

TRANSPARENCY IN EC LAW: ACCESS TO DOCUMENTS

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Case T-105/95 *WWF UK v Commission* [1997] ECR II-313

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Introduction

From a slogan *transparency*, and more precisely access to documents evolved into an important topic in European policy. It was introduced as a remedy to overcome the euro scepticism that characterised parts of the public opinion in many Member States in the early 1990s. The vogue term *democratic deficit* described the crisis of legitimacy into which the European Communities had fallen when the project of European integration reached a new level. While the institutions – rather opaque entities – exercised increasingly more powers, citizens felt alienated and excluded. Access to documents offered a promising way out. In contrast to intransparent decision-making and secrecy, which had caused suspiciousness, access to documents should invigorate the Communities' democratic character: increasing participation in the decision-making process would lead to more legitimacy and also have a positive influence on accountability and effectiveness. The motto has since been to grant widest possible access to (certain) institutions' documents.

During the almost eight years in force, the impact of the Regulation¹ has changed considerably. To grasp its true scope of the one has to be aware of the exceptions listed in Article 4: drafted rather vaguely, they keep the contours of the concept flexible. Additionally some of the exceptions act as *interfaces*, connecting access to documents with other related areas, covered by special provisions, e.g. data protection or competition law.

Even though the topicality of transparency in the literature decreased over the years, it underwent important developments, most prominently by the decisions of the Community

¹ Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to the European Parliament, Council and Commission documents OJ (2001) L 145/43 (hereinafter Regulation 1049/2001, Regulation on public access or simply, the Regulation)

courts. Important contributions in the earlier literature are de Búrca's *The Quest for Legitimacy in the European Union*², an excellent discussion of the background of the legitimacy crisis and the intergovernmental conferences before Amsterdam and Dyrberg's *Accountability and Legitimacy: What is the Contribution of Transparency?*³, a critical assessment of the impact of transparency on accountability and legitimacy. More recently, Lenaerts strongly advocated transparency's recognition is a general principle of Community law, which "would empower the Community courts to [...] assess the legality of the different exceptions themselves in the light of the general principle of transparency."⁴ Heliskoski and Leino undertook an analysis of the courts' case law in 2006 focussing on three decisions (*Turco*, *Sison* and *IFAW*)⁵, two of which have been amply overruled in the meanwhile. However their analysis provides a sound basis for the analysis of the recent developments. Finally Kranenborg most recently analysed the relation between access to documents and data protection, an aspect that will be of some importance in the present paper.⁶

Even without the power Lenaerts favours, the courts have started early to shape the right to access actively and still play a crucial role in the ongoing development. The case law offers most valuable insights as it (normally) deals with disputes where both sides believe to have strong arguments for their cause. With hindsight the courts' decisions are frequently found to follow a certain *thread*, however, at the time the decision is made the scope of the disputed right (or exception) as well as the due balance of interests are most often intricate.

² De Búrca, *The Quest for Legitimacy in the European Union* In *The Modern Law Review* (1996) 59: 349.

³ In Arnulf/Wincott (eds.) *Accountability and Legitimacy in the European Union* (Oxford: OUP, 2002) 81 – 96.

⁴ Writing in his capacity as a scholar not as a Judge at the Court of Justice. Lenaerts, "*In the Union We Trust*": *Trust-Enhancing Principles of Community Law*. *Common Market Law Review* (2004) 41: 317 at 319.

⁵ Heliskoski/Leino, *Darkness at the Break of Noon: The Case Law on Regulation No. 1049/2001 on Access to Documents*. *CMLR* (2006) 43: 735 (accessed via ebsco host).

⁶ Kranenborg, *Access to Documents and Data Protection in the European Union: On the Public Nature of Personal Data*. *CMLR* (2008) 45: 1079.

Access to documents is a dynamic field of law: Only recently the Court of Justice (ECJ) has radically overturned some decisions of the Court of First Instance (CFI), which itself has taken new decisions with far-reaching consequences. Not only does the case law influence the parallel efforts of the European Transparency Initiative (which, in 2008, culminated in a proposal to amend Regulation 1049/2001), it virtually leaves them behind. This leads to two preliminary conclusions: First Regulation 1049/2001 is a living document, which makes it an interesting object of study. Second, the utmost importance of the case law is evident; to see the whole picture we have to look at it through the eyes of the courts, which is the approach taken in the present paper. The question of particular interest will be, how the courts interpret the individual exceptions presently and whether there are substantial differences between them (and if so, what are they)?

As the scope of the exceptions is the (intermediate) result of an ongoing process, it is inevitable to begin with some theoretical considerations and the historical background. Some of the principles defined in early court decisions are still applicable (Chapter 1). After presenting the current legal regime on access to documents (Chapter 2), the focus of the analysis will lie on the interpretation of the exceptions and the interrelation between access to documents and special provisions dealing with particular related aspects (see especially the excursus in Chapter 3). Following the structure of Art 4 of Regulation 1049/2001 the courts' more recent case law will be analysed. Some of the major innovations concern legal service documents and such originating from the Member States. But there is also a less favourable trend concerning the protection of public interest, which will be critically assessed (Chapter 4). Some statistical data provided by the institutions' annual reports on the implementation of Regulation 1049/2001 will be presented in Chapter 5. Finally Chapter 6 will briefly discuss the ongoing process of recasting the Regulation on public access.

It will be seen that the courts tend to gradually open the exceptions, making them less severe. The strategy pursued is not to create categories of documents that access *has to be granted* to but the development of a sophisticated system, combining teleological interpretation with procedural safeguards (e.g. the duty to give reasons and a delicately structured balancing of interests). This approach also influences the attitude towards other Community instruments (e.g. protecting personal data).

1. Preliminary Considerations

Before analysing the current system of access to documents, attention will be paid to the theoretical and historical background. Whereas the present paper focuses on access to documents, transparency is a much broader concept. The questions briefly addressed at the outset will be: What are (some of) the other elements? Which objectives is transparency (allegedly) able to achieve? After a short and abstract overview the concrete development in the European context will be traced. This is not only historically interesting but also helpful in order to see the bigger picture and understand past, present or future changes.

1.1 The Concept of Transparency

1.1.1 Elements

Access to documents in the *façon* outlined in Regulation 1049/2001 and explored in detail in the present paper is one – rather specific – aspect of the eclectic notion of transparency. The latter is embedded in the wider context of process rights⁷ and accountability⁸, hence the rule of law and the democratic principle. Apart from access to documents (or information) it comprises various other elements:⁹

Firstly it is useful for the public to know how specific decisions are accomplished, respectively who actually takes them. This goal “can be increased by *procedural measures* that

⁷ Craig, *EU Administrative Law* (Oxford, New York: OUP 2006) 349.

⁸ Dyrberg, *Accountability and Legitimacy* 83.

⁹ Compare: Chalmers/Tomkins, *European Union Public Law* (Cambridge: CUP 2007) 317; Craig, *EU Administrative Law* 351; Dyrberg, *Accountability and Legitimacy* 84.

ensure that EU rules and rule-making become more visible, accessible, comprehensible and tangible to interested parties.”¹⁰

Secondly, apart from clear and comprehensible procedures, *meetings held in public* can be of some value for this purpose as well as *clearly drafted* Treaties and legislation.¹¹ Moreover the *duty to give reasons* also increases transparency.

Finally, another – ambivalent – aspect concerns external influence on policy-making (*consultations*). Whereas especially the Commission can gain valuable input from experts or interest groups, their influence has to remain traceable.

