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**“Less is more”? The Commission  
Proposal on Access to EU  
Documents and the Proper  
Limits of Transparency**

Working paper de l’IDHEAP

**Unité Europe et Mondialisation**  
**Unité Gouvernance Publique Internationale**  
**Chaire Management et Marketing Publics**

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## **Abstract**

Transparency is now seen as a key tool of democratic governance. The European Union's commitment to transparency is now at the centre of a crucial debate between the Commission and the Parliament on the future of citizen's right of access to information. This article presents the main characteristics of the current regime and questions the pertinence of the proposed changes in light of the international drive at modernising access to information laws and the attempt at identifying the 'proper limits of transparency'. The questions raised range from the identification of what can be accessed to the definition of exemption and the protection of competing interests.

European Union – Public Administration - Access to information

# 1 INTRODUCTION: THE 'INEXORABLE RISE' OF DOCUMENTARY TRANSPARENCY

Transparency is a general paradigm focused on opening internal organizational processes and decisions to third parties, whether or not they are involved in the organization<sup>1</sup>. It rests upon a non-negotiable 'right to know'<sup>2</sup>, whose connection to the fundamental freedom "to seek, receive and impart information" (art. 19 UDHR) is increasingly recognized<sup>3</sup>.

Transparency, as a legal right, can be activated through a number of different laws and procedures. Over the last 20 years, one of the key instruments of transparency has been access to information laws (ATI). These laws give individuals the opportunity to request, without need to justify or substantiate the request, information, or a document containing the desired information. Citizens thus have a legally guaranteed right of access to information held by the authorities. This right is qualified by a specific and limited number of exceptions and exemptions to the general rule of disclosure. The main objective of ATI is to force the authorities to disclose what they would rather keep secret. This represents, for administrations and citizens, a significant cultural transformation away from traditional and historical administrative privileges<sup>4</sup>.

This 'documentary transparency' has come to be seen as a cornerstone of administrative democracy<sup>5</sup>. Today over 80 countries have implemented ATI laws. In 1766 Sweden was the first country to give citizens the legal right to access information detained by public sector organisations. In the 1960s, it is the enactment of the American Freedom of Information Act (1966) that influenced a spur of ATI legislations, e.g. Norway (1970), Australia (1982), Denmark (1985), and the United Kingdom (2000)<sup>6</sup>. Since the 1990s, the adoption of such

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<sup>1</sup> FLORINI, A. (1998) The end of secrecy. *Foreign Policy*, 111, 50-63.

<sup>2</sup> FUNG, A., GRAHAM, M. & WEIL, D. (2003) The political economy of transparency: What makes disclosure policies sustainable. John F. Kennedy School of Government Harvard University. OPEN GOVERNMENT (2004) Freedom of information coalition. Freedom of Information Coalition. POPE, J. (2003) L'accès à l'information: Qui y a droit et à quelle information? *Rapport mondial sur la corruption 2003*.

<sup>3</sup> See HINS, W. & VOORHOOF, D. (2007) Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights, *European Constitutional Law Review*, 3, 114-126.

<sup>4</sup> ROBERTS, A. (2005) Spin control and freedom of information lessons for the United Kingdom from Canada. *Public Administration*, 83, 1-23.

<sup>5</sup> OECD (2005) Engaging citizens in policymaking. Paris, OECD.

ROBERTS, A. (2007) Future challenges for the RTI movement. *Fifth Annual International Conference of Information Commissioners*. Wellington.

<sup>6</sup> BANISAR, D. (2006) Freedom of information around the world 2006: A global survey of access to government information laws. Privacy International. HOOD, C. & HEALD, D. (Eds.) (2006) Transparency: The key to better government?, Oxford, British Academy/Oxford University Press.

legislation has greatly accelerated, in part as a development of the rise of both administrative democracy and democratic governance.

The foregoing observations apply in full to the European Union, where a right to the public access of documents has now been in existence for more than fifteen years.

The Union and its forerunner, the European Community, were traditionally secretive organizations<sup>7</sup>. Until the early 1990s, only interested parties enjoyed rights of access to administrative files concerning them personally<sup>8</sup>, while sweeping provisions protecting business secrecy and the confidentiality of the institution's deliberations were (and still are) widespread (see e.g. art. 339 TFEU and art. 6, annex III of the Staff Regulations).

The EU first expressed a commitment to “transparency” through a declaration added to the Maastricht Treaty (Declaration n° 17 “on the right of access to information”). Concrete steps were then taken in midst of a legitimacy crisis, after the Danish negative referendum on the Treaty<sup>9</sup>. The Council and the Commission agreed a common “Code of conduct” on transparency, and amended accordingly their Rules of Procedure by granting the “public” a limited, but legally enforceable right of access to their documents. This was the first step of the EU in the direction of a true ATI legislation.

After such modest beginnings, access to information has known a “slow but inexorable rise”<sup>10</sup> in the hierarchy of EU constitutional principles. With the Treaty of Amsterdam, access to “European Parliament, Council and Commission documents” has been formally enshrined in primary law as a right of EU citizens and residents (Art. 255 of the Treaty establishing the European Community, TEC)<sup>11</sup>. The Treaty of Lisbon, which has only just come in force, has taken this process further in several ways:

- First, it has placed beyond discussion the fact that the public right of access to documents is a fundamental right of EU citizens and residents (see Art. 6 TEU and Art. 42 EU Charter of Fundamental Rights, CFR).

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<sup>7</sup> See GRØNBECH-JANSEN, C (1998) The Scandinavian tradition of open government and the European Union: problems of compatibility?, *Journal of European Public Policy*, 5, 185-199, at 190; DYRBERG, P (1999), Current issues in the Debate on Public Access to Documents, *European Law Review*, 24, 157-710, at 160.

<sup>8</sup> And that, mostly, thanks to the case-law of the European Court of Justice: see ECJ, C-135/92, *Fiskano*, [1994] ECR I-2885.

<sup>9</sup> See BRADLEY, K. (1999) La transparence de l'Union européenne: une évidence ou un trompe-l'oeil?, *Cahiers de droit européen*, 35, 283-362, at 319-320.

<sup>10</sup> AG Poiares Maduro, C-64/05P, *Sweden/Commission*, [2007] ECR I-11389, para. 37.

<sup>11</sup> This new article was mirrored in an amendment to Art. 1 of the Treaty on the European Union, inserting a reference to open government within the EU.

- Second, it has linked, more eloquently than ever before, this right to broader principles of open government, good governance, and participatory democracy (see art. 10(3) TEU and 15(1)(2) TFEU).
- Third, it has laid down the principle that all “Union institutions, bodies, offices and agencies” must grant public access to their documents, subject to partial exemptions for the European Central Bank, European Investment Bank, and EU Courts (see art. 15(3), the successor of art. 255 TEC).

The rise of transparency in EU primary law is of course only part of the story. With the possible exception of article 42 CFR, the above-mentioned provisions are not directly enforceable<sup>12</sup>. They do recognise a right of access to documents, but this right is “subject to the principles and the conditions to be defined” by secondary legislation, which must in particular determine “limits on grounds of public and private interest” (see art. 15(3) TFEU). In EU law, it is therefore secondary legislation that makes of access to documents a legally enforceable right, and it is secondary legislation that defines in detail its object and scope, as well as its limitations *vis-à-vis* competing interests.

The key instrument in the area is currently Regulation (EC) n° 1049/2001 “regarding public access to European Parliament, Council and Commission documents” (Regulation 1049)<sup>13</sup>. This Regulation coexists with a number of special rules concerning access to particular categories of documents – such as Regulation (EC) n° 1367/2006 on “environmental information (the Aarhus Regulation)”<sup>14</sup> – or access to the documents of particular EU bodies.

