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Accountability through Transparency and the role of the Court of Justice

Abstract

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. In this regard, the EU's access to documents regime can be considered as an on-going process capable of securing, through a set of binding rules, open performance of the decision-making process. It is here that the role of the Court of Justice of the EU (CJEU) comes into play. Tasked with interpreting the access regime, the CJEU imposed boundaries on the broad derogations to the right. Yet, in terms of accountability, the transparency friendly line of case law has creatively been interpreted in a way that now restricts the access right per se. On the whole, the paper concludes that the CJEU, with all due respect, contributed to the accountability deficit of the EU's access to documents regime.

Keywords: Role of the CJEU; Regulation 1049/2001; access to documents; accountability deficit.

1. Introduction

This paper examines the EU access to documents regime from the point of accountability. It argues that the latest judicial tendency creates a substantial accountability gap in the area. To substantiate this, the first part of the paper examines whether the judicial process before the CJEU qualifies as a fully-fledged accountability relation whereas the EU organs can be held accountable by the CJEU on how they implemented the Transparency Regulation.¹ The paper then outlines the EU's transparency framework and examines whether the contribution of the CJEU strengthens public accountability. The paper adopts a historical perspective by examining the Code of conduct of access to EU documents introduced in 1993 and considers the *initial* contribution of the EU Courts with regards to transparency. Additionally, the paper examines the developments introduced by the Transparency Regulation. Finally, the paper argues that as regards non-legislative documents, the net effect of judicial developments is to reduce the standards for public accountability.

2. Accountability

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¹ Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

This section of the paper focuses on whether the judicial process before the Court can qualify as an accountability relation. Observing the contribution of the CJEU with regards to transparency, as well as assessing whether the EU's access to documents regime suffers from accountability deficits, along with examining alternatives on how to mitigate these deficits, presupposes a clear understanding of the meaning of accountability. This section therefore begins by explaining accountability to understand what is, and what is not, meant by the concept. The definition adopted and explained here is used to measure accountability (deficits) in relation to the EU's access to documents rules and conversely highlights why more accountability is being called for in this area.

Accountability is a term frequently used in EU documents: 'we live in the age of accountability, wherever one looks there is a discussion and debate over accountability'²; the word 'crops up everywhere performing all manner of analytical and rhetorical tasks and carrying most of the burdens of democratic "governance."³ In its fundamental sense, accountability means being answerable for one's actions to some authority and, if necessary, having to suffer sanctions for actions not in accordance with the mandate granted by that authority. This form of accountability can be broken down into four major elements: the setting of standards, the obtaining of an account, the judging of such an account and a decision about the consequences that arise from such a judgment.⁴ A suitable definition of the term is provided by Bovens where he describes accountability as a 'relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences.'⁵ In other words, 'A is accountable to B when A is obliged to inform B about A's (past or future) actions and decisions, to justify them, and to suffer punishment in the case of eventual misconduct.'⁶

Accountability is also closely related with the notion of independence. Indeed, most commentators focus on the challenge of finding the fine balance between accountability and independence. In doing so, the literature considers independence as a factor or rather as a threat which may have a negative impact upon accountability. The apparent consensus is that accountability cannot co-exist with independence and that independence overload leads to a non-accountable agent.⁷ Similarly, when the accountability forum is constantly steering the behavior of the agent the accountability gap is drastically diminished. Yet, the autonomy of the agent under these circumstances is equally reduced and the outcome is to have an 'accountable' but rather a dependent agent. I therefore argue for the contrary and I consider that the person or the body under scrutiny, the actor, needs to be accountable and simultaneously independent throughout the decision-

² Fisher, 2004, p 495

³ Mulgan 2000, p 555

⁴ Davies 2001

⁵ Bovens 2007, p 447

⁶ Schedler 1997, p 17

⁷ Geradin 2005, p 231; Busuioc 2009

making process. Following from this, the accountability relationship can be effective so long as the delegator does not directly interfere in the decentralized decision-making process. After all, accountability can be meaningful if the agent takes decisions by relying on highly complicated and technical scientific knowledge and expertise.⁸ When the actions of the agent are directed by the delegator, the *raison d'être* of delegation defeats its purpose. In consequence, I consider that conceptually accountability and independence are interrelated terms and not mutually exclusive. Overall, the whole essence of accountability calls for independence from politics while the actor executes the delegated tasks.

