¹⁶⁵ is that of the protection of court proceedings.

a. *Scope*

As regards the types of documents covered by the exception, the Court has nonetheless adopted a *restrictive* interpretation. Only “documents drawn up by an institution solely for the purposes of specific court proceedings”¹⁶⁶ will be covered. These include pleadings and other documents lodged, internal documents concerning the investigation of the case at hand, correspondence concerning the case between the Directorate-General involved and the Legal Service or a lawyers’ office.¹⁶⁷ Documents drawn up in connection with a purely administrative matter are, however, not covered, even if their disclosure could harm the Commission’s position in an action for annulment against the outcome of the administrative procedure.¹⁶⁸

b. *Protected interests and duration of protection*

Protection until final judgment

Exemption by category until final judgment – In *API/Commission* the Court had to assess a refusal by the Commission to grant the Association de la Presse Internationale (API) access to its written submissions in a number of pending proceedings.¹⁶⁹ The EGC ruled that documents drawn up for the purpose of court

164. *Ibid.*, paras 137-143.

165. Yet still not sufficiently according to some worried that pleadings submitted by an institution in the context of one particular case would be “pulled out of context” and used against it in other cases to prove the institution’s “inconsistent approach”.

166. *Franchet and Byk*, para. 88.

167. *Ibid.*, para. 90.

168. *Ibid.*, para. 91.

169. I.e. several merger cases (Case T-209/01 *Honeywell v Commission* [2005] ECR II-5527; Case T-210/01 *General Electric v Commission* [2005] ECR II-5575; Case T-342/99 *Airtours v Commission* [2002] ECR II-2585; Case T-212/03 *MyTravel/Commission* [2008] ECR II-1967); an infringement case (Case C-203/03 *Commission v Austria* [2005] ECR I-935.) and the EU US ‘Open Skies’-cases: *Commission v United Kingdom* (C-466/98); *Commission v Denmark* (C-467/98); *Commission v Sweden* (C-468/98); *Commission v Finland* (C-469/98); *Commission v Belgium* (C-471/98); *Commission v Luxembourg* (C-472/98); *Commission v Austria* (C-475/98); and *Commission v Germany* (C-476/98). The Commission did grant access to the state aid case *Altmark* (Case C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747) and to the infringement case *Köbler* (Case C-224/01, *Köbler* [2003] ECR I-10239).

proceedings could be protected *en bloc*, i.e. without the need for an individual and specific examination, until the hearing has taken place.¹⁷⁰ This was the first time that the Court accepted such an exception *by category* of documents.¹⁷¹ On appeal, the ECJ extended the categorical protection of these documents up to the time where the *final judgment* has been rendered.¹⁷² Hence, *before a final judgment* has been delivered there is a *general presumption that the documents deserve to be kept confidential*.¹⁷³ Conversely, *after the judgment* has been rendered, a refusal of disclosure will need to be based on *an individual and specific examination*, even if a closely related case is pending before the Court.¹⁷⁴

Equality of arms – In its reasoning the ECJ relied first on the *principle of equality of arms*, as the corollary to the right to a fair hearing, explaining that “if the content of the Commission’s pleadings were to be open to public debate, there would be a danger that the criticism levelled against them, whatever its actual legal significance, might influence the position defended by the Commission before the EU Courts”¹⁷⁵ and that “such a situation could well upset the vital balance between the parties to a dispute before those Courts – the state of balance which is at the basis of the principle of equality of arms – since only the institution concerned by an application for access to its documents, and not all the parties to the proceedings, would be bound by the obligation of disclosure.”¹⁷⁶

Sound administration of justice – Secondly, it considered that the *sound administration of justice* justifies “the exclusion of judicial activities from the scope of the right of access to documents, without any distinction being drawn between the various procedural stages [...] in the light of the need to ensure that, throughout the court proceedings, the exchange of argument by the parties and the deliberations of the Court in the case before it take place in an atmosphere of total serenity.”¹⁷⁷ Indeed, “[d]isclosure of the pleadings in question would have the effect of exposing judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings.”¹⁷⁸

Moreover, if disclosure would be ordained this would frustrate “the effectiveness of the exclusion of the Court of Justice from the institutions to which the principle of transparency applies, in accordance with Article 255 EC.”¹⁷⁹

170. Case T-36/04, *API/Commission* [2007] ECR II-3201, paras 74-76, 98.

171. *API/Commission*, paras 72-74; confirmed in *Sweden/API and Commission*, para. 74.

172. *Sweden/API and Commission*, paras 85-95.

173. *Sweden/API and Commission*, para. 74 & 94.

174. *API/Commission*, para. 106; *Sweden/API and Commission*, paras 130-134.

175. *Sweden/API and Commission*, para. 86.

176. *Sweden/API and Commission*, para. 87; see also *API/Commission*, paras 63, 78-81.

177. *Sweden/API and Commission*, para. 92.

178. *Ibid.*, para. 93.

179. *Ibid.*, para. 95.

Lex specialis – In addition, the ECJ considered that when interpreting Art. 4(2) para. 2 the Statute of the Court of Justice and the Rules of Procedure of the EU Courts have to be taken into account. Since neither of these two sets of rules contain a third-party access right to written pleadings submitted to the Court in court proceedings, such access could not be granted on the basis of the general Regulation No 1049/2001 without calling this system of procedural rules in question.¹⁸⁰

Infringement procedures: leaving room for negotiation with the Member State

As regards documents relating to the Court proceedings in *an infringement procedure* against a Member State for failure to fulfill its obligations under the Treaty (Art. 258 TFEU; ex Art. 226 EC), the General Court ruled that letters of formal notice and reasoned opinions drawn up in connection with the investigations and inspections carried out by the Commission are *en bloc* covered by this exception *up until the judgment* has been rendered.¹⁸¹ Given that infringement procedures strive to reach an amicable settlement of the dispute with the Member State, the confidentiality of these documents is required so as to preserve this negotiation option.¹⁸² Clearly, *once the judgment is rendered* on the basis of Art. 258 TFEU (ex Art. 226 EC), there is no more room for negotiation with the Member State¹⁸³ and refusal of public access should thus be based on *an individual and specific examination*.¹⁸⁴ In *API* the Commission relied on the protection of *the purpose of inspections, investigations and audits*, to refuse public access to pleadings in an infringement procedure. The General Court accepted that such pleadings could be *en bloc* exempted from public access if they contain the same type of information as the procedural documents drawn up in the context of that infringement procedure, and if the infringement to which they relate is contested by the Member State concerned.¹⁸⁵ In view of the objective of an amicable settlement, the ECJ confirmed that such documents could be kept confidential until it has ruled on the existence of an infringement.¹⁸⁶ However, this investigation exception cannot be invoked merely because other similar proceedings are still underway or because a procedure on the basis of Art. 260(2) TFEU could potentially follow. Indeed, the ECJ stressed that Art. 260(2) TFEU concerns a distinct procedure “designed only to induce a defaulting Member State to comply with a judgment establishing a breach of

180. *Ibid*, paras 96-101.

181. Case T-191/99, *Petrie and others/Commission* [2001] ECR II-3677, para. 68

182. *Petrie*, para. 67; *API/Commission*, para. 121.

183. The ECJ stated that once a Member State has been condemned on the basis of Art. 258 TFEU, the negotiations between the Member State and the Commission are no longer aimed to establish an infringement, but to determine whether the conditions for an action under Art. 260 TFEU are met. (para. 120)

184. Joined cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and others/API and Commission* [nyr], paras 120-121

185. *API/Commission*, para.123.

186. *Sweden/API and Commission*, para. 134

obligations” and thus requires a different investigation seeking to establish whether the infringement has endured after the judgment of the Court.¹⁸⁷

c. *Overriding Public Interest?*

Although in *API* both the EGC and the ECJ repeat that, as a rule, the overriding public interest invoked should be distinct from the interests underlying the Regulation, they add that “[t]he invocation of those same principles may, in the light of the particular circumstances of the case, be so pressing that it overrides the need to protect the documents in question.”¹⁸⁸ Hence, contrary to the applicant’s claim on appeal, the EGC did not rule out the possibility that the interest in transparency is taken into account as an overriding public interest.¹⁸⁹ Moreover, the General court even balanced the interest in transparency against the interest in the protection of court proceedings.¹⁹⁰ Still, in the case at hand, the applicant merely advanced vague arguments in support of the acclaimed need for an overriding interest in transparency, claiming that “the public’s right to be informed about important issues of Community law, such as those concerning competition, and about issues which are of great political interest, which is true of the issues raised by infringement proceedings, prevails over the protection of the court proceedings”.¹⁹¹

d. *Analysis*

It is clear that the Court has been comparatively “mild” in respect of the refusal of public access to documents concerning pending court proceedings when it allowed for a *general presumption* against such disclosure. In so far as *API* implicitly confirms the trend to find that more *specific access rules*¹⁹², tailored to the particular context, should in principle supersede the general regime of the Regulation, and thus create a *general presumption* in favour of non-disclosure, it should be welcomed. Yet, where it in substance posits that it should be generally presumed that disclosure of court pleadings before the final judgment undermines the court proceedings and that it is up to the applicant to demonstrate why a particular document would not do so, the Court’s reasoning is less

187. *Sweden/API and Commission*, para. 118-122; EGC *API* para. 137.

188. *API/Commission*, para. 97; *Sweden/API and Commission*, para. 152 & 156.

189. *API/Commission*, para. 97; *Sweden/API and Commission*, paras 152-153.

190. *API/Commission*, para. 98-99; *Sweden/API and Commission*, para. 154.

191. *Sweden/API and Commission*, paras 157-158. ADAMSKI, in contrast, deems it “hard to find more convincing arguments for disclosure”, wondering whether “balancing retain[s] any *effet utile* if the most profound reasons for disclosure are not in a position to outweigh the exception?”. (ADAMSKI, “How Wide Is “The Widest Possible”?”, 533-534).

192. In casu the Statute of the Court of Justice and the Rules of Procedure of the EU Courts.

convincing and the Advocate General's more careful analysis seems preferable.¹⁹³

It should be noted that the Court itself is one of the few institutions who has been "spared" from the transparency requirements set out in Art. 15 TFEU; except when exercising its administrative tasks. In *API* the ECJ explicitly relied on "the wording of the relevant provisions of the Treaties and [...] the broad logic of Regulation No 1049/2001 and the objectives of the relevant EU rules" to confirm "that judicial activities are as such excluded from the scope, established by those rules, of the right of access to documents"¹⁹⁴. According to the ECJ, "the fact that the Court of Justice is not among the institutions which, in accordance with Article 255 EC, are subject to those obligations is justified precisely because of *the nature of the judicial responsibilities* which it is called upon to discharge under Article 220 EC (emphasis added)"¹⁹⁵.

While the "*serenity*" of *the judicial proceedings* – excluding pressure on judges and parties – and respect for the *principle of a fair trial* are indeed important interests worthy of protection¹⁹⁶, I agree with Advocate General Poiares Maduro in *API* that there should be a case-by-case analysis of the actual risks. Though considering that "pleadings lodged before the Court of Justice in court proceedings are [...] inherently more a part of the judicial activities of the Court than of the administrative activities of the Commission" and that "judicial activities are as such excluded from the scope, established by [Regulation No 1049/2001 and ex Art. 255 EC] of the right of access to documents", the Court does not pursue its reasoning further to find that such requests for access to pleadings should be *evaluated by the Court itself*.¹⁹⁷ Even without going as far as to conclude that requests of access to pleadings in ongoing procedures fall outside the scope of Regulation 1049/2011¹⁹⁸, the Court could still have found that the assessment of a potential undermining of the court proceedings is to be carried out by the Court itself to which the pleadings have been submitted.¹⁹⁹ Such a *case-by-case analysis* by the Court would have been preferable above the blunt general exemption of all pleadings in ongoing procedures.²⁰⁰ Indeed, such a drastic exemption contrasts rather sharply with the more publicity-minded

193. Favoring the EGC's choice to uphold this general presumption *only until after the public hearing* see KRANENBORG, H.R., "Tien jaar Eurowob: reden voor een feestje?" (2011) *SEW*, Issue 5, 225.

194. *Sweden/API and Commission*, para. 76.

195. *Sweden/API and Commission*, para. 82.

196. Contrast however with ADAMSKI, who is of the opinion that positive pressure exercised on the Commission in the form of critical public debate is "in essence a good thing" since it allows to "alter an imperfect position on the basis of informed public debate". ADAMSKI, "How Wide Is "The Widest Possible"?", 534.

197. Opinion of Advocate General Poiares Maduro of 1 October 2009 in joined cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden/API and Commission*, paras 77, 79-82.

198. Which was the preferred route by the Advocate General, paras 13-19; considering that the "best conclusion in the present case would be to find that all documents submitted by parties in pending cases fall outside the scope of Regulation No 1049/2001."

199. Opinion of Advocate General in *Sweden/API and Commission*, para 30.

200. *Ibid.*, para. 30.

approaches adopted in other Courts, like the ECtHR, Supreme Court, International Criminal Court, etc., where openness is the rule yet the courts can restrict this in a specific case when they consider that disclosure would harm the judicial process or other important interests.²⁰¹

Recast – In the Commission’s proposal the exception on court proceedings is expanded to include “arbitration and dispute settlement proceedings”. Another proposed amendment would exclude from the Regulation’s scope of application “documents submitted to Courts by parties other than the institutions” (Art. 2(5)). In practical terms this would mean that to obtain access to such documents one would have to turn to the Court itself and follow its specific rules on access. As discussed above, granting the Court the power to decide on the merits of each individual case whether court submissions can be disclosed without undue harm, would seem to make sense, although it is unclear why a distinction should be drawn between the institutions’ and other parties’ submissions.²⁰² Yet, in evaluating such requests for access, the Court will clearly need to move beyond its current unsatisfactory regulatory framework of its Rules of Procedure and Statute which does not provide for any third party access.

2.3.3. *Legal Advice exception*

An exception which has formed the object of considerable controversy over the last couple of years is the protection of legal advice.

A preliminary question whether the *scope* of the legal advice exception had to be limited to “legal advice given in the course of or related to court proceedings” was unanimously answered in the negative.²⁰³ However, the main point of contention in these cases lies in establishing the exact *meaning of ‘protection’ of legal advice*²⁰⁴, i.e. what is the precise *content of the interest* deemed to be protected by refusing public access to legal advice?

Though not explicitly provided for in Art. 4(2)(b)²⁰⁵, the Court gradually put more and more emphasis on the difference between legal advice given in the framework of legislative and administrative processes, with the former requiring

201. See Opinion of Advocate General in *Sweden/API and Commission*, paras 22-30.

202. Also in favour of leaving the question of disclosure to the courts themselves, though unclear as to why there should be a difference in treatment between pleadings of the institutions and documents submitted to courts by parties other than the institutions: House of Lords, “Access to EU Documents”, 7-8. Contra: see PEERS, S., “State-watch Analysis June 2008: Proposal on access to documents: Article-by-Article commentary”, 2.

203. Case T-84/03, *Turco/Council* [2004] ECR II-4061, para. 58, 65-66.

204. See Joined cases C-39/05 P and C-52/05 P, *Sweden and Turco/Council* [2008] ECR I-4723, para. 41: “In that regard, it must be pointed out that neither Regulation No 1049/2001 nor its *travaux préparatoires* throw any light on the meaning of ‘protection’ of legal advice(emphasis added)”.

205. See however Recital 6: “Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions’ decision-making process. Such documents should be made directly accessible to the greatest possible extent.”

a greater degree of openness.²⁰⁶ However, in its most recent case law it has underlined that also administrative processes should on principle be subject to the widest possible access.

a. Legal advice given in a legislative process

In *Turco*, the first case interpreting this exception under the Regulation regime, the applicant²⁰⁷ fought a Council decision to only partially disclose an opinion of its Legal Service regarding a proposal for a Council Directive. The legal opinion formed thus part of an *ongoing legislative process*.

Confidentiality of specific legal opinions versus categories of legal opinions

Although the General Court repeated the requirement of a specific and individual examination of the effect of disclosure of the particular legal opinion at hand, it did accept the Council's *general justificatory reasoning* that disclosure "could give rise to uncertainty as regards the legality of legislative acts adopted following such advice".²⁰⁸ Satisfied that the Council's disclosure of the legal opinion's introductory paragraph showed that it had examined the content of the particular legal opinion²⁰⁹, the EGC considered the "generality of the Council's reasoning [to be] justified by the fact that giving additional information, making particular reference to the contents of the legal opinion in question, would deprive the exception relied upon of its effect."²¹⁰

Advocate General Poiares Maduro agreed that a general statement of reasons covering a *category of documents* could sometimes be acceptable, as in the case of all legal opinions (of the institutions' legal services) regarding the legality of draft legislation. Indeed, considering that Art. 4(2) establishes "*a general presumption of confidentiality* in respect of the legal advice given by the legal services of the institutions on draft legislation", he estimated that a case-by-case examination for this exception involves solely the identification of *what* in that document amounts to genuine legal advice, noting that "[n]othing but the legal advice, but all the legal advice, is covered by that provision".²¹¹

However, on appeal the ECJ concluded that the General Court had erred in accepting such a *general need for confidentiality in respect of legal advice relat-*

206. *Sweden and Turco*, para. 46.

207. Who, interestingly enough, was in fact a member of the European Parliament (MEP).

208. *Turco/Council*, paras 73-74.

209. *Turco/Council*, para. 75.

210. *Turco/Council*, para. 74. The EGC explicitly recognized that the Council's reasoning "relating to the need for protection relied upon, seems to relate to all the Council's legal advice on legislative acts and not specifically to the legal opinion in question".

211. Opinion of Advocate General in *Sweden/API and Commission*, para. 37 (emphasis added); see also para.38 in which the Advocate General underpins his position with a historical overview of the case law which was endorsed by the legislature in this provision; and para. 40.

ing to legislative matters.²¹² Although accepting that reasons of a general nature could, in principle, form part of the institution's justification in refusing access, the ECJ emphasized that the Council should have been required to apply them to the particular legal opinion at stake.²¹³ Moreover, stressing the overriding public interest in transparency of legislative processes, the ECJ concluded that Regulation No 1049/2001 "imposes, *in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process*"²¹⁴. Thus, in contrast with the EGC's (implicit) acceptance of a general presumption against the disclosure of legal opinions regarding legislative questions, the ECJ found a *general presumption that legal opinions relating to a legislative process should be disclosed*. It did add, however, that a *specific* legal opinion can be found to be of a "particularly sensitive nature" or "particularly wide scope [going] beyond the context of the legislative process in question" thereby justifying the refusal of access on the basis of the protection of legal advice.²¹⁵

Precise meaning of "protection of legal advice"

As regards the meaning of "protection of legal advice" the General Court had accepted that documents containing legal advice could, because of their *particular nature*, be kept confidential to *avoid fueling doubts about the legality of Community legislation as well as to preserve the independence of the opinions of the legal service*.²¹⁶ The ECJ for its part limited the rationale for protecting legal advice to the *institution's interest in receiving frank, objective and comprehensive legal advice*.²¹⁷ On the risk that disclosure of legal opinions would fuel doubts about the legality of legislative acts, the ECJ considered that it is on the contrary the lack of information and open debate which triggers such doubt, and that transparency would confer greater legitimacy on the institutions as well as increase the trust of citizens.²¹⁸ Moreover, such doubts could be better addressed by including a convincing statement of reasons in the legislative act wherein the legislative choice is defended.²¹⁹ In his opinion Advocate General Maduro offered a third argument for confidentiality, i.e. the risk that an overly broad public access to documents could lead the Legal Service to *resort to oral rather than written expressions* of its opinion, thereby in fact reducing transparency.²²⁰

212. *Sweden and Turco*, para. 57. (emphasis added)

213. *Sweden and Turco*, para. 50, 56-57, 61, 63.