1.1.2 Importance

Access to documents lies within the “core of transparency efforts”¹² but these are not an aim in themselves: From the democratic aspect, transparency – and especially access to documents – is a prerequisite for fostering a fruitful public debate. This is crucial as democratic legitimation on the European level can be described as a “patchwork of different strands”¹³, transparency being one of them. By increasing the public’s knowledge and hence meaningful participation in the decision-making process “the democratic nature of the institutions and the confidence of citizens in the European administration”¹⁴ is supposed to be strengthened.¹⁵

¹⁰ Lodge, *Transparency and Democratic Legitimacy*. Journal of Common Market Studies (1994) 32: 343, at 353 (emphasis added).

¹¹ “Perhaps the most notorious illustration [...] was the renumbering of the Treaty Articles that took place at Amsterdam [...]” Chalmers/Tomkins, *European Union Public Law* 317.

¹² Dyrberg, *Accountability and Legitimacy* 84.

¹³ Héritier, *Composite democracy in Europe: the role of transparency and access to information*. Journal of European Public Policy 10:5 (October 2003) 814, at 815.

¹⁴ Report from the Commission on the implementation of the principles in EC Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, 30.1.2004 COM(2004) 45 final 43 (hereinafter: Commission Report 2004)

¹⁵ Similarly recognised by Chalmers/Tomkins, *European Union Public Law* 318 as the “popular or political argument.”

Another argument frequently brought in favour of transparency is that it raises the public's ability to efficiently monitor "the exercise of the powers vested in the Community institutions."¹⁶ Whether this – apart from enhancing accountability – also leads to better decision-making can only be assumed axiomatically. However, it seems plausible that in the long run control will – at least partly – be shifted from the classical ex post judicial review to more ex ante self-control in the public eye. Additionally transparency makes governmental action also more challengeable in the traditional review based system as it "facilitates construction of a reasoned argument by those opposed to a measure."¹⁷

1.2 Historical background

1.2.1 Once upon a Time ... in Maastricht

Before the Maastricht Treaty, which is generally seen as the starting point of the Communities' endeavours to accomplish more openness, "secrecy was the norm in the institutions."¹⁸ However, Declaration No 17 attached to the Treaty stated:

The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.¹⁹

Difficulties in the ratification process in Denmark and France showed an urgent need "to promote a Community closer to the citizens."²⁰ The European Council at meetings at

¹⁶ Case T-92/98 *Interporc v Commission* [1999] ECR II-3521, para 39.

¹⁷ Craig, *EU Administrative Law* 350.

¹⁸ Dyrberg, *Accountability and Legitimacy* 86.

¹⁹ The Treaty on European Union, OJ 1992 C 191 (accessed 11 March 2009 at) <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html#0101000037>

²⁰ Code of conduct of 6 December 1993 concerning public access to Council and Commission documents 93/730/EC, OJ 1993 L 340/41.

Birmingham (October 1992), Edinburgh (December 1992) and Copenhagen (June 1993) “stressed the need to introduce greater transparency into the work of the Union institutions.”²¹

As a result, based on a comparative survey carried out by the Commission²², the Council and the Commission adopted a common Code of Conduct on public access to documents in 1993²³, which was implemented into the internal rules of procedure by respective decisions.²⁴ Similarly the European Parliament adopted a decision concerning its documents.²⁵

1.2.2 Contents of the Code of Conduct

The *leitmotif* enshrined in the Code was to grant the public “the widest possible access to documents” held by one of the institutions. Hence applicants were neither restricted by any rules of standing nor bound to justify their request. The main contents of the Code will be discussed briefly, especially and insofar as it differs from later concepts or helps understand the development of Regulation 1049/2001.

The scope of the right principally depends on the *definition* of the central notion *document*. In 1993 it covered “any written text, whatever its medium, which contains existing data and is held by the Council or the Commission.” Likewise important are the *exceptions*, which were listed expressly. Drafted in quite general terms they were widely open to interpretation, a task eventually to be carried out by the courts. Apart from a number of *mandatory* exceptions²⁶ the Code also provided for a *discretionary* one, stating the institutions “may also refuse access in

²¹ Recital 3 in the preamble to Regulation 1049/2001.

²² A summary of which is published in OJ 1993 C 156/5.

²³ Code of conduct.

²⁴ Council Decision 93/731 of 20 December 1993, OJ 1993 L 340/43 and Commission Decision 94/90 of 8 February 1994, OJ 1994 L 46/58.

²⁵ Decision 97/632/EC, ECSC, Euratom of the European Parliament of 10 July 1997 on public access to European Parliament documents, OJ 1997 L 263/27.

²⁶ Protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations), protection of the individual and privacy, protection of commercial and industrial secrecy, protection of Community’s financial interest and the protection of confidentiality as requested by the natural or legal person who supplied any of the information contained in the document or as required by the legislation of the Member State which supplied any of that information.

order to protect the Institution's interest in the confidentiality of its proceedings." Another important limitation, which was abandoned in Regulation 1049/2001, was the authorship rule, extending the right to access only to documents written by the institution access was requested from.²⁷

In terms of *procedure*, sufficiently precise, written requests had to be handled within one month. Failure to comply with this timely limit was treated as an implicit refusal enabling the applicant to make use of further remedies, just as in the case of explicit refusal: Within one month after rejection the applicant could "make a confirmatory application to the institution for that position to be reconsidered." A consequent negative decision had to "indicate the means of redress that are available, i.e. judicial proceedings and complaints to the ombudsman."

1.2.3 Impact, Shortcomings and Further Development

The immediate results were modest as Council and Commission "had a restrictive view of what could be disclosed to citizens."²⁸ Hence the courts as well as the European Ombudsman are to be credited for the interpretation and development of the right to access to documents.

The effort to improve openness gained further *impulse* when Sweden and Finland, both proponents of extensive transparency in government, joined the Union in 1995. With Art 255 EC the Amsterdam Treaty introduced access to documents on a primary law level and laid the foundation for further Community legislation.²⁹ In the aftermath of the resignation of the Santer Commission the aforementioned Regulation 1049/2001 was finally adopted.

²⁷ "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 application must be sent direct to the author."

²⁸ Dyrberg, *Accountability and Legitimacy* 88.

²⁹ As the CFI later clarified in Case T-191/99 *Petrie v Commission* [2001] ECR II-3677, paragraph 34, applying the criteria set out in Case 26/62 *Van Gend en Loos* [1963] ECR 1, neither Article 1, second paragraph, EU nor Article 255 EC are directly applicable. To be directly applicable rules have to be clear, unconditional and implementable independently from further measures adopted.

Progress had also been made with the amendment of the CFI's Rules of Procedure, allowing the court to either "verify the confidentiality" of a potentially relevant document³⁰, or see into a document produced before the court "to which access has been denied"³¹ without communicating this document to the other parties.

1.2.4 Early case law

Some of the early decisions on access to documents are still relevant today. This continuity makes it worthwhile to look into some of these cases a little bit more carefully. While the courts' overall tendency has been to widen the scope of the right to access not every opportunity to do so has been seized. The following five cases also illustrate the courts' technique of developing a consistent conception step by step.

*Carvel v Council*³² was the first case concerning access to documents brought before the CFI under the regime set out by the Code of Conduct. Based on the discretionary ground of protecting the institution's "interest in the confidentiality of its proceedings"³³, the Council had denied the disclosure of minutes, attendance and voting records of the Justice and Agriculture Council.³⁴ The delivery of similar documents concerning the Social Affairs Council was explained as "an administrative error."³⁵

The court only addressed only one argument put forward by the applicants, namely the alleged infringement of Art 4 (2) of Decision 93/731 by a "blanket refusal to allow access to certain types of documents."³⁶ Instead of using the "opportunity to trumpet the new found

³⁰ Art 67 (3) subparagraph 2

³¹ Art 67 (3) subparagraph 3, both added by OJ 2000 L 322/5.

³² Case T-194/94 *Carvel and Guardian Newspapers Ltd v Council* [1995] ECR II-2765.

³³ Art 4 (2) Council Decision 93/731.