What role do the EU Courts play to the state of accountability in the EU? To address this, we need to focus on the field of access to documents since accountability's alter ego, transparency, ensures and requires accessibility of all the relevant information by taking decisions out of the backroom.⁹ In consequence, access to documents rules become a pre-requisite of the accountability relationship.¹⁰ It has been argued, rightly, that 'no society can be considered truly democratic if its citizens are denied the possibility of vindicating their legal rights in judicial proceedings, whether against the oppressive acts of a powerful legislature—even a democratically elected one—or against the unlawful practices of an overweening administration.'¹¹ As a consequence, the EU Courts can play a crucial role in public accountability by bringing transparency cases to public attention. It has been noted that:

The fact that the citizens are aware of what the administration is doing is a guarantee that it will operate properly. Supervision by those who confer legitimacy on the public authorities encourages them to be effective in adhering to their [citizens'] initial will and can thereby inspire their confidence, which is a guarantee of public content as well as the proper functioning of the democratic system.¹²

Overall, I consider that the status of accountability in the EU can only be properly understood through the lens of the access to documents rules. The public's right to hold decision-makers into account, by assessing the impact of the activities of the EU and by commenting upon those activities, can effectively be exercised if there are rules in place which allow people to access the relevant information. 'After all, without information on what decisions are being taken and by whom, it will not be possible for various accountability forums to hold actors to account'.¹³ In this way, transparency enhances awareness and understanding of the ultimate objectives that the

⁸ Busuioc 2013

⁹ Fisher 2004, p 503

¹⁰ Frost 2003, p 87

¹¹ Mancini and Keeling 1994, p 181

¹² *Hautala v Council* (353/99P) ECLI:EU:C:2001:392, opinion of Advocate-General Leger at [52]

¹³ Brandsma, Curtin and Meijer 2008, p 819

decision-making processes aim to achieve.¹⁴ 'Without maximum access to government information, citizens have no way effectively to evaluate and monitor the process by which laws and policies get made and enforced'.¹⁵ In the words of the judiciary, 'the widest possible access to documents ... is essential to enable citizens to carry out genuine and efficient monitoring of the exercise of the powers vested in the [Union] institutions...'.¹⁶ Accountability is now clearly set out in the second recital in the preamble of the Transparency Regulation which states that 'openness ... guarantees that the administration enjoys greater legitimacy and is more effective and more *accountable* to the citizen in a democratic system'. Consequently, the constitutional role of the Court to interpret the access to documents rules has a significant impact upon the status of accountability in the EU legal order since the access regime is used as a tool to assess and strengthen the EU's legitimacy and accountability.

The duty of the CJEU is to rule on whether the legal requirements stipulated in the Transparency Regulation have been respected and to issue binding judgments settling the dispute. The adjudication is based on a legal debate amongst the litigants. The Court, as the stereotypical accountability forum, assesses the performance of the litigants, the actors. The assessment also involves the giving of an account of the defendant's prior conduct on how they applied the Transparency Regulation. In the end, the Court has discretion to impose sanctions that take the form of the annulment of the contested measure and rule on the legal costs. This is consistent with legislative framework which provides for a mere annulment of the contested decision rather than for a substantive entitlement of the citizenry to access official documents.

Pursuant to the accountability requirements, the actor is liable for giving an explanation for their actions and to suffer the consequences where appropriate. In that regard, the role of the Court is often understood as a process that operates retrospectively in the sense that it assesses the prior conduct of the actor, and as such it meets perfectly the accountability requirements which mainly deal with past wrongdoings. This is the core meaning of the accountability relationship: the liability to give an account or explanation of actions and, where appropriate, to suffer the consequences, take the blame or undertake to put matters right if it should appear that errors have been made. That is essentially the role of the Court in the access to documents litigation. In order for the Court to comply with the accountability requirements, it needs to ensure public awareness and participation in the decision-making process. To see whether this is the case, the remaining of the paper outlines the EU's access to documents regime and assesses the role of the EU Courts in interpreting that regime.

¹⁴ Harden (2001), p 165

¹⁵ Kierkegaard (2009), p 3-4

¹⁶ *Interporc v Commission* ECLI:EU:T:1999:308 para 39

3. Historical overview of the Legislative Background

The main problems that occurred during the process of ratification of the Treaty of Maastricht¹⁷ and particularly the negative response from Danish public opinion confirmed the widespread notion that the Union's decision-making process lacked accountability and legitimacy. In consequence, accountability was placed high on the political agenda and forced the Heads of States and Government as well the other EU institutions to find alternatives that would bring the Union closer to the citizens. Access to documents was believed to be the solution to the problem.

Declaration No17 attached to the Final Act of the Maastricht Treaty 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. The conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.

Declaration No 17, quoted above, illustrated the willingness for the establishment of a general 'right' of access to information. This non-binding political statement constitutes a type of soft law and not rule of law of higher order which the previous rules would be invalid for not complying with.¹⁸ Rightly, the Advocate General Maduro opined that declarations attached to the Treaties can be used as a basis in order to clarify Treaty provisions so long as they do not amend explicit stipulations provided in the Treaties.¹⁹ This approach is in line with the case law which confirms that declarations can be used as a basis for interpretation of Treaty provisions.²⁰

In response to Declaration No17, the Commission first surveyed national law on access to documents and then released a communication on the issue.²¹ These endeavours constitute the early steps that the EU has taken as an attempt for more openness and transparency in the decision-making process. Amongst these, clearly the most important was the Code of conduct on

¹⁷ 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.

