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REASSESSING TRANSPARENCY: MIND THE “GENERAL PRESUMPTIONS”

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Abstract

This paper reconsiders the principle of transparency in the European Union (EU) legal order and takes as its focal point the contribution of the EU courts as regards the presumptions of non-disclosure. The aim is to investigate the role played by the judiciary in relation to a twofold question: How open can the Union’s decision-making be and is it possible for citizens to participate in the decision-making process of institutions, bodies, offices and agencies? The paper argues that accountability deficits in the field of access to documents have been filled, to an extent, by the EU courts’ imposition of boundaries on the broad derogations to the right. But nevertheless, the paper concludes that the establishment through the case law of general presumptions against openness has worsened the standards of accountability. Rather regrettably, while the legislature has set the default position to the widest access; this has now been reversed, specifically as regards non-legislative documents, by the judiciary to non-disclosure.

Keywords: transparency; access to documents; accountability; general presumptions

Introduction

This paper examines the problematic aspects of the access to documents regime, namely the ambiguously drafted derogations and the development of general presumptions through the case law. In particular, the paper argues that the EU courts’ imposition of boundaries on the derogations to the access right mitigates, to an extent, the problematic aspects of the access rules. Yet, the more recent development of the set of presumptions against openness has actually worsened the standards of accountability by reversing the default position, specifically in relation to non-legislative documents, from the widest possible access to non-disclosure. To substantiate this, the paper firstly examines the legislative framework as regards the access to documents rules and outlines the contribution of the EU courts in relation to the pre-Transparency Regulation regime from the point of view of accountability. Secondly, the paper assesses in detail whether the framework incorporated by the Transparency Regulation,¹ as applied to date, enhances openness in the decision-making process. The paper concludes that, as regards non-legislative documents, the net effect of judicial developments in the area of

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¹ Regulation (EC) No 1049/2001 [2001] OJ L145/43.

presumptions is to reduce the standards for public accountability that previously applied.

Overview of the legislative background

It is often alleged that the EU's decision-making is insufficiently transparent and that accountability deficits are even growing, something which compromises the Union's overall legitimacy.² The widespread notion that the Union's decision-making process lacked accountability and legitimacy³ was highlighted by the problems that arose during the process of ratification of the Maastricht Treaty.⁴ In consequence, the EU institutions had to consider alternatives that would rectify this public disinterest and would bring the Union closer to the citizens. Access to documents was seen from the early days as the solution to the Union's legitimacy problems and has been at the core of transparency efforts.⁵

The initial step which was proved to be the cornerstone of the public's fundamental right to information was a Declaration on transparency attached to the Final Act of the Maastricht Treaty. This provided that transparency enhances the democratic credentials of the institutions and increases the public's confidence in the administration.⁶ Declaration No. 17 illustrated the political willingness for the establishment of a "right" of access to information and is commonly considered as the beginning of a transparent era in the EU.⁷

² M Costa, *Mind the Accountability Gap in the European Union* (forthcoming, Routledge 2016); M Bovens, D Curtin and P Hart, *The Real World of EU Accountability, What Deficit?* (Oxford University Press, 2010); A Arnall and D Wincott (eds), *Accountability and Legitimacy in the EU* (Oxford University Press, 2002).

³ S Peers, 'The New Regulation on Access to Documents: A Critical Analysis' (2001) 21 (1) *Yearbook of European Law* 385; I Osterdahl, 'Openness v. Secrecy: Public Access to Documents in Sweden and the European Union' (1998) 23 (4) *European Law Review* 336.

⁴ The negative response from the Danish electorate and also the very near to the majority of the electorate voting in the referendum in 1992 chose to reject France's ratification of the Maastricht Treaty. The long discussions occurred in the UK Parliament and the challenge of the German ratification in the German Constitutional Court.

⁵ For an overview of the theoretical framework of transparency and openness in EU law see A Alemanno, 'Unpacking the Principle of Openness in EU Law Transparency, Participation and Democracy' (2014) 39 (1) *European Law Review* 72. It must be noted here that the majority of the Member States, with the notable exception of Cyprus, have regulated the issue and introduced provisions on public access either at Constitutional or at legislative level. Constitutional provisions exist in Sweden, Spain, the Netherlands, Austria, Portugal, Belgium, and Finland. Legislative provisions regulating access to documents exist in France, Denmark, Portugal, Ireland, Greece, Italy, Germany, the United Kingdom, Luxembourg, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Slovak Republic, Slovenia. A comparative analysis of the Union's public access to documents rules with public access legislation in the Member States reveals that the issue had already been regulated at the national level years before the EU legislation on the issue was introduced. See for example H Kranenborg and W Voermans, *Access to Information in the European Union: A Comparative Analysis of EC and Member State Legislation* (Europa Law Publishing, 2005).

⁶ Declaration No. 17, Treaty of the European Union, Maastricht, 7 February 1992.

⁷ S Peers, 'From Maastricht to Laeken: The Political Agenda of Openness and Transparency in the EU' in V Deckmyn (eds), *Increasing Transparency in the European Union* (European Institute of Public Administration, 2002); A Tomkins, 'Transparency and the Emergence of a European Administrative Law' (1999) 19 (1) *Yearbook of European Law* 217; D Curtin and H

In response to the Declaration and with the aim of bringing the Union closer to the citizens, the Commission first surveyed national law on access to documents and then released a communication on the issue.⁸ In the same year the Code of Conduct⁹ on access to documents was adopted and shortly afterwards implemented by the Council¹⁰ and the Commission.¹¹

The next step towards more transparency came with the Treaty of Amsterdam which provided that decisions need to be taken as openly and closely as possible to the citizen (Article 1 TEU). More importantly, under old Article 255 EC any EU citizen and any natural or legal person residing or having its registered office in a Member State could have access to EP, Council and Commission documents. Access was to be denied for the protection of certain public and private interests to be determined by the Council under the then co-decision procedure. Currently, Article 15 TFEU requires from all the EU organs to conduct their work openly. There is, therefore, a generic Treaty obligation upon the institutions to function openly. These Treaty amendments show clearly the political consensus to incorporate the principle of transparency in the EU. What is less clear, however, is the exact status of transparency in the EU legal order due to national divergences on the issue.¹²