³⁴ For the latter, access was only sought to the minutes. *Carvel* para 14.

³⁵ *Ibid* para 22.

³⁶ *Ibid* para 36: "In support of their application, the applicants put forward five pleas in law, alleging: breach of the fundamental principle of Community law of access to the documents of the institutions of the European Union; breach of the principle of the protection of legitimate expectations; infringement of Article 4(2) of Decision 93/731

privileging of openness and transparency in the European legal order”³⁷ the CFI merely clarified the institution’s obligation to “genuinely balance the interest of citizens in gaining access to its documents against any interest of its own in maintaining the confidentiality of its deliberations.”³⁸ This minimalist approach is rather common for the courts’ decisions on access to documents. Rarely they analyse more aspects than necessary to reach a certain conclusion.

*Netherlands v Council*³⁹ concerned an action for annulment directed against the Code of Conduct and the implementing Decision 93/731. The Dutch Government mainly argued that the public’s right to information was a fundamental right, insufficiently regulated and safeguarded by its implementation through the rules of procedure.⁴⁰ However, the ECJ disagreed: it qualified the Code of Conduct as “an act which is the expression of purely voluntary coordination and is therefore not intended in itself to have legal effects.”⁴¹ Concerning the regulation qua internal rules of procedure it held:

37 So long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organization [...]

The maybe most influential decision taken at that time was *Hautala v Council*⁴², representing “a significant recognition of the fact that [...] the right is essentially to ‘information’ not covered by one of the specific exceptions.”⁴³ It concerned a member of the European Parliament “seeking clarification of [...] criteria for arms exports defined by the

inasmuch as the contested decisions are the expression of a blanket refusal to allow access to certain types of document; infringement of Article 7(3) of Decision 93/731 and of Article 190 of the Treaty inasmuch as the decisions do not state the reasons on which they are based; and, finally, misuse of powers.”

³⁷ Chalmers/Tomkins, *European Union Public Law* 320.

³⁸ *Carvel* para 65.

³⁹ Case C-58/94 *Netherlands v Council* [1996] ECR I-2169.

⁴⁰ *Netherlands v Council* paras 31-36.

⁴¹ *Ibid* para 27.

⁴² Case T-14/98 *Hautala v Council* [1999] ECR II-2489.

⁴³ Curtin, *Citizens’ Fundamental Right of Access to EU Information: An Evolving Digital Passepartout?* in CMLR (2000) 37: 12.

European Council.”⁴⁴ The applicant requested access to a report of the Working Group on Conventional Arms Exports, which was refused based on Art 4 (1) of Decision 93/731, more exactly the protection of the public interest with regard to international relations.

At the outset the CFI reiterated its decision in *Svenska Journalistförbundet*⁴⁵ “that Decision 93/731 applies to all Council documents, irrespective of their content”⁴⁶, thus also to the report in question, falling within Title V of the Treaty on European Union.⁴⁷

The interpretation of the exceptions in Art 4 – which neither provided for nor prohibited partial access explicitly – had to take into account the aim of the Code of Conduct to grant “widest possible access”.⁴⁸ Anticipating a “principle of access to information”⁴⁹, the CFI held that exceptions to a *general principle* “should be construed and applied strictly.”⁵⁰ Only “where the volume of the document or the passages to be removed would give rise to an unreasonable amount of administrative work”⁵¹ the principle of proportionality was found to permit balancing the interest in access against the workload.

The ECJ upheld the CFI’s judgment on the Council’s duty to grant partial access⁵², quashing the Council’s interpretation that the right granted merely access to documents and not more flexibly to information:

26. The interpretation put forward by the Council [...] would have the effect of frustrating, without the slightest justification, the public's right of access to the items of information contained in a document which are not covered by one of the exceptions listed in Article 4 (1) of Decision 93/731.

⁴⁴ *Hautala* para 14.

⁴⁵ Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289 paras 81 and 82.

⁴⁶ *Hautala* para 41.

⁴⁷ The latter being otherwise excluded from the jurisdiction of the courts (Art 46 EU).

⁴⁸ *Hautala* paras 78-80.

⁴⁹ *Ibid* para 88.

⁵⁰ *Ibid* para 84. This standard formula was originally established in Case T-105/95 *WWF UK v Commission* [1997] ECR II-313 para 56.

⁵¹ *Hautala* para 86. See *infra* Case T-2/03 *Verein für Konsumenteninformation (VKI) v Commission* [2005] ECR II-1121.

⁵² Case C-353/99 P *Council v Hautala* [2001] ECR I-9565.

Partial access, which is now expressly laid down in Art 4 (6) originally resulted from proportionality considerations in the light of the overall aim of the Code. Whether a “principle of the right to information” existed was however left unanswered by the ECJ.⁵³

In *British American Tobacco*⁵⁴ the Commission had refused to grant access to certain “minutes of the meetings of the Committee on Excise Duties [...] in so far as they concerned the tax treatment of expanded tobacco.”⁵⁵ The refusal (eventually restricted to the names of the Member States) was based solely on the non-mandatory exception safeguarding the institution’s interest in the confidentiality of its proceedings⁵⁶.

The court reiterated its case law, stating that although exceptions have to be “interpreted and applied strictly [...] the Commission nevertheless enjoys a margin of discretion”⁵⁷ within which it must “strike a genuine balance.”⁵⁸ Having failed to do so properly, the court as a result overturned the Commission’s decision.

In *Kuijer*⁵⁹ the applicant, a university lecturer and researcher in asylum and immigration matters, was denied access to a number of documents containing “very sensitive information about the political, economical and social situation”⁶⁰ and the protection of human rights in non-Member States, based on Art 4 (1) of Decision 93/731 (international relations). The CFI rejected the Council’s line of argument, holding “the risk of the public interest being undermined must [...] be reasonably foreseeable and not purely hypothetical.”⁶¹ On the one hand large parts of the

⁵³ For the existence of such a right, e.g. Koen Lenaerts, at the time of the *Hautala* decision Judge at the Court of First Instance, since 2003 Judge at the Court of Justice: “Notwithstanding the ambiguous position taken – so far – by the Community courts, it can at present hardly be denied that the principle of transparency has evolved into a general principle of Community law.” Lenaerts, “In the Union We Trust CMLR (2004) 41: at 321.

⁵⁴ Case T-111/00 *British American Tobacco v Commission* [2001] ECR II-2997.

⁵⁵ *British American Tobacco* paragraph 9.

⁵⁶ *Ibid* para 25.

⁵⁷ *Ibid* para 40 with references to the court’s case law.

⁵⁸ *Ibid*.

⁵⁹ Case T-211/00 *Kuijer v Council* [2002] ECR II-485.

⁶⁰ *Kuijer* para 12.

⁶¹ *Ibid* para 56.

information related to *facts* already made public and not primarily concerning international relations (e.g. the past political development in a given country).⁶² On the other hand, the court – having studied the reports *in camera* – came to the conclusion that the Council could have protected the public interest sufficiently by only partially granting access to the reports.⁶³

The cases described above show some of the most important aspects of the courts' attitude to access to documents. Firstly, their approach can be largely characterised minimalist (leaving questions that are not immediately decisive unanswered) and functionalist (not dwelling on theoretical considerations as seen in *Netherlands*). Secondly, the solution lies often in a delicate balancing of antagonistic interests. Here the courts try to develop differentiated criteria making this balancing process itself as transparent and comprehensible as possible.

1.3 Ombudsman

It has been pointed out that the European Ombudsman has played, and still plays, a crucial role in the “development of openness and transparency as broader principles of law.”⁶⁴

Of utmost importance to mitigate the Code's restricted applicability to Council and Commission was a 1996 own-initiative inquiry into public access to documents and the subsequent Special Report (616/PUBAC/F/IJH).⁶⁵ Following the Ombudsman's draft

⁶² Ibid paras 62, 63 and 66.