¹⁸ Peers 2002b

¹⁹ Case C-64/05 P, *Kingdom of Sweden v Commission of the European Communities and Others* ECLI:EU:C:2007:433, Opinion of Advocate-General Maduro, para 7

²⁰ Case T-187/99, *Agrana Zucker und Stärke v Commission* ECLI:EU:T:2001:149 and order of the Court in Case C-321/01 P, *Agrana Zucker und Stärke v Commission* ECLI:EU:C:2002:635

²¹ [1993] OJ L 156/5 and [1993] OJ L 166/4

access to documents which was later implemented by the Council²² and the Commission.²³

The accession of Austria, Finland, and Sweden in 1995 and the appointment of the first European Ombudsman, Mr. Jacob Soderman, also increased the state of transparency in the EU. In 1996, the Ombudsman began an own initiative inquiry regarding the adoption of access rules by the other EU institutions, bodies, offices and agencies and argued that as long as the Union legislature had not adopted general rules on access to documents, the institutions and bodies were obliged to adopt access rules as part of their internal organisation. This inquiry resulted to a draft recommendation that the other institutions and bodies should follow the example of the Council and the Commission and adopt their own internal rules on public access considering that failure to do so could be maladministration. The outcome of this attempt was that all the Union institutions, bodies, offices and agencies introduced rules regarding public access to their documents.²⁴

3.1. The Pre-Regulation Regime: The Code of conduct

The basic principle enshrined in the joint Code of conduct governing access to the Commission and the Council was the 'widest possible access to documents' and also the narrowest interpretation of the exceptions since the latter is a corollary of the former.²⁵ However, this did not mean that the Code guaranteed an absolute right. On the contrary, it provided for documents to be refused where disclosure 'could' undermine the protection of certain public and private interests. Although the Code started with the assurance that 'the public will have the widest possible access to documents held by the Commission and the Council' the openness criterion was not the rule. Rather paradoxically, the Code's exceptions were defined broadly with the effect of changing the presumption of disclosure from positive rights with negative exceptions to a text which treated access as the exception.²⁶

The Code contained a non-exhaustive list of mandatory exceptions,²⁷ which meant that the institutions must refuse access to documents that came within

²² Decision 93/731 [1993] OJ L 340/43

²³ Decision 94/90 [1994] OJ L 340/41

²⁴ OJ 1998 C295/1 (Court of Auditors); OJ 1997 C243/13 (European Investment Bank); OJ 1999 L110/30 (European Central Bank); the European Agency for Health and Safety at work; Europol; OJ 1997 L339/18 (Economic and Social Committee); OJ 1997 351/70 (Committee of the Regions); OJ 1998 L90/43 (European Monetary Institute); European Centre for the Development of Vocational Training (cadefop); OJ 1997 C282/5 (European Environment Agency); OJ 1998 C46/5 (Translation Centre for Bodies of the European Union); European Monetary Centre for Drugs and Drug Addiction; European Agency for the Evaluation of Medicinal Products.

²⁵ Peers 2002b

²⁶ De Leeuw, 2003

²⁷ Case T-610/97, *Carlsen v Council* ECLI:EU:T:1998:48. The President of the Court ruled that the mandatory exceptions regarding the protection of the public interest were not

one of the exceptions, if the relevant circumstances were shown to exist. The rules provided for a radical change into the hitherto situation which was secrecy, thus the grounds for refusing access were drafted generously. The Code exceptions were covering:

- The protection of the public interest (exemplified by public security, international relations, monetary stability, court proceedings, inspections, and investigations);
- The protection of the individual and of privacy;
- The protection of industrial and commercial secrecy;
- The protection of the Union's financial interests; and
- The protection of confidentiality as requested by the natural or legal persons that supplied the information or as required by the legislation of the Member State that supplied the information.

Additionally, the institutions could refuse access to protect confidentiality of their proceedings.²⁸

Even after the enactment of the Code, the institutions were reluctant to interpret the code in favour of transparency.²⁹ This attitude led to the refusal of access repeatedly. The Code's exceptions were indeed dangerously restrictive and in a Court case the legal basis of the Code was challenged.³⁰ It was argued that transparency constitutes an essential aspect of democracy and as such cannot be regulated by measures of internal organisation. The Court of Justice, however, dismissed the challenge on the grounds that the institutions could adopt those measures as part of their internal organisation.³¹ At that time the Treaty of Amsterdam was not in force and thus the institutions were entitled to have access rules governing citizens' rights based solely on internal procedural rules.³²

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.

²⁸ Case T-194/94, *Carvel v Council* ECLI:EU:T:1995:183

²⁹ Harlow 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'.

³⁰ The Netherlands, Denmark, Sweden, and Finland have consistently hard-pressed for greater openness within the Union gaining strong inspiration from their National laws where the notion of citizens' rights is underscored.