More recently, the appointment of Timmermans, a strong advocate for greater transparency, as the new first vice-president of the Commission, sent the signal for higher ethical standards and increased transparency as regards EU lobbying with stakeholders.¹³ In consequence, Commission's officials can now only meet with registered industry representatives, consumers and non-governmental organisations that seek to influence decision-making in their favour.¹⁴ Yet, the situation in relation to the online register for expert groups¹⁵ is significantly different.¹⁶ The register appears to be incomplete and outdated as some of the experts do not exist and others that do exist are not listed on the register. Accountability deficits in this field exist because of the lack of

Meijer, 'The principle of open government in Schengen and the European Union: democratic retrogression?' (1995) 32 (2) *Common Market Law Review* 391.

⁸ [1993] OJ L 156/5 and [1993] OJ L 166/4.

⁹ 93/730/EC, Code of Conduct concerning public access to Council and Commission documents, OJ L340/41, 31 December 1993.

¹⁰ Decision 93/731, [1993] OJ L 340/43.

¹¹ Decision 94/90, [1994] OJ L 340/41.

¹² A Guggenbuhl, 'A Miracle Formula or an Old Powder in New Packaging? Transparency and Openness after Amsterdam' in V Deckmyn and I Thomson (eds), *Openness and Transparency in the European Union*, (European Institute of Public Administration, 1998); R W Davis, 'Public access to community documents: a fundamental human right?' (1999) 3 *European Integration Online Papers* 8.

¹³ See: <<http://ec.europa.eu/transparencyregister/pubic/>>.

¹⁴ R Mack, 'Lobbying Effectively in Brussels and Washington - Getting the Right Result' (2005) 9 (4) *Journal of Communication Management* 339.

¹⁵ Expert groups have been defined as 'a committee or group set up by and terminated by the Commission of its own accord or a committee/group that is regarded to be the Commission's expert group although not financed, chaired or set up by the Commission.' See T Larsson, *Precooking in the European Union - The World of Expert Groups* (Fritzes Offentliga Publikationer, 2003), at 14.

¹⁶ See: <<http://ec.europa.eu/transparency/regexpert/>>.

transparency regarding their exact number, composition and meetings.¹⁷ This lack of transparency is unacceptable given that expert groups are now crucial as conduits of expertise for the Commission and (indirectly) as sources of information for the EP and the Council, when holding the Commission accountable.

The pre-Regulation regime: The Code of Conduct

According to the CJEU, the main principle enshrined in the Code was that of the “widest possible access to documents”¹⁸ and the narrowest interpretation of the exceptions, the latter being a corollary of the former. The Code provided for access to be denied where disclosure could undermine the protection of certain public and private interests. Nevertheless, the very wide non-exhaustive list of mandatory exceptions¹⁹ effectively changed the balance from positive rights with negative exceptions to a text which treated access as the exception.²⁰ Even after the enactment of the Code there was dissatisfaction with the state of openness.²¹ The Council and the Commission, based on a system of secrecy, were reluctant to implement the Code in favour of openness.²² This led to the consistent refusal of various documents. As a result, the EU courts handed down several judgments interpreting the Council’s and the Commission’s decisions denying access under the Code.

The Court of First Instance, now the general court, held, for instance, that the exceptions must be justified on objective grounds and be applied strictly in a

¹⁷ S Peers and M Costa ‘Accountability for Delegated and Implementing Acts After the Treaty of Lisbon’, (2012) 18 (3) *European Law Journal* 427.

¹⁸ *Swenska Journalistförbundet v Council*, T-174/95, EU:T:1998:127, paragraph 110; *WWF v Commission*, T-105/95, EU:T:1997:26, paragraph 56; *Interporc (I) v Commission*, T-124/96, EU:T:1998:25, paragraph 49; *Kuijjer (II) v Council*, T-211/00, EU:T:2002:30, paragraph 55; B Vesterdorf, ‘Transparency-not just a vogue word’ (1998) 22 (3) *Fordham International Law Journal* 902.

¹⁹ *Carlsen v Council*, T-610/97, EU:T:1998:48, paragraph 48 where the President of the Court ruled that the mandatory exceptions regarding the protection of the public interest were not exhaustive and that an exception relating to the stability of the Community legal order which covers also the legal advice given by the legal service of the institutions existed.

²⁰ M de Leeuw, ‘The Regulation on Public Access to European Parliament, Council and Commission Documents in the European Union: Are Citizens Better Off?’ (2003) 28 (3) *European Law Review* 324.

²¹ D Curtin, ‘The Fundamental Principle of Open Decision-making and EU (Political) Citizenship’ in P Twomey and D O’Keefe (eds), *Legal Issues of the Amsterdam Treaty* (Hart Publishing, 1999), at p 72.

²² A Alemanno and O Stefan, ‘Openness at the Court of Justice of the European Union: Toppling a taboo’ (2014) 51 (1) *Common Market Law Review* 97; D Curtin, ‘Official secrets and the negotiation of international agreements: Is the EU executive unbound?’ (2013) 50 (2) *Common Market Law Review* 423; C Harlow, *Accountability in the European Union*, (Oxford University Press, 2002); See also the open letter addressed to the Secretary General of the Council by the European Federation of Journalists dated 30 April 1996 mentioning ‘grave reservations about the Council’s interpretation and practice of the Code of Conduct concerning access to documents’; H Brunmayr, ‘The Council’s Policy on Transparency’ in V Deckmyn and I Thomson (eds), *Openness and Transparency in the European Union* (European Institute of Public Administration, 1998); D Curtin, *Executive Power of the European Union* (Oxford University Press, 2011).