⁶³ Ibid paras 69, 71.

⁶⁴ Craig, *EU Administrative Law* 353. In 2007 fourteen new complaints concerning access to documents have been lodged with the Ombudsman: thirteen concerning alleged maladministration by the Commission (Report from the Commission on the Application of Regulation (EC) No 1049/2001 of 10 October 2008 COM(2008) 630 final 4; hereinafter: Commission Report 2007) and one against the Parliament (Annual Report 2007 on Public Access to Documents, hereinafter: Parliament Report 2007).

⁶⁵ <http://www.ombudsman.europa.eu/cases/specialreport.faces/en/378/> [html.bookmark](#) (accessed 11 March 2009). See also OJ 1998 C44/9.

recommendations to fifteen Community institutions and bodies virtually all of them with the exception of the Court of Justice adopted rules on access to documents.⁶⁶

A very recent example for the Ombudsman's successful mediation is Complaint 111/2008/TS against Europol: A Danish Journalist was initially refused access to documents. "After the Ombudsman had opened its inquiry, Europol released the documents to the complainant and also apologised to him for the delayed handling of his access request."⁶⁷

Art 195 EC constitutes the primary law basis for the Ombudsman and describes the scope of his duties as investigating "instances of maladministration." The findings are not legally binding, the effectiveness of this institution results from an interplay of negotiations (the Ombudsman can make recommendations to the mal-administrating institution, which has to send a detailed reply within three months) and the pillorying effect of a critical report to the European Parliament.⁶⁸

1.4 Summary

Access to documents is only one – however important – aspect of transparency, which became a matter of general interest in the early 1990s: the crisis of legitimacy forced the Community institutions to lift the shadow of opacity and come closer to the citizens. The result was a Code of Conduct, the precursor Regulation 1049/2001, pursuing the aim of giving citizens the widest possible access to documents.

⁶⁶ Diamandouros, *Transparency, Accountability and Democracy in the EU*, Lecture of the European Ombudsman, Professor P. Nikiforos Diamandouros, at the School of Advanced International Studies of the John Hopkins University, Bologna, 17 October 2006. For a current case involving the ECB see e.g. Joined Cases T-3/00 and T-337/04 *Pitsiorlas v Council and ECB* [2007] ECR II-4779 (appeal pending).

⁶⁷ Summary of decision on complaint 111/2008/TS against Europol <http://www.ombudsman.europa.eu/cases/summary.faces/en/3797/html.bookmark> published on the Ombudsman's webpage on 9 March 2009 (accessed 11 March 2009).

⁶⁸ Art 3 Statute (Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties, adopted by Parliament on 9 March 1994 (OJ 1994 L 113/15) and amended by its decisions of 14 March 2002 (OJ 2002 L 92/13) and 18 June 2008 (OJ 2008 L 189/25).

As Council and Commission were reluctant to make proper use of the Code, the courts as well as the European Ombudsman played an important role in substantiating the right from the very beginning. Some of the early decisions are still relevant today, among them *Hautala*, (establishing the duty to grant partial access whenever reasonably possible) *Kuijer* (clarifying that a risk must be “reasonably foreseeable and not purely hypothetical”) or *WWF UK* (referred to in footnote 50 *supra*, establishing the standard formula that exceptions “should be construed and applied strictly”).

2. Regulation 1049/2001

In the following Chapter the contents of the Regulation on public access will be discussed. The Regulation comprises three parts, dealing with definitions and exceptions, questions of procedure and other issues relating to the implementation (such as registers or annual reports). Apart from Art 4, which is analysed comprehensively in Chapter 4, most of these points will be addressed in this Chapter. It has to be noted that Regulation 1049/2001 does not exist in a legal vacuum, thus the legal context will be outlined briefly before going into the details of the Regulation. As the exceptions are the *centre of gravity* of the Community's system of access, this chapter is mainly concerned with the general framework and its improvement in contrast to the Code of Conduct. After all it is important to know the rule to understand the exception(s) to the rule.

2.1 Legal Context

It has to be noted that Regulation 1049/2001 is not the only source of access to documents. Based on the *Århus Convention*, Regulation 1367/2006⁶⁹ contains rules on access to environmental information. Art 3 stipulates the application of the general rules on access to document with certain modifications.⁷⁰ Whereas Regulation 1049/2001 grants a general right to the widest possible access to documents, other rules contain specific rights, e.g. for parties involved in a certain procedure. One such – especially important – concept is *access to the file* in

⁶⁹ Regulation (EC) No 1367/2006 of the European Parliament and the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ 2006 L 264/13.

⁷⁰ First, it does not make any distinction based on citizenship, residency etc. Second, it applies to Community institutions and bodies. As will be seen, the alignment of the two regimes is one of the aims in the reform of Regulation 1049/2001.

competition or merger proceedings.⁷¹ An important conflicting concept that will be discussed in the Chapter exceptions, is data protection (Regulation 45/2001). Other relevant provisions can be found in the courts' Rules of Procedure, an Annex to Staff Regulations or rules on protection of personal data etc.

A final remark concerns the foundation of access to documents on the Treaty level: It has been mentioned that Art 255 EC, introduced by the Treaty of Amsterdam, is the primary law basis for access to documents. If the currently pending Treaty of Lisbon⁷² enters into force, this important provision will be included in Art 15 (3) of the 'Treaty of the Functioning of the European Union'⁷³ (Part One – Principles).

The “solemnly proclaimed” Charter of Fundamental Rights, which contains an equivalent right in Art 42, will – upon entry into force of the Lisbon Treaty – also become legally binding. The new Art 6 of the Treaty on European Union provides that the “freedoms and principles set out in the Charter [...] shall have the same legal values as the Treaties.”

2.2 Content of Regulation 1049/2001

The structure of the Regulation follows more or less the logical pattern of the Code of Conduct, including the institutions obliged, the scope of the right, the beneficiaries, exceptions, procedures and remedies. There are however differences which will be highlighted throughout the discussion.

2.2.1 Scope of the Right

The Regulation does not extend its scope beyond the wording of Art 255 EC, hence originally only applied to Council, Commission and Parliament. Dissatisfied with this limitation

⁷¹ Discussed in Chapter 3 *infra*.

⁷² OJ 2007 C 306/1.

⁷³ OJ 2008 C 115/47.

the three institutions enacted a joint declaration⁷⁴ based on which they “extended the application of Regulation 1049/2001 to the Agencies.”⁷⁵ These modifications were implemented by means of a series of regulations in 2003.⁷⁶ Quite importantly, the authorship rule was abandoned, with the right now principally applicable “to all documents held by an institution [...] in all areas of activity of the European Union” (Art 2 (3)).

2.2.2 Definition

The notion *document* is apparently central to any concept of access. Whereas in the Code of Conduct *document* was understood as “any written text, whatever its medium”, the definition in Art 3 (a) is far broader, comprising

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.

2.2.3 Beneficiaries

In contrast to the Code, Art 2 (1) theoretically limits the right to access to “[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State.” De facto the European Parliament, Council and Commission – in accordance with their rules of procedure – make no difference and apply the right to all natural and legal persons.⁷⁷

2.2.4 Procedures and Remedies

Art 6 (1) sets out that requests have to be in written (including electronic) form, in one of the authentic languages (Art 314 EC) and shall be “sufficiently precise [...] to enable the

⁷⁴ OJ 2001 L 173/5.

⁷⁵ Commission Report 2004 9.

⁷⁶ For an exhaustive listing see Lenaerts, “In the Union We Trust CMLR (2004) 41: FN 22. Moreover, the Committee of the Regions (Decision No 64/2003, OJ 2003 L 160/96) and the Economic and Social Committee (Decision No 603/2003, OJ 2003 L 205/19) adopted similar access systems whereas the Court of Auditors, the European Investment Bank and the European Central Bank apply their own – more restrictive – rules (Commission Report 2004 9).

