

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs

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**Openness, transparency
and access to
documents and
information in the EU**

NOTE





DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

Openness, transparency and access to documents and information in the European Union

NOTE

Abstract

The Treaty of Lisbon updates the terms under which the principles of transparency and openness clarify the right of public access to documents in the European Union. This right is both a fundamental right of individuals and an institutional principle. The revision of Regulation (EC) No 1049/2001, which sets out the arrangements for this, is influenced, to a large extent, by the numerous interpretations from the Court of Justice of the European Union, particularly during the last five years. Observation of the practice followed by the EU institutions and the broad lines of the practices followed nationally indicate that EU law needs to undergo extensive revision, with the aim of both leveraging the case law experience acquired and bringing itself up to date.

This note was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

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EXECUTIVE SUMMARY

This study is an update to a previous study¹ about case law in relation to the right of access to documents. It puts into perspective the Union's institutional practice in relation to the entry into force of the Treaty of Lisbon.

The right of access to documents in the Union is part of a legal context updated by the Treaty of Lisbon. The principles of transparency and good governance have constitutional implications for the Union's institutions, and the Charter of Fundamental Rights of the European Union establishes them as a fundamental right. While the implementation of Regulation (EC) No 1049/2001 has been a success during the last 10 years, it now needs to be revised to bring it up to date.

In fact, the constitutional progress represented by the Treaty of Lisbon has been boosted by advances in case law. The challenge of the revision process, requested by the European Parliament since 2006 and initiated in 2008, involves giving consideration to the following two elements: the declaration of a fundamental right and the important lessons learnt from case law.

This body of case law and observation of the Union's institutional practice have given rise to the following significant remarks.

I – The first remark concerns the very nature of the right of access. The combination of the Treaty of Lisbon with the case law relating to Regulation (EC) No 1049/2001 now creates a different perception of the right of access. Before being an institutional challenge within the Union, requiring institutions to have the same amount of information when performing their duties, access to documents has now become a right of the individual.

This is a general trend. It is noted in comparative law and in European law in particular, with this being confirmed by the Convention of the Council of Europe on Access to Official Documents. The nature of the obstacles it describes preventing the right of access is largely the same as that under EU law. On the other hand, the Union does not give a specific independent authority the guarantee of access to documents, unlike many of its Member States.

II – A second series of remarks derives from the Court of Justice's interpretation of Regulation (EC) No 1049/2001. Apart from the far-reaching nature of this right, in less than five years, the Court has given its verdict accordingly on exercising the right of access in relation to administrative, legislative and judicial matters.

1. The right of access to documents is linked to **the Union's democratic nature**. Transparency guarantees greater legitimacy and accountability of the administration in a democratic system because citizens need to have the opportunity to understand the considerations underpinning EU regulations in order to exercise their democratic rights (Turco, Access Info Europe cases).
2. Access must be **as broad as possible**, thereby reducing the internal 'space to think' or the 'negotiation space' which the institutions want. Therefore, protecting the

¹ 'Public access to the European Union documents, State of the law at the time of revision of Regulation 1049/2001', PE 393.287, 2008 and 'Classified information in light of the Lisbon Treaty', PE 425.616, 2010.

- decision-making process within the Union excludes any general confidentiality, especially in the field of legislation (Borax, Access Info and MyTravel cases).
3. The scope of the various exceptions is **tightly controlled**. Therefore, the major challenge posed by the exception concerning international relations does not automatically entail confidentiality (In't Veld cases). Similarly, court proceedings are not excluded from transparency under the guise of respect for the proper administration of justice (API case). Legal opinions are not necessarily bound by confidentiality, especially on legislative matters (Turco and MyTravel cases), no more than the identity of Member States is protected by confidentiality during the legislative procedure (Access Info Europe case).
 4. Combining data protection schemes may require 'switching' from a general regulation to a special regulation on data protection (Bavarian Lager case) and on monitoring activities. Legal protection for confidentiality (Bavarian Lager case) and a '**general presumption**' of confidentiality (Technische Glaswerke Ilmenau case) may reduce the scope of transparency.
 5. The documents supplied by **Member States** are not covered by general confidentiality (IFAW judgment).

III – There are also plenty of lessons which may be drawn from the practice of the three EU institutions, by reading the annual reports required by the regulation and looking at certain national practices.

1. The number of applications for access in the European Union is **in decline**. This is not in keeping with the practices in some Member States or even in states outside the EU such as the United States or Australia.
2. The volume of **refusals to provide access** remains proportionally large and is tending to rise.
3. The number of applications for access in the areas of Common and Foreign Security Policy (CFSP) and Justice and Home Affairs (JHA) confirms the **sensitive nature** of these matters.

The type of public interested in gaining access to documents should raise questions for the Union on two counts. Firstly, **professionals** are the main group requesting access to documents (particularly Commission documents) and, secondly, university institutions are nowadays **the most efficient** channels for transmitting information and guaranteeing administrative transparency. The glaring lack of interest from ordinary citizens in transparency must provide some food for thought.

INTRODUCTION

There is an ever-growing demand for openness and transparency in modern societies. The European Union is also subject to this demand, although it is not necessarily successful in finding solutions which meet people's expectations.² The Union has undergone a sea change, from a diplomatic approach to dealing with records, where secrecy is the rule, to an **institutional system requiring a democratic basis**.

Firstly, and mainly as a result of the accession of new Member States, which are sensitive to this issue, the European Union made some of its documents available for public access. Declaration 17 annexed to the Treaty of Maastricht referred to the link between the transparency of the decision-making process and the democratic nature of the institutions, but its scope remained limited. Two Commission communications on transparency and access to documents were then published, followed by a '**Code of Conduct**'³ adopting the principle of public access to Council and Commission documents.

Secondly, the Treaty of Amsterdam enshrined these principles in primary law. Firstly, Article 1 of the treaty stated that 'decisions are taken as openly as possible', thereby recognising the principle of openness. Secondly, Article 255 TEC provided a legal basis for governing the right of public access to EU documents. This would be achieved with the adoption of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents⁴. Finally, the White Paper on governance 2001⁵ would highlight the need for involvement from and openness towards citizens to restore confidence in the Union.

Until then, the principles of '**openness**' and '**transparency**', which were used frequently in common parlance, had actually fulfilled more of a political than a legal function. Highlighted by the European Union with the aim of abating the **crisis of confidence** over the administration, these principles still had very little regulatory force, unlike the right of access to documents, which would be developed under Regulation (EC) No 1049/2001.

The scope of this study does not extend to a more in-depth examination of this historical period, but it does cover two of its main features. Firstly, openness and transparency basically boiled down to just one thing, **access to information**; and, secondly, the **guarantee from the judicature** was key to ensuring that this right had real meaning. Case law was intended to make the judicature a prominent player in the exercise of the right of access to documents, on the instigation of the European Ombudsman, thereby conferring upon it the status of a real fundamental right.

The prospect of this development was upset by the entry into force of the Treaty of Lisbon. This treaty outlined a new legal framework both in terms of the functioning of the Union's administration and of European citizens' rights.

² Specific reference will be made to our studies 'Public access to the European Union documents, State of the law at the time of revision of Regulation 1049/2001', PE 393.287, 2008 and 'Classified information in light of the Lisbon Treaty', PE 425.616, 2010.

³ Code of Conduct concerning public access to Council and Commission documents, OJ L 340 31.12.1993, p. 37.

⁴ OJ L 145, 31.05.2001, p. 43.

⁵ COM(2001) 428.

1. LEGAL FRAMEWORK OF RIGHT OF ACCESS TO DOCUMENTS

The Treaty of Lisbon changes not only the perception of the right of access to documents in the Union, but also the conditions under which the administration and the legislature perform their duties. Nowadays, the principles of openness and transparency feature in EU primary law, which should have consequences for the right of access to documents as one of the ways of applying that law.

1.1 Constitutional framework

The text of the treaty is clear: the principle of openness is set out in it. Hence its implementation via the principle of transparency and principle of access to documents⁶.

1.1.1 Principle of openness

This is a general, 'umbrella' term incorporating both the principle of transparency and the principle of participation.

Article 1 of the Treaty on European Union (TEU) therefore echoes the Treaty of Amsterdam by stating that it marks '*a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as **openly** as possible and as closely as possible to the citizen*'⁷.

The treaty conveys the specific meaning of this principle in two places. In Article 10(3) on the '*functioning of the Union*', under Title II on '*democratic principles*', the TEU confirms that '*every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen*'. The principle of openness is therefore linked for the first time to the '*democratic life*' of the Union and to '*representative democracy*'. The Union is democratic because it is 'open' to its citizens, which is confirmed by the following article.

Article 11(2) TEU is aimed directly at the institutions, which must maintain '*an **open, transparent and regular dialogue***' with representative associations and civil society. It therefore adds an active dimension to the principle of openness.

The Treaty on the Functioning of the European Union (TFEU) reinforces the basis of the principle by setting out the terms for its implementation in Article 15(1) TFEU. The '*Union's institutions, bodies, offices and agencies*' have a duty to conduct their work '*as **openly as possible***' and this is '*in order to **promote good governance and ensure the participation of civil society***'. This requirement requires several comments.

At this stage, **the principle of openness in the Union was still regarded as a prerequisite for its functioning more than as a right of its citizens**. This explains why it had a very wide scope of application, extending across the whole administrative machinery. Although it did not have an absolute remit and included no obligations in terms of results, the '**promotion**' objective assigned to the Union still required the Union to adopt a dynamic approach.

Finally, Article 298(1) and (2) TFEU provided a vital addition to the regulatory transposition of the principle of openness. Stating that in carrying out their missions, the institutions, bodies, offices and agencies of the Union '*shall have the support of an **open, efficient and independent **European administration*****', it conferred on the Union's legislature the power to '*establish provisions to that end*'.

⁶ A. Allemanno, 'Unpacking the principle of openness in EU Law, transparency, participation and democracy', *European Law Review* 2014 (forthcoming).

⁷ J. Mendes, 'Participation and the rôle of law after Lisbon: a legal view on article 11 TEU', *CMLRev* 2011.1849.

1.1.2 Principle of transparency

As the Court of Justice confirmed in a leading case discussed below, 'a lack of information and debate 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'⁸. With those words, the Union judge put the debate on transparency⁹ squarely in the camp of legitimacy and democracy. From his perspective, 'it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated'.

Previously and without yet mentioning the 'requirement of transparency'¹⁰, the case law of the General Court and the Court of Justice had been based on Declaration 17 annexed to the Treaty of Maastricht¹¹, in the absence of another more explicit text. Once this text became available with Regulation (EC) No 1049/2001, the judicature **reinforced its argument**. Transparency guarantees that 'the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system'¹². It enables them 'to carry out genuine and efficient monitoring of the exercise of the powers vested in the Community institutions'¹³. 'Only where there is appropriate publicity of the activities of the legislature, the executive and the public administration in general, is it possible for there to be effective, efficient supervision, inter alia at the level of public opinion, of the operations of the governing organization and also for genuinely participatory organizational models to evolve as regards relations between the administration and the administered.'¹⁴

The **procedural transparency** and **institutional transparency** referred to in the TEU and TFEU merged in the Treaty of Lisbon to give some practical meaning to the Union's action¹⁵.

The principle's normative scope still remained limited,¹⁶ but the provisions of Article 11 TEU indicate that the **battle lines had shifted**. The Union's institutions now had an obligation to apply the principle 'by appropriate means'. Whether this involved the 'open, transparent and regular dialogue' with civil society stated in Article 11(2) TEU or the EU's 'actions being transparent', which requires 'broad consultations' under paragraph 3, the respect for 'democratic principles' mentioned under Title II TEU exerted new pressure on the institutions, especially when it came to access to information, and by extension, documents. Therefore, this citizen's right shifts from being a judgment call to being exercised in a regulatory context.

The consequences arising from this **change of perspective** were significant. The call for openness and transparency was no longer an abstract reference in this case, but represented a **condition for the democratic legitimacy** of the rule of the Union. The treaty 'legalised' principles that could, one day, be interpreted on the basis of case law, if, for example, a legislative act has been adopted outside this participatory dialogue required by the treaty.

⁸ ECJ, 1 July 2008, Kingdom of Sweden and Turco v Council, C-39/05 P and 52/05P, paragraph 59.

⁹ M. Hillebrandt, D. Curtin, A. Meijer, 'Transparency in the Council of ministers of the EU: institutional approach', Amsterdam Centre for European law, Working paper 2012-04.

¹⁰ CFI, 25 April 2007, WWF European Policy Programme/Council, T-264/04, paragraph 61.

¹¹ CFI, 17 June 1998, Svenska journalistförbundet v Council, T-174/95, ECR II-2289 paragraph 66; CFI, 14 October 1999, Bavarian Lager/Commission, T-309/97, ECR II-3217, paragraph 36.

¹² CFI, 7 February 2002, Kuijter/Council, T-2011/00, paragraph 52 and ECJ, 6 March 2003, Interporc/Commission C-41/00 P, ECR p. I-2125 paragraph 39.

¹³ ECJ, 7 December 1999, Interporc v Commission, paragraph 39.