manner that did not defeat the application of the widest possible access.²³ More importantly, the courts ruled that abstract and general justifications could not be accepted and that the institutions were obliged to state reasons. In doing so, the institutions needed to carry out a concrete and individual assessment before deciding whether or not to release the requested documents.²⁴ The risk of the public or private interest being undermined must be reasonably foreseeable and not purely hypothetical.²⁵ The Court of First Instance ruled in *Kuijer (II)*²⁶ that the Council had wrongly applied the exception of the international relations. The Council failed to consider whether there was a risk that would prejudice the Union's relations with third countries. Instead of making this specific examination, refusal was based on general statements and assumptions rather than on an analysis of factors which effectively may undermine the exception. Yet, in limited circumstances, the requirement of a document-by-document assessment can be abandoned under the "administrative burden rule" whereas the institutions can balance the work that they will have to bear against the public interest in gaining access. In other words, excessive administrative work caused by a request may allow the institution to derogate from the principle of widest access.²⁷

The EU courts developed further the restriction of the administrative burden through the "general presumptions" of non-disclosure.²⁸ The latest tendency is that careful scrutiny of the requested documents is no longer necessary for certain categories of documents since similar considerations are likely to apply to documents of the same nature.²⁹ In consequence, the institutions can

²³ *WWF v Commission*, EU:T:1997:26, paragraph 55. This was the first judgment on the access to documents rules concerning the Commission. It established that the internal institutional rules on access are capable of conferring rights on citizens as well as imposing obligations upon the Commission. The General Court also ruled on the public interest exception concerning inspections and investigations and held that the documents relating to infringement proceedings according to art. 226 EC Treaty, now art. 258 TFEU, satisfy the conditions that must be met by the Commission in order to rely on the public interest exception pursuant to art. 4(1) of the Code of Conduct. *Netherlands v Council*, C-58/94, EU:C:2003:125; *Netherlands and Van der Wal v Commission*, C-174/98 P & 189/98 P, EU:C:2000:1, paragraph 27 and *Hautala v Council*, C-353/99 P, EU:C:2001:661, paragraph 25; RW Davis, 'The Court of Justice and the right of public access to Community-held documents' (2000) 25 (3) *European Law Review* 303.

²⁴ *Van der Wal v Commission*, T-83/96, EU:T:1998:59, paragraph 43; *Interporc (I) v Commission*, EU:T:1998:25, paragraph 52; *Svenska Journalistförbundet v Council*, EU:T:1998:127, paragraph 112; *Netherlands v Council*, EU:C:2003:125; *Netherlands and Van der Wal v Commission*, EU:C:2000:1, paragraph 27 and *Hautala v Council*, EU:C:2001:661, paragraph 25.

²⁵ *Kuijer (II) v Council*, EU:T:2002:30, paragraph 56.

²⁶ *Kuijer (II) v Council*, EU:T:2002:30.

²⁷ *Hautala v Council*, EU:C:2001:661, paragraph 30; *Hautala v Council*, T-14/98, EU:T:1999:157, paragraph 86; *Kuijer v Council*, T-188/98, EU:T:2000:101, paragraphs 55-56; *Kuijer (II) v Council*, EU:T:2002:30, paragraph 57. See e.g. J Heliskoski and P Leino, 'Darkness at the Break of Noon: The Case Law on Regulation No. 1049/2001 on Access to Documents' (2007) 43 (3) *Common Market Law Review* 735; A Flanagan, 'EU Freedom of Information: Determining where the Interest Lies' (2007) 13 (4) *European Public Law* 595.

²⁸ For the latest judicial approach see *LPN and Finland v Commission*, C-514/11 P & C-605/11 P, EU:C:2013:738.

²⁹ *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraphs 53-54.

now offer a general justification which applies to the entire administrative file. Rather regrettably, the requirement to show that the institutions have considered alternative ways of dealing with the request has disappeared since access would seldom be granted. These are significant limitations particularly from the standpoint of someone who wants to access certain documents. The administrative burden rule and its link with the “presumptions” case law raise significant concerns about the legality of the presumptions case law which are addressed further below.

Regulation 1049/2001 and the relevant case law

The principle of transparency was established formally in the EU legal order with the adoption of Regulation 1049/2001 which governs, at the time of writing, the fundamental³⁰ right of citizens and residents in the EU to access, in principle, all the documents drawn or held by the EP, Council and Commission.³¹ Unfortunately, this development has had only limited legal effect, as the then Court of First Instance held that Article 1 TEU and Article 255 EC had no direct effect and that the latter could not be used for the interpretation of the pre-Regulation rules.³² Yet, the adoption of this measure was seen as a real triumph for the advocates of transparency in the EU.³³ For the first time in the history of European integration, EU law set out the binding requirements for securing the democratic right of an informed citizenry. This Regulation reflects the overall intention, specified in the second subparagraph of Article 1 TEU, to mark a new stage in the process of creating an even closer Union among the peoples of Europe, in which decisions are taken as openly and as closely as possible to the citizen. It is also specified in the Recital 2 of the Regulation’s Preamble that there is a direct causal link to the fundamental right of European citizens and residents to have access with the democratic nature of the EU institutions. This formal ability of the public to participate, influence and monitor the decision-making process increased the state of accountability in the EU and secured open performance in the

³⁰ Legal scholars (and applicants before the courts) have repeatedly argued on the fundamental nature of the access right. See for example D Curtin, ‘Citizens’ fundamental right of access to EU information: an evolving digital passepartout?’ (2000) 37 (1) *Common Market Law Review* 7; M Bromberg, ‘Access to Documents: A General Principle of Community Law’, (2002) 27 (2) *European Law Review* 194. This discourse constitutes now a discussion for the past. Post Lisbon, Article 6 TEU recognizes the Charter of Fundamental Rights as legally binding granting it the same legal value as the Treaties. The Charter includes in Article 42 a right of access to documents. In addition Article 15 TFEU which is the equivalent of the ex Article 255 EC Treaty is significantly widened. For example it covers the Union institutions, bodies, offices and agencies and also the Court of Justice, the European Central Bank and the European Investment Bank are covered by this provision for their administrative tasks.