214. *Ibid*, para. 67-68 (emphasis added)

215. *Ibid*, para. 69, stressing the need for a detailed statement of reasons as well as a limitation in time of the potential invocation of the exception to the period during which such protection is justified. (para. 70)

216. *Turco/Council*, para. 78-79; Opinion of Advocate General in *Sweden and Turco/Council*, para. 40.

217. *Sweden and Turco*, para. 42 & 62.

218. *Sweden and Turco*, para. 59

219. *Sweden and Turco*, para. 60.

220. Opinion of Advocate General in *Sweden and Turco/Council*, para. 40

Although the ECJ agreed in principle that disclosure could entail the risk of impairing *the independence of the opinions of the legal service*²²¹ and thus of *undermining the institution's interest in receiving frank, objective and comprehensive legal advice*²²², it condemned the Council's lack of detailed argumentation establishing a reasonably foreseeable and not purely hypothetical risk.²²³ As regards the risk of improper external pressure trying to influence the Legal Service, the ECJ asserted that it is that pressure itself rather than the possibility of the disclosure of legal opinions which would compromise the interest in receiving frank, independent, etc. advice and which should thus be addressed.²²⁴ Furthermore, the Commission's argument that disclosure would cause problems for the Council's Legal Service when called upon to defend an opposing legal position in potential legal proceedings was deemed to be too general.²²⁵ Hence, the ECJ found no proof of a reasonably foreseeable risk that disclosure of legal opinions would undermine the interest in the protection of legal advice.²²⁶

Transparency as an overriding public interest

Having accepted that there was a reasonably foreseeable risk of the protection of legal advice being undermined, the General Court examined the *overriding public interest in disclosure* raised by the applicant. Contrary to the applicant, the General Court considered that the principles of transparency, openness and democracy were precisely those principles being implemented by the Regulation and to which the protection of legal advice had been consciously introduced as an exception or limitation. Hence, those same principles of transparency, etc., could not be invoked as overriding public interests to be, once again, weighed against the exceptions and limitations explicitly introduced in the Regulation and to justify the disclosure of a document undermining that protection of legal advice.²²⁷ The General Court did however add, somewhat puzzlingly, that “[i]f that is not the case, it is, at the very least, incumbent on the applicant to show that, *having regard to the specific facts of the case, the invocation of those same principles is so pressing that it overrides the need to protect* the document in question.”²²⁸ thereby all the same introducing a balancing of the protected interest against transparency.

221. *Turco/Council*, para. 79.

222. *Sweden and Turco*, para.42&62.

223. *Sweden and Turco*, para. 63.

224. *Sweden and Turco*, para. 64. Contrast with *Turco/Council*, para. 79.

225. *Sweden and Turco*, para. 65. Contrast however with Opinion of Advocate General in *Sweden and Turco/Council*, para. 40.

226. *Sweden and Turco*, para. 63&66.

227. *Turco/Council*, paras 82-83.

228. *Turco/Council*, para. 83 [emphasis added]

The ECJ on the contrary accepted that such an overriding public interest could be formed precisely by the principles underlying the Regulation²²⁹, such as the public interest in increased openness, which “enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system”²³⁰. Especially in the a legislative process the Court, relying on recital 6 of the Regulation’s preamble, advocated increased openness considering that “citizens [should be able] to scrutinize all the information [including legal opinions] which has formed the basis of a legislative act” and that “[t]he possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.”²³¹

As regards the burden of proof, the ECJ, in contrast with the EGC, considered that it is for the Council to ascertain whether there is an overriding public interest and balance it against the protected interest.²³²

b. Legal advice given in an administrative process

In *MyTravel*, the Commission refused to disclose legal opinions on the draft texts of a concentration decision which had already been annulled in the *Airtours* judgment.²³³ The General Court upheld this refusal, accepting that disclosure would risk to make public the internal discussions between DG Competition and the legal service on the lawfulness of the assessment of the compatibility of the *Airtours*/First Choice concentration with the common market, and could thus affect possible future decisions to be made as regards the same parties or in the same sector.²³⁴ Moreover, such disclosure risked causing the legal service to display reticence and caution in the drafting of future notes so as not to affect the Commission’s administrative decision-making capacity.²³⁵ Furthermore, disclosure could impair the Commission’s legal service’s capacity to defend a position in Court which is different from the one “it had argued for

229. *Sweden and Turco*, para. 74. See also the Opinion of Advocate General in *Sweden and Turco/Council*, para. 50. “In actual fact, what is imposed, in my opinion, by the last phrase in Article 4(2) of Regulation No 1049/2001 is the obligation, for the institution concerned, to weigh the public interest protected by the exception on the ground of confidentiality against the public interest in access to documents, in the light of the content of the document requested and the specific circumstances of the case. In other words, the ratio legis of that provision, so far as concerns the exception on the ground of confidentiality in respect of legal advice, is that, although the public interest which underlies the protection of legal advice prevails as a rule over the public interest in access to documents, an analysis of the circumstances of the case and of the content of the legal opinion requested may tip the scales in the opposite direction.”

230. *Sweden and Turco*, para. 45, see also para. 67.

231. *Sweden and Turco*, para. 46.

232. *Sweden and Turco*, paras 44-45; see also Opinion of Advocate General in *Sweden and Turco/Council*, para. 54. Contrast with *Turco/Council*, paras 84-85

233. Case T-342/99 *Airtours v Commission* [2002] ECR II-2585.

234. Case T-403/05, *MyTravel Group/Commission* [2008] ECR II-2027, para. 124

235. *MyTravel*, para. 125

internally in its role as adviser” and thus create an inequality of arms with the other parties’ legal representatives.²³⁶ In addition, it would likely affect the Commission’s internal decision-making process where it decides in college and should thus retain the freedom to depart from the legal service’s initial opinion.²³⁷

However, on appeal, the ECJ (partially) reversed this judgment²³⁸ and found in essence that also legal opinions delivered in the context of an administrative procedure need to be made public *once that administrative process has ended*.²³⁹ It dismissed the Commission’s claim that disclosure of such legal advice could give rise to uncertainty as regards the lawfulness of the final decision, referring to *Turco* in which the Court already clarified that openness, by allowing for an open debate between divergent points of view, in fact contributes to greater legitimacy of and public confidence in the institutions.²⁴⁰ Moreover, any doubts in the minds of European citizens on account of an unfavourable legal opinion could be solved by a reinforced statement of reasons.²⁴¹ In addition, no concrete or detailed evidence (only general and abstract considerations) was put forward to support the claim that the Legal Service would display reticence and caution.²⁴² Furthermore, the ECJ considered the argument that the Legal Services’ capacity to defend the institutions’ final decision before the Court could be affected by the disclosure of a prior negative opinion from its side to be of a too “general nature”.²⁴³ More importantly, since the time-limit to challenge the legality of the decision before the Court had already passed, there was no more risk for such a situation to arise.²⁴⁴

In *Éditions Jacob*, rendered before the appeal judgment in *Sweden/MyTravel and Commission*, the EGC accepted that an obligation to disclose legal advice, forming part of an internal discussion as regards the interpretation of a provision of the old Merger Regulation 4064/89²⁴⁵ in a specific Merger procedure, could reasonably be thought to risk undermining (1) the interest in receiving

236. *MyTravel*, para. 126

237. *MyTravel*, para. 126

238. Since some of the Commission’s arguments, in particular as regards the exception on the protection of the purpose of inspections, investigations and audits, had not been examined by the General Court, the matter was referred back for a new judgment.

239. Case C-506/08 P, *Sweden/MyTravel and Commission* [n/r]; see also the Opinion of Advocate General Kokott of 3 March 2011 in Case C-506/08 P *Sweden/MyTravel and Commission*, paras 91-99..

240. Case C-506/08 P, *Sweden/MyTravel and Commission* [n/r], para. 113.

241. *Sweden/MyTravel and Commission*, para. 114.

242. *Sweden/MyTravel and Commission*, para. 115. The Advocate General was likewise not impressed by the EGC’s argument as to the risk of self-censorship on the side of the Commission’s Legal Service which, she reminded, operates independently from DG Competition and whose opinions are “specifically intended to highlight possible problems and weaknesses”, para. 94.

243. *Sweden/MyTravel and Commission*, para. 116.

244. *Ibid.*, para. 117. As regards the action for damages then pending, Advocate General Kokott considered that since only a “sufficiently serious breach” can trigger liability, the legal opinions will only work against the Commission if they “reveal serious deficiencies in the administrative procedure” in which case the Commission has no legitimate interest in withholding such documents, paras 97-98.

245. In casu, Art. 3(5)(a).

frank legal advice from the Legal Service²⁴⁶, (2) the Service's *capacity to defend* the final position adopted by the institution before the Court and (3) the *internal decision-making process of the Commission who decides in college and should thus retain the freedom to deviate from its Legal Service's opinion*.²⁴⁷ Although the particular Merger decision had already been taken, *Éditions Jacob* had filed an appeal and was seeking information to strengthen its case. The General Court further emphasized that the need for transparency does not carry the same weight in the context of a purely administrative procedure concerning the application of the competition law rules as opposed to a legislative procedure.²⁴⁸

In *Agrofert*, the applicant was refused access to documents containing the legal opinion of the Commission's Legal Service in respect of a particular Merger notification procedure. The merger proceedings had been *closed* by a decision taken over a year ago and which had become definitive at the time of the request for access.²⁴⁹ Unlike in *MyTravel* and *Éditions Jacob* the General Court rejected the Commission's reliance on the legal advice exception because of the vagueness and generality of its argumentation. Indeed, although a refusal to disclose may be based on "general presumptions which apply to certain categories of documents", the institution will still need to establish that these considerations apply to that particular document.²⁵⁰ The EGC estimated that the Commission's statement of reasons did not explain how, having regard to the facts of the case, access could, specifically and effectively undermine the interest in having full and frank legal advice.²⁵¹ In other words, the EGC emphasized that also a refusal of access to documents from an administrative procedure will need to be supported by a statement of reasons setting out the *specific and individual* reasoning in respect of those documents.²⁵²

c. Analysis

Although it is hard to argue *in abstracto* with the value of the principle of transparency and the widest possible public access to documents, also in respect of legal opinions, context is crucial.

Fair trial & equality of arms – For one, the fact that all three Legal Services of the Community institutions perform the *double function of advising and*

246. *Éditions Jacob*, paras 157-159, where the EGC also referred to the risk that the legal service would refrain from producing written opinions which nonetheless form an important instrument for the Commission in performing its tasks.

247. *Éditions Jacob*, para. 160.

248. *Éditions Jacob*, para. 161.

249. Nor were there any connected pending proceedings or proceedings concerning the same sector mentioned.

250. *Agrofert*, para. 123.

251. *Agrofert*, para. 128.

252. *Agrofert*, para. 129.

defending their institution,²⁵³ gives rise to the legitimate concern that disclosure of previous conflicting opinions might compromise their capacity to *effectively defend their institution's interests* “on equal footing with the other legal representatives of the various parties” before the Court.²⁵⁴ Although this argument was rebutted by the ECJ in *Turco* on the basis that it is too “general” in nature²⁵⁵, the General Court continued to rely on it when accepting confidentiality of legal advice in *administrative* procedures.²⁵⁶ Arguably, rather than denying the truth in this argument²⁵⁷, it would make more sense if the ECJ were to base its rejection on the consideration that in *legislative* matters this “equality of arms” principle is outweighed by the overriding public interest in transparency.

Risk of external pressure on Legal Service – In *Turco* the ECJ dismissed rather bluntly the argument that disclosure of legal opinions carries the risk of improper external pressure on the Council Legal Service, asserting that it would be that pressure itself rather than the possibility of disclosure which would compromise the interest in receiving frank, independent, etc. advice and which should thus be addressed.²⁵⁸ However, in respect of the risk of “improper pressure on the judiciary and the parties to judicial proceedings”²⁵⁹ caused by the disclosure of written submissions in court proceedings, the ECJ was much more willing to accept that this “would have the effect of exposing judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings.”²⁶⁰ Yet, in line with Advocate General Poirares Maduro’s Opinion in *API*, I find it somewhat hard to see why this argument of external pressure should be treated differently in both settings.²⁶¹

253. ARNULL notes that the ECJ might have been influenced in *Turco* by “the practice of Member States where legal advice on forthcoming legislation is provided to government by autonomous bodies and made available to the public”; ARNULL, A., “Joined Cases C 39/05 P & C 52/05 P, Sweden and *Turco* v. Council, judgment of the Grand Chamber of 1 July 2008, not yet reported” (2009) *C.M.L.Rev.* 46, 1232.

254. *MyTravel*, para. 126. See also Opinion of Advocate General in *Sweden and Turco/Council*, para. 40.

255. See also *Sweden/MyTravel and Commission*. However, in *Sweden/MyTravel and Commission* the ECJ based its rejection largely on the fact that the Commission decision had become final and an appeal, requiring an intervention by the Legal Service, was no longer possible, para. 117.

256. See *MyTravel*, para. 126 (reversed on appeal in *Sweden/MyTravel and Commission*); *Éditions Jacob*, paras 157 & 159.

257. It is worth noting that the ECJ has explicitly held in *Sweden/API and Commission* in the context of the protection of court proceedings that the principle of “equality of arms” applies also to the Community institutions (para. 90), considering that “if the content of the Commission’s pleadings were to be open to public debate, there would be a danger that the criticism levelled against them, whatever its actual legal significance, might influence the position defended by the Commission before the EU Courts” (para. 86) thereby risking “to upset the vital balance between the parties to a dispute before those Courts – the state of balance which is at the basis of the principle of equality of arms – since only the institution concerned by an application for access to its documents, and not all the parties to the proceedings, would be bound by the obligation of disclosure” (para. 87). Arguably, the institutions are likewise disadvantaged when previous opinions of their “in-house legal services” on certain points of law are to be made public whereas the other parties challenging their decisions, acts, etc., can benefit from the “legal professional privilege” protecting the legal opinions produced by their “independent lawyers”.

258. *Sweden and Turco*, para. 64. Contrast with *Turco/Council*, para. 79.

259. Opinion of Advocate General in *Sweden/API and Commission*, para. 25

260. *Sweden/API and Commission*, para. 93.

261. Opinion of Advocate General in *Sweden/API and Commission*, para. 25.

Complexity of Council decision-making and the need for frank, independent and high quality legal opinions – Furthermore, for legal opinions delivered by the Council Legal Service in the context of legislative procedures, the *complex nature of the decision-making process within the Council* cannot be ignored. For, a system in which delegates from 27 Member States with differing backgrounds and interests have to come to an agreement, the quality and clarity of information provided by the Council’s Legal Service is crucial.

The idea that publicity of these opinions and legal debates would “rid the legal service of unprofessional legal advice and the institutions of questionable legislative initiatives”²⁶² as well as enhance the Union’s legitimacy²⁶³, is, at the very least, debatable. Indeed, any lawyer knows that law is far from “exact science” and that many legal opinions, especially in controversial cases, are a matter of interpretation. Hence, within the context of Council debates on controversial issues, the legal opinions produced are most likely to contain analyses of the different competing positions, their potential legal problems and how they are likely to hold up in Court. It is not unimaginable that these arguments offered in the context of a nuanced and complex legal debate could afterwards be invoked to discredit the final position adopted by the Council.²⁶⁴ The ECJ’s suggestion that these doubts as to the legality of the final act could be prevented by an extended statement of reasons explaining why a negative opinion of the Legal Service was not followed proceeds from the quite unrealistic assumption that a detailed and complex legal debate can be set out in the preamble to an act.²⁶⁵

Moreover the risk that such publicity might prejudice the Legal Service’s *frankness and independence* when asked for its opinion, or even cause it to resort to expressing these opinions *orally*, does not seem “purely hypothetical”²⁶⁶ in nature.²⁶⁷ Indeed, disclosure would cause the legal service to display reserve and caution in drafting its opinions, “so as not to affect the institution’s scope for decisions”.²⁶⁸ The *loss of written legal opinions*, aside from having the effect of reducing rather than increasing transparency, would be particularly detrimental to the quality of decision-making in a context of seeking agreement between 27 Member State delegations that have to communicate back and forth with their capitals. Hence, bearing in mind Advocate General Maduro’s warning that “the

262. ADAMSKI, “How Wide Is “The Widest Possible”?”, 537

263. *Sweden and Turco*, para. 59.

264. See in that sense ARNULL, “Sweden and Turco v. Council”, 1234.

265. *Sweden and Turco*, para. 60; ARNULL, “Sweden and Turco v. Council”, 1234.

266. *Sweden and Turco*, para. 63.

267. Opinion of Advocate General in *Sweden and Turco/Council*, para. 19, 38, 40, recalling also the case law preceding and underlying Art. 4(2) like Order in Case T-610/97 R, *Carlsen and Others/Council* [1998] ECR II-485, para. 46; see also in that sense ARNULL, “Sweden and Turco v. Council”, 1236.

268. Opinion of Advocate General in *Sweden and Turco/Council*, para. 40.

best can sometimes be the enemy of the good”²⁶⁹, the risk that this provision of free and frank legal advice by the Legal Service, often on its own initiative, during the negotiations in the Council would be hampered, could in fact counteract the objective of a “Union based on the rule of law”.²⁷⁰

Administrative versus legislative, ongoing versus ended – Since *Turco* it is clear that legal opinions in legislative procedures are to be made public even if the procedure is still ongoing, unless it is proven that a *specific* legal opinion is of a “particularly sensitive nature” or “particularly wide scope [going] beyond the context of the legislative process in question”.²⁷¹ The problems likely to arise from publicity of legal opinions in an ongoing legislative process in the Council have been discussed in the previous point. Less clear up to now is the position of legal opinions in administrative procedures. Whereas the General Court seemed intent on upholding the legal advice exception in administrative procedures²⁷², the ECJ considered that at least in respect of *ended* administrative procedures such legal opinions should be made public.²⁷³ It remains to be seen what the ECJ will decide in the pending appeals in the *Éditions Jacob* as well as *Agrofert* cases²⁷⁴, and whether it might even go as far as to extend public access to legal opinions which form part of an *ongoing* administrative procedure.²⁷⁵ In her Opinion in *Sweden/MyTravel and Commission* the Advocate General conceded that disclosure of opinions in the course of *ongoing* administrative procedures merits greater protection so as to avoid undue influence by interested parties that could disturb the serenity of the procedures as well as affect the quality of the final decision and the Commission’s capacity to respect the time-limits in procedures for the control of concentrations.²⁷⁶

General presumption of non-disclosure of legal advice mitigated by accepting overriding public interest in transparency – It is argued here that rather than “twisting” the text of the Regulation and finding a general presumption in favour of disclosure of legal opinions in legislative procedures, a more nuanced analysis is possible when a *general presumption of confidentiality of legal opin-*

269. *Ibid.*, para. 40

270. Contrast however with Advocate General Kokott in *MyTravel* who was not convinced about the likelihood of a shift to informal and oral working methods in the context of a Commission competition law procedure, since, “it will often be impossible, because of the complexity of competition procedures, to dispense entirely with written opinions”, Opinion of Advocate General in Case C-506/08 P *Sweden/MyTravel and Commission*, para. 96.