⁷⁷ Commission Report 2004 10.

institution to identify the document.” The applicant does not have to justify the request or give any reasons. If the request involves a very large (amount of) document(s), informal deliberations will be held between the institution and the applicant to find a “fair solution” (Art 6 (3)).

Initial applications have to be handled within fifteen working days (instead of formerly thirty days), in case of a (partial) refusal the applicant can submit a “confirmatory application” (Art 7 (1)), asking the institution to “reconsider its position” (Art 7 (2)). Whereas the time limit may be exceptionally extended by another fifteen working days (Art 7 (3)), failure to reply is treated as a refusal, opening the possibility of a confirmatory application (Art 7 (4)).

Art 8 contains analogue provisions for the processing of confirmatory applications. Administrative silence counts as implied refusal.⁷⁸ This tacit refusal additionally implies “by definition an infringement of the obligation to state reasons.”⁷⁹ If the institution does not comply with the confirmatory application the applicant may “institute court proceedings [...] and/or make a complaint to the Ombudsman” (Art 8 (3)). Whereas judicial review has the advantage of legally binding decisions, the Ombudsman’s service is “relatively quick and free to the complainant.”⁸⁰

2.2.5 Register

An important step towards facilitating the right to access and thereby making it even more meaningful was the establishment of registers (Art 11), including for each document “a reference number [...], the subject matter and/or a short description of the content” (Art 11 (2)). “As far as possible” documents shall be accessible through this register in electronic form (Art 12 (1)).

⁷⁸ Setting out the conditions for implicit refusal concretely Case T-42/05 *Williams v Commission* Judgment of 10 September 2008 para 66 (not yet published).

⁷⁹ *Williams* para 93, see also para 96.

⁸⁰ Diamandourous, *Transparency, Accountability and Democracy in the EU*.

2.2.6 Sensitive documents

While not forming an individual class of exceptions, sensitive documents require some procedural particularities. Most frequently sensitive documents concern public security or defence and military matters. Applications have to be handled by sufficiently authorised personnel (Art 9 (2)). Moreover such documents “shall be recorded in the register or released only with the consent of the originator” (Art 9 (3)) and the reasons given in a refusal may “not harm the interests protected in Article 4” (Art 9 (4)).

2.3 Summary

Access to documents is not regulated in a legal vacuum. The overlapping provisions concern e.g. specific aspects of access to environmental information, documents in competition cases or in the staff selection process. As will be seen in Chapters 3 and 4 transparency is a strong concept, extending to vast parts of the European legal order.

The logical structure of Regulation 1049/2001 more or less follows the system set out in the Code of Conduct. The notion document is extremely broad. Additionally the scope of the right is wider than under the Code as an important limitation, the authorship rule has been abandoned. An important innovation was the introduction of registers. Not only do the registers contain lists of more or less all documents (except e.g. some sensitive documents) but they also enable interested parties to access a large number of documents directly online. The exceptions to the right to access, which are of utmost importance for assessing the factual impact are discussed in a separate chapter.

3. Excursus: Access to the File

3.1 Relevance

Access to the Commission file is a concept generally distinct from the right to access to documents. It can be characterised as a procedural guarantee safeguarding the principle of equality of arms and the rights of the defence.⁸¹ As a consequence of its character, access to the file (in its technical meaning) applies to addressees of a statement of objection, giving them the opportunity to “express [their] views effectively on all the objections raised”⁸² before the Commission takes a decision.⁸³

Whereas the Commission Notice underlines the distinction of the right to access to the file and the general right to access to documents, the CFI’s 2006 *Bank Austria* judgment⁸⁴, in a case arising from the field of competition law, instructively illustrates the interaction between different Community concepts of access and data protection. Therefore the following *side trip* to an area otherwise beyond the scope of this paper is not only interesting but of particular importance.

3.2 Legal Provisions

Access to the file is provided for in a number of regulations, dealing with competition and merger proceedings:

⁸¹ This is also recognised in Art 41 (2) of the EU Charter of Fundamental Rights, which serves as a yardstick for the interpretation of e.g. Regulation 1/2003 (infra 3.2).

⁸² Toth, *Access to the file*, in Toth (ed) *The Oxford Encyclopaedia of European Community Law – Volume III Competition Law and Policy* (Oxford: OUP, 2008) 52.

⁸³ Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ 2005 C 325/07 paras 1, 3 (hereinafter: the Commission Notice).

⁸⁴ Case T-198/03 *Bank Austria Creditanstalt AG v Commission* [2006] ECR II-1429.

- Article 27(1) and (2) of Council Regulation (EC) No 1/2003⁸⁵
- Article 15(1) of Commission Regulation (EC) No 773/2004⁸⁶
- Article 18(1) and (3) of the Council Regulation (EC) No 139/2004⁸⁷
- Article 17(1) of Commission Regulation (EC) No 802/2004⁸⁸

Before taking certain decisions⁸⁹ in accordance with these Regulations the Commission will grant the addressees the above mentioned “opportunity of making known their views on the objections against them and [...] to have access to the Commission's file in order to fully respect their rights of defence in the proceedings.”⁹⁰

3.2.1 Scope of the Right

Persons (natural and legal), undertakings and associations of undertakings can be addressees of Commission's objections ('parties') and as such granted access to the file.⁹¹ Complainants enjoy less far-reaching procedural rights.⁹²

This *file* is a compilation “of all documents, which have been obtained, produced and/or assembled.”⁹³ As the rationale is that the parties can make use of their rights of defence effectively, access to parts of the file is only denied insofar as internal documents, business secrets or other confidential information is concerned.

⁸⁵ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

⁸⁶ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ 2004 L 123/18 ('the Implementing Regulation').

⁸⁷ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004 L 24/1 ('Merger Regulation').

⁸⁸ Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ 2004 L 133/1, corrected in OJ 2004 L 172/9 ('the Merger Implementing Regulation').

⁸⁹ According to Art 7, 8, 23 and 24 (2) Regulation 1/2003 and Art 6 (3), 7 (3), 8 (2) to (6), 14 and 15 Regulation 139/2004.

⁹⁰ Commission Notice para 1.

⁹¹ Ibid para 3.

⁹² For details and numerous relevant cases see Toth, *Encyclopaedia* 61 et seq.

⁹³ Commission Notice para 8. For merger cases it has to be said that documents found to be irrelevant which are returned to undertakings cease being part of the file, at para 9.

3.2.2 Exceptions

As mentioned above, there are three categories of documents excluded from this right:⁹⁴

Internal documents such as drafts, memos, opinions etc do not form part of the evidence and therefore can neither have any “incriminating nor exculpatory”⁹⁵ effect. Correspondence with other public authorities falls under the same category (e.g. between the Commission and national competition authorities of member or non member states, the EFTA Surveillance Authority etc).⁹⁶

Confidential information exists in two forms, business secrets and other confidential information. To enjoy the status of confidentiality a substantiated request has to be made and accepted by the Commission. Generally, the confidentiality of information concerning the market share, turnover etc “can reasonably be ruled out on account of the age of the information.”⁹⁷ Furthermore the interest in confidentiality can be outweighed by the necessity “to prove an alleged infringement (‘inculpatory document’) [...or] to exonerate a party (‘exculpatory document’).”⁹⁸

Business secrets are “afforded very special protection.”⁹⁹ In *Akzo Chemie* the Court of Justice held that Art 19 (3) and Art 21 (2) – both obliging the Commission to duly consider legitimate interests of undertakings in the protection of their business secrets – expressed a more general principle “which applies during the course of the administrative procedure.”¹⁰⁰ In order to prevent undertakings from lodging complaints with the Commission as a vehicle “to gain

⁹⁴ Art 27 (2) Regulation 1/2003, Art 15 (2) and 16 (1) Regulation 773/2004 and Art 17 (3) Regulation 802/2004. See also Case T-7/89, *Hercules Chemicals v Commission* [1991] ECR II-1711, para 54.