¹⁴ Opinion of Tesouro under ECJ, 30 April 1996, Netherlands v Council, C-58/94, ECR I-2169 paragraph 14.

¹⁵ D. Curtin, 'Judging EU secrecy', Amsterdam Centre for European law, Working paper 2012-07.

¹⁶ See A. Meijers, 'Understanding the Complex Dynamics of Transparency', and S. Castellano et A. Ortiz, 'Legal Framework for e-transparency and the right to public access in the EU', Transatlantic Conference on Transparency Research, Utrecht, 2012.

1.1.3 Right of access to documents

The public's right to access institutional documents¹⁷ was asserted in the Union by way of regulation before being enshrined in the founding treaties. The implementing regulation came before the constitutional declaration in this case, with the judge pointing out that 'the domestic legislation of most Member States now enshrines **in a general manner** the public's right of access to documents held by public authorities as a constitutional or legislative principle'¹⁸.

This right is based politically on the principle of transparency. This was confirmed by the Court of Justice in 2007: its 'aim is to **improve the transparency** of the Community decision-making process, since such openness inter alia guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system'¹⁹. As the Court points out, 'the possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights'²⁰.

Legally speaking, this right was therefore established initially on the basis of Article 255 TEC, which gave citizens the right to access the documents of the three main institutions. It subsequently gave rise to a substantial body of case law without the Court of Justice going as far as to establish a general principle. Its general wording in the TEC explained its **lack of direct effect**²¹, with the treaty instructing derived law to provide content for it. Nevertheless, at this point the right of access changed from a simple option granted on a discretionary basis to the administered by the institutions to a true 'subjective, fundamental right'²² granted to those targeted by Article 255 TEC.

The Treaty of Lisbon amends this law as it stands significantly in two respects.

First of all, **the Charter of Fundamental Rights** makes this access a **fundamental right**. Article 42 has the heading '**Right of access to documents**', implying that '*any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents*'. The explanatory notes accompanying the Charter point out that this Article 42 '*has been taken*'²³ from Article 255 TEC, which provided the basis on which Regulation (EC) 1049/2001 had been adopted, with the Convention wishing to extend its scope.

Advocate General Maduro emphasised this change in his conclusions on the case *Sweden v Commission* cited above with this 'protection of the right of access under ever higher norms': 'Since the right of access to documents of the institutions has become a fundamental right of constitutional import linked to the principles of democracy and openness, any piece of secondary legislation regulating the exercise of that right must be interpreted by reference to it, and limits placed on it by that legislation must be interpreted even more restrictively.'²⁴

When referring to the relationship between Article 42 of the Charter and the European Convention on Human Rights (ECHR), this EU judge therefore stated that 'with respect to

¹⁷ The analysis will continue to focus on Regulation (EC) No 1049/2001, apart from provisions relating, for example, to environmental law.

¹⁸ ECJ, 30 April 1996, *Netherlands v Council*, C-58/94, ECR I-2169 paragraph 34.

¹⁹ ECJ, 18 December 2007, *Kingdom of Sweden v Commission*, C-64/05, ECR I-11389, paragraph 54.

²⁰ *id* paragraph 46; see also CJEU, 17 October 2013, *Council v Access Info Europe*, C-280/11 P.

²¹ In spite of the calls of some of its Advocate Generals or the positions of the CFI: Advocate General Tesauro speaks of a 'fundamental civil right' in the case *Netherlands v Council* (paragraph 19) and the CFI talks about a 'principle of the right to information' (CFI, 19 July 1999, *Hautala v Council*, T-14/98, ECR. p. II- 2489, paragraph 87) or of the 'principle of transparency' (CFI, 7 February 2002, *Kuijter v Council*, T-211/00, ECR p. II-485, paragraph 52).

²² Opinion of Maduro under ECJ, 18 December 2007 cited above, ECR I-11389, paragraph 40.

²³ By mentioning its extension to the 'bodies and agencies' of the EU.

²⁴ Opinion of Maduro under ECJ, 18 December 2007 cited above, ECR I-11389, paragraphs 40-42.

the right of access to documents of the Union's institutions, bodies, offices and agencies, the Charter provides for a **special fundamental right**²⁵.

The TFEU itself has also changed the legal environment of the right of access. This has happened, first and foremost, because the protection desired by Member States regarding the confidentiality of the Council's work disappeared in Article 207(3) TEC²⁶. On the other hand, Article 15(1) TFEU confirmed the requirements for 'good governance' by providing specific content for the principles of openness and transparency. In paragraph 3 the ways of exercising the right of access to documents on a compulsory basis are expressed in far more precise terms than in Article 255 TEC. The removal of the inter-governmental pillars and the downgrading of the institutional treatment of the JHA and CFSP allow it to cover all the Union's work, which must be carried out 'as openly as possible'.

A literal analysis of Article 15 TFEU highlights that this statement is part of an overall initiative. While the Union's governance requires its work to be conducted 'openly' in paragraph 1, paragraph 3(3) of the same article refers to the proceedings of each relevant EU administrative entity being 'transparent'. Therefore, **the systematic nature of the triangle of openness/transparency/document access** is outlined in the treaty. Moreover, it clearly states the scope of the obligations incumbent upon the 'institutions, bodies, offices and agencies'. While the call for the Union's work to be conducted 'as openly as possible' is not necessarily an indication of a constraint, on the other hand, the conditions for the right of access to documents are pinned down in a more binding manner.

Article 15(3) (1) TFEU starts off by defining a right 'subject to the principles and the conditions to be defined in accordance with this paragraph'. **It does not grant the legislature the power of discretion** to decide what these 'principles and conditions' are. It is the duty of the legislature to implement the right of access allowing EU citizens to enjoy this right. The definition of its general principles and conditions for exercising it is an absolute requirement, governed by ordinary legislative procedure.

The third subparagraph of the same article then reinforces the obligations imposed on the relevant entities: they must ensure that their 'proceedings are transparent' and they have to draw up in their own Rules of Procedure 'specific provisions regarding access' to documents. This presupposes therefore that the right of access has been regulated before.

Lastly – and this is an important observation – the authors of the treaty **expand considerably** the group of institutions that are bound by the obligations. The group is no longer just made up of the three main institutions, but in a very general manner incorporates the 'Union's institutions, bodies, offices and agencies'. The penultimate subparagraph of paragraph 3 emphasises in the case of the Court of Justice of the European Union (CJEU), the European Central Bank (ECB) and the European Investment Bank (EIB) that they 'shall be subject to this paragraph only when exercising their administrative tasks'. This generalisation, which is already taken into account by a number of internal agencies and institutions, therefore reinforces the need for a new text on the right of access, failing which a right based on the Treaties may not be applied.

The value added offered by the Treaty of Lisbon can therefore be summarised as follows: on the one hand, the treaty establishes a **real fundamental right** of access to documents and, on the other hand, it **tightly controls** the exceptions to a right whose scope has been generalised.

The value added deriving from this for individuals then allows a hierarchy of challenges to be established: **before being an institutional challenge** within the Union, requiring institutions to have the same amount of information when performing their duties, **the access to documents has now become a right of the individual**. This shift completes the structural change initiated by the Union's judicature 20 years ago.

²⁵ GC, 29 November 2012, Gaby Thesing v ECB, T-590/10 paragraphs 72-73.

²⁶ 'For the purpose of this paragraph, the Council shall define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in those cases, while at the same time preserving the effectiveness of its decision-making process. In any event, when the Council acts in its legislative capacity, the results of votes and explanations of vote as well as statements in the minutes shall be made public.'

In this legal context, the regulation of the right of access applied by Regulation (EC) No 1049/2001 13 years ago seems considerably **out of touch nowadays**. Both the '*general principles*' and legitimate '*limits*' governing the right of access, mentioned in Article 15(3) TFEU, need to be revamped by the legislator by means of the ordinary legislative procedure, a fact which should not be forgotten.

The need to update the regulation actually comes from the triangle described earlier, linking the duties of openness, transparency and access to documents²⁷. It extends beyond the framework of Article 15 TFEU alone, for instance, in light of Article 298 TFEU. Furthermore, the strictly minimalist approach of the Commission's second regulatory proposal²⁸ derives more from the amendment to the previous regulation than from the implementation of the Treaty of Lisbon.

Consequently, with regard to both the scope of the right of access and the particular issues relating to the sensitive nature of some classified documents or codifying the advances made in case law for some categories of documents, a new text needs to be adopted.

1.2 Regulatory framework of the right of access to documents

A quick recap of what this framework²⁹ entails will make it possible to assess not only the challenges involved with its revision but also the significant impact of the case law from the Court of Justice and the General Court.

1.2.1 System for the right of access

As a result of the gap in the Treaties, Regulation (EC) No 1049/2001 has become the **cornerstone** of the right of access to administrative documents, which has led the Court of Justice to focus specific attention on the reason for this in order to clarify its use. This reason provides some guiding principles:

- Access to documents is linked to the principles of transparency and openness referred to by the Treaties, with the regulation consolidating current practices.
- The purpose of the regulation is '**to give the fullest possible effect**³⁰ to the right of access in its definition of its principles and limits. Therefore, in principle, '*all documents should be accessible to the public*', in other words, '*any citizen of the Union, and any natural or legal person*' residing there.
- The right of access assumes a particular meaning '*in cases where the institutions are acting in their legislative capacity*' and it is applicable to CFSP and JHA.

On this point, Regulation (EC) No 1049/2001 provides an **extremely broad** definition of a 'document' as Article 3(a) defines it as '*any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility*'. In specific terms, each institution has therefore been granted the procedural mechanisms required to obtain access and, by applying Regulation (EC) 1049/2001, they produce an annual report about its application.

²⁷ Acknowledged by the Council in its 2012 annual report on exercising the right of access, p.7.

²⁸ COM(2011) 73.

²⁹ For a more in-depth look at the regulatory framework and the associated case law up until 2008, refer to our study 'Public access to the European Union documents, State of the law at the time of revision of Regulation 1049/2001', PE 393.287, 2008.

³⁰ CJEU, 21 July 2011, Sweden and MyTravel v Commission, C-506/08 P cited above, paragraph 73 and CJEU, 17 October 2013, Access Info Europe, C-280/11 P cited above, paragraph 28.

In addition to this key text, other specific texts should be mentioned³¹ whose interaction with Regulation (EC) No 1049/2001 caused difficulties which led the Court of Justice to settle matters (see below)³². The following table³³ can provide accordingly a summary of the current state of play.

Table 1: Regulatory framework of the right of access to documents

Legal framework	Institutions and bodies covered	Scope and beneficiaries	
		EU citizens and residents	Any natural or legal person
Regulation (EC) No 1049/2001 + (EC) No 1367/2006	Parliament Council Commission Agencies	Any document	
Non-compulsory rules + Regulation (EC) No 1367/2006	Court of Auditors European Central Bank European Investment Bank European Economic and Social Committee Committee of the Regions European Ombudsman	Any document	Only environmental information
Regulation (EC) No 1367/2006	European Data Protection Supervisor (EDPS) Court of Justice (except for appointment to judicial office)	Only environmental information	

1.2.2 Exercise of the right of access

In line with the national legislations relating to the right of access, the EU right is **not an absolute right**³⁴. Regulation (EC) No 1049/2001 sets out a principle, which is then accompanied by 'exceptions' listed in the various paragraphs of Article 4. Without entailing any legal consequences, Article 15 TFEU does not use itself the term 'exceptions', but refers to 'conditions'. Article 42 of the Charter does not mention them at all.

The proposal for revision tabled by the Commission in 2008 continued to follow this logic, whereas the second proposal submitted in 2011 preferred more moderate wording, mentioning in its justification and first article 'the general principles and the limits on grounds of public or private interests governing the public right of access to documents have been laid down in Regulation (EC) No 1049/2001'.

This list of '**exceptions**' or '**limits**' are mainly based on case law.

1.3 Case-law framework of the right of access to documents

Several factors explain the impact which case law has had on exercising the right of access.

³¹ Reference should be made, on this point, to the provisions of Regulation (EC) No 1367/2006 regarding access to environmental information, which apply to all EU institutions and bodies. This regulation has just been clarified in a totally relevant manner by the General Court, which objects to an attempt by the Commission, 'by its line of argument' not to 'ensure a consistent and harmonious interpretation of Regulation No 1049/2001 and Regulation No 1367/2006 with the provisions of the Charter ...', GC, 8 October 2013, Stichting Greenpeace Nederland et PAN v Commission, T-545/11, paragraph 44.

³² Some of these provisions may also be aimed at harmonising national law, which is excluded on the basis of Article 15 TFEU.

³³ Source: O'Neill, B., Livingstone, S., & McLaughlin, S: COM(2007) 185, Green Paper: Public Access to Documents held by institutions of the European Community, A review, p.10.

³⁴ See our study cited above 'Public access to the European Union documents, State of the law at the time of revision of Regulation 1049/2001', PE 393.287, 2008.