271. *Sweden and Turco*, para. 69.

272. *MyTravel* (reversed on appeal in *Sweden/MyTravel and Commission*); *Éditions Jacob*. However, in *Agrofert* such protection of a legal opinion rendered in the course of an administrative procedure which had ended more than a year ago was not accorded since the Commission had failed to provide specific and non-hypothetical evidence substantiating the risk of harm.

273. *Sweden/MyTravel and Commission*, paras 109-119; see also the Opinion of Advocate General in Case C-506/08 P *Sweden/MyTravel and Commission*, para. 92.

274. *Éditions Jacob* (C-404/10 P), *Agrofert* (C-477/10 P)

275. In particular when the Court deems the administrative document to be of a policy nature resorting effects beyond the individual case.

276. Opinion of Advocate General in Case C-506/08 P *Sweden/MyTravel and Commission*, paras. 65-69, 92.

ions is subjected to an overriding public interest in transparency check.²⁷⁷ Indeed, the interest in the protection of legal advice from disclosure is not (solely) connected to the particular *content* of the legal advice provided in the specific document yet to the *nature* of legal opinions in general, the disclosure of which carries the risk of compromising the independence and frankness of the legal services.²⁷⁸

Clearly, such a general presumption should be rebuttable on the basis of an overriding public interest in transparency in the particular (type of) case. Yet, as mentioned above, the substance of this “overriding public interest”-prong has been the object of debate since the adoption of Regulation No 1049/2001. In *Turco* the ECJ accepted the possibility to invoke the principles of transparency, openness, democracy, citizen participation as such an overriding public interest. The General Court had held on the contrary that, since those principles are already implemented by the Regulation, the overriding public interest had to be “as a rule, distinct” from them.²⁷⁹ The ECJ’s decision has been criticized as a misinterpretation of Art. 4(2) last sentence²⁸⁰ and as turning the exception into the rule and vice versa²⁸¹. Although it is a bit confusing that the balancing of transparency as against the interest protected by the exception would need to take place under a so-called “overriding public interest”-analysis, I do tend to agree with the Advocate General’s opinion that the last phrase of Art. 4(2) can be read as aiming at “the obligation, for the institution concerned, to weigh the public interest protected by the exception on the ground of confidentiality against the public interest in access to documents, *in the light of the content of the document requested and the specific circumstances of the case* (emphasis added)”²⁸², or in other words as a “*full*” *proportionality test*. Indeed, although a limited proportionality test is already imposed in the form of a partial disclosure obligation,²⁸³ this does not seem to cover the *actual weighing up of both interests in the specific case at hand*.²⁸⁴ Its limited nature is moreover illustrated by the fact that the duty for partial disclosure also exists in respect of the mandatory exceptions where a genuine balancing of the protected interests as against transparency is ruled out, since this “balancing of interests was made by the Community legislator and has been laid down in the regulation itself”.²⁸⁵

277. See also the Opinion of Advocate General in *Sweden and Turco/Council*, para. 40....

278. See in that sense, Opinion of Advocate General in *Sweden and Turco/Council*, para. 43; KRANENBORG, H.R., “Is het tijd voor een herziening van de Eurowob?” (2005) *SEW*, Issue 4, 166-167.

279. *Sweden and Turco*, paras 82-83

280. ARNULL, “Sweden and Turco v. Council”, 1236-1237.

281. BROUSSY, E., DONNAT, F., LAMBERT, C., « Chroniques – Chronique de jurisprudence communautaire. Droit institutionnel – Accès aux documents des institutions », (2008) *l’AJDA*, 1533.

282. Opinion of Advocate General in *Sweden and Turco/Council*, para. 50

283. ARNULL bases himself on this to conclude that the “overriding pI” should thus be something distinct, ARNULL, “Sweden and Turco v. Council”, 1236-1237.

284. See also KRANENBORG, H.R., “Is het tijd voor een herziening van de Eurowob?” (2005) *SEW*, Issue 4, 168.

285. Opinion of Advocate General Geelhoed of 22 June 2006 in case C-266/05 P, *Sison/Council*, para. 27.

Recast – The Commission’s proposal predates the *Turco*-case law and would thus best be amended to address the consequences and implications of this judgment in one way or another.²⁸⁶

2.3.4. *Exception protecting the purpose of inspections, investigations and audits*

a. *Basic principles*

To rely on this exception, the institutions need to show, not only that the document concerns an inspection or investigation,²⁸⁷ but, more importantly, that its disclosure will *endanger the purpose and outcome* of the inspections, investigations or audit.²⁸⁸ In general, the exception can be invoked *as long as the investigations or inspections are ongoing*²⁸⁹, even if “the particular investigation or inspection which gave rise to the report to which access is sought is completed”.²⁹⁰ Hence, investigations which resulted in a final report yet still await a decision on the action to be taken (for example by national authorities acting upon information received from OLAF)²⁹¹ can be protected as “ongoing” *if* the decisions and actions are taken “within a reasonable period”.²⁹²

Whereas in principle a non-disclosure decision should be based on a *specific and individual examination* of the documents at hand²⁹³, in some instances the case law seems to have moved towards an exemption of documents *by category*.

b. *Infringement procedures*

The Court had to assess this exception in several cases involving *infringement proceedings* against Member States for failure to fulfil their obligations under the Treaty (Art. 258 TFEU; ex Art. 226 EC). The reasoning underpinning the

286. PEERS, S., “Statewatch Analysis June 2008: Proposal on access to documents: Article-by-Article commentary”, 6, considers that to reflect the *Turco*-judgment this exception should be amended in the following manner: “legal advice and court proceedings, *except as regards legal advice in connection with procedures leading to a legislative act or a non-legislative act of general application*”.

287. Case T-20/99, *Denkavit Nederland/Commission* [2000] ECR II-3011, para. 45; *Franchet and Byk*, para. 105.

288. *API/Commission*, para. 133 (purpose); *Franchet and Byk*, para. 109 (completion). Case T-237/05, *Éditions Jacob/Commission* [nry], paras 72-76.

289. See *Terezakis* in respect of the need to protect the Commission and its auditors from external pressure during an ongoing audit; paras 133&135.

290. *Denkavit*, para. 48; *Franchet and Byk*, 110.

291. *Franchet and Byk*, 120-124.

292. *Franchet and Byk*, 110-113. See also Case T-471/08, *Toland/Parliament* [nry], paras 44-46, where the EGC however did not find reference to “any specific inspection or investigation or of any other administrative checks which were ongoing” at the time of the non-disclosure decision and which could be considered as implementing the final audit report. The implementing initiatives mentioned concerned the protection of the institution’s decision-making process rather than the protection of the purpose of investigations, inspections and audits. Paras 51-58.

293. *Franchet and Byk*, paras 115-118.

Court's analysis is that infringement procedures strive to *reach an amicable settlement of the dispute with the Member State*, and therefore the confidentiality of these documents is required to preserve this *negotiation option*.²⁹⁴

In *Bavarian Lager I* the General Court was confronted with a request for disclosure of a purely preparatory document in a procedure in which the delivery of a reasoned opinion had been suspended, and which was thus to be seen as still at the *ongoing inspection and investigation stage*. The EGC concluded that such a document could be shielded from disclosure since the infringement procedure was “still at the stage of inspection and investigation” and “the Member States are entitled to expect confidentiality from the Commission during investigations which *may* lead to an infringement procedure”.²⁹⁵

In respect of requests for disclosure of documents relating to infringement procedures at the time that proceedings are brought before the Court of Justice, the EGC held that *letters of formal notice* and *reasoned opinions* drawn up in connection with the investigations and inspections carried out by the Commission are covered by this exception *up until the judgment* has been rendered.²⁹⁶ Likewise in *API* the Court stated that, in principle, *pleadings* in infringement proceedings which refer to the results of the investigation carried out to establish the existence of an infringement, and where the infringement is contested by the Member State concerned, can be *as a category exempted* from public access until the time that the Court of Justice has adjudicated on the possible existence of an infringement.²⁹⁷

Clearly, *once the judgment is rendered* on the basis of Art. 258 TFEU (ex Art. 226 EC), there is no more room for negotiation with the Member State²⁹⁸ and refusal of public access should thus be based on *an individual and specific examination*.²⁹⁹ Likewise, this investigation exception cannot be invoked merely because other similar proceedings are still underway³⁰⁰ or because a procedure on the basis of Art. 260 TFEU could potentially follow. Indeed, the ECJ stressed that Art. 260 TFEU concerns a distinct procedure “designed only to induce a defaulting Member State to comply with a judgment establishing a breach of obligations” and thus requires a separate investigation seeking to establish whether the infringement has endured after the judgment of the Court.³⁰¹

294. Case T-309/97, *Bavarian Lager* (“*Bavarian Lager I*”) [1999] ECR II-3217, para. 46; *Petrie*, para. 67-68; *API/Commission*, para. 121; *Bavarian Lager II*, para. 159.

295. (emphasis added) *Bavarian Lager I*, para 46.

296. *Petrie*, para. 68.

297. *API/Commission*, paras 122-123; by analogy yet focused solely on the court proceedings exception: *Sweden/API and Commission*, para. 134.

298. The ECJ stated that once a Member State has been condemned on the basis of Art. 258 TFEU, the negotiations between the Member State and the Commission are no longer aimed to establish an infringement, but to determine whether the conditions for an action under Art. 260 TFEU are met. (para. 120)

299. *Sweden/API and Commission*, paras 120-121

300. *API/Commission*, para. 141.

301. *Sweden/API and Commission*, para. 118-122; *API/Commission*, para. 137.

c. *State aid investigations*

Whereas the General Court had found in *Technische Glaswerke* that the Commission's refusal to disclose documents from an administrative file concerning a state aid investigation³⁰² was invalid for lack of concrete and individual examination³⁰³, the ECJ rendered a landmark ruling accepting the existence of a rebuttable general presumption that disclosure would undermine the state aid investigation. More precisely, it held that the EGC should "have taken account of the fact that interested parties other than the Member State concerned in the procedures for reviewing State aid do not have the right to consult the documents in the Commission's administrative file, and, therefore, [should] have acknowledged the *existence of a general presumption that disclosure of documents in the administrative file in principle undermines protection of the objectives of investigation activities*".³⁰⁴ In other words, the ECJ implicitly accepted that Regulation 659/1999 concerning state aid review procedures ("State Aid Regulation")³⁰⁵ forms a type of "*lex specialis*" (yet susceptible to rebuttal) which derogates the *lex generalis* Transparency Regulation No 1049/2001.

Indeed, while reaffirming the need to explain why access to that document would specifically and effectively undermine the protected interest, the ECJ emphasized that institutions can base their disclosure decisions "on general presumptions which apply to certain categories of documents".³⁰⁶ In respect of *ongoing* procedures³⁰⁷ for reviewing State aid, "such general presumptions may arise from Regulation No 659/1999 and from the case law concerning the right to consult documents on the Commission's administrative file".³⁰⁸ Given that the State Aid Regulation does not grant a right to consult the Commission's administrative file to interested parties other than the Member State concerned³⁰⁹, to allow such access on the basis of Regulation No 1049/2001 would amount to circumvention and thus justifies applying a general presumption that disclosure would undermine the protection of the purpose of the investigation within the meaning of Art. 4(2), para. 3.³¹⁰

302. *Technische Glaswerke Ilmenau (TGI)* wanted access to all documents from a state aid investigation against Germany which concerned TGI and the aid received by it.

303. Case T-198/01, *Technische Glaswerke Ilmenau/Commission* [2004] ECR II-2717, para. 77-79, 85, 89.

304. Case C-139/07P, *Commission/Technische Glaswerke Ilmenau* [nry], para. 61. (emphasis added)

305. Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Art.88) of the EC Treaty ([1999] O.J. L 83/1).

306. Case C-139/07 P, *Commission/Technische Glaswerke Ilmenau* [nry], paras 53-54. This case law was confirmed in the domain of state aid review procedures by Cases T-494/08 to T-500/08 and T-509/08, *Ryanair/Commission* [nry].

307. Though in *Technische Glaswerke* the ECJ did not explicitly limit its acceptance of a general rebuttable presumption to *ongoing* state aid review procedures, in *Sweden/MyTravel and Commission* (para. 77) it did expressly stress this fact when distinguishing it from the situation in *Technische Glaswerke*.

308. Case C-139/07P, *Technische Glaswerke Ilmenau*, para. 55

309. Art. 20 of that Regulation.

310. Case C-139/07P, *Technische Glaswerke Ilmenau*, paras 58-61.

This general presumption can still be rebutted if the party demonstrates that the specific document at hand should not be covered by it (thus requiring an individual examination), or that there exists an overriding public interest in disclosure.³¹¹ In *Technische Glaswerke* the applicant had however solely relied on its own interest as a beneficiary of the state aid under scrutiny and thus failed to rebut the general presumption.³¹²

d. Merger investigations

In *Éditions Jacob* the applicant sought access to a large number of documents from a merger investigation file³¹³ on the basis of which the Commission had issued a positive decision and against which that applicant had already launched an appeal.³¹⁴ When the Commission awarded only partial access, the applicant appealed also this partial disclosure decision. The General Court accepted that documents submitted in a pré-notification stage of a merger do indeed form part of the investigation file yet emphasized the need for a restrictive interpretation of the exception.³¹⁵ When considering the temporal scope of the exception to disclosure, the EGC emphasized that *once the merger decision has been adopted* by the Commission, the investigative file can no longer be deemed to be protected.³¹⁶ To accept that the exception would continue to apply as long as the merger decision has not yet become “final”, i.e. still open to annulment by the courts, or as long as the Commission has not adopted another decision to replace the annulled merger decision, would make disclosure dependent on an uncertain, future and possibly distant event.³¹⁷ Therefore, the requested documents were no longer covered by the exception protecting the purpose of investigations.³¹⁸

The EGC further rejected the Commission’s more general argument on the risk of a “chilling effect”, i.e. the fear that parties and third parties in merger cases would no longer speak as freely during the investigation out of fear that this information might be transmitted to third parties for other purposes. In other words, the Commission argued that disclosure risks to destroy the climate of

311. *Ibid.*, para. 62. Note that this places once again the burden of proof on the applicant. (see general conclusions)

312. *Ibid.*, para. 70

313. Case T-237/05, *Éditions Jacob/Commission* [nyr](hereafter *Éditions Jacob*)

314. Case T-279/04, *Éditions Odile Jacob/Commission* [nyr]; an appeal has been lodged with the ECJ against this judgment: Pending Case C-551/10 P.

315. *Éditions Jacob*, para. 67-68.

316. *Ibid.*, para. 77.

317. *Ibid.*, para. 76

318. *Ibid.*, para. 77. However, even if the documents would have been covered, the Court deemed that the Commission’s motivation was too vague and general and failed to reveal an individual and concrete assessment. (paras 78-84) As regards correspondence between the Commission and parties in the context of a merger investigation, the EGC stressed that this cannot be deemed to be manifestly covered by the exception, yet should be subjected to an individual and concrete assessment. (para. 86.)

trust and cooperation necessary during such investigations.³¹⁹ The General Court deemed the Commission's argumentation to be *too vague and general*.³²⁰ The Commission's attempt to underpin its claim by referring to a law firm's publication, following the *VKI* judgment, in which the firm advised companies who are the object of an investigation to be careful when giving out information precisely because of the risk of later publicity, did not convince the EGC who recalled moreover that parties in merger proceeding are in any event under a legal obligation to provide the information requested by the Commission.³²¹

Likewise, the General Court did not follow the Commission's "*limited use*" argument, i.e. the fact that information gathered on the basis of the Merger Regulation can be used solely for the purposes of the relevant request, investigation or hearing, flowing from Art. 17(1) of the Merger Regulation. The EGC considered that this restriction only concerns the manner in which the Commission can use the information and has nothing to do with the right of access to documents as implemented by the Transparency Regulation. This restriction moreover needs to be read in light of Art. 17(2) as only requiring secrecy of information "of the kind covered by the obligation of professional secrecy".³²²

The EGC thus concluded that the documents were no longer within the scope of the exception and had in any case not been subject to a concrete and individual assessment.³²³

In *Agrofert*, where a third party sought access to all unpublished documents regarding the pre-notification and notification procedures on the basis of which the Commission authorised the acquisition of Unipetрил by PKN Orlen, the EGC responded more nuanced to the "chilling effect"-criterion. Though still concluding that the Commission's argumentation was too vague and general, the General Court nonetheless showed somewhat more willingness to accept that such a chilling effect on future investigations could be a ground for refusing disclosure if this risk is proven to the "requisite legal standard".³²⁴

e. Analysis

Lex specialis – The ECJ should be applauded for having clarified that, at least in respect of state aid review procedures³²⁵, specialized legislation organizing

319. *Ibid.*, para. 87.

320. *Éditions Jacob*, para. 88.

321. *Ibid.*, paras 87-88.

322. *Ibid.*, para. 89.

323. *Ibid.*, para. 97.

324. *Agrofert*, paras 102-103.

325. Yet the same can be expected for other specialised procedural rules such as Articles 27, 28 and 30 of Regulation 1/2003. The Ombudsman has already followed up on this in his recent decision in E.ON: Decision of the European Ombudsman closing his inquiry into complaint 2953/2008/FOR against the European Commission, 27 July 2010.

access to documents in specific domains should be *presumed* to prevail over the more general rules on access.³²⁶ Indeed, it could be assumed that when adopting the specific regulation the legislator has already balanced the value of transparency against the different opposing interests in the particular context of state aid procedures. Hence, the transparency needs in that context should be adequately guaranteed by the legislator's balancing act.³²⁷ The fact that Regulation No 1049/2001 affects so many different domains with a multitude of conflicting interests would seem to plead in favour of relying on the legislator's *specific* balancing act conducted in a *specific* policy context.³²⁸

Clearly, it should be verified that the special access rules at hand can indeed be deemed to reflect such a balancing act. As regards e.g. the competition law domain, it can be expected that the specific rules on access to files will be mainly inspired by the goal to protect the rights of defence and guarantee the equality of arms.³²⁹ Hence, it should always remain possible to prove the existence of an "overriding public interest" in transparency in the particular case.