⁹⁵ Commission Notice para 12.

⁹⁶ *Ibid* para 15.

⁹⁷ Case T-213/01 *Österreichische Postsparkasse AG v Commission* [2006] ECR II-1601 para 199.

⁹⁸ Commission Notice para 24.

⁹⁹ Case 53/85 *Akzo Chemie v Commission* [1986] ECR 1965.

¹⁰⁰ *Akzo Chemie* para 28.

access to its competitors business secrets”¹⁰¹ the only acceptable solution is that “a third party who has submitted a complaint may not in any circumstances be given access to documents containing business secrets.”¹⁰²

A definition of ‘business secrets’ was given in *Postbank NV*: “information of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information may seriously harm the latter's interests.”¹⁰³ Concrete examples for this abstract concept are “[t]echnical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy.”¹⁰⁴

Other confidential information's disclosure would “significantly harm a person or undertaking, [... for example] expose the authors [of a letter] to the risk of retaliatory measures”¹⁰⁵ by an economically powerful competitor. As the Commission is highly dependent on insider information from complainants or third parties to carry out its tasks in the competition field successfully it will be useful to protect the anonymity of the informants.

3.2.3 Failure to Disclose

The consequences of a failure to disclose documents properly are twofold. A gross violation of the rights of the defence will lead to the (entire) annulment of the Commission's final decision; if “the administrative procedure as a whole is not tainted with irregularity”¹⁰⁶ the

¹⁰¹ Ibid.

¹⁰² *Akzo Chemie* para 28.

¹⁰³ Case T-353/94, *Postbank NV v Commission* [1996] ECR II-921, para 87.

¹⁰⁴ Commission Notice para 18.

¹⁰⁵ Ibid para 19.

¹⁰⁶ Toth, *Encyclopaedia* 55.

consequence will be exclusion as evidence of the documents in dispute (or partial annulment, insofar as the decision was based solely on these pieces of evidence).¹⁰⁷

3.3 *Bank Austria Creditanstalt AG v Commission*

3.3.1 Dispute

The applicant had been involved in an Austrian banking cartel fixing deposit and borrowing rates ('Lombard Club'). Under Art 21 of Regulation 17¹⁰⁸ (now replaced by Art 30 Regulation 1/2003), implementing Articles 81 and 82 EC, the Commission is required to publish certain decisions, stating "the names of the parties and the main content of the decision" and taking into account "the legitimate interest of the undertakings in the protection of their business secrets."

The applicant alleged that a too comprehensive publication had violated the principle of lawfulness of administrative action. The argument was that according to Art 21 (2), construed narrowly as the exception to Art 20, only the "main content" of the decision could be published.¹⁰⁹

3.3.2 Ruling of the Court

The court, pointing at Art 1 EU (requiring that "decisions are taken as openly as possible"), Art 254 and 255 EC as well as "numerous provisions of Community law"¹¹⁰ found that

¹⁰⁷ Toth, *Encyclopaedia* 54 et seq.

¹⁰⁸ Council Regulation No 17 (EEC): First Regulation implementing Articles 85 and 86 of the Treaty OJ 1962 13/204. "Following the entry into force of the Amsterdam Treaty, the articles of the EC Treaty were re-numbered (e.g. Art 85 and 86 became Art 81 and 82). However, this measure does not apply to the titles of regulations pre-dating the Amsterdam Treaty." <http://europa.eu/scadplus/leg/en/lvb/l26042.htm> (accessed 5 March 2009).

¹⁰⁹ *Bank Austria* para 60.

¹¹⁰ *Ibid* para 69.

[I]n the absence of provisions explicitly ordering or prohibiting publication, the power of the institutions to make acts which they adopt public is the rule, to which there are exceptions in so far as Community law, in particular through provisions ensuring compliance with the obligation of professional secrecy, prevents disclosure of such acts or of certain information contained therein.

Thus, the aim of Article 21(2) of Regulation No 17 is not to limit the Commission's freedom to publish, of its own volition, a version of its decision that is fuller than the minimum necessary and also to include information whose publication is not required, in so far as the disclosure of that information is not inconsistent with the protection of professional secrecy.¹¹¹

The notion *professional secrecy* is broader than *business secrets* and does not gain clarity from Art 287 EC or the Regulation. Thus the court set out three criteria defining *professional secrecy* in Paragraph 71: (i) that information is "known only to a limited number of persons", (ii) that "disclosure is liable to cause serious harm to the person who has provided it or to third parties" and (iii) that these potentially harmed interests "objectively be worthy of protection."

In addition the interest in secrecy has to be weighed against the public interest in disclosure. Expressions of that balancing principle are for example Regulations 45/2001 or 1049/2001.¹¹² Whereas the primary law concept of 'professional secrecy' (Art 287 EC) can "in no circumstances"¹¹³ be amended by secondary legislation, the latter gives an important insight as to how the Community legislature construes a certain provision.

Consequently information cannot fall under professional secrecy insofar as the public has access to documents containing this information.¹¹⁴ Hence Art 20 of Regulation 17 prohibits – apart from business secrets – only the publication of such information "covered by the

¹¹¹ *Bank Austria* paragraphs 69, 79. These principles have been restated in Case T-474/04 *Pergan v Commission* [2007] ECR-II 4225, paragraph 61. In this decision, however, the applicant's "participation in the infringement was not referred to in the operative part [...] of that decision in which its participation in the infringement was mentioned. Such a situation is (found) contrary to the principle of the presumption of innocence and infringes the protection of professional secrecy [...]" Paragraph 80.

¹¹² *Bank Austria* para 72.

¹¹³ *Ibid.*

¹¹⁴ *Ibid* para 74.

exceptions [...] laid down in Article 4 of Regulation No 1049/2001 or [...] protected under other rules of secondary legislation, such as Regulation No 45/2001.”¹¹⁵

3.4 Summary

Access to the file is generally a distinct concept from access to documents under Regulation 1049/2001. Whereas the former is safeguarding two procedural principles in competition and merger proceedings, namely equality of arms and the rights of the defence, the latter tries to promote democracy (by enabling citizens to participate in the decision making process) and accountability. While the bearers of both rights can be natural or legal persons, access to documents has an ambivalent hybrid nature, being an individual and a *collective* right at the same time (which has a bearing on the balancing of interests, as the Commission in its 2004 report made clear that the “interest of a private individual can never justify disregarding an exception”¹¹⁶). The addressees of a statement of objection however, enjoy their right completely individually. They will be granted access to the file with exception of internal documents, business secrets and other confidential information. The *Bank Austria* case impressively shows the interplay between provisions concerning access to the file and *inter alia* access to documents. The principle of openness enshrined in the latter *infects* even a concept so different.

¹¹⁵ Ibid para 75. As a result the CFI construed main content in Art 21 (2) as intended to facilitate “the Commission’s task of informing the public of such decisions, having regard *inter alia* to the linguistic constraints connected with publication in the Official Journal. Conversely, that provision does not limit the Commission’s power to publish the full text of its decisions, if, resources permitting, it considers it appropriate to do so, without prejudice to the obligation of professional secrecy as set out above.” (at para 76).

¹¹⁶ Commission Report 2004 24.