³¹ Case C-58/94, *Netherlands v Council* ECLI:EU:C:1996:171

³² It must be noted here that it was only in 1997 that the EP adopted rules regarding access to its documents.

The Court of Justice and the Court of First Instance handed down several judgments interpreting the Council and the Commission decisions denying access. The Courts held, for example, that the institutions after having adopted their internal rules on access were abiding by them and any exceptions to the principle of the widest access must be justified on objective grounds and be applied strictly.³³ In addition to this, the Court ruled that the institutions were obliged to carry out a concrete and individual assessment of each of the requested document before deciding whether or not to release.³⁴ Also, as already explained above, if the institutions were relying on a discretionary exception they were required to balance the interest of the applicant against their interest in protecting confidentiality. Access should be granted if the applicant's interest outweighed institution's interest.³⁵ Finally, the institutions had to disclose the part of the documents not covered by the exceptions. This is known as the principle of partial access which was firstly developed by the Courts as this possibility was not provided by the Code.³⁶

Under the Code, there is consistent jurisprudence that 'the legal rule is that the public is to have access to the documents of the institutions and the power to refuse access is the exception'.³⁷ At the same time, the exceptions needed to be interpreted and applied restrictively so as not to defeat the general principle of the widest possible access found in the Code.³⁸ To implement this, the institutions were required to examine concretely and individually the documents and to state reasons if access was to be refused.³⁹ The risk of the public or private interest being undermined must be reasonably foreseeable and not purely hypothetical.⁴⁰ This exercise was aimed to help the applicant to assess the reasons on which access was denied and to enable the Court to exercise its power of review. The Court ruled that in exceptional cases the requirement of concrete and individual examination could be limited under the

³³ Case T-105/95, *WWF v Commission* ECLI:EU:T:1997:26. This was the first judgment on access to documents rules concerning the Commission. It established that although the internal institutional rules on access to documents are capable of conferring rights on citizens and imposing obligations on the Commission. The CFI also ruled for the first time on the public interest exception concerning inspections and investigations and ruled that the documents relating to investigations which may lead to an infringement procedure according to Article 226 of the 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 according to Article 4(1) of the Code of conduct

³⁴ Case T-174/95, *Svenska Journalistförbundet v Council* ECLI:EU:T:1998:127

³⁵ Case T-194/94, *Carvel v Council* ECLI:EU:T:1995:183 and Case T-105/95, *WWF v Commission* ECLI:EU:T:1997:26

³⁶ Case C-353/99 P, *Hautala v Council* ECLI:EU:C:2001:661

³⁷ Case T-211/00, *Kuijjer (II) v Council* ECLI:EU:T:2002:30, para 55

³⁸ Case T-174/95, *Swenska Journalistförbundet v Council* ECLI:EU:T:1998:127; Case T-105/95, *WWF v Commission* ECLI:EU:T:1997:26; Case T-124/96 *Interporc (I) v Commission* ECLI:EU:T:1998:25

³⁹ Case T-83/96 *Van der Wal v Commission* ECLI:EU:T:1998:59; Case T-124/96, *Interporc (I) v Commission* ECLI:EU:T:1998:25

⁴⁰ Case T-211/00, *Kuijjer (II) v Council* ECLI:EU:T:2002:30

'administrative burden rule'.⁴¹ Pursuant to that rule, the document by document examination could be abandoned. The institutions were allowed to balance the work that will have to bear against the public interest in gaining access. In other words, excessive administrative work could allow an institution to derogate from the access requirement.⁴²

4. The Transparency Regulation and the relevant case law

The Transparency Regulation governs, at the time of writing, the right of citizens and residents in the EU to access, in principle, all the documents drawn or held by the EP, Council and the Commission.⁴³ 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.⁴⁴ 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'.

As already explained above, pursuant to settled case law and in view of the objectives of the Regulation, the exceptions set out in Article 4 of the Regulation must be interpreted and applied strictly. Thus, when the institution decides to rely on any of the exceptions mentioned in Article 4 'it must explain how access to that documents could specifically and effectively undermine the interest protected by an exception'.⁴⁵ The purpose of the Regulation as set out in its Article 1 is 'to define the principles, conditions, and limits on grounds of public or private interest governing the right of access to EP, Council, and Commission documents ... in such a way as to ensure the widest possible access to documents ... to establish rules ensuring the easiest possible exercise of this right ... and to promote good administrative practice on access to documents'. For this purpose, any European citizen and any natural or legal person residing or having its registered office in any of the Member States can apply to access any documents.⁴⁶

The Regulation reflects the overall intention specified in the second subparagraph of ex Article 1 TEU, currently Article 1 of the TEU, to mark a new stage in the process of creating an even closer union amongst the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. Similarly, as it is noted in the recital 2 of the

⁴¹ Case C-353/99 P, *Hautala v Council* ECLI:EU:C:2001:661; Case T-14/98, *Hautala v Council* ECLI:EU:T:1999:157

⁴² *Heliskoski and Leino* (2006)

⁴³ 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

⁴⁴ *Peers 2002b*; *Kranenborg 2006*

⁴⁵ Case T-121/05, *Borax v Commission* ECLI:EU:T:2009:64

⁴⁶ Article 2(2) of Regulation 1049/2001 [2001] OJ L 145/43

Regulation's Preamble there is a direct link of the fundamental right of European citizens and residents to have access to documents held by the EU institutions with the democratic nature of those institutions.