Firstly, until 2001, the fragile nature of the legal basis of this right required the additional intervention of the Union's judicature. This judicial involvement proved to be crucial in guaranteeing a **minimum level of protection** for this right. The subsequent adoption of Regulation (EC) No 1049/2001, based on the Treaty of Amsterdam, did not mean, for all that, any less need for a case-law interpretation. The interpretation of the text along with the list of the exceptions to public access stipulated by the regulation led both the Court of Justice and the General Court to increase the number of interventions. This body of case law has made a huge contribution to the specific content of the right of access.

Secondly, the behaviour of the institutions makes it clear that appealing to the judicature is **the only path offered to citizens** of the European Union for gaining access to a large proportion of documents, in spite of the confirmation of the principle of access and the availability of the registers to this end.

In fact, both the Council and Commission share a **common reservation, if not a common hostility** towards an open interpretation of Regulation (EC) No 1049/2001. The issue of the exceptions disclosed by Article 4 of the Regulation has been the main bone of contention. Whether it concerns documents supporting international negotiations involving the former or those relating to infringement or competition law procedures involving the latter, both institutions have joined forces to **curb as far as possible** the right of access. It has fallen to the judicature **to provide arbitration and define clear-cut rules of behaviour**, by balancing the interests in play.

The case law of the European Union on the right of access to documents is based on largely converging analyses from both the General Court and Court of Justice³⁵. During the period under examination, the Union's courts have therefore issued around 10 key judgments which have had a considerable impact on the future regulation:

ECJ, 1 July 2008, *Kingdom of Sweden and Turco v Council*, C-39/05 P and 52/05 P

CJEU, 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P

CJEU, 29 June 2010, *Commission v Bavarian Lager*, C-28/08 P

CJEU, 21 September 2010, *Kingdom of Sweden and ASBL(API) v Commission*, C-514/07 P, C-528/07 P, C-532/07 P

CJEU, 21 July 2011, *Kingdom of Sweden and MyTravel v Commission*, C-506/08 P

CJEU, 21 June 2012, *IFAW v Commission*, C-135/11 P

CJEU, 28 June 2012, *Commission v Odile Jacob*, C-404/10 P

CJEU, 17 October 2013, *Council v Access Info Europe*, C-280/11 P

GC, 19 March 2013, *Sophie In't Veld v. Commission*, T-301/10

1.3.1 Principle of right of access

The Court of Justice presents it in a formal perspective. In its leading case *Sweden v Commission and Turco*³⁶, it emphasises that 'in view of the objectives pursued by Regulation No 1049/2001 and especially the fact, noted in recital 2 in the preamble thereto, that **the public right of access to the documents of the institutions is connected with the democratic nature of those institutions** and the fact that, as stated in recital 4 and in Article 1, the purpose of the regulation is to give the public the widest possible right of access, the exceptions to that right set out in Article 4 of the regulation must be interpreted and applied strictly'³⁷. This 'wide as possible' access is

³⁵ It presents details about the applicants: the automatic involvement of the Nordic states, especially Sweden, in support of the applicants is in contrast to the restrictive view developed jointly by the Council and Commission, frequently supported by France and Germany.

³⁶ ECJ, 1 July 2008, *Kingdom of Sweden and Turco v Council*, C-39/05 P and 52/05 P.

³⁷ ECJ, 18 December 2007, *Kingdom of Sweden v Commission*, C-64/05 P, paragraph 66; ECJ, 1 July 2008, *Kingdom of Sweden and Maurizio Turco v Council*, C-39/05 P and C-52/05 P, paragraphs 34, 35 and 36; see also ECJ, 1 February 2007, *Sison/Council*, C-266/05 P, ECR p. I-1233, paragraph 63.

guaranteed strictly on the basis of two requirements³⁸: any application for access must be examined **specifically and individually**. This means that evidence has to be provided, proving that the interest protected by the regulation has been specifically and effectively undermined and an examination carried out, on a case-by-case basis, into a foreseeable risk relating to disclosure.³⁹ The case law of the period under examination confirmed this conventional approach.

The following summary can therefore be provided of the relevant case law. The Court of Justice endeavours to guarantee as far as possible the right of access in the Union, especially when transparency facilitates the practice of democracy, by clarifying the Union's political choices, which is why it has focused **particular attention on the 'legislative' aspect of the relevant documents**. It therefore tightly controls the internal 'space to think' which the institutions want to use to oppose the applications for access during the legislative process. Nevertheless, when needed to protect some requirements, such as those relating to privacy and security, the Court of Justice approves the refusals made by the institutions. Furthermore, it rejects any argument aimed at making confidentiality the rule and disclosure the exception. It has systematically developed a reverse interpretation of the regulation.

1.3.2 Content of right of access

Neither Article 15 TFEU **nor** Regulation (EC) No 1049/2001 expresses **an absolute right**. The right of access to documents may be restricted, depending on the interests it is likely to harm. In the same way as with domestic legislation, the Union legislature defines two types of 'exceptions': absolute and relative.

- 3. Absolute limits on the right of access

Article 4(1) of Regulation (EC) No 1049/2001 mentions **two absolute exceptions** to the right of access. They relate to the protection of public interest and respect for privacy where disclosure of the document '*would undermine*' them. The judiciary has drawn major lessons from this since 2004⁴⁰: the institutions are obliged to refuse access to documents falling under any one of those mandatory exceptions once the relevant circumstances are shown to exist and they do not have any discretion on this⁴¹.

In this case, therefore, the legal argument involves establishing whether the document being requested belongs or not to the category referred to by the regulation, which almost automatically results in refusal or access to the document. The review of the legality of such a decision by the EU judiciary is therefore limited to **establishing whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers**⁴². Defining the scope of these exceptions is **crucial**.

- *Protection of public interest: Article 4(1)(a) of Regulation (EC) No 1049/2001*

Regulation (EC) No 1049/2001 does not provide an exact definition of its content. It lists a series of assumptions largely corresponding to the precautions taken by Member States under their national law. The judiciary endeavours, on a case-by-case basis, to prevent

³⁸ See also: ECJ, 18 December 2007, *Sweden v Commission*, C-64/05 P, paragraph 66, and of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, paragraph 36.

³⁹ The only circumstance that a document relates to an interest protected by an exception would not be sufficient to justify applying the latter (CFI, 13 April 2005, *Verein für Konsumenteninformation v Commission*, T-2/03, paragraph 69).

⁴⁰ ECJ, 22 January 2004, *Mattila v Council and Commission*, C-353/01 P, ECR 2004 p. I-1073.

⁴¹ D. Adamski, 'How Wide Is "The Widest Possible"? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited' (2009) C.M.L.Rev. 46, 521-549.

⁴² ECJ, 1 February 2007, *Sison/Council*, C-266/05 P, ECR p. I-1233, paragraph 34.

the institutions from automatically resorting to it: '*the risk of a protected interest being undermined must be **reasonably foreseeable** and not purely hypothetical.*'⁴³

- Public security

There had been clarifications made by case law in this area, which have already been studied, especially the *Sison* case cited above, and should be used as a reference⁴⁴. The General Court has had to encounter this matter since in minor cases.

The *Evropaïki Dynamiki* ruling of 6 December 2012⁴⁵ highlights how easy it is for the Commission to wrongfully present this exception. In a tendering procedure giving rise to a request to provide commercial quotations, it actually claimed that producing these documents relating to a wide range of IT systems would be likely to reveal their 'functioning and weaknesses'. The General Court held the view that nothing could establish 'how access to the documents requested could specifically and actually undermine that objective in a way that is reasonably foreseeable and not purely hypothetical'.

The order of 27 November 2012 made in the *Steinberg*⁴⁶ case is more informative. A refusal to grant access relating to the provision of grants in Palestine on the basis of European programme was opposed for fear that detailed information about the relevant projects featuring in the documents might be used to exert pressure on the relevant persons, even to make threats to their physical or moral integrity. Security might then be breached due to the 'high' risk hanging over the parties involved. The Order of the General Court endorsed this analysis.

In its proposal for recasting, the Commission expanded the phrase considerably: 'including the security of physical or moral persons'. This is a sweeping approach based on this wording, which is unclear and could change the nature of the exception without necessarily improving the situation.

- Defence and military matters

There has been no case law applied to this exception during this period.

- International relations

This exception poses a major challenge in terms of access to documents since the *Hautala* case, which has already been studied. Clarifications on this have been provided by the General Court.

The events relating to the former Yugoslavia have provided case-law material based on Article 4(1)(a). The case *Jurašinović v Council*⁴⁷ related to a refusal to grant access to certain documents exchanged with the International Criminal Tribunal for the former Yugoslavia (ICTY) during proceedings. Claiming that the Union's cooperation in good faith with the ICTY would suffer from such disclosure, the Council had opposed it. The General Court believed that the applicant had not provided the evidence to prove that this refusal was not justified. A second case with a judgment issued on the same day (T-465/09)⁴⁸ related to a refusal to grant access to reports compiled by EU observers posted in Croatia. Emphasising the requirements of the 'historical truth' 14 years after the events, the applicant put forward that the 'neutrality' of the EU observers in relation to the conflict justified disclosure.

The General Court dismissed all the arguments. It believed that the 'neutrality' of the European Community Monitor Mission (ECMM) had no bearing on the public interest whose confidentiality was being protected⁴⁹, but it added that disclosure of this information might,

⁴³ CFI, 25 April 2007, WWF European Policy Programme v Council, T-264/04, paragraph 39; ECJ, 6 December 2001, *Council v Hautala*, C-353/99 P, ECR p I-9565.

⁴⁴ Study cited above, p. 17 ff.

⁴⁵ GC, 6 December 2012, *Evropaïki Dynamiki et al. v Commission*, T-167/10.

⁴⁶ GC, Order of 27 November 2012, *Steinberg v Commission*, T-17/10.

⁴⁷ GC, 3 October 2012, *Jurašinović v Council*, T-63/10.

⁴⁸ GC, 3 October 2012, *Jurašinović v Council*, T-465/09.

⁴⁹ Paragraph 42.

in any case, harm the Union's objectives. Disclosure of information likely to spark or increase resentment or tensions between the various communities present would be likely to undermine confidence in the ongoing process⁵⁰. Since the situation had not changed with the passing of time, the argument based on the '**historical truth**' was also dismissed, with the General Court reminding on this occasion that the institutions had a circumscribed power as part of Article 4(1): they had an obligation to refuse access.

The *Bresselink*⁵¹ ruling issued on 12 September 2013 is also informative, relating to the disclosure of a document about the negotiation on the accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The applicant was basically claiming the 'constitutional' nature of the draft decision in question, also made public, to challenge the refusal which it had received, referring to the need for 'public debate'.

The General Court refused to respond to this, based on its view that the contentious document came under the exception relating to international relations. Whatever its 'nature', this did not hide the fact that the practical procedures for this accession, which are not provided for in the EU Treaty, were carried out as part of the Union's international relations⁵². However, the General Court believed that the Council had made a manifest error of assessment by opposing the disclosure of a negotiating directive concerning only the Union and not jeopardising the climate of confidence during this negotiation process. A similar argument allowed it to reject another complaint therefore that disclosure could undermine the EU's negotiation capacity.

The **two rulings issued by the General Court in the *In't Veld*⁵³ case**, involving incidentally an MEP, **will be established as case law**, at any rate, whether the Court of Justice approves or annuls them. They require specific analysis, which may be summarised as follows: the scope of the exception relating to international relations has been established by the judge in 2012 without the specific means of access being properly reviewed in 2013.

Scope of the exception relating to international relations

The applicant was challenging the Council's refusal to provide access to an opinion from the Council Legal Service concerning the start of negotiations on an anti-terrorism agreement with the United States (SWIFT), based on Article 4(1)(a) of the regulation concerning the protection of public interest relating to international relations.

Such a document substantively came under the scope of the exception referred to. However, its content, an **opinion from the Council Legal Service** on the 'legal basis' of the relevant agreement, caused a problem concerning the powers available.

With regard to this subject, the applicant claimed that the exception did not come into play in relation to 'domestic law' matters. The Council responded by saying that this disclosure would firstly reveal to the public information about certain provisions in the planned agreement, which would undermine the climate of confidence in the ongoing negotiations and would secondly reveal to the other party aspects relating to the position to be taken by the Union, which could be exploited in order to weaken its position.

The General Court provided two arguments. It noted that the document was 'likely' to be classified as an exception, 'linked to the specific context of the international agreement'. It then discharged the Council of responsibility for any consequences arising from the document possibly being disclosed because of its impact on the 'relations of trust', vital for conducting negotiations.

The judge exercised greater caution regarding the risk of disclosing to the other party information likely to undermine the Union's position.

⁵⁰ Paragraph 40.

⁵¹ GC, 12 September 2013, *Bresselink*, T-331/11.

⁵² Paragraph 45.

⁵³ GC, 4 May 2012, *Sophie In't Veld v Council*, T-529/09; GC, 19 March 2013, *Sophie In't Veld v Commission*, T-301/10.

