

# Transparency through tinted windows

On the conditional openness in the European Commission



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# Introduction

Interest organisations, political parties, paid professionals, journalists, students or just interested people who approach the EU for the first time rarely experience a lack of information to be a problem. On the contrary, the difficulty is to sort and sift through all that is available.

Simultaneously, it is a recurring assertion that the EU is closed, secretive and therefore undemocratic. This assertion is almost as often confronted with a contrary claim. Institutional representatives can point to extensive online publications and a system established in 2001 to make it possible to request documents which aren't directly accessible. Journalists based in Brussels happily point out that EU institutions leak like a sieve.

Both assertions and their contradictive claims are justified. The amount of information can be dazzlingly large but also irritatingly limited. Clearly the institutions leak but foremost and preferably to selected journalists and rarely with the purpose of being kind or accommodating. This report is an attempt to review the available kinds of documents the inquisitive is not served spontaneously during his or her first contact to the EU institutions, and for those who do not have access to "insiders" within the system.

The report focuses on the Commission, which in a sense is the EU's daily government and has a central role in legislative work, with a monopoly right to initiate new legislation. The rules on access to documents applicable to the Commission have since its inception also applied to the European Parliament and the Council of Ministers. With certain specified exceptions the Treaty of Lisbon now covers all EU institutions.

The first part of the report, which concerns background and development, is valid for all of EU while part two is about transparency in numbers as regards the Commission. Part three describes three specific examples and part four contains conclusions, which refer for the most part to the Commission. Transparency, or the lack thereof, in other institutions is to be dealt with in a possible report in the future.

Factual statements are, as far as possible, documented with references while the conclusions and opinions expressed in this report are the sole responsibility of the author, and not the OEIC.

Staffan Dahllöf

# I. Our right to know - Background and Development

## Promises and expectations

The Lisbon Treaty, the EU Constitution, states in Article 1: "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, *in which decisions are taken as openly and as closely as possible.*" It has not always been the case.

The first part of the sentence, about an "ever closer union", has been around almost from the beginning. It was written into the preamble of the Treaty of Rome in 1957 and has followed in many treaties accordingly. But the addition of "where decisions are taken as openly and as closely as possible," was an innovation when it came into the Treaty of Amsterdam in 1997, which came into force on 1 May 1999.

Two converging forces lay behind. One driving force was the EU's enlargement, which added three new members in 1995, Finland, Sweden and Austria. In Sweden and Finland the issue of transparency, particularly the availability of public documents, was a politically important and sensitive issue. Defence of the "Publicity Principle", a part of Sweden's unique constitution which secured the right to access public sector documents, was one of the few issues that united supporters and opponents of EU membership. The Publicity Principle would not only be defended at home, it was also something that Sweden could, to its benefit, attempt to export to the whole Union.

## A unilateral explanation

A declaration by Sweden's government on its accession to the EU reads: "Open government and, in particular, public access to official records as well as the constitutional protection afforded to those who give information to the media are and remain fundamental principles which form part of Sweden's constitutional, political and cultural heritage".<sup>1</sup>

This proud declaration of the Swedish perspective was to be repeated many times, including in a brochure that was distributed to all Swedish households ahead of the referendum on membership in autumn 1994.

Less quoted was the 2<sup>nd</sup> paragraph of the Declaration, when the then 12 member states stated slightly laconically:

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<sup>1</sup> Explanation nr 48 point 1 in Ds 1994:60

*"The Union's current members note that Sweden has made a unilateral declaration on transparency. They assume that Sweden as a member will comply fully with Community law in this regard. "*

Thus it also became a Swedish and Finnish government interest to try to drive community law in the transparency direction.

## Three referendums

The other driving force behind the promise of transparency was the difficulty of getting Danish acceptance of the Maastricht Treaty, pre-negotiated in 1991 but rejected in a Danish referendum in June 1992. Admittedly, a majority of Danes said Yes to the treaty a year later, when the Danes obtained four specific opt-outs. However, the No one year before had left its mark. Prior to the 1998 Danish referendum on the Treaty of Amsterdam, both EU supporters and opponents fixed on the pun ÅND (Åbenhed, Nærhed, Democracy), which translated from Danish means spirit, (Openness, Closeness, and Democracy).

The Danish No to Maastricht in 1992 also had repercussions further south. French President Mitterrand decided, inspired by Denmark, the French would also hold a referendum on the Treaty of Maastricht. The outcome came close to a disaster. The French accepted the Treaty of Maastricht by a very narrow margin in September 1992, with 51.1% voting yes.

Issues of popular participation, democracy and openness - or lack of the same - came to be entrenched in the political agenda.

## In the treaty and in the law

The Amsterdam Treaty's sub-clause about transparent decision making as close to the citizens as possible wasn't entirely new in term of content. The Maastricht Treaty already contained a statement, a non-legal binding goal, concerning the right of access to information.<sup>2</sup> The statement later laid the foundation for a code of conduct that in various phases was adopted by the Council of Ministers, the Commission and the Parliament where these three institutions promised the "widest possible access to documents".

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<sup>2</sup> Explanation nr. 17 Maastricht Treaty - Official Journal C 191, 29/071992 P. 0095

What was new about the Amsterdam Treaty was the form in which the promise of transparency was embedded into the very text of the treaty. This was partly done by a quote in the objective clause of article 1 and partly by article 255.<sup>3</sup> Article 255 established that a right of access to institutional<sup>4</sup> documents would be in accordance with the principles and conditions that would be specified in a regulation - direct EU law.

With the promises about transparency as a principle and as an independent article in the treaty the Council and the Parliament later adopted those rules concerning EU institutions that exist today: regulation 1049/2001 where 1049 is the serial number and 2001 the year when the regulation was adopted.

Subsequently there has been little of substance that affects the legal basis for transparency in the EU. With a well-intended interpretation one could claim that the fundamental right of access to documents has been slightly further strengthened as a result of the Lisbon Treaty in two, at the most three, ways.

\* Article 15 (formerly 255) gained an amendment regarding "participatory democracy". The purpose with transparency is not only the citizens right to know but also to strengthen the opportunity to participate in the decision-making process.<sup>5</sup>

\* A new article, Article 288, establishes that the EU shall have an "*open, effective and independent administration*".

## Fundamental right?

One may also claim that the right of access to documents gained further assistance when the Charter of Fundamental Rights of the European Union was written in to the treaty (Treaty of Lisbon, Article 6).

Article 11 of the Charter, regarding freedom of speech and freedom of information states:

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<sup>3</sup> The Amsterdam Treaty Article 255, "Transparency and insight when it comes to the consultations in the institutions", in the Lisbon Treaty (the part about functions) renumbered to Article 15.

<sup>4</sup> The Amsterdam Treaty only covered the Council, the Commission and the Parliament. The Lisbon Treaty refers to all EU institutions, including: European Court of Justice (ECJ), European Central Bank (ECB), and European Investment Bank (EIB), though only their administrative functions.

<sup>5</sup> Article 15 in the constitutions part about functions: "*In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.*"

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." This is a copy of Article 10 in the European Convention on Human Rights.<sup>6</sup>

The European Court of Human Rights in Strasbourg, which is not a EU institution, in a judgement on April 2009 (TASZ against Hungary) found that the right to access public information is directly linked to the freedom of expression as defined in Article 10.<sup>7</sup>

Moreover, Article 42 of the Charter states:

*"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 documents of the institutions, bodies, offices and agencies of the Union, whatever their medium."* It is, in substance, just a repetition of the previously mentioned Article 15.3 of the Treaty of Lisbon.

On the other hand, it is unclear to what extent the Charter of Fundamental Rights really brings something new. Article 6 of the Treaty of Lisbon suppresses any hopes or fears in this area: *"The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties."*

The question about the value of the Charter of Fundamental Rights is moreover unanswered as long as it is not clear which body is the ultimate interpreter: the Council of Europe's Court of Human Rights in Strasbourg, or the EU court (European Court of Justice, ECJ) in Luxembourg. Nearly seven years after the signing of the Lisbon Treaty, the EU has not yet acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms - which the EU should do according to Article 6.2.

In summary, so far the right of access to EU documents has slowly but surely been strengthened throughout the years, at least in principle. But there has also been a tendency in the opposite direction.

## Vague Exemptions

Regulation 1049/2001<sup>8</sup>, which applies to the EU institutions but not the member states, is structured like many national laws on the right to transparency and access to

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<sup>6</sup> [www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487\\_pointer](http://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487_pointer) The convention elaborated by the intergovernmental Council of the European Union which isn't an EU organ came in to force 1953 but has been remodelled several times since then.

<sup>7</sup> <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92171>

<sup>8</sup> THE CONSTITUTION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL (EG) nr 1049/2001 May 30 2001 regarding public access to European Parliament, the Council and Commission documents.

documents with the definitions, objectives, principles, exceptions and some purely practical measures. The regulation is fairly easy to read compared with much other EU law.

Based on its content, the regulation is not a transparency advocates heaven. It includes diffuse exceptions for access to documents "relating to legal proceedings and legal advice" (Article 4.2, second indent) and exemptions for the disclosure of documents "that could undermine the institutions decision-making procedure" - an exemption that also applies after the decision has been taken (Article 4.3). However, the Court has in some important judgments interpreted the provisions in a more transparency friendly direction than one might assume that the legislators had intended.<sup>9</sup>

Regulation 1049/2001 could have been far better than it turned out to be, something that critics pointed out and warned about when it was enacted. But it could indeed have become worse; something that the Commission with the support of the Council of Ministers has endeavoured to do, when after seven years it presented a proposal for a revised regulation.

## An attempt at revision

In spring 2008, the Commission led by the Swedish Commissioner Margot Wallström, launched a "revision" of the current regulation.<sup>10</sup> The purpose of the revision was according to Wallström "more transparency, access, contact and understanding." Critics argued that the proposal went in the opposite direction. The diffuse exceptions for access to certain documents would specify, among other things, by narrowing the definition of what constitutes a file, and by cementing the exclusion of entire categories of documents: documents submitted to the court and documents in administrative matters would simply not be subject to transparency rules. Member States would also have the right to veto EU institutions ability to disclose documents they had sent in. The proposal also contained prolonged time frames. In a briefing on the proposal for The Swedish Journalist Association the writer of this report counted one (1) amendment in a transparency friendly direction while 15 amendments would tighten existing

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<sup>9</sup> In the case of *Sweden and Turco v Council* (C-52 C on 1 July 2008) the Court held that the Italian politician Maurizio Turco would acquire access to the statements from the Councils legal experts although all three legal services in the EU said the opposite.