Article 2 of the Regulation sets out the basic provisions and its wording is analogous to the wording of ex Article 255 (1) of the EC Treaty whereas Article 2(3) defines the scope of the Regulation and reads as follows:

This Regulation shall apply 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 activities of the EU.

The provision, quoted above, marks a significant change to the pre-Regulation regime. Article 2(3) provides that documents *drawn or received* by the institutions fall within the scope of the Regulation. This broader access constitutes an important obvious step forward in respect of the former situation, which covered only access to documents *drawn up* by the institutions.⁴⁷ As explained already, according to the authorship rule, access requests were directed to the authors. Yet, this welcome abolition does not mean that the right of access to documents is an absolute right. The institutions may still rely on Article 4 to justify denial to grant access.

There are four types of exceptions: mandatory, 'discretionary', the protection of the decision-making process and, finally, documents originating from third parties and Member States. Article 4(1) is written in mandatory terms and provides that: 'the institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and the integrity of the individual, in particular in accordance with the Community legislation regarding the protection of personal data'.

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.⁴⁸ As regards the privacy exception, the personal data legislation provides for limits. The CFI, now the General Court, was called to interpret the relationship between Regulation 1049/2001 and Regulation 45/2001 and ruled that disclosure can only be denied if the privacy or the integrity of the person

⁴⁷Peers 2002b; De Leeuw 2003

⁴⁸ Peers 2002b; De Leeuw 2003

would be undermined.⁴⁹ In consequence, the CFI carried out a balancing exercise between the two fundamental rights at stake: public access and data protection. It highlighted the importance of the access right and reiterated that any limitations must be construed and applied restrictively so as not to defeat the general principle enshrined in Regulation 1049/2001. At the same time, the right to data protection must be protected. As a result, the Court ruled that names, titles and functions of public office holders, civil servants and interest representatives in relation with their professional activities shall be disclosed because disclosure does not lead to an interference with the private life of the persons, nor would those persons have any ground to believe that they enjoyed confidential treatment.⁵⁰

Unfortunately, from an openness point of view, the Court of Justice set aside the judgment of the General Court on the grounds that the assessment of whether the protection of privacy and the integrity of the individual protected by Article 4(1) (b) of the Regulation should not be confined to Article 8 of the European Convention on Human Rights (ECHR) but must take into account the EU legislation on data protection. Under Regulation 45/2001, the Bavarian Lager did not provide with any justification in favour of obtaining the requested data and therefore the Commission and the Court were not in a position to assess whether the applicant's interest outweighed the 'data subject's legitimate interest and to examine whether the latter's interest might be prejudiced, as required by Article 8(b) of 45/2001'.⁵¹

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'.⁵² 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'.⁵³ 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. The application of the exceptions regarding sensitive, legislative, administrative and judicial documents, as per settled case law, is discussed below.

4.1 Sensitive Documents: *Sison* case

⁴⁹ Case T-194/04, *Bavarian Lager v Commission* ECLI:EU:T:2007:334

⁵⁰ Case T-194/04, *Bavarian Lager v Commission* ECLI:EU:T:2007:334

⁵¹ Case C-28/08 P, *Commission v Bavarian Lager* ECLI:EU:C:2010:378

⁵² Case T-14/98, *Hautala v Council* ECLI:EU:T:1999:157. This has been confirmed as regards the Regulation see Case C-266/05 P, *Sison v Council* ECLI:EU:C:2007:75

⁵³ Case T-121/05, *Borax v Commission* ECLI:EU:T:2009:64

*Sison*⁵⁴ was the first case whereas the Court examined the mandatory exceptions relating to public security and international relations under the Regulation. As explained already, in principle, the Regulation covers all the documents drawn or held by the EP, Council and the Commission. Pragmatically, however, certain documents are subject to special procedural rules before they can be released. In this regard, Article 2(5) provides that 'sensitive documents as defined in Article 9(1) shall be subject to special treatment'. The pre-Regulation understanding of the nature of the discretion related to the mandatory exceptions⁵⁵ has played a key role in *Sison* and led the Court to adopt a conservative interpretation of the public security and international relations exceptions. Pursuant to the reasoning of the Court, the power to review the legality of the institutions' decisions regarding in Article 4(1) (a) is 'limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers'.⁵⁶

In *Sison*, the applicant, based on the short and formulaic response, argued that the Council, contrary to the settled case-law, had never conducted a concrete and individual examination of the documents requested. As a result, the applicant was unable to ascertain the reasons put forward by the Council and the Court was unable to exercise its power of review. The Council, however, argued that the existence of a specific procedure dealing with the request for sensitive documents shows that concrete examination had taken place. The Court agreed with the Council and adopted a very conservative interpretation of the public security and international relations exception. On appeal, Mr Sison tried to set aside the CFI's judgment, though the Court of Justice reiterated that the Union institutions enjoy wide discretion in the areas covered by Article 4(1)⁵⁷ and thus dismissed the appeal.