In April 2008, the European Commission has tabled a proposal to amend Regulation 1049, which is now being examined by the European Parliament and Council (the Recast proposal)<sup>15</sup>. The Commission has presented it as part of a “drive towards more transparency”<sup>16</sup>. In order to evaluate the validity of such a claim, the present paper will analyze and critically assess the most salient aspects of the proposal (sections D.2 and E). As a necessary background, we will recall the central objectives for transparency and ATI laws (section B), the basic features of access to documents under current EU law (section C), as well as the key items on the transparency reform agenda in the EU and elsewhere (section D.1).

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<sup>12</sup> CFI, T-191/99, *Petrie*, [2001] ECR II-3677, 34; AG Poiares Maduro, C-64/05P, *cit*, para. 39. The issue of whether art. 42 CFR has direct effect lies outside the scope of the present contribution.

<sup>13</sup> OJ 2001 L 154/43.

<sup>14</sup> OJ 2006 L 264/13.

<sup>15</sup> COM (2008) 229 final.

<sup>16</sup> *Ibidem*, para. 1.2.

It is an understatement to say that the Recast proposal has not been well received. As it will be seen, it does at least have the merit of identifying a number of relevant questions, which are usually overlooked by transparency advocates. The answers it provides to them, unfortunately, appear distinctively regressive.

## 2 THE 'ARGUMENTS' FOR TRANSPARENCY AND ATI LAWS

Public access to documents is both a legal right and a tool. Its development is based on three postulates: 1) the 'Governance Argument'; 2) the 'Trust Argument'; and 3) the 'Participation Argument'.

### **The Governance Argument**

Access to governmental information, and its subsequent diffusion, gives power to all societal stakeholders to peer through the outer walls of governmental organisations. This possibility, whether it is activated or not through ATI requests, is believed to create an atmosphere more conducive to effective and efficient management of policies and delivery of services. "Sunlight is a great disinfectant"<sup>17</sup> ATI is here yet another mechanism pushing for greater accountability and efficiency of public organisations.

### **The Trust Argument**

Transparency is also intended to improve relations between public authorities and citizens. In a context marked by the ever-present problem of public deficits<sup>18</sup>, the loss of confidence in the authorities<sup>19</sup> demands for greater accountability on the part of those in power<sup>20</sup> and the fight against corruption<sup>21</sup>, access to information makes it possible to reverse some of these trends and to re-establish more harmonious relations between authorities and citizens. It is believed that by 'shining a light' within organisations and diffusing information on their operations and processes, a greater level of trust can be attained.

### **The Participation Argument**

Transparency is, finally, a tool which promotes the co-participation of the people in the development and implementation of public policies. There is a growing trend for the public to participate in decision making and in the policy processes of the State<sup>22</sup>. A more active

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<sup>17</sup> MURDOCK, CW, Sarbanes-Oxley Five Year Later: Hero or Villain, *Loyola University Chicago Law Journal*, 39, p.568

<sup>18</sup> OECD (1999) Fiscal transparency. Paris, OECD.

<sup>19</sup> VAN DE WALLE, S. & BOUCKAERT, G. (2003) Comparing Measures of Citizen Trust and User Satisfaction as Indicators of 'Good Governance': Difficulties in Linking Trust and Satisfaction Indicators. *International Review of Administrative Sciences*, 69, 329-343.

<sup>20</sup> SAVOIE, D. J. (2003) *Breaking the bargain*, Toronto, University of Toronto Press.

<sup>21</sup> TRANSPARENCY INTERNATIONAL (2004) Global corruption report. Berlin, Transparency International.

<sup>22</sup> JUILLET, L. & PAQUET, G. (2001) Politique d'information et gouvernance. Ottawa, Gouvernement du Canada. OPEN GOVERNMENT (2004).

participation of the public in the governance of the state requires information of a higher quality and in a greater quantity. The transparency of state activities becomes, in this context, a *sine qua non* for the active participation of the public in the policy process.

The emphasis put on these three arguments by various national legislations will vary. A proper understanding of the specific rationale for the introduction of an ATI law is necessary for any evaluation of its successful or unsuccessful implementation. It is on that basis that it will be evaluated. The importance given to one criteria or the other shall lead to relatively different options and solutions on the road to a well balanced approach between privacy and transparency. In Switzerland, for example, the federal government's first attempt at enacting an ATI law had the specific objective of positioning the state 'closer to citizen via increased transparency'<sup>23</sup>. When 'la loi fédérale sur le principe de la transparence dans l'administration' or LTRANS was passed in December 2004, it was in order "*to promote the transparency of the mission, organization and activity of the administration. To this end, it contributes to public information by guaranteeing access to official documents*"<sup>24</sup>.

The initial impetus for the development of an access to information legislation in the EU is by and large similar to that of most countries and integrates parts of the three arguments presented above.

Regulation 1049, in particular, identifies the main objectives in establishing a European ATI law: 'participation', 'legitimacy', 'accountability' and 'democracy'. "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*. Openness contributes to *strengthening the principles of democracy* and respect for fundamental rights ..."<sup>25</sup> Likewise, the Treaty on the functioning of the European Union identifies the benefits expected from ATI as 'good governance' and the 'participation of civil society'. "In order to *promote good governance* and ensure the *participation of civil society*, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible" (art. 15(3)).

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<sup>23</sup> CONSEIL FÉDÉRAL (2003) Message relatif à la loi fédérale sur la transparence de l'administration.

<sup>24</sup> Loi fédérale du 17 décembre 2004 sur le principe de la transparence dans l'administration (LTrans, RS 152.3).

<sup>25</sup> Regulation 1049, recital 2, emphasis added.

### **3 ACCESS TO DOCUMENTS IN THE EU: CORE FEATURES AND OPEN QUESTIONS**

The current rules pertaining to ATI in the EU cover the same aspects as most ATI legislations. They define who can access information, what can be accessed, under what process it can be accessed, the time allotted for disclosure, the eventual fees to be paid and the redress procedures in the case of a refusal to communicate on the part of the authorities. Of these elements, four aspects are of interest for our evaluation of the Recast proposal: 1) who has rights of access and what organisations are under ATI obligations; 2) what can be accessed, i.e. the definition of what is an accessible “document”; 3) the special rules on third party documents; and 4) the substantive principles regulating the exceptions to disclosure.

#### **3.1 THE SCOPE OF DOCUMENTARY TRANSPARENCY IN THE EU**

##### **3.1.1 WHOSE ACCESS, TO WHOSE DOCUMENTS?**

As noted above, the Treaties only recognize the public right of access to documents to nationals and residents of a Member State. This right, which can be exercised without justification on the part of the requester (art. 6(1) Regulation 1049), is distinct from and without prejudice to “privileged” rights of access under EU law, such as the right of every person to access his or her personal data held by the institutions (art. 8(2) CFR), or the rights of every person to have access to his or her file in an administrative procedure (art. 41(2) CFR). Conversely, interested parties are entitled like anybody else to obtain documents *via* their public right of access<sup>26</sup> – and as a matter of fact they often take this route, partly because due process rights are insufficiently codified in EU legislation<sup>27</sup>.

As for the organizations that are subject to transparency obligations under Regulation 1049, these are at present the Parliament, Council, and Commission. This is so because the Regulation was adopted under the old rules of the Amsterdam Treaty. The new rules, placing transparency obligations on all EU bodies, still await implementation.

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<sup>26</sup> If they do so, however, their “special” interest is entirely irrelevant, and the request must be treated as a request from any citizen to bring a document in the public domain: see ECJ, C-266/05P, *Sison*, [2007] ECR I-1233, 43-48. In this particular case, non-disclosure of certain documents relating to the applicant was deemed compatible with the rules on public access, but subsequently judged as contrary to the applicant’s “rights of the defence” (CFI, T-47/03, *Sison*, [2007] ECR II-73, 210-214).