In the case *Access Info Europe v Council* (C280/11 P) received campaign organization Access Info right to talk part in actions of Member States' positions in a working group under the Council discussed the upcoming legislative changes - besides stranded proposals on stricter transparency rules. More about that proposal later. In the case of *Carl Schlyter v Commission* (T-402/12 April 6 2015) the Court rejected that the Commission could keep secret their critical opinions on a upcoming French law.

<sup>10</sup> COM(2008)0229

rules, or leave them unchanged.<sup>11</sup>

More important than what individual critics claimed, was that the European Parliament squared off against the Commission. Led by British MEP (Member of the European Parliament) Michael Cashman, Labour adopted a report in December 2011 that essentially rejected the Commission proposal by 394 votes to 197.<sup>12</sup> The Council, following the Commission, in return rejected Parliament's criticisms and amendments. Several attempts have since been made to reconcile the positions of the three institutions, the latest by the Danish Presidency in spring 2012. But at a Council meeting in June 2012 it was clear that the positions were in complete deadlock,<sup>13</sup> which continues as of the time of writing - summer 2015.

That the three institutions have failed to agree on new rules for accessibility to documents is in itself not a major disaster. To the contrary, the current rules are more transparency friendly than the revised rules most likely would be. But at the same time uncertainty about what really applies has increased after the Lisbon Treaty has entered into force.

## A possible mini-change

The Lisbon Treaty can therefore be said to provide enhanced legitimacy to the right of access to documents. The Lisbon Treaty also explicitly says that transparency rules should apply to all institutions, and not just the Council, Commission and Parliament (The Merger Treaty, Article 15.1). To meet this requirement, and thus have secondary legislation (the Public Access Regulation) to be consistent with primary law (Treaty), in 2009 the Commission proposed a mini-change of the current regulation. The mini-change was not launched as an independent proposal but as an alternative version of the criticized amendment from 2008.<sup>14</sup> The proposal meant only that the words "Council, Parliament and Commission" would be replaced by "institutions", with a clarification of the Treaty of Lisbon's definitions.

This strategic move did not change the negotiation stalemate. Parliament held to the position that the Lisbon Treaty meant more, among other things, than just a broader definition of the institutions. Moreover, the Parliament's legal service believed the proposed mini-change was unnecessary. The Treaty is stronger than the current regu-

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<sup>11</sup> "The quiet Europe - the new threats towards the transparency in the EU", spring 2009 - an insert to the magazine The Journalist, not electronically available.

<sup>12</sup> [www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-580](http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-580)

<sup>13</sup> <http://www.wobbing.eu/news/game-over-nobody-won>

<sup>14</sup> <http://www.statewatch.org/news/2011/mar/eu-com-access-reg-1049-proposal.pdf>

lation. A change of only that point would, according to the Legal Service, not change anything.

The situation, summer 2015:

\* Current regulations on transparency from 2001 are based on a treaty that is no longer valid, but the Lisbon Treaty has strengthened the legal basis for transparency.

\* Attempts to rewrite the existing rules have stalled due to disagreements between the three central institutions.

## Neither purged nor up to date

The new Commission under President Jean-Claude Juncker has by summer 2015 not yet officially said anything on how it intends to act on the issue, if at all. Neither the old amendment from 2008 nor the proposed mini-change from 2009 is included on a list of dormant bill to be scrapped. The list has been prepared by the Commission's First Vice-President Frans Timmermans in the stated aim of reducing bureaucracy and discard proposals that are either no longer relevant or have a very small chance of being adopted.

On the other hand none of the resting proposals are to be found in the Juncker-Commissions work programme for 2015. Martin Selmayr, Commission President Jean-Claude Juncker's Head of Cabinet, confirms that the negotiations have stalled and that the Commission does not intend to take any new initiatives on the matter:

*"Despite the efforts made under the Danish Presidency in 2012 to find a compromise between the three institutions on the Commission's proposal, negotiations were unsuccessful and remained blocked at the level of the Council. The matter is therefore in the hands of the legislator. In the meantime, the Commission is constantly aiming at achieving the best application of the existing rules with the objective to provide the widest possible access to European citizens."*<sup>15</sup>

In the European Parliament the Swedish MEP Anna Hedh (Social Democrat) replaced British Michael Cashman as rapporteur for the European Parliament Committee on Civil Liberties, Justice and Home Affairs. A member of Anna Hedh's staff revealed that as of spring 2015 the Parliament is formally still waiting for the Council of Ministers to

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<sup>15</sup> Email from Martin Selmayr, 2015-05-05, writers own translation in this report.

agree on what they mean, but that they are not counting on a solution to the current deadlock during the current term (2014 to 2019).<sup>16</sup>

## Other legislation: one good and two dangerous examples

Even if the "transparency regulation" is a significant law base on the Treaty, it is not universally prevailing. Other EU legislation may overlap, or even override the rules on right of access.

The UN body UNECE (United Nations Economic Commission for Europe) adopted in 1998 a convention on the strengthening of the citizens' right to access environmental information, to participate in decisions affecting the environment, and to challenge environmental decisions in court.<sup>17</sup> The Convention, named after the city of Århus (official Danish spelling Aarhus since 2011), has 39 signatories, including the EU as an organization. The Aarhus Convention has also become binding law of the EU member states under two directives from 2003<sup>18</sup> and the EU's own institutions by virtue of a regulation from 2006.<sup>19</sup>

The Aarhus rules (the Convention, Directives and Regulation) are significantly stronger than the EU's own transparency regulation in the environmental field. Among other things, the authorities have an obligation to inform about the emission of pollutants. In countries like Germany with a young tradition of transparency, or weak rules on access to documents, the Aarhus rules have in some cases served as an icebreaker for NGOs and journalists.

However, the Aarhus rules have hitherto had a minor role in opening the EU's institutions. The EU does not itself decide about the location of polluting activities operate factories, or has direct environmental responsibility for much other than its own buildings. Note the word "hitherto"; the Aarhus rules are in many respects an untested tool.

It's conceivable that two current bills can conversely have a major negative impact on the possibility of access to EU documents, but also to documents in the member countries; a Directive on the protection of trade secrets and a regulation on data protection. While this report is being written, the two proposals are soon to be decided, with the chance - or risk - of a decision in autumn 2015 or spring 2016.

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<sup>16</sup> Email from Staffan Dahl, special adviser to Anna Hedh 2015-03-18

<sup>17</sup> <http://www.unece.org/env/pp/treatytext.html>

<sup>18</sup> Directive 2003/4/EG January 28 2003, and Directive 2003/35/EG

<sup>19</sup> Regulation EG 1367/2006

## Trade Secrets

The proposal for a Directive on the protection of trade secrets in 2013<sup>20</sup> has been little discussed outside the circle of lobbyists and interest groups in Brussels. Corporate Europe Observatory, a campaign organization that monitors lobbyists, has published a detailed report on the proposals creation with a focus on the role of business representatives.<sup>21</sup> An interesting aspect of the report is that it is based on extensive use of Regulation 1049/2001. The organization has gained access to hundreds of documents on lobbyists cooperating with the Commission, something that the proposal in question may complicate in the future.

The proposal on the protection of trade secrets is justified by the increasing threat from industrial espionage and that EU member states have a widely different and poor protection of trade secrets. The main content is the requirement for member states to offer a strong civil law protection of trade secrets during litigation, but also "to protect trade secrets in requests for access to documents".<sup>22</sup>

Critics of the proposal include the European Federation of Journalists (EFJ) and the trade union umbrella organization, ETUC (European Trade Union Confederation). They call for an exemption for journalists, union representatives and informants ("whistle-blowers") that act in the public and the employees' interest by revealing abuses.<sup>23</sup> The EFJ further points out that a similar proposal in France has been withdrawn following widespread criticism.

The protection of trade secrets is intended to become a directive and should therefore be inserted in the member states legislation to come into force. It remains to be seen whether countries such as Sweden, with a constitutional right of access to documents ("offentlighetsprincipen") and constitutional protection of whistleblowers, can avoid open conflict with EU law in this area.

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<sup>20</sup> "THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure" – COM(2013)0813 final

<sup>21</sup> <http://corporateeurope.org/power-lobbies/2015/04/towards-legalised-corporate-secrecy-eu>

<sup>22</sup> Quote from brief of the proposals content in the European Parliaments law database OEIL [http://www.europarl.europa.eu/oel/popups/ficheprocedure.do?reference=2013/0402\(COD\)&l=en](http://www.europarl.europa.eu/oel/popups/ficheprocedure.do?reference=2013/0402(COD)&l=en)

<sup>23</sup> EFJ Press release 2015-04-02 <http://europeanjournalists.org/blog/2015/04/02/eu-draft-trade-secrets-directive-threatens-press-freedom-and-protection-of-sources-says-efj/>

## Data Protection and Transparency

The 2012<sup>24</sup> proposal on data protection is in contrast to the proposal on the protection of trade secrets a regulation. This means that exactly the same instrument, after the official translation, will apply as a one size fits all model in all 28 member states. Countries with differing laws and a differing administrative cultures from the others will be left with a small or no margin to act differently than the regulation stipulates.

The stated aim is to modernize the existing Data Protection Directive of 1995 (95/46/EC) and strengthen the right to privacy which with the Lisbon Treaty has become a fundamental right.<sup>25</sup> The proposal is comprehensive. The Commission initiative from 2012 contains 91 articles (paragraphs) and fills 100 pages. An unofficial but leaked summary of the Commission, Council and Parliament amendments in spring 2015 fills 630 pages and 4.6 MB plain text.<sup>26</sup>

The fundamental principle is that the collection and processing of personal information requires the consent of the person concerned, or support in law for a specified and limited use, and that other uses thus becomes prohibited. Various exceptions shall be made to ensure that worthwhile pursuits such as public administration, archiving, research, and historiography are not compromised.

At the time of writing the unclear issues include whether or not the use of social media like Facebook, Twitter, Instagram and private websites should be covered by the regulation, or whether they fall under an exception for "household activities." The proposal further strengthens the "right to be forgotten" with the possibility to have erased unwanted links and information on the web.

The major bone of contention has been a tug of war between the IT companies like Microsoft, eBay, Apple, Google, and Facebook who see their business ideas and earnings potential threatened, and civil rights organizations that protect personal privacy. IT companies have had success in influencing the Council's position while privacy advocates have had the Parliament's ear. One possible outcome of the upcoming final battle in the negotiations between the Commission, Council and Parliament (expected late 2015) may therefore be a compromise that makes regulation less extensive than the Commission had initially wanted.