³¹ Although in principle the beneficiaries of the right of access to documents are EU citizens and residents, Article 2(2) of the Regulation grants discretion to the EU institutions bound by it to grant access to any natural or legal person not residing or not having its registered office in a MS. The institutions responded positively to this option. See Decision 2001/840 of the Council (OJ 2001, L313/40, Decision 2001/937 of the Commission (OJ 2001, L 345/94 and the Decision of the EP (OJ 2001, L 374 /I). Additionally, the application of the Regulation was extended, by separate legal measures, to all the EU institutions, bodies, offices and agencies.

³² *Petrie v Commission*, T-191/99, EU:T:2001:284, paragraphs 34-38.

³³ I Harden, ‘Citizenship and Information’, (2001) 7 (2) *European Public Law* 165.

decision-making process. Seen from this perspective, access to documents is considered to be an essential accountability component, since without information on what basis decisions are being taken, and by whom, it is impossible for the various accountability forums to hold the actors to account.

There are a number of ambiguous provisions within the Regulation which highlight the level of political disagreement over the exact status of transparency in the EU legal order. It is this ambiguity that imposes an extra duty upon the judiciary to establish the right balance amongst the various interests at stake. But nevertheless, pursuant to Article 2 of the Regulation, all documents held by the EU organs are subject to the access rules. This marks a significant change to the pre-Regulation regime. Under the Code of Conduct, documents held by the institutions but authored by third parties and Member States needed to be directed to them since they were not covered by the access rules. This broader access constitutes an important obvious step forward in respect of the former situation.³⁴

There are four types of exceptions provided by the Regulation: mandatory, “discretionary”, the protection of the decision-making process and, finally, documents originating from third parties and Member States. The first category of exceptions precludes access to any of the documents falling within it and calls for no balancing of interests at stake. If the institutions can prove that the documents fall into this category, refusal is automatically justified.³⁵ The second category, set out in Article 4(2), is not really discretionary, since it is written in the same mandatory way (“shall refuse”) as the exceptions in Article 4(1) but is subject to a public interest override in favour of disclosure. The decision-making exception provided by Article 4(3) is the equivalent of the confidentiality exception under the Code of Conduct. The former imposes with a higher threshold to non-disclosure. Specifically, it requires that the disclosure “significantly undermines” the decision-making. Accordingly, the balance is tipped towards disclosure.

In April 2008, the Commission published a legislative proposal to recast the Regulation.³⁶ Following the publication of the Commission’s proposal, the EP adopted a number of amendments and, after the Parliament’s requests, the Commission adopted a later proposal.³⁷ On 15 December 2011, the EP

³⁴ Peers, see note 3 above; De Leeuw, see note 19 above.

³⁵ H Kranenborg, ‘Access to documents and data protection in the European Union: On the public nature of personal data’ (2008) 45 (4) *Common Market Law Review* 1079; *Sison v Council*, joined cases T-110/03, T-150/03 and T-405/03, EU:T:2005:143; *Kuijjer (II) v Council*, EU:T:2002:30; *Hautala v Council*, EU:T:1999:157; *Sweden and Others v API and Commission*, joined cases C-514/07 P, C-528/07 P & C-532/07 P, EU:C:2010:541; *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376.

³⁶ Proposal for a Regulation regarding public access to European Parliament, Council and Commission documents, COM (2008) 229 final (April 30, 2008), 2008/0090(COD).

³⁷ Proposal for a Regulation regarding public access to European Parliament, Council and Commission documents, COM (2011) 137 final (March 30, 2011), 2011/0073(COD).

approved the proposal.³⁸ The weak points of the current regime, as already explained above, stem predominantly from the broad exceptions enshrined in the Regulation. Thus, in the amendment process, emphasis must be based upon the task of clarifying the exceptions. Rather regrettably, the procedure to recast the current access regime provides evidence to the contrary and the proposal itself is far from securing transparency.

In particular, Article 2(6) of the Commission's proposal reduces dramatically the current standards since it would leave outside the scope of the Regulation documents relating to individual decisions and investigations until the decision has been taken and the investigation has been closed or the act has become definitive. In addition, "documents containing information gathered or obtained from natural or legal persons by an institution in the framework of such investigations shall not be accessible to the public even after the closure of the investigation". At present, Article 4(2) of the Regulation provides that the disclosure of documents which would undermine the protection of inspections, investigations and audits shall be refused, unless there is an overriding public interest following disclosure. If the proposed provision is adopted this would constitute a step backwards in terms of the existing *status quo*, since this provision would not be protected by an overriding public interest in disclosure.

The pre-Regulation case law has, to a large extent, been incorporated into this Regulation and the interpretation of the old rules is still applicable unless clearly stated otherwise.³⁹ This is justified by Recital 3 of the Regulation's Preamble, which states that the Regulation "consolidates the initiatives which the institutions have already taken". Essentially, the jurisprudence towards the right of access has developed two approaches. The first one was described as "marginal review", whereas the second was called as the "foreseeability standard".⁴⁰ The former approach relates to the fact that the institutions exercise wide discretion when they apply the exception⁴¹ and in consequence judicial review is significantly restrained. The latter confirms the requirement for the widest possible access so long as the risk to harm the protected interest is not merely hypothetical.

³⁸ For a general criticism of the Commission's proposal see N Diamandouros, 'Contribution of the European Ombudsman to the public hearing on the revision of Regulation 1049/2001 on public access to documents', speech delivered in the EP on 2 June 2008.

³⁹ Peers, see note 3; H Kranenborg, 'Is it Time to Revise the European Regulation on Public Access to Documents?' (2006) 12 (2) *European Public Law* 251; *Franchet and Byk v Commission*, joined cases T-391/03 & T-70/04, EU:T:2006:190, paragraphs 82 and 88 where the court applied and further developed the prior jurisprudence concerning the exceptions of the access rules.

⁴⁰ D Adamski, 'How wide is "the widest possible"?' Judicial interpretation of the exceptions to the right of access to official documents revisited', (2009) 46 (2) *Common Market Law Review* 521.

