BRIEFING PAPER

DIRECTORATE GENERAL INTERNAL POLICIES OF THE UNION

EUROPEAN PARLIAMENT

**Policy Department C**
**Citizens' Rights and Constitutional Affairs**

# PUBLIC ACCESS TO THE EUROPEAN UNION DOCUMENTS

## *STATE OF THE LAW AT THE TIME OF REVISION OF REGULATION 1049/2001*

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## *STATE OF THE LAW AT THE TIME OF REVISION OF REGULATION 1049/2001*

### BRIEFING PAPER

Résumé:
The paper presents the legal system of the right of public access to EU documents. It underlines the various limitations of this right. The most important legal cases of the EC Court of Justice are recalled in some details. The paper describes the types of guarantee which support the effective applications of the right of access. A number of suggestions are presented to make the present system more effective.

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# Public access to the European Union documents

## *State of the law at the time of revision of Regulation 1049/2001*

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This Briefing note reviews the legal framework of the right of access to documents, based of Regulation nr.1049/2001, from a normative and jurisprudential point of view. The right of the Member States is covered when they are concerned by the application of the right of access.

## I – History

The right of access to documents was introduced at a rather late stage in the Community legal order, under the influence of the new Member States from Northern Europe. Following a directive that played a precursory part in 1990[1] and Declaration No 17 attached to the Final Act of the Maastricht IGC, a series of converging initiatives prepared the ground for the adoption of this principle in the EC Treaty of Amsterdam.

Following the Commission's review and a statement which laid down the principle of the access to documents, The Council and the Commission adopted in 1993 a common Code of Conduct regarding public access to their documents[2]. Implemented independently by both institutions, the right of

[1] Council Directive 90/313 of 7 June 1990, regarding free access to information in environmental matters, OJ L158 of 23 June 1990

[2] Code of Conduct regarding public access to the Council's and Commission's documents, OJ L340 of 31 December 1993

access to documents was considered as an organisational measure that did not require a general Community Regulation adopted by the legislator, as the Court of Justice and the Court of First Instance did not fail to point out[3].

The adoption of Article 255 of TEC in Amsterdam changed the nature of things in that a general primary law provision now allows public access to the documents of the Community institutions. Its effective application called for a regulation. In fact, the Council was required by Paragraph 2 of Article 255 TCE to adopt such a regulation through co-decision within two years, that is before 1st May 2001. At the time, political difficulties, notably within the Commission, as well as divergent views among the States, allowed to reach an agreement based on a compromise text, i.e. that of Regulation 1049/2001[4] of 30 May 2001.

The application of this text brought about a series of reactions. On the one hand, the institutions were induced to amend their internal regulations in order to take it into account. They also encouraged the other institutions and bodies to act accordingly, thus contributing to widen in practice the scope of application of the right of access beyond the initial forecast. On the other hand, the regulation led to the establishment of a relatively significant jurisprudence, in particular regarding the interpretation of the scope of exceptions to the right of access.

In the same way, the adoption of the Charter of Fundamental Rights, on 7 December 2000, raised the status of the right of public access to documents. Article 42 of the Charter states the existence of a "*Right of access to documents of the European Parliament, of the Council and of the Commission*" and, during the European Council of Laeken, the heads of States and governments pondered about the possibility to broaden the European citizens' opportunities of access to the EU documents.

The Treaty for the Constitution of Europe enhanced this device on three counts. Firstly, the concept of "*transparency of the documents of the Union institutions, bodies, offices and agencies*" was stressed on two occasions, both in Article I-50 §3 which lays down the concept and in Article II-102 which proclaims more specifically the "*Right of access to documents*". Secondly, Article III-399 imposed the implementation of such prescriptions on institutions, bodies and administrations. The hierarchy created between the three parties had the advantage of implying that the work policy is also a citizens' right that should be guaranteed by the institutions in their daily actions.

The amending Treaty of Lisbon adopts these options, at least in substance, thus offering new bases at the time of revision of Regulation 1049/2001, within the framework of a wider action called "*European Transparency Initiative*" the scope of which goes beyond the mere aspect of the right of access to documents[5].

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[3] ECJ, 30 April 1996, *Netherlands vs Council* (C-58/94), Rec. p.2169; CFI, 5 March, 1997, *WWF UK*, T-105/95 Rec. p.II-313

[4] Regulation 1049/2001 of the European Parliament and Council of 30 May 2001 on public access to the European Parliament, Council and Commission documents, OJ L145 of 31 May 2001 p. 43

[5] http://ec.europa.eu/transparency/index_fr.htm

## II – The legal system of the right of public access to documents

### II. 1. The legal bases of the right of public access to documents

- **Primary law**

The right of public access to the documents of the European Union is currently laid down by Article 255 TEC which provides that: " *1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.*
*2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.*
*3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents*".

Article 15 §3 of the consolidated amending Treaty of Lisbon on the functioning of the European Union (TFEU), provides that " *Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.*
*General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.*
*Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.*
*The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks. The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph*".

These rules of primary law are strengthened by Article 42 of the Charter of Fundamental Rights to which Article 6 §1 of the Treaty on the European Union gives the same legal value as the treaties. The rules regarding public access to documents shall be construed and applied in the light of this Article 42 which provides that "*Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium*".

On the other hand, even though it is a question of access to document and not access to information, the right of access to documents can come up against the respect of professional secrecy that the institutions are required to comply with by Article 287 TCE: "*The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by*

*the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components*".

These provisions are reproduced in substance in article 339 of TFEU.

- **Derived law**

The general rule of application referred to in the Treaty consists of Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to the European Parliament, Council and Commission documents.

Other provisions can also relate to the application of the right of access, without being part of the scope of this survey, for instance provisions regarding the right to information. The adoption, on 6 September 2006, of Regulation 1367/2006 related to the application to the European Community institutions and bodies, of the provisions of the Århus Convention on access to information, public participation in the decision-making process and access to justice in environmental matters[6] thus constitutes a novelty that is all the more remarkable since the text has been applicable since 28 June 2007.

> The first article thereof provides that "*The objective of this Regulation is to contribute to the implementation of the obligations arising under the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, hereinafter referred to as "the Aarhus Convention", by laying down rules to apply the provisions of the Convention to Community institutions and bodies, in particular by:*
>
> > *(a) guaranteeing the right of public access to environmental information received or produced by Community institutions or bodies and held by them, and by setting out the basic terms and conditions of, and practical arrangements for, the exercise of that right;* "

This text, which introduces a right of access to environmental information, lays down the concept of its complementarity with Regulation 1049/2001 in article 3 thereof. Nevertheless, the gaps left in Regulation 1049/2001 are meant to be filled or specified by Regulation 1367/2006, in particular with regard to the system of exceptions in terms of access to government information.

For the Community legislation, the stakes thus consist in choosing between the option of a common right of access to documents, implying identical solutions according to the fields covered, and a common right accompanied by a *Lex specialis* that would complete this common right[7].

Lastly, Regulation 1049/2001 does have repercussions regarding the opening of the Community historical records to the public. Thus, in accordance with Article 2 of Regulation 354/83 as amended

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[6] OJ L264 of 25 September 2006 p. 13

[7] This *lex specialis* exists, for instance, about the confidentiality of the promotion boards : CFI, 5 April 2005, *Hendrickx vs Council,* T-376/03, Rec. FP p. II-379 or professional secrecy

in 2003[8], and in the case of documents pertaining to the exceptions related to privacy and individual integrity, as well as those related to the commercial interests of a natural or legal person, these exceptions may still apply to all or part of a document, beyond the thirty-year period, if the relevant conditions of their application still exist.

At the time of revision of Regulation 1049/2001, ensuring the homogeneity of the rules governing the access to documents, through their alignment with the most protective system, seems to be the most suitable way from the Fundamental Rights point of view.

- **Structuring with internal law**

The issue of the relations between Community law and the national right of access to documents should not exist *a priori*. The diversity of national legislations remains the rule[9] in spite of the gradual emergence of a common principle: "*the domestic legislation of most Member States now enshrines in a general manner the public's right of access to documents held by public authorities as a constitutional or legislative principle*"[10]. The Community Regulation concerns the Community institutions and, by nature, does not call for any national transposition measure. However, the Member States, as participants of the Community process, may be involved by the duty of disclosure, for example because they are the authors of the documents or because they hold them, as will be seen later[11]. Structuring the Community rule with the applicable rules of national law is far from being an obvious task.

The Member States must strive not to undermine its proper application, in the name of the fair cooperation principle, even though Regulation 1049/2001 does not have the purpose nor the effect of amending the national legislations regarding access to documents[12]. Article 5 thereof describes the procedure to be followed : "*Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation. The Member State may instead refer the request to the institution*".

However, this principle is not sufficient to reduce the risks of conflicts related to a same document, as too many differences exist in terms of access procedures, definition of disclosable documents, or presence of independent authorities liable to guarantee access to documents. The relation between the Community rule and the national regulations is complex, insofar as each of them remains autonomous in various fields of application, even though a same document can be related both to national law and to Community law. In this case, the national rule may be more generous than the

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[8] Regulation 1700/2003 amending Regulation (CEE, Euratom) no 354/83 on the opening to the public of the historical records of the European Economic Community and the European Atomic Energy Community, OJ L243 of 27 September 2003 p.1

[9] See the comparative documents drawn up by the Secretariat-General of the Commission on this issue http://ec.europa.eu/transparency/access_documents/docs/compa.pdf

[10] ECJ, 30 April 1996, *Netherlands vs Council*, C-58/94, Rec. p. I-2169 §34

[11] III.2.2.

[12] Preamble 15

Community rule but it cannot compromise its application. The Regulation provides for this scenario in Article 5 thereof : "*Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation. The Member State may instead refer the request to the institution*".

Hence, a Member State will be able to disclose a document to which the Community institution has refused access and the reverse is also true. A contentious case illustrates this circumstance in a caricatured way, when a claimant with the Council was at odds with the Kingdom of Sweden[13] , concerning the same 20 documents relating to the creation of Europol. The Council expressed its opposition to 18 documents whilst the Member State refused access to 2 of them only...

The jurisprudence of the Court of Justice has recently clarified the conditions of these relations in the *Kingdom of Sweden vs Commission* judgement[14]*.* First, the Court confirms that any request for access to documents held by the national authorities remains governed by the national rules applicable to such authorities, including when such documents originate from community institutions, without these being replaced by the provisions of Regulation 1049/2001[15]. Then the Judge reminds that the Community law governs the conditions of access to Community documents within the Community system, and refuses that "*access to documents of the same kind and of the same importance for shedding light on the Community decision-making process could be granted or refused depending solely on the origin of the document*"[16]. In fact, and this statement is of paramount importance, Regulation 1049/2001 "*did not aim to establish a division between two powers, one national and the other of the Community, with different purposes" and it "creates a decision-making procedure the sole object of which is to determine whether access to a document should be refused under one of the substantive exceptions listed in Article 4(1) to (3) of the regulation, a decision-making procedure in which both the Community institution and the Member State concerned play a part*"[17]. This is how the Court's competence in the matter is justified (*see below*).

The complexity of this structure calls for an observation: The Community law has initiated a process for the harmonisation and reconciliation of national legislations, in a sectorial manner and in particular in environmental matters. Nevertheless, at the time of revision of the Regulation, it would be useful to clarify things by stressing the priority of the Community rule.

**II. 2. The nature of the right of access to documents**

The nature of the right of access to documents was the subject of debates that the Treaty of Lisbon should close, in particular following the integration of Article 42 of the Charter of Fundamental Rights.

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[13] CFI, 17 June 1998, *Svenska Journalistförbundet vs Council*, T-174/95, Rec. p. II-2289

[14] ECJ, 18 December 2007, *Royaume de Suède vs Commission*, C-64/05 P

[15] Point 70

[16] Point 72

[17] Point 93

- **A fundamental right**

In the current state of the law, the right of access is based on Article 255 TCE, implemented by Regulation 1049/2001 which allows to specify its scope and limits. This legal basis confers to the right of access a value that it did not have initially. In fact, the right of public access to the institutions' documents was built through a "gradual assertion"[18] since the Treaty of Maastricht and through the institutions' desire to acquire internal organisational measures that fostered this right. This progression probably explains why the Court of Justice did not intend to raise it to the status of general principle of Community law, in spite of the requests made by its advocate general[19] or the statements of the Court of First Instance[20].