From its own perspective, the Council had to **establish the risk of a 'subsisting and specific injury'**⁵⁴. In actual fact, 'contrary to the claims of the Council and the Commission, the risk of disclosing positions taken within the institutions regarding the legal basis for concluding a future agreement does not **in itself** establish the existence of a threat to the European Union's interest in the field of international relations'⁵⁵. Because of its '**constitutional' aspect and the objectivity** involved in determining it, the issue about the **legal basis of an act is not a matter of discretion for an institution**. Therefore, 'the mere fear of disclosing a disagreement within the institutions regarding the legal basis of a decision authorising the opening of negotiations on behalf of the European Union is not a sufficient basis for concluding that the protected public interest in the field of international relations may be undermined'⁵⁶. Consequently, the Council did not establish where the risk of harm to the public interest lay with regard to the debate on the legal basis, whereas it did this in terms of the content for the act.

Therefore, the Court's position meant that **falling within the scope of the exception concerning international relations does not automatically entail confidentiality**. The General Court believed that the negotiating directives and the background to the negotiations obviously enjoyed the protection desired by the EU legislature in 2001. On the other hand, it highlighted the issue of the legal basis by combining it with an **objective concern for information**, allowing it to cross the line in terms of the protection of confidentiality.

Limits on openness

The judgment in the second *Sophie In't Veld*⁵⁷ case, issued 19 March 2013, related to the controversial negotiation of the ACTA agreement. The General Court **rejected all the pleas** submitted with the aim of gaining access to some documents relating to these negotiations.

The applicant had requested access to around 50 documents relating to the Anti-Counterfeiting Trade Agreement (ACTA) on the basis of Regulation (EC) No 1049/2001. Irrespective of the technical issues involved, she was casting doubt on the manifest error of assessment of the Commission's refusal.

The Commission typically claimed that unilateral disclosure of these documents would have undermined the **parties' mutual trust** and, therefore, the public interest. The judge concurred with this approach, with this interpretation of Article 4 seeming to be consistent⁵⁸. He rejected the applicant's idea that disclosure would have been possible as soon as the negotiation positions had been stated to third parties.

The General Court believed that 'in the context of international negotiations, the positions taken by the European Union are, by definition, subject to change depending on the course of those negotiations, and on concessions and compromises made in that context by the various stakeholders. As has already been noted, the formulation of negotiating positions may involve a number of tactical considerations of the negotiators, including the European Union itself ... it is possible that **the disclosure by the European Union, to the public, of its own negotiating positions**, even though the negotiating positions of the other parties remain secret, could, in practice, **have a negative effect** on the negotiating position of the European Union'⁵⁹.

In an almost systematic manner, the judge adhered, in this case, to a **rigid interpretation of the exception**, hiding behind the justification that 'unilateral disclosure by one negotiating party of the negotiating position of one or more other parties, even if this appears anonymous at first sight, may be likely to seriously undermine, for the negotiating party whose position is made public and, moreover, for the other negotiating parties who

⁵⁴ Paragraph 30.

⁵⁵ Paragraph 46.

⁵⁶ Paragraph 50.

⁵⁷ T-301/10.

⁵⁸ Paragraphs 121-122.

⁵⁹ Paragraph 125.

are witnesses to that disclosure, the mutual trust essential to the effectiveness of those negotiations⁶⁰.

Lastly, this observation is not neutral even though mentioned incidentally in both judgments⁶¹. The General Court took care to **emphasise the context** in which the disclosure of a document relating to international relations takes place: 'initiating and conducting negotiations in order to conclude an international agreement fall, in principle, within the domain of the executive, and that public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations.'

- Financial, monetary or economic policy of the Union or a Member State

The *Evropaïki Dynamiki* case of 6 December 2012, cited above⁶², provided the General Court with the opportunity to censure the Commission for the flippant manner in which it opposed the disclosure of quotation requests, based on the following reasons: 'risk' to public security, commercial interests and the protection of the European Union's economic policy. The General Court therefore pointed out that the content of this exception definitely included ensuring fair and undistorted competition within the internal market⁶³. Nevertheless, it needed to be established how access to the documents requested could specifically and actually undermine that objective in a way that was **reasonably foreseeable and not purely hypothetical**.

The judgment in the case *Thesing v ECB*, issued on 29 November 2012, is more informative in this respect⁶⁴. This challenged the ECB's refusal to disclose documents relating to derivative transactions in financing the deficit and in managing public debt in Greece. Firstly, it allowed the General Court to challenge Decision 2004/258/EC of the ECB of 4 March 2004 on public access to European Central Bank documents⁶⁵, inspired by Regulation (EC) No 1049/2001. The General Court therefore ruled that 'the reasoning on which those principles are based is also valid in a case where the ECB refuses to grant access to a document under the second indent of Article 4(1)(a) of Decision 2004/258⁶⁶.

Given that at the time when the challenged decision was adopted, Europe's financial markets were operating in a very vulnerable climate, not only could **the exception be asserted but even justified**. The fragile stability of these markets, particularly due to the economic and financial situation in Greece, explains the concern about wishing to protect public confidence⁶⁷. In applying the exceptions to the right of access provided for in Article 4 of Decision 2004/258, the ECB did not limit that right solely to documents falling within the exercise of its administrative tasks, as referred to in Article 15(3) TFEU, and did not go ahead with a total, blanket ban either⁶⁸.

- *Protection of the privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data: Article 4(1)(b)*

The disclosure of documents on the basis of the right of access may raise a problem with the protection of personal data guaranteed by both the Charter and Regulation (EC)

⁶⁰ Paragraph 126.

⁶¹ T-529/09 paragraph 88; T-301/10, paragraphs 120 and 186.

⁶² GC, 6 December 2012, *Evropaïki Dynamiki et al. v Commission*, T-167/10.

⁶³ Paragraph 82.

⁶⁴ GC, 29 November 2012, *Gaby Thesing v European Central Bank*, T-590/10.

⁶⁵ OJ L 80 p. 42.

⁶⁶ Paragraph 44.

⁶⁷ Paragraph 52.

⁶⁸ Paragraph 79.

No 45/2001 on the protection of individuals in this area. The **courts have continued their task of reconciling** subsisting fundamental rights⁶⁹.

In this regard, the appeal made to the Court of Justice in the *Bavarian Lager* case, already cited above, assumes particular significance⁷⁰. In fact, the General Court had been of the view⁷¹ that **priority had to be given to the right to information about personal data** concerning the attendees at a Commission meeting as part of an infringement procedure. The Court actually **invalidated this reasoning on** 29 June 2010⁷².

The interaction between the subsisting regulations was the nub of the debate⁷³, due to their regulatory nature (without implying one overriding the other), their proximity in time and the 'general' nature of one (access to documents) and the 'special' nature of the other (data protection).

The General Court had handled this by restricting the duty of respect for privacy stipulated in Article 4(1)(b) to situations where it relates to the individual's privacy under Article 8 of the ECHR without taking into account Union legislation on the protection of personal data and, in particular, Regulation (EC) No 45/2001. It had therefore believed that compliance 'with Community legislation regarding the protection of personal data' could be **qualified**. In other words, the General Court had abided by the 'threshold theory', wishing to establish, first and foremost, that the privacy of the persons concerned is affected before the rules on data protection possibly come into play. It had received the support of the European Data Protection Supervisor on this point, who argued that 'the privacy of the individuals who attended the meeting (acting in their professional capacity) would not be affected by the full public disclosure of the minutes'.

In contrast, the 'renvoi' theory would like Article 4(1)(b) to be a '**renvoi**' to the data protection regulation, meaning that once a public access request was made for a document containing personal data, it should be dealt with further under the data protection regulation.

The General Court chose the **second option** to define its view of the relationship existing between regulations 45/2001 and 1049/2001. These two texts pursue '**different objectives**'. The aim of the first one is to protect an individual right to privacy, whereas the second one aims to ensure the Union's decision-making process is as transparent as possible. The link between them is established by Article 4(1)(b) of Regulation (EC) No 1049/2001 as a relationship '**in accordance** with Community legislation regarding the protection of personal data', described by the Court as an '**indivisible provision**'⁷⁴.

It believes that 'Article 4(1)(b) of Regulation No 1049/2001 establishes a specific and reinforced system of protection of a person whose personal data could, in certain cases, be

⁶⁹ On a more general note, even if the reflection on this exceeds the scope of this study devoted to the right of access, the protection of personal data may also run counter to a legitimate demand for openness. In case C-92/09 of 9 November 2010 (*Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen*), the Court of Justice states that 'while it is true that in a democratic society taxpayers have a right to be kept informed of the use of public funds, the fact remains that striking a proper balance between the various interests involved made it necessary for the institutions concerned, before adopting the provisions in question, to ascertain whether publication via a single freely consultable website in each Member State of data by name relating to all the beneficiaries concerned and the precise amounts received by each of them from the EAGF and the EAFRD – with no distinction being drawn according to the duration, frequency or nature and amount of the aid received – did not go beyond what was necessary for achieving the legitimate aims pursued, having regard in particular to the interference with the rights guaranteed by Articles 7 and 8 of the Charter resulting from such publication. In this respect, no automatic priority can be conferred on the objective of transparency over the right to protection of personal data, even if important economic interests are at stake' (paragraphs 79 and 83).

⁷⁰ The General Court also annulled in two *Borax* cases the refusals by the Commission to grant access for the reason that the latter had not given any specific reason in its refusal about the risk of the protection of privacy being undermined.

⁷¹ CFI, 8 November 2007, *The Bavarian Lager Co. Ltd supported by the European Data Protection Supervisor*, T-194/04.

⁷² CJEU, 29 June 2010, *Commission v Bavarian Lager Co. Ltd*, C-28/08 P, ECR I-06055.

⁷³ It will also be noted that, in the eyes of the Court, surnames and first names may be regarded as 'personal data'. Disclosing such data comes under the definition of 'processing' as stipulated by the data protection regulation.

⁷⁴ Paragraph 59.

disclosed to the public⁷⁵, which cannot be disregarded. The General Court was unable to dismiss it, except as a 'particular and restrictive interpretation', even if this was also how it was interpreted by the European Data Protection Supervisor. There could not be two assessment scales for observing privacy, depending on the working of Article 8 of the ECHR, even if it meant giving the protection of privacy precedence over the right of access to documents.

In this case, the Commission was able to rely on Article 8 of Regulation No 45/2001⁷⁶ to refuse to disclose the names of the relevant persons, after establishing whether they gave their consent or not. Legally, it could, in the case of those who had not given their explicit consent, have requested **the applicant to demonstrate the need to transfer this personal data**⁷⁷, even if this meant **undermining the general principle of the access to documents**, without giving any reason for the interest in gaining access, stipulated by Article 6(1) of Regulation (EC) No 1049/2001.

This presents a **major challenge as part of the process of revising** Regulation (EC) No 1049/2001. The risk of the case law based on the *Bavarian Lager* case being used to undermine the general nature of the rights of access to documents is real. Therefore, the European Data Protection Supervisor quite rightly **adopted a proactive approach** on this point in the analysis he made of the Court's judgment⁷⁸. He took the view that in order to 'achieve a fair balance between the right to data protection and the public interests of transparency, institutions should take a proactive approach on the matter and not assess the possible public nature of personal data they collect only at the moment they receive a request for public access to a document containing personal data'⁷⁹.

This position based on case law has been applied since then. This is true in the case *Jordana v Commission*⁸⁰. The applicant requested access to the reserve list for an open competition and to the individual decisions appointing officials, based on the assumption of the application of Regulation (EC) No 45/2001. The fact that the Commission failed to establish the relationship between the two texts based on the new case law resulted in an annulment by the General Court.

Lastly, a number of cases apply the exception on data protection. The case *Josephides v Commission and Education, Audiovisual and Culture Executive Agency (EACEA)*⁸¹ is a classic case in point, confirming the need to carry out a detailed, individual examination of the situation.

The ruling in *Internationaler Hilfsfonds eV v Commission*⁸² related to the refusal to grant access to a cofinancing contract to a German NGO. The General Court rejected the argument based on the *Bavarian Lager* case law, cited frequently, for the reason that, as there is a strict interpretation of the exceptions listed in Article 4 of Regulation (EC) No 1049/2001 and Regulation (EC) No 45/2001 applied, 'it must be held that the disclosure of personal data exclusively concerning the applicant for access in question cannot be refused on the ground that it would undermine the protection of privacy and the integrity of the individual. It must, however, be guaranteed ... in relation to third parties'⁸³.

There was no lack of interest either in the case *Dennekamp v European Parliament*⁸⁴, aimed at having annulled a ruling refusing to grant access to documents relating to the affiliation

⁷⁵ Paragraph 60.

⁷⁶ Article 8(b) requires the person requesting access to provide an explicit and legitimate reason or persuasive arguments in order to prove the need for disclosure.

⁷⁷ Paragraphs 75 and 77.

⁷⁸ EDPS, Review of relationship between transparency and data protection more urgent after Court ruling on Bavarian Lager, Press release, 30 June 2010.

⁷⁹ EDPS, Public access to documents containing personal data after the Bavarian Lager ruling, 24 March 2011, p. 7.

⁸⁰ GC, 7 July 2011, *Jordana v Commission*, T-161/04.

⁸¹ GC, 21 October 2010, *Josephides v Commission and Education, Audiovisual and Culture Executive Agency (EACEA)*, T-439/08.