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<sup>24</sup> "THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)"- COM(2012)11 final

<sup>25</sup> The Lisbon Treaty, Treaty of the Functioning of the European Union article 16.1

<sup>26</sup> <http://statewatch.org/news/2015/apr/eu-council-dp-reg-4column-2015.pdf>

Three aspects of the proposal will be the key for the future of the right of access to documents if, or when, the Regulation enters into force:

\* Access to documents is secured in the regulation by a specific exception to the general rule.<sup>27</sup> The right to know exception is equated with the protection of personal information. These two equally fundamental rights should therefore not only be balanced against each other. The two rights must be "reconciled".

The problem here is that the right to know, as well as freedom of expression, is based on the philosophy that everything that is not expressly forbidden is allowed. The protection of personal information is based on the opposite thought: only the usage that is mentioned in the Act is permitted, all other uses are prohibited. The choice between public access and data protection is therefore not about finding a middle ground between two different interests, but what principle should govern in a specific case.

In the case of *Commission v Bavarian Lager*<sup>28</sup> the European Court of Justice concluded that an importer of German beer into the UK would not be allowed to see the names of his opponents who had participated in a meeting with the Commission to keep him off the UK pub market. Protection of lobbyists' privacy - which they were - outweighed the importer's right to access the documents.

\* Data collected for a specific purpose should not be used for another. According to the Council of Ministers, various exceptions should be made to ensure that archiving, statistics, research and historiography are not compromised. However, the European Parliament did not agree to those exceptions.

The consequence could be that although the right to seek access to documents should be ensured in full, it risks being rendered moot, especially if the persons concerned have the right to remove their own information from government records.

\* Protection of freedom of speech (which also includes the right to information) is proposed as a general exception from the heart of the regulation.

The problem here is that European Parliament, just as with access to documents, wants the right to be "reconciled" with the protection of personal information. The Council of Ministers, on the other hand, would like to limit the protection of freedom of expression exception to data processing with "journalistic, artistic or literary purposes", that is, an exception for certain practitioners but not for citizens in general.

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<sup>27</sup> The articles 80 or 80 a 80aa in the leaked work document - see footnote 22

<sup>28</sup> C-28/08P = look under court cases on the courts website <http://curia.europa.eu>

## Summary of Legislation

The Commission and a majority in the Council of Ministers have tried to turn the clock backwards with regards to the rules on access to documents, so far with limited success. At the same time, the ECJ has generally, but not consistently, interpreted the applicable rules in a transparency friendly direction, and thus extended accessibility.<sup>29</sup> With EU legislation based on the Aarhus Convention, the public's right to access environmental issues has been strengthened, yet still fairly unproven.

Two dark clouds are looming on the fast approaching horizon. Protection of trade secrets and the protection of personal information can become more severe restrictions on transparency than attempts so far to weaken core regulation.

Parliament's Legal Affairs Committee addressed the proposal on the protection of trade secrets on June 16, 2015 with the requirement that the proposal not affect the transparency of the EU's institutions. A Parliamentary plenary session is expected to vote on the committee's report in November. Then the final negotiations with the Council and Commission can begin.

The proposal on protection of personal data is being processed by Council of Ministers on June 15, 2015 who has agreed to a platform<sup>30</sup> for final negotiations with the European Parliament and the Commission. The aim is for the crucial decision to be made by the end of the year.

The next section deals with the implementation of the legislation in practice.

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<sup>29</sup> In the case of Corporate Europe Observatory against Commission about a trade treaty between the EU and India (C-399/13P) the Commission won the right to refuse disclosure of documents that had been sent to a large number of representatives from enterprises and industries (2015-06-04), also see <http://corporateeurope.org/pressreleases/2015/06/blow-citizens-eu-court-backs-privileged-corporate-access-eu-trade-talks>

<sup>30</sup> <http://www.consilium.europa.eu/en/press/press-releases/2015/06/15-jha-data-protection/>

## 2. Here's the outcome – transparency in numbers

2002 was the first full calendar year with the transparency regulation in effect. The Commission received 991 applications for access to documents. The applications have increased since then, although not always from year to year. Recent accounts for 2013 show the highest-ever number: 6,525 applications.<sup>31</sup>

The Commission itself points out that it "is by far the institution which handles the most applications." The Council noted 2,212 applications and the Parliament 610 in 2013.

In the report for 2013, as with applied reports from earlier years, there are somewhat detailed statistics covering whom applied for what, what the outcome was, and what were the most common reasons for denial. Here is an excerpt summarizing the latest reported figures:

### Who applied?

Scientists 22.08%

Civil Society (interest organizations, enterprises and industries etc) 16.62%

Legal experts 14.46%

Other EU-institutions 8.76%

Authorities (non EU-organs) 8.24%

Journalists 4.58%

Unknown 25.26%

The ranking order between the various groups has shifted the past three years but the size has roughly been the same. The biggest change since 2011 has been that "Civil Society" has increased from 8.59% in 2011 to 16.62% in 2013.

### From where did the applications come?

(The largest five)

Belgium 24.23%, Germany 12.96%, Great Britain 7.64%, France 7.27% and Spain 6.54%.

The ranking order has shifted since 2011, but Belgium (with many interest organizations and law firms in Brussels) has constantly been in top.

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<sup>31</sup> REPORT FROM THE COMMISSION on the application in 2013 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (COM(2014)619). The figures refer, unless otherwise stated, to the number of applications, not the number of documents requested.

### **What did they apply for?**

The top five most searched policies (out of 34), grouped with the responsible Directorate General (DG) in the Commission:

Health and Consumers (DG SANCO): 8.20%, Competition (DG COMP): 5.13%, Environment (DG ENV): 5.07%, Enterprise and Industry (DG ENT): 5.02%.

### **What was the result?**

Of the 6,525 applications in 2013, 6,055 covered regulation 1049/2001. Of them 4,400 (73.43%) were granted, 886 partially (14.45%) while 640 (10.68%) were denied.

Of the 640 denials, 236 were reversed through a so-called confirmatory application. This means that the person applying maintains their request and asks the Commission to reconsider their administrator's initial decision, often accompanied with a more detailed justification than in the first request.

Of the 189 replies to the confirmatory applications in accordance with Regulation 1049/2001, the Commission maintained its initial denial in 106 cases (56.08%) but fully reversed in 38 cases (20.11%) and revised partially 45 times (23.81%). The percentages of positive responses and negative responses have roughly been the same size the past three years. (Please note that the percentages and absolute numbers do not correspond exactly between the number of requests and responses. That's because an application may cover multiple documents and therefore trigger several answers. Some answers in 2013 may also have been intended for previous applications.)

### **The reasons for denial in the 6,055 initial decisions:**

(Cited article of the regulation in brackets)

1. Protection of inspections, investigations and audits (Article 4.2): 23.60%.
2. Protection of a decision not yet made (Article 4.3, first paragraph): 20.60%.
3. Protecting the individual's privacy (Article 4.1b): 16.26%.
4. Protection of commercial interests (Article 4.2): 16.14%.
5. Protection of internal documents from decisions already made (Article 4.3, second paragraph): 6.51%.
6. Protection of international relations (Article 4.1a): 6.19%.
7. Protection of court proceedings and legal advice (Article 4.2): 5.42%.
8. Member State or third party saying no (no veto power in the Regulation): 1.85%.
9. Protection of financial, monetary or economic policy (Article 4.1b): 1.66%.
10. Protection of public security (Article 4.1a): 1.53%.
11. Protection of defence and military matters (Article 4.1a): 0.26%.

### **Reasons for denial of the 189 confirmatory/appealed requests:**

1. Protection of inspections, investigations and audits (Article 4.2): 36.87%.
2. Protection of an individual's privacy (Article 4.1b): 16.13%.

3. Protection of commercial interests (Article 4.2): 11.98%.
4. Protection of a decision not yet made (Article 4.3, first paragraph): 10.60%.
5. Protection of financial, monetary or economic policy (Article 4.1b): 7.37%.
6. Protection of court proceedings and legal advice (Article 4.2): 6.91%.
7. Protection of internal documents from decisions already made (Article 4.3, second paragraph): 5.53%.
8. Protection of defence and military matters (Article 4.1a): 3.69%.
9. Protection of public security (Article 4.1a): 0.92%.
10. Protection of international relations (Article 4.1a): -
11. Member State or third party saying no (no veto power in the Regulation):

## What do the numbers tell us?

Out of 6,055 requests nearly 90% were fully (73.43%) or partially granted, including those that were partially or fully granted on appeal ("confirm") after an initial rejection. So far this testifies to the application of the transparency regulation functioning.

The ranking of the various reasons for denial suggest that the Commission has a penchant for protecting its own operations (protection of inspections, investigations and audits and the protection of decisions not yet made).

But whether or not the rejections have been motivated is difficult to assess without a more detailed analysis of the specific applications. Nor can it be inferred about the rejected applications that they may have had a broader interest, or if they were simply motivated by business concerns for example the competition case.

To investigate how access requests have been specifically and substantively processed this report is reviewing the application of transparency rules in three separate issues and with three different methods – see the next section.

Before that, there may be reason to consider two other conditions in light of what has been reported so far:

## How can we know what there is to see?

The exact number of documents in the Commissions public register is not specified. After more than six years of Regulation 1049/2001, the register contained 73,708 documents.<sup>32</sup> About 18,000-20,000 new documents per year have thereafter been added to the register, which should mean about 200,000 documents in 2013 although exact information is lacking. As a comparison for the same year the Council states that it had 293,350 documents in its open register.<sup>33</sup>

The Commission's register now includes the following types of documents: C (legal documents of the Commission's own responsibilities), COM (legislative proposals, communications, reports), JOIN (Joint actions by the Commission and the high foreign policy representative - since 2012), OJ (agendas for Commission meetings), PV (minutes of Commission meetings); SEC (documents that do not fit into any other category) and SWD (Commission working document since 2012).

It might seem to be sufficient.

But already in 2004 the Commission self critically observed that there was a malfunction in processing applications, which had consequences for the applications it had received:

*"At Parliament and the Council, the vast majority of applications for access arise from the consultation of the registers. Almost all the applications sent to Parliament are submitted using the electronic form associated with the register. At the Commission, only a small number of applications concern documents identified in the two registers, that of the COM, C and SEC documents and that of the President's mail. Most of the applications concern files (infringements, state aid, mergers) and not specific documents. Moreover, the applications sent to the Commission do not usually concern legislative activities, but rather the monitoring of the application of Community law.*

*It is clear from the Parliament's and Council's experience that the registers enable people to make more precise applications and hence they contribute to reducing the administrative burden linked to the identification of and search for documents."<sup>34</sup>*

(Here one can otherwise note that the register at the time specified in the above quote included the then Commission President Romano Prodi mail, a question to come back to later.)