⁴¹ *Kuijer (II) v Council*, EU:T:2002:30, paragraph 53: 'When the Council decides whether the public interest may be undermined by realising a document, it exercises a discretion which is among the political responsibilities conferred on it by provisions of the Treaties'; *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 15: 'in areas covered by the mandatory exceptions to public access to documents, provided for in Art. 4(1) (a) of Regulation 1049/2001, the institutions enjoy a wide discretion'; *Hautala v Council*, EU:T:1999:157, paragraph 44.

The Article 4.1 case law consistently applies the marginal review standard, since judicial review is “limited to verifying whether the procedural rules have been complied with, the contested decision is properly reasoned, and the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or misuse of powers”.⁴² Yet, the exceptions set out in Article 4 must be interpreted and applied strictly to secure the *effet utile* of the access right. It follows from this, that when the institution decides to rely on any of the exceptions “it must explain how access to that document could specifically and effectively undermine the interest protected by an exception”.⁴³ This delicate balancing task has been deemed essential and access cannot be denied without firstly appraising the requested documents on a case-by-case basis. Despite this careful and consistent emphasis in support of transparency, as already explained above in this contribution, there is a parallel development of a set of general presumptions (against openness) which reveals the existence of a paradox. Arguably, general presumptions defeat the very purpose of the widest access which is emphasised categorically during the past 20 years in the case law.⁴⁴ More fundamentally, this approach reveals that the EU courts have taken a rather limited line on openness which necessarily contributes to the debate about the lack of accountability in the EU. To substantiate this, the application of the exceptions regarding legislative, administrative and judicial documents, as per settled case law, is discussed below.

Legislative Documents

In *Turco*,⁴⁵ the applicant requested access to an opinion of the Council’s legal service relating to a proposal for a Council Directive laying down the minimum standards for the reception of applicants for asylum in Member States.⁴⁶ The general court, in keeping with prior case law, reiterated that denial of access must be based on a concrete and individual examination. But nevertheless, the Council’s generality was this time justified by the fact that giving additional information would deprive the exception relied upon of its effect.⁴⁷ The rationale behind the legal advice exception, according to the court, is to avoid uncertainty by raising doubts over the legality of EU legislation,⁴⁸ to secure independence of the legal service and to protect the interest of institution to receive independent and frank legal advice.⁴⁹ In essence, the court ruled that the legal advice exception should escape the well-established duty, incumbent on institutions, to carry out the case-by-case assessment and that the public interest override will never apply. In other words, it would be

⁴² *Hautala v Council*, EU:T:1999:157, paragraph 72. This has been confirmed as regards the Regulation see *Sison v Council*, EU:T:2005:143, paragraph 46; *Sison v Council*, EU:C:2007:75, paragraphs 34 and 64.

⁴³ *Borax v Commission*, T-121/05, EU:T:2009:64.

⁴⁴ See *LPN and Finland v Commission*, EU:C:2013:738.

⁴⁵ *Turco v Council*, T-84/03, EU:T:2004:339.

⁴⁶ *Turco v Council*, EU:T:2004:339, paragraph 4.

⁴⁷ *Turco v Council*, EU:T:2004:339, paragraph 74.

⁴⁸ *Turco v Council*, EU:T:2004:339, paragraph 74.

⁴⁹ *Turco v Council*, EU:T:2004:339, paragraph 79.

impossible to imagine a case in which the override would ever be applied in practice.

In relation to legislative matters, this case law can no longer be considered as good law. The Court of Justice, in the joined cases of *Sweden and Turco v Council*,⁵⁰ invalidated the general court's reasoning, upheld the appeal and ruled that legal advice given in the remit of legislative procedures must be released. The judgment addressed how institutions should deal with disclosure requests relating to legal advice. It was held that when institutions are asked to disclose such a document, they must carry out a specific three-stage procedure that corresponds to the three criteria set out by the court.⁵¹ Firstly, the institution must consider and satisfy itself that the document does relate to legal advice and if so to examine whether partial access can be given.⁵² Secondly, the institution is required to consider whether disclosure of any parts of the document would undermine the protection of the advice.⁵³ The court noted that the exception must be understood in the light of the purpose of the Regulation. Under this, the exception "must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice".⁵⁴ Finally, it is incumbent on the institution to balance the interest in non-disclosure against any possible countervailing interest, bearing in mind the overall purpose to secure the widest possible access, giving a reasoned judgment.⁵⁵

What is most important for the interpretation given in *Turco* is the finding that the general court erred in law in concluding that the *raison d'être* of the legal advice exception is not to avoid fuelling doubts over the legality of legislation. According to the wording of the Court of Justice, "it is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole".⁵⁶ Therefore, while the judgment increases public access as regards legal advice, it also more fundamentally places the access rules next to the principles of democracy and civil participation in the Union's overall decision-making process. It does so in a way which highlights the ability of the citizenry to have access to information as one of Union's fundamental credentials.

By upholding the appeal, the Court of Justice reintroduced the cornerstone of the access regime and its relationship with the state of accountability and legitimacy in the EU. The ability of the citizenry to assess the impact,

⁵⁰ *Sweden and Turco v Council*, joined cases C-39/05 P and C-52/05 P, EU:C:2008:374. See also A Arnall, 'Joined Cases C-39/05 P & C-52/05 P, Sweden and Turco v Council, judgment of the Grand Chamber of 1 July 2008' (2009) 46 (4) *Common Market Law Review* 1219; D Adamski, 'Approximating a workable compromise on access to official documents: The 2011 developments in the European courts' (2012) 49 (2) *Common Market Law Review* 521.

⁵¹ *Sweden and Turco v Council*, EU:C:2008:374, paragraph 37.

⁵² *Sweden and Turco v Council*, EU:C:2008:374, paragraph 38.

⁵³ *Sweden and Turco v Council*, EU:C:2008:374, paragraph 40.

⁵⁴ *Sweden and Turco v Council*, EU:C:2008:374, paragraph 42.

⁵⁵ *Sweden and Turco v Council*, EU:C:2008:374, paragraph 44.