⁸² GC, 22 May 2012, *Internationaler Hilfsfonds eV v Commission*, T-300/10.

⁸³ Paragraphs 107 and 109.

⁸⁴ GC, 23 November 2011, *Dennekamp v European Parliament*, T-82/09.

of certain Members of the European Parliament to the pension schemes. This was actually the occasion to apply the *Bavarian Lager* case law, which resulted in the applicant's request being dismissed. The same reasoning applied in the case *ClientEarth v European Food Safety Authority* (EFSA)⁸⁵

The ruling on *Egan and Hackett v Parliament*⁸⁶ related to gaining access to the register of assistants to former MEPs. Published previously, these documents led the General Court to define the **scope of the term 'disclosure'**, which means 'to make accessible a document which is not accessible'⁸⁷. As no specific, individual assessment was carried out, aimed at ascertaining whether the documents requested came under the exception stipulated in Article 4(1)(b) in preference to applying this exception automatically, the refusal by Parliament to grant access was annulled.

The *Borax*⁸⁸ case also led to the General Court rejecting the Commission argument about disclosing the **identity of experts** who have attended meetings. The General Court believed that the Commission's refusal was not based on any grounds explaining how identifying the experts would invade their privacy or breach Regulation (EC) No 45/2001. Therefore, the general nature of this explanation was criticised in this case without the risk of pressure excluding a different solution.

- Relative limits on the right of access

Article 4(2) of Regulation (EC) No 1049/2001 list these limits, also featuring an 'overriding public interest', which may be likely to allow disclosure. Case law has shown a varying degree of interest in this, including some significant advances.

- *Protection of commercial interests of a natural or legal person*

The first indent of Article 4(2) features one of the most traditional exceptions. It is the subject of numerous cases where case law is applied⁸⁹, relating to mergers or tender proceedings, without, nevertheless, the substantive law being modified as a result. In fact, the General Court ensures systematically that the institution in question has definitely undergone an individual, specific examination to provide a judgment on a case-by-case basis.

It will also be noted from recent case law, the ruling on *Stichting Greenpeace Nederland*⁹⁰ issued by the General Court on 8 October, where the Court criticised the Commission's refusal to give precedence to this overriding public interest as part of a special regulation⁹¹, in connection with the Charter and an international convention.

- *Protection of court proceedings and of legal advice*

The key aspects of this are based on the case law of the Court of Justice in the cases '*MyTravel*'⁹² and '*ASBL API*'. Nevertheless, it will be remembered that in the *Jurašinović* case cited above, the General Court believed that the Council was committing an error in law, by thinking that it was bound by the rules on confidentiality of the International Criminal Tribunal for the former Yugoslavia, by giving up its power of discretion⁹².

- Court proceedings

⁸⁵ GC, 13 September 2013, *ClientEarth v European Food Safety Authority* (EFSA), T-214/11.

⁸⁶ GC, 28 March 2012, *Egan and Hackett v Parliament*, T-190/10.

⁸⁷ Paragraph 75.

⁸⁸ CFI, 11 March 2009, T-166/05, *Borax Europe*, T-166/05 and T-121/05.

⁸⁹ GC, 19 January 2010, *Co-Frutta Soc. coop. versus European Commission*, T-355/04 and T-446/04; GC, 7 July 2010, *Agrofert Holding*, T-111/07; GC, 24 May 2011, *Navigazione Libera del Golfo Srl (NLG) versus European Commission*, T-109/05 and T-444/05; GC, 22 May 2012, *EnBW Energie Baden-Württemberg AG*, T-344/08; GC, 15 January 2013, *Guido Strack versus European Commission*, T-392/07; GC, 29 January 2013, *Copesuri v European Food Safety Authority* (EFSA) T-339/10 and T-532/10; GC, Order of 25 April 2013, *AbbVie / EMA*, T-44/13 and Order of 25 April 2013, *InterMune UK e.a. / EMA*, T-73/13.

⁹⁰ GC, 8 October 2013 cited above, T-545/11 paragraph 35 ff.

⁹¹ Regulation (EC) No 1367/2006 of 6 September 2006, on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

⁹² GC, 3 October 2012, *Jurašinović v Council*, T-63/10.

The Court confirmed that in the '*API*⁹³ case **disputed procedures** were not excluded from the scope of transparency. Examining the appeals lodged by the Commission, the Kingdom of Sweden and an association of journalists, the Court provided an important clarification on the debate about the institutions **drafting pleadings**. The general presumption of confidentiality which it establishes was counterbalanced by a time-related factor.

First of all, the Court interpreted the exception desired by the legislator: 'the limitations placed on the application of the principle of **transparency in relation to judicial activities** pursue the same objective: that is to say, they seek to ensure that exercise of the right of access to the documents of the institutions does not undermine the protection of court proceedings⁹⁴.' Otherwise, there would be a risk of upsetting the vital balance between the parties to a dispute. Moreover, there is a '**general presumption** that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings⁹⁵. These pleadings actually feature more in the legal activity of the Court, which is protected, than in the administrative action taken by the relevant institution. In fact, this position manages to turn into an absolute exception what, in Regulation (EC) No 1049/2001, comes under relative exceptions ...

Nevertheless, in keeping with the case law already established⁹⁶, this presumption is **not non-rebuttable**. An overriding public interest may be allowed to dismiss it under the legislation itself. Furthermore, the Court 'does not exclude the right of those interested parties to demonstrate that a given document disclosure of which has been requested is not covered by that presumption⁹⁷. Therefore, the presumption is only valid **up until the judgment is issued** (and not until the hearing, as put forward by the General Court): 'that is not the case where the proceedings in question have been closed by a decision of the Court⁹⁸.' In this case, 'there are no longer grounds for presuming that disclosure of the pleadings would undermine the judicial activities of the Court since those activities come to an end with the closure of the proceedings'. The proper examination of the requested documents will help ascertain whether there is a risk of seeing disclosure undermine other proceedings still pending.

The debate on the **nature of this 'overriding public interest'** is certainly not over. In fact, the Court of Justice seems reluctant to develop its case law based on the *Turco* case where it had disavowed the General Court when the latter requested that the public interest cited to justify disclosure differed from the principle of transparency. But the Court of Justice backed down in this case when it admitted that an interest in transparency could be taken into account, provided that it was '**particularly pertinent**⁹⁹.

The caution exercised by the Court of Justice when the matter relates to its own activities is still noticeable. While some doubt may be cast over the breach of the equality of arms highlighted by the Court of Justice in justifying a presumption of confidentiality, on the other hand, it is obvious that this **solution overturns the rule of general access presented in Article 6 of the regulation**. If this was to be the solution, it was better therefore to exclude this type of document completely from the scope of the regulation or, at the very least, adhere to the opinion of the Advocate General that only the Court of Justice could make a decision on disclosure¹⁰⁰.

- Legal opinions

Two extremely important cases from the Court of Justice are transforming the case law system. In the case *Turco v Council*¹⁰¹, the Court of Justice outlines an ambitious frame of

⁹³ CJEU, 21 September 2010, Kingdom of Sweden and ASBL (API) v Commission, C-514/07 P, C-528/07 P and C-532/07 P.

⁹⁴ Paragraph 84.

⁹⁵ Paragraph 94.

⁹⁶ CJEU, 29 June 2010, Commission/Technische Glaswerke Ilmenau, C-139/07 P, paragraph 62.

⁹⁷ Paragraph 103.

⁹⁸ Paragraph 130.

⁹⁹ Paragraph 152 ff.

¹⁰⁰ Opinion of Maduro, paragraph 39.

¹⁰¹ CJEU, 1 July 2008, Sweden and Turco v Council, C-39/05 and C-52/05, ECR I-04723.

reference with regard to the **confidentiality of legal opinions, which means that documents may be disclosed, in principle. It therefore overturns the presumption of confidentiality associated with these documents. This openness is confirmed by the MyTravel case.**

The *Turco* judgment is a leading case. The Court of Justice annulled the ruling of the CFI¹⁰², thereby protecting the confidentiality of an opinion issued by the Council Legal Service, on the grounds that disclosure might have left the legality of the relevant legislative act in doubt.

Firstly, the Court interpreted the exception as 'aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice'¹⁰³. Claiming on a general, abstract basis that disclosure could raise doubts about the legality of legislative acts could not provide justification in itself for refusal to disclose.

On a formal note, it stated that 'it is precisely openness in this regard that **contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens**, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole'¹⁰⁴. It added harshly that these doubts would not arise if the statement of reasons for that act was reinforced, so as to make it apparent why an unfavourable opinion was not followed.

It then introduced a line of argument based on 'general presumptions', likely to favour disclosure or not, which is confirmed later on: 'It is, in principle, open to the Council to base its decisions in that regard on **general presumptions which apply to certain categories of documents**, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature. However, it is incumbent on the Council to **establish in each case** whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose'¹⁰⁵.

This analysis allows it to outline the limits in terms of confidentiality by making a significant distinction between **opinions relating to legislative matters** and others. For this to happen, the specific interest protected by non-disclosure must be balanced with the general interest regarding transparency.

It is the duty of the institution receiving a request to disclose a document to establish whether it considers that disclosing this document would breach the protection of the legal opinions, and that there is no overriding public interest justifying its disclosure. These considerations are 'of particular relevance' where the Council is acting in its **legislative capacity**.

This has given rise to the following solution: Regulation (EC) No 1049/2001 'imposes ... **in principle, an obligation to disclose** the opinions of the Council's legal service relating to a legislative process. That finding does not preclude a refusal, on account of the protection of legal advice, to disclose a specific legal opinion, given in the context of a legislative process, but being of a particularly sensitive nature or having a particularly wide scope that goes beyond the legislative process in question. In such a case, it is incumbent on the institution concerned to give a detailed statement of reasons for such a refusal'¹⁰⁶.

The *MyTravel Group*¹⁰⁷ judgment provides additional clarification regarding legal opinions

¹⁰² CFI, 23 November 2004, *Sweden and Turco v Council*, T-84/03, ECR II-4061; confirming our analysis, Parliament study cited above.

¹⁰³ Paragraph 42.

¹⁰⁴ Paragraph 59.

¹⁰⁵ Paragraph 50.

¹⁰⁶ Paragraph 68 ff.

¹⁰⁷ CJEU, 21 July 2011, *Sweden and MyTravel Group*, C-506/08 P.

issued in an administrative context, in relation to a refusal to grant access to the competition authorities' file concerning the follow-up action to a judgment issued by the Court of Justice.

Firstly, the Court dismissed the argument that the *Turco* case would only relate to 'legislative matters' and it emphasised that **'the administrative activity of the institutions does not escape in any way from the scope of Regulation No 1049/2001'**¹⁰⁸.

It then repeated its argument based on *Turco* in relation to the benefits of transparency and the way in which it reinforces the legitimacy of the Union's action. In any case, as the procedure was closed, there was no longer any risk that disclosure of the opinion would affect the decisions likely to arise between the same parties or in the same sector¹⁰⁹.

Therefore, combining both these decisions defines the current state of substantive law.

- o *Inspections, investigations and audits*

This exception has extensively been the subject of case law, mentioned during the period being examined, as well as of conventional cases where it has been applied¹¹⁰. It has led the Court of Justice to clarify the **relationship between a general regulation and a specialised regulation** and, as part of this, to restrict the open-mindedness that it had shown.

The judgment issued by the CJEU on the *Technische Glaswerke Ilmenau*¹¹¹ case was the first practical application based on case law of 'general presumptions', confirmed in the judgment from the *Turco* case, and which may ultimately curtail the application of the right of access. In this case, the Court of Justice disavowed the General Court, which had requested access to documents relating to procedures for reviewing State aid.

In its view that this framework differs from that for the institutions' legislative activities, the Court complained that the General Court failed to consider that the interested parties, except for the Member State responsible for granting the aid, do not have a right under the procedure for reviewing State aid to consult the documents on the Commission's administrative file.

This 'fact'¹¹², linked to the interaction of two competing regulatory systems, one for access to documents and the other for reviewing State aid, influenced the interpretation of the exception stipulated by Regulation (EC) No 1049/2001, thereby undermining the second one. It explained 'the existence of a **general presumption**' that disclosure of documents in the administrative file would in principle undermine the protection of the objectives of investigation activities. This **presumption is not absolute and may be overturned if there is an overriding public interest**¹¹³.

This interpretation in favour of 'general presumptions', also applies in the case of **merger control proceedings**. This is the conclusion which must be drawn from the two judgments issued on 28 June 2012¹¹⁴ in the *Odile Jacob* and *Agrofert* cases. In the view of the Court, providing third parties with excessive access to the documents exchanged as part of the Commission carrying out merger control procedures was liable to 'jeopardise the balance which the European Union legislature sought to ensure in the merger regulation between the obligation on the undertakings concerned to send the Commission possibly sensitive commercial information to enable it to assess the compatibility of the proposed transaction with the common market, on the one hand, and the guarantee of increased protection, by

¹⁰⁸ Paragraph 109.

¹⁰⁹ Paragraphs 115 and 116.