4. Exceptions – Article 4

The exceptions listed in Art 4 of Regulation 1049/2001 largely define the scope of the right to access in practice. As mentioned above these exceptions are drafted rather vaguely giving the institutions and – in the last resort – the courts substantial interpretative leeway. The latter's findings in various contexts have gradually developed into some (general) principles, mostly forming procedural requirements. The major difference that remains will be found to exist between the protection of public interest (Art 4 (1)(a)) and basically all the other interests. Exactly the elements of perusal that are generally valid and applicable are only of rudimentary relevance when public interest is at stake. After outlining some conceptual innovations and the generally applicable principles, the focus of this chapter will be on the construction of the individual exceptions. Two aspects of particular interest are the developments concerning legal service documents and documents originating from Member States. More abstractly the developments concern the duty to give proper reasons, the concrete and individual assessment and the extensiveness of the *spirit* of transparency (whether or not it constitutes a general principle of Community law has not been finally settled by the ECJ).

4.1 Preliminary observations

First it has to be noted that there is no principal exclusion of any category of documents access can be sought to:

Refusal to disclose a document must be based on an analysis of the harm that would be caused by disclosure to one of the public or private interests expressly mentioned in the Regulation.¹¹⁷

¹¹⁷ Commission Report 2004 7 (The Principle of Harm).

Abandoning the concept of mandatory and non-mandatory exceptions, the exceptions listed in Art 4 of the Regulation can be divided into absolute and relative exceptions. Art 4 (1) contains the absolute exceptions: potential harm done by disclosure to any of the interests *must* lead to refusal of access. The relative exceptions are listed in Art 4 (2) and (3), they require weighing of the potential harm against the public interest in disclosure. If the latter prevails, the documents are to be disclosed “despite the applicability of an exception.”¹¹⁸ Art 4 (3), which protects the internal decision making process is subject to especially strict conditions: it can be invoked only if disclosure would “seriously undermine” the decision making process. To draw a line between “undermine” and “seriously undermine” can appear arbitrary or at least lead to considerable difficulties, even more so as Art 4 (3) subparagraph 2 extends this option to decisions already taken. More important than the degree of harm will in practice be the result of the weighing against the public interest.¹¹⁹

Before an individual analysis of the exceptions provided for in Art 4 important general principles gradually developed by the courts – as summarised in *Technische Glaswerke Ilmenau*¹²⁰ – will be reiterated:

[The] fact that a document concerns an interest protected by an exception cannot justify application of that exception.¹²¹

Such application may, in principle, be justified only if the institution has previously assessed [a] whether access to the document would specifically and actually undermine the protected interest and [b] in the circumstances referred to in Article 4 (2) and (3) of Regulation No 1049/2001, whether there was no overriding public interest in disclosure.

The risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical.¹²²

¹¹⁸ Commission Report 2004 20.

¹¹⁹ Ibid 23.

¹²⁰ Case T-237/02 *Technische Glaswerke Ilmenau v Commission* [2006] ECR-II 5131, para 77.

¹²¹ Case T-20/99 *Denkavit Nederland v Commission* [2000] ECR II-3011, para 45.

¹²² *Kuijer* paragraph 56 (supra FN 59).

The examination [...] must be carried out in a concrete manner and must be apparent from the reasons for the decision.¹²³

Additionally it has to be borne in mind that “the purpose of the regulation is to give the public the widest possible right of access, the exceptions to that right set out in Article 4 of the regulation must be interpreted and applied strictly.”¹²⁴ Equipped with this armamentarium we can now turn to the interpretation of the individual provisions.

4.2 The Individual Provisions

4.2.1 Art 4 (1)(a) – Public interest

The two most important exceptions under this heading are the protection of public security (first indent) and international relations (third indent), which are frequently invoked together by the Council.¹²⁵ The first one has special importance in foreign and security policy as well as justice and home affairs, two areas are of utmost interest to the public. In 2007 approximately 45% of all initial requests to the Council were made in one of those areas and 13,3% of its refusals were based on this ground.¹²⁶ Protecting the relations between the Community and non-Member States as well as International Organisations covers “bilateral and multilateral relations, and political, commercial and development aid relations.”¹²⁷ This exception was invoked rather frequently in 2007 as well: 15% of the Council’s refusals and almost 11% of the Commission’s refusals of initial requests were based on the protection of international relations.¹²⁸

4.2.1.1 Public Security and International Relations

¹²³ *Hautala* para 67 (supra FN 42), *Kuijer* para 38 and *VKI* (supra FN 51) paras 69 and 74.

¹²⁴ Case T-403/05 *MyTravel Group plc v Commission* para 32, referring to Case C-64/05 P *Sweden v Commission and Others* [2007] ECR I-0000, para 66, and Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2006] ECR II-2023, para 84.

¹²⁵ *Infra* 5.4.2.

¹²⁶ Council annual report on access to documents – 2007 (hereinafter Council Report 2007) 35-36. The Commission based not more than 1,19% of its refusals on public security, Commission Report 2007 9.

¹²⁷ Commission Report 2004 18.

¹²⁸ Council Report 2007 36, Commission Report 2007 9. Important cases dealing with the exception on international relations have been *Hautala* and *Kuijer*, both decided under the regime set out by the Code of Conduct, underlining the institutions’ wide discretion as well as the limitations on the judicial review.

Generally it can be said that both kinds of exceptions are not surprisingly rather common in public access systems. The Community courts tend not to interfere with the institutions' (political) judgment and concede rather far-reaching discretion, an approach instructively exemplified in *Sison v Council*:¹²⁹

On the basis of an anti-terrorism regulation¹³⁰ Mr Sison appeared on a list of persons whose funds and financial assets were frozen. He then sought access to the documents that had led to including him in the list, including the disclosure of the Member States that had provided the information.

Whereas the CFI first underlined the principle that “exceptions must be construed and applied strictly”¹³¹, it also stated that the institutions have a wide discretion in cases where refusal depends on potential harm to public interest (Art 4 (1)(a)).¹³² As a consequence judicial review “must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers.”¹³³

Concerning the duty to give reasons, required by Art 253 EC, the CFI restrictively held that “justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and, thereby, depriving the exception of its very purpose” might be impossible.¹³⁴ The statement of reasons must (merely) make it “possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception

¹²⁹ Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR-II 1429.

¹³⁰ Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/460/EC (OJ 2002 L 295/12).

¹³¹ *Sison* para 45, referring to *Kuijer* (by analogy).

¹³² *Hautala* para 71, and *Kuijer* para 53.

¹³³ *Sison* para 47.

¹³⁴ For this line of argument see also e.g. *WWF UK* para 65 (supra FN 50) and *Turco* para 74.

is genuine.”¹³⁵ As these minimum requirements were met the “relative brevity”¹³⁶ of the “formulaic”¹³⁷ statement of reasons sufficiently satisfied the Court of First Instance.¹³⁸

As regards the concrete assessment whether disclosure would undermine the public interest the CFI held that pursuing “the procedure [...] for access to sensitive documents, under which both the officials authorised for that purpose and the delegations of the Member States were able to examine the documents”¹³⁹ indicates that a concrete examination has been carried out.

On appeal the ECJ entirely upheld the *Sison* decision.¹⁴⁰ One more remark: The appellant’s fourth ground of appeal consisted basically of an alleged violation of the presumption of innocence and subsequently a deprivation of an effective remedy. Whereas elegantly rejected as inadmissible – constituting a new plea in law extending the subject matter at the appeal stage – the underlying problem might cause troubles in similar future cases.

The judgment presents a highly intricate interlinking of problems, leaving the individual bereft of any meaningful protection: First, the duty to carry out an individual assessment is reduced to a procedural formality when sensitive documents are involved. Second, the duty to give reasons is reduced to an absolute minimum by the argument that any additional information would curtail the very purpose of the exception. Obviously this is a knock out argument, potentially stretching the scope of the exception “*ad infinitum*.”¹⁴¹ Third, the exceptions

¹³⁵ *Sison* para 61.

¹³⁶ *Sison* para 65.

¹³⁷ *Ibid* 63.