⁵⁶ *Sweden and Turco v Council*, EU:C:2008:374, paragraph 59.

comment upon, influence the development of policies and finally hold the “government” accountable is highlighted in the judgment. It follows clearly from the reasoning of the court that the EU is democratic in part because of the ability of the citizens to stay informed. Similarly and in contrast with what was ruled by the general court, the overriding public interest pressing for disclosure of the legal advice needs to be no different from the principles of openness, transparency, democracy and civil participation in the decision-making process which already underlie the Regulation.⁵⁷ The last limb of the delicate balancing exercise is perhaps the greatest contribution of the court in terms of accountability since it prioritises access amongst the countervailing interests at stake.

The validity of wider access in legislative matters was confirmed in *Access info*.⁵⁸ The general court ruled that the Council erred not to disclose the identity of countries taking positions on the reform of the EU’s access to documents rules. In light of this, the court stated that the Council had “in no way demonstrated”⁵⁹ how publication of the country names would “seriously undermine its decision-making process”.⁶⁰ The court further found that “if citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process ... and have access to all relevant information”.⁶¹ The Court of Justice confirmed this approach and rejected the appeal lodged by the Council.⁶² The Council, however, in practice continues not to publish the names of the national delegations and full access is confined to a successful request under the Regulation.

The approach taken in *Turco* was indeed promising in terms of transparency and was described as “spectacularly” progressive.⁶³ It clearly provided the foundations to disclose legal advice given also in the remit of the executive action of the EU institutions. This was upheld by the general court and recently confirmed by the Court of Justice in *In’t Veld*.⁶⁴ Yet, it is deemed necessary to revisit the wider contribution of *Turco*. A further and detailed examination indicates significant shortcomings of the judgment. In particular, the “general presumptions” line of reasoning as introduced by *Turco* raises significant questions as to the fundamental nature of the access right. In this regard, the court established that “[i]t is in principle, open to the Council to base its decisions [...] on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature.”⁶⁵

⁵⁷ *Sweden and Turco v Council*, EU:C:2008:374, paragraph 74.

⁵⁸ *Access Info Europe v Council*, T-233/09, EU:T:2011:105.

⁵⁹ *Access Info Europe v Council*, EU:T:2011:105, paragraph 83.

⁶⁰ *Access Info Europe v Council*, EU:T:2011:105, paragraph 84.

⁶¹ *Access Info Europe v Council*, EU:T:2011:105, paragraph 69.

⁶² *Council v Access Info Europe*, C-280/11 P, EU:C:2013:671.

⁶³ See Adamski note 49 above.

⁶⁴ *Sophie In’t Veld v Commission*, T-301/10, EU:T:2013:135; *Council v Sophie In’t Veld*, C-350/12 P, EU:T:2013:135.

⁶⁵ *Sweden and Turco v Council*, EU:C:2008:374, paragraph 50.

The court effectively ruled that the Council, and arguably by analogy all the other institutions, can deny access based on general considerations as opposed to the well-established duty for a specific and detailed examination. After the *Turco* ruling, there was every possibility that the institutions, the Commission in particular, would rely on general considerations in order to avoid carrying out a concrete appraisal of the requested documents. The court, with great respect, set the foundations to depart from the principle of transparency and to disregard almost two decades of jurisprudence. Indeed, the later developments, examined further below, provide with sufficient evidence to question the validity of the early finding that the judgment was spectacularly progressive.

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

Despite the adoption of the Regulation, the state of transparency in the EU is still problematic. The institutions continuously rely on a culture of secrecy and take every opportunity to deny access. This is particularly the case as regards administrative documents. In *Verein für Konsumenteninformation*,⁶⁶ a consumers' organisation, had sought access to the Commission's administrative file containing 47,000 pages. The Commission refused access to the entire file on the grounds that partial access "would have represented an excessive and disproportionate amount of work for it".⁶⁷ In essence, the Commission denied access without even looking at the file, not even attempting to browse through the documents. But assume for a while that the Commission was right and the request was particularly burdensome. Assume further that the request could even paralyse the proper functioning of the institution. Should it result in the public being deprived from the fundamental right of access in such generic terms? Can it be considered as acceptable for the institutions to reduce the standards of transparency without invoking the exceptions provided by the Regulation?

The Regulation does not provide in any provision for the requirements of concrete and individual assessment to be abandoned under any circumstances. While Article 6(3) provides for an informal consultation aiming to find a fair solution, Article 7(3) provides that the time limit for handling an application can, under certain circumstances, be extended. Similarly, the Court noted that in the absence of a fair solution mentioned in Article 6(3), the Regulation provides no ruling similar to the one developed through the jurisprudence of the Courts relating to the administrative burden.⁶⁸ The Court moved on to note that the principle of proportionality may justify refusal of a concrete and individual examination to avoid cases where a manifestly unreasonable number of documents is requested which could result in paralysis of the proper functioning of the institution.⁶⁹

⁶⁶ *Verein für Konsumenteninformation v Commission*, T-2/03, EU:T:2005:125.

⁶⁷ *Verein für Konsumenteninformation v Commission*, EU:T:2005:125, paragraph 20.

⁶⁸ *Verein für Konsumenteninformation v Commission*, EU:T:2005:125, paragraph 96.

⁶⁹ *Verein für Konsumenteninformation v Commission*, EU:T:2005:125, paragraph 101.

According to the court, Article 6(3) reflects the possibility that where a very large number of documents is requested the institution can “reconcile the interests of the applicant with those of good administration”.⁷⁰ As a result, there can be cases that require no individual examination. The court observed that the possibility of non-concrete assessment must satisfy four requirements:

i) The administrative burden entailed by concrete and individual examination must be heavy and exceed the limits of what may be reasonably required.

ii) The burden of proof rests within the institution relying on its unreasonableness.

iii) The institution must consult with the applicant in order to ascertain his interest and consider how it might adopt a measure less onerous than a concrete and individual examination.

iv) The institution must prioritise the most favourable option for the applicant’s right of access.⁷¹

With great respect to the judgment, the validity of the criteria quoted above can be questioned. The requirements lack proper foundation on the legislation. Had the legislature wanted to incorporate the pre-Regulation case law on administrative burden it would have had every opportunity to do so. Yet, the legislature did not do so because they could hardly see how this restriction could fit with the principle of the widest possible access and with the corollary fundamental legal standard to interpret the exceptions narrowly.