¹¹⁰ For example, CJEU, Pfeiderer, 14 June 2011, C-360/09; GC, EnBW Energie Baden-Württemberg AG v Commission, T-344/08; GC, 15 January 2013, Guido Strack v Commission, T-392/07.

¹¹¹ CJEU, 29 June 2010, Commission v Technische Glaswerke Ilmenau, C-139/07 P, ECR I-05885.

¹¹² Paragraph 58.

¹¹³ Paragraph 68.

¹¹⁴ CJEU 28 June 2012, Commission v Editions Odile Jacob SAS, case C-404/10 P; CJEU 28 June 2012, Commission v Agrofert Holding a.s., case C-477/10 P.

virtue of the requirement of professional secrecy and business secrecy, for the information so provided to the Commission, on the other¹¹⁵.

This interaction between general and specific regulations does not always have a negative outcome for the right of access. When the specific regulation provides enhanced protection, as in the case of **environmental matters**, the judge obviously gives this precedence. For instance, in the case cited above, *Stichting Greenpeace Nederland* of 8 October 2013¹¹⁶, the General Court rejected the argument submitted by the Commission on the basis of the *Technische Glaswerke Ilmenau* case to refuse the disclosure of the requested documents.

- o *Protection of Union's decision-making process*

Article 4(3) of the regulation defines its two areas: protection is afforded to the institutions' **internal deliberations and workings** to the same extent as the **decision-making process**. The disclosure of the document would need to '*seriously undermine*' the process to refuse access and not have any '*overriding public interest*' preventing this.

The *Borax* ruling is an interesting application in this regard. The Court of First Instance commented in this that Regulation (EC) No 1049/2001 explicitly permits access to a document containing **opinions for internal use** as part of deliberations and preliminary consultations within the relevant institution. 'Neither the purely internal purpose of a document nor its use as a document preparatory to the institution's final decision are therefore, by themselves, grounds for refusing access to the documents applied for¹¹⁷.' Furthermore, since the **principle of disclosure is involved**, 'in order to refuse the access sought, the institution cannot simply rely on the document's use for internal purposes or the absence of a decision and thus decide that in those circumstances its decision-making process has been seriously undermined¹¹⁸.'

The judgment cited above on the *MyTravel Group*¹¹⁹ case clarifies this issue once and for all, regarding the protection both of the Commission's internal consultations and the decision-making process. This also included its political aspect. In this regard, Advocate General Kokott emphasised that the main intention of the Union's legislature in 2001 was to exercise minimal transparency in these phases, contrary to the opinion of the Commission.

Therefore, this put at stake an administrative '**internal space to think**' requested by the institutions as a way of departing from the principle of transparency.

The Court adhered to the arrangement in Article 4(3), which makes a distinction according to whether the decision has been adopted or not. When the **procedure has been closed**, the exception covers 'only documents containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned¹²⁰.'

It believed that 'the Union legislature took the view that, once the decision is adopted, the requirements for protecting the decision-making process are less acute, so that disclosure of any document other than those mentioned in the second subparagraph of Article 4(3) of Regulation No 1049/2001 can never undermine that process'. The refusal to disclose such a document could not be permitted, even if its disclosure would have seriously undermined that process if it had taken place **before the adoption** of the decision in question.

This is the contribution made by this judgment: the arguments justifying a refusal must be based on '**specific reasons**¹²¹ which do not permit disclosure when the process has been ended.

Furthermore, even if the relevant documents did come under the scope of the exception

¹¹⁵ Paragraph 121.

¹¹⁶ GC, 8 October 2013, *Stichting Greenpeace Nederland and PAN Europe / Commission* T-545/11.

¹¹⁷ Paragraph 101.

¹¹⁸ Paragraph 92.

¹¹⁹ CJEU, 21 July 2011, *Sweden and MyTravel Group*, C-506/08 P.

¹²⁰ Paragraph 78.

¹²¹ Paragraph 82.

relating to internal documents, failure to prove that there were grounds for fearing that the decision-making process would be undermined warrants the same criticism.

The Court has just reinforced its position with a major argument in a judgment issued on 17 October 2013 in the case *Council v Access Info Europe*¹²², by rejecting an appeal lodged by the Council, with the support of three Member States.

In fact, the General Court had issued a ruling¹²³ in favour of granting access to data relating to the identity of a Member States, after tabling legislative amendments precisely when Regulation (EC) No 1049/2001 was being revised(!). In support of its appeal, the Council cited the exception in Article 4(3) to protect the national delegations' 'room for manoeuvre' in their quest for a compromise due to the sensitive nature of the proposals submitted by the representatives of the Member States. This was the reason for its refusal to have a note from the Council's Secretariat General disclosed as part of a legislative procedure and more especially, the identity of the relevant Member States.

The General Court had taken the opposite view, 'particularly in the light of the importance for European Union citizens of the questions debated and the lack of any other evidence in the file showing the reactions of Member State delegations, the media and the public'¹²⁴.

The Advocate General was also inclined towards this view. In his opinion, the Council 'acting in its legislative capacity' could not hide behind the transparency desired by recital 6 of the regulation and used by the *Turco* case. Asserting legitimately that 'openness is an inherent part of the working method of a legislature', the Advocate General rightly emphasised that, in this case, the public interest provided by transparency would almost naturally take precedence *a priori*, even if it is an exception to the protection of confidentiality. 'Access to this information serves in a direct way to satisfy the ultimate purpose of the legislative procedure, namely to give democratic legitimacy to the legislation that emerges from that procedure'¹²⁵.

The Court confirmed this approach wholeheartedly. First and foremost, it challenged the notion that the protection of confidentiality would require 'guaranteeing a negotiation space', desired by the Council. After recalling the basic principles of its case law, it emphasised its '**particular relevance where the Council is acting in its legislative capacity**'¹²⁶. Without denying the need to strike a balance between the principle of transparency and maintaining an effective decision-making process, the Court of Justice remarked that disclosure of the identity of the Member States participating in the legislative procedure did not give rise to a 'genuine risk of seriously undermining the [Council's] decision-making process'. In fact, since Regulation (EC) No 1049/2001 ensured 'the widest possible access', such a risk alone was likely to justify either restricted access or a refusal to grant access, if it was not hypothetical. The risk of harm alone could not be enough to justify a refusal to grant access.

Therefore, the general interest in obtaining access to the documents took precedence *a priori*, with the identity of the Member States participating in the legislative process featuring as an aspect of democratic transparency.

- *Protection for documents originating from a Member State*

The exception set out in Article 4(5) of the regulation has already been at the centre of several disputes since the leading case *Kingdom of Sweden v Commission*¹²⁷, specifically about IFAW. The acceptance of the appeal lodged in the IFAW case¹²⁸ and the annulment of the judgment issued by the General Court refusing to grant an NGO access to environmental information supplied by a Member now define the law as it currently stands.

¹²² CJEU, 7 October 2013, Council / Access Info Europe, (C-280/11 P).

¹²³ GC, 22 March 2011, Access Info Europe v Council, T-233/09.

¹²⁴ Paragraph 74.

¹²⁵ Opinion of Pedro Cruz Villalon, in case C-280/11 P, 16 May 2013, paragraph 61.

¹²⁶ Paragraph 33.

¹²⁷ ECJ, 18 December 2007, Kingdom of Sweden v Commission, C-64/05 P.

¹²⁸ CJEU, 21 June 2012, IFAW v Commission, C-135/11 P

In the view of the General Court, faced with a Member State's objection to having a document supplied to the institutions disclosed, **its review** was to be limited to establishing whether the procedural rules and the duty to state reasons had been complied with, whether the facts had been accurately stated, and whether there had been a manifest error of assessment or a misuse of powers, with the Member State enjoying broad discretion¹²⁹.

While acknowledging that, according to Article 4(5), disclosure of the document was subject to prior consent from the Member State, as had been stated in case C-64/05 P, the Court reminded, however, that it had pointed out that this provision '**does not confer on the Member State a general and unconditional right of veto**, permitting it arbitrarily to oppose, and without having to give reasons for its decision, the disclosure of any document held by an institution simply because it originates from that Member State'¹³⁰. It 'resembles not a discretionary right of veto but a form of assent confirming that none of the grounds of exception under Article 4(1) to (3) is present'. It follows that the institution concerned is required to examine whether this Member State justified its objection on the basis of the substantive exceptions laid down in Regulation (EC) No 1049/2001 and if it duly justified its position in this regard¹³¹. Now, before issuing a refusal, the Commission must **ensure that such a reason exists** and state it in the decision it adopts at the end of the procedure, without embarking on a comprehensive assessment of the decision to object made by the Member States.

A refusal does not mean in any way that the applicant has lost judicial protection within the Union. It 'is within the jurisdiction of the European Union judicature to review, on application by a person to whom the institution has refused to grant access, whether that refusal could have been validly based on those exceptions, regardless of whether the refusal results from an assessment of those exceptions by the institution itself or by the Member State concerned'¹³². In the specific case, the General Court had to consult these documents *in camera*, so that the parties themselves did not have access to them¹³³.

The case *Federal Republic of Germany v Commission*¹³⁴ raised the same issue¹³⁵, concerning Germany's refusal to disclose a document which the Commission had decided not to follow. Applying the case law from *Sweden v Commission* already looked at, the General Court reminded that Article 4 'does not in any way confer on the Member State a general and unconditional right of veto, so that it can oppose, in an entirely discretionary manner and without having to give reasons for its decision, the disclosure of any document held by an institution simply because it originates from that Member State'¹³⁶. This article relating to both Member States and institutions 'establishes for that purpose **a decision-making process within the framework of which the two are obliged to cooperate in good faith**'¹³⁷. Since the institution is empowered to ensure that the grounds for the Member State's objection are not unfounded, the Commission was therefore able legally to override the Member State's refusal.

On this basis, the General Court has therefore just criticised a refusal by the Commission to disclose environmental information on the basis of a specific regulation, Regulation (EC) No 1367/2006 cited above, while the Member State which issued the document refused to disclose this information on the grounds that it was not justified by any overriding interest¹³⁸.

¹²⁹ GC, 13 January 2011, IFAW, T-362/08, paragraph 107.

¹³⁰ Paragraph 58.

¹³¹ C-135/11 P, paragraph 62.

¹³² Paragraph 72.

¹³³ Paragraph 73.

¹³⁴ GC, 14 February 2012, Federal Republic of Germany v Commission, T-59/09.

¹³⁵ See also GC, 24 May 2011, Navigazione Libera, T-109/05 and T-444/05.

¹³⁶ Paragraph 35.

¹³⁷ Paragraph 45.

¹³⁸ GC, 8 October 2013, Stichting Greenpeace Nederland and PAN v Commission, T-545/11.

2. EXERCISING THE RIGHT OF ACCESS TO DOCUMENTS

Taking a closer look at the conditions under which the right of access to documents is exercised in the European Union reveals the limits of the current regulation. This discrepancy is highlighted by the practice in comparative law.

2.1 Details of comparison

The regulation on access to documents in the Union was a **relative late-comer** in relation to the practices known in the Member States and abroad. On the other hand, it is pioneering on the European continent.

2.1.1 The Council of Europe

Access to administrative documents has gradually assumed its place in the law of the Council of Europe, with more than a passing interest in taking it into consideration in the case law of the ECHR on the eve of the Union joining the Convention.

- Convention on Access to Official Documents ¹³⁹

Until this convention was signed, on 18 June 2009, there was no general international treaty offering a binding guarantee of the right of access to documents. International law referred the problem to be dealt with using 'soft law' texts or was happy with requirements in specific areas such as environmental law, with the Aarhus Convention.

Article 2(1) of the text guarantees '*the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities*', thereby making it compulsory for signatory states to transpose this obligation into their national law. Therefore, the freedom of access is the rule and its restriction the exception.

Even though it is not worded explicitly in these terms, this is definitely a **fundamental subjective right** with an extremely broad personal scope. This is a 'basic movement which tends to disassociate the right of access to administrative documents not only from the idea of the administered (affected directly by the administrative document), but also from that of the citizen (affected by the administration establishing a "social contract") to create from it a **fundamental personal freedom** (irrespective of any administrative or social attachment)¹⁴⁰.

The convention provides a **very broad definition** of the concept of 'document': 'official documents' are considered to be any information drafted or received and held by public authorities that is recorded on any sort of physical medium whatever be its form or format (written texts, information recorded on a sound or audiovisual tape, photographs, e-mails, information stored in electronic format such as electronic databases, etc.)¹⁴¹.

The reasons allowing access to be blocked are conventional in two respects. Firstly, they are based on **proportionality**, which is encountered in the law of the Council of Europe. The signatory States may restrict the right of access to public documents under Article 3(1) of the Convention, but these limitations 'shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim' which they intend to protect. This proportionality therefore requires a 'balancing of interests', which **is different to the distinction between absolute exceptions and relative exceptions** set out by Regulation (EC) No 1049/2001. Similarly, the list of these reasons for limitations varies somewhat with the environment and disciplinary investigations.

Finally, while the Convention follows the usual pattern for a Council of Europe convention, supporting the coexistence of a hard core of non-negotiable principles and optional rules, it

¹³⁹ CETS No 205.