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<sup>32</sup> COM(2008)630, page 8

<sup>33</sup> Council Annual Report on Access to Documents 2013, page 11

<sup>34</sup> COM(2004)45, pages 38-39

From the perspective of a user: For those who do not know exactly what documents he or she is looking for the official index is not of much help. The registry's search function often gives incomplete or useless responses. An open search in May 2015 using the abbreviation "TTIP" (Transatlantic Trade and Investment Partnership) resulted in 13 hits; a result that is far below what the Commission has actually published openly on its dedicated TTIP portal.<sup>35</sup>

However, realization of the deficiency in the registry from the Commission's side has not been converted into action.

In December 2008, the current European Ombudsman, P. Nikiforos Diamandouros, criticized the Commission for failing to live up to the requirements the regulation imposes on a comprehensive register. The Ombudsman was not impressed by the Commission's explanations on the technical difficulty in gathering various records for a common database. He argued that the Commission had had enough time to comply with the registry requirements for the then seven-year-old regulation.<sup>36</sup>

Seven years later, the criticism of the Commission's incomplete register is still relevant. As of spring of 2015 the European Ombudsman's office has not been informed of any efforts to meet the criticisms of 2008.<sup>37</sup>

In a reply to a written question to President Juncker's cabinet the Head of Cabinet, Martin Selmayr, writes that it is still considering how registry functionality can be improved, but that we will have to wait for specific changes:

*"The Commission is committed to developing further its public registers in the interest of enhanced transparency. Over the last years, the Commission has extended the scope of the Register of Commission documents to cover new categories of documents (Staff Working Documents; Commission and High Representative Joint Acts) and has developed its registers of committee documents and expert groups. It has also developed an internal central registration tool ("Ares") for administrative documents, and is currently examining the possibility to improve access to these documents.*

*However, it is still of the opinion, as expressed in its reply to the Ombudsman, that it is very difficult to establish a fully comprehensive, single public register covering all documents falling under the wide definition of documents set out in Regulation (EC) 1049/2001."<sup>38</sup>*

In short, the extent of the problem is known and acknowledged. The solution remains to be found.

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<sup>35</sup> <http://ec.europa.eu/trade/policy/in-focus/ttip/>

<sup>36</sup> Ombudsman's opinion in case 3208/2006/GG

<sup>37</sup> Mail Correspondence with the Ombudsman office 2015-03-18

<sup>38</sup> Mail from chief of cabinet Martin Selmayr 2015-05-05

## How long does it take?

In December 2013, the EU Ombudsman, Emily O'Reilly, on her own initiative contacted the then Commission President Jose Manuel Barroso and asked about the processing of requests for access to documents. Mr Barroso replied that the processing time in 2010-2013 fluctuated between 14 and 17 businessdays.<sup>39</sup> The three applications that had taken the longest time to process had taken 608, 626 and 627 days to respond. The Commission responded that they had used the opportunity to prolong processing time in 12-13 per cent of the received requests, and that it had extended the processing deadline of between 60% and 80% of the confirmatory applications (appeals process).

(The author's subjective view is that the prolonged processing times have almost become standard practice, but it could be due to what has been requested and therefore contradicts Barroso's response to O'Reilly.)

In March 2015 O'Reilly noted that the processing time had improved slightly but that additional measures were in place and that the applicants, on the whole needs more help from the EU authorities, something she looked forward to from the new Commission<sup>40</sup>

## Who benefits from the system?

The high representation of scientists, interest groups and lawyers among the users does not indicate that the system has meant a breakthrough for the public's participation in and understanding of the EU.

Nor do journalist's low participation indicate that the media as the public's representatives have taken these opportunities for themselves to any great extent.

The reason why it looks this way is not necessarily something that the Commission or the European Union can be blamed for. But it is an issue that there are reasons to come back to later on.

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<sup>39</sup> Letter from Barroso to O'Reilly 2014-03-14 Case OI/6/2013/KM

<sup>40</sup> <http://www.ombudsman.europa.eu/sv/cases/decision.faces> 2015-03-11

### 3. How it works - three examples in practice

To investigate how access to documents works in practice was selected three examples from three very different policy areas, and using three different methods. The examples, justification, method and results are explained for each of them below.

#### Example 1: Should the EU impose its own taxes?

**What:** On 25 February 2014, a working group was chaired by former Commissioner Mario Monti with the task of investigating possible changes to the revenue side of the EU budget (High-Level Group of Own Resources). The group's work shall be assessed by the member state parliaments in 2016. Subsequently, the Commission might propose a new funding system for the EU's future budgets.

**Why this is of interest:** Who pays, how much and in what way, is almost always interesting in the political context, as well of course how the money is used. The issue of the EU's "own resources"<sup>41</sup> also holds a most fundamental question: should the EU be understood as an intergovernmental cooperation where income - like today - mainly comes from the Member States according to their VAT base and gross national income? Or should the EU as a kind of state be able to demand direct taxation of citizens or of businesses in the Union? The discussion has been going on for many years. A detailed account of the issue and the debate has been published in two rounds of the OEIC.<sup>42</sup>

**The procedure Step 1:** An initial search of the Commission's document register gave a rather meager result. In a second step, the document register open form on March 17 to request access to the following:

- Documents have been received and sent by the High Level Group on own resources since February 2014.

#### Preliminary results:

- Confirmation of receiving the online form request was confirmed via automatic reply the same day.
- On April 10 2015, after 15 business days and a Easter holiday, the office manager of the Directorate General for the Budget informed me that the application was being considered, but that it needed a further 15 working days to complete the investiga-

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<sup>41</sup> Own resources - an EU term for the EU's own direct incomes. Read more for example at: [https://en.wikipedia.org/wiki/Budget\\_of\\_the\\_European\\_Union#Revenue](https://en.wikipedia.org/wiki/Budget_of_the_European_Union#Revenue)

<sup>42</sup> <http://oeiceurope.com/say-no-to-eu-tax-update-december-2014/>

tion, including to consult outside experts and group members. (Processing time of 15 working days but the possibility of extension is regulated in Regulation 1049/2001.)  
– On May 4 2015 after the 15 additional working days, access was granted to parts of the High Level Group acts, in all 21 different files sent electronically, plus four links to documents from the European Parliament.

The provided documents were:

\* Meeting invitations, with agendas for six meetings of the group from the first meeting 2014-04-03 to the sixth meeting 2015-03-23 - in all six files.

\* Three reports and a presentation from external experts participating in group meetings - in all four files.

\* An initial interim report on the group's consideration and further work by December 2014, various documents from EU institutions (the list of VAT ranges of the Member States, a report from the Court on how to calculate GNI, the conclusions of the Summit in February 2013 statement about the long-term budget 2014-2020 and working papers, reports and resolutions from the European Parliament) - in all ten files, plus three links; all previously published and available documents.

**Preliminary conclusion:** The request for access so far yielded new knowledge about when the group held meetings, what they would have talked about, and insight into the advice and arguments that the group has received from outside experts. An interesting example is the expert Gabriele Cipriani's illustration with a fictional cafe receipt of how a EU VAT can be made clear, but without discouraging citizens.

Cipriani explains his illustration like this:

*"A final (but critical) issue concerns avoiding giving the impression to citizens that with the introduction of a EU VAT rate they would pay a higher tax than it is currently the case, while the aim is precisely to substitute the current national contributions. Indeed, the combination of 'European' and 'tax' could be seen as an additional burden and could therefore become deeply unpopular."*<sup>43</sup>

However, the provided documents gave no new knowledge of how the group work progresses - in addition to the preliminary and are already available report from December 2014. They also show that the group possesses documents not disclosed - including former draft papers that will be published later, record of discussions at the meetings and documents to help individual members. Nadio Calviño, Director General of the Budget Directorate justified refusal of access to the documents with Article 4.3 of Regulation 1049/2001.<sup>44</sup> A full disclosure would undermine the group and later the Commission's work unless there is "overriding public interest in disclosure".

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<sup>43</sup> Cipriani: "Financing the EU-budget - moving forwards or backwards" sid 69-70

<sup>44</sup> "Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the

**The procedure Step 2:** The decision not to disclose all documents was appealed to the Commissions General Secretary the next day (2015-05-05) with a so-called confirmation request.

The appeal used the following arguments:

\* Article 4.3 refers to the protection of the EU legislative procedure, while HLG work is about preparing a possible forthcoming legislation. It is therefore questionable whether the invoking exception is at all relevant.

\* If, on the other side, the group's work should be seen as part of a legislative process, we have as citizens an entitlement to see the actors' different position. It is in line with the European Court of Justice ruling on the right to take part in Member States' arguments in the Council of Ministers *before* the Council has reached a decision.<sup>45</sup>

\* The issue of direct or indirect taxes to the EU is known and debated, it is hard to imagine that someone in the group would feel restricted in their work on his or her arguments became widely available.

\* It is extremely difficult to imagine that the question of how the EU will be financed in the future - and what the money will be used for - would not be an overwhelming public interest.

Furthermore, it was pointed out that the Director General's reply was missing a list that could make it possible to see which documents were *not* disclosed. The Commission's Secretariat-General acknowledged receiving the appeal in an email the next day (2015-05-06).

After another 17 business days the Commission's Secretariat General sent a notification via email 2015-06-01 that the confirmatory application (= appeal) was now finished but the answer was not yet approved by the Commission's legal service and the "higher up in our hierarchy", and therefore would not be able to meet the deadline on 1 June. The deadline for replies was now extended to 22 June, with an assurance that it would do its best to come back before then. A reply arrived at the end of 23 June, a day after the promised final answer.

### **Result of appeal**

After the decision of the Commission's Secretary-General, Catherine Day, five additional documents were released in their entirety; a report on how to calculate gross national income (GNI), a compilation of the member countries different discounts, a summary of which own resources are subject to VAT, a strategic signpost ("roadmap")

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*document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."*

<sup>45</sup> C-280/11 P on the 13 oktober 2013 in the case of Access-Info Europe v Council

for the group's continued work and a specification of a upcoming assignment for an investigation.

None of those documents contained particularly interesting information.

Further releases include minutes from five of the cherished meetings, a "Reflection Paper" from the group's secretariat, as well as three drafts of the preliminary report that had been officially published in December 2014. In all of these documents were central and "sensitive" parts redacted = painted over with black.

Attached to these completely and partially disclosed documents was an eight page long statement in which the Secretary-General commented on the arguments in the appeal:

**Arguments in favor of disclosure I (Staffan Dahllöf):** HLG work is not part of the legislative process and therefore not covered by the exception for protection of the legislative process (Article 4.3).