<sup>27</sup> European Commission, Report on the implementation of the principles in EC Regulation No 1049/2001, COM (2004) 45 final, paras. 3.10 and 7.2.1.

These two limitations – only EU citizens and residents have a public access right, and only vis-à-vis the three main institutions – do not apply in the case of “environmental information”<sup>28</sup>. But these limitations are not as strict as it may seem. On the one hand, the institutions “may” – and in practice do – grant access to any person regardless of citizenship and residence (art. 2(2) Reg 1049)<sup>29</sup>. On the other hand, many EU bodies have been formally subjected to Regulation 1049 (e.g. EU agencies)<sup>30</sup>, and others still have voluntarily adopted identical or slightly less stringent transparency rules (e.g., the Committee of the Regions and the Court of Auditors)<sup>31</sup>. In other words, the implementation of the Lisbon Treaty will not revolutionize matters – it will bring clarity in this area, and it will also subject some EU bodies to stricter transparency obligations than is the case today<sup>32</sup>.

### 3.1.2 WHAT IS A “DOCUMENT”?

The foregoing discussion has taken for granted the notion of “document”, to which we must now turn. Under current law, a “document” is defined as “any content whatever its medium” (art. 3a Reg. 1049; see also art. 42 CFR). This is indeed an extremely broad definition, potentially covering formal documents, tape recordings of meetings, and, arguably, even “post it” notes drawn up by officials<sup>33</sup>.

Be that as it may, an important point is that EU Law recognizes a right of access to “documents” not “information”. The distinction may seem a fine one, yet it carries one consequence: for a right of access to exist, the information (or “content”) must be contained in a pre-existing “medium”. In other words, EU institutions are not duty-bound to produce “new documents” acting on a request for information<sup>34</sup>.

This point deserves close attention, as it could potentially constitute the Achille’s heel of EU transparency law. The latter’s purposes can in fact be defeated if the institutions choose to

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<sup>28</sup> Aarhus Regulation, art. 1 and 2 (a-c).

<sup>29</sup> See DRIESSEN, B. (2008) *Transparency in EU institutional law*, London, Cameron May, para. 2.1.

<sup>30</sup> See the Regulations published in OJ 2003 L 245, as well as Regulation (EC) n° 58/2003 (OJ 2003 L 11/1) on executive agencies.

<sup>31</sup> See respectively the Rules of Procedures of the CoR (OJ 2010 L 6/14) and Decision n° 12/2005 of the Court of Auditors on public access to Court documents (OJ 2009 C 67/1).

<sup>32</sup> In the intricate jungle of the Union’s institutional framework, there are indeed bodies that apply weak rules of access on a voluntary basis (e.g. the European Council: see Rules of Procedure, OJ 2009 L 315/51, art. 4, 10 and 11) or that do not apply any such rules at all (e.g. EU Courts, including for their non-judicial activities).

<sup>33</sup> For a different position, see DRIESSEN (2008), p. 17.

<sup>34</sup> See in particular CFI, T-264/04, *WWF-EPP*, [2007] ECR II-911, para. 75 ff; CFI, T-380/04, *Terezakis*, [2008] ECR II-11, 151 ff. In spite of its title, the Aarhus Convention “on access to information, public participation in decision-making and access to justice in environmental matters, which has been given effect in the EU through the Aarhus Regulation, also provides for a right to access to “documents”. This is so because it defines “information” as “any information in written, visual, aural, electronic or any other material form” (art. 2(3) Aarhus Convention; see further DRIESSEN (2008), p. 16-17).

keep “off the record” the information they want to shield from public scrutiny<sup>35</sup>. The point is important, also, because it highlights a core functional need of EU transparency law: if the public is to know what documents are held by EU institutions, publicly accessible and comprehensive registers must be maintained.

Current law establishes qualified duties on both points.

Institutions must indeed draw up and maintain documentation of their activities (e.g. minutes of meetings) – but only “insofar as possible”: failure to do so will be considered unlawful only if “unpredictable” or “arbitrary”<sup>36</sup>.

As for registers, art. 11 Reg. 1049 requires institutions to set them up and to maintain them. However, it does not require them to include references to all their documents therein. It even falls short of establishing what documents, if any, must be referenced – a point which has recently given rise to disagreement between the EU Ombudsman and the Commission<sup>37</sup>.

It may be readily conceded that a rigid obligation to put on record every spoken word, and to reference everything falling in the broad definition of “document” in a register, would be unreasonable and disproportionate<sup>38</sup>. At the same time, it is quite clear that the law as it stands opens up a tempting space for the institutions to adopt “avoidance strategies”<sup>39</sup>.

### **3.2 THIRD PARTY DOCUMENTS AND MEMBER STATES’ RIGHTS TO CONFIDENTIALITY**

Following from the previous discussion, it is now important to note that the “documents of” EU institutions are currently defined as the documents “held” by EU institutions, whatever their author (see art. 2(3) Reg. 1049). This constitutes a major step forward from pre-Amsterdam law, which limited access to documents “drawn up” by the institutions through

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<sup>35</sup> PASQUIER, M. & VILLENEUVE, J.-P. (2006) Access to information in Switzerland. From secrecy to transparency. *Open Government*, September-October.

<sup>36</sup> CFI, *WWF-EPP*, *cit.*, paras. 61-63. It is noteworthy that in this case, the Council radically denied the existence of any rule to the effect that it should “minute” meetings (para. 59). It is also noteworthy that the CFI held that failure to minute a “purely informative” debate, which was not functional to the adoption of any implementation measure, was not in breach of the duty described above (para. 62).

<sup>37</sup> Complaint 3208/2006/GG (“Statewatch case”). The Ombudsman’s position is that each “relevant” document should be included in the register (see final remark, together with a summary of the Commission’s reply, in EU Ombudsman (2009), Follow-up to Critical and Further Remarks – How the EU Institutions responded to the Ombudsman’s Recommendations in 2008, p. 35). The Commission has maintained that it enjoys broad discretion in this respect, and that while “legislative” documents should be systematically included, it can legitimately exclude documents relating e.g. to trade defence and competition law procedures (see full-text letter of the Commission, dated 30 September 2009, available on [www.statewatch.org](http://www.statewatch.org)).

<sup>38</sup> On this point see EU Ombudsman (2007) Response to the Commissions green paper “Public access to documents held by institutions of the European Community: a review”, p. 6-7.

<sup>39</sup> See the facts of the *WWF-EPP* case cited above (“this document doesn’t exist”), as well as the documents relating to the Statewatch complaint to the EU Ombudsman.

the so-called “authorship rule”. The importance of this point can hardly be overstated: a vast proportion of the documents in the hands EU institutions, and many of those whose disclosure may be of interest to the public, are communicated by third parties. This is particularly true of documents transmitted by the Member States, who are closely involved in both policy-making and policy implementation in the EU.

But this step was not taken without precautions, and access to third-party documents is covered by several special rules. The general rule, applying to any third-party document, is that the originator must be consulted prior to disclosure (art. 4(4) Reg. 1049).

If the originator is a Member State, it has the special right to “request the institution not to disclose the document” (art. 4(5) Regulation 1049). The meaning of this rather ambiguous provision was clarified in a landmark judgment of the European Court of Justice. The Court made it clear, first, that if the Member State concerned is opposed to disclosure, then the institution is duty-bound to refuse it. On the other hand, the Court clearly distinguished this right from an unconstrained “veto right”: following its judgment, a Member State may only oppose disclosure on the grounds enumerated in the Regulation, and the institution’s decision refusing access is then subject to full judicial review by EU Courts<sup>40</sup>

A true “veto right” exists, by contrast, in the case of “sensitive” documents (i.e. documents classified as “confidential”, “secret” or “top secret”). For such documents, the originator (State, EU institution, or international organization) can even veto the inclusion of a reference in the institution’s register (art. 9).