Article 255 TEC as introduced in Amsterdam, breaks with this state of the law. It provides for a "*true subjective, fundamental right granted to the individual* "[21] which is opposable to the institutions and guaranteed. The shift from a reasoning until then mainly based on the efficiency of the institutions' actions and on the need for their control, to a ground involving the democratic legitimacy of the Union's action explains this fracture. The advocate general has brilliantly defined it as a "normative rise".

The amending Treaty of Lisbon will close the debate. Article 42 of the Charter puts into effect the existence of a fundamental right of access to documents and shifts the debate to a different ground. Advocate general Maduro expresses this situation perfectly : "*the right of access to documents of the institutions has become a fundamental right of constitutional import linked to the principles of democracy and openness, any piece of secondary legislation regulating the exercise of that right must be interpreted by reference to it, and limits placed on it by that legislation must be interpreted even more restrictively* "[22].

In short, the recognition of the fundamental nature of this right echoes the motivation expressed in the second preamble of Regulation 1049/2001: *"Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system*". The Court of Justice assesses the above in its *Kingdom of Sweden* judgement[23] : the text aims "*to define the principles, conditions and limits on grounds of public or private interest governing the right of access to the public documents in such a way as to ensure the widest possible access to documents*"[24].

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[18] Maduro's opinion, 18 July 2007, C-64/05 P

[19] See Opinion of advocate general Tesauro in the case *Netherlands vs Conseil*, above, point 19 which mentions a "fundamental civil right" and of advocate general Léger in the case *Conseil vs Hautala*, above, point 77

[20] The latter mentions a "principle of the right to information" (CFI, 19 July 1999, *Hautala vs Conseil*, T-14/98, Rec. p. II-2489, point 87) or the "transparency principle" (CFI, February 7 2002, *Kuijer vs Conseil*, T-211/00, Rec. p. II-485, point 52).

[21] Maduro opinion, 18 July 2007, C-64/05 P, point 40

[22] Id, point 42

[23] ECJ, C-64/05 P, points 54 & 66

[24] ECJ, 18 December 2007, *Suède vs Commission*, C-64/05 P

The jurisprudence sets a limit to this development in terms of Fundamental rights, in the *Sison vs Council* case concerning registration on an EU Anti-terrorist List. The non-disclosure of the document that allowed this registration posed an obvious problem to the claimant's elementary rights, in particular to organise his defence. The Court of Justice considers that "*such a right to be informed, assuming it to be established, cannot be exercised by having recourse to the mechanisms for access to documents provided for under Regulation No 1049/2001. It follows that no breach of such a right can result from a decision refusing access adopted under that regulation or, therefore, give rise to judicial censure, in favour of an application for annulment against such a decision*"[25]. The highly restrictive character of this jurisprudence, whatever the relevance of the protection of "*sensitive*" documents, poses a major problem in a law Community that would not be able to revive the tradition of the "orders under the King's private seal"…

The statement of advocate general Maduro should be approved at the time of revision of the Regulation: the right of access is a "*right subjective recognized to all the citizens of the Union*"[26].

Moreover, this transition or migration process towards fundamental right is in keeping with a wider movement in Europe.[27]. The Council of Europe has undertaken a similar process. The Specialist Group dealing with access to public documents of the Management Committee for Human Rights agreed, on 26 March 2008, on a European Convention project on access to public documents, which places the debate on the ground of fundamental rights.

- **A right with no direct applicability**

By establishing "*the rules and the limits*" of the right of access, Article 255 TEC and Article 15 §3 of the amending Treaty, or the explanations attached to Article 42 of the Charter, expressly refer to application texts. Hence, the right of access has no direct applicability.

The Community Judge considers that the jurisprudential criteria of direct applicability are not fulfilled, both in the accuracy of their terms and in their unconditional nature: "*Article 255 EC is, by virtue of paragraphs 2 and 3 thereof, not unconditional and that its implementation is dependent on the adoption of subsequent measures. The determination of general principles and limits which, on grounds of public or private interest, govern exercise of the right of access to documents is a matter entrusted to the Council in the exercise of its legislative discretion*"[28].

The right of access is therefore greatly determined, in its application, by the reference to the Community legislation.

### II. 3. The field of application of the right of access to documents

- **The beneficiaries of the right of access to documents**

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[25] ECJ, 1st February 2007, *Sison vs Conseil*, C-266/05 P, point 52

[26] Maduro opinion, 18 July 2007, C-64/05 P, point 40

[27] The ECHR does not acknowledge as such the right of access to document and the main text of the European Council is the Recommendation Rec. (2002)2 of the Committee of Ministers to the Member States on access to public documents

[28] CFI, 11 December 2001, *Petrie vs Commission*, T-191/99, Rec. p. II-3677 points 34 to 38

Article 255 §1 of TCE names the beneficiaries of the right of access to documents. This access is open to *"Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State*". Article 1 §§ 1 & 2 of Regulation 1049/2001 transcribes this list in §2 thereof : "*The institutions may… grant access to documents to any natural or legal person not residing or not having its registered office in a Member State*". This ability was widely used by the institutions since their internal regulations open up vast opportunities of access to document to "*any natural or legal person*"[29]. However, the limitation set by the Community Treaty is evoked both in Article 42 of the Charter and in Article 15§3 of TFEU.

This restriction is open to criticism. In the first place because it is in the background of the provisions governing the access to documents related to national law, which is usually open to "*any person*" or to "*any individual*". In the second place, because it introduces a limitation that deviates from other rights that are now guaranteed by the amending Treaty and the Charter of Fundamental Rights, such as the right to fair administration or the right to personal data protection. The latter benefits to "*any individual*". Lastly, it does not coincide with the recent developments of the Community legislation and in particular the integration of the Aarhus Convention in Regulation 1367/2006[30]. This regulation lays down the basic principle that "*the rights guaranteed by the three pillars of the Aarhus Convention are without discrimination as to citizenship, nationality or domicile* "[31].

The justifications of the discrimination brought about by primary law and Regulation 1049/2001 remain little convincing, in particular considering today's electronic communication means which actually forbid any control of this condition. This regulation would benefit from being harmonised, in line with the current international instruments such as the European Convention project regarding access to public documents, which bans this type of discrimination.

Pursuant to Article 6 §1, the beneficiaries of the right of access are not obliged to "*justify their request*" that is to prove their interest in obtaining the disclosure of the requested document. The review of the practice, as revealed by the yearly reports on the application of the regulation, however shows that the text fails to fulfil its primary objective, i.e. that of guaranteeing democratic transparency to the citizens. The number of citizens requesting this access is decreasing[32], in spite of the spreading of the European Union, which is a major sign of disinterest. An analysis of the causes of this disinterest would be useful.

- **The institutions concerned**

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[29] Ruling 2001/840 of the Council of 29 November 2001 amending the internal regulation (article 1°, annex III of the internal regulation); Ruling 2001/937 of the Commission of 5 December 2001; article 1′ indent 2, annex II of the internal regulation); Internal Regulation of the European Parliament, article 172 §1 al.2

[30] Regulation 1367/2006 of 6 September 2006 on the application to EC institutions and bodies of the Aarhus Convention provisions on access to information, public participation in the decision-making process and access to justice in environmental matters, OJ L264 of 25 September 2006 p.13

[31] Preamble 6

[32] The 2006 report of the Commission (COM(2007) 841 indicates that the requests from "civil society" dropped from 27.31 % in 2004 to 17.27 in 2006 and for the "non identified" public members from 32.15 % to 16.55%

Article 255 TCE names the Council, the Commission and the European Parliament as the institutions concerned by the right of access to documents[33]. Other Union bodies had deliberately chosen to respect this right of access, both before and after the Treaty of Amsterdam, thus following the incentives of the European Ombudsman[34].

The adoption of Regulation 1049/2001 helped to clarify things. The text only referred to the three main institutions, but the eighth preamble thereof already encouraged some extension. In a common statement attached to the text, the institutions specified that the agencies and similar bodies created by the legislation should implement rules in compliance with the present regulation, with regard to the access to their documents[35]. Hence the adoption of a series of texts that review all the regulations establishing the Community agencies and performing this upgrade[36]. Nevertheless, the wording of Regulation 1049/2001 remains short of what it is in the case of statutory access to environmental information, which involves "*community institutions and bodies*".

The entry into force of the amending treaty will take this extension to constitutional level, as Article 15 §3 and Article 42 of the Charter now mention documents "*of the institutions, bodies and agencies of the European Union*". All of the Union's institutional structures are therefore concerned.

In this respect, Article 15 §3 indent 4 of the amending Treaty mentions the restrictions of Article III-399 of the Constitutional Treaty and specifies that "*The Court of Justice of the European Union, the European Central Bank and the European Investment Bank are not subject to the existing paragraph like the bodies that have administrative*" The exact scope of the meaning to be given to these "*fonctions administratives*" will certainly call for further jurisprudential details[37].

Moreover, Regulation 1049/2001 puts an end to the application of the so-called "author" rule. On the basis of the Code of Conduct, the right of access to documents concerned only the documents held and established by the institutions. When the documents originated from third parties, the "*author's rule*" applied. It provided that, "*Where the document held by an institution was written by a natural or legal person, a Member State, another Community institution or body or any other national or international body*", the request should be directly addressed to the author of the document. The institution was not entitled to disclose the requested document, which represented an absolute derogation to the right of access. The compatibility of this derogation with a possible general principle of access had been recognised by the Court, for lack of a general Community regulation on the subject[38].

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[33] Which implies, for the access to documents, that the "committees" are bound to Regulation 1049/2001

[34] Such as the Audit Office, BEI and BCE but with a more restrictive approach

[35] Common statement concerning Regulation 1049/2001 of the European Parliament and Council of 30 May 2001 related to public access to the documents of the European Parliament, Council and Commission, OJ L173 of 27 June 2001 p.5

[36] OJ L245 of 29 September 2003 p.1

[37] In spite of the Ombudsman's indications in this sense, the Court of Justice has not adopted any regulation regarding access to its administrative documents

[38] ECJ, 6 March 2003, *Interporc*, C-41/00 P, Rec. p. I-2125 point 40

This rule, which resulted into a strong dispute[39], was abandoned by Regulation 1049/2001. Consequently, the document accessibility is now a right, provided that this document is established by or is in the possession of an institution, or that it originates from a third party, subject to the exceptions examined below.

- **The documents concerned**

On a material level, Regulation 1049/2001 covers a field of application as wide as possible. Article 2§3 thereof indicates that it applies to "*all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union".* Pursuant to Articles 28 §1 and 41§1 of TEU, the right of access also applies to the documents pertaining to the CFSP and the Police and Judicial Cooperation in penal matters, which are natural fields of dispute[40]. In fact, the limits set by the Treaty to the justiciability of some acts cannot be opposed to the right of access[41].

The Euratom Treaty does not contain any provision similar to Article 255, however, in accordance with Declaration nr. 41 attached to the Final Act of the Treaty of Amsterdam, the institutions should draw guidance from Regulation 1049/2001 regarding access to documents related to activities covered by the Euratom Treaty. Article 255 of the EC Treaty and Regulation 1049/2001 apply, for lack of contrary provisions in the Euratom Treaty of in derived law based on the Euratom Treaty, subject to the provisions related to classification.

The statutory definition of the "document" notion is extremely wide and in disagreement with the restricted approach adopted by the Code of Conduct. Article 3 a) thereof defines the document as " *any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility*". Some shadow areas remain, that are likely to pose problems.