Commission response (Catherine Day): Article 4.3 contains no clear definition of what constitutes the EU's legislative process, the term must be interpreted broadly in order to protect the functioning of the institutions. *Future EU funding as pointed out is politically sensitive and controversial* (italics here). It would jeopardize the group's continued work on members' deliberations were known. The argument is rejected.

**Arguments in favor of disclosure II (SD):** Should the group's work be considered to belong to the legislative process, we have as citizens the right to know about the actors' positions, in line with the judgment in Case C-280/11P (Access Info Europe v Council).

Commission response (CD): The decision in C-280/11P is about member countries' positions in the ongoing legislative process, but member states are not represented in the High Level Group. The judgment is therefore not relevant here. Additionally, the withheld parts contain the analysis of member countries' contributions to the EU budget, drafted without the participation of the member countries. *Here there is a real and not a hypothetical risk that publicity would jeopardize not only the mutual trust between member states and EU institutions, but also the group's ability to perform independent work* (italics here). That in turn risks having negative repercussions on the discussions on the EU budget, and the EU's financial policy, which in itself is a reason not to disclose documents (Article 4.1a). The argument is rejected.

**Arguments in favor of disclosure III (SD):** Arguments for and against the direct funding of the EU budget are known and have been debated for many years. It is difficult to imagine that the group's work would be more difficult if they became known which of the arguments relied on in its work.

**Commission response (CD):** The argument is reproduced without comment.

**Arguments in favor of disclosure IV (SD):** The issue of how the EU is funded in the future, and what the money will be used for can not have anything other than an overriding public interest, as the reasons for not disclosing the documents must be balanced against this.

**Commission response (CD):** "While I understand that there may be a public interest in understanding the decision making on own resources, I can not see that this interest outweighs the public interest in protecting the ongoing decision process that is connected to the high-level group." The argument is rejected.

### **Final Result:**

The appeal led to as shown above, additional documents were disclosed, and a detailed justification of why parts of the released documents were not.

In the unredacted parts of the minutes from the meetings some interesting information is found, for example how the invited experts describe the past decade as a "socially lost decade" for the EU, and is referred to the following:

*"The crisis has demonstrated the inadequacy of the structures in the euro area (EMU without appropriate budgetary tools), and the deeply flawed economic strategy based on the idea that the source of the crisis, fiscal debauchery, when in fact it was a banking crisis."*<sup>46</sup>

The minutes also show that the group discussed the need to distinguish between the EU and the euro area, which should establish some form of government functions to protect the single currency.

It also appears that new forms of direct taxation, such as an EU VAT regarded as highly sensitive, and that the group is concerned that future direct financing of the EU budget should not be perceived as a tax increase.

For those interested, these pieces help to understand what the High Level Group is working on, and might propose. Whether the pieces of the puzzle are in proportion to the labor employed for more than three months is another story.

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<sup>46</sup> Professor Loukas Tsoukalis, from the minutes of the meeting on 17 October 2014

Example 1:  
**Should the EU impose its own taxes?**



In 25 February 2014, a working group chaired by former Commissioner Mario Monti with the task of investigating possible changes to the revenue side of the EU budget (High-Level Group of Own Resources, was created.

**THE PROCEDURE  
 STEP 1**

1

5/3/15

**Working day 1:** An initial search of the Commission's document register gave a rather meager result.

17/3/15

**Working day 2:** In a second step, the document register's application form was used to request access to documents "that have been received and sent by the High Level Group on Own Resources since February 2014." A confirmation that the application had been received came via automatic reply the same day.

EU Deadline

10/4/15

**Working day 17:** A head of office at the Directorate General for Budget informed me that the application was being considered. A further 15 working days to complete the investigation were needed.

EU Deadline

4/5/15

**Working day 32:** Access was granted to parts of the High Level Group acts.

**THE PROCEDURE  
 STEP 2**

2

5/5/15

**Working day 33:** The decision not to disclose all documents was appealed to the Commissions General Secretary.

EU Deadline

1/6/15

**Working day 50:** The Commission's General Secretary notified it was not able to meet the deadline set for 1 June.

EU Deadline

22/6/15

**Working day 65:** No answer from the Commission on the promised deadline.

23/6/15

**Working day 66:** A reply arrived at the end of 23 June, one day after the promised final answer.

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After 32 working days request for access to documents from the High-Level Group of Own Resources throughout the Commission's online form gave some insight into what the group had been considering.

## Example 2: The relationship between the EU and Saudi Arabia

**What:** Is it possible to get an idea of the relationship between the EU and Saudi Arabia with a request for access to documents?

**Why this is of interest:** Saudi Arabia is an important international and regional player, but is neither a "neighbour" to the EU nor a candidate for EU membership. The relationship between the EU and Saudi Arabia are in as much an example of a purely foreign policy relationship.

In spring 2015, an event occurred that might shed light on the role of foreign policy when a conflict arises between one of the EU member countries and "third party" outside the EU: The Swedish Foreign Minister, Margot Wallström, would have delivered a speech at a meeting of the Arab League, on March 9, but was withdrawn from the agenda at the last moment. A declared reason was Wallström's public criticism of the treatment of women and political dissidents in Saudi Arabia. Shortly thereafter, the Swedish government cancelled a defense industrial agreement with Saudi Arabia, after which the latter country recalled its ambassador in Stockholm.<sup>47</sup> As background information Swedish Radio had previously uncovered attempts by Swedish authorities to establish a weapons factory in Saudi Arabia - in violation of the official Swedish arms export policy.<sup>48</sup> Margot Wallström was for that reason already under political pressure to denounce the defense contract at home.

The issue in this context was if the Swedish-Saudi crisis laid a track of correspondence between Saudi Arabia and EU foreign authority EEAS (European External Action Service), which is part of the Commission.

**The procedure Step 1:** A request for access to documents relating to communications between the EU and Saudi Arabia from 2015-01-01 to 2015-03-15 was sent to the EEAS via webportal [www.asktheeu.org](http://www.asktheeu.org).

This web portal is operated by the pressure group Access Info Europe in Madrid with support from the fund Open Society Foundation and a number of other organizations.<sup>49</sup> The purpose of the portal is to facilitate the use of EU transparency rules, but also as a campaigning organization serve as a platform for increased transparency.

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<sup>47</sup> For a non-Swedish report and commentary see the British daily newspaper The Guardian: <http://www.theguardian.com/commentisfree/2015/mar/29/guardian-view-on-margot-wallstrom-undiplomatic-diplomat>

<sup>48</sup> The gathered scrutiny made by Dagens Eko (in Swedish) <http://sverigesradio.se/sida/gruppsida.aspx?programid=3437&grupp=17277>

<sup>49</sup> <http://www.asktheeu.org/en/help/about>

Unlike applications directly to the EU institutions, all documents during the administrative process are instantly available on "Ask the European Union". My application, the Commission's response and further progress can thus be followed by all online. Outsiders can subscribe to be directly informed when something new happens in a matter of interest. (A later section of this report discusses the pros and cons of utilizing "Ask the EU" in comparison with the EU's internal systems.)

- Application for access to documents was confirmed by automatic reply on the same day the application was sent.

- EEAS responded two days later (2015-03-25) that the application lacked the necessary details of the documents referred to, and that the EEAS had not established a specific list of correspondence with Saudi Arabia.

- In response to the EEAS on the same day (2015-03-25) it was pointed out that the purpose of the request was to find out which contacts had taken place, and that by its nature is difficult to pinpoint details which are not known; a kind of 'Catch 22'.

In an attempt of clarification, a request was made for access to correspondence between the EU and Saudi Arabia concerning *"official visits, trade, political discussions, cultural events or other matters that either of the two parties have taken the initiative."* It also specified that the application also included documents prepared by the EEAS for Saudi Arabia, but not necessarily exchanged with the Kingdom.

- In a statement on April 16 2015 the EEAS announced that the request was under consideration but that they had to extend the processing time by a further 15 days to submit "a sufficiently validated reply".

- In a comment to the reply, the EEAS thanked for the message concerning the delay, and added that the lengthy processing time itself could be a matter for the European Ombudsman at a later stage.

- On May 8 2015, exactly 30 days after the initial request was answered, the EEAS replies with a partially accommodating answer and sent three documents.

**Preliminary results:** With the answer on May 8 the EEAS gave access to three documents:

\* A letter of condolence to Foreign Minister Prince Saud Al-Faisal 2015-01-15 because of his father King Abdullah's death. The letter is signed Federica Mogherini, Vice-President of the Commission and the EU's "High Representative of the European Union", the deceased is spoken of as a strong partner for Europe and a man with grand visions.

\* A virtually identical letter of condolence to the Crown Prince and Deputy Prime Muqrin Al Saud 2015-01-15 on account of his father King Abdullah's death, signed Federica Mogherini.

\* A letter on 2015-03-18 to Crown Prince and First Deputy Prime Minister Muqrin Al Saud with an apology from Federica Mogherini because she could not participate as planned in a conference, and thanked Saudi Arabia for its promised generous contributions to Egypt at the conference.<sup>50</sup>

EEAS further confirmed that it had identified two relevant documents:

\* A "note verbale" 2015-03-18 (a non-signed diplomatic clearance) from Saudi Arabia to the EU on the country's application for membership of the UNHRC (United Nations Commission for Human Rights). According to the UNHCR website, however Saudi Arabia's membership of the Commission lasts for a period of three years, which expires in 2016. The note is most likely due to Saudi Arabia's desire to chair the UNHRC in 2016.

\* A "note verbale" 2015-03-15 from Saudi Arabia Mission to the EU concerning Yemen. Neither of the two documents could be released, in whole or in part citing the exception 4 (1) (a) third indent of Regulation 1049/2001.<sup>51</sup>

#### **The justification read:**

EEAS has consulted Saudi authorities whom it let be understood they did not wish the documents to be disclosed. The fact that the consulted party is the government of a third country was considered to have a particular weight. The documents have sensitive content linked to international relations between the Kingdom of Saudi Arabia and the EU. Access to parts of the content cannot be considered, as the sensitive parts are an integral part of the entire contents.<sup>52</sup>

**Preliminary conclusion:** The diplomatic complications between Sweden and Saudi Arabia did not in the short run have any visible impacts on the EEAS. The Swedish Government had declared that relations with Saudi Arabia were a purely intergovernmental matter and that the Government did not wish to raise the matter in the EU, although Foreign Minister Wallström said that she had oriented Federica Mogherini.