### **3.3 THE PROTECTION OF COMPETING INTERESTS: EXCEPTIONS TO PUBLIC ACCESS**

#### **3.3.1 OVERVIEW**

It is generally accepted that the objective of the right of access to documents is not absolute transparency but relative transparency: all access-to-documents laws provide, to a greater or lesser extent, for exemptions and limitations designed to protect competing interests that would be harmed by disclosure. That is also the case of public access to EU documents under art. 15(3) TFEU. We already noted two rules in this respect: the exemption of the EU Banks and Courts from transparency obligations, save in the exercise of their administrative tasks, and the “veto right” accorded to the originator in respect of sensitive documents.

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<sup>40</sup> ECJ, C-64/05P, *Sweden/Commission*, [2007] ECR I-11389, para. 43 ff.

The central provision is, however, article 4 of Regulation 1049. This article enumerates the interests whose protection may justify an exception to disclosure, and lays down differentiated principles for balancing them against the public's right to know:

- Under paragraph 1, when disclosure would undermine *public security* (including defence and military matters), *international relations*, or *economic policy* broadly defined, access to a document must be refused (lit. a). The same applies to privacy and the integrity of the individual (lit. b). In order to apply one of these exceptions, the institution concerned must only carry out a "harm test", i.e. ascertain whether disclosure would harm one of the relevant interests.
- Under paragraph 2, the institutions must refuse access to documents that would undermine the *commercial interests* of a legal or moral person, *court proceedings*, *legal advice*, or the purpose of *inspections, investigations and audits*. In order to apply one of these exceptions, the institution must carry out a harm test as under paragraph 1, and also consider whether there is an "overriding public interest in disclosure"<sup>41</sup>.
- Under paragraph 3, finally, institutions must refuse access to documents *relating to a matter where the decision has not been taken*, when disclosure would seriously undermine the decision-making process. *Opinions for internal use* may be kept confidential, for the same reason, even after the decision has been taken. In such cases, an exception may only be justified on the basis of a qualified harm test ("seriously undermine"), and unless there is an "overriding public interest in disclosure".

The interpretation and application of these exceptions has been, unsurprisingly, the main source of litigation under Regulation 1049<sup>42</sup>. Before examining the principles that have been developed by EU Courts, it is interesting to consider briefly the approach that the requested institutions, particularly the Commission and the Council, have taken in this matter.

### **3.3.2 THE COUNCIL AND COMMISSION APPROACH: EXCEPTIONS OR "BLANKET" EXEMPTIONS?**

From the very outset, the Commission and the Council have shown particular reluctance in disclosing certain categories of documents, and have relied on article 4 Reg. 1049 to systematically refuse public access to them.

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<sup>41</sup> For an interpretation of this formula, see ECJ, C-39/05P and 52/05P, *Turco*, [2008] ECR I-4723, para. 44-46.

<sup>42</sup> The interpretation and application of these exceptions also represent the majority of ATI litigation in most jurisdictions.

The Commission has, in particular, routinely resisted attempts to access its files relating on antitrust, state aid, and infringement procedures. Significantly, these documents are usually absent from the Commission's register<sup>43</sup>. Whenever interested parties, NGOs, or journalists have nonetheless requested access to them, the Commission has regularly invoked one or more of the grounds listed in article 4: protection of investigations, commercial interests, court proceedings, or "space to think". More interesting than this bare fact are the arguments that the Commission has put forward to defend its practice. The pleadings in the case of *Technische Glaswerke* are as good as any. The case concerned access to the files of state aid procedures. The applicant, an interested party, had requested all the documents relating to its own state aid procedure, as well as those relating to a procedure concerning a competitor. Significantly, the Commission expressed its deep dissatisfaction with the fact that interested parties could try to obtain, *via* public access, the disclosure of documents they could not access under their "privileged" rights<sup>44</sup>. It stopped short of arguing that Regulation 1049 did not apply, however, and invoked the exception relating to the protection of investigations instead. It did so in the following terms:

"[A]s in [infringement] proceedings for failure to fulfil obligations, there must be, in aid investigation procedures, proper cooperation in good faith between the Commission and the Member State, which excludes third parties having access to documents relating to those procedures before they have been concluded"<sup>45</sup>.

The same kind of argument was advanced in *Bavarian Lager II*, where the applicant sought access to the names of interest representatives that had been consulted in an infringement procedure. At the time of the dispute, the infringement procedure had been closed for approximately six years. The Commission nonetheless argued that:

"If the names of persons who provided information to the Commission [in the course of investigations relating to infringement procedures against Member States] could be disclosed against their will, the Commission could be deprived of a valuable source of information, putting at risk its ability to carry out such investigations".

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<sup>43</sup> This was the central point at stake in the abovementioned Statewatch complaint to the EU Ombudsman.

<sup>44</sup> See COM (2004) 45, p. 43, where the Commission goes so far as to equate the use of public access rights by interested parties to "inappropriate recourse to [Regulation 1049]".

<sup>45</sup> CFI, T-237/02, *Technische Glaswerke*, [2006] ECR II-5131, para. 69.

Such arguments may well be based on sound considerations. But they are based on consideration so general as to apply to any investigation procedure. They do not tend to justify the refusal to disclose this or that particular document – rather, they seek the exemption of whole categories of documents.<sup>46</sup>

Similar arguments were made for other categories of documents, the legal opinions provided by the institutions' legal services being another good case in point. Such documents are covered by a specific exception (art. 4(2) Reg. 1049). The institutions have usually refused access to them by relying on arguments tending to a thorough exemption from public access rules. Consider the following passage, from the Council's arguments in the *Turco* case:

“[T]here is a general need for confidentiality in respect of legal advice on legislative questions, since, first, the disclosure of such advice could give rise to lingering doubts as to the lawfulness of the legislative act concerned and, secondly, the independence of its legal service would be compromised by systematic disclosure of that advice”<sup>47</sup>.

In this case, as in *Bavarian Lager*, the argument failed to convince the Courts.

### 3.3.3 THE APPROACH OF EU COURTS: CASE-BY-CASE EXCEPTIONS

Over the years, a substantial body of case law has accumulated on the exact scope and interpretation of the exceptions listed in article 4. While this case law is not exempt from obscurities and contradictions<sup>48</sup>, EU Courts have developed a number of well-established principles, which have been in part summarized by the Court's Grand Chamber in the aforementioned *Turco* judgment.

The basic principle is that under the Regulation, which aims to ensure the “widest possible access to documents” (art. 1), disclosure is the rule, and exceptions must be interpreted restrictively<sup>49</sup>. In itself, the principle is banal – but its implications are not.

First of all, before they can apply an exception, the institutions must examine the content of each requested document – including where the request concerns a group of (unspecified) documents (e.g. “the file relating to ...”). This duty is linked to a number of other key principles:

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<sup>46</sup> CFI, T-194/04, *Bavarian Lager*, [2007] ECR II-4523, para. 85.

<sup>47</sup> ECJ, C-39/05P and 52/05P, *Turco and Sweden*, [2008] ECR I-4723, 54.

<sup>48</sup> ADAMSKY, D. (2009) How wide is “the widest possible”? Judicial interpretation of the exceptions to the right of access to official documents revisited, *Common Market Law Review*, 46, 521-549..