In contrast with the ECJ and, recently also, the ombudsman, the General Court has shown itself less "amenable" to the specific concerns in the competition law domain, and has imposed a high standard of proof on the Commission in its *Editions Jacob* and *Agrofert* cases.³³⁰ Hence, it will be interesting to see how the ECJ, in the pending appeals in *Editions Jacob* and *Agrofert*, will deal with the specific risk in competition policy of a "chilling effect" on cooperation to investigations.³³¹

326. Yet, the ECJ's reliance on *Turco* to underpin its acceptance of general presumptions is rather tricky. Indeed, when citing paragraph 50 in *Sweden and Turco* which states that "It is, in principle, open to the Council to base its decisions in that regard on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature" it conveniently ignores the second sentence where it was said that "it is [however] incumbent on the Council to establish in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose." Case C-139/07 P, *Technische Glaswerke Ilmenau*, para. 54.

327. Contrast however with KRANENBORG, "Tien jaar Eurowob", 224, who is precisely of the opinion that this crucial link in the Court's reasoning, i.e. the assumption that the legislator took into account the interest in public access when designing the specialised legislation, is faulty. Indeed, the State Aid Regulation at hand in *Technische Glaswerke* predates Regulation No 1049/2001 and KRANENBORG finds that genuine public access to documents considerations are absent from the State Aid Regulation. He bases this, among others, on the fact that nothing is said about possible access to documents from the file after the Commission Decision has been taken.

328. See also Advocate General Kokott in *MyTravel* who suggests that the access rules contained in the Merger Regulation should serve as an interpretative tool for Regulation No 1049/2001; Opinion of Advocate General in Case C-506/08 P *Sweden/MyTravel and Commission*, para. 60 ev.

329. GODIN, G., "Recent Judgments Regarding Transparency and Access to Documents in the Field of Competition Law: Where Does the Court of Justice of the EU Strike the Balance?" (2011) *Journal of European Competition Law & Practice*, Vol. 2, No. 1, 15.

330. *Agrofert*; *Editions Jacob*; GODIN, "Recent Judgments Regarding Transparency", 11.

331. GODIN, "Recent Judgments Regarding Transparency", 23, stresses that the exception regarding the protection of investigations is key to competition policy and should indeed "remain valid even after completion of an investigation, in order to avoid a 'chilling effect' that would discourage undertakings, such as potential immunity/leniency applicants, from cooperating."

Competition law documents not the Regulation’s “core business”? – Competition law files constitute a specific collection of documents whose disclosure poses considerable challenges to the Commission, not in the least because of their often impressive size.³³² Without denying the importance of scrutiny of and accountability for administrative tasks, it does seem that access to competition law files should not be the core business of the Transparency Regulation. Yet, in reality there has been a steady and significant increase in public access applications linked to competition law activities.³³³

Recast – Another proposed amendment which is strongly contested concerns the Commission’s attempt to “pre-empt” the application of the Regulation to “documents forming part of the administrative file of an investigation or of proceedings concerning an act of individual scope [...] until the investigation has been closed or the act has become definitive” and, even after the investigation has been closed, those “documents containing information gathered or obtained from natural or legal persons by an institution in the framework of such investigations” (Art. 2(6)).

Whereas under the current Regulation most of those documents would probably already fall under the exception of the protection of investigations, exempting them from the scope of the proposed Regulation clearly goes beyond that. Indeed, it not only relieves the Commission of having to prove concretely a risk of harm to the investigation, but also excludes the possibility of an overriding public interest being invoked. In addition, it rules out the option of taking into account the factor of passage of time when exempting documents obtained from natural or legal persons.³³⁴

Although the recent *TGI* case indeed establishes a general presumption in favour of applying the *more specific rules on access* developed in the context of state aid, and this presumption is likely to be applied in the future to other “specific rights of access for interested parties established by EC law”³³⁵ in the context of competition law; the difference between an outright exemption versus a rebuttable general presumption is obvious.

332. 30.000 to 40.000 pages are no exception.

333. See in that sense Report from the Commission on the application in 2009 of Regulation (EC) No 1049/2001, 30.6.2010 COM(2010)351 final, 7, where the Commission notes that “As in past years, the overall picture that emerges from analysis of access applications is that a large proportion of them relate to Commission monitoring of the application of Community law”; GODIN, “Recent Judgments Regarding Transparency”, 10.

334. HARDEN, “The Revision of Regulation No 1049/2001”, 246.

335. Art. 2(6) – wording. In its Memorandum the Commission notes in this respect: Articles 27, 28 and 30 of Regulation 1/2003 (competition) Articles 6(7) and 14(2) of Regulation (EC) No 384/96 (antidumping), Articles 11(7) and 24(2) of Regulation (EC) No 2026/97 (anti-subsidy), Article 6(2) of Regulation (EC) No 3285/94 (safeguards) and Article 5(2) of Regulation (EC) No 519/94 (safeguards against non-WTO members).

2.4. Exception relating to the protection of the decision-making process (Art. 4(3))

Art. 4(3) of the regulation contains a specific exception aimed at protecting the institutions' decision-making process. Its first paragraph deals with *documents drawn up by an institution for internal use or received by it*, which concern matters in which the *decision is still pending*. The second paragraph allows for limitations on access to *documents containing opinions for internal use as part of deliberations and preliminary consultations, even after the decision has been taken*.

Different from Art. 4(1)&(2), this provision explicitly requires there to be a *serious undermining* of the institution's decision-making process. In other words, the application of this exception is subjected to a stricter “qualified harm test”³³⁶ and calls for a “substantial impact on the decision-making process”³³⁷. Moreover, this exception is also subject to a balancing test requiring the protected interest to be weighed off against any potential *overriding public interest* in disclosure.

While the Court consistently reaffirms the need, on principle, for wider access to documents stemming from *legislative* procedures,³³⁸ this has not prevented it from annulling several decisions refusing access to documents relating to *administrative* activities.³³⁹ Whereas for *legislative* decision-making procedures the Court has clearly confirmed the public accessibility of documents on principle, even if the procedure is still ongoing³⁴⁰, the situation is less clear in respect of ongoing *administrative* procedures.³⁴¹

2.4.1. Administrative and other non-legislative decision-making processes

Although in *MyTravel*³⁴² the General Court seemed open to a more generous interpretation of this exception in the context of administrative procedures, the later case law of the same Court indicates a much more stringent approach, emphasizing in particular the need for the institution to prove that disclosure would “*concretely and effectively*” undermine its decision-making

336. ADAMSKI, “How Wide Is “The Widest Possible”?”

337. Case T-144/05, *Muñiz v. Commission* [2008] ECR II-335*, Summ.pub, para. 75.

338. *Borax*, para. 69; *Sweden/API and Commission*, para. 77; Case C-139/07P, *Technische Glaswerke Ilmenau*, para. 60.

339. *Éditions Jacob, Agrofert*, Case C-506/08 P, *Sweden/MyTravel and Commission* [nyr].

340. *Muñiz*, Case T-233/09, *Access Info Europe/Council* [nyr].

341. Contrast *Technische Glaswerke*, which admittedly was solved on the basis of the protection of investigations and specialized legislation on access rights in state aid review procedures, and the Opinion of Advocate General in Case C-506/08 P *Sweden/MyTravel and Commission* (para. 65-70, 73) with *Éditions Jacob* where the decision was arguably not yet final since appeal remained possible.

342. Case T-403/05, *MyTravel Group plc./Commission* [2008] ECR II-2027, para. 49.

process.³⁴³ The ECJ's recent judgement on appeal in the *MyTravel* case, which effectively reverses the General Court's judgment, confirms this trend.³⁴⁴

a. MyTravel

The General Court's favourable appraisal in the *MyTravel* case of the Commission's desire to protect a *finalized administrative decision-making process* from being seriously undermined by the disclosure of certain documents offered a glimpse of hope to those supporting some degree of "space to think" within administrations. However, on appeal the ECJ *de facto* rejected the General Court's reasoning across the board.³⁴⁵

The background to the dispute was the Commission's rejection of *MyTravel*'s concentration plans, a decision which was later annulled in the *Airtours* judgment.³⁴⁶ Following this judgment, the Commission established a working group, composed of officials from DG Competition and the Legal Service, charged with investigating the possibility of bringing an appeal, as well as, more generally, with reviewing the Commission's investigation procedures in respect of concentrations. When instigating an action for damages against the Commission, *MyTravel* also filed a request for access to the report drawn up by this working group, the preparatory documents for that report and the documents from the file concerning the *Airtours/First Choice* case on which the report was based or which were referred to in it. The Commission rejected this request on the basis of, among others, the risk that disclosure would seriously undermine its decision-making capacity.

The EGC first emphasized that the interest in public access to documents carries less weight as regards documents drafted in the context of a *purely administrative as opposed to a legislative procedure*.³⁴⁷ It accepted that disclosure could seriously undermine the Commission's decision-making process by depriving it for the future from *frank and complete views of its service*. Indeed, the possibility of public access might incite the services to practise self-censorship in their opinions and avoid expressing (even constructive) criticisms.³⁴⁸ Moreover, such disclosure could reveal internal discussions and disagreement within the Commission, thereby seriously undermining the *decision-making freedom* of the Commission "which adopts its decisions on the basis of the prin-

343. *Éditions Jacob, Agrofert*.

344. Case C-506/08 P, *Sweden/MyTravel and Commission* [nryr].

345. The ECJ partially reversed the General Court's judgment and partially annulled the Commission's Decisions. Yet, since some of the Commission's arguments, in particular as regards the exception on the protection of the purpose of inspections, investigations and audits, had not been examined by the General Court, the matter was referred back for a new judgment.

346. Case T-342/99 *Airtours v Commission* [2002] ECR II-2585.

347. Case T-403/05, *MyTravel Group plc./Commission* [2008] ECR II-2027, para. 49.

348. *MyTravel*, paras 50, 52, 94, 97, 106.

principle of collegiality and whose Members must, in the general interest of the Community, be completely independent in the performance of their duties”.³⁴⁹ Likewise, disclosure would restrict the Commission’s freedom to depart from its services’ recommendations and take into account factors going “beyond the scope of the rules in force, as interpreted by the Commission services and the Community judicature”, like *political priorities and resources constraints*, when adopting its line of action.³⁵⁰ Lastly, the EGC accepted that there was a reasonably foreseeable risk that *written procedures would be gradually replaced with oral less effective procedures* thereby seriously undermining the decision-making process.³⁵¹

In her Opinion, Advocate General Kokott firmly rejected these arguments and considered that the new case law adopted after *MyTravel* rightly requires *specific evidence* that disclosure of the documents at stake would *concretely and effectively* undermine the decision-making process in a serious manner, something which the Commission had failed to do.³⁵²

The judgment on appeal, which was surprisingly rendered by the First and not the Grand Chamber, confirmed the strict stance adopted in the recent case-law as regards ended versus ongoing procedures, the narrow interpretation of Art. 4(3), para. 2³⁵³, as well as the high standard of proof developed in cases like *Borax*. In essence, the ECJ found that the Commission had failed to prove how disclosure of these documents from a finalized administrative procedure would “specifically and effectively” undermine the interest protected by Art.(3), para. 2.

Though agreeing that administrative activities do not require the same degree of public access to documents as legislative activities, the ECJ recalled that administrative documents do not in any way fall outside the scope of the Regulation.³⁵⁴ Moreover, like the Advocate General, the ECJ placed strong emphasis on the fact that the documents at hand concerned a *procedure which had been closed*. The fact that Art. 4(3), para. 2, limits protection in respect of finalized procedures to a smaller category of internal documents indicates the legislator’s opinion that in respect of closed administrative procedures, the need for protection is less acute.³⁵⁵ Hence, drawing an analogy with the case-law on ongoing

349. *MyTravel*, para. 51.

350. *Ibid.*, para. 53

351. *Ibid.*, para. 54. As regards the applicants claim that there was an overriding public interest in understanding what the internal analysis and reform taking place within the Commission following the *Airtours* judgement amounted to, the EGC deemed the applicant’s argumentation to be insufficient. (ADAMSKI disagrees, ADAMSKI, “How Wide Is “The Widest Possible”?”, 543) The EGC further considered that the applicant’s reliance on the sound administration of justice solely concerned the applicant’s search for information to underpin his case, and was thus a private as opposed to a public interest. Paras 63 & 65.

352. Opinion of Advocate General in Case C-506/08 P *Sweden/MyTravel and Commission*, para. 38, 55; *Muniz*, para. 75; *Borax*, para. 66; *Editions Jacob*, para. 141; *Agrofert*, para. 142.

353. See case T-250/08, *Batchelor* [n/r], discussed below.

354. Para. 87-88

355. Para. 79.

and ended court proceedings, it considered that the Commission had to provide “*specific reasons*” to support its claim that, despite the fact that the procedure was closed, disclosure could *still* seriously undermine its decision-making process.³⁵⁶ Evaluating the Commission’s non-disclosure decisions against this touchstone, the ECJ disagreed with the EGC’s finding that the Commission’s arguments were sufficient. Unlike the EGC, it did not consider the risk that the Commission’s services would refrain from expressing frank and critical opinions or might even resort to oral rather than written working methods to constitute sufficiently “detailed evidence”, allowing it to be understood why disclosure was likely to seriously undermine its decision-making process, even if the procedure to which these documents relate had been closed.³⁵⁷

b. *Éditions Jacob and Agrofert*

Also in the recent *Éditions Jacob/Commission* and *Agrofert* cases the Commission failed to *concretely* substantiate its arguments as to why the disclosure (of the *content*) of certain internal documents preparing a decision regarding the compatibility of a concentration operation³⁵⁸ would, *after* that decision has been taken³⁵⁹, have the effect of *seriously undermining* its decision-making process, i.e. expose its services to external pressure, hamper their free exchange of opinions, affect the collective nature of the decision-making process and diminish the will to cooperate of parties in a merger notification procedure. Rather, the Commission’s argumentation was given in such a general and abstract manner, without any genuine application to the content of each of the specific documents at hand, that it could pertain to the whole category of documents of that type/nature.³⁶⁰

356. Para. 82. Yet, a brief observation should be made in respect of the ECJ’s reliance on this analogy with the protection of pleadings in *ongoing* versus *closed* court proceedings. Though the analogy might hold in as far as it would refer to a potential presumption in favour of non-disclosure in *ongoing* administrative procedures in competition or infringement investigations to safeguard “the serenity of the procedures”, arguably no such strong analogy between the jurisprudence on *ended* court proceedings and closed administrative decision-making procedures can be drawn. Indeed, the interest in the protection of internal documents from an administrative decision-making process in terms of “non-censured” internal brainstorming and deliberation, frankness of opinions, etc., goes beyond a mere safeguarding of the serenity of the proceedings as is at stake in the protection of pleadings submitted in court proceedings. Whereas *internal* notes on concrete cases already differ in nature from pleadings “officially” submitted in a court case, such is even more the case for the Report drawn up to analyse the consequences of a court judgment for the Commission’s handling of merger cases. Hence, the ECJ’s use by analogy of this touchstone of “specific reasons”, as developed in respect of ended court proceedings, to assess the argumentation for non-disclosure of the documents in the case at hand, does not seem entirely justified.

357. Para. 89, 97-98, 100.

358. In *Éditions Jacob* the applicant sought access to the following documents to use in its appeal against the Commission’s positive concentration decision: a note from DG COMP to the legal service asking for advice on the application of Art. 3, para. 5, sub a Regulation 4064/89 and a note containing a summary of the state of the dossier drawn up for the Competition Commissioner.

359. Note that in the case of *Éditions Jacob*, the concentration decision was under appeal.

360. *Éditions Jacob*, paras 142-143; *Agrofert*, paras 144-150.

c. *Batchelor – non-disclosure of a Member State document on the basis of Art. 4(3), para.2?*

In *Batchelor*, the UK relied on the protection of the decision-making process in Art. 4(3) para.2, to refuse disclosure by the Commission of two letters sent by the UK in the context of an assessment of the compatibility with Community law of certain measures taken with respect to television broadcasting activities. The General Court however, deemed such documents “sent to an institution by an external person or body, in order to be the subject of an exchange of views with the institution concerned” to fall *outside* of the category of “opinions for internal use as part of deliberations and preliminary consultations within the institution concerned” as protected by Art. 4(3), para. 2.³⁶¹ Moreover, the UK failed to adequately prove the risk that the EU’s decision-making process would be seriously undermined. Indeed, it could evidently not rely on its own unwillingness to loyally cooperate with the Commission once the documents exchanged during such a cooperation risked being made public. Such reluctance to respond frankly to the Commission’s queries could not form the basis for a claim of a serious undermining of the decision-making process.³⁶²

d. *Toland – internal audit report as part of ongoing decision-making process*

While accepting that the internal audit report to which access was sought was indeed a document “drawn up by an institution for internal use” and relating to an issue, i.e. the reform of the rules on parliamentary assistance, on which the European Parliament had not yet adopted any decision,³⁶³ the General Court did not deem it proven that disclosure might risk to seriously undermine the ongoing decision-making process. Indeed, the Parliament’s fear that parts of the audit report could be abused to hinder the complex decision-making process concerning such a sensitive and mediatised topic as the reform of the parliamentary allowances’ system, was not supported in its decision by “any tangible element”, mention of existing “acts undermining, or attempting to undermine” or reference to “objective reasons” on the basis of which such a risk could be reasonably foreseen.³⁶⁴ Moreover, the EP had failed to provide any motivation as regards the absence of an overriding public interest.³⁶⁵

361. Case T-250/08 *Batchelor/ Commission* [nyr], paras 70-76.

362. *Batchelor*, paras 77-81.

363. Case T-471/08, *Toland/Parliament* [nyr], paras 72-74.

364. *Toland*, paras 78-81.

365. *Ibid*, paras 83-84.

2.4.2. *Legislative decision-making processes*

a. *Muñiz*

In the *Muñiz* case decided only two months after *MyTravel*, the EGC showed itself much less amenable to “unconditionally” accept the Commission’s arguments that its decision-making process would be seriously undermined by disclosing certain internal documents. The preparatory documents to which access was sought formed part of a *still ongoing legislative* procedure. Nonetheless, the EGC rejected the Commission’s arguments across the board.

More precisely, the applicant had sought access to certain internal documents of a Working Group, which had been set up to support the work of the Nomenclature Committee. The documents at stake contained a preliminary analysis of certain technical issues. At the time of the request, the Nomenclature committee had not yet discussed those preparatory documents intended to help the Committee in formulating its opinion for the Commission, who was then to adopt measures as regards the classification of goods for the purpose of customs duties.