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<sup>50</sup> The letter can be read in its entirety on [www.asktheeu.org](http://www.asktheeu.org) search acronym EEAS, alternatively, the applicant's name (Staffan Dahllöf)

<sup>51</sup> "The institutions shall refuse access to a document where disclosure would undermine the protection of: (a) the public interest as regards: (...) international relations."

<sup>52</sup> To read the original formulation refer to the reference above in footnote 47

It seems as if the EU, through the EEAS, was just as absent an actor as the Swedish government wanted it to be. It might be questioned whether the five documents referred to above really represent the whole of the overall correspondence between Brussels and Riyadh during nearly a three months time. The suspicion that it would not be the case cannot be proven within the frames of this report.

**The procedure steps 2:** The decision not to disclose the two verbal notes was appealed 2015-05-11 with a "confirmatory application" to the EEAS with the following justifications:

\* The ECJ has in a previous court case held that a consulted third party's objections are not enough reason to refuse access to a document.<sup>53</sup>

\* The fact that the consulted party constitute the government of a third country is not a legally justifiable reason to refuse to dispense with the support of the regulation.

\* EU authorities are obliged to report the manner in which an exception to the regulation is relevant for each individual document requested.<sup>54</sup>

\* ECJ has ruled the right of access to the parts of a document if not the entire document can be released.<sup>55</sup> It seems unlikely that the entire contents of the two documents are directly and equally strongly linked to sensitive information from a Saudi Arabian perspective.

- EEAS confirmed the receipt of the appeal (the confirmatory request), same day (2015-05-11) with the promise of a reply within 15 working days, but did actually before that, on May 26 (however, incorrectly dated 26 June).

### **Final result:**

EEAS agreed in an email 2015-05-26 that third parties do not have a veto right against the disclosure of a document, and that it is not an argument in itself that the third party is a government. But Director of the EEAS Patrick Child wrote:

*"(...) it is common sense that the fact that the document concerned is issued by a government, i.e., a primary actor in international relations, reinforces the relevance of the application of the exception."* (Artikel 4.1.a Protection of international relations)<sup>56</sup>

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<sup>53</sup> In Case C-135 / 11P (IFAW v Commission), the Court ruled that the German government had no right to prevent the Commission's disclosure of a submitted document to an environmental organization in Germany.

<sup>54</sup> In Case T-174/95 (Swedish Union of Journalists v Council), the Court ruled that access to documents concerning police cooperation, Europol, could not be rejected as a single bloc, but must be justified by the expected damage to the disclosure for each document.

<sup>55</sup> In Case C-353/99 (Council v Hautala) the then MEP Heidi Hautala (again elected MEP 2014) got the right to read portions of the parts of a report on arms exports even if she could be denied the report in its entirety.

<sup>56</sup> For documentation see [www.asktheeu.org](http://www.asktheeu.org) - search for "Relations between the EU and Saudi Arabia"

However, the EEAS slightly lifted the veil regarding the specific justifications for not giving access to the two documents:

\* The note on the UNHCR (the UN Commission on Human Rights) reports the Saudi reasons why its membership - probably the presidency - by the UNHRC should be accepted and supported.

\* The note on Yemen recognizes Saudi attitudes to the political situation in Yemen, and the details of the measures Saudi Arabia has taken for that reason. (This note is dated 2015-03-15, ten days before the Saudi and a dozen other states launched bomb attacks against the country.)

More cannot be said by EEAS regarding the contents of the documents without revealing their content and thereby break the protection of international relations. A partially accommodating answer is therefore not possible. The two "note verbale" were not disclosed.

Example 2:  
**What is there to know about the relationship between the EU and Saudi Arabia?**



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Saudi Arabia is an important international and regional player, but is neither a “neighbour” to the EU nor a candidate for EU membership. In spring 2015, a diplomatic crisis arose between Saudi Arabia and Sweden. I wanted to find out if the Swedish-Saudi crisis laid a track of correspondence between Saudi Arabia and EU foreign authority EEAS (European External Action Service), which is part of the Commission.

**1**  
**THE PROCEDURE STEP 1**

**23/3/15**  
**Working day 1:** A request for access to documents relating to communications between the EU and Saudi Arabia was sent to the EEAS and was confirmed as received by an automatic reply.

**25/3/15**  
**Working day 3:** EEAS responded that the application lacked the necessary details of the documents referred to. An attempt of clarification was made from my part.

**EU Deadline**  
**16/4/15**  
**Working day 16:** In a statement the EEAS announced that the request was under consideration. A further 15 days were needed to submit “a sufficiently validated reply”.

**EU Deadline**  
**8/5/15**  
**Working day 32:** 32 working days after the initial request, the EEAS replied with a partially accommodating answer and sent three documents. EEAS further confirmed it had identified two other relevant documents, called verbal notes.

**2**  
**THE PROCEDURE STEP 2**

**11/5/15**  
**Working day 33:** The decision not to disclose the two verbal notes was appealed by me followed by a confirmation and a promise of a reply within 15 working days.

**EU Deadline**  
**26/5/15**  
**Working day 42:** EEAS replied. The two verbal notes were not released.

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Requests for access to documents via the portal AskTheEu.org resulted in notification after 30 days of the existence of five different documents. Three of them were made available. An appeal of the decision not to release the two remaining (totally or partially) was rejected after 10 working days, but the rejection itself revealed some information about the contents of the two remaining documents.

### Example 3: Commission President Juncker correspondence

**What:** Is it possible to see the extent of, and access to, commission chairman Jean-Claude Juncker electronic and paper-based mail?

**Why this is of interest:** In March 2000 current Commission President Romano Prodi decided to set up on his website a searchable register of his incoming and outgoing correspondence.<sup>57</sup> This occurred before the current Regulation, 1049/2001, was adopted and entered into force, a result of the scandals that led to the dissolution of the previous Santer Commission.<sup>58</sup> Register of Prodi's Correspondence includes 34,383 documents in December 2002. The numbers were thus higher than in the Commission's searchable record of other documents. It covered 24,942 references at the end of 2002.<sup>59</sup> Prodi's records are no longer available online.

In the present Commission, led by Mr Juncker, the Swedish Commissioner Cecilia Malmström links as the sole member of the collage to a list of her own correspondence. The register includes document details and where appropriate links to pdf files. Requests from the public are reported only as a brief statement on the subject.<sup>60</sup> In the spring of 2015 former US secretary of state, now a presidential candidate, Hillary Clinton came under fire for having stored official government email on a private server. Thus, she broke both the US security and archiving rules.<sup>61</sup> The question is whether Mr Juncker is as open with his correspondence as Romano Prodi and Cecilia Malmström, and if there could be a parallel in the EU to the US commotion surrounding Hillary Clinton's privatization of her official correspondence.

**The procedure:** The Commission's document register provides no definitive answer about the availability of the President's mail.

When Jean-Claude Juncker after taking office introduced the requirement that members of his Commission would report their contacts with lobbyists and other interest representatives<sup>62</sup>, it was obvious to simply ask if corresponding openness also applies to other commissioners' correspondence.

It would prove to be something easier said than done.

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<sup>57</sup> Press Release 31 March 2000 (IP/00/319)

<sup>58</sup> [http://en.wikipedia.org/wiki/Santer\\_Commission](http://en.wikipedia.org/wiki/Santer_Commission)

<sup>59</sup> COM(2003)216 final, page 6

<sup>60</sup> [http://ec.europa.eu/commission/2014-2019/malmstrom/correspondence\\_en](http://ec.europa.eu/commission/2014-2019/malmstrom/correspondence_en)

<sup>61</sup> <http://www.nytimes.com/2015/03/03/us/politics/hillary-clintons-use-of-private-email-at-state-department-raises-flags.html>

<sup>62</sup> Reported under "Agenda Appointments and Meetings" (only in English) for each one of the members of the Commission, that can be read here: [http://ec.europa.eu/commission/2014-2019\\_en](http://ec.europa.eu/commission/2014-2019_en)

A first letter (email) addressed to President Juncker [president.juncker@ec.europa.eu](mailto:president.juncker@ec.europa.eu) was sent 2015-03-15. Besides the issue of the President's correspondence Juncker was asked on the general criticism of the Commission's flawed register and of any initiative to revise the current Regulation. The issues are talked about in another place.

Answers to the questions were slow in coming.

After a week without any reaction a new message was sent 2015-03-25 with the same content to the officer of the Commissioner Frans Timmermans cabinet as stated by a source in the Commission's has transparency issues as their special task.

No reply.

After more than a month has passed since the first mail, and it was neither confirmed nor responded to, a copy was sent to the Commission Representation in Copenhagen 2015-04-17, asking for help to reach the right person, or just to connect to someone who could issue an official response on its behalf.

A week later one of its spokespersons emailed back that the questions would be answered.

Two weeks later, and 47 non-holiday working days after the first contact attempt, President Juncker's cabinet chief Martin Selmayr replied 2015-05-05 with a pdf copy of a signed letter to the questions. Whether reminders from the Copenhagen office triggered Selmayr's response or if they would have come in any case on 5 May is - and remains - uncertain.

The point in reporting the protracted process is to show that the person who petitions the Commission directly through the official channels without knowledge of other means of contact may wait longer for an answer, if you get an answer at all.

Formal requests for access to documents have a deadline of 15 working days for the Commission to process them, with the possibility of extension for another 15 days. Journalists who turn to the Commission's official spokespersons (Spokesman's Service) can usually expect a response within one or two days depending on the substance of political sensitivity, personal contacts to the spokesperson and an alleged or actual deadline.

For more general issues such as those that have been described here there is no corresponding deadline. And the spokesman service is not intended to serve the public. The Commission's national office can be of assistance but does not always have the expertise on specific issues, and does not always have authorization to speak on policy issues.

The issues of registration of Juncker's correspondence and the Commissions failure to state records and any new legislative initiatives could not be answered by the office in Copenhagen. "Transparency is a topic for Headquarters", as one employee put it.

**Final results:** The answer to the question on whether it is possible to see the extent of, and access to, the President's correspondence is yes, in principle, but it is not easy in practice.

Head of Cabinet Selmayr wrote:

*"The documents held by the President and his team fall under the scope of Regulation (EC) 1049/2001 and requests for access are assessed accordingly. If an application for access is imprecise, as referred to in Art 6 (2) of the Regulation, the Commission will invite the applicant to provide clarifications making it possible to identify the documents requested and will, where necessary, assist the applicant in doing so."*<sup>63</sup>

Selmayr further confirmed that Malmström established a register of her correspondence on her own initiative in the previous Commission under Mr Barroso, and that she has continued to do so for Jean-Claude Juncker.

The question of whether Mr Juncker himself intends to follow after Malmström's practice is not answered.