<sup>49</sup> ECJ, *Turco*, *cit.*, para. 36.

- (a) The harm test that institutions must carry out under article 4 must be specific and concrete. In other words, before it can refuse access to a document, an institution must assess whether there are concrete and specific reasons to believe that disclosure would affect a protected interest, at the time when the request is made (for a reference to this all-important time factor, see art. 4(7)).
- (b) Likewise, when an exception under art. 4(2) and (3) is considered, the institutions must assess *in concreto* whether there is an “overriding public interest in disclosure”. According to the Court of Justice, the interest in disclosure will normally be stronger in regard of documents relating to a legislative procedure, since “the possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights”<sup>50</sup>.
- (c) The concrete examination of each document is necessary i.a. because the requested institution must ascertain what parts of the document are indeed covered by an exception. The duty to give partial access, whenever possible, is clearly stated in art. 4(6) of the Regulation.

It is not necessary to go into further details to show that the Courts have taken a fundamentally different approach from the Council and Commission. Of course, they have not been unreceptive to arguments based on the protection of public and private interest. In some respects, they have even taken a deferent approach – for instance, by affording the political institutions broad discretion in judging whether disclosure would harm public security, or any other public interest cited in art. 4(1a)<sup>51</sup>. However, EU Courts have constantly rejected the institutions’ arguments tending to demonstrate that whole categories of documents should be excluded from public access. Such arguments have been usually dismissed as based on “mere assertions” of “hypothetical risks”, i.e. as falling short of the demonstrating a concrete and “reasonably foreseeable risk” of harm to a protected interest.

Courts have proved only slightly more sympathetic to the argument that the requisite document-by-document examination would entail a disproportionate amount of work. In the *VKI* case, the Court of First Instance reaffirmed the duty of a concrete examination even in situations where a large number of documents is requested. It did concede that in very exceptional cases the institution could dispense with it. But following art. 6(3) of the

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<sup>50</sup> *Ibid.*, 37-46.

<sup>51</sup> ECJ, *Sison*, *cit.*, para. 34..

Regulation, it pointed out that in such cases it was the institution's duty to consult the applicant and to actively seek and propose alternative, reasonable solutions<sup>52</sup>.

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<sup>52</sup> CFI, T-2/03, *VKI*, [2005] ECR II-1121, para. 60 ff and 94 ff.

## 4 REFORMING THE RIGHT OF PUBLIC ACCESS IN THE EU: REFORM AGENDAS AND CONCRETE PROPOSALS

### 4.1 THE IMPETUS TO REVISE ATI LEGISLATION

Access to information has been deemed, on the whole, a positive endeavour. After more than 20 years of experience, the Canadian Commissioners concluded that “[t]wo decades is not long in the life of a statutory right. Yet, in its short life, the *Access to Information Act*'s ability to overcome barriers to openness, thrown up by a deeply-imbedded governmental culture of secrecy, has been put to test after test. The Act has risen to the challenge; it has shown its strength to overcome barriers of unreasonable delay, fees and application of exemptions”<sup>53</sup>. The EU Ombudsman has expressed similar views in 2007: “Moving to a situation in which availability of information is the norm and confidentiality the exception involves a major cultural change. Whilst the situation is by no means perfect, the Union’s institutions have, in the period since the adoption of the Maastricht Treaty, made real progress towards greater transparency”<sup>54</sup>.

Positive reviews do not, of course, preclude the need for modifications and improvements. Either through full-blown revisions or more simply through administrative review procedures, numerous countries are re-evaluating if not the fundamental impetus for transparency at least its modalities and applications. Currently, the governments of the United Kingdom, Scotland, New Zealand, Australia, Mexico and India are reviewing their ATI laws. The general trend is favouring a greater transparency and more stringent access to information laws. In the European Union, the debate on revising Regulation 1049 has started in 2006, with an EP resolution calling for immediate proposals<sup>55</sup>. This was followed in 2007 by a Commission Green Paper<sup>56</sup>, which attracted a large number of responses from the public, private, and non-profit sectors<sup>57</sup>.

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<sup>53</sup>OFFICE OF THE INFORMATION COMMISSIONER OF CANADA (2003) Annual Report 2002-2003. Ottawa, office of the information commissioner of Canada.

<sup>54</sup> EU Ombudsman (2007), p. 1. See also European Commission, Green Paper: Public Access to Documents held by institutions of the European Community – a Review, COM (2007) 185, p. 2, where the Commission states that “[e]ven if the implementation of the Regulation put a burden on the institutions, the overall conclusion was that it had worked remarkably well”.

<sup>55</sup> EP resolution with recommendations to the Commission on access to the institutions’ texts, P6-TA(2006)0122.

<sup>56</sup> COM (2007) 185.

<sup>57</sup> Contributions available at [http://ec.europa.eu/transparency/revision/contributions\\_en.htm](http://ec.europa.eu/transparency/revision/contributions_en.htm).

In the EU and elsewhere, the current discussion surrounding ATI touches several key points, examined below:

- Defining what organisations should fall under ATI;
- Defining exactly what type of information/document can be requested;
- Dealing with classified information and documents coming from third parties;
- Fine-tuning the scope of the exceptions and exemptions to the public right of access.
- Evaluating the administrative costs of transparency;
- Improving the transparency of legislative, regulatory and policy processes.

For the purpose of the following discussion, it should be borne in mind that several of these items on the EU reform agenda are inextricably linked to an overarching, and somewhat more technical preoccupation: that of clarifying the legislative framework, by codifying the principles emerging from the case-law and/or by articulating more explicitly the relationship between public access to documents, on the one hand, and privileged rights or special confidentiality rules, on the other hand.

#### **4.1.1 DEFINING WHAT ORGANISATIONS SHOULD FALL UNDER ATI**

The question of defining what organisations should fall under ATI legislation has central relevance in many jurisdictions, where three distinct and separate dynamics threaten directly the integrity of ATI regimes: the statutory exclusion of governmental organizations, often at their own requests<sup>58</sup>; the increasingly frequent creation of autonomous corporate bodies charged with carrying out public tasks, which are often exempted from ATI obligations<sup>59</sup>; and the increasing externalisation of public tasks to private sector organisations<sup>60</sup>.

In the EU, however, the Lisbon Treaty has effectively foreclosed the discussion in favour of a near-universal subjection of EU bodies to transparency obligations (see above, C.1). The question thus becomes simply one of aligning Regulation 1049 to the new Treaty rules by

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<sup>58</sup> EVANS, R. (2006) The freedom of information act forces the downfall of Scottish Tory leader David Mclethie over his use of taxis, but what else has it revealed to the media in the past year? *The Guardian*. 2 January 2006 ed. London.

<sup>59</sup> ROBERTS, A. (2007).

<sup>60</sup> COLLINS, P. & BYRNE, L. (Eds.) (2003) *Reinventing government again*, London, The Social Market Foundation. HOOD, C. (1991) A public management for all seasons. *Public Administration*, 69, 3-19. OSBORNE, D. & GAEBLER, T. (1993) *Reinventing government: How the entrepreneurial spirit is transforming the public sector*, New York, Penguin Group.

extending its scope of application – a point on which there is at present no disagreement among the institutions<sup>61</sup>.

#### **4.1.2 DEFINING EXACTLY WHAT TYPE OF INFORMATION/DOCUMENT CAN BE REQUESTED**

ATI legislations have different definitions of what can be requested. For example, in the case of Switzerland, only *completed* documents can be accessed.<sup>62</sup> In other countries, such as Canada, the e-mails and personal expenses of civil servants can also be accessed.<sup>63</sup> There is currently a trend towards widening the definition of documents and this despite some of the reservations emitted at the logistical and financial consequences of such modifications<sup>64</sup>.