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.

Article 4(2) reads as follows: '[t]he institutions shall refuse access to documents where disclosure would undermine the protection of:

⁵⁴ Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* ECLI:EU:T:2005:143

⁵⁵ According to settled case-law, the institutions enjoy wide discretion in the context of a decision denying access based on the protection of public interest regarding international relations. See Case T-14/98, *Hautala v Council* ECLI:EU:T:1999:157

⁵⁶ Joined Cases T-110/03, T-150/03 and T-405/03, *Sison v Council* ECLI:EU:T:2005:143, para 47

⁵⁷ Case C-266/05 P, *Sison v Council* ECLI:EU:C:2007:75

- commercial interests of natural or legal person, including intellectual property,
 - court proceeding and legal advice,
 - the purpose of inspections, investigations and audits,
- Unless there is an overriding public interest in disclosure’.

The latter clause constitutes an ‘exception to the exception’⁵⁸ and if applicable the requested documents need to be released. However, the CFI interpreted this provision strictly and held in *Turco*⁵⁹ and in other cases⁶⁰ that the overriding public interest provided by Article 4(2) must be additional to the public’s right to be informed. This case law, however, cannot be considered as good law any longer after the ruling of the Court of Justice’s in the *Turco*’s appeal.⁶¹

4.2 Legislative documents relating to legal advice: *Turco* case⁶²

The applicant, Mr Turco, requested access to an opinion of the Council’s legal service relating to a proposal for a Council Directive laying down minimum standards for the reception of applicants for asylum in Member States. He was refused access on the basis that the release of the opinion would undermine the protection of legal advice regulated by the second indent of Article 4(2) of the Regulation. The Council argued that its interest in protecting internal legal advice outweighed the public interest in disclosure. In addition to this, the Council argued that the mere fact that the release of the document would be in the general interest of increasing openness and transparency of the institutions decision-making process is irrelevant. This criterion, according to the Council, would apply to all written opinions of the Council’s legal service. Finally, the Council argued that the release of the opinion concerned would give rise to uncertainty of the validity of the legislative act adopted following such advice.

The applicant and one of the intervening governments⁶³, Finland, argued that denial of access should be based on a concrete and individual examination of the documents requested and not relate to all legal advice on legislative acts in general.⁶⁴ The Court ruled that, in principle, denial of access must be based on concrete and individual examination but, however, the Council’s generality was justified by the fact that giving additional information would deprive the exception relied upon of its effect.⁶⁵ The CFI ruled also that the rationale

⁵⁸ Kranenborg and Voermans 2005

⁵⁹ Case T-84/03, *Turco v Council* ECLI:EU:T:2004:339

⁶⁰ Case T-36/04, *Association de la presse internationale asbl (API) v Commission* ECLI:EU:T:2007:258

⁶¹ Joined cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council* ECLI:EU:C:2008:374

⁶² Case T-84/03, *Turco v Council* ECLI:EU:T:2004:339

⁶³ The other two intervening governments were Denmark and Sweden

⁶⁴ Case T-84/03, *Turco v Council* ECLI:EU:T:2004:339 para 36

⁶⁵ Case T-84/03, *Turco v Council* ECLI:EU:T:2004:339 para 57

behind the legal advice exception is to avoid uncertainty, by raising doubts, over the legality of EU legislation⁶⁶ along with securing independence of the opinions of the institutions legal service.⁶⁷ As far as the public interest override is concerned, the Court found that the legal advice can derogate from the established duty, incumbent on the institutions, to carry out a concrete assessment of the requested documents. By doing so, the CFI placed the burden of proof regarding the override upon the applicants. What is more surprisingly, however, was the outcome of the Court that the override could not be invoked in the general interest of transparency, openness, democracy and citizens participation in the decision-making process. These principles, according to the Court, have already been implemented and underlie the transparency Regulation.

The judicial reasoning is hardly convincing. The CFI here says that the purpose of the exception is to prevent disclosure of the underlying legal advice in order to avoid uncertainty as to the legality of the acts adopted following such advice and that any reference in the statement of reasons to the content of the opinion would deprive the exception of its effect. To paraphrase, the CFI is of the view that a way to protect legal certainty is to prevent the public from finding out that acts of uncertain legality have been issued and are maintained.