Juncker correspondence is therefore covered by the regulation.

But no, there is no special recording of mail to Commission President as during Romano Prodi between the years 2000-2004, and as with mail to Cecilia Malmström.

Therefore it is not immediately possible to get an overview of Juncker's collective contacts and thus detect any potential gaps that could imply that parts of it are stored outside the Commission, as was the case with Hillary Clinton's mail.

While Martin Selmayr's answer was clear, one question remained; how does the Commission assess the practical management of access to President Juncker mail, for example, all correspondence for a month, or any correspondence in a broad subject such as Greece and the Eurozone? These issues plus an additional reference to the practice of Romano Prodi and Cecilia Malmström was emailed to Martin Selmayr 2015-05-05, which returned with an additional reply a month later 2015-06-04:

\* Yes, broad applications can indeed trigger significant additional work for employees of the Commission, but the rules authorize them to confer with the applicant in order

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<sup>63</sup> Email from Martin Selmayr 2015-05-05.

to find a "reasonable solution", for example by reducing the application's scale or divide an application into smaller parts.<sup>64</sup>

\* No, the Commission is not considering creating a new document register, but intends to continue to develop the existing registry. In addition, (as mentioned earlier) all meetings between the Commissioners, their cabinets and Directors General and lobbyists have been published since 1 December 2014.

*"The Commission is also examining possibilities for wider active publication of documents, including in the framework of a pilot project financed under the EU's general budget for 2015,"* Selmayr answered.

The answer that the correspondence is available in principle, but not possible to overview for outsiders, leads back to the already presented criticism of the Commission's flawed register.

Ideally, the inquisitive should know what he or she is looking for. While you can get help identifying what is available the credibility of such identification cannot be verified. Openness is on the institution's terms and will ultimately be a question of credibility.

In the example of the EU's contacts with Saudi Arabia, the EEAS stated that during the first three months there had been all in all five registered contacts between the EU and Saudi Arabia, three of which must be regarded as belonging to the category of diplomatic courtesies. It is a task that the applicant is unable to verify himself.

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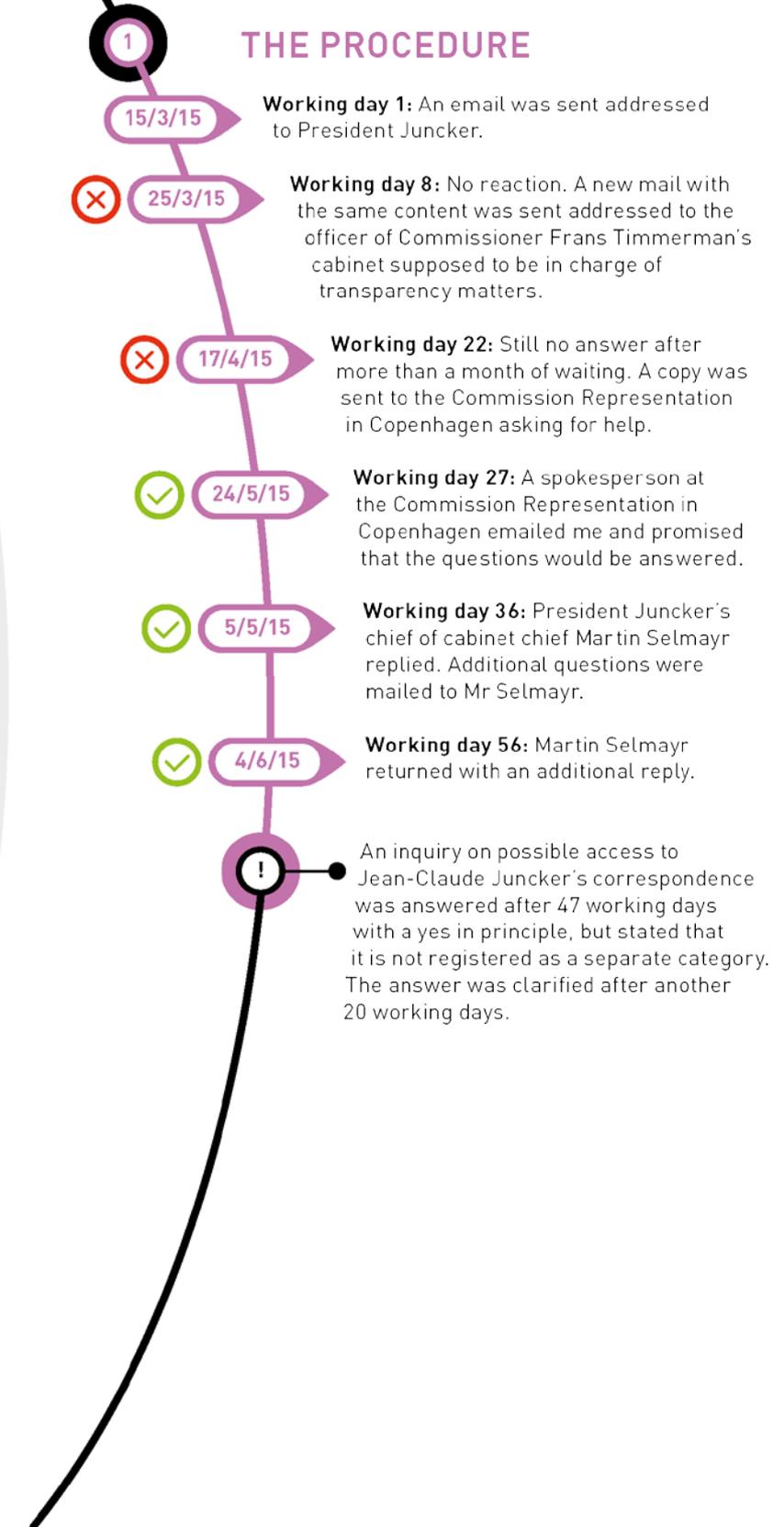
<sup>64</sup> Mail from Martin Selmayr 2015-06-04: instructions for applying Article 6.2 (right to demand clarification) and 6.3 (right to an informal consultation with the promoter in order to find a fair solution).

Example 3:  
**Can we see  
 Commission  
 President Juncker's  
 correspondence?**



Is it possible to see the extent of, and have access to, Commission President Jean-Claude Juncker's electronic and paper-based mail?

**THE PROCEDURE**



## Summary of the three examples

### 1. Should the EU impose its own taxes?

Requests for access to documents from the High Level Group on own resources through the Commission's online form gave after 30 days some insight into what a central working group had been thinking about, although most of the released documents were known and available previously.

An appeal of the decision not to make all the documents available resulted after a further 37 working days in the release of more documents, among them the records of the High Level Group meetings, albeit the most interesting and controversial topics were redacted.

The partial disclosure illustrates what is sensitive in the issue of the EU's own resources, as it illustrates the areas that the Commission has the greatest interest in protecting against transparency, both from the public and from the Member States (!).

### 2. The relationship between the EU and Saudi Arabia

Requests for access to documents via the portal AskTheEu.org resulted in notification after 30 days of the existence of five different documents. Three of them were made available. An appeal of the decision not to release the two remaining (totally or partially) was rejected after a wait of 14 working days, but the rejection itself betrayed something about the contents of the two remaining documents.

### 3. Commission President Juncker correspondence

An inquiry on possible access to Jean-Claude Juncker's correspondence was answered after 47 days with a yes in principle, but stated that it is not registered as a separate category. The answer was clarified after another 20 working days:

The inquisitive can get help identifying the existence of documents that are not registered publicly and/or to limit the scope of the application. A comparison of how electronic communication is handled between the United States (Hillary Clinton) and the EU (Jean-Claude Juncker or Federica Mogherini) cannot be made without research that goes beyond the scope of this report.

## 4. Summary of Conclusions

The issue of transparency is a late phenomenon in terms of the origin and history of the EU.

The Treaty that guarantees the right to documents and related legislation has existed for nearly 15 years. The tug of war about how the rules are interpreted, and possibly change has lasted just as long.

There are arguments for the thesis that the system has slowly but surely opened up to transparency in a process that will be difficult to reverse. The argument could be added into a global trend in which the number of countries with disclosure laws has risen exponentially.

Sweden was for a long time unique with the principle of transparency enshrined in the Constitution of 1766. That was 200 years before the United States got its Freedom of Information Act and became number two globally. Since then the spread and development has been fast. The webportal Freedom Info lists as of spring of 2015 around 100 countries with transparency regulation with Paraguay as the latest addition to the list in 2014.<sup>65</sup> The site also has all the transparency regulation judged on points. The ranking refers to statutory rights, not the application in practice. It is topped by Serbia, Slovenia and India. Sweden ranks 41th globally.<sup>66</sup>

It can on the other hand be claimed that the EU system obstructs the treaty's promises of transparency by closing open windows, sealing cracks in the facade, and introducing new rules and laws that run counter to the transparency regulation.

The outcome of a tug of war between opposing tendencies will be as always something that is determined by the practical application.

It is therefore worrying that so few of those who currently use the rules for access to documents act it in any kind of public interest; to create opinions, fuel political debates or add to journalistic reporting.

It is not negative per that lawyers, lobbyists, officials and researchers have received facilitated access to EU documents. But greater mutual openness between the EU institutions, and increased accessibility for actors who on beforehand are well informed, or simply could become, is not the same as proven public transparency and participation.

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<sup>65</sup> <http://www.freedominfo.org/regions/global/foi-regimes/>

<sup>66</sup> <http://www.rti-rating.org/>

## The openness of the EU - the positive factors

\*The right to access to documents of the institutions is protected in the treaty and legally regulated, with the stated purpose to strengthen the public's right to know and to be able to participate in the decision-making processes.

\* The European Court has in several decisions interpreted the applicable rules in a transparency friendly direction - even if some judgments pull in the opposite direction.<sup>67</sup>

\* The Commission (and other institutions) have established a practice, albeit shaky, on how to deal with requests and report annually on how the rules are implemented.

\* Of the applications received nearly three quarters get a positive response. It may also be worthwhile to appeal against a first negative decision.

\* As shown in the three practical examples, the right to request documents gives an opportunity to get some insight into political processes and knowledge that was not otherwise available.

## The openness of the EU - weaknesses and shortcomings

\* 14 years after the statutory requirements and seven years after widespread criticism of the EU Ombudsman the Commission has not yet established a functioning search register for their documents. Anyone who does not know what to search for is at the mercy of the department's willingness to sort and report what documents exist.

\* The processing time of up to 30 working days - or more - is a serious obstacle for journalistic news reporting, but of course less troublesome for applicants with opportunities for a longer-term planning.