As we have seen, current EU Law needs no fundamental widening of the “document” definition. The Commission has rather advocated a restriction thereof, by suggesting that some requirement of formalization or registration be included for the sake of legal certainty<sup>65</sup>. On the other hand, the inclusion of “loose” information contained in databases is being considered. Whether and how such information is covered by the current definition is a matter of debate<sup>66</sup>. Be that as it may, there is a broad understanding that formal inclusion would contribute to keep the right of public access abreast of technological development<sup>67</sup>.

#### **4.1.3 DEALING WITH THIRD PARTY DOCUMENTS**

Most governments, and especially those in multilevel systems of government, receive numerous documents and information from third parties. As we have seen, this aspect is covered by special rules under Regulation 1049.

The question of the management and right of access to give to these documents still remains to be resolved in most ATI jurisdictions. It is clear that this situation can and does result in decision directly contravening the spirit and letter of ATI legislations. The “security of information” agreements developed by the American government constitute a textbook case

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<sup>61</sup> See the Commission’s explanatory note on the alignment of the Recast proposal with the Treaty on the Functioning of the European Union, Council doc. n° 5461/10.

<sup>62</sup> PASQUIER, M. & VILLENEUVE, J.-P. (2006).

<sup>63</sup> DOUGLAS, K. (2006) *Les lois sur l'accès à l'information au Canada et dans quatre autres pays*. Library of Parliament (Ed. Canada).

<sup>64</sup> PASQUIER, M. & VILLENEUVE, J. P. (2007) Organizational barriers to transparency: A typology and analysis of organizational behaviour tending to prevent or restrict access to information. *International Review of Administrative Sciences*, 73, 147-162.

<sup>65</sup> See COM (2004) 45, paras. 2.3.1, 2.3.5, and 6.2; COM (2007) 185, para.:7.3.2. For a critical reaction, see EU Ombudsman (2007), p. 6.

<sup>66</sup> This point was at issue in the EU Ombudsman complaint n. 1693/2005/PB (see EU Ombudsman Annual Report 2007, 45).

<sup>67</sup> EU Ombudsman (2008) Public access to information in databases.

in this regard. They stipulate that measures must be taken by the country receiving information from the United States to protect it.<sup>68</sup>

In this matter, as we have seen, article 9 of Regulation 1049 grants a full “veto right” to the originator of sensitive documents. A better delimitation of the rights and privileges affecting such third party documents must be attained. The risk is the development of an ATI system that applies the lowest possible denominator; a case in which the benefits of ATI would most likely be suboptimal. The European Parliament, in particular, has been consistent in requesting the introduction of more stringent conditions on classification, coupled with a periodical review of the need to retain classification for particular documents. It also called for a better delimitation of the Member States’ rights to oppose disclosure of “their” documents – but this was before the Court of Justice made it clear that this was no unconditional veto right (above, C.2).

#### **4.1.4 FINE-TUNING THE SCOPE OF THE EXCEPTIONS AND EXEMPTIONS TO THE PUBLIC RIGHT OF ACCESS**

The balance between the right of public access against competing interests is largely contingent on the formulation of the exceptions to transparency obligations, and on the procedural mechanisms for their implementation. In many jurisdictions, the discussion focuses on the exceptions relating to public security and international relations. Many criticise the overextension of such justification to effectively trump ATI rules.

In the European Union, the Commission has instead largely focused the debate on the protection of commercial interest and data protection. Though stating the point in interrogative form, the 2007 Green Paper clearly suggested that more protection could be afforded to such interests – a point on which many qualified respondents disagreed<sup>69</sup>.

The Commission also suggested that clearer rules, imposing disclosure or non-disclosure in particular circumstances, could be “distilled” from the “case-by-case” exceptions contained in the Regulation. This, the Commission argued, could favour legal certainty.

#### **4.1.5 EVALUATING THE ADMINISTRATIVE COSTS OF TRANSPARENCY**

The cost of transparency is high on the reform agenda and is in many ways tied with the development of proper strategies to create, use and archive documents and information.

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<sup>68</sup> ROBERTS, A. (2002), "Australia's "great surprise" for the US: negotiating the 2002 Security of Information Agreement," *Freedom of Information Review* (106), 50-51.

<sup>69</sup> COM (2007) 185, paras. 7.1 and 7.2; EU Ombudsman (2007), p. 8-9.

Transparency is not free. Despite savings resulting from transparency (better information and control of costs) the fact remains that documentary transparency is expensive. For example, each official demand for information under the Canadian Freedom of Information Act costs on average 2000 CND dollars.<sup>70</sup> For the year 2000 in the United States, the cost of information demands — after deduction of fees collected — amounted to 253 million dollars.<sup>71</sup> Given the many financial problems that governments are faced with today, there is certainly a strong temptation to reduce these budgets or to increase the direct cost of making an access to information request.<sup>72</sup> As fees are also a way of impeding access to information, the financial question soon becomes one of policy effectiveness. The question of ATI resources is not only financial. Some argue that too much openness does in fact directly hamper the delivery of services. “In terms of efficiency, too much openness will deflect resources away from the provision of essential public service and services.”<sup>73</sup> The current challenge is to strike a balance between on the one hand ballooning costs, direct and indirect, the desire through financial means of restricting access and on the other the viability of a transparency approach that has proven its value over time.

In its consultation documents, the Commission placed considerable emphasis on this aspect. It did mention better information management as the key response to the problem. But it went on to suggest that more flexibility could be allowed to the institutions to reject “excessive” or “abusive” applications for access, and that a system of invoicing could be introduced<sup>74</sup>. The proposal to introduce “per se” rules applying to well-defined cases, instead of “case-by-case” exceptions may also be considered in this light: by their very nature, “per se” rules would dispense the institutions from the costs and burden involved in examining in-depth each requested document<sup>75</sup>.

#### **4.1.6 IMPROVING THE TRANSPARENCY OF LEGISLATIVE, REGULATORY AND POLICY PROCESSES**

The ‘protection’ of key aspects of the policy process from transparency, this ‘space to think’, is aimed at guaranteeing the voicing of possibly uncomfortable truths. National and EU ATI

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<sup>70</sup> OFFICE OF THE INFORMATION COMMISSIONER OF CANADA (2000-2001) Annual report 2000-2001. Ottawa, office of the information commissioner of Canada.

<sup>71</sup> BLANTON, T. (2002) The world's right to know. *Foreign Policy*, 131, 50-58.

<sup>72</sup> FUNG, A., GRAHAM, M. & WEIL, D. (2003).

<sup>73</sup> BIRKINSHAW, P. (2006) Freedom of information and openness: Fundamental human rights? *Administrative Law Review*, 58, 177-218.

<sup>74</sup> COM (2004) 45, paras. 4.8 and 6.4; COM (2007) 185, 7.3.

<sup>75</sup> *Ibidem*, para. 7.3.3.

legislations cover and protect such a space. But, the growing jurisprudence has delimited in an increasingly precise way how large, or how small, that protective bubble should be.

In the case of Canada, the elements located within a minister's office are excluded from the reach of ATI and in Switzerland access to a document can be refused if it is susceptible to hamper the free formation of opinion<sup>76</sup>. Some criticism has been voiced as to the increasingly narrow place given to this protection<sup>77</sup>, while other point to the reaction of administration in abusing the protections accorded in the law<sup>78</sup>. The question remains one of balance, how much and how little transparency is needed in policy processes? What should be the scope of 'legislative transparency'?