¹⁴⁰ F. Edel, 'La convention du Conseil de l'Europe sur l'accès aux documents publics : premier traité consacrant un droit général d'accès aux documents administratifs' Revue française d'administration publique, 2011 p. 70.

¹⁴¹ Explanatory report of the Convention, point 11.

does not have a judicial review system. In fact, it resorts to a 'reporting' mechanism, allowing the obligations committed to by the states to be monitored.

- Case law of the European Court of Human Rights

The case law from the European Convention on Human Rights lagged behind the American Convention for a long time as it failed to guarantee as such the right of access to documents in relation to the freedom of information covered by Article 10 of the Convention¹⁴².

The situation gradually improved in 2006 when the Court acknowledged the right of an NGO in the field of environmental protection to obtain documents about a nuclear plant which the State refused to give it¹⁴³.

It confirmed this openness¹⁴⁴, while continuing to exercise the utmost caution in this area. In 2012 it initiated a **major change** in a Grand Chamber judgment¹⁴⁵ where it stated that 'the right to receive and impart information explicitly forms part of the right to freedom of expression under Article 10. That right basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him'¹⁴⁶. It recognises the existence of 'rights under Article 10, as granted by the Administrative Court of Appeal, to receive information in the form of access to the public documents'¹⁴⁷. Finally, in 2013, it **established implicitly** the right of access¹⁴⁸. It declares that 'the notion of "freedom to receive information" embraces a right of access to information', adding that the applicant should in this case warrant similar protection to that afforded to the press because of its concern with informing public opinion.

2.1.2 National comparisons

It is not possible in this study to review all the national legislations¹⁴⁹. A few simple observations will be made on this subject.

- General trends

The first observation relates to **how widespread the principle of free access** to administrative documents has become in Europe and throughout the world¹⁵⁰. According to Right2Info¹⁵¹, in March 2013, 94 countries had made provision for legislation concerning access to information. In most of the states, common law is supported by specific laws, for instance, on the environment. On the other hand, the level of protection afforded by this law continues to vary, ranging from constitutional or legislative protection to a simple judicial guarantee.

For a long time, the Nordic States have assumed the role of pioneers in this area, with Sweden recognising this right **since 1766** before it became enshrined in its constitution in 1974. Following Italy and France like other Member States, the UK adopted the Freedom of Information Act (FOI) in 2000 before Germany finally joined them with its Freedom of Information Act entering into force in 2006. This has been adopted by almost all the *Länder*

¹⁴² Its wording was unchanged: Article 10 'does not confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual' (*Leander v Sweden*, 26 March 1987, end of paragraph 74, Series A No 116). It is 'difficult to derive from Article 10 a general right to have access to administrative documents' (*Loiseau v France* (decision), No 46809/99).

¹⁴³ ECHR, decision of 10 July 2006, *Sdružení Jihočeské Matky v Czech Republic*, No 19101/03.

¹⁴⁴ ECHR, 14 April 2009, *Társaság a Szabadságjogokért v Hungary*, No 37374/05; ECHR, 26 May 2009, *Kenedi v Hungary*, Application No 31475/05.

¹⁴⁵ ECHR, 3 April 2012, *Gillberg v Sweden* No 41723/06.

¹⁴⁶ Paragraph 83.

¹⁴⁷ Paragraph 93.

¹⁴⁸ ECHR, 25 June 2013, *Youth initiative for Human Rights v Serbia*, Application No 48135/06 paragraph 20.

¹⁴⁹ For a general survey: T. Mendel, 'Freedom of Information: A Comparative Legal Survey', 2008, http://portal.unesco.org/ci/en/file_download.php/fa422efc11c9f9b15f9374a5eac31c7efreedom_info_laws.pdf

¹⁵⁰ To obtain an overview as of the end of 2012, visit http://www.right2info.org/resources/publications/laws-1/ati-laws_fringe-special_roger-vleugels_2011-oct

¹⁵¹ <http://www.right2info.org>

in Germany, thereby reversing the principle of secrecy which applied until then in favour of disclosure. Spain has just approved in its Congress of Deputies, on 13 September 2013, a new law on transparency, access to information and good governance, marking steady progress¹⁵². Finally, it should be noted that Luxembourg, by its own admission, a long-time opponent of general legislation on public access to information, tabled a bill to this effect on 28 January 2013¹⁵³. It is also worth noting that the reason for this bill is the desire to 'catch up' with European legislation and that it is inspired by French and German legislation, as well as by the Council of Europe's Convention. Elsewhere, from Australia (1982) and Quebec (1982) to the United States¹⁵⁴ (1966) and Switzerland (2006), the right of access is legally protected.

The second observation relates to the **general nature of this right**. The concept of a 'communicable document' is extremely broad, whatever form it comes in (paper, emails, audio and video recordings, handwritten notes). The presumption of access to information is also moderated by restrictions which nearly always confirm the same concerns: protection of privacy and sensitive information. On the other hand, those benefiting from the duty to inform are diverse. The freedom of access relates to documents held by public administrations. This basically means the executive machinery of the State, which excludes judicial or legislative documents, as in Germany or the United States¹⁵⁵. In this respect, two approaches may be considered: a general definition of the 'public body' subject to the law or a list of the relevant entities¹⁵⁶.

A third lesson from comparative law relates to the **existence of bodies entrusted with guaranteeing compliance with the right of access**¹⁵⁷. CADA (Commission for access to administrative documents) in France, the Federal Commissioner for Data Protection and Freedom of Information in Germany, the Commission for access to administrative documents in Italy, the Information Commissioner Office in the UK and the Australian Information Commissioner highlight the concern about not entrusting the relevant administration with the task of guaranteeing transparency. The powers enjoyed by these bodies, which are most often independent, obviously vary considerably, but they are beneficial in that they do not escalate the process of resolving problems by turning them into disputes.

Finally, there is a **broad diversity seen in national practices** regarding applications for access to documents, with considerable differences highlighted between national cultures. The main reason for this is that statistics are not always published as a general rule and they can be supplied in very different ways¹⁵⁸. The second reason is the surprising variation in these figures, which will be explained below.

When compared to the figures for the European Union (in 2012, 5 274 applications submitted to the Commission and 6 166 to the Council, see below), a **quick browse through the national statistics** is enlightening.

For instance, in 2012 almost 10 000 applications were made in the UK, compared with around 2 000 in Germany and 5 000 in France, which are steady figures. In stark contrast, 650 000 applications were made in the United States¹⁵⁹ and 25 000 in Australia, indicating that this practice is much more widespread than in Europe.

- Example of the United States

The right of access is not a constitutional right, but comes under a legislative statute. The *Freedom of Information Act* (FOIA) adopted in 1966 can therefore be explained, in light of

¹⁵² Some criticism has still been made about no acknowledgement of a 'fundamental' right and about the possibility available to the administration to maintain secrecy.

¹⁵³ Chamber of Deputies, No 6540, 26 February 2013.

¹⁵⁴ For information on the US system, see W. Ginsberg, *Access to Government Information in the United States: a primer*, Congressional research Service, 16 January 2013.

¹⁵⁵ Congress, the courts and President's office do not come under the scope of the US FOIA.

¹⁵⁶ The FOIA in the UK lists the relevant bodies in 18 pages of annexes.

¹⁵⁷ In contrast, in the United States, every Federal agency has an office devoted to access applications.

¹⁵⁸ To see an example, visit: www.justice.gov.uk/statistics/FOI/implementation

¹⁵⁹ <http://www.foia.gov/index.html>

the Vietnam War, by the desire to establish **minimal transparency in accessing documents** in the US, based on the principle that the administration's documents are actually public assets and should be available to the taxpayer. Since then, the Privacy Act in 1974, the Federal Advisory Committee Act in 1972 and the Government in the Sunshine Act in 1976 have formed the main legal basis for the right of access.

The FOIA stipulates that any person has the right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure. In fact, public disclosure may come under one of **nine exemptions or three special law enforcement record exclusions**.

The exemptions cover national security, internal personnel rules, federal legislative bans, commercial secrets, protection of legal privileges, privacy, protection of investigations and justice, personal safety and geological information on wells. The three exclusions referred to by the legislature relate to an ongoing criminal law enforcement investigation, informant records and the classification of records relating to espionage and terrorism.

While generally presented as a particularly liberal model, US legislation actually highlights a **restrictive development of the right of access** to information. In actual fact, the law's broad scope has been restricted in two ways. Firstly, a political-administrative strategy where communicable documents and non-communicable documents are combined to issue refusals gave grounds for the legislature to intervene in 1974, in spite of a presidential veto. However, this has not prevented encouragement being given politically to curtail any decision where disclosure is discretionary. The second restriction has arisen as a result of the systematic priority given to the requirements for secrecy and security, which has been a growing trend in the wake of the events of 2001. The importance of blocking tactics explains why the Office of Government Information Service (OGIS) was set up, tasked with monitoring the proper enforcement of the law.

Every federal agency is required under US legislation to submit an annual report about its activities in this area. The annual reports from all the departments and agencies are published on the Internet by the US Department of Justice¹⁶⁰, which has also launched a dedicated information portal¹⁶¹ populated by data received from the administrations.

Therefore, in 2012, the number of applications for access was more or less identical to that for 2011, with a backlog of 71 000 files which was cut by half in five years.

Table 2: Number of applications for access to documents

	2012
Total applications	651 254
Full access	234 049
Access denied	30 727
Partial access	200 209

During the 2012 financial year, the **Department of Homeland Security** received almost a **third** of applications (190 589) compared with 69 456 by the Justice Department, 68 467 by the Health Department and 66 078 by the Defense Department.

¹⁶⁰ <http://www.justice.gov/oip/reports.html>

¹⁶¹ Foia.gov

2.2 Institutional practices relating to access to documents

The three institutions, Parliament, Commission and Council, submit every year a **public report on the application of Regulation (EC) No 1049/2001**. These reports help provide an instructive overview which will be presented in a similar manner to facilitate any assessments.

2.2.1 Practice of the Commission

The Commission published on 10 July 2013 its annual report¹⁶² on the application in 2012 of Regulation (EC) No 1049/2001. It is fairly **concise**, focusing mainly on providing a statistical assessment. It does not reveal at all the fundamental problems raised by exercising the right of access.

Because of its institutional role, the Commission is the main body involved. It registered 17 490 documents in 2012 (1 832 COM, 1 429 SEC, 13 452 C, 53 JOIN, 859 SWD, 130 OJ, 95 PV).

The **number of applications for access** based on this regulation has **declined significantly** compared with previous years, from a figure of 6 127 applications in 2010 to 5 274 in 2012. The size of this decrease precludes any monitoring of the Commission, which suggests that it 'has reached, via various means and forums, including access to documents, a stable and well-known transparency framework'¹⁶³.

This decrease is also observed for the approvals granted for access.

Table 3: Approvals granted for access to documents

	2010	2011	2012
Total applications	6 127	6 055	5 274
Full access	5 034 / 82.16 %	4 856 / 80.20 %	3 928 / 74.48 %
Access denied	764 / 12.47 %	737 / 12.18 %	892 / 16.91 %
Partial access	329 / 5.37 %	462 / 7.62 %	454 / 8.61 %

The report also rightly indicates the significant rise in confirmatory applications, highlighting the good knowledge which applicants have of the regulatory framework and the benefit they gain from it. In 2012, 160 confirmatory application (as opposed to 122 in 2010) were submitted, of which 91 (56.88 %) were, strictly speaking, confirming the initial application, whereas 39 (24.38 %) provided the basis for partial revision and 30 applications (18.75 %) for full revision.

Table 4: Breakdown of refusals from the Commission by exception applied (as %)

	2010	2011	2012
Article 4(1): Absolute exceptions			
a) : Protection of public security	1.94	2.40	1.34
a) : Protection of defence and military matters	0.14	0.39	0.11
a) : Protection of international relations	9.83	12.02	3.58
a) : Protection of financial, monetary or economic policy	2.15	1.88	1.40

¹⁶² COM(2013) 515.

¹⁶³ p. 7.

b) : Protection of privacy and the integrity of the individual	9.76	8.90	14.65
Article 4(2), (3), (5): Relative exceptions			
(2), first indent: protection of commercial interests	11.84	16.83	16.94
(2), second indent: protection of court proceedings and of legal advice	7.32	6.76	9.84
(2), third indent: protection of the purpose of inspections, investigations and audits	26.63	21.90	25.32
(3), first subparagraph: decision-making process, decision not yet made	16.80	17.15	20.23
(3), second subparagraph: decision-making process, decision already made: opinions for internal use as part of deliberations and preliminary consultations	9.62	8.58	4.92
(5): Refusal by Member State	3.94	3.18	1.67
Total	100	100	100

Finally, the 2012 report confirms the recipients of the applications for access submitted, which does not produce any surprises. The Commission's Secretariat General and Directorate-General of Health and Consumer received the highest number of initial applications (12.10 % and 7.28 % respectively), followed by JHA (6.86 %), Competition (6.81 %), Environment (6.61 %), Energy (5.15 %), Internal market and services (5.02 %) and Development and Cooperation (4.67 %).