Similarly in 2010, *TGI*⁷² concerned a request for access to certain large state aid files held by the Commission. The Court of Justice by citing *Turco* this time confirmed the “settled case law” as regards the existence of a general presumption against disclosure.⁷³ In consequence, *TGI* upheld the validity of the presumption and established that administrative documents are essentially exempted from the document-by-document appraisal and that the public interest override will never apply unless particularly pertinent.⁷⁴

More recently, the validity of the general presumption was upheld in *LPN*.⁷⁵ Citing this time *TGI* and *Turco*, *LPN* confirmed the existence of the presumption in the administrative file, in what appears to be a new development, to cover infringement proceedings.⁷⁶ On appeal, the applicants,

⁷⁰ *Verein für Konsumenteninformation v Commission*, EU:T:2005:125, paragraph 101.

⁷¹ *Verein für Konsumenteninformation v Commission*, EU:T:2005:125, paragraphs 112-115.

⁷² *Commission v Technische Glaswerke Ilmenau* (C-139/07 P) [2010] E.C.R. I-5885; *Commission v Agrofert Holding a.s.* (C-477/10 P), not yet reported; *Commission v Editions Odile Jacob SAS* (C-404/10 P) not yet reported; *Guido Strack v Commission* (T-392/07) not yet reported.

⁷³ *Commission v Technische Glaswerke Ilmenau*, EU:C:2010:376, paragraph 61.

⁷⁴ *Commission v Technische Glaswerke Ilmenau*, EU:C:2010:376, paragraph 62.

⁷⁵ *LPN and Finland v Commission*, EU:C:2013:738.

⁷⁶ *LPN v Commission*, T-29/08, EU:T:2011:448, paragraph 126.

LPN and Finland, argued that the Commission denied access without carrying out, in violation of settled case law, a concrete and individual assessment of the requested documents.⁷⁷ The court ruled "... that it can be *presumed* (emphasis added) that the disclosure of the documents concerning the infringement proceedings during the pre-litigation stage risks altering the nature of that procedure and changing the way it proceeds and, accordingly, that disclosure would in principle undermine the protection of the purpose of investigations, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001".⁷⁸

The presumptions case law, upheld recently in *LPN*, is fairly vague and in direct contrast with the Treaty framework, in particular with the requirements to take decisions as openly as possible pursuant to Article 1 TEU as well as with the overall wording of the Regulation. The Regulation provides with no basis for the establishment of general presumptions. The Court of Justice's position regarding the administrative functions imposes significant constitutional ramifications on the fundamental aspect of the access right and incorporates limitations without the required level of explanation and clarity. The Court also did not take into account the overriding public interest as regards the infringement proceedings. As a result, the judgment makes one to wonder if such an override cannot be established in an area where possible violations of EU law by Member States might take place then remains difficult to conceive a scenario where the override would ever be accepted by the court.

Interestingly, *LPN* treats in a rather paradoxical way a respectable non-governmental organisation as a mere "busybody" unable to invoke successfully the override. This latest jurisprudence reveals the existence of a paradox. We saw the court to confirm categorically through the last 20 years that openness secures public oversight of the EU's decision-making describing it as one of the fundamental credentials of the Union's democratic society. Yet, we have evidence that the court provides little or no contribution in relation to the opening up the functioning of the institutions. The judgment significantly decreases public access and leaves intact the possibility of the Commission, and by analogy the other institutions, to refuse access as regards to the entire administrative file without even looking at the individual documents.

Judicial documents

Equally restrictive is the approach of the court in relation to its own documents. Currently, it is presumed that disclosure of judicial documents is capable of causing harm, in a foreseeable way, to the outcome of court proceedings. In *API*,⁷⁹ a non-profit-making organisation of foreign journalists made a request to have access to the Commission's submissions regarding,

⁷⁷ *LPN and Finland v Commission*, EU:C:2013:738, paragraph 35.

⁷⁸ *LPN and Finland v Commission*, EU:C:2013:738, paragraph 65.

⁷⁹ *Association de la presse internationale a.s.b.l. (API) v Commission*, T-36/04, EU:T:2007:258.

inter alia, a number of ongoing cases and one which, although closed, was related to an open case.⁸⁰ The general court ruled that the Commission could provide with a blanket refusal in relation to all documents so long as the oral argument in the court proceedings had not yet been presented. The rationale behind this is to protect the interest of the litigant from external pressure until the case reaches the final stage of the hearing.⁸¹

With great respect, the Court's ruling was wrong to find that the Commission was in a position to refuse access to the whole category of judicial documents without following a concrete and individual examination and without stating detailed reasons. The blanket refusal accepted by the court, justified only by the fact that the litigant needs to protect its litigious interest and stay free from external pressure, seems to misunderstand the rationale of the access to documents regime.⁸² More importantly, it leaves the access to documents rules at a vulnerable stage. As already explained above, the mere fact that a document referred to in the application for access concerns an interest protected by an exception does not justify application of that exception. The exceptions are applicable only if the institution had previously assessed whether access would specifically and actually undermine the protected interest and, if so, there was no overriding public interest under Article 4(2) and (3). The risk of the protected interest being undermined must not be purely hypothetical. Consequently, the examination which the institution must undertake needs to be carried out in a concrete manner and be apparent from the reasons given. Only a concrete and individual examination, as opposed to an abstract, overall examination, would enable the institution to assess the possibility of granting the applicant partial access pursuant to Article 4(6) of the Regulation. The institution's obligation to undertake this type of assessment is applicable to all the exceptions found in paragraphs 1 to 3 of Article 4.