The approach followed by the CFI in this case is in a direct contradiction with the settled case law which sets out the principles governing the access to documents regime. As already explained, the widest possible access enhances citizens' participation in the decision-making process. In fact, the same Court has ruled that 'the widest possible access to documents ... is essential to enable citizens to carry out genuine and efficient monitoring of the exercise of the powers vested in the Community institutions...'.⁶⁸ How can citizens exercise these rights when access to legal advice is refused as a matter of principle? Can any legal system be based on principles which prevent citizens from scrutinising the legality of any acts? On the contrary, there is a strong public interest override as regards the right to seek for the annulment of measures of uncertain legality. To that end, protecting legal certainty cannot be considered as a panacea for an act which might very well be invalid.

The applicant also argued that the correct exception for the protection of the Council's legal advice is Article 4(3) which aims to protect the institution's decision-making process.⁶⁹ The CFI had rejected the application of Article 4(3) to the case of legal advice relating to legislative acts on the basis that to do so would empty Article 4(2) of relevancy. The CFI ruled that Article 4(2) does not relate to legal advice taken for the purpose of court proceedings but was designed to cover both situations. However, such an argument

⁶⁶ Case T-84/03, *Turco v Council* ECLI:EU:T:2004:339 para 74

⁶⁷ Case T-84/03, *Turco v Council* ECLI:EU:T:2004:339 para 79

⁶⁸ Case T-92/98, *Interporc v Commission* ECLI:EU:T:1999:308 para 39

⁶⁹ Case T-84/03, *Turco v Council* ECLI:EU:T:2004:339

contradicts the fact that in Article 4(2) legal advice and court proceedings are mentioned separately. It is worth mentioning that the Code of conduct, examined thoroughly previously, was only referring to the court proceedings exception, legal advice was inserted by the Regulation. Had the legislature wanted to protect court proceedings alone it would have had every opportunity to do so by choosing not to include an exception relating to legal advice. In any event, there can be legal advice not related to legislative proceedings, even legal advice given by in-house lawyers to companies and obtained by the Commission under competition proceedings, as long as such advice is not protected as privileged under EU law.

The second ground put forward by the CFI appears no less problematic. The CFI found that the disclosure of the introductory paragraph of the Council's legal service opinion confirms that concrete and individual examination has taken place.⁷⁰ If the reasoning adopted here by the CFI becomes the accepted norm then the access right will be drastically diminished of any substance in the sense that any partial access would always constitute evidence that an individual and concrete assessment had taken place. Finally, the CFI placed the burden of proof regarding the public interest override on the applicants by ruling that the override could not be invoked in the general interest of transparency, openness, democracy and citizens' participation in the decision-making process. These principles, according to the Court, have already been implemented and underlie the transparency Regulation. Thus, the overriding interest capable of justifying disclosure must be distinct from those principles.

For the abovementioned reasons, it seems unfortunate that the reasoning of the Court was framed in such a general language especially because the Court in *Turco* ruled for the first time on the legal advice exception as well as on the public interest override provided by the Regulation in a number of exceptions. One would have wished the Court to confirm in a more explicit manner that not all the legal advice should escape the duty incumbent on the institutions to carry out a concrete assessment of documents of this kind.

Fortunately and in the interests of transparency, the Court of Justice, in the joined cases of *Sweden and Turco v. Council*,⁷¹ set aside the CFI's judgment and upheld the appeal. The Court highlighted the importance of the principle of transparency in the decision-making process. The Court of Justice addressed how the EU institutions should deal with disclosure requests relating to legal advice laid down in the second indent of 4(2) of the transparency Regulation. It was held that when the institutions are asked to disclose such a document must carry out a specific 3 staged procedure that corresponds to the three criteria outlined in that provision.⁷² Firstly, the institution must consider and satisfy itself that the requested document does

⁷⁰ Case T-84/03, *Turco v Council* ECLI:EU:T:2004:339 para 75

⁷¹ Joined cases C-39/05P and C-52/05P, *Sweden and Turco v Council* ECLI:EU:C:2008:374

⁷² Joined cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council* ECLI:EU:C:2008:374 para 37

indeed relate to legal advice and whether any parts of the requested documents are covered by the exception.⁷³ The second stage is the requirement to consider whether disclosure of any parts of the document would undermine the protection of such an advice.⁷⁴ Regarding the latter requirement, the Court, using a teleological interpretation, ruled that the term legal advice must be understood in the light of the purpose of the Regulation. Under this purpose, the exception 'must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice'.⁷⁵ The assessment of the risk of that interest being undermined should consider what is reasonably foreseeable and not purely hypothetical. Finally, if the outcome of the above assessment is that disclosure of the document would undermine the ability of the institution to receive frank and objective legal advice, it is incumbent on the institution to balance the interest in non-disclosure against any possible overriding interest, bearing in mind the purpose of the transparency legislation to secure the widest possible access to documents, giving a reasoned judgment for its decision.⁷⁶