2.2.2 Practice of the Council

Access to documents is one of the most important duties of transparency incumbent upon the Council, along with its obligations in terms of openness with regard to its debates, based on Article 15(2) TFEU. They mean that the Council must make available meeting agendas, minutes, outcome of votes and a monthly summary of Council Acts.

In 2012¹⁶⁴, 24 511 new original language documents were recorded in the register, marking a 4.3 % drop on 2011. On 31 December 2012, a total of 267 619 original language documents were listed in the public register. Of these, 176 094 (65.8 %) were public documents and available for download. Around 5 % or 13 817 documents recorded in the public register were classified 'Restreint UE/EU Restricted'. This included 1 399 documents which were classified as 'sensitive' under Regulation (EC) No 1049/2001¹⁶⁵, i.e. classified 'Confidentiel UE/EU Confidential' (1 390 documents) or 'Secret UE/EU Secret' (9 documents). The compilation of these figures is a new development.

In 2012 the Council produced 386 sensitive documents, 353 classified 'Confidentiel UE/EU Confidential' and 33 classified 'Secret UE/EU Secret'. No documents classified 'Top Secret' were produced in 2012.

In 2012 the Council received 1 871 initial requests from 847 individual applicants¹⁶⁶ for access to a total of 6 166 documents, including 544 classified documents, of which 18 were classified 'EU Confidential' and 526 classified 'EU Restricted'. The Council received 23

¹⁶⁴ Council annual report on access to documents 2012, May 2013, www.consilium.europa.eu

¹⁶⁵ Article 9(1): 'Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as "TRÈS SECRET/TOP SECRET", "SECRET" or "CONFIDENTIEL" in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.'

¹⁶⁶ The Council report notes, in this regard, the small number of applicants, given that 60 % of initial applications for access came from barely 1.5 % of applicants.

confirmatory applications for access to 78 documents which had had previous requests for access refused.

The table below shows a **sharp fall** of nearly 30 % in three years, which seems to indicate that the applicants' interest is tailing off. In 2010, 9 188 documents were requested compared with 6 166 in 2012. A clear drop in the number of positive responses is also noticeable.

Table 5: Number of requests for access

	2010	2011	2012
Total applications	9 188	9 641	6 166
Full access	6 478 / 70.50 %	7 403 / 76.80 %	3 860 / 62.60 %
Access denied	1 341 / 14.60 %	1 135 / 11.80 %	1 308 / 21.20 %
Partial access	1 369 / 14.90 %	1 103 / 11.40 %	998 / 16.20 %

The number of documents involving confirmatory applications (78 documents in 2012, including 21 which were submitted partially and 7 in full) is a far cry from the figure in 2009 (351 documents).

Table 6: Breakdown of refusals from the Council by exception applied (as %)

	2010	2011	2012
Article 4(1): Absolute exceptions			
a) : Protection of public security	7	8.9	5.8
a) : Protection of defence and military matters	1.9	1.4	1.6
a) : Protection of international relations	24.2	21.2	20.5
a) : Protection of financial, monetary or economic policy	0.5	1.1	0
b) : Protection of privacy and the integrity of the individual	0.4	0.2	0.2
Article 4(2), (3), (5): Relative exceptions			
(2), first indent: protection of commercial interests	0	0	0
(2), second indent: protection of court proceedings and of legal advice	0.8	1	0.6
(2), third indent: protection of the purpose of inspections, investigations and audits	0.3	0	0
(3), first subparagraph: decision-making process, decision not yet made	33.1	40.9	41.3
(3), second subparagraph: decision-making process, decision already made: opinions for internal use as part of deliberations and preliminary consultations*			
§ 5 : Refusal by Member State			
Several reasons together**	31.7	25.3	30.09
Total	100	100	100

* The Council does not make any distinction in the figures submitted between the two subparagraphs.

** This heading is specific to the report presented by the Council.

In terms of the recipients of the access applications it comes as no surprise, given that no information is provided for competition and infringement proceedings, that **the Area of freedom, security and justice (18.1 %) and CFSP (10.7 %) clearly stand out**, creating the feeling that the Council's attitude is to continue to pursue an inter-governmental approach to these issues. They are followed by the internal market (9.7 %), the environment (7.6 %), economic and monetary policy (6.9 %) and taxation (6.7 %).

2.2.3 Practice of the European Parliament

Parliament's activity is not at all comparable to that of the other two institutions because of both its role in the legislative set-up and the tradition of transparency which is usually part and parcel of the work of parliaments in a representative democracy.

The figures featuring in the 2012 annual report¹⁶⁷ of the European Parliament on Public Access to Documents (11th edition) highlight this as only 777 documents received applications for access in 2012, marking a **33 % drop** compared to 2011 when applications were received for 1 161 documents, and nearly 50 % down on the figure for 2008.

In 2012, 1 397 documents were sent to applicants. Of these 624 were sent as supplementary documents, as a result of clarifications provided by applicants submitting unclear requests. In 35 % of cases, more than one document was sent to the applicant. Applications were made for 166 documents which were still not disclosed. Six confirmatory applications were submitted.

The types of documents most frequently requested in 2012 were tabled texts (13 %), adopted texts (12 %), non-specific document or general information (11.7 %), Bureau documents (6 %), comitology documents (6 %) and correspondence (5 %).

In 2012, 158 documents were disclosed by Parliament, i.e. 95 % of the 166 documents requested. Access was refused to 22 documents, although partial access was granted in 14 cases. The steady level and low number of these applications make any comparison a pointless exercise.

Table 7: Breakdown of refusals from the Parliament by exception applied (as %)

	2010	2011	2012
Article 4(1): Absolute exceptions			
a) : Protection of public security*	12.5	25.4	15.8
a) : Protection of defence and military matters*			
a) : Protection of international relations*			
a) : Protection of financial, monetary or economic policy*			
b) : Protection of privacy and the integrity of the individual	25	16.3	31.6
Article 4(2), (3), (5): Relative exceptions			
(2), first indent: protection of commercial interests	8.3	3.6	10.5
(2), second indent: protection of court proceedings and of legal advice	12.5	14.5	10.5

¹⁶⁷ PE 508.908/BUR/ANN.

(2), third indent: protection of the purpose of inspections, investigations and audits	4	5.4	10.5
(3), first subparagraph: decision-making process, decision not yet made*	37.5	34.5	21
(3), second subparagraph: decision-making process, decision already made: opinions for internal use as part of deliberations and preliminary consultations			
(5): Refusal by Member State			
Total	100	100	100

* There is no distinction made with the information from Parliament based on the possible options.

2.2.4 Details of comparison

The observation of institutional practice highlights, overall, a **certain degree of consistency in terms of practices**. It is particularly instructive regarding the reasons for refusing access given to the applicants. Once the reasons relating to particular functions of the institution (supervision of competition for the Commission, for instance) have been discounted, it is easy to identify the sticking points in terms of administrative secrecy within the Union.

Table 8: Breakdown of refusals from the EU institutions by exception applied (as %)

	Commission	Council	Parliament
Article 4(1): Absolute exceptions			
a) : Public security	1.34	5.8	15.8*
a) : Defence and military matters	0.11	1.6	
a) : International relations	3.58	20.5	
a) : Financial and economic policy*	1.40	0	
b) : Privacy and the integrity of the individual	14.65	0.2	31.6
Article 4(2), (3), (5): Relative exceptions			
(2), first indent: commercial interests	16.94	0	10.5
(2), second indent: court proceedings	9.84	0.6	10.5
(2), third indent: inspection, investigation activities	25.32	0	10.5
(3), first subparagraph: decision-making process, decision not yet made	20.23	41.3	21*
(3), second subparagraph: decision-making process, decision already made: opinions for internal use as part of deliberations and preliminary consultations	4.92		
(5): Refusal by Member State	1.67		
Several reasons together**		25.3	
Total	100	100	100

* There is no distinction made with the information from Parliament based on the possible options.

** Heading specific to the Council.

The socio-professional group which applicants belong to provides another perspective for comparison.

Table 9: The socio-professional groups of the applicants

	Commission	Council	Parliament
Academic sector	22.70	33.4	35.84
Lawyers	13.58	9.8	11.16
Civil society (interest groups, industry, NGOs etc.)	10.32	17.9	16.95
Public authorities (other than EU institutions)	7.12	4	6.44
Other EU institutions	7.64	1	0
Journalists	4.81	2.8	3.00
Not specified	33.83	16.5	26.61

These figures are particularly significant in terms of the transparency being assigned by the Treaties as an objective and of its description as a fundamental right.

There is a clear contrast shown between the low figures for civil society (between 10 and 17 %, depending on the institution) and journalists (which can also be explained), even if the academic sector is also involved in promoting this objective, and the extent to which those working in institutions use Regulation (EC) No 1049:2001. Lawyers, public authorities and other institutions use it on a strategic basis.

From this perspective, the important role played in this by academic circles seems, at this stage, to be the best way to guarantee transparency in the Union's work.

3. CONCLUSIONS AND RECOMMENDATIONS

The lessons learned on the basis of case law from the Court of Justice and the General Court, along with the observation of institutional practice in both a national and EU context will assume great importance the moment when the revision of Regulation (EC) No 1049/2001 reaches deadlock.

Leveraging the experience acquired from case law is already, in itself, a challenge to the risk of the legislature taking a step backwards. The case law from the Court seems to be more balanced than the Council and Commission are willing to acknowledge. If the judicature guarantees a broad approach when applying the scope of the right of access, it moderates this approach itself by highlighting a set of 'general presumptions' in some sectors, which favour confidentiality.

1. The **constitutional nature of the right of access**, based on primary law, restricts the room for manoeuvre available to Member States and the Commission. They are caught between the choice of maintaining the *status quo*, which nevertheless leads to the advances made by the Court of Justice being put into practice, and the framework of a formal revision process. Since, as was confirmed by the Court of Justice, transparency is part of the democratic nature of the Union's

institutional system, it would seem difficult to stick with such a minimalist approach as that favoured by the Commission¹⁶⁸, both technically and substantively.

In technical terms, the scope of the regulation's revision must therefore be minimal, incorporating the essential aspect of the case law, especially as soon as it is based on the Treaty. In substantive terms, the 'fundamental' nature of the right of access would therefore end up being emphasised more as a **personal right** before being presented as an institutional issue. Based on the Treaty and the case law established, the right of access is a **fundamental right whose restrictions must be strictly interpreted and controlled**.

In some cases and transferring, in this instance, the logic from Regulation (EC) No 1367/2006, the objective would be to make a successful attempt to establish a **legal presumption of disclosure** based on the fundamental nature of the right of access, regardless of whether it was up to the institutions or Member States to overturn it with appropriate grounds for doing so.

2. Among the **questions** raised by case law in the Union is whether a hierarchy should be established of the problems raised, based on sensitivity.

Undoubtedly, the distinction made by the Court's case law **between legislative matters** (which include international relation matters) and **administrative matters** must guide the legislature's analysis, given, obviously, that administrative matters are also governed by transparency. Therefore, 'legislative matters' entail a stricter duty of disclosure.

In this respect, the vital issue of disclosing the identity of Member States during certain phases of the legislative debate, approved by the Court of Justice in the Access Info case, **is of key importance**. Member States participating in the Council **in their capacity as Union legislators** cannot avoid the requirements incumbent upon the legislature in a democracy. This means that the scope of disclosure cannot boil down only to the material content of the document, but must be complete.

On a more general basis, the **stance of Member States**, as such, in relation to accessing documents raises an issue of principle. Their desire to retain control over the documents which they own or make disclosure dependent upon their national law is hardly acceptable.

Another issue is raised by the interaction of sources whereby the general principles featuring in the revised version of Regulation (EC) No 1049/2001 must interact with specific texts establishing a particular balance appropriate to the relevant field. Nevertheless, the **growing number** of these texts is likely to **reduce the scope of the right of access so much** as a principle, which everything must be done to prevent.

3. However, some issues require a measured approach. Observation of institutional practice brings up again comments used by opponents of transparency as an argument in playing down the importance of the right of access.

The large proportion of legal professionals and companies submitting applications for access may not justify putting their application on a par with the action of the legislator in terms of democracy, but it is entirely acceptable in light of the need for transparency. Accepting in this case a restrictive approach is not admissible with regard to some of the requirements of representative democracy governed by primary law (especially in relation to debatable issues such as CFSP and JHA) and, on the other hand, in light of the situation in Member States, which is very frequently identical to that in the Union.

¹⁶⁸ COM(2001) 137.

Another issue of principle relates to the problem of whether to have or not an **internal 'space to think'** or **'negotiating space'** aimed at preserving the freedom of analysis and discussion during the debates in the run-up to a decision.

The desire of the courts to control this phase as tightly as possible **must not be diminished by the legislature** at the risk of clashing with the principles of openness and transparency arising from primary law and of questioning the legality of this action. On the other hand, as was publicly debated about legal advice, there is a fear of seeing the emergence of circumventive administrative practices (reticence in expressing opinions, oral expression), thereby allowing disclosure to be avoided.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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