Thus, considering the significant development of databases, the question of the "production" of a specific document providing the information contained in the data base should be specified. The question was dealt with by the Court in the *WWF European Policy Programme* case[42]. Whilst rejecting the request for access to information regarding an issue on the agenda of a committee meeting, outside the minutes, the Judge declares that "*it would be contrary to the requirement of transparency which underlies Regulation No 1049/2201 for institutions to rely on the fact that documents do not exist in order to avoid the application of that regulation. In order that the right of access to documents may be exercised effectively, the institutions concerned must, in so far as possible and in a non-arbitrary and predictable manner, draw up and retain documentation relating*

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[39] CFI, 12 October 2000, *JT's Corporation vs Commission*, T-123/99, Rec. p. II-3269; CFI, 11 December 2001, *Petrie*, T-191/99, Rec. p. II-3677; CFI, 16 October 2003, *Co-Frutta*, T-47/01, Rec. p. II-4441; ECJ, 6 March 2003, *Interporc*, C-41/00 P, Rec. p. I-2125

[40] Preamble 7. See CFI, 26 April 2005, *Sison vs Council*, T-110/03, T-150/03 and T-405/03, Rec. p. I-1429 and ECJ, 1st February 2007, *Sison vs Council*, C-266/05 P

[41] CFI, 19 July 1999, *Hautala vs Council*, T-14/98, Rec. p.II-2489 point 41

[42] CFI, 25 April 2007, *WWF European Policy Programme vs Conseil*, T-264/04

*to their activities*"[43]. The entry into force of Regulation 1367/2001 which refers to the right of access to environmental information, calls for some clarification.

The same applies to the notion of document "*held by an institution*", that the Parliament was the only one to clarify in Article 172 §2 of its internal regulation. Such a clarification could be made at the time of the Regulation revision, on the basis of the jurisprudence and in particular the clarifications made by the Court of Justice in the *Kingdom of Sweden* judgement. A case pending before the Court of Justice raises the issue of the regulation applicability to legislative documents that have not been published, in this case a technical annex to a regulation[44]. This problem is not simple and advocate general Sharpston answered in the negative on 10 April 2008 : The statutory acts that should be published in the Official Journal in accordance with Article 254 do not constitute documents according to Articles 2§§ 3 and 3 a) insofar as they are fully accessible to the public.

A specific reflection could certainly be useful in relation to the notion of "*legislative document*" which has a clear connection with the right to democratic transparency and should have an integral access of principle, even if it means making a distinction between these documents and the other categories of documents issued by the EU, a distinction that would allow to stress the transparency obligations regarding the SEC documents. Even though the distinction between legislative and non-legislative acts is particularly difficult to establish, like in the Convention works, it is nevertheless the case that the right of access chiefly concerns the legislator's work, and its elements must be accessible to the citizens, both in terms of preparation and implementation

However that may be the amending Treaty, as well as the Charter of Fundamental Rights, adopts this general approach ("*whatever their medium*") which includes the documents stored in electronic, visual or sound form.

- **The document access procedure**

The application of the right of access is not restrictively controlled from a procedural point of view. The provisions of Regulation 1049/2001 set their conditions of application.

***1. The access principle***

The requests for access to documents are made in written form, including with electronic means, in one of the languages listed in Article 314 of TCE, in a form that is sufficiently detailed to allow the identification of the document by the institution. The applicant has no obligation to justify his request. If the request is not sufficiently detailed, the institution invites the applicant to clarify it and helps him/her to this end, for example by providing him information on the use of the public registers of documents. In case of request regarding a very long document or a large number of documents, the institution concerned can consult the applicant informally in order to find a fair arrangement based on Article 6 §3 of the Regulation. A period of 15 days is available to address a reply to the applicant, however it is not necessarily respected by the institutions, as shown by the examination of the claims with the Ombudsman.

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[43] Point 61

[44] C-345/06

The jurisprudence has cognizance of this situation. In the *Verein für Konsumenteninformation* case [45], The Court supervises the institutions' margins of appreciation, underlining that "*where the institution has adduced proof of the unreasonableness of the administrative burden entailed by a concrete, individual examination of the documents referred to in the request, it is obliged to try to consult with the applicant in order, on the one hand, to ascertain or to ask him to specify his interest in obtaining the documents in question and, on the other, to consider specifically whether and how it may adopt a measure less onerous than a concrete, individual examination of the documents, to prefer the option which, whilst not itself constituting a task which exceeds the limits of what may reasonably be required, remains the most favourable to the applicant's right of access*"[46].

Pursuant to Article 11 of the Regulation, each institution makes available a register of documents, possibly in electronic form, in which the document references are immediately entered.

Lastly, pursuant to Article 4 §7 of the Regulation, the exceptions referred to in §§ 1, 2 and 3 apply only during the period in which the protection is justified in view of the document contents. Exceptions can apply during a maximum period of thirty years. In the case of documents relating to exceptions concerning privacy or commercial interests and sensitive documents, the exceptions can still be applied, if necessary, beyond this period.

All these procedural conditions do not call for any particular comment, except to point out some omissions. The first of these omissions is probably the passive approach which characterises the implementation of this fundamental right. It is clear that the European Union could adopt an "*active*" or "*positive*" approach on this subject that is not being content with the sometimes very theoretical possibility of having access to its documents. The main point probably does not lie there but in the wide variety of practices currently observed in the institutions. It is true that Regulation 1049/2001 fails to define the document categories that should be included in the registers, thus leaving complete freedom to the institutions in the matter. Many documents available for consultation therefore escape disclosure, for lack of being entered in the register. The difficulty for the citizens to find their way in this absolute maze is a major obstacle.

Linguistic facilitation, grouping of the access points to documentation to facilitate single access within the European Union, even for a single entity, limited spreading of the service information policy, pedagogical and simplification efforts, full availability of the documents, are among the many immediate improvements to be carried out if the EU intends to guarantee what is a citizen's right and which often appears as a facility granted by each institution.

The survey of the procedures used by the applicants requesting access, detailed in the reports drawn up by the Commission on the regulation application, reveals the citizens' relative indifference or ignorance, unlike the interest shown by professionals. A great majority of requests are issued by specialists in European affairs, such as law firms, NGO and the academic sphere. The still very specific nature of this access request is illustrated by the fact that the competition field is a privileged ground for requests. In other words, the right of access s is mainly requested within the context of a

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[45] CFI, 13 April 2005, *Verein für Konsumenteninformation vs Commission*, T-2/03, Rec. p. II-1121

[46] Point 114

confirmed or potential dispute, rather than in the exercise of a civic right. In this case, the existing procedural conditions are probably not obstacles that cannot be overcome by the professionals.

On the other hand, the objective of transparency towards the citizens is clearly missed, partly because it requires different behaviours and tools.

***2. Partial access to documents***

In Article 4 §6, Regulation 1049/2001 provides that "*If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released* ".

This so-called "partial access" rule adopts the terms used by the jurisprudence in the leading case of the Court of Justice, *Hautala vs Council* pronounced about the Code of Conduct : "*The principle of proportionality requires… to consider partial access to a document which includes items of information whose disclosure would endanger one of the interests protected*" and "*a refusal to grant partial access would be manifestly disproportionate for ensuring the confidentiality of the items of information covered by one of those exceptions*"[47].

The Community Judge systematically verifies the conditions in which the Institutions fulfil this obligation. For example, in the aforesaid *WWF European Policy Programme* case concerning the disclosure of notes on the OMC negotiations, the Court considers "*that an institution is required to consider whether it is appropriate to grant partial access to documents requested and to confine any refusal to information covered by the relevant exceptions. The institution must grant partial access if the aim pursued by that institution in refusing access to a document may be achieved where all that is required of the institution is to blank out the passages which might harm the public interest to be protected (see, to that effect, Case C-353/99 P Council v Hautala [2001] ECR I-9565, paragraph 29)"*[48]. When it is not the case, for example when the full document is covered by one of the legal exceptions, the Judge accepts the disclosure refusal. For the examination of a possible partial access to have a useful effect, it should be carried out before any legal recourse[49].

## III. Limitations of the right of access to documents

The Treaty explicitly acknowledges the existence of limits to the right of access. These limits can be absolute and, in this case, the institution concerned has the obligation to refuse access to the requested documents. These limits can also be relative. In this case, access to documents is possible but a balance between the interests to be protected and the applicant's rights must be found. The Institution concerned can then refuse or accept the requested access.

### III.1. Absolute limits to the right of access to documents

The right of access is held in check by two absolute limits: the first limit regards the protection of public interest and the second the protection of privacy. They are based on Article 4 §1 a) and b) of Regulation 1049/2001 and forbid any disclosure. They are strictly interpreted by the Judge : "*the*

[47] Points 27 & 29

[48] Point 50

[49] ECJ, 22 January 2004, *Mattila vs Council and Commission*, C-353/01 P, Rec. 2004 p. I-1073

*exceptions set out in Article 4(1) of Regulation No 1049/2001 are framed in mandatory terms and it follows that the institutions are obliged to refuse access to documents falling under any one of those mandatory exceptions once the relevant circumstances are shown to exist … Those exceptions are therefore different from the exceptions relating to the interest of the institutions in maintaining the confidentiality of their deliberations laid down in Article 4(3) of Regulation No 1049/2001, in the application of which the institutions enjoy a discretion which allows them to balance, on the one hand, their interest in maintaining the confidentiality of their deliberations against, on the other hand, the interest of the citizen in gaining access to documents*"[50].

They automatically take precedence over the right of access insofar as the higher interest they protect cannot be weighed against any other right, including a fundamental right.

- **Protection of public interest**

Article 4 §1 a) of Regulation 1049/2001 provides that *"the institutions shall refuse access to a document where disclosure would undermine the protection of the public interest* ". It also lists four expressions of this public interest.
Following the more restrictive approach of the Code of Conduct[51], The Community Judge considers that these exceptions shall not hinder the application of the principle: "*the rule is that the public is to have access to the documents of the institutions and refusal of access is the exception to that rule. Consequently, the provisions sanctioning a refusal must be construed and applied strictly so as not to defeat the application of the rule… In order for those exceptions to be applicable, the risk of the public interest being undermined must therefore be reasonably foreseeable and not purely hypothetical*"[52].

**1. Protection of public security**

It represents the first limitation, as it does in the national laws and in the previous Code of Conduct. This exception was the subject of interesting developments in the case T-174/95 regarding the refused access to certain documents related to the creation of the European Police Office[53]. For the Court, "*the case-law of the Court of Justice shows that the concept of public security does not have a single and specific meaning. Thus, the concept covers both the internal security of a Member State and its external security (see Case C-70/94 Werner v Germany [1995] ECR I-3189, paragraph 25), as well as the interruption of supplies of essential commodities such as petroleum products which may threaten the very existence of a country (Case 72/83 Campus Oil v Minister for Industry and Energy [1984] ECR 2727, paragraph 34). The concept could equally well encompass situations in which public access to particular documents could obstruct the attempts of authorities to prevent criminal activities, as the applicant has argued"*[54].

More recently, in the *Sison* case[55], The Community jurisdiction linked the question of refused access for public security purposes and their "sensitive" character. Facing the Council's refusal to

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[50] CFI, 25 April 2007, *WWF European Policy Programme vs Council*, T-264/04, point 44

[51] CFI, Order of 3 March1998, *Carlsen*, T-610/97 R, Rec. p.II-485 points 48 & 49

[52] CFI, 25 April 2007, *WWF European Policy Programme vs Council*, T-264/04, point 39; ECJ, 6 December 2001, *Council vs Hautala*, C-353/99 P, Rec.p I-9565

[53] CFI, 17 June 1998, *Svenska Journalistförbundet vs Council*, T-174/95, Rec. p. II-2289

[54] CFI, above, point 121

[55] ECJ, 1st February 2007, C-266/05, *Sison vs Conseil*

communicate the evidence on the basis of which the applicant was registered on a European Union Anti-terrorism list, going as far as refusing to disclose the name of the State which proposed this registration[56], The Court followed the Court of First Instance's opinion and confirmed the lawfulness of such a refusal.

From the point of view of the Court, "*the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation*"[57].

Its analysis of the preliminary works on the regulation led the Court to exclude the particular interest for the benefit of "*sensitive documents as defined by Article 9 of Regulation No 1049/2001 must not be disclosed to the public in order not to prejudice the effectiveness of the operational fight against terrorism and thereby undermine the protection of public security*"[58]. The significance of such a prioritisation can be measured, knowing that the applicant's only interest was to be able to organise his defence…

**2. Protection of defence and military matters**

They represent another exception to the right of access, which has not required any jurisprudential application.

**3. Protection of international relations**

It fosters a relatively abundant litigation, which also includes the above-mentioned *Sison* case as it concerned the fight against terrorism in the framework of TEU Title V.