\* Exemptions which justify refusal of requests for public access are broad and vague, with preferential consideration of the institutions' decision-making process against the public's overriding interest of transparency.<sup>68</sup>

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<sup>67</sup> Commission v Bavarian Lager (C-28/08P) see Section I

<sup>68</sup> An example on the verge of grotesque outside this report's focus is the so-called trialogues; negotiations between the Commission, Parliament and Council in the final phase of the legislative process. The Trialogue held negotiations behind closed doors, violating in practice Treaty Article 15.2 (function part) that Parliament and Council legislate transparently. European Ombudsman Emily O'Reilly on her own initiative, and for the same reason, decided to launch an investigation of the trialogue system in May 2015. <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/59978/html.bookmark>

\* Regulation 1049/2001 is not only under pressure for revision from the Commission and parts of Council of Ministers. It is in constant danger of being brushed aside by other EU legislation as demonstrated by the examples of data protection and business secrets.

\* The ECJ is the final and highest authority on how the rules should be interpreted and applied, but it requires great financial resources to pay ones own and possibly the opposing parties legal costs for those who lose a case.<sup>69</sup>

## What should be done <sup>70</sup> – recommendations and proposals

\* Stop attempts to diminish the existing regulation; tighten if possible the current exemptions for access to documents.

\* Establish a working directory of the Commission's documents - the Council of Ministers registers indicates that large amounts of data may well be searchable, and registers made relatively user-friendly<sup>71</sup> – if there is a will.

\* Let Romano Prodi and Cecilia Malmström lead the way: Establish a searchable list of all commissioners' correspondence.

\* Make it possible to appeal principally important rejections of access to the European Court of Justice also for non-financially strong organizations and companies.

\* Shorten the processing time for access to documents.

\* Ensure that an upcoming data protection regulation, and a future directive on the protection of trade secrets do not weaken existing transparency rules.

\* Secure the EU member states right and ability to maintain or establish national rules of access that allow greater openness than 28 member states can agree upon collectively. EU legislation should form a common floor but not restrictive ceiling for transparency and participation.

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<sup>69</sup> Complaints to the European Ombudsman are free but the Ombudsman can only express an opinion and make suggestions, and lacks the power to override the decisions made.

<sup>70</sup> Those interested in history may recognize the title of a utopian novel from 1885 by the Russian writer Nikolai Chernyshevsky, later reused as the title of a pamphlet by VI Lenin 1902.

<sup>71</sup> <http://www.consilium.europa.eu/register/sv/content/int/?lang=sv&typ=ADV> see in particular the "List") to sort out the documents by subject.

\* Take advantage of the opportunities that exist to educate the EU institutions, to raise awareness amongst the legislators and to create as good a practice as possible for others.

## Final words

If this report has drawn a reasonably accurate picture of transparency in the EU, another question arises: How come it looks like this?

European cooperation has never been as broad as now, with a great variety of difficult issues: the financial crisis and unemployment, Greece and the euro, the stream of refugees across the Mediterranean, the relationship with the Ukraine/Russia, Britain's uncertain status as a member, just to take some examples from the summer of 2015.

At the same time it seems enthusiasm for the EU as a political project is rapidly diminishing. EU-skepticism, EU-criticism or direct EU-resistance is represented along the entire political left-right spectrum.

Should not all efforts be made to strengthen the legitimacy of the project? Wouldn't clear and straightforward rules on access to documents of the institutions, and a fast and smooth practice, be some natural and relatively cheap measures in order to strengthen the EU's legitimacy and to defuse some of the criticism?

To such a leading questions, the answer could of course not be anything but "yes!"

Why such measures are not taken, and why on earth the requirements of transparency are not heard more often and stronger than is the case possibly illustrates a fundamental problem with an "ever closer union among the peoples of Europe".

In an ideal political union people have an interest in following, monitoring, and participating in the decisionmaking because they are, or at least feel, involved in the process. At the same time, policy makers and administrators have a vested interest in justifying their decisions and administration.

In the existing European Union the interest in how decisions are taken is weak. The interest of transparency and participation has largely become a vested interest for professional actors. When transparency legislation works it is of good help to lawyers and lobbyists - and their organized opponents.

The solution to this dilemma is, in all its complicated simplicity, to break the professional actors monopoly on transparency and participation; that is, more people should ask for more.

Without a constant and growing pressure from below there will be no change.

The existence of transparency in the EU is governed by the - originally medieval - definition of whether something exists, attributed to, among others, the writer Miguel de Cervantes: The proof of the pudding is in the eating.

# How to request documents

## 1. Googling (or use another search engine)

**Why:** One need not make it more complicated than necessary. Google searches surprisingly often provide relevant answers. A search for documents referred to in this report can provide faster results than a step-by-step search in, for example, the law database Eur-Lex or the European Court of Justice web portal Curia.

**Why not:** Responses may be too many and too broad to be useful. A search for "openness of the EU" in spring 2015 gives 392,000 hits. The first ten are certainly relevant, but it requires some prior knowledge to be able to evaluate the responses, and, not least, what the sources are and what it stands for.

Documents that have not been published on the web are not indexed by search engines, but in any case can of course be available. Google does not find everything.

## 2. Use the institutions online form (or write one you self)

The Commission online form is as of June 2015 a link to the left on the "Transparency Portal" [http://ec.europa.eu/transparency/index\\_sv.htm](http://ec.europa.eu/transparency/index_sv.htm) under the heading "How to go about to get the documents from the Commission."

If the location should change google, "openness eu", or "transparency eu" to find it.

Applications must be made in writing, but need not be made through the online form. A direct mail, or a posted letter to a specific General Directorate has the same legal value, but there is a risk it might get lost in the process. Via the online one receives an automatic acknowledgment of receipt and a file number to refer to for further processing.

Applications (and the receipt of documents) are free, and can be made in all official EU languages, but with some risk that translation can extend processing time.

The form "Application for documents" is self-explanatory, but not entirely unproblematic.

Several of the fields marked with a red star (mandatory) are something that the Commission itself has designated as a requirement, such as address the capacity in which you act.

The organization Access Info Europe, and individual members of Parliament argue that the requirements lack support in the regulation and involves unwarranted prying into

the applicant's motives and integrity.<sup>72</sup> Regardless, the consequence is that those who do not submit the information are informed that the process cannot be accepted because the Commission wants to ensure that the applicant exists.

Note the open field for the ordered action. This is where you specify the request for the documents not found on ones own; for example, documents relating to the Commission's response to country X's use of support Y over a specified period, or whatever you want to know.

The more precise the demarcation, the better chance one has to find the right documents. On the other hand, the more restrictive the demarcation, the greater the risk that the reply will state that precisely those documents are not available. Conclusion: It is better to search a bit too wide than too narrow.

Under Regulation, Article 6.2 and 6.3, the Commission may reject an application that is excessive, but are also required to help to find a "reasonable solution". Please also note: "The Applicant is not obliged to state Reasons for application." (Article 6.1)

### A tip

In other guides on how to search for documents in the EU they readily emphasize the importance of referring to Regulation 1049/2001, to use the correct terms such as documents or the broader term information, and that one wishes to get the right documents in electronic form. These appeals were initially designed to "educate" the EU institutions. If it is still necessary is perhaps questionable, but it does not hurt to show that even the application is serious.

One specific tip before you press send; print or possibly take a screenshot. It is easy to forget when one sent their application, and exactly what one asked when using an online form that does not leave traces in your own email service.

Wait and see, at best you will receive a reply in 15 days in the worst case in 30 days or more.

An application rejected completely or partially can be appealed by a "confirmatory application".

How best to argue to achieve ones ends is nothing other than experience gained from practice. It may look over the top referring to court cases that support one's arguments, mainly based on a Regulation and a Treaty, or to a statement from the European Ombudsman – see the examples of potential EU Taxation and the relationship with

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<sup>72</sup> <http://www.access-info.org/frontpage/15667>

Saudi Arabia in the previous section. One can take note that the Commission actually comments and takes a position on the alleged objections. But which arguments are effective can only be discerned from the cases that have been brought up to the highest court, the European Court of Justice.

### **When one gets a no.**

A rejection of "confirmatory request", i.e. an appeal, can be brought up to the EU Courts; primarily to the Tribunal (the "General Court" formerly called Court/Court of First Instance), then to the Court of Justice (the "European Court of Justice"). It is an approach that only is recommended for those who can afford to pay their own attorney costs and in the worst case the counterparty - if you would lose. A case may take two to three years in each instance.

The alternative to the courts is to turn to the European Ombudsman.<sup>73</sup> It is free, but does not confer an automatic right to the documents sought even if the Ombudsman addresses and then uphold the complaint. An investigation by the Ombudsman carried out following a complaint, or on her/his own initiative, can take up to two years.

### **3. Use web portal AskTheEU (or don't)**

Requests for documents through the institution's online form, or by direct mail or letter, will be a matter between the applicant and the department. An application through webportal [www.asktheeu.org](http://www.asktheeu.org) is like asking on an open bulletin board, all who are interested can read it. The application itself will immediately become public, as will as the replies of the institutions and eventual result.

The points of AskTheEU, which is not actually an EU body, is to be on hand to provide help to the EU inexperienced, or those who are unaccustomed to transparency law, on the whole, and to establish a platform for increased transparency.

The applicants via AskTheEU are automatically reminded when different time limits expire and get help step by step in the process. In addition to following ones own application, you can follow others, and get reports on how it's going. The only requirement is a free registration which requires an email address and a password. Registration is not required to search for interesting cases in the portal register or to read and learn how others have formulated their applications.

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<sup>73</sup> <http://www.ombudsman.europa.eu/start.faces>

There are two reasons for not using AskTheEU, but there are also arguments against these reasons:

\* The application can be seen as part of a campaign, and therefore not treated as seriously as if it was sent directly to an EU institution.

The counterargument is that thus suspicion is difficult to prove, and indeed it can foster a positive outcome that more can follow the process.

\* Organisations preparing a campaign, or the journalists working on disclosure, do not necessarily want to tell you what they will use the documents for beforehand.

The counter argument is that while AskTheEU is used by established organizations it does not seem to have slowed down their campaigns.<sup>74</sup> The extent to which the media limit their use of AskTheEU is more difficult to assess, partly because users are searching in their own name and never or rarely indicate whether they are journalists. As stated in the Commission's statistics, on the whole there are too few journalists who ask for access via the formal route, just 299 out of 6,525 applicants during 2013.

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<sup>74</sup> See, for example, the Corporate Europe Observatory report on TTIP negotiations:<http://corporateeurope.org/power-lobbies/2015/04/towards-legalised-corporate-secrecy-eu>