This issue is particularly salient in the EU, whose key decision-making processes are still in part shrouded by secrecy. In its 2006 resolution, the European Parliament called for a differentiated approach, and advocated for "full transparency" in law-making and regulatory procedures. According to the EP, "full transparency" would mean direct access to all documents drawn up and considered during such procedures, with exceptions only for classified documents<sup>79</sup>.

This stance clearly reflects the "participation" rationale for public access to documents (see above, B). However, as observed in particular by the EU Ombudsman, it runs the risk of weakening the case for strong administrative transparency, thus neglecting the "trust" and "good governance" rationales for public access to documents.

## **4.2 THE RECAST PROPOSAL TABLED BY THE COMMISSION**

The various elements we have mentioned above all underline the tensions and difficulties in devising an ATI legislation that is workable and effective. It is by confronting such tensions and difficulties that an appropriate balance between administrative privilege and transparency rights must be achieved. This task is inherently a difficult one. It is made even more difficult by the biases that characterize this policy field. For, as the Canadian Commissioner stated in his annual report 2002-2003, "...there remains a deep nostalgia in the bureaucracy for the days when officials controlled information and the spin of the message. Officials have not

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<sup>76</sup> LTRANS (2004): Art.7, al.1

<sup>77</sup> SAVOIE, D.J. (2003)

<sup>78</sup> PASQUIER, M. & VILLENEUVE, J. P. (2007).

<sup>79</sup> See EP 2006 Resolution, Annex I, Recommendation 2.

given up the fight to weaken the law, but they have come to realize that the only effective strategy left to them is to rewrite the law.”<sup>80</sup>

The Commission has tabled its proposal to recast Regulation 1049. Is it part of a strategy to “rewrite the law” in its self-interest, or is it a true “drive towards more transparency”?

The proposal contains a number of amendments, ranging from the relatively marginal (e.g. a slight extension of the time-limits for answering access requests) to the very important (e.g. revisiting the grounds for exceptions in art. 4). Within the limits of this paper, we will present and discuss a selection of the most salient aspects.

#### **4.2.1 THE SCOPE OF APPLICATION OF PUBLIC ACCESS RIGHTS**

Under the rubric of “scope”, one might be tempted to discuss the extension of transparency obligations to all EU bodies – which the proposal does *not* foresee, but which will nonetheless be implemented – and of transparency rights to all natural or legal persons – which the proposal foresees, but which might lack legal basis in article 15 TFEU.

The important point is, however, the amended definition of “document”. This new definition would include “data contained in electronic storage, processing and retrieval systems”, provided that “they can be extracted in the form of a printout or electronic-format copy using the available tools for the exploitation of the system”. As said, this would broaden the scope of transparency, or at any rate codify good practice developed under Regulation 1049<sup>81</sup>.

However, the new definition would also entail a potentially significant restriction. As far as documents drawn up by the institutions are concerned, it would only cover documents “formally transmitted to one or more recipients or otherwise registered” (art. 3(a) Recast). Commissioner Wallström has defended this amendment by pointing out that the present definition, potentially covering “post it” notes drawn up by EU officials, entails “a risk of ambiguity and bad practice”<sup>82</sup>. And as said above, it may be readily conceded that access rules covering “every scrap of paper”, or requiring the registration thereof, could lead to undesirable results<sup>83</sup>. Yet, in trying to avert this risk, the Commission’s proposal gives rise to graver problems. Although the legal implications are not entirely clear, the new definition

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<sup>80</sup> OFFICE OF THE INFORMATION COMMISSIONER OF CANADA (2003).

<sup>81</sup> This is currently the practice of the Commission, which has received the approval of the EU Ombudsman (...). It is widely acknowledged that as the law stands, databases could be considered as excluded from the notion of “document”.

<sup>82</sup> See Council doc. 7394/09, 5, titled “Outcome of the EP first reading”.

<sup>83</sup> See DRIESSEN (2008), p. 17

would give the institutions, *via* their own internal rules on the registration of documents, considerable control on the actual scope of transparency.

#### **4.2.2 NEW EXEMPTIONS IN LIEU OF CASE-BY-CASE EXCEPTIONS**

Excluding “scraps of papers” and “post it” notes is not the only restriction proposed to the scope *ratione materiae* of the Regulation. The Recast proposal includes two absolute exemptions covering important formal documents, whose disclosure can at present be refused only on the basis of a concrete examination.

The first exemption concerns the documents submitted by parties other than the institutions to Courts (art. 2(5) Recast). It reflects uncontroversial preoccupations – to respect the procedural autonomy of Courts, as well as the other parties’ right to a fair trial – and it does not appear to bring significant limitations to transparency rights.

The second exemption, by contrast, is harder to justify and would entail major consequences for access to documents in the EU. Under art. 2(6) Recast, the files relating to investigations or “proceedings concerning an act of individual scope” would be temporarily excluded, until the closure of investigation or until the act becomes “definitive” – i.e. until it cannot be challenged anymore or litigation has ended. Such documents would moreover be permanently excluded if they contain information obtained from natural or legal persons during investigations.

The rationale behind this “blanket” exemption is all too obvious: it would solve most of the problems the Commission faces under the current rules. To wit:

- It would eliminate at the root any tension between privileged rights of access and public access, since it would strip public access of all utility for interested parties. Remarkably, no suggestion is made in the proposal to update and upgrade due process rights in EU administrative procedures.
- It would also eliminate the friction existing between public access and special confidentiality rules regarding business secrecy, by sealing under permanent confidentiality the information submitted by undertakings.
- To fully appreciate the point, it is worth recalling the Commission’s long-standing argument that it needs absolute confidentiality in investigations in order to obtain cooperation (concerning information provided by the Member States, see below B2.4). But the exemption goes well beyond this point, covering also “individual” procedures concerning e.g. the grant of EU funds or procurements.

- Last but not least, a “blanket exemption” of this sort would drastically reduce the workload generated by requests of access addressed to the Commission, a great proportion of which concern competition law and public procurements<sup>84</sup>.

It is barely the case to note that, whatever the advantages from the Commission’s standpoint, the proposed provisions would drastically alter the balance between (administrative) transparency and competing interests. The Commission has argued that things would not change much, since the documents exempted are already covered by several exceptions under art. 4(2) and (3) Regulation 1049 (commercial interest; inspections, investigations, and audit; protection of the institution’s decision-making process). The only difference would be that more clarity would be achieved, together with a cost reduction. But these arguments fail to convince.

As the case-law of EU Courts amply shows, the documents whose exemption is sought are far from being “automatically” covered by exceptions at present. Moreover, the Commission’s proposal entirely disregards the option of partial access.

#### **4.2.3 THIRD-PARTY DOCUMENTS AND DOCUMENTS EMANATING FROM MEMBER STATES**

The Recast proposal does not include any alteration to the general rule on third-party documents (“consultation”). Nor does it respond to the call of the European Parliament to limit the “veto” right of the originator on the disclosure of sensitive documents. It does include, however, an important amendment to article 4(5) Regulation 1049, the key provision concerning documents originating from the Member States. This provision, as noted, states that “a Member State may request the institution not to disclose a document originating from that Member State without its prior agreement”.

We have recalled earlier that the EU Court of Justice has interpreted this provision in a way that deprives Member States of a discretionary, unrestrained veto right.

Art. 5(2) Recast purports to codify this ruling, but in fact it turns it on its head:

“Where an application concerns a document originating from a Member State [...] the authorities of that Member State shall be consulted. The institution holding the document shall disclose it unless the Member State gives reasons for withholding it, based on the exceptions referred to in Article 4 **or on specific provisions in its**

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<sup>84</sup> COM 2007:1.1

**own legislation preventing disclosure of the document concerned** (emphasis added).”

This reads, precisely, like a power to veto disclosure on the basis of (suitably formulated) national legislation. Again, it is not difficult to see why the Commission wishes to include such a provision in the Regulation. Taken together with art. 2(6), examined above, it would shield most documents relating to infringement procedures from public scrutiny. The fact that this special rule would not apply to “legislative” documents, as foreseen in the Recast, confirms this analysis.