The *Hautala* case[59] is one of the best known jurisprudential illustrations. It involved the Council's refusal to grant access to a report on the export of conventional weapons. Confirming the decision of the Court of First Instance, the Court of Justice laid down the principle that access to documents, even within an exception such as the protection of public interest, should not be restricted out of proportion. Any exception to the right of access should therefore be strictly interpreted. In this respect, the Court specifies that access to certain information contained in the document can allow a partial access to information that is not covered by the public interest exception. This means that access to documents concerns the elements contained in such documents and not their material support.

A series of other cases played a part in the jurisprudential definition of the conditions of access when international relations are involved. For example the *Mattila* case[60] which deals with a request for access regarding the relations between the EU and the Russian Federation and Ukraine, was the

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[56] CFI, 26 April 2005, *Sison/Council*, T-110/03, T-150/03 & T-405/03, Rec. p. II-1429

[57] Point 35

[58] Point 66

[59] ECJ, 6 December 2001, *Conseil vs Hautala*, Case C-353/99 P, Rec. p. I-9565

[60] ECJ, 22 janvier 2004, *Mattila,* C-353/01 P, Rec. p. I-1073

opportunity for the Court to control the refusal of partial access to a document, by censoring the attitude of the institutions for the resulting loss of procedural guarantees. In other cases, the importance of partial access was also emphasized by the jurisprudence. For instance, in the *Kuijer* case[61], the Court declared, about a document regarding persons to be contacted on asylum matters, that the Council has the obligation to examine, for each document to which access is requested, whether, based on the information available, disclosure is effectively expected to interfere with one of the public interest protected by Article 4 §1 of Decision 93/731 on public access to the Council's documents. Consequently, the Court cancelled a decision in which the latter had merely indicated that certain documents contained sensitive information, the disclosure of which could compromise the relations of the European Union with third countries, without giving evidence that it had carried out a partial examination or justified its position.

**4. Protection of the financial, monetary or economic policy of the Community or a Member State**
This is the last exception laid down in the framework of Article 4 §1 a) of Regulation 1049/2001. It did not call for any significant details.

- **Protection of privacy**

This is the second absolute limit. Article 4 §1 b) provides that "*The institutions shall refuse access to a document of the privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data*".

The right of access to documents can come into conflict with the Community rules that protect the individuals' privacy. It is therefore necessary to reconcile these two individual rights, i.e. access to documents and respect for privacy, in particular when the document to be disclosed contains nominative data. Solutions have been provided both by the texts and by the jurisprudence.

**1. The text reconciliation**

Article 286 TEC and Article 8 of the Charter of Fundamental Rights guarantee the protection of personal data. They are taken into account in the new Article 16 §1 of the Treaty on the Functioning of the European Union (TFEU). The subordinate legislation on the subject consists of Regulation 45/2001 on the protection of natural persons regarding personal data processing by the Community institutions and bodies and the free flow of such data[62].

Obviously, no hierarchy exists between the two existing regulations. In a way, their objectives could even be opposed whilst they both contribute to the protection of the fundamental rights. One covers the access to documents and aims at opening this access as widely as possible for the sake of democratic transparency, whilst the other covers data protection and aims at protecting the individuals against disproportionate interferences in their private life. The publication of nominative data in matters of claim procedures, public service and employment, is mainly mentioned to illustrate such conflict contingencies. In fact, the institutions' official documents that the EU citizens request access to are likely to undermine the privacy of the individuals mentioned therein. Their

[61] CFI, 6 avril 2000, *Kuijer*, T-188/98, Rec. p. II-1959 points 41 et ss
[62] OJ L8 of 12 January 2001, p. 1

disclosure should therefore be made in compliance with the Community legislation insofar as they deal with personal data processing.

Article 4 §1 b) of Regulation 1049/2001 provides that the protection of the individual's privacy and integrity should be "*in accordance with Community legislation regarding the protection of personal data*". This last legislation is therefore expected to forbid access to documents.

**2. The jurisprudence reconciliation**

The Community jurisdiction has taken cognizance of the difficulties in the *Bavarian Lager* case[63], which is a basic decision on the subject. On the occasion of infringement proceedings referring to the British legislation on the distribution of imported beer, the substantiated recommendation used as the basis of these proceedings, was requested and refused by the Commission on the ground of the protection of the identity of the persons taking part in the survey. In the case in point, the Court of First Instance pronounced a judgement in principle on the basis of the arguments and attending parties, whilst the Ombudsman and the European Data Protection Supervisor[64] supported the priority of the right to information over the protection of privacy alleged by the Commission.

The Community Judge first asserts the need to clarify "the relation", to define "the structuring" between Regulation 1049/2001 and the protection of personal data, finding a balance between the two regulations: "*it should be borne in mind that they have different objectives. The first is designed to ensure the greatest possible transparency of the decision-making process of the public authorities and the information on which they base their decisions. It is thus designed to facilitate as far as possible the exercise of the right of access to documents, and to promote good administrative practices. The second is designed to ensure the protection of the freedoms and fundamental rights of individuals, particularly their private life, in the handling of personal data*"[65].

These two regulations should be construed in the light of the Fundamental Rights as provided by Article 6 §2 TEU and Article 8 of ECHR on the protection of privacy, in particular on the basis of the very broad nature of the "privacy" notion. The Court stresses that "*the right to the protection of personal data may constitute one of the aspects of the right to respect for private life… does not mean that all personal data necessarily fall within the concept of 'private life' and that, " a fortiori, not all personal data are by their nature capable of undermining the private life of the person*"[66].

Consequently, *" the mere fact that a document contains personal data does not necessarily mean that the privacy or integrity of the persons concerned is affected, even though professional activities are not, in principle, excluded from the concept of 'private life' within the meaning of Article 8 of the*

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

[64] For a reference analysis on the question, see EDPS, *Public access to documents and data protection*, July 2005 The line of argument of this document should guide the regulation revision task.

[65] Point 98

[66] Point 118

*ECHR*"[67]. So, "*disclosure of the names of the CBMC representatives is not capable of actually and specifically affecting the protection of the privacy and integrity of the persons concerned. The mere presence of the name of the person concerned in a list of participants at a meeting, on behalf of the body which that person represented, does not constitute such interference, and the protection of the privacy and integrity of the persons concerned is not compromised*"[68].

Lastly, *"Even if one cannot, a priori, exclude the possibility that the concept of private life may cover certain aspects of the professional activity of an individual, that does not mean that any professional activity is wholly and necessarily covered by protection of the right to respect for private life… the mere participation of a representative of a collective body in a meeting held with a Community institution does not fall within the sphere of that person's private life, so that the disclosure of minutes revealing his presence at that meeting cannot constitute an interference with his private life*".

The *Bavarian Lager* jurisprudence contains important guidelines. It prioritises the transparency obligations. In the vast majority of cases, it is actually easy to grant access to the requested document without affecting privacy, because even if the EU documents containing personal data are many, they do not necessarily interfere with the privacy of the individuals whose names are contained therein. The privacy elements that call for protection should therefore be precisely defined before refusing access to documents.

In the first place, the practice of professional functions is not covered by any right to anonymity that would forbid access to public documents. This professional practice hides, screens the privacy of the individuals who fulfil these functions and represent institutional entities. Even though public agents clearly benefit from the protection of privacy, the exercise of their functions does not generally involve their privacy. The cases in which disclosure would affect privacy, can be identified using the principles contained in the Community legislation[69] and in particular Regulation 45/2001. This allows the judge, on the one hand, to declare that the right of opposition of the person concerned does not automatically apply in terms of access to documents[70] and, on the other hand, to stress the importance of the disclosure impact on the person concerned. The "sensitive" nature of this disclosure can be assessed, for example, on the basis of Article 10 of Regulation 45/2001, referring to

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[67] The judge's reasoning was obvious as the persons attending the meeting the minutes of which were requested, were present as professionals and not as individuals, on account of the entities they represented.

[68] Point 126

[69] Regulation 1049/2001 as above, preamble 11

[70] CFI, T-194/04 as above, point 109 : *"As regards the data subject's right to object, Article 18 of Regulation No 45/2001 provides that that person has the right to object at any time, on compelling legitimate grounds relating to his or her particular situation, to the processing of data relating to him or he, except in cases covered by, in particular, Article 5(b) of that regulation.Therefore, given that the processing envisaged by Regulation No 1049/2001 constitutes a legal obligation for the purposes of Article 5(b) of Regulation No 45/2001, the data subject does not, in principle, have a right to object. However, since Article 4(1)(b) of Regulation No 1049/2001 lays down an exception to that legal obligation, it is necessary to take into account, on that basis, the impact of the disclosure of data concerning the data subject."*

data related to racial or ethnic origins, religious or philosophical belief and data related to health or sexual life.

The jurisprudence thus declares that, to assert the legal exception of the right to information, it must be verified that disclosure of the information would seriously affect the privacy of the person concerned, beyond the mere theoretical approach. The sole reference to this privacy is not sufficient to prevent the application of the right of access to documents.

As a whole, the agreements reached through these various reconciliations are reasonable and could be integrated into the revised regulation, relying strongly on the EDPS proposals and detailing the disclosure criteria.

### III.2. Relative limits to the right of access to documents

Other limitations may oppose the right of access to the documents. Their scope is not as vital as the absolute limits related to public interest or privacy. Access refusal can be overcome by the reference to a "*superior public interest*" that "*justifies*" disclosure or by the agreement of a third party. These limits are referred to as relative.

The choice made by the Community legislation in 2001 consists in giving up the imperative nature of the exceptions previously set by the Code of Conduct and by weighing the interests involved before refusing access to documents.

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

The competence of the institutions consulted to supply a document is bound when "*its disclosure would undermine the protection of: commercial interests of a natural or legal person, including intellectual property*". In this case, Article 4 §2, 1st indent of Regulation 1049/2001 forbids them to supply the document: They "*refuse*" access to the requested documents, under the pretence that a *"superior public interest*" does not justify the opposite decision.

The Court of First Instance has recently interpreted this exception in the *Terezakis* case of 30 January 2008[71]. The case involved a request for access to documents related to the construction of the new Athens international airport and in particular contract documents that the Commission had refused to communicate, putting forward the protection of a third party's commercial interests. The Court declares that "*by nature*", such a document is expected to contain proprietary information both on the companies involved and on their business relations : "*it is therefore for the institution to assess, first, whether the document to which the request for access relates falls within the scope of one of the exceptions provided for by Article 4 of Regulation No 1049/2001, second, whether the disclosure of that document would specifically and actually undermine the protected interest and, third, if so, whether the need for protection applies to the whole of the document*"[72].

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[71] CFI, 30 January 2008, *Ioannis Terezakis vs Commission*, T-380/04

[72] Id. point 88

To refuse access to these documents, the Commission actually put forward the existence of detailed information on the contracting parties, their business relations and specific cost components related to the project. Hence its decision that the disclosure of the document to third parties others than the contracting parties' shareholders would interfere with their commercial interests. In the opinion of the Court, since the contract in question contained information on specific cost components related to the project, "*in principle, precise information relating to the cost structure of an undertaking constitutes business secrets, the disclosure of which to third parties is likely to undermine its commercial interests*"[73]. However, even though the fact that these passages contain information on the contracting parties and their business relations is not questionable, the Court declares that "*that finding is not, as has already been stated, sufficient to conclude that their disclosure would specifically and actually undermine the commercial interests of those parties*"[74]. In fact, the Commission must provide the effective and concrete proof thereof. As it was not the case, the Court cancelled the opposed decision.

- **Protection of the court proceedings and legal advice**

The introduction of statutory provisions related to access to legal advice and court proceedings fills in the gaps previous left in the texts.

**1. Legal advice**

Legal advice has a particular status in the Community order. It is generally considered as being "*contrary to public policy, which requires that the institutions can receive the advice of their legal service, given in full independence, to allow such internal documents to be produced in proceedings before the Court unless such production has been authorised by the institution concerned or ordered by that Court* "[75]. The jurisprudence made the exception to the right of access in legal advice matters an absolute exception. It endorsed the arguments according to which such documents constitute opinions in legal matters originating from the legal services of the Community institutions, the disclosure of which affects the public interest inherent in the protection of legal security and the stability of Community law as much as in the ability for the Council to collect independent legal advice.