On appeal, the court reiterated that the institutions may base their decisions on general presumptions since considerations of a similar kind are likely to apply to documents of the same nature.⁸³ The court confirmed that judicial documents are covered by a presumption against openness and that disclosure of the pleadings would undermine their protection, covered by the exception of the second indent of Article 4(2), while those proceedings remain pending.⁸⁴ In consequence, the Commission bears no obligation "to carry out

⁸⁰ *Honeywell International v Commission*, T-209/01, EU:T:2005:455 and *General Electric v Commission*, T-210/01, EU:T:2005:456; *Airtours v Commission*, T-342/99, EU:T:2002:146; *Commission v Austria*, C-203/03, EU:C:2005:76; *Commission v United Kingdom*, C-466/98, EU:C:2002:624; *Commission v Denmark*, C-467/98, EU:C:2002:625; *Commission v Finland*, C-469/98, EU:C:2002:627; *Commission v Belgium*, C-471/98, EU:C:2002:628; *Commission v Luxembourg*, C-472/98, EU:C:2002:629; *Commission v Austria*, C-475/98, EU:C:2002:630 and *Commission v Germany* ("the Open Skies cases"), C-476/98, EU:C:2002:631.

⁸¹ *Association de la presse internationale a.s.b.l. (API) v Commission*, EU:T:2007:258, paragraph 99.

⁸² P Leino, 'Just a little sunshine in the rain: The 2010 case law of the European Court of Justice on access to documents' (2011) 48 (4) *Common Market Law Review* 1215.

⁸³ *Sweden and Others v API and Commission*, EU:C:2010:541, paragraph 74.

⁸⁴ *Sweden and Others v API and Commission*, EU:C:2010:541, paragraph 94.

a concrete assessment of each document requested in order to determine whether, given the specific content of that document, its disclosure would undermine the court proceedings to which it relates”⁸⁵.

With this judgment, the Court of Justice significantly curtailed the already limited, public access as regards court proceedings. Post *API*, the burden of proof to rebut the presumption of non-disclosure rests on the applicant, whereas previously the institutions had the burden to prove that concrete and individual examination was not necessary.⁸⁶ This is deeply unsatisfactory for the state of transparency and in conjunction with the finding that the overriding public interest can only be taken into account as long as it is particularly pertinent effectively leaves with no access right as regards judicial documents.⁸⁷ Overall, the decision of the court is problematic mainly for two reasons. Firstly, it decreases dramatically public access as regards judicial documents and sets the default position to non-disclosure; secondly and more fundamentally, requires the applicant, rather illogically, to discharge the burden of the presumption, given that the plaintiff has no sight of the documents.

While there is a clear strand in the case law about the general presumptions, still there are cases in which the EU courts have rejected the idea of the presumption and pointed out to the opposite direction on the grounds that disclosure could not distort the administrative process.⁸⁸ Notably, the general court ruled recently in *Breyer*⁸⁹ that the Commission should not automatically refuse access to documents submitted to the EU courts and highlighted that the presumption of non-disclosure does only apply while the court proceeding remain pending. The aftermath of *Breyer*, although it is very early to say with certainty, seems to suggest that the court is ready to reconsider its approach on the presumptions. Nevertheless, general considerations leading to the presumption of non-disclosure are well-established and very difficult to rebut.⁹⁰ In practice, the nature of the requested documents gives rise to different judicial treatment. As already explained above, while the case law significantly increased public access as regards legislative documents it has set the default position in regards to non-legislative documents to non-disclosure. These fundamental discrepancies, as to the nature of documents, question the contribution of the courts in respecting the standards of transparency mandated by the legislature and highlight the overall problematic state of transparency in the EU.

⁸⁵ *Sweden and Others v API and Commission*, EU:C:2010:541, paragraph 104.

⁸⁶ *Verein für Konsumenteninformation v Commission*, EU:T:2005:125.

⁸⁷ *Sweden and Others v API and Commission*, EU:C:2010:541, paragraph 157.

⁸⁸ *Sweden v Commission and MyTravel Group plc. (MyTravel)*, C-506/08 P, EU:C:2011:496; *Batchelor v Commission*, T-250/08, EU:T:2011:236; *NLG v Commission*, joined cases T-109 & 444/05, EU:T:2011:235.

⁸⁹ *Patrick Breyer v Commission*, T-188/12, EU:T:2015:124.

⁹⁰ *LPN and Finland v Commission*, EU:C:2013:738; *Dennekamp v Parliament*, T-82/09, EU:T:2011:688; *Sweden and Others v API and Commission*, EU:C:2010:541; *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376.

Conclusion

The Treaty of Lisbon attempted to rectify the transparency inadequacies by incorporating a generic obligation upon all the EU organs to function openly. In doing so, the Treaty has reinforced that, without access to the relevant information, citizens are unable to participate in the decision-making process, to monitor and finally to hold “governmental” actors accountable. In this way, transparency enhances awareness, illustrates understanding of the ultimate objectives that the decision-making processes aim to achieve and finally grants legitimacy upon the EU. Similarly, the transparency Regulation has improved the position of the access regime in several aspects. Notably, it has codified the exceptions and confirmed the widest possible access.

The judiciary has also contributed, to a greater or lesser extent, to the development of the access right. It has done so in a more limited way as regards administrative and judicial documents. The extent to which the jurisprudence acknowledges the existence of general presumptions is fundamentally wrong. As a result of this, the institutions can now offer a wide justification often relating to the entire administrative file and provide no evidence that they considered less onerous ways of dealing with the request. This is especially true in the light of the significant number of cases involving general presumptions as regards the administrative functions of the institutions.⁹¹ In practice, the presumptions case law establishes a clear distinction between legislative and non-legislative documents and confirms, contrary to the wording of the Regulation, the widest possible access with regards to the former category. More regrettably, the ongoing procedure to recast the existing legislation indicates that, in the years to come, we may be in a completely new situation, not necessarily a better one.

⁹¹ *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376; *Commission v Agrofert Holding a.s.*, C-477/10 P, EU:C:2012:394; *LPN and Finland v Commission*, EU:C:2013:738.