#### **4.2.4 IMPROVING “LEGISLATIVE” AND “REGULATORY” TRANSPARENCY?**

The final point we would like to mention is article 12 of the Recast proposal, concerning registers and direct access.

This provision makes it mandatory to include in registers, and to render directly accessible, all documents drawn up and received by the institutions in the course of “legislative” and “regulatory” procedures – two terms that have acquired a precise legal signification with the entry into force of the Lisbon Treaty (see art. 289 ff TFEU). There is nonetheless a reserve in favour of the exceptions laid down in art. 4, as well as of the special rules on sensitive documents (art. 9).

As for other documents, and in particular documents “relating to the development of policy and strategy”, the recast proposal maintains a slightly reinforced version of the current rule: they “shall” – instead of “should” – “be made directly accessible”, but only “where possible”.

These amendments respond, to some extent, to the call of the EP for increased transparency in law-making and policy-making. However, they fall short of establishing “full transparency”. More importantly, they stress once more the Commission’s conception that while law-making and to some extent policy-making transparency are to be increased, administrative transparency should by contrast be somewhat restrained. Revealingly, the Recast proposal would do away with the general principle that “the institutions shall as far as possible make [NoA: all] documents directly accessible” (art. 12(1) Regulation). This would be in effect replaced by the contrary principle that it is up to each institution to decide which “other documents [NoA: than legislative, regulatory, and strategy documents] are directly accessible” (art. 12(4) Recast).

## 5 COMMENT: A “DRIVE TOWARDS MORE TRANSPARENCY” OR A RETURN TO SECRECY?

Can one say that “less is more” in all circumstances? Only on this premise would the Recast proposal reflect a “drive towards more transparency”, as it purportedly does.

The proposal’s explanatory memorandum stresses the importance of the input received from the European Parliament and civil society. Yet, the operative text of the proposal is unmistakably inspired by Commission’s own agenda and conceptions, as consistently expressed in previous documents: extensive protection to the information provided by third-parties, private undertakings or Member States, so as to facilitate i.a. investigative tasks; emphasis on “legislative” transparency at the expenses of “administrative” transparency; priority to reducing the costs and workload associated to the processing of access requests.

Indeed, a striking feature of the proposal is that it constitutes a bid to enshrine in legislation the positions defended by the Commission and Council in judicial proceedings, and dismissed as too restrictive by the Courts. To recall, the proposal provides that:

- All preparatory documents are exempted in the course of administrative procedures, until such procedures are closed;
- Information collected from private parties during investigations or enquiries is permanently exempted;
- The disclosure of documents obtained from Member States is essentially left to their *bon vouloir*,

It is also worth recalling the ambiguous reference to “formal registration” before the “support of content” can indeed be considered as a “document”.

True, the proposal includes a few progressive provisions, such as the extension of access rights to any legal or natural person, the provision on databases, or marginal improvements concerning legislative, regulatory, and policy transparency. On key aspects, and on balance, it nonetheless advocates a clear and drastic step back from the level of transparency afforded by current rules. As such, it goes against its own stated objectives, and the current international trend.

Should we content ourselves of condemning the proposal as just this, a naked attempt by the EU bureaucrats to revert to the happier times of secrecy, a full concession to the “*charmes*

*discrets du secret [des] deliberations*”<sup>85</sup>? This is the position taken by many commentators, whose assumption is that “more is always better”, at least in the field of transparency.<sup>86</sup> While this is an entirely respectable position, it is not our own.

Transparency poses several challenges. The most obvious challenge is that of giving adequate protection to competing interests while not rendering access to documents nugatory. Public authorities must be *at the same time* transparent and fit for purpose, accountable and efficient. An somewhat less publicized challenge is that of pre-empting the defensive reactions of administrations and political bodies in the face of this new right, while at the same time taking seriously their legitimate preoccupations relating to the charge transparency represents, financially and otherwise. Simple “more transparency is better” approaches tend to overlook these complexities.

In this light, the propositions of the Commission could also be considered, more constructively, as a very imperfect attempt at facing these various challenges, and at devising an ATI legislation that does fulfil its ambitions and objectives. In the case of the EU, ‘participation’, ‘legitimacy’, ‘accountability’ and ‘democracy’, ‘good governance’ and the ‘participation of civil society’ (see section A1). Indeed, some of the innovations foreseen in the proposal could be justified by other, less self-serving rationales than direct attempts at thwarting transparency.

Trying to avoid degenerations of the right of access to documents, by introducing some certainty as to the limits of the very notion of “document”, is per se a legitimate objective. A more specific definition could accelerate the identification and communication of the relevant information all the while minimising the impacts on the accomplishment of organisational objectives. This would, however, require agreed and transparent rules on the production and management of documents. Unfortunately, the Recast proposal omits to include any rules on the subject, opening new possibilities for the circumvention of the ATI process as such.

Likewise, introducing some clear-cut rules imposing disclosure or confidentiality in well-defined cases, where the current system requires cumbersome and potentially contentious “balancing acts” in each individual case, would probably be a sensible option. As the European Data Protection Supervisor puts it, the value of such provisions would lie in the fact that, by taking stock of experience so far, the legislator could give “clear guidance” to public

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<sup>85</sup> The expression is borrowed from BRADLEY (1999), p. 296.

<sup>86</sup> BLANTON, S. (2003)

authorities, correspondingly restricting their discretion<sup>87</sup>. The objective of expediency, standardisation and rationalisation of ATI procedures is essential. It is very much what is entailed by the current wave of pro-active disclosure used in many national governments. But for this goal to be achieved, rules allowing the identification of easily communicable documents would be required, not just the introduction of blanket exemptions. Unfortunately, the “per se” rules introduced in the Recast proposal are perfectly one-sided: they all serve confidentiality and secrecy.

In light of the above, it is not surprising that the Commission’s proposal has come under heavy fire from the European Parliament, EU Ombudsman, EU Data Protection Supervisor, and civil society (not to mention the position of several Member States). Yet, some of the very general ideas that purportedly inspired it could serve in devising a more mature public access regime – one that is more focused, legally predictable, and balanced. Could these ideas be vindicated and rescued in the following steps of the legislative procedure? The opportunity, at least, exists.

The European Parliament has expressed the strongest reservations on the Recast proposal, and has requested the Commission to come up with a new, more “transparency-friendly” proposal<sup>88</sup>. In the worse-case scenario, the legislative process will grind to a halt due to irreconcilable differences. In this scenario Regulation 1049 will be merely aligned to the provisions of the Lisbon Treaty<sup>89</sup> – an “improved *status quo*” that would, at any rate, be better than a faulty reform. In the best-case scenario, by contrast, the three institutions – Parliament, Council, and Commission – would enter into a “trilogue” to place the legislative process on a new basis. “Trilogues” are known to be the most characteristically opaque phase of EU law-making procedures. In this case, paradoxically, they may be just what it takes to place the reform agenda back on track towards “more” – and better – transparency in the EU.

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<sup>87</sup> Opinion of the European Data Protection Supervisor on the Recast proposal, OJ 2009 C 2/7, para. 49.

<sup>88</sup> See EP Resolution of 17 December 2009 on improvements needed to the legal framework for access to documents following the entry into force of the Lisbon Treaty, P7-TA(2009)0116.

<sup>89</sup> See the Commission’s explanatory note on the alignment of the Recast proposal with the Treaty on the Functioning of the European Union, Council doc. n° 5461/10.