Such documents were therefore mere work instruments, the disclosure of which would make public the institution's internal debate and exchange of views on the legality and scope of the legal act to be adopted. Opening them to the public may have created uncertainty regarding the legality of the Community acts and brought about negative consequences, both on the stability of the Community order and on the proper operation of the institutions, i.e. public interests that must be respected. Therefore, the fact that these interests were not explicitly mentioned in the list of exceptions provided by the Code of Conduct, was not deemed sufficient to grant access : "*and accordingly it would not be right to limit, contrary to the actual wording of that provision, the scope of the concept of the public interest by reducing it to the five cases set out in brackets, which represent only certain*

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[73] Point 95. The Court adds to its demonstration that "Article 287 EC expressly provides that the members of the institutions, the members of committees, and the officials and servants of the Community are required, even after their duties have ceased, not to disclose information about the cost components of undertakings.

[74] Point 97

[75] ECJ, Order of 23 October 2002, *Austria vs Council*, C-445/00 Rec. p. I-9151

*specific cases to which, clearly and unequivocally, only secondary importance is attached in relation to the general requirement that the public interest should be protected*"[76].

The interest represented by the knowledge of the data related to the legal drawing up of the Community legislation, had not drawn the attention of the Judge, who made it an absolute exception.

This is not the case on the basis of Article 4 §2 of Regulation 1049/2001 since "*an overriding public interest*" can now justify disclosure. This addition, made by the Community legislation, reverses the reasoning supported until now. Even though a presumption of confidentially exists around legal advice, this presumption can be reversed and make disclosure obligatory.

First of all, the notion "*of legal opinion*" required a jurisprudential interpretation aimed at providing a stricter definition of the field of application of the exception expected to interfere with the right of access to documents[77]. The case involved the Council's refusal, based on Article 4§2 of Regulation 1049/2001, to grant access to advice from its legal service, delivered on the occasion of a legal procedure relating to a directive proposal defining the minimum standards to accept asylum seekers. The applicant pointed out that the Community legislation, in linking the terms "*legal opinion*" and "*court proceedings*" had not intended to give an absolute significance to the first notion. It intended to make a distinction between the legal advice drawn up in the framework of legal procedures and the legal advice drawn up in the framework of court proceedings. Unlike the previous provisions interpreted by the Court I[78], Regulation 1049/2001 imposes a strict interpretation, at the risk of making the transparency principle ineffective.

For the Court, the legislator's contribution consists in filling an existing legal gap when it assigns to legal advice a relative exception, different from the exception regarding court proceedings. However, it fails to specify this exception through a distinction between the various forms of legal advice of the institutions' legal services. Since it is legitimate to believe that the legal advice issued in the framework of a contentious action is in keeping with the documents covered by the notion of "*court proceeding*", the field of "*legal opinion*" referred to by the legislator, necessarily cover the others, which are issued in the framework of the legislative activity of an institution.

This reasoning is consistent. The guarantee of the advice confidentiality certainly contributes to its quality, objectivity and openness. Its author is thus certain that the non-disclosure of the advice will guarantee the interests of the institutions they belong to. On the contrary, he could be led to restraint. Moreover, from a very practical point of view, if the institution chose not to follow a negative advice of its legal team, as it is entitled to do, disclosure of this advice could significantly weaken its contentious position. Lastly the protection related to legal advice necessarily extends over time insofar as contesting the legality of a community act through exceptions makes the time of this confidentiality essential.

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[76] CFI, Order of March 3, 1998, *Carlsen et al.*, T-610/97 R, Rec. p. II- 485

[77] CFI, 23 November, 2004, *Turco vs Council*, T-84/03, Rec. 2004 p. II-4061

[78] CFI, 7 December, 1999, *Interporc*, T-92/98, Rec. p.II-3521

A clarification from the Judge is crucial: "*the fact that the document in question is a legal opinion cannot, of itself, justify application of the exception relied upon. Indeed, as previously observed, any exception to the right of access to the institutions' documents under Regulation No 1049/2001 must be interpreted and applied strictly*".

The main point does not rest in the determination of the field of application of the notion "*of legal opinion*" but in the consequences that should be drawn from the presence of such an advice in relation with the right of access. The institution must prove that it has not made any obvious appraisal error by opposing the exception to this right. It must make sure that no "*of the overriding public interest*" was likely to justify its disclosure that the concrete appraisal laid down actually led to confidentiality. In other words, it must "weigh" the need for confidentiality of legal advice and public interest to access to documents. This appraisal sometimes exists in the head of this institution, who deems it appropriate to disclose some advice in order to put an end to any dispute on the legality of the institution's action. In the same way, the passing of time can significantly weaken the confidentiality reasons of legal advices, to the point of tipping the scale in favour of public interest to transparency, for example in the event of the disappearance of the legislative act that was the subject of the legal advice.

In the case in point, the Court considers that the Council has fulfilled this obligation, for reasons that can be discussed and probably explain that an appeal before the Court of Justice, on the way to being settled, was filed by the Kingdom of Sweden[79]. The interpretation that the Community judge will necessarily give of the notion "*of the overriding public interest*", opposable to confidentiality, should actually be questioned.

In the case in point, the claimant considered that the principles of transparency, openness and democracy or citizens' participation in the decision-making process, constitute higher public interests that justify the disclosure of legal advice. The Court rejects this analysis: "*the overriding public interest, under Article 4(2) of Regulation No 1049/2001, capable of justifying the disclosure of a document which undermines the protection of legal advice must therefore, as a rule, be distinct from the above principles which underlie that regulation. If that is not the case, it is, at the very least, incumbent on the applicant to show that, having regard to the specific facts of the case, the invocation of those same principles is so pressing that it overrides the need to protect the document in question. That is not, however, the case here*"[80].

This reasoning is highly open to criticism. Its direct consequence is the loss of meaning of the limitation established by the legislator on confidentiality and the return to the situation existing prior to 2001. Presumably, there does not exist any "*overriding public interest*" stronger than those of transparency, openness and democratic participation, which are the basis of Regulation 1049/2001. It is precisely their respect, together with the respect of the citizen's right to have access to information, which justifies the ignorance of confidentiality. Besides, how could the citizens give prove thereof when they have not had access to the requested information or document?

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[79] C-39/05 P & C-52/05 P

[80] T-84/03 above, point 83

This duty of appraisal by the institution is the only one capable of ensuring "*effect to the exception to the exceptions on the ground of confidentiality based on the existence of an overriding public interest*". The opinion of advocate general Maduro, pronounced in this case on 29 November 2007 when he declared the cancellation of the judgement of the Court of First Instance, can only be approved : *"that duty of striking a balance, which lies with the institution concerned, cannot be limited, contrary to the findings of the Court of First Instance in the judgment under appeal, to the prior demonstration by the applicant that, having regard to the specific facts of the case, the principle of transparency is so pressing that it overrides the need to protect the legal opinion in question. That would be to forget that one of the fundamental reasons for the specific and individual examination imposed on the institution concerned lies in that duty of balancing public interests".*

**2. The court proceedings**

The limited access to documents related to court proceedings fulfils a different logic, which involves the exercise of the jurisdictional function and the application of the required guarantees. The right of any individual to be fairly heard by an independent Court is likely to be affected by an unlimited access to documents. The Community legislator did not intend to exclude the contentious proceedings from the access principle. On the contrary, it has chosen to adjust this principle in a balanced manner, in view of the fair proceedings required by the law.

For the Community Judge, "*as regards the exception relating to the protection of court proceedings, it should be recalled, first, that it follows from the broad definition of the notion of document, as set out in Article 3(a) of Regulation No 1049/2001, and from the wording and the very existence of the exception relating to the protection of court proceedings, that the Community legislature did not intend to exclude the institutions' litigious activities from the public's rights of access, but that it provided, in that regard, that the institutions are to refuse to disclose documents relating to court proceedings where such disclosure would undermine the proceedings to which those documents relate*"[81].

The *Van der Wal* case is an illustration of this approach. Based on the Code of Conduct, the Community jurisdiction had to form an opinion of the legality of refusing access to letters addressed by the general management of the competition to national jurisdictions, in the framework of the cooperation between the Commission and the national jurisdictions for the application of Article 85 and 86 of the EEC Treaty. The Court had rejected the request[82]. In its opinion, the exception to the general principle of access to the Commission's documents, drawn from the protection of public interest when the documents in question are related to court proceedings, aims at guaranteeing the general respect of this fundamental right. The scope of this exception could therefore be limited to the sole protection of the parties' interests in the framework of specific court proceedings; however it had to cover the procedural autonomy of the national and Community jurisdictions concerned. An appeal on this question was laid before The Court, which endorsed this point of view[83].

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[81] CFI, 12 September 2007, *Association de presse internationale vs Commission*, T-36/04 point 59

[82] CFI, 19 March 1998, *Van der Wal vs Commission*, T-83/96, Rec. p. II-545

[83] ECJ, 11 January 2000, *Royaume des Pays-Bas et van der Wal vs Commission*, C-174/98 P et C-189/98 P, Rec. p. 1

The Court exposed its arguments in the *Interporc* case[84]. Whilst underlying that the Code of Conduct was adopted with the purpose of making the Community action more transparent, the Judge reminds the need to widen as much as possible the access conditions, including in the presence of the court proceedings requirements. Regarding the exception to access, he declares that "*the words 'documents drawn up by the Commission solely for the purposes of specific court proceedings* " are protected, that means that " *not only the pleadings or other documents lodged, internal documents concerning the investigation of the case before the court, but also correspondence concerning the case between the Directorate-General concerned and the Legal Service or a lawyers' office. The purpose of this definition of the scope of the exception is to ensure both the protection of work done within the Commission and confidentiality and the safeguarding of professional privilege for lawyers* "[85]. However, *" the exception based on the protection of public interest (court proceedings) contained in the Code of Conduct cannot enable the Commission to escape from its obligation to disclose documents which were drawn up in connection with a purely administrative matter. That principle must be respected even if the disclosure of such documents in proceedings before the Community judicature might be prejudicial to the Commission. The fact that court proceedings for annulment were initiated against the decision taken following the administrative procedure is immaterial in that regard*"[86].

This jurisprudential decision to confine to the essentials the right of access in matters of court proceedings, was confirmed by the Court in the *Association de la presse internationale ASBL* case of 12 September 2007[87]. In this case, the Community Judge relied on the wording of Regulation 1049/2001, which is stricter than that of the Code of Conduct. The purpose of the Journalist Association in question was to help its members to inform their countries of origin on the European Union. To achieve this, it requested access to the Commission's defence statements filed in various cases before the Court of First Instance or the Court of Justice, in vain. The Court before which the refusal was referred pointed out that the statements are obviously expected to fall into the field of the exception because they concern a protected interest.

Then the Judge made a fundamental distinction, based on the consequences that disclosure may result into. His reasoning is different depending on whether the disputed statement concerns a pending case before the jurisdiction: "*since the proceedings to which the pleadings to which access has been requested relate have not yet reached the hearing stage, the refusal to disclose those pleadings must be considered to cover all aspects of the information contained therein. On the other hand, after the hearing has been held, the Commission is under an obligation to carry out a concrete assessment of each document requested in order to ascertain, having regard to the specific content of that document, whether it may be disclosed or whether its disclosure would undermine the court proceeding to which it relates*"[88]. The Judge does not insist on considerations that he does not deem decisive, whether it is a question of deliberate disclosure of their own statements by other parties or

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[84] CFI, 7 December 1999, *Interporc Im- und Export GmbH vs Commission*, T-92/98, Rec. 1999 p. II-3521

[85] Point 41

[86] Point 42

[87] CFI, 12 September 2007, *Association de la presse internationale ASBL (API) vs Commission*, T-36/04

[88] Point 82

a question of diversity of the national legal solutions. In his opinion, from the angle of fundamental rights and in particular that of equal terms, "*the fact remains that the guarantee of an exchange of information and opinion free from all external influences may require, in the interests of the proper course of justice, that public access to pleadings of the institutions be refused so long as the arguments contained therein have not been debated before the court*"[89].