The core criticism was the Commission’s failure to provide convincing evidence showing how disclosure would *concretely and effectively undermine* its decision-making process, and how the risk of that happening was reasonably foreseeable and not purely hypothetical. Indeed, the EGC was not convinced by the Commission’s “procedural” arguments relating to the *preliminary nature of the analysis* and the *informal* nature of the Working Group.³⁶⁶ Furthermore, the fear of *external pressure* on the experts and staff influencing their decisions was not backed up with concrete evidence lifting this argument beyond mere hypothesis.³⁶⁷ Likewise, the claim that a disclosure obligation would lead the experts and staff to exercise *self-censure* and prevent *open and frank discussions* was not supported by any concrete evidence.³⁶⁸ Finally, a possible confidentiality promise made by the Commission could not justify a protection level above and beyond that laid down in Art. 4(3).³⁶⁹

b. *Access Info*

In the recent case *Access Info*, the General Court annulled a Council decision which had allowed only partial disclosure of a Working Group note regarding the recast of Regulation No 1049/2001 itself.³⁷⁰ More precisely, while revealing

366. *Muñiz*, paras 78-82.

367. *Muñiz*, paras 86-88. A general statement considering that such external pressure is possible in view of the important commercial interests linked with custom tariff classification, does not qualify as concrete evidence.

368. *Ibid*, paras 89-91.

369. *Ibid*, paras 92-93

370. Case T-233/09, *Access Info Europe/Council* [nyr]. An appeal has been lodged by the Council: Pending Case C-280/11 P, *Council/Access Info Europe*.

all the information in that note as to the substantial arguments and proposals for amendments advanced by the Member States, the Council refused to reveal the *identity* of the delegations behind separate proposals, claiming that it would seriously undermine its decision-making process in this ongoing legislative procedure. This practice of keeping the individual positions of the Member State delegations secret until the legislation has been adopted is in fact common practice in the Council.³⁷¹ Interestingly, in the time between the refusal of the applicant's request for access and the Court proceedings, the document at hand had already appeared with the names of the different delegations on the website of the organisation Statewatch.

Recalling that “openness makes it possible for citizens to participate more closely in the decision-making process and for the administration to enjoy greater legitimacy and to be more effective and more accountable to the citizen in a democratic system” the General Court emphasized that these considerations are of even greater importance in *legislative procedures*.³⁷² More specifically, it asserted that “the possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights”.³⁷³

In view of these considerations and given that Member State delegations should be publically accountable for their proposals, the EGC concluded that *full disclosure* of the Council documents, including the name of the delegation making a particular proposal, has to be the *principle* to which the exceptions should be interpreted and applied strictly³⁷⁴ and that no such *general practice* of blanking out names could thus be accepted.

Indeed, after examining the Council's arguments, the Court concluded that the Council had failed to establish “to the requisite legal and factual standard” that such full disclosure would have seriously undermined the ongoing legislative process relating to the proposal for amending Regulation No 1049/2001.³⁷⁵

Hence, the Council's argument that such publicity of the different Member States' positions would *complicate negotiations* by reducing the delegations' capacity to modify their position and to compromise, as well as *risk serious external pressure from the public* with regard to any proposal tending towards restricting openness, was judged insufficiently substantiated.³⁷⁶ Considering that public accountability and the exercise by citizens of their democratic rights

371. *Access Info*, para. 43 referring to COREPER guidelines (Note from the General Secretariat of the Council to Coreper (Part II) – Public access to documents – Issues of principle, doc. 6203/02 of 1 March 2002 approved by Council doc. 6898/02 of 23 July 2002, at point 22.

372. *Access Info*, paras 56-57.

373. *Ibid*, para. 57 citing *Sweden and Turco*, para. 46.

374. *Ibid*, para. 69.

375. *Ibid*, para. 66.

376. *Ibid*, aras 68-69.

requires them to 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”³⁷⁷, the Court did not see such information as an insurmountable hurdle for the delegations to modify and refine their positions. On the contrary, it deemed “[p]ublic opinion [...] perfectly capable of understanding that the author of a proposal is likely to amend its content subsequently”.³⁷⁸ Moreover, as regards the risk for public pressure on those delegations in favour of restricting openness, the Court deemed these to be based on the “undemonstrated premise that public opinion would be hostile to any limitation of the principle of transparency”.³⁷⁹

Furthermore, the Court asserted that the *preliminary nature* of the ongoing discussions depicted in the requested document cannot alter the balancing exercise since Art. 4(3), para. 1, does not make such a distinction.³⁸⁰

As regards the Council’s plea to take into account the “particularly *sensitive nature* of the proposals made by the Member State delegations”, the Court rejected such a categorization finding that “those questions are not ‘particularly sensitive’ to the point that a fundamental interest of the European Union or of the Member States would be jeopardised if the identity of those who made the proposals were to be disclosed.”³⁸¹ In addition to pointing out the specific procedure laid down in Art. 9, for documents that are likely to qualify as a “sensitive document”, which the Council had failed to invoke, the General Court considered that “it is in the nature of democratic debate that a proposal for amendment of a draft regulation [...] can be subject to both positive and negative comments on the part of the public and media”.³⁸² Furthermore, the Council’s assertion that the length of the ongoing legislative process *de facto* illustrated the difficulty in reconciling the different positions was not deemed convincing by the Court which suggested several possible alternative explanations.³⁸³ Hence the Council failed to provide actual proof of the “risk of compromising the room for manoeuvre of the Member State representatives”.³⁸⁴

With regard to the risk that Member States would *replace written communication with oral*, the Court pointed out that the document drawn up by the Council relies on the submissions by the delegations regardless of whether these are made in writing or orally. Hence, such a potential shift could not be thought to seriously undermine the decision-making process.³⁸⁵

377. *Ibid.*, para. 69

378. *Ibid.*, para. 69

379. *Ibid.*, paras 70-71.

380. *Ibid.*, paras 75-76

381. *Access Info*, para. 78.

382. *Ibid.*, para. 78.

383. *Ibid.*, para. 79

384. *Ibid.*, para. 80.

385. *Ibid.*, para. 81.

More generally, the Court did not find the Council's evidence as regards the *actual harmful impact* on the decision-making process of the disclosure of the document on the *Statewatch* website convincing, and thus annulled the Council's decision.

c. Other cases

In the earlier case of *Borax* the EGC came essentially to the same conclusion that the Commission had failed to provide specific evidence as to how disclosure in this case would concretely and effectively undermine its decision-making process.³⁸⁶ The case concerned a request for access to transcripts and audio recordings of an expert meeting on the basis of which the Commission had included the applicant's products on a list of dangerous substances annexed to a Directive. Hence, it concerned documents relating to a *legislative decision which had already been taken*.

The Commission argued that disclosure would expose the experts to *external pressure* and destroy the space for *frank and open discussion*, likely deterring them from expressing their opinions in the future. The EGC, however, considered that the fact that the public debate following disclosure of such scientific opinions could deter experts from participating in the decision-making process is a risk which "is inherent in the rule which recognises the principle of access to documents containing opinions intended for internal use as part of consultations and preliminary deliberations".³⁸⁷ Furthermore, since this risk cannot be extrapolated to mean that any disclosure of a scientific opinion with significant economic or financial consequences will deter experts or even make it impossible for the Commission to consult appropriate experts as part of its decision-making process, the EGC concluded that "scientific opinions obtained by an institution for the purpose of the preparation of legislation must, as a rule, be disclosed".³⁸⁸ Considering that the Commission only offered abstract and general justifications for its refusal and failed to specify how disclosure of the recordings "would concretely and effectively undermine the process by which it decides on the classification of the substances in question", the risks of external pressure and of deterring frank and free opinions were "based on mere assertions, unsupported by any properly reasoned argument".³⁸⁹

Interestingly, in this case the EGC briefly compared the level of protection accorded to scientific as opposed to legal "expert" advice. It pointed out that, unlike for legal advice, the Regulation does not contain an explicit exception for

386. *Borax*, paras 70-71.

387. *Borax*, para. 70.

388. *Ibid*, para. 70

389. *Borax*, para. 71

the protection of scientific advice. Moreover, since the ECJ has rejected a *general* need for confidentiality of legal advice given in the context of a legal procedure³⁹⁰, such a general and abstract protection from disclosure would be even less justified in respect of scientific advice.³⁹¹

2.4.3. *Analysis*

It is clear that an exception protecting the decision-making process touches upon *the core of the “raison d’être” of the right to transparency and access to documents*, i.e. the transparency of the Union’s decision-making and administration as a prerequisite for its democratic legitimacy and accountability. Hence, the requirement that the harm inflicted upon the decision-making process must be of a “serious” nature seems reasonable. Yet, at the same time the proper functioning of the decision-making processes is fundamental to the so-called output legitimacy of that Union, i.e. its ability to deliver. Therefore, it does not seem unreasonable to also take into account the *specificity and complexity* of the decision-making processes at EU level when evaluating the institutions’ reliance on this exception.

From the case law it emerges that the Court has gradually *toughened the burden of proof* on the institutions, emphasizing the need for specific non-hypothetical evidence showing an actual risk of a serious undermining of the decision-making process. It can be argued that in some cases, the Courts have, on the one hand, failed to adequately take into account the complexity of decision-making in the EU as well as the pragmatic reality of political decision-making processes more generally, and, on the other hand, arguably overestimated the actual benefits in terms of democratic participation flowing from increased access to documents.

a. A ‘space to think and negotiate’

Within the European academic debate, it has for a long time been assumed that transparency is almost unambiguously beneficial for the decision-making process in terms of legitimacy, democratic participation, quality of decisions, etc. Gradually however, some academics started to feel the need to empirically as well as game-theoretically investigate these assumptions. Hence, without denying the importance of transparency, their findings could help to develop a more *balanced perspective*. Indeed, not every stage of political and administrative decision-making processes will necessarily benefit from publicity. Hence, the idea of a so-called ‘space to think’ or ‘space to negotiate’ is not without merit. These overlapping concepts could be described as the shielding of internal delib-

390. *Sweden and Turco*, para. 57.

391. *Borax* paras 67-68.

erations and/or negotiations that serve to prepare a decision or other policy action to be taken by a public authority from instant or even *ex post* publicity.

Publicity, denying any such a ‘space to think or negotiate’, can affect the quality of decision-making roughly in two ways. For one, it can *prevent the actual reaching of agreement* and thus adoption of a particular decision. Secondly, it could even *reduce the quality of deliberation*. Several factors can contribute to this.

Given that “a basic finding in social psychology is that public commitment to a position makes people more resistant to moderating their views in light of subsequent argument”³⁹², there is a clear risk of “*entrenchment of positions*” once they are out in the open. This would mean that policy-makers would refuse to retreat from a position, despite good counterarguments, simply because the public could perceive this as a lack of commitment or incapacity more generally. In other words, “if deliberation is about transforming preferences, and publicity forces you to know what you want and stand by your position, then ‘public deliberation’ [...] is something of a contradiction in terms”³⁹³ It would also strip the debate from the benefits of spontaneity where “deliberating parties are able to try out ideas out of the blue with the risk of having to abandon them straightaway (trial and error), to show hesitation, to re-consider the issues again and again with a fresh eye”.³⁹⁴ This might lead “the actual deliberation [to] be [op] more than the juxtaposition of pre-prepared statements with no actual interaction taking place”.³⁹⁵

Another possible effect of publicity is that it could lead politicians “*to posture*”, i.e. adopt excessively tough bargaining positions so as to demonstrate their loyalty to their constituents, a behavior which clearly risks causing a breakdown in the negotiations.³⁹⁶ Relatedly, when voters are uncertain about the merits of a particular policy, it could create a so-called “*political correctness effect*” where politicians adopt the position which is most likely to follow prior beliefs held by their constituents rather than the position which corresponds to their own private beliefs about what is the best policy.³⁹⁷

392. MACCOUNC, R.J., “Psychological Constraints on Transparency in Legal and Government Decision Making”, (2006) *Swiss Political Science Review* 12(3), 116-117, referring to, among others, JELLISON, J.M. and MILLS, J., “Effect of Public Commitment Upon Opinions”, (1969) *Journal of Experimental Psychology* 5(3), 340-346; and GOSSERIES, A., “Publicity”, in ZALTA, E.N. (ed.), *The Stanford Encyclopedia of Philosophy (Fall 2010 Edition)*, <http://plato.stanford.edu/archives/fall2010/entries/publicity/>, who argues that unless deliberating actors are able to “try out ideas out of the blue with the risk of having to abandon them straightaway (trial and error), to show hesitation, to reconsider the issues again and again with a fresh eye the actual deliberation may not be more than the juxtaposition of pre-prepared statements with no actual interaction taking place”

393. NAURIN, D., “Taking Transparency Seriously” (2002) SEI Working Paper No. 59, 19.

394. GOSSERIES, A., “Publicity”, *The Stanford Encyclopedia of Philosophy (Fall 2010 Edition)*, Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/fall2010/entries/publicity/>,

395. *Ibid.*

396. Stasavage, D., “Does Transparency Make a Difference? The Example of the European Council of Ministers” (2005), 6, available at: <http://as.nyu.edu/docs/IO/5395/transparency.pdf>,

397. *Ibid.*

Finally, in complex dossiers, it might also be beneficial if a representative is able to shield of the deal under negotiation until all the “pieces of the puzzle” are put together and the compromise-solution can be appreciated in its entirety.³⁹⁸

b. Council legislative decision-making: what the Council is versus ought to be...

From the *Turco* and *Access Info* judgments it can be inferred that the Court requires, as a principle, full openness of the legislative process. The *Access Info* case demonstrates some of the concerns raised by such increased transparency demands for the *decision-making process within the Council*. Although the General Court is right in requiring a careful case-by-case analysis of disclosure requests, it did not exhibit a great deal of openness towards the pragmatic arguments advanced by the Council Legal Service and considerably raised the bar for justifying reliance on that exception.

“Space to negotiate” – Yet, despite the hopes and aspirations of “European federalists” who perceive the Council as a type of senate in a federal state system, the reality is still somewhat different. It is fair to say that at present the Council still resembles more closely a kind of permanent diplomatic conference in which sovereign Member States negotiate “deals”. Hence it seems rational to take into account the specific dynamics of such negotiations. Although unsubstantiated vague claims as to the risks of external pressure are indeed unsatisfactory to defy transparency demands, it would seem common sense that, as set out above, the *psychology of negotiations* will often require a certain degree of confidentiality.

As regards the reports made of the Council working group sessions, the Council considered that with its “Coreper 2002”-compromise³⁹⁹ it had struck a good balance between the demands of transparency and the needs of negotiations. Indeed, by ensuring that the names of the delegations are blanked out in documents concerning *ongoing* legislative procedures which are disclosed, the Council Secretariat created a “climate of confidence” which persuaded the Member States to accept that the reports drawn up of the meetings do display the positions taken by the different delegations. Hence, when made public *after* the end of the process they will constitute a valuable source of information and accountability *ex post*.

The General Court was, however, unconvinced by the Council’s assertions that disclosure would complicate ongoing negotiations by *entrenching the Member States’ positions* as well as inflicting *external pressure*, and considerably raised

398. *Ibid*, 7.

399. Note from the General Secretariat of the Council to Coreper (Part II) – Public access to documents – Issues of principle, doc. 6203/02 of 1 March 2002 approved by Council doc. 6898/02 of 23 July 2002, at point 22.

the standard of proof for this exception. As in *Turco*, the General Court renounced the Council's general practice of non-disclosure based on the presumption that it would undermine the protected interest and imposed *as a principle* the need for disclosure of the delegations' names in legislative procedures, while still leaving the Council the possibility to prove on a case-by-case basis that disclosure of a specific preparatory legislative document would harm its decision-making. Yet as discussed above, this fear for "entrenchment of positions" once they are out in the open, does not seem such a "wild idea."

Standard of proof – It could be argued that in *Access Info* the EGC went beyond the requirement of a "reasonably foreseeable and not purely hypothetical risk" of the protected interest being undermined and de facto requested the Council to provide evidence of "*actual harm*". Such a standard of proof would clearly be excessive and unfeasible. Aside from the fact that practical arguments based on the "psychology of negotiations" are difficult to prove empirically, it is somewhat paradoxical that no such "standard of proof" seems to apply in respect of the claims of "enhanced democratic participation rights", "increased quality of legislation", etc., which are axiomatically invoked to underpin the imposition of more stringent access requirements.⁴⁰⁰

Though the practical implications of this judgment remain to be seen, some potentially worrisome consequences can be imagined. For one, increased disclosure requirements could lead to the drawing up of *documents containing less substance*.⁴⁰¹ Even more drastically, it could cause a *switch from written to oral procedures* which would be detrimental to the quality of decision-making in a context of seeking agreement between 27 Member State delegations who have to communicate back and forth with their capitals. Furthermore, such potential disclosure could cause the delegations participating in the Working groups to be much more careful and reticent in taking "individual initiative or responsibility" without prior approval of their highest national level. Such would obviously seriously *slow down* and handicap decision-making at EU level.

400. Criticising the axiomatic rather than argumentative nature of the claims made in the EU as regards the positive consequences of transparency in terms of legitimacy, accountability, etc., see: See Naurin, D., *Deliberation Behind Closed Doors* (ECPR Press, 2007), 3; see also Stasavage, D., "Does Transparency Make a Difference? The Example of the European Council of Ministers" (2005), 3, available at: <http://as.nyu.edu/docs/IO/5395/transparency.pdf>.

401. Which has according to some sources already happened in Sweden: see Ahlenius, I., "Rätten att granska tomma skåp" (2004) *Dagens Nyheter* 040423, as cited by NAURIN, D., "Public deliberation – a contradiction in terms? Transparency, deliberation and political decision-making", – (2006) *Översikter och meddelanden* Vol. 108(2), 192; ERIKSSON, F. and ÖSTBERG, K., "The problematic freedom of information principle – The Swedish experience", in FLINN, A. and JONES, H. (eds) *Freedom of Information – Open Access, Empty Archives?* (Routledge, London, 2009), 113-124.

c. *Commission internal decision-making process*

In the *MyTravel* case, the General court had accepted, on the basis of quite “general” arguments, the Commission’s need for a “space to think” in *administrative* procedures. Heavily criticized by some as favouring an unconstrained independence of the Commission in administrative processes above the beneficial self-restraint accompanying accountability⁴⁰², the judgment nonetheless seems to reflect a certain realism as regards the interests at stake. Yet, on appeal, the ECJ followed the Advocate General’s call to reverse the *MyTravel* judgment and abandon the greater leeway given to confidentiality of administrative processes, at least once they have been closed.⁴⁰³ In essence, the ECJ concluded that the Commission had failed to prove how disclosure of these documents from a finalized administrative procedure would “specifically and effectively” undermine the interest protected by Art. 4(3), para. 2. Whereas the ECJ’s reliance on an analogy with the case-law on the protection of court proceedings to establish the “principles” in the light of which the Commission’s argumentation is to be evaluated, i.e. the need for that “institution [to explain] the *specific reasons* why it considers that the closure of the procedure does not exclude the possibility that that refusal of access may remain justified having regard to the risk of a serious undermining of its decision-making process (emphasis added)”, is already questionable⁴⁰⁴, its blunt rejection of the Commission’s arguments seems somewhat unfair. Indeed, the finding that the Commission’s fear for the deterrence of frank and written opinions, as well as self-censorship, was “not in any way supported by detailed evidence, having regard to the actual content of the report” allowing it to be understood why disclosure would have been likely to seriously undermine the decision-making process even if the procedure “to which that document relates” had been closed, seems a rather strong conclusion.⁴⁰⁵ From the detailed mandate of that working group, which the Commission disclosed⁴⁰⁶, it can be deduced that the content of the report will go beyond that particular case and is likely to contain sensitive divergences in view.