The Court of Justice, in the *Turco* appeal, held that the CFI was erred in law by finding that the *raison d'être* of the legal advice exception is not to fuel doubts over the legality of legislation. In fact, the Court of Justice has ruled that preventing disclosure can lead to the contrary and raise doubts in the citizens' minds over the legality of the decision-making process. Pursuant to the wording of the judiciary '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'.⁷⁷ By upholding this appeal, the Court of Justice highlighted the importance of the access to documents rules and reintroduced the cornerstone of this regime which is based on the ability of the public to assess the impact, comment upon and influence the development of policies, an activity which cannot take place without maximum access to information.

Nevertheless, regarding the protection of the institutions' interest in seeking and receiving frank, objective and comprehensive legal advice, the Court of Justice's justification appears to be particularly problematic. It is difficult to understand how the public's access to legal advice can affect the objectiveness of it. Anyone studying accountability will argue that disclosure of

⁷³ Joined cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council* ECLI:EU:C:2008:374 para 38

⁷⁴ Joined cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council* ECLI:EU:C:2008:374 para 40

⁷⁵ Joined cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council* ECLI:EU:C:2008:374 para 42

⁷⁶ Joined cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council* ECLI:EU:C:2008:374 para 44

⁷⁷ Joined cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council* ECLI:EU:C:2008:374 para 59

this kind of documents can only lead to professional behaviour because of the fact that the drafters of the legal advice will always have in mind that the advice will be accessible. Arguably, it may even make more sense to interpret the legal advice exception more strictly, on a case by case basis, and limit it for the very sensitive cases.

More interestingly, the Court of Justice ruled that the overriding public interest pressing for disclosure of the legal advice needs to be no different from the principle of openness, transparency, democracy and civil participation in the decision-making process which already underlie the Regulation.⁷⁸

The approach taken in *Turco* was indeed promising in terms of transparency. 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*.⁷⁹ 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.'⁸⁰

The Court ruled effectively 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. In consequence, post *Turco* 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.

⁷⁸ Joined Cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council* ECLI:EU:C:2008:374 para 74

⁷⁹ Case T-301/10, *Sophie In't Veld v Commission* [2013] ECLI:EU:T:2013:135; Case C-350/12 P *Council v Sophie In't Veld* [2014] ECLI:EU:C:2014:2039

⁸⁰ Joined cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council* ECLI:EU:C:2008:374 para 50

Similarly in 2010, *TGI*⁸¹ 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.⁸² *TGI* upheld the validity of the presumption and established that administrative documents are now essentially exempted from the document-by-document appraisal and that the public interest override will never apply unless particularly pertinent.

The validity of the general presumption was upheld in *LPN*.⁸³ 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.⁸⁴ On appeal, the applicants, *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.⁸⁵ 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'.⁸⁶

The presumptions case law, upheld 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

⁸¹ Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau* ECLI:EU:C:2010:376; Case C-477/10 P, *Commission v Agrofert Holding a.s.* ECLI:EU:C:2012:394; Case C-404/10 P, *Commission v Editions Odile Jacob SAS* ECLI:EU:C:2012:393; Case T-392/07, *Guido Strack v Commission* ECLI:EU:T:2013:8

⁸² Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau* ECLI:EU:C:2010:376 para 61

⁸³ Case C-514/11, *LPN and Finland v Commission* ECLI:EU:C:2013:738

⁸⁴ Case T-29/08, *LPN v Commission* ECLI:EU:T:2011:448 para 126

⁸⁵ Case C-514/11, *LPN and Finland v Commission* [2013] ECLI:EU:C:2013:738 para 35

⁸⁶ Case C-514/11, *LPN and Finland v Commission* [2013] ECLI:EU:C:2013:738 para 65

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.

5. Conclusion

There is no doubt that the EU has taken important steps to ensure transparency of the decision-making process. If one compares the pre-Regulation rules whereas the then CFI held for example that transparency did not require the adoption of secondary legislation and that decisions on access to documents could properly be based purely on the institution's Rules of Procedure with the current situation it can be safely argued that progress has been made. Currently, it is obvious that 'we have gone from a situation of a mere favour being granted to the individual by the institutions in the exercise of their discretionary power to one of a true subjective fundamental right granted to the individual'.⁸⁷

The Transparency Regulation has improved the position governing access in several aspects. The most significant developments introduced by the Regulation are the abolishment of the authorship rule. The judiciary contributed to the development of transparency to a more or a lesser extent. In a more limited, the extent to which the jurisprudence acknowledges the existence of general presumptions is fundamentally wrong. 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.

⁸⁷ Case C-64/05 P, *Sweden v Commission* ECLI:EU:C:2007:433, Opinion of Advocate-General Maduro, para 40

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