On the other hand, the public nature of the jurisdictional debate automatically brings down the restricted access. The arguments contained in the requested statement actually belong to the public domain from that moment on, at least in the form of a summary. Refusing access would be "*on the sole ground that the arguments set out therein will be discussed in a separate case which is still pending, is liable to negate the general principle of granting the widest possible access to documents held by the institutions* ". The "*consequence of such an approach is manifestly to invert the relationship between the rule laid down in Regulation No 1049/2001, which consists in the right of access, and the exceptions to it, which… , must be interpreted and applied strictly*"[90].

- **Protection of the purposes for the inspection, investigation and audit activities**

Access to document can also be refused in order to protect the inspection, investigation and audit activities carried out by the EU institutions. The Judge was led to adapt his solutions to the various assumptions covered by Article 4 §2, insofar as the nature and scope of the activities carried by the EU in this framework are very varied, ranging from infringement proceedings to OLAF enquiries. Nevertheless, the jurisprudence stated at a very early stage, about the application of the Code of Conduct, that refusing access to documents should be understood in a limitative and concrete manner, rejecting an approach of the institutions based on document categories, and adopting a pragmatic approach in which the granting or refusal of access is based on the information elements contained in each document[91].

**1. The infringement proceedings**

The disclosure of documents drawn up by the Commission on the occasion of these proceedings, in particular during the pre-contentious stage, is highly interesting for potential litigants or business communities. The Judge had the opportunity to express his interpretation of this point very soon.

In its opening jurisprudence on the matter, the Court based the exception to the right of access on the assertion that "*the confidentiality which the Member States are entitled to expect of the Commission in such circumstances warrants, under the heading of protection of the public interest, a refusal of access to documents relating to investigations which may lead to an infringement procedure, even where a period of time has elapsed since the closure of the investigation*"[92].

The Court later confirmed that such proceedings fall within the field of application of the exception, in particular in their preliminary stage. In the *Bavarian* Lager case[93]in 1999, the Court repeats that,

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[89] Point 79

[90] Point 106

[91] See for example CFI, 12 October 2000, *JT's Corporation Ltd vs Commission*, T-123/99, Rec. 2000 p. II-3269, point 45

[92] CFI, 5 March 1997, *WWF UK (World Wide Fund for Nature) vs Commission*, T-105/95, Rec. p.II-313

[93] CFI, 14 October 1999, *The Bavarian Lager Company Ltd vs Commission*, T-309/97, Rec. p. II-3217

"*in the present case, having regard to the preparatory nature of the document at issue and to the fact that, when access to it was requested, the Commission had suspended its decision to deliver the reasoned opinion, it is clear that the procedure under Article 169 of the Treaty was still at the stage of inspection and investigation … The disclosure of documents relating to the investigation stage, during the negotiations between the Commission and the Member State concerned, could undermine the proper conduct of the infringement procedure inasmuch as its purpose, which is to enable the Member State to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position could be jeopardised. The safeguarding of that objective warrants, under the heading of protection of the public interest, the refusal of access to a preparatory document relating to the investigation stage of the procedure under Article 169 of the Treaty*"[94].

In the *Petrie* case [95], the request for access was made by natural persons concerned by infringement proceedings against Italy, who wished to know the contents of formal notice and substantiated recommendation letters addressed to this Member State by the Commission. The Court develops the confidentiality requirement argument because "*this requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice. The preservation of that objective, namely an amicable resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, justifies refusal of access to the letters of formal notice and reasoned opinions drawn up in connection with the Article 226 EC proceedings on the ground of protection of the public interest relating to inspections, investigations and court proceedings, which comes within the first category of exceptions in Decision 94/90*"[96]. Nonetheless, the scope of the exception is not absolute.

The recently settled case of *Association de la presse Internationale ASBL* confirms it[97]. The Court took cognizance of the Commission's refusal to communicate documents related to infringement proceedings, both pending and already closed. Faced with this refusal, the requesting association claimed that the date from which the public interest related to the disclosure has priority over the enquiry protection is the date of filing of the appeal before the Court, based on the fact that, at this stage of the case, the efforts made to reach an amicable settlement of the dispute failed, relying on the *Petrie* jurisprudence.

The Court confirms it. In its opinion, "*the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with Treaty obligations may continue during the court proceedings and up to the delivery of the judgment. The preservation of that objective, namely an amicable settlement of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, therefore justifies refusal of access to*

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[94] Point 46

[95] CFI, 11 December 2001, *Petrie et al. vs Commission*, T-191/99, Rec. p.II-3677

[96] Point 68

[97] CFI, (higher chamber), 12 September 2007, *Association de la presse internationale ASBL (API) vs Commission*, T-36/04

*documents drawn up in connection with Article 226 EC proceedings*"[98]. However it sets the limits thereof.

The Commission claimed that the objective of the protection of its enquiry activities remained valid as long as these States had not complied with the judgement of the Court, even after the decision of the Court judgement. The Court did not fall into the trap of this reasoning, which would have resulted in the abusive generalisation of the exception referred to in Article 4 §2 of the Regulation. The States have the obligation to implement without delay the measures required to comply with this judgement, and this result cannot depend on the result of the negotiations under way with the Commission. Since the non-fulfilment of the infringement judgements acts upon replies specifically laid down by Article 228 TCE, the non-disclosure of the enquiry elements which led to the infringement proceedings "*would make access to those documents dependent on uncertain events, namely non-compliance by the Member State concerned with the judgment of the Court establishing the infringement and the bringing of an action under Article 228(2) EC, which falls within the discretion of the Commission. In any event, they are uncertain and future events, which depend on the speed and diligence of the various authorities concerned*". Since the application of the right of access fulfils the objective of *"giving citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers*", the disclosure of reports presented in the framework of the procedures towards Member States, that have not yet been closed by judgements of the Court, is possible at the risk of "*a manifest inversion of the relationship between the principle and the exceptions thereto, that is to say, between the principle of free access to the documents of the institutions and the exceptions to that principle, as set out in Regulation No 1049/2001*"[99].

The right of access to documents also applies to other types of enquiries, for example those related to government assistance. The *Technische Glaswerke Ilmenau* jurisprudence pronounced in 2006 by the Court[100] clarifies the situation. To refuse access to documents related to government assistance matters, the Commission asserted that, in the framework of current enquiries on the compatibility between government assistance and the single market, fair cooperation and mutual confidence between the Commission, the Member State and the companies concerned, were essential to allow the different parties to express themselves freely. This justified its access refusal since the disclosure of documents inherent in these inquiries could be prejudicial to the treatment of the claim examination, and could compromise the dialogue.

The Court rejects the argument, not without a certain amount of irony, asserting that "*it may, in that regard, appear paradoxical to say the least to evoke the necessity for a free and direct dialogue between the Commission, the Member State and the 'undertakings concerned', in the context of a climate of cooperation in good faith and mutual confidence, in order, precisely, to refuse one of the 'parties' concerned access to knowledge of any information directly touching the very subject of the discussions*"[101].

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[98] Point 121

[99] Points 136 and fol.

[100] CFI, 14 December 2006, *Technische Glaswerke Ilmenau GmbH vs Commission,* T-237/02, Rec. p. II-5131

[101] Point 92

**2. The audit procedures**

The *Terezakis* case[102]deals directly with audit procedures. In the case in point, the Commission had refused access to documents related to the construction of the new Athens airport, financially supported by the Cohesion Fund, hiding behind an ongoing audit procedure.

In the first place, the Judge confirms the full applicability of Article 4 §2, indicating that the Article in question "*does not lay down any formal or procedural requirement for audits whose protection may justify a refusal of access. In particular, the applicability of the exception provided for in Article 4(2), third indent, of the regulation does not depend on whether the College of Commissioners has approved the audit in question, whether OLAF has decided to open an investigation, or whether the audit is carried out by external experts*"[103]. Then, the Court stresses the scope of action that Regulation 1049/2001 guarantees to the Commission in this case : "*it must be noted that, even on the assumption that the Commission did not provide information about the purpose and duration of the audit, that cannot in itself affect the legality of the contested decision. In the context of a decision refusing access to a document on the basis of Regulation No 1049/2001, the Commission is required to set out the reasons justifying the application to the particular case of one of the exceptions to the right of access provided for by the Regulation, but is nevertheless not required to provide more information than is necessary in order for the person requesting access to understand the reasons for its decision and for the Court to review the legality of that decision. It must be held, however, that the contested decision satisfies those requirements* "[104].

**3. The OLAF enquiries**

The *Franchet and Byk* jurisprudence[105] clarifies its behaviour. The question was sensitive, considering the specificity of the administrative enquiries carried out by the European Anti-Fraud Office(OLAF). This case involved access to documents related to the enquiry conducted on the Eurostat activities, access to which was refused by OLAF on the ground that it came within the provisions of the statutory exception – regarding the protection of court proceedings and the purposes of inspection, investigation and audit activities.

The claimants denied the validity of this analysis on the ground that, OLAF being an administrative and not a legal body, its communications would be administrative. Their only purpose would be to inform the legal authorities about facts leading to criminal or disciplinary proceedings, therefore outside any pending court proceeding.

The Court, after repeating the validity of its interpretation in the *Interporc* jurisprudence, excludes the OLAF reports from the exceptions related to court proceedings : "*to find under these circumstances that the various documents sent by OLAF were drawn up solely for the purposes of court proceedings would not correspond to the interpretation given by the case-law to that exception and runs counter to the obligation to construe and apply the exceptions restrictively*"[106].

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[102] CFI, 30 January 2008, *Terezakis vs Commission*, T-380/04.

[103] Point 115

[104] Point 119

[105] CFI, 6 July 2006, *Franchet and Byk vs Commission*, T-391/03 & T-70/04, Rec. 2006 p. II-2023

[106] Point 97

However, since these documents fall within the second category of exceptions, related to the protection of the purposes of inspection, investigation and audit activities, the Court determines whether the access refusal is justified. This exception applies if the disclosure may jeopardise the achievement of the inspection, investigation or audit activities, which is admissible as long as the investigation or inspection activities continue, even if the particular investigation or inspection leading to the report to which access is requested is closed[107]. "*Nevertheless, to allow that the various documents relating to inspections, investigations or audits are covered by the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001 until the follow-up action to be taken has been decided would make access to the IAS documents dependent on an uncertain, future and possibly distant event, depending on the speed and diligence of the various authorities*"[108]. This would interfere with the transparency objective of the Regulation. Since OLAF limited itself to an abstract and general reasoning, The Court censored the refusal.

- **Protection of the EU works**

Article 4 §3 of Regulation 1049/2001 specifically protects the confidentiality of the European Union's works. It does so in two complementary ways.

In the first place, the text guarantees the protection of the decision-making process by forbidding any disclosure prior to decision making: "*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 document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure*".

In the second place, the secrecy of the institutions' deliberations is guaranteed by the same article, in its second indent, by protecting confidentiality after decision-making: "*Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure*".

At a very early stage,[109], the Community Judge stressed that the purpose of this type of exceptions was not to protect the interests of the public or third parties but to "*in which the institution's interest alone is at stake"*. He also declared, on the basis of the Code of Conduct, in his *Carvel* jurisprudence, that "*the Council enjoys a discretion as to whether or not to refuse a request for access to documents relating to its proceedings*". It results "*from the objective pursued*" that, when the institution exercises this appreciation power, it "*must strike a genuine balance between, on the one hand, the interest of the citizen in obtaining access to those documents and, on the other, its own interest in protecting the confidentiality of its deliberations*"[110].

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[107] See *Denkavit Nederland vs Commission*, above, point 48

[108] CFI, T-391/03 above, point 111

[109] CFI, 5 March 1997, *WWF UK (World Wide Fund for Nature) vs Commission*, T-105/95, Rec. p. II-313, point 60

[110] Point 65

The Judge also confirmed the scope of the right of access, on the occasion of the *Svenska Journalistförbundet* case[111]. The applicant, wishing to verify in which conditions its Member State fulfilled its obligations in transparency matters, requested to the national authorities (successfully) and to the Council (in vain) the communication of a certain amount of documents related to JAI and in particular about Europol. The Court reminds that "*the Council enjoys a margin of discretion which enables it, if need be, to refuse access to documents which touch upon its deliberations. It must, nevertheless, exercise this discretion by striking a genuine balance between on the one hand, the interest of the citizen in obtaining access to the documents and, on the other, any interest of its own in maintaining the confidentiality of it deliberations*"[112].