Whereas administrative accountability is indispensable and indeed contributes to the quality of argumentation of the institutions, there is once again a balance to be struck between “stimulating” and “paralyzing” openness.⁴⁰⁷ Indeed, the

402. See ADAMSKI, “How Wide Is “The Widest Possible”?”, 543.

403. Based on the provision’s drafting history, the Advocate General concluded that the protection of the decision-making process set out in Art. 4(3) purposefully refrained from granting a broad “space to think”-exception, Opinion of Advocate General in Case C-506/08 P *Sweden/MyTravel and Commission*, paras 41-75.

404. See footnote 363

405. Case C-506/08 P *Sweden/MyTravel and Commission*, para. 89.

406. Next to its working plan and calendar. Case T-403/05, *MyTravel*, para. 34.

407. Contrast with Advocate General Kokott’s Opinion in *Sweden/MyTravel and Commission* para. 48, where she emphasized that it is in fact the Regulation’s intention that “Union citizens [...] understand how and for what reasons the administration takes its decisions” and be informed about the “positions which the institution in question has discussed internally and subsequently rejected”, thereby allowing them to judge the quality of the administration’s “decision-making processes, participate in the public discussion on the administration’s action and possibly be given guidance in making their democratic vote”.

risk that “anything you say may be used against you” will logically lead civil servants to avoid asserting criticisms, at least on paper, which could discredit a later Commission action or decision. The Advocate General’s suggestions that more transparency could equally well lead to the assertion of more “honest or critical opinions” since publicity means that such well-reasoned arguments will be harder to disregard, and that a shift to informal forms of deliberation might not occur since “all participants in the administration have an interest in taking high-quality decisions”,⁴⁰⁸ are not entirely convincing.⁴⁰⁹ Indeed, quite likely the fear of disclosure has already led to a decrease in the “paper trail”, although currently probably still limited to a practice of “selective conservation”, i.e. an ex post screening of the documents which are to be kept as part of a file. However, if also documents forming part of ongoing procedures would become subject to disclosure, a shift from written to oral procedures in controversial or sensitive matters seems plausible. Indeed, some have argued that this is precisely what has happened under the Swedish system, resulting in so-called “empty archives”.⁴¹⁰ Clearly, this would hamper the efficiency of the Commission’s decision-making process as well as *de facto* reduce the degree of transparency. The Advocate General herself conceded *ongoing administrative procedures* merit greater protection so as to avoid undue influence by interested parties disturbing the serenity of the procedures and affecting the quality of the final decision as well as the Commission’s capacity to respect the time-limits of the procedure.⁴¹¹

As regards the different treatment of *ongoing versus closed* administrative procedures, it should be noted that the Court in *Editions Jacob* deemed a merger procedure to have ended when the decision is adopted, regardless of any remaining appeal opportunity. However, in her opinion in *MyTravel*, Advocate General Kokott suggested that the merger procedure is to be considered as finalized when the final decision can no longer be judicially challenged.⁴¹²

408. Opinion of Advocate General in Case C-506/08 P *Sweden/MyTravel and Commission*, paras. 51-54.

409. MEADE and STASAVAGE found that in the setting of the US Federal Reserve’s Federal Open Market Committee (FOMC) the introduction of ex post publicity in the form of verbatim transcripts of meetings in fact significantly lowered the willingness of committee members to share dissenting opinions and thereby arguably reduced the quality of deliberation, MEADE, E. and STASAVAGE, D., “Two Effects of Transparency on the Quality of Deliberation” (2006) *Swiss Political Science Review* 12(3), 123-133.

410. AHLENIUS, L., “Rätten att granska tomma skåp” (2004) *Dagens Nyheter* 040423, as cited by NAURIN, D., “Public deliberation – a contradiction in terms? Transparency, deliberation and political decision-making”, – (2006) *Översikter och meddelanden* Vol. 108(2), 192. ERIKSSON, F. and ÖSTBERG, K., “The problematic freedom of information principle – The Swedish experience”, in FLINN, A. and JONES, H. (eds) *Freedom of Information – Open Access, Empty Archives?* (Routledge, London, 2009), 113-124.

411. *Ibid.*, paras. 65-69.

412. Opinion of Advocate General in Case C-506/08 P *Sweden/MyTravel and Commission*, paras 70-73.

d. *Consultation of experts by the Commission*

Also in certain cases on the consultation of experts by the Commission, i.e. *Borax* and *Muniz*, the Court imposed a stringent standard of proof, almost amounting to a demand for proof of *actual harm* suffered rather than the risk of harm, and rejected on that basis the Commission's request for confidentiality to protect its experts.⁴¹³ It seems that, at least in *Borax*,⁴¹⁴ the Court's analysis was of a worrisome naivety in its refusal to recognize the power of industry lobby groups and their capacity to discredit an expert when his opinion is known to be adverse to their interests.

e. *Recast*

Although the Commission considers that its amended Art. 4(3) does not alter the substance of that exception, it does extend the protection of documents relating to *ongoing* decision-making processes beyond those "drawn up for internal use or received by an institution" as protected under the current Regulation.⁴¹⁵

Moreover, both the EP and several other actors in the debate plead in favour of an outright abolishment of this decision-making process exception. Indeed, they are of the opinion that, especially since the entry into force of the Lisbon Treaty, this exception lacks legitimacy given that there is no more reference in the Treaty to the need to preserve the effectiveness of the decision-making process.⁴¹⁶ Yet, while it is true that the specific reference in the Treaty to the effectiveness of the decision-making process has disappeared⁴¹⁷, Art. 15(3), para. 2, instructs the legislator to adopt the "general principles and limits on grounds of public or

413. In *Muniz*, the language used by the EGC as regards the standard of proof for such a *risk* of external pressure seems overly strict: "Nevertheless, the *reality of such external pressure must be established with certainty*, and evidence must be adduced to show that there was a reasonably foreseeable risk that the classification decision to be taken would be substantially affected owing to that external pressure.", para. 86 (emphasis added).

414. In the *Borax* case, the experts had first heard the arguments of the company concerned in a public gathering and had then given their advice in the context of a closed meeting.

415. 4(3) would become: "Access to the following documents shall be refused if their disclosure would seriously undermine the decision-making process of the institutions: (a) documents relating to a matter where the decision has not been taken; (b) documents containing opinions for internal use as part of deliberations and preliminary consultations within the institutions concerned, even after the decision has been taken." HARDEN, "The Revision of Regulation No 1049/2001", 50, who notes that this would broaden its scope by, for example, allowing the institutions to rely on this exception even in respect of documents "drawn up for purposes of external consultation with specific persons or interests."

416. European Parliament, Resolution of 11 March 2009 regarding public access to European Parliament, Council and Commission documents (recast), to be considered as Parliament's position at first reading (COM(2008)0229 – C6-0184/2008 – 2008/0090(COD)), P6_TA(2009)0114; see also the Draft Report of 12 May 2010 on the proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (recast) (COM(2008)0229 – C6-0184/2008 – 2008/0090(COD)); Report of 22 June 2011 on public access to documents (Rule 104(7)) for the years 2009-2010 (2010/2294(INI)).

417. The 3d paragraph of ex Art. 207 EC, instructing the Council to elaborate within its Rules of Procedure the conditions for access to its documents as well as the cases in which it acts in its legislative capacity "with a view to allowing greater access to documents in those cases, while at the same time preserving the effectiveness of its decision-making process" has been dropped.

private interest governing this right of access to documents” and thus still leaves open the option of including efficiency of decision-making as a limit to disclosure. Moreover, while the reference to effectiveness of the *legislative* decision-making process contained in ex Art. 207(3) EC has disappeared, the exception in Art. 4(3) concerns also non-legislative decision-making processes.

2.5. Exception relating to the protection of the authority of Member States (Art. 4(5))

No unconditional and general veto right – In *Sweden/Commission (IFAW I)* the ECJ limited on appeal the “boundless” discretion which the General Court had accorded to the Member States to refuse disclosure of documents transmitted by them to the EU institutions.⁴¹⁸ In this case, the applicant sought the annulment of the Commission’s denial of access to certain documents which had been sent to it by Germany. These German documents served to allow the Commission to take its decision in a procedure for declassification of a site protected under the Directive on conservation of natural habitats, so as to permit the site to be used for economic purposes. The General Court concluded that the institutions are bound by a Member State veto, without there being any obligation on that Member State to provide reasons.⁴¹⁹ Whereas the ECJ confirmed the principle that *a priori (dis)agreement of the Member State is binding* on the EU institution⁴²⁰, it nonetheless emphasized that this does not confer an unconditional and general veto right.⁴²¹ Hence, in line with the duty of loyal cooperation⁴²², the Member State is required to *state reasons* for its refusal⁴²³, and, more importantly, these reasons should be able to fall under the *exceptions set out in Art. 4(1)-(3) of the Regulation* or relate to the specific protection accorded to *sensitive documents*.⁴²⁴ The EU institution will need to include those reasons provided by the Member State in its statement of reasons accompanying a possible negative decision.⁴²⁵ In the recent *Batchelor* case the General Court held that the institution “need not set out its own assessment of the merits of that reason-

418. Art. 4(5) allows the Member States “to request the institution not to disclose a document originating from that Member State without its prior agreements”.

419. Case T-168/02, *IFAW Internationaler Tierschutz-Fonds/Commission* [2004] ECR II-4135, paras 58-59.

420. *Ibid.*, para. 58; Case C-64/05 P, *Sweden/Commission (IFAW I)* [2007] ECR I-11389, paras 43, 47, & 50.

421. *Sweden/Commission (IFAW I)*, para. 75.

422. *Ibid.*, para. 85.

423. *Ibid.*, paras 87. Contrast with EGC, *IFAW/Commission*, paras 58, 59&72.

424. *Sweden/Commission (IFAW I)*, paras 76, 83, 84, 86, 88 & 89. Contrast with the Opinion of Advocate General Poiares Maduro of 18 July 2007 in case C-64/05 P, *Sweden/Council (IFAW I)* where he suggested that Member States could also rely on grounds of exception derived from their national law, paras 50-51. LEINO, P., “Case C-64/05 P, *Kingdom of Sweden v. Commission*” (2008) *C.M.L.Rev.* 45(5), 1483-1484.

425. *Sweden/Commission (IFAW I)*, para. 89; see also Joined cases T-109/05 and T-444/05, *NLG v. Commission* [nry], paras 195-197. in which a Commission decision refusing access to a Member State document, and pre-dating *IFAW I*, was annulled due to the lack of a statement of reasons setting out the grounds of exception invoked by that Member State.

ing”.⁴²⁶ The ECJ has furthermore asserted that it falls within the jurisdiction of the Community judicature to review whether the refusal was validly based on those exceptions, regardless of whether this refusal followed the assessment of these exceptions by the institution itself or by a Member State.⁴²⁷

Extent of review – In the follow-up case *IFAW Internationaler Tierschutz-Fonds/Commission (IFAW II)*⁴²⁸ the General Court had to assess whether the German authorities and the Commission had complied with the conditions set out in *IFAW I* when substantiating their refusal of access to one of the documents, i.e. a letter from the Chancellor.⁴²⁹ The applicant challenged the formal nature of the Commission’s review which was limited to checking whether Germany had provided a statement of reasons based on the exceptions in Arts. 4(1) to (3) for its refusal.⁴³⁰ However, since the Commission decision confirmed and based itself on the grounds of objection invoked by Germany, the EGC considered that, for the appraisal of the present case, it was not necessary to determine the nature of the review, *prima facie* or full, to be undertaken by the Commission under an Art. 4(5) exception.⁴³¹ Such would only have been necessary if the Commission had disagreed with the Member States’ objections.⁴³²

Rather, in the case at hand, it was the nature of the *judicial review* of the Commission’s final decision which had to be determined.⁴³³ Hence, the General Court considered that, regardless of whether the refusal stems from an assessment of the exception by an EU institution or by a Member State, the Courts are obliged to conduct a *complete review* of the matter as opposed to a mere *prima facie* review.⁴³⁴ Nonetheless, if the exception being invoked falls within the category of mandatory public interest exceptions, *in casu* the protection of the economic policy of a state, the Member States (like the EU institutions) enjoy a wide discretion⁴³⁵ and the Courts can only carry out a limited legality review.⁴³⁶ Satisfied that the Commission had provided an adequate statement of reasons and that the Member State had not committed a manifest error of assessment when applying the exception regarding the protection of the economic policy of the

426. Case T-250/08 *Batchelor/ Commission* [nry], para. 47. It should however be noted that the Dutch translation of this paragraph is highly confusing since it states that the institution “niet zelf dient te beoordelen of deze motivering gegronid is” which can be read as implying that the institutions themselves do not need (or are possibly not even allowed) to substantively evaluate the merits of the Member States’ argumentation.

427. *Sweden/Commission (IFAW I)*, para. 94

428. Case T-362/08, *IFAW Internationaler Tierschutz-Fonds/Commission (“IFAW II”)* [nry]

429. Following the *IFAW I* judgment of the ECJ, Germany allowed disclosure of all the documents requested, with the exception of a letter from the Chancellor to the Commission President. Hence it is this refusal of access which formed the basis for the *IFAW II* procedure.

430. Or in the Commission’s own words: “cursory examination”. (*IFAW II*, paras. 59 & 64)

431. *IFAW II*, paras 84-86.

432. *IFAW II*, para. 86. It should be noted that this is precisely what is at stake in the pending case T-59/09, *Germany/Commission*, where Germany challenges the Commission’s decision to go ahead with the disclosure of a document originating from the German authorities despite the latter’s objection.

433. *Ibid.*, para. 87.

434. *Ibid.*, para. 87.

435. *Ibid.*, para. 104-105.

436. *Ibid.*, para. 107; C-266/05 P, *Sison/Council*, paras 34-36.

Federal Republic of Germany, the EGC concluded that the Commission correctly refused disclosure of the Chancellor's letter.⁴³⁷

2.5.1. Analysis

Whereas the Regulation abandoned the disputed authorship rule⁴³⁸, it introduced the ambiguously worded⁴³⁹ Art. 4(5) which seemed destined to pose interpretative challenges for the Court. Indeed, the combination of the Member State's possibility to "request" the institutions not to disclose "without its prior agreement" one of its documents held by them seems to reflect a compromise solution which allowed the Member States to come to an agreement⁴⁴⁰, yet which ultimately deferred the cutting of the knot to the Court. However, since not much teleological guidance could be derived from the intentions of the divided legislative actors⁴⁴¹, the General Court and the ECJ arrived at opposite conclusions.

The General Court thus sided with those who rely on the *subsidiarity principle* to assert that the Regulation with its explicit statement that "it is neither the object nor the effect of this Regulation to amend national legislation on access to documents"⁴⁴² does not affect the applicability of national access to documents regimes to Member State documents.⁴⁴³ Hence, rather than a genuine exception to the principle of the widest possible access laid down in the Regulation, Art. 4(5) would constitute a conflict of laws rule.⁴⁴⁴ Member State documents, even if held by the institutions, should thus remain solely a matter of national law. However, as is also reflected in the ECJ's reasoning, it seems quite untenable in a decision-making structure which is so intertwined as today's EU, to deny that *those* Member State documents *which genuinely form part of the core information on the basis of which the EU institutions decide*, do not take on a Community nature which could require their disclosure as part of the *trans-*

437. *Ibid*, paras 118, 127, 138. An appeal has however been lodged: Pending Case C-135/11 P, *IFAW Internationaler Tierschutz-Fonds/Commission*.

438. This rule formed part of the regime under the Code of Conduct of December 6, 1993 concerning public access to Council and Commission documents, and established that European institutions could not disclose documents, even if in their possession, which originated from third parties.

439. Opinion of Advocate General Poiares Maduro of 18 July 2007 in case C-64/05 P, *Sweden/Council (IFAW I)*, para. 29.

440. *Ibid*, para. 32.

441. See also DRIESSEN, B., *Transparency in EU institutional law: a practitioner's handbook* (Cameron May, London, 2008), 107, who considers that the intentions of the different institutions and Member States were to divergent to distillate any coherent legislative intent.

442. Recital 15 of the Regulation.

443. Defending this position, DRIESSEN, *Transparency in EU institutional law*, 104-107, emphasizing that the applicant should then use the national route of access to documents.

444. See in that sense *IFAW/Commission*, paras 57, 58 & 61; DRIESSEN, *Transparency in EU institutional law*, 104-105 who stresses that Art. 4(5) is not a genuine exception because it relates to the *status* rather than the *content* of the document. Hence, the principle that exceptions should be interpreted restrictively should not apply. Moreover, Driessen considers that neither ex Art. 255 EC nor any other provision provides a legal basis for the Community to interfere with the Member States domestic policies on access beyond the laying down of a jurisdictional rule.

parency required from *Community decision-making*.⁴⁴⁵ Yet, the ECJ's claim that since "in their capacity as members of the Council and as participants in many committees set up by the Council [...], the Member States constitute an important source of information and documentation intended to contribute to the Community decision-making process" and a veto right for Member States would thus exclude an important class of documents is, at the very least, puzzling.⁴⁴⁶ Indeed documents transmitted by Member States as part of their work in the Council are automatically considered as Council documents and thus do not even come within the scope of Art. 4(5).⁴⁴⁷

In reality, it will primarily be the Commission dealing with such requests for Member State documents, either as part of its decision-making processes or as part of infringement proceedings, state aid investigations, ...⁴⁴⁸

As for the claim that, were the EU regime to prevail in respect of Member State documents held by the institutions, this would amount to an indirect harmonisation of national access to documents rules, this would seem to somewhat overstretch reality. Indeed, it should be kept in mind that the EU regime would only apply to those Member State documents which are in the possession of the EU institutions.⁴⁴⁹

Although the Advocate General had attempted to convince the ECJ to rely on the *fundamental right* status of the right of access to documents to limit the applicability of this ground for exception and thus abandon an unconditional veto right⁴⁵⁰, the ECJ did not follow. Rather, it adopted a somewhat ambiguous approach. Indeed, on the one hand it confirmed the existence of a veto right, yet on the other hand, it limited the exercise of this veto right to those situations where the Member State gave a clear statement of reasons based on the exceptions in Art. 4(1) to (3) without however clarifying the nature of the institutions' oversight over the Member State's arguments. Hence, the ECJ left the question as to whom, the institution or the Member State, has the *final word* unre-

445. See also Opinion of Advocate General in *Sweden/Council (IFAW I)*, para. 42-43; *Sweden/Council (IFAW I)*, paras 63, 72 & 73 asserting that those Member State documents could be essential in understanding the rationale for the Commission's decision. Furthermore, it should be noted that if documents of several Member States are involved, requiring the individual to make applications for access under the different national regimes could constitute a prohibitive barrier.