Lastly, the Judge logically considered that the action of the "*committees*" of any kind, which precede or accompany the institutions' work, fell within the field of application of the text[113].

- **Protection of third party's documents**

Article 3 b) of Regulation 1049/2001 provides a broad definition of the "*third party"* likely to be the authors of documents the access to which can be requested. It includes " *any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries*" The system governing the disclosure of documents originating from these third parties is organised according to this distinction: either the document originates from an external natural or legal person or it originates from a Member State of the European Union.

Previously, under the Code of Conduct, when the document held by an institution originated from a natural or legal person, the Member State, another Community institution or body or any other national or international body, the consulted institution was not authorised to disclose the document in question. The request had to be addressed directly to the author of the document or to the third party in question, hence the designation of this rule as "*rule of the author*" (see above). Regulation 1049/2001 discards this author rule and lays down the access principle, subject to its implementation.

**1. Protection of document originating from a natural or legal person**

Article 4 §4 provides that " *As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed*".

Frequently associated to grievances related to the exception on the protection of commercial interests of Article 4 §2, this provision was interpreted by the Court in the *Ifaw Internationaler*

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[111] CFI, 17 June 1998, *Svenska Journalistförbundet vs Conseil*, T-174/95, Rec. p. II-2289

[112] Point 113

[113] CFI, 19 July 1999, *Rothmans International BV vs Commission*, T-188/97, Rec. 1999 p. II-2463 point 62; CFI, 10 October 2001, *British American Tobacco International (Investments) Ltd c. Commission*, T-111/00. Rec. 2001 p. II-2997

*Tierschutz* case [114] and in the *Terezakis* case[115]. The case involved the disclosure of documents related to the construction of the new Athens airport and the reference to a contract binding private persons. The Community Judge reminds the obligation to consult the third party and defines the limits thereof: "*the institutions are under no obligation to consult the third party concerned if it is clearly apparent whether the document should or should not be disclosed. In all other cases, the institutions must consult the relevant third party. Accordingly, consultation of the third party is, as a general rule, a precondition for determining whether the exceptions to the right of access provided for in Article 4(1) and (2) of Regulation No 1049/2001 are applicable in the case of third-party documents*".

Nevertheless, "*as the applicant rightly points out, the Commission's duty to consult third parties under Article 4(4) of the Regulation does not affect its power to decide whether one of the exceptions provided for in Article 4(1) and (2) of the Regulation is applicable*"[116]. For example, regarding the communication of a contract document, the Judge clarifies the obligations weighing on the institution : "*it follows that, in the present case, while the Commission correctly consulted the parties to the main contract since it was not clear that disclosure had to be made or that it had to be refused, the fact remains that the view expressed by those parties was not overriding and the Commission was still obliged to assess the justification for that view and the applicability of one of the exceptions provided for under Article 4(1) or (2) of Regulation No 1049/2001*"[117].

**2. Protection of documents originating from a Member State**

Regulation 10049/2001 gives a particular place to this specific category of "*third parties*" represented by the Member States when they are the authors of a requested document. Article 4 §5 of the Regulation provides that: "*A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement*".

This provision adopts Declaration 35 related to Article 255 attached to the Treaty of Amsterdam which provided that "*a Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement*". The principle poses a major problem as it does not specify the actions to be taken following a refusal by the consulted Member State. Is this agreement a consistent advice, which forbids the European Union to go on, as a "*prior agreement* " must be given, or is it a mere procedural requirement, that may allow disclosure by the institution that is the sole holder of the final decision-making power?

The free exercise of the right of access in the European Union depends on this, both for the material importance of the documents originating from the Member States in the functioning of the Union, but also because the interpretation given is likely to grant a true right of veto to the Member States. The settlement of this debate had to wait for the recent intervention of the Court of Justice.

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[114] CFI, 30 November, 2004, *IFAW Internationaler Tierschutz-Fonds vs Commission*, T-168/02, Rec. p. II-4135, point 55

[115] CFI, 30 January, 2008, *Ioannis Terezakis vs Commission*, T-380/04

[116] CFI, T-168/02 point 56

[117] CFI, T-380/04 above point 61

The initial interpretation of article 4§5, which was very restrictive, was provided by the Commission. It was ratified by the Court in the *Ifaw* case and repeated later[118]. It recognised a right of veto to the Member States holding a document the access to which is requested. The Court has formalised this interpretation, asserting that "*article 4(5) of the Regulation places the Member States in a different position from that of other parties and lays down a lex specialis to govern their position*"[119]. In other words, and according to this interpretation, the regulation would grant derogation to common law, by authorising the Member State to forbid access to documents, the institution having the obligation not to disclose documents without its "*prior agreement* ". The Member State would not have the obligation to justify its confidentiality request and the institution would not have the obligation to verify whether the non-disclosure of the document in question is justified, notably in application of public interest. Consequently, according to the Court, national law and community law would find a break-even point or sharing of the competences.

The other interpretation of Article 4 §5 is more sensible. According to this interpretation, the regulation would simply recognise the right of the Member States to be consulted before any disclosure of a document that they have communicated to the European Union. The Institution concerned would however retain the responsibility of deciding whether it is advisable to make it public, since the decision not to grant access to the document can only be justified on the basis of the exceptions §§ 1 to 3 of the Regulation.

To rule on the scope of the treatment applicable to the documents originating from the Member States, in its leading case of 18 December 2007, *Kingdom of Sweden vs Commission*[120], The Court of Justice developed a global reasoning, combining the context of the drawing up of Regulation 1049/2001 and the desire to guarantee its useful effect.

The invalidation of the so-called "author rule" by Regulation 1049/2001 encountered various difficulties during the drawing up of the text between the Member States, and the ambiguous wording of Article 4§5 bears witness thereto. It remains silent on the consequences of a refusal of the Member State to agree to the disclosure of the document, and the arguments drawn from the text do not allow to decide[121]. The institutions' internal regulations provide no additional information. Lastly, the context of the text drawing up shows an absence of consensus of the States on the subject[122].

The Court interprets Article 4 §5 by confirming the first interpretation of the Court of First Instance whilst denying it regarding the scope to be given to the Member State's agreement. This agreement

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[118] 17 September 2003, *Messina vs Commission*, T-76/02, Rec. p. II-3203, point 48; CFI, 17 March 2005, *Scippacercola vs Commission*, T-187/03, Rec. p. II-1029 point 57

[119] CFI, 30 novembre 2004, *IFAW Internationaler Tierschutz-Fonds gGmbH vs Commission*, T-168/02, Rec. p. II-4135 point 58

[120] ECJ, 18 December 2007, *Royaume de Suède vs Commission*, C-64/05 P.

[121] For example, they oppose on the one hand the mention of a "*accord préalable*", supporting the veto thesis, to the provisions of Article 9 of the same Regulation, which, on the other hand, expressly lays down such a veto of the Member States about "sensitive" documents.

[122] The proposal by a Member State, France, to formulate a right of veto was not followed at the time

should be a prior agreement and is a requirement "*that provision gives the Member State an option, and only the actual exercise of that option in a particular case has the consequence of making the prior agreement of the Member State a necessary condition of the future disclosure of the document in question*"[123].

On the other hand, the scope of the Member State's prior agreement cannot result in the granting to the State of an implied right of veto that is discretionary, "g*eneral and stalwart*"[124]. Apart from reintroducing the "*author's rule*", the democracy and transparency objective of the decision-making process required by the legislator would be significantly reduced. The documents *"originating from a Member State"* cover the whole of the documents supplied by the latter, including those drawn up on the ground of their Community obligations and pertaining to the Community legislation. In their capacity of members of the Council and participants in many committees established sometimes by the Council, sometimes by the Commission, The Member States represent an important source of information and documents intended to support the Community decision-making process. Acknowledging their discretionary power to avoid transparency would be contrary to the useful effect of the regulation required by the Community legislator. This is what the Court underlines, quoting the *Hautala* case from analogy[125]. "*All documents held by the institutions are within the scope of the regulation, including those originating from the Member States, so that access to such documents is in principle governed by the provisions of the regulation, including those which lay down substantive exceptions to the right of access*"[126].

For the Court of Justice, "*the exercise of the power conferred by that provision on the Member State concerned is delimited by the substantive exceptions set out in Article 4(1) to (3), with the Member State merely being given in this respect a power to take part in the Community decision. Seen in that way, the prior agreement of the Member State referred to in Article 4(5) resembles not a discretionary right of veto but a form of assent confirming that none of the grounds of exception under Article 4(1) to (3) is present*"[127].

In this respect, "*there is nothing to exclude the possibility that compliance with certain rules of national law protecting a public or private interest, opposing disclosure of a document and relied on by the Member State for that purpose, could be regarded as an interest deserving of protection on the basis of the exceptions laid down by that regulation…*"[128].

The Court of Justice draws the procedural consequences from this jurisprudential interpretation. The application of the exceptions to the right of access depends both on the Community institution and on the Member State, which must guide the principle of loyal cooperation provided for by Article 10 of the Treaty. As soon as the institution is presented with a request for access to a document originating from a Member State, it has the obligation of notifying it to the latter and "*commence*

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[123] Point 47
[124] Point 59
[125] Point 64
[126] Point 67
[127] Point 76
[128] Point 84

*without delay a genuine dialogue concerning the possible application of the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001*" . This dialogue is dominated by the need to allow the institution to take position within the terms specified in Articles 7 and 8 of this Regulation, to give a reply on this request for access. At this time, if the State concerned is opposed to the disclosure of the document, it has to justify its refusal regarding the statutory exceptions. Failure to provide this justification, or if the justification was not structured regarding these exceptions, following an express request to this end, the institution must express its decision on the application of these exceptions. According to articles 7 and 8 of the Regulation, the institution has the obligation to justify the refusal opposed to the author of the access request. This obligation implies that the institution must explain, in its decision, not only the opposition expressed by the Member State concerned regarding the disclosure of the requested document, but also the reasons put forward by the Member States, in order to recommend the application of one of the exceptions to the right of access provided for in Article 4 §§ 1 to 3 of the Regulation. This information will allow the applicant to understand the origin and reasons of the refusal, and the competent jurisdiction will be able to exercise its control, as required.

Should the Member State refuse to authorise access to the document concerned for justified reasons, and should the institution be compelled to reject the request for access, the Court of Justice highlights the main points : "*the person who has made that request enjoys judicial protection*"[129]. Obviously, it is not for the Court to take cognizance of the legality of actions made by national authorities in the framework of the legality control[130], even if this action is part of Community decision-making process. However, Regulation 1049/2001 establishes *"a decision-making procedure the sole object of which is to determine whether access to a document should be refused under one of the substantive exceptions listed in Article 4(1) to (3) of the regulation, a decision-making procedure in which both the Community institution and the Member State concerned play a part"*. The Community Judge declares himself logically competent to "*review, on application by a person to whom the institution has refused to grant access, whether that refusal was validly based on those exceptions, regardless of whether the refusal results from an assessment of those exceptions by the institution itself or by the relevant Member State. From the point of view of the person concerned, the Member State's intervention does not affect the Community nature of the decision that is subsequently addressed to him by the institution in reply to the request he has made for access to a document in its possession*"[131].

The lessons drawn from the *Kingdom of Sweden vs Commission* case are therefore critical : they lay down the principle that the system of access to documents cannot vary according to the circumstances and that the Community Judge is the guardian of the consistency of this system.

- **The protection of sensitive documents**

Article 9 of Regulation 1049/2001 deals with the question of the "*sensitive*", documents, a traditional question regarding the right of access. In this case, it involves documents originating from the institutions or the agencies established by them, Member States, third countries or international

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[129] Point 90

[130] ECJ, 3 December 1992, *Oleificio Borelli vs Commission*, C-97/91, Rec. p. I-6313, point 9

[131] Point 94

organisations classified as "*very secret/top secret*", "*secret*" or "*confidential*" in accordance with the rules of the institution concerned, which protects essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4 §1 a), notably public security, defence and military matters. In practice, these documents are held by the Council or the Commission, as the Parliament has reached an inter-institutional agreement on the conditions of access to such documents.[132] The question was strongly debated when drawing up Regulation 1049/2001, and a compromised was reached, i.e. the legal supervision of the treatment of sensitive documents and their immunity in relation to the transparency obligation, for want of defining them. The result is an abnormal situation.

Strangely, the statutory definition does not match the document classification system provided by the security rules of the Council and the Commission which define the method of treatment of such documents[133]. They consider as "*sensitive*" the documents that are assigned at least the "*confidential UE*" classification (i.e. containing information the non authorised disclosure of which could affect the essential interests of the European Union) in order to protect a public interest area (public security, defence, international relations, financial, monetary or economic policy) and which originate from an institution or a Community Agency, a Member State, a third country of an international organisation.

Documents classified "*restricted UE*" (the disclosure of which would be inopportune or premature) "*secret or very secret UE*" (the non authorised disclosure of which could be highly prejudicial to the essential interests of the European Union) which do not concern one of the public interest areas (for example related to OLAF enquiries or containing information on privacy) or do not originate from a public authority, are not listed as "*classified*". The question remains theoretical for the main part, insofar as the applications for access are rare and the number of documents concerned is just as rare. Nevertheless, it would be logical for all the classified documents to be subject to the same rules. When access to a classified document is requested, the prejudice caused by its disclosure will be examined, like for any other document. If it appears that none of the exceptions is applicable at the time of this examination, the document will have to be declassified, then disclosed.

The procedural consequences of this exception system, applicable to "*sensitive*" documents, are important. Applications for access are handled only by those persons who have a right to acquaint themselves with those documents. Article 9 §3 provides that "*sensitive documents shall be recorded in the register or released only with the consent of the originator*".

The jurisprudential application that resulted from these provisions shows the difficulties expected to arise in sensible matters. The *Sison* case illustrates them through the registration on an Anti-Terrorist list of the EU. The case involved the refusal of the Council to disclose the identity of the States at the origin of this registration and their motivations. The applicant used it as an argument to contest an illegal breach of his right of access to documents, in connection with his right to defence.

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[132] OJ C 298 of 30.11.2002

[133] Council ruling 2001/264, JO L101 of 11 April 2001, p. 1; Commission ruling 2001/844, OJ L317 of 3 December 2001 p. 1

The Court of Justice[134] confirms a restrictive interpretation of the right of access to documents, already exposed by the Court. The Court relies on the "special nature of sensitive documents" and their "*character extremely sensitive*" to consider that, in accordance with Article 9 §3 of the Regulation, "requires the consent of the originating authority before such documents are recorded in the register or released. As the Court of First Instance correctly held in paragraph 95 of the judgment under appeal, it is clear from those provisions that the originating authority of a sensitive document is empowered to oppose disclosure not only of that document's content but even of its existence". This authority "is thus entitled to require secrecy as regards even the existence of a sensitive document and … such authority also has the power to prevent disclosure of its own identity in the event that the existence of that document should become known"[135].

This particular treatment, the consequences of which are particularly serious for the application of a jurisdictional protection, "*cannot therefore be held to be disproportionate on the ground that it may give rise, for an applicant refused access to a sensitive document, to additional difficulty, or indeed practical impossibility, in identifying the State of origin of that document*"[136].

This jurisprudential approach creates a problem insofar as it leads to exclude any access to such documents. A revision of Regulation 1049/2001 should make up for this state of the law and organise a minimal procedure allowing a third party (the judge?) to verify the truthfulness of the assertion forbidding disclosure, if necessary.

### IV – The guarantee of the right of access to document

This is a twofold guarantee: it is chiefly administrative, but also results from the jurisprudence, the evolution of which has greatly contributed to the establishment of the right of access.

- **The administrative guarantee**

Two types of guarantee support the effective application of the right of access. The first guarantee is inherent in the economy of Regulation1049/2001 through the subsequent application of the initial request relying on Article 7 of the text, followed by the treatment of the confirmatory application of Article 8. In fact, in the event of a total or partial refusal of the initial application for access, the applicant may, within fifteen working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position. In the event of a total of partial refusal, the institution shall inform the applicant of the remedies available, namely instituting court proceedings against the institution[137] and/or making a complaint to the Ombudsman, under the

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[134] ECJ, 1st February 2007, *Jose Maria Sison vs Council*, C-266/05 P, Rec. p. I-1233

[135] Points 101 &102

[136] Point 103

[137] On the mechanism of the Code of Conduct, the Court has declared that "*where the initial application for access is rejected, the applicant is entitled to ask the institution to reconsider that rejection without being obliged to put forward arguments challenging the validity of the first decision. That procedure does not constitute an appeal against the refusal but an opportunity to obtain a second assessment by the institution of the application for access…It follows that when a reply confirms the rejection of an application on the same grounds, it is appropriate to consider the sufficiency of the reasons given in the light of all the exchanges between the institution and the applicant, taking into account also the information available to the applicant*

conditions laid down in Articles 230 and 195 of the EC Treaty. Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and will entitle the applicant to institute court proceedings against the institution and/or to make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.

These proceedings should be controlled by time limits in the second stage.

The Ombudsman's intervention is specifically concerned in this case and occupies a very critical place in the application of the regulation, as shown by the Commission's application reports. The Ombudsman plays a central part in the application of the text and the management of the applicants' claims, for want of instituting, like in some Member States, an autonomous administrative structure in charge of the question. Strengthening its role could be useful if the creation of an autonomous body was not considered, like in the Member States

- **The jurisdictional guarantee**

The jurisprudence evolution has played and still plays a critical part for the guarantee of the right of access. The scope of jurisdictional control on access decisions has undergone deep changes since the issue of Regulation 1049/2001, following the Code of Conduct. After a first period, when the Court was noted for its rather restrictive interpretation of the text potentiality, the Community Judge's reasoning shifted towards an approach focused on fundamental rights instead of administrative organisation. The use of the teleological and systematic method has allowed to interpret the regulations and the exceptions it contains, thus allowing the text to develop its potential.

On this basis, the jurisprudence claims that refusal of access to document can only result from a concrete appraisal aimed at determining whether disclosure would actually affect a public interest protected by a confidentiality exception. By asserting the principle of the interpretation and strict application of the exceptions to the right of access, the jurisprudence has imposed a concrete and individual examination, forbidding stereotyped approaches. The application of the proportionality principle has also allowed to limit confidentiality to the strict extent required to protect public interest, justifying derogation to the transparency principle, making partial disclosure a compromise that the institutions must explore.

This results into significant constraints for the institution. Its examination of the application for access must have a concrete character and the fact that a document concerns an interest protected by an exception is not enough to justify the application of this exception. The consulted institution should appraise whether access to the document is likely to affect the protected interest and if the risk of breach of a protected interest is reasonably foreseeable and not hypothetical. This examination should have an individual character and be carried out for each requested document, insofar as it is the only basis allowing the institution to evaluate the possibility of granting partial access to the applicant.

This jurisdictional control however experiences some limitation as to its intensity, in particular when one of the exceptions related to public interest, referred to in art. 4§1 a) is opposed to disclosure. In

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*concerning the nature and content of the requested documents*"; CFI, 19 March 1998, *Van der Wal c. Commission*, T-83/96, Rec. p. II-545

this case, the Court deems that the Council should be granted " *as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest… the legality of such a decision must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers*"[138].

This jurisprudential trend should be approved. However regarding "*the superior public interest*" likely to revoke the application of the exceptions related to article 4§2 and 3, a textual precision made at the time of revision of Regulation 1049/2001 could be used as a guide to the Judge's interpretation. In the same way, the appreciation margin left by the judge in the *Sison* case would benefit from some control in terms of sensitive documents.

## V. Recommendations for reflection

The framework proposed by the Green Book of the Commission does not provide a suitable answer to the questions arising from the previous legal analysis. It is based on the assumption that the current system operation is satisfactory in general, and merely calls for some adjustments. The analysis of the yearly reports of the Council and the Commission proves otherwise. The limited number of "ordinary" citizens" wishing to get access to documents (with regard to lobbies and other current applicants) is a worrying sign of their lack of interest.

With the enlargement of the Union and the developments of its action, the challenges faced by transparency are huge, in particular in the fields of PESC and JAI. A new stage must therefore be completed. The Chart integration and the coming into force of the amending treaty offer this perspective to the legislator**.** The suggestions below are aimed at facilitating this task.

**1. Public access to documents should first benefit the public and then be an instrument aimed at improving the Union governance. The revision of Regulation 1049/2001 should therefore be set in terms of protection of the individual fundamental rights before being organised with regard to the mere improvement of the Union administrative operation.**

- *Recording the individual right of access to documents in the text motivation*
- *Widening the scope of the right of access beneficiaries to "any individual", in compliance with other Community and European instruments*
- *Including all the Union Institutions, in compliance with the amending treaty.*

**2. The right of access has a dual meaning. As a right of the European Union citizens, it targets specifically democratic access to legislative documents as a general rule, i.e. access to the drafting and implementation of the rule. As a citizen's right, it concerns specific documents related to a particular interest. This dual process deserves a more thorough reflection. The revised regulation should make a distinction, within the documents, between those related to legislative documents**

[138] Point 34

**(for which access would be legal and exceptions supervised) and the other documents, for which the exception system would be more tolerable.**

- *Making a distinction between legislative documents and other types of documents*
- *Organising access to the first category in the most open manner (unabridged text, reporting, SEC documents, for example)*
- *Strengthening the requirements related to disclosure regarding legislative documents, through a strict supervision of the notions of "breach of the decision-making process" (a. 4§3) and "higher public interest" (a. 4 §§.1 b, 2, 3)*
- *Updating the notion of "document" in connection with the amending treaty and the WWF European Policy case.*

**3. The effectiveness of the legal system regarding public access to documents is determined by its unity. Consistency of the rules applicable in the Union law should be guaranteed and scattering of principles preventing the understanding of the rules by the Union citizens should be avoided.**

- *Aligning, as much as possible, the general regulation (Regulation 1049/2001) and the specific regulation (Regulation 1367/2006) on the basis of the most protective text, without necessarily going as far as unification or harmonization* [139] *through the definition of minimum standards*
- *Bearing in mind that the system of exceptions to the right of access has repercussions on the opening of historical records to the public (article 6 of Regulation 354/83)*

**4. The standardisation of document access procedures should be a priority for the Union, even if it implies radical changes, for the same reason as above.**

- *Asserting an inter-institution cooperation principle guiding access to documents*
- *Specifying the rules surrounding the entry of the documents in the register*
- *Grouping the points of access to documents, facilitating a single access within the Union, if necessary through the creation of a single body to manage this function, in order to put an end to the current trend, which reserves access to specialists only.*
- *Halting the spreading of the information policy of the various services, making pedagogical and simplification efforts, full availability of the documents, updating of the existing tools in terms of transparency*[140]
- *Facilitating access to the tools, issuing them in a few languages at least (German, French, Spanish) in order to put an end to the current unfair discrimination that benefits exclusively English-speaking users in access to documentation*
- *Defining a standardized procedure for entering and managing the documents in a single register*

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[139] For example, for preserving the peculiarity of environmental information (objectives of public participation to the decision-making process and access to justice)

[140] The "transparency" sites of the Commission or the Ombudsman (exclusively in English) illustrate this need

- *Drawing the consequences from the inefficiency of the current guarantee, making the communication period binding and strengthening the ombudsman's powers (investigation, binding recommendation to the institution)*
- *Granting significant means to allow the effective implementation of the right of access by ordinary citizens*

**5.As a whole, the balance between the access principle and the exception system is at present satisfactory but it can be improved.**

- *Reminding the principle of partial access, confirmed by the Hautala case-law, as a useful point of compromise, to be systematically exploited*
- *Entering the case law principle of the restrictive interpretation of exceptions to access*
- *Deciding whether the public interest notion (public security) can hold in check access to documents, including in case of legal proceedings (Sison case law)*

**6. The years of application of the regulation should allow the capitalisation of the case law achievements, through their codification at the time of revision or through amendment proposals.**

- *Integrating the request reviewing principles (concrete and individual examination, proportional weighting, access to third party documents including those held by the States (Kingdom of Sweden case law)*
- *Codifying the case law solutions regarding the related exceptions (Bavarian Lager,Terezakis, API, Petrie, Franchet)*
- *Changing the interpretation of sensitive document protection, tending to exclude any form of access (Sison case law)*