446. *Sweden/Council (IFAW I)*, paras 62-64.

447. Note from the General Secretariat of the Council to Coreper (Part II) – Public access to documents – Issues of principle, Council doc 6203/02 of 1 March 2002 approved by Council doc 6898/02 of 23 July 2002 at point 22.

448. See for example: Joined cases T-109/05 and T-444/05, *NLG v. Commission* [nry]; pending case T-59/09, *Germany/Commission*.

449. KRANENBORG seems to consider that disclosure at EU level of a Member State document which would not be disclosed under the national regime does not oblige that Member State to adapt its national rules. (KRANENBORG, H.R., "Is het tijd voor een herziening van de Eurowob?" (2005) *SEW*, Issue 4, 170. Yet, it is obvious that if those national rules can be circumvented via a request for access at EU level, that would *de facto* amount to an abolition of the national rule at hand.

450. Opinion of Advocate General in *Sweden/Council (IFAW I)*, paras 38-42.

solved.⁴⁵¹ It did emphasize that, regardless of whether the exception on which the refusal was based had been interpreted by an EU institution or a Member State, given that the disclosure decision was still in the end a Community decision, it remained subject to its judicial review.⁴⁵² In *IFAW II* the General Court then added that this amounts, in principle, to a complete review, unless the Member State relies on an exception falling in the category of mandatory public interest exceptions, then only a limited legality review will be carried out.

Recast – In its recast proposal the Commission replaced Art. 4(5) with a new Art. 5(2) which reads: “Where an application concerns *a document* originating from a Member State, *other than documents transmitted in the framework of procedures leading to a legislative act or a non-legislative act of general application*, the authorities of that Member State shall be consulted. The institution holding the document shall disclose it unless the Member State gives reasons for withholding it, based on the exceptions referred to in Article 4 or *on specific provisions in its own legislation preventing disclosure of the document concerned. The institution shall appreciate the adequacy of reasons given by the Member State insofar as they are based on exceptions laid down in this Regulation.*”

While enhancing transparency by excluding “documents transmitted in the framework of procedures leading to a legislative act or a non-legislative act of general application” from prior Member State consultation, the Commission’s proposal diverges from the ECJ’s finding in *IFAW*. Indeed, in *IFAW* the Court set out the obligation for Member States to justify their refusal on the basis of *the exceptions laid down in Art. 4 (1)-(3)* (or as a sensitive document in the sense of Art. 9), and thus seems to have excluded the reliance on justificatory grounds drawn from national legislation – which do not fall within Art. 4(1)-(3) or Art. 9 of the Regulation – as is provided for in the recast proposal.⁴⁵³ Moreover, the current proposal would seem to deny the institutions the power to judge the adequacy of those reasons which are based on specific national legislation, whereas this question is still open under the current regime. Clearly, this would give the Member States an incentive to justify their refusal on the basis of national rules rather than the Regulation.⁴⁵⁴

451. The pending Case T-59/09, *Germany/Commission*, in which Germany challenges the Commission’s decision to go ahead with the disclosure of a document originating from the German authorities despite the latter’s objection, will hopefully clarify this matter; LEINO, “Case C-64/05 P, *Kingdom of Sweden v. Commission*”, 1481-1482. Unlike Advocate General Maduro who was of the opinion that the institution should definitely be able to refuse the Member States’ reliance on a particular exception derived from the Regulation. As for exceptions based on national law, though in principle not subject to scrutiny from the institution, they could still be ignored by that institution if it considers that such is necessary for the transparency of the Community decision-making process. Opinion of Advocate General in *Sweden/Council (IFAW I)*, paras 52-53.

452. *Sweden/Council (IFAW I)*, para. 94; ADAMSKI considers that such review of what is in essence a national decision is in fact inconsistent with Art. 230 EC, ADAMSKI, “How Wide Is “The Widest Possible”?”, 546.

453. See also HARDEN, “The Revision of Regulation No 1049/2001”, 251; House of Lords, “Access to EU Documents”, para. 55.

454. LEINO, “Case C-64/05 P, *Kingdom of Sweden v. Commission*”, 1485.

3. GENERAL OBSERVATIONS

3.1. General tendencies in the case law

3.1.1. *Transparency for general policy measures unless conflicting fundamental values*

General policy measures – Irrespective of whether one agrees with the result, there is a relatively consistent line of reasoning that has emerged over the last two years in the ECJ’s case law on public access to documents. More specifically, the ECJ can be seen to promote maximum transparency in cases involving *political decisions containing general and abstract policy choices*, as well as *implementing decisions with a clear policy content*. In a democracy, decision-making processes resulting in general policy choices affecting all are deemed to mandate the utmost openness. Yet, the Court has accepted a restriction of transparency when *other fundamental values* such as the right to a fair trial, privacy, etc., risked being undermined and when the interests in democracy as well as accountability were sufficiently guaranteed.

The “**big five**” – Five Grand Chamber judgments handed down over the last two years, i.e. *Sweden/Commission (IFAW I)*, *Turco*, *Bavarian Lager*, *Technische Glaswerke* and *API*, all fit in this framework. In *Sweden/Commission (IFAW I)* and *Turco* the ECJ considered that the interest in democracy mandated access to a legal opinion in a legislative procedure, respectively a Member State document forming part of an administrative decision-making process resulting in measures of general application. However, in *Bavarian Lager* and *API*, the Court found the interest in transparency to be outweighed by the right to privacy, respectively the right to a fair trial and the need for a sound administration of justice. In *Technische Glaswerke* the Court de facto applied the *lex specialis derogat legi generali* principle considering that the State Aid Regulation already embodied the legislator’s balancing act of transparency against a myriad of other interests worthy of protection in the context of a state aid investigation.

Legislative versus administrative procedures – The Court’s demand for complete openness of the legislative process *on principle*,⁴⁵⁵ as is clear from the *Turco* and *Access Info* judgments, is fully in line with its increased transparency requirement as regards “general policy choices”. Likewise, the greater leeway given to the institutions in *Technische Glaswerke* and the first instance judgment in

455. *Sweden/API and Commission*, para. 77; Case C-139/07P, *Technische Glaswerke Ilmenau*, para. 60. (Opinion of Advocate General in Case C-506/08 P *Sweden/MyTravel and Commission*, para. 61)

*MyTravel*⁴⁵⁶ reflects the lesser public interest in full transparency of such administrative procedures leading to decisions with an individual scope⁴⁵⁷ as well as, in the case of *Technische Glaswerke*, the greater deference accorded to the legislator's balancing act of the specific interests which is deemed to be incorporated in such "sector-specific" Regulations.

Yet, the Court has recently recalled in *Agrofert* and *Sweden/MyTravel and Commission* that, even if legislative processes mandate greater openness, *also for administrative processes "openness remains the principle"*.⁴⁵⁸ Indeed, in her opinion in the *MyTravel*-case, Advocate General Kokott points out that the Regulation explicitly provides that "openness guarantees that the *administration* enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system".⁴⁵⁹

3.1.2. *Special versus general access to documents regimes*

Interpreting Regulation No 1049/2001 in light of other specific EU rules – In the three judgments mentioned above where the ECJ deemed the interest in transparency to be outweighed by other fundamental values, it also, somewhat implicitly, clarified that Regulation No 1049/2001 should be interpreted in light of other more specific EU rules on access.⁴⁶⁰ Hence, in *Bavarian Lager*, *Technische Glaswerke* and *API* the Court interpreted the exceptions invoked in light of the more specific rules contained in the Personal Data Protection Regulation, the State Aid Regulation, the Statute of the Court of Justice and the Rules of Procedure of the EU Courts. Although the Court never explicitly relied on the *lex specialis derogat generalis* principle, it clearly emerges from this case law that the Regulation cannot deprive these specific access rules of their "effectiveness".⁴⁶¹ Although it remains to be seen whether the Court will extend this reasoning to other specific access regimes in, for example, merger proceedings, it

456. Yet on appeal this reasoning seems to have been rejected in respect of ended administrative procedures: Case C-506/08 P *Sweden/MyTravel and Commission*. In line with the EGC's *MyTravel* judgment, see also *Éditions Jacob/Commission*, para. 161, in respect of legal opinions provided in an administrative process. Contrast however with *Agrofert* where a different chamber of the General Court rejected the Commission's refusal to disclose a legal opinion relating to a Merger decision arguing that the Commission's statement of reasons failed to offer any explanation why disclosure would compromise its capacity to benefit from having full and frank legal advice. (paras 128-129)

457. Note however that in her opinion on the appeal in the *MyTravel* case Advocate General Kokott considered that the Report on the consequences of the *Airtours* judgement is "not a typical administrative activity, but *the development of policy or strategy*", and that therefore, "[u]nder Article 12(3) of Regulation No 1049/2001, such documents, like legislative documents, should where possible be made directly accessible" (emphasis added, Opinion of Advocate General in Case C-506/08 P *Sweden/MyTravel and Commission* para. 87)

458. *Agrofert*, para. 129. (emphasis added)

459. Recital 2.

460. See also GODIN, "Recent Judgments Regarding Transparency", 22.

461. GODIN, "Recent Judgments Regarding Transparency", 22-23.

does seem likely.⁴⁶² The recent E.ON decision of the Ombudsman seems to confirm this in respect of antitrust cases governed by Regulation 1/2003.⁴⁶³

Rebuttable general presumptions – In view of the very *diverse* interests at stake in requests for access to documents addressed to the different institutions in different domains, it seems sensible to rely on *specialized access rules* drawn up for a particular sector or domain. Yet, since it would be naive to assume that the legislator consciously took into account the public interest in transparency when adopting these “sector instruments”⁴⁶⁴, as long as these special regimes are not adapted in this respect, the existence of such a *lex specialis* should probably do no more than create a “general presumption” which remains rebuttable *also* on the basis of an overriding public interest in transparency. This was the approach taken in *Technische Glaswerke* as well as, though less clear, in *API*.⁴⁶⁵ However, whereas these cases shifted the burden of proving an overriding public interest once again upon the applicant⁴⁶⁶, the institutions themselves should be required to *ex officio* consider whether there can be expected to be an overriding public interest in disclosure.⁴⁶⁷

In *Bavarian Lager*, the Court went beyond this “general presumption” approach and effectively applied the *lex specialis* Regulation 1045/2001-regime, requiring the applicant to provide an “express and legitimate justification or any convincing argument in order to demonstrate the necessity for those personal data to be transferred” and thus his “*specific interest*” in disclosure (Art. 8) beyond the general public’s interest in transparency.⁴⁶⁸

3.1.3. *Ongoing versus ended procedures*

Legislative procedures – It seems that the Court has seriously limited the possibility to restrict access to documents which form part of an *ongoing* legislative process. Indeed, both in *Turco* and *Access Info* the Court stressed the need for citizens to be fully informed about the ongoing debate so as to allow them to

462. More clarity should be brought by the appeals pending in *Éditions Jacob* (C-404/10 P), *Agrofert* (C-477/10 P), *MyTravel* (C-506/08 P). See also Advocate General Kokott in *MyTravel* who asserted that the interpretation of the exception in Art. 4(3) of Regulation No 1049/2001 needs to take into account the restrictions of access to the file laid down in “the Merger Regulation” (i.e. Art. 17(3) of Regulation No 802/2004) governing the merger control procedures. (Opinion of Advocate General in pending Case C-506/08 P *Sweden/MyTravel and Commission*, paras 68-69)

463. Decision of the European Ombudsman closing his inquiry into complaint 2953/2008/FOR against the European Commission, 27 July 2010.

464. See the criticisms on this point expressed by KRANENBORG, “Tien jaar Eurowob”, 223-224.

465. In contrast with TGI (Case C-139/07P, *Technische Glaswerke Ilmenau*, para. 62), in *API* the possibility to rebut the general presumption on the basis of an overriding public interest is only discussed much later in the judgment (*Sweden/API and Commission*, para. 152)

466. For a critical analysis in this respect, see KRANENBORG, “Tien jaar Eurowob”.

467. Some clarity could be brought by the pending appeal cases *Éditions Jacob* (C-404/10 P), *Agrofert* (C-477/10 P).

468. *Commission/Bavarian Lager*, paras 77-78; see in that sense, KRANENBORG, “Tien jaar Eurowob”, 227.

“exercise their democratic rights” and “participate more closely in the decision-making process” (“democratic participatory right”)⁴⁶⁹, rather than merely having the option of holding decision-makers accountable *ex post*. It is beyond doubt that in a democracy legislative processes should be as transparent as possible. Yet, aside from the fact that it would seem somewhat naïve to believe that mere public access to documents will genuinely empower and encourage *citizens* to actively participate in the ongoing legislative debates, certain arguments also plead in favour of allowing some “space to think and deliberate”.⁴⁷⁰ Indeed, as already discussed in the context of the exception protecting the decision-making processes, excessive transparency demands could very well harm the specific deliberation and negotiation process within the Council, lead to the use of more informal working methods detrimental to the functioning of any institution, deprive the Commission of “frank expert advice” in domains with large financial interests at stake, etc.

Administrative procedures – Although in *MyTravel* the General Court accepted the need for protection of the Commission’s administrative decision-making process even *after* the relevant decision has been taken, in two subsequent cases *Editions Jacob* and *Agrofert* the Commission failed to produce evidence substantiating a similar need for protecting documents from a merger file where the decision had been taken.⁴⁷¹ Moreover, on appeal, the ECJ (partially) reversed the *MyTravel* judgment and restricted the greater leeway given to confidentiality of administrative processes, at least as regards *closed* procedures.⁴⁷² In her Opinion, the Advocate General explicitly recognized that *ongoing administrative procedures* merit greater protection so as to avoid undue influence by interested parties disturbing the serenity of the procedures and affecting the quality of the final decision and the Commission’s capacity to respect the time-limits of the procedure.⁴⁷³

3.1.4. *Standard and burden of proof*

Standard for proving “risk of harm” – Whereas the *general presumptions* accepted in the recent line of cases clearly alleviate the institutions’ task of establishing a risk of harm to a protected interest, on several other occasions the

469. *Sweden and Turco*, para. 45 & 67; *Access Info*, paras. 56-57, 69, 78.

470. As regards the empowerment of citizens, it is clear that sufficient *transparency* is a *necessary yet insufficient condition* to strengthen democratic participation, and some of the efforts might thus be better invested in developing other means of participation. Apropos the encouragement of citizens to participate more actively in the democratic process, the striking lack of individual citizens among the applicants seeking access to documents contrasts with the preponderance of academics, lawyers, lobbyists and NGOs, and indicates that the ideal of a “participatory democracy” is unlikely to be (solely) realized via an ever greater public access to documents.

471. Note however that in *Editions Jacob* an appeal was pending against the Commission’s merger decision.

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

473. Opinion of Advocate General in Case C-506/08 P *Sweden/MyTravel and Commission*, paras. 65-69.

Court has on the contrary toughened the standard of proof as regards the risk that disclosure “would actually and effectively undermine the protected interest”. Indeed, it has repeatedly concluded that the institutions’ arguments were “mere assertions”, “merely hypothetical”,...,⁴⁷⁴ and thus failed to establish “*to the requisite legal and factual standard* that disclosure [...] would seriously undermine” the protected interest.⁴⁷⁵ Yet, the nature of such a “requisite legal and factual standard of proof” for a *risk*, i.e. an event which is yet to occur, is far from obvious. It could even be argued that in some cases the Court’s “standard” almost amounts to demanding evidence of “actual harm”.⁴⁷⁶

Burden of proof of overriding public interest – Since *Turco* it seemed clear that the institutions themselves are, at least as regards documents from a *legislative* procedure, under the obligation to *ex officio* investigate whether there exists an overriding public interest in disclosure, including the general interest in transparency itself.⁴⁷⁷ Hence, the institutions would have to balance the interests protected by the exceptions against the interest in transparency in that particular case. Also in respect of documents from a non-legislative procedure, the General Court recently reaffirmed in *Toland* the institutions’ duty to include in their non-disclosure decision an explicit motivation as regards the absence of an overriding public interest.⁴⁷⁸

Yet, in the *Technische Glaswerke* case concerning an *administrative* state aid procedure, the ECJ shifted the burden of proving the existence of an overriding public interest, capable of rebutting the general presumption, once again upon the applicant.⁴⁷⁹ A similar story is found in the *API*-case.⁴⁸⁰ Obviously this significantly weakens the applicant’s position and ignores that such general presumptions should remain sufficiently open to rebuttal as long as it cannot be assumed that the specific rules adequately incorporate the public interest in transparency.

474. *Sweden and Turco*, para. 63 & 66; *Borax*, paras 44-50.

475. *Access Info*, para. 66 (emphasis added)

476. See in that sense *Borax* (a.o. para. 44) and *Muñiz*.

477. *Sweden and Turco*, para. 74.

478. *Toland*, paras 83-84.

479. Case C-139/07P, *Commission/Technische Glaswerke Ilmenau* [nyr], para. 62; KRANENBORG, “Tien jaar Eurowob”, 224.

480. *Sweden/ API and Commission*, paras 57-59.

3.1.5. *General assumptions/categories of documents versus specific examination*

Although the Court has always been very strict on the requirement of a concrete case-by-case analysis and rejected arguments based on *categories* of rather than individual documents, the recent line of cases discussed above (*TGI, Bavarian Lager, API*) has visibly broken with this tradition.⁴⁸¹

Though the technique of general presumptions in favour of non-disclosure conflicts with the core “case-by-case” approach of the Regulation, it seems currently the best manner to deal with the unintended consequences of the very broad scope of the Regulation. Indeed, whereas a general exemption of situations which are governed by specific access rules from the scope of application of Regulation No 1049/2001 would in theory be a better solution, this would arguably require a revision of those sectorial regimes to ensure that they adequately take into account the *public* interest in transparency. Since this is unlikely to happen soon, the application of general presumptions which remain rebuttable on the basis of an overriding public interest in transparency is probably the best option.

Indeed, it has the potential to relieve the institutions from the burden of having to establish in respect of every single document – from files which often contain thousands of pages – the risk of harm from disclosure, in domains where specific rules of access exist and the applicants are mainly motivated by other reasons than increased accountability or democracy. This would particularly help the Commission to contain the increasing workload from requests for access to competition law files.

3.2. The Regulation: some more general reflections

3.2.1. *Regulation is very often not used for its original goal*

Irrespective of the more fundamental question whether a right of public access to documents is *überhaupt* capable of living up to the important role accorded to it within the EU in terms of *increasing democratic legitimacy and participation*, it can be empirically observed that Regulation No 1049/2001 is very often used for purposes other than it was designed for. Indeed, though differing across the institutions and policy domains, the majority of requests for access stem from academics, lawyers, lobbyists, officials and NGOs, as opposed to individual citizens seeking to exercise their democratic participa-

481. Contrast however with the recent *Agrofert* case where although it was reiterated that a refusal to disclose may be based on “general presumptions which apply to certain categories of documents”, the institution will still need to establish that these considerations apply to that particular document, para. 123.

tion rights.⁴⁸² Admittedly, the active involvement of NGO's indirectly representing particular concerns and interests in society would, overall, seem a positive development in terms of democratic participation.⁴⁸³

Yet, if it emerges that a significant proportion of the applications come from lawyers seeking access to large quantities of documents in the hope of finding evidence in support of their clients' case in eg. infringement or competition law cases,⁴⁸⁴ it can be argued that a lot of people and resources are being invested for reasons that do not correspond to the ones which inspired the adoption of the Regulation. Moreover, in view of the efforts to facilitate private actions for damages brought before national courts by victims from breach of EU antitrust rules, these types of expansive requests from competition lawyers looking for evidence to support their clients' claims are likely to increase even further.⁴⁸⁵ Even if these applications could have some marginal democracy or legitimacy knock-on-effects, in a world of limited resources it makes sense to rely on specific rules and redirect the Regulation to its original purpose.

3.2.2. *Are we dancing around the "elephants in the room"?*

Lobbying the European Parliament – While the European Parliament is without doubt the most transparent of the EU institutions in several respects, some important “black holes” remain. It is well-known that MEPs depend heavily on the input provided by external stakeholders or so-called lobbyists to manage the technicality and diversity of dossiers entrusted to them.⁴⁸⁶ Yet, while it would seem crucial for such external input, which will often take the shape of fully

482. For 2009, the profile of the applicants seeking access to documents of the different institutions was the following:

1. the Commission: 21.29% academics, 9.85% civil society (down from 18.26% in 2008), 45.5% applicants with unknown “socioprofessional profile” (up from 6.75% in 2008), 7.33% public authorities (down from 14.19% in 2008), 10.24% lawyers, 3.77% other EU institutions, 2.02% journalists; (Report from the Commission on the application in 2009 of Regulation (EC) No 1049/2001, COM(2010)351 final), 30.6.2010.
2. the Council: Initial applications came mainly from students and researchers (33,6%). Lawyers (11,4%), industry and commerce and pressure groups (17,2%) were also high on the list of social and professional categories represented. Since applicants are not required to give their identity or provide reasons for their applications, which are usually sent by e-mail, the occupations of a significant proportion (12,7%) of them is unknown. Most confirmatory applications also originated from students and researchers (46,9%). However, numbers from lawyers increased remarkably in 2009 (18,8% against 10,5% in 2008). (Council Annual report on access to documents – 2009)

483. CURTIN & MEIJER note however that the democratic nature of many NGO's is increasingly being questioned, casting doubts on their contribution in terms of representation and increased legitimacy, CURTIN and MEIJER, “Does transparency strengthen legitimacy?”, 117.

484. Report from the Commission on the application in 2009 of Regulation (EC) No 1049/2001, 7.

485. Already in its Green Paper on Damages actions for breach of the EC antitrust rules (SEC(2005) 1732), COM(2005) 672, 19.12.2005, 5-6, the Commission implied that disclosure by the competition authorities under Regulation No 1049/2001 is not the proper route to obtain this sort of information. A system of “discovery rules”, allowing a party to request the defendant to hand over evidence to the Court without these documents having to be made public, would be a better option, yet many Member States do not know such rules, 5-6.

486. RASMUSSEN, M.J., “Lobbying the European Parliament: A necessary evil”, CEPS Policy Brief No. 242, May 2011, at: <http://www.ceps.eu/book/lobbying-european-parliament-necessary-evil>, 2.

elaborated lists of amendments and voting lists⁴⁸⁷, to be made visible to the public in some form, it is not. Despite the efforts being undertaken to remedy these shortcomings, in the form of the recently set up Transparency register⁴⁸⁸ and the working group on codes of conduct for MEPs and lobbyists set up by President Jerzy Buzek,⁴⁸⁹ there is still a long way to go. Introducing a so-called legislative footprint, which obliges the rapporteurs to list in their report the interest groups that they have consulted, is a valuable yet insufficient step. Rather, what seems really needed is the installation of more *formalised consultations of external stakeholders*, with their position papers being put online and with an obligation on the MEPs to invite the major stakeholders representing the main diverging viewpoints and interests.⁴⁹⁰ Relatedly, the *position papers and lists of amendments drafted by interest groups and received by the MEPs* via email, etc., and which are currently covered under the so-called “free mandate” principle until they are tabled in accordance with the Rules of Procedure, *should be made available to the public*.⁴⁹¹ Indeed, given the reality that about 80% of amendments tabled in the committees are estimated to come directly from interest representatives⁴⁹², it seems that the MEP’s “freedom to receive information” should in this instance be outweighed by the public’s interest in knowing where that information comes from.

Trialogues – Another “black hole” in the transparency of the EU’s legislative decision-making process are undoubtedly the (in particular first reading) triologue meetings which take place in complete secrecy and do not produce documents. Yet the European Parliament is undertaking efforts to enhance the triologues’ transparency and ensure a more active involvement of the MEPs (in particular committee members) who are not part of the negotiating team.⁴⁹³

487. Ibid.

488. European Parliament decision of 11 May 2011 on conclusion of an interinstitutional agreement between the European Parliament and the Commission on a common Transparency Register (2010/2291(ACI)), P7_TA-PROV(2011)0222; for the Transparency Register itself, see: http://europa.eu/transparency-register/index_en.htm.

489. <http://www.europarl.europa.eu/nl/pressroom/content/20110523BKG20013/html/Parliament's-working-group-on-codes-of-conduct-for-MEPs-and-lobbyists>

490. RASMUSSEN, “Lobbying”, 6.

491. Currently, such “correspondence” is not qualified as “a document” and thus not subject to Regulation No 1049/2001: Art. 4 of the Statute for Members of the European Parliament reads “Documents and electronic records which a Member has received, drafted or sent *shall not be treated as Parliament documents* unless they have been tabled in accordance with the Rules of Procedure.” (emphasis added)

492. RASMUSSEN, “Lobbying”, 2.

493. See already: European Parliament. *Code of Conduct for Negotiating Codecision Files*. Brussels, 2008; and calls for further reforms: Minutes of the Conference of Presidents meeting on 10 March 2011 discussing among others first-reading agreements, PV CPG 10.03.2011, 15-17; Own Initiative Report by Heidi Hautala of 22 June 2011 on public access to documents (Rule 104(7)) for the years 2009-2010 (2010/2294(INI), A7-0245/2011, paras 17 & 29.

3.2.3. “Best can be the enemy of the good” – optimal instead of maximal transparency

As stated before, it is overly clear that transparency of government is a must in any democratic society. Hence, transparency should be consciously and vigorously defended against “old boys”-club reflexes, institutionalised bureaucratic attitudes, etc. Yet, it should also be protected from a self-defeating dogmatic pro-transparency attitude.⁴⁹⁴ Therefore, both the costs as well as the benefits of transparency need to be taken into account in the EU debate.⁴⁹⁵

Evasion – Indeed, if the reality is that complex compromises are rarely reached in public, neither at the national nor at the EU level, there is no good reason to try to impose on the EU formalised processes a degree of publicity which will ultimately relocate the real decision-making to other informal settings. In addition, a shift from written to oral procedures is far from “merely hypothetical”⁴⁹⁶ and clearly risks to affect the quality of decision-making as well as ex post transparency. Indeed, some have argued that such a shift from written to informal oral practices is precisely what has happened under the Swedish system, resulting in so-called “empty archives”.⁴⁹⁷ Though “fear” for evasion practices cannot dictate transparency policy⁴⁹⁸, these practices should nonetheless be taken into account when the costs and benefits of imposing further openness are weighed of. As asserted before, increased transparency should not be seen as a goal in itself, rather the benefits to be included in the balance should be the gains in accountability and democracy that can flow from greater transparency.

Benefits of “a space to think and negotiate” – Likewise, as discussed extensively above⁴⁹⁹, denying the need of any so-called “space to think” both within legislative deliberation processes, as in administrations where ideas and opinions can

494. See already VERHOEVEN, “The Right to Information: A Fundamental Right?”, 2-5, who, though strongly in favour of transparency, admits that (1) excessive transparency could lead to “legalism” and “risk aversion”, thereby undermining effective decision-making; and that (2) the result of an effective participation of citizens in EU governance on the basis of increased access to information remains contested given the experience in the US where the freedom of information act has “more often than not been used by commercial interests seeking to gain competitive advantages which is hardly related to participation of citizens in government”.

495. Criticising the axiomatic way in which the claims regarding the positive consequences of transparency in terms of legitimacy, accountability, etc., are made in the EU, see: See Naurin, D., *Deliberation Behind Closed Doors* (ECPR Press, 2007), 3&6; see also Stasavage, D., “Does Transparency Make a Difference? The Example of the European Council of Ministers” (2005), 3, available at: <http://as.nyu.edu/docs/IO/5395/transparency.pdf>, 496. See among others, Opinion of Advocate General in Case C-506/08 P *Sweden/MyTravel and Commission*, para. 55.

497. AHLENIUS, I., “Rätten att granska tomma skåp”(2004) *Dagens Nyheter* 040423, as cited by NAURIN, D., “Public deliberation – a contradiction in terms? Transparency, deliberation and political decision-making”, – (2006) *Översikter och meddelanden* Vol. 108(2), 192. ERIKSSON, F. and ÖSTBERG, K., “The problematic freedom of information principle – The Swedish experience”, in FLINN, A. and JONES, H. (eds) *Freedom of Information – Open Access, Empty Archives?* (Routledge, London, 2009), 113-124.

498. Opinion of Advocate General in Case C-506/08 P *Sweden/MyTravel and Commission*, para. 50.

499. See II. 4.3.

be freely exchanged and left to mature without the constraints of self-censure, would seem highly counter-productive for any decision-making process.

It should be noted that, in its opposition to any such “space to think”, the European Parliament is not fully consistent since it has its own share of closed or even informal meetings. For instance, Coordinators’ meetings⁵⁰⁰ are not held in public and know no formal practice of publishing minutes, although some experimenting in this respect seems ongoing.⁵⁰¹ Still, these meetings do deal with important matters such as whether or not the Parliament should object to Commission draft Comitology measures.⁵⁰² At times the Coordinators’ meeting even decides on (adaptations to) the negotiating team and mandate for dialogues.⁵⁰³ Another example is the practice of (unofficial) pre-meetings between the rapporteur and shadow-rapporteurs dealing with a particular dossier, so as to find compromises between the different positions which emerged during the Committee meetings.

In conclusion, Advocate General Maduro’s observation in *Turco* that the “Best can sometimes be the enemy of the good”⁵⁰⁴ should be kept in mind when designing and implementing measures to increase transparency at EU level.

500. Rule 192 of the Rules of Procedure of the European Parliament.

501. See for instance the websites of the ENVI and IMCO committees: <http://www.europarl.europa.eu/activities/committees/publicationsCom.do?language=EN&body=ENVI>; <http://www.europarl.europa.eu/activities/committees/publicationsCom.do?language=EN&body=IMCO>

502. Rules 87-88 of the Rules of Procedure of the European Parliament.

503. See for example: <http://www.europarl.europa.eu/document/activities/cont/201104/20110420ATT18246/20110420ATT18246EN.pdf>.

504. Opinion of Advocate General in *Sweden and Turco/Council*, para. 40.

CONCLUSION – A PLEA FOR ‘OPTIMAL’ AS OPPOSED TO ‘MAXIMAL’ TRANSPARENCY

While the answer as to what precisely is the ‘optimal level of transparency’ is all but clear-cut, and the difficulty of the Court’s balancing act should thus be fully recognized, it nonetheless seems that part of the recent case-law is driven by a “principled approach” which risks to defeat its own purpose. Rather than doubting the Court’s willingness to “strike the right balance”, it seems that too little voices critical of the ‘maximal transparency’ objective could be heard *outside* of the institutions.⁵⁰⁵ Indeed, for a long time, legal-political academic debate seems to have assumed increased openness to be unequivocally beneficial.⁵⁰⁶ And quite likely, such a fervent pro-transparency attitude was legitimate as long as the scales in the EU were tipped heavily towards secrecy. However, over time the EU institutions’ attitude and openness have evolved significantly. Hence, I argue that the EU should adopt a balanced approach and strive for an optimal level of transparency rather than pursue a maximal transparency which is likely to come at the expense of other valid interests such as effective decision-making. Indeed, even the Parliament, which has played a crucial role in attaining the current level of openness, should concede that its work benefits from closed meetings such as those between the Group of Coordinators as well as the (unofficial) pre-meetings between the rapporteur and shadow-rapporteurs for a particular dossier.

Hence, the Court should avoid imposing a *de facto* “prohibitive” *standard of proof* on the parties who argue for the need for some degree of ‘space to think and negotiate’ and who point out the risk of evasion practices. Indeed, if not, it risks to harm the specific deliberation and negotiation process within the Council, to deprive the Commission of ‘frank expert advice’, to rob the institutions from a free exchange of ideas and opinions that are given the time to mature without the constraints of self-censure, etc. More generally, it can be argued that Regulation No 1049/2001 should be reoriented towards its *core business* of increasing the accountability and democratic legitimacy of the EU. Indeed, given that a non-negligible (and increasing) amount of requests for disclosure come from lawyers seeking access to large quantities of documents to support their clients’ case in e.g. infringement or competition law cases, it seems that a lot of people and resources are being invested for reasons that do not correspond to the ones which inspired the adoption of the Regulation. Hence, in a world of limited resources it makes sense to rely on the specific rules on access designed

505. ARNULL, A., “Joined Cases C 39/05 P & C 52/05 P, Sweden and Turco v. Council, judgment of the Grand Chamber of 1 July 2008, not yet reported” (2009) *C.M.L.Rev.* 46, 1219-1238.

506. For a critical examination of some of these assumptions, see CURTIN, D. and MEIJER, E.J., “Does transparency strengthen legitimacy?” (2006) *Information Polity* 11, 109-122.

for these situations and reorient the ‘general’ Regulation to its original purpose. Moreover, some of these transparency efforts could probably even be usefully *redirected* to address other concerns such as the remaining obscurity of phenomena like lobbying and, to some extent, dialogues.

TABLE OF CASES

General Court

- Case T-105/95, *WWF UK/Commission* [1997] ECR II-313.
Case T-174/95, *Svenska Journalistförbundet /Council* [1998] ECR II-2289
Case T-309/97, *Bavarian Lager (“Bavarian Lager I”)* [1999] ECR II-3217
Order in Case T-610/97 R, *Carlsen and Others/Council* [1998] ECR II-485
Case T-14/98, *Hautala/Council* [1999] ECR II-2489.
Case T-20/99, *Denkavit Nederland/Commission* [2000] ECR II-3011.
Case T-191/99, *Petrie and others/Commission* [2001] ECR II-3677.
Case T-342/99 *Airtours v Commission* [2002] ECR II-2585
Case T-211/00, *Kuijjer/Council (“Kuijjer II”)* [2002] ECR II-485
Case T-198/01, *Technische Glaswerke Ilmenau/Commission* [2004] ECR II-2717
Case T-209/01 *Honeywell v Commission* [2005] ECR II-5527
Case T-210/01 *General Electric v Commission* [2005] ECR II-5575
Case T-168/02, *IFAW Internationaler Tierschutz-Fonds/Commission* [2004] ECR II-4135.
Case T-2/03, *Verein für Konsumenteninformation/ Commission* [2005] ECR II-1121
Case T-47/03, *Sison/Council* [2007] E.C.R. II-73.
Case T-84/03, *Turco/Council* [2004] ECR II-4061.
Joined cases T-110/03, T-150/03 and T-405/03, *Sison/Council* [2005] ECR II-1429
Case T-36/04, *API/Commission* [2007] ECR II-3201
Case T-194/04, *Bavarian Lager/Commission* [2007] ECR II-4523.
Joined cases T-3/00 and T-337/04, *Pitsiorlas/Council and ECB* [2007] ECR 2007, II-4779.
Joined cases T-391/03 and T-70/04, *Franchet and Byk/Commission* [2006] ECR II-2023
Case T-264/04, *WWF European Policy Programme/Council (“WWF EPP”)* [2007] ECR II-911
Case T-380/04, *Terezakis/Commission* [2008] ECR II-11*, Summ.pub.
Case T-42/05, *Williams/Commission* [2008] ECR II-156*, Summ.pub.
Joined cases T-109/05 and T-444/05, *NLG /Commission* [nyr]
Case T-237/05, *Éditions Jacob/Commission* [nyr]
Case T-166/05, *Borax Europe/Commission* [2009] ECT II-28, Summ.pub.
Case T-403/05, *MyTravel Group plc. v. Commission* [2008] ECR II-2027.
Case T-144/05, *Muñiz v. Commission* [2008] ECR II-335*, Summ.pub
Case T-111/07, *Agrofert Holding/Commission* [nyr].
Case T-250/08 *Batchelor/ Commission* [nyr]

Case T-362/08, *IFAW Internationaler Tierschutz-Fonds/Commission* (“*IFAW II*”) [nyr]
Case T-439/08, *Agapiou Joséphidès v. Commission* [nyr].
Case T-471/08, *Toland/Parliament* [nyr]
Cases T-494/08 to T-500/08 and T-509/08, *Ryanair/Commission* [nyr]
Case T-233/09, *Access Info Europe/Council* [nyr].

Court of Justice

Case C-353/99 P, *Council v. Hautala* [2001] ECR I-9565
Case C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747
Case C-224/01, *Köbler* [2003] ECR I-10239
Opinion of Advocate General Poiares Maduro of 29 November 2007 in Joined cases C-39/05 P and C-52/05 P, *Sweden and Turco/Council* [2008] ECR I-4723.
Joined cases C-39/05 P and C-52/05 P, *Sweden and Turco/Council* [2008] ECR I-4723.
Opinion of Advocate General Poiares Maduro of 18 July 2007 in case C-64/05 P, *Sweden/Council*, paras 37-47.
Case C-64/05 P, *Sweden/Commission* (“*IFAW I*”) [2007] ECR I-11389
C-266/05 P, *Sison/Council* [2007] ECR I-1233.
Opinion of Advocate General Poiares Maduro of 1 October 2009 in joined cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden/API and Commission* [nyr].
Joined cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden/API and Commission* [nyr].
Case C-28/08 P, *Commission/Bavarian Lager* [nyr].
Case C-139/07P, *Commission/Technische Glaswerke Ilmenau* [nyr].
Opinion of Advocate General Kokott of 3 March 2011 in pending Case C-506/08 P *Sweden/MyTravel and Commission*.
Case C-506/08 P, *Sweden/MyTravel and Commission* [nyr].