¹³⁸ The critical relation between the duty to give reasons and the exception from the right to access has also been subject of the CFI’s scrutiny in Case T-327/03 *Stichting Al-Aqsa v Council* [2007] ECR II-79*, summ. pub.: Decisions concerning the freezing of funds according to the relevant counter-terrorism Community measures “must at least make actual and specific reference to the reasons why the Council considers [...] that a decision satisfying the definition given in Article 1(4)^[138] has been taken by a competent authority of a Member State in respect of the person concerned, unless overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, militate against it, and subject also to the possibility of publishing a non-confidential version of that decision in the *Official Journal* [...]”

¹³⁹ *Sison* para 83.

¹⁴⁰ Case C-266/05 P *Sison v Council* [2007] ECR I-1233.

¹⁴¹ *Helioskoski/Leino, Darkness at the Break of Noon*. CMLR (2006) 43: at 765 (accessed via ebsco host).

concerning public interest are absolute; no balancing of interests will be carried out. Fourth and finally, the exception interferes with some core constitutional rights (the presumption of innocence, the freedom of property etc) without giving any realistic chance to challenge the decision. In the light of the minimum procedural safeguards this seems to be blatantly disproportionate.

4.2.1.2 Other Public Interests

The other two exceptions available under the heading *public interest* are of no particular practical relevance:¹⁴² *Defence and military matters* (second indent) had not been available as an individual exception under the Code of Conduct. Whereas classified documents relating to the European security and defence policy had been excluded from the scope of the right to access by a Council decision¹⁴³, this category now falls under the Regulation. However, the interplay with Art 9 on sensitive documents, which is of vital importance here, has to be underlined. *Financial, monetary or economic policy of the Community or a Member* (fourth indent), intending to protect “essential interests of the Community and Member States”¹⁴⁴ is rarely invoked: whereas the Commission relied on it in 1,26% of the cases, the Council did not invoke it a single time in 2007.¹⁴⁵

4.2.2 Art 4 (1)(b) Privacy and integrity of the individual

As mentioned above, the right to access to documents does not exist in a legal vacuum. Here the interrelation with data protection considerations becomes particularly conspicuous. The

¹⁴² In 6% of the initial requests the Council was confronted with defence and military matters, resulting in a total of 2,3% of all refusals in 2007; Council Report 2007 35-36. The Commission refused an equally small amount of cases on ground of this exception (2,23%). The amount of initial requests falling under this heading is however not clear as the relevant statistics do not include this explicit category. Commission Report 2007 9, 13.

¹⁴³ Decision of 14 August 2000 (2000/527) amending Decision 93/731, OJ 2000 L 212/9.

¹⁴⁴ Commission Report 2004 18.

¹⁴⁵ Council Report 2007 36, Commission Report 2007 9.

relevant Community instrument dealing with data protection is Regulation 45/2001.¹⁴⁶ The central notion *personal data* is defined in Art 2 (a) as

any information relating to an identified or identifiable natural person [...]; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity.

The Commission relied on this exception in approximately 5% of its decisions to refuse access.¹⁴⁷ Regulation 1049/2001 “read in conjunction with the data protection Regulation leads to a legal framework which is as such rather unclear.”¹⁴⁸ One particular problem used to be that there is no hierarchy between the two concepts as both are rooted in the EC Treaty (Art 255 and 286 respectively). Where personal data is concerned the conditions of Regulation 45/2001 generally have to be met in addition to those in Regulation 1049/2001.¹⁴⁹

A very recent case decided by the CFI is *Bavarian Lager*.¹⁵⁰ The applicant sought access, inter alia, to a list of attendance, containing the names of delegates of the CBMC (Confédération des Brasseurs du Marché Commun) who had taken part in an October 1996 meeting. Following a complaint lodged with the European Ombudsman (713/98/IJH) the applicant received first fourteen and later another twenty-five persons’ names.¹⁵¹ The applicant submitted another request in December 2003 under Regulation 1049/2001 and the Commission insisted on blanking out five names, arguing that Art 8 Regulation 45/2001 required the fulfilment of certain

¹⁴⁶ Regulation No 45/2001 of 18.12.2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001 L 8/1.

¹⁴⁷ Commission Report 2007 9. The Council invoked this ground only four times (0,2%), Council Report 2007 36. One case that has not been decided yet, concerns access, inter alia, to attendance lists of certain Committee meetings: T-170/03 British American Tobacco (Investments) Ltd v Commission (pending).

¹⁴⁸ Kranenborg, *Access to Documents and Data Protection in the European Union*. CMLR (2008) 45: at 1080.

¹⁴⁹ Ibid 1090.

¹⁵⁰ Case T-194/04 *The Bavarian Lager Co. Ltd v Commission* [2007] ECR II-4523.

¹⁵¹ *Bavarian Lager* paras 27 – 30. On the whole the Commission had sent letters to 45 persons, asking for permission to release their identity.

conditions, which the applicant had not established. Therefore access was to be (partially) denied.¹⁵²

To solve the ostensible tensions between Regulations 1049/2001 and 45/2001, their different objectives have to be borne in mind. The CFI states in Paragraph 98:

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.

Private life as protected in Art 8 ECHR (as the relevant yardstick in terms of fundamental rights) is an extremely broad concept, containing inter alia professional and business activities (e.g. ECHR judgments in *Niemietz v Germany* of 16 December 1992, Series A No 251-B, § 29). However, not all personal data fall within the scope of private life and hence are “by their very nature capable of undermining the private life of the person concerned.”¹⁵³

As the exceptions have to be interpreted restrictively, Art 4 (1)(b) is only concerned with data of the latter kind, which is “capable of actually and specifically undermining the protection of privacy and the integrity of the individual.”¹⁵⁴ The question before the court was finally whether “public access to the names of the participants at the meeting [...which falls under the definition of ‘personal data’ in Art 2 (a) Regulation 45/2001] is capable of actually and specifically undermining the protection of the privacy and the integrity of the persons concerned.”¹⁵⁵ The delegates in question had attended the meeting not in their personal capacity but as representatives, exercising their professional functions. The court held that there was no interference with their private lives and the Commission hence had been wrong in relying on Art

¹⁵² Ibid paras 36 – 37.

¹⁵³ *Bavarian Lager* paras 114 – 119, at 119.

¹⁵⁴ Ibid para 117.

¹⁵⁵ Ibid para 120.

4 (1)(b). Moreover, “where the disclosure gives effect to Article 2 of Regulation No 1049/2001 and does not fall under the exception laid down by Article 4(1)(b) of that regulation, the applicant has no need to prove necessity for the purposes of Article 8(b) of Regulation No 45/2001.”¹⁵⁶

4.2.3 Art 4 (2)

4.2.3.1 Commercial interests including intellectual property (first indent)

Under this heading intellectual property rights and business secrets as well as a general interest in one’s commercial reputation are protected. Data is often obtained in the course of competition investigations, disclosure mainly sought by rival undertakings. Whereas the Council invoked this exception in only one case in 2007, the Commission based almost 11% of its refusals on this ground.¹⁵⁷

A recent example from the case law is *Terezakis v Commission*¹⁵⁸ where access to, inter alia, the main contract, concerning the new Athens International Airport at Spata, co-financed by the Cohesion Fund was sought. Principally “a contract such as that at issue [...] is likely to contain confidential information concerning the contracting companies and their business relations and must therefore be regarded as falling within the scope of the exception”¹⁵⁹ protecting commercial interests. However the Commission’s reasoning was found to be too abstract, virtually applying “per se to any commercial contract”¹⁶⁰ and not showing any effort to fulfil the requirement of concrete and individual assessment. In the words of the court:

¹⁵⁶ Ibid paras 124 – 138, at 138. See also Art 6 (1) Regulation 1049/2001 as well as its overall goal to grant the widest access possible. Paragraph 109: “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.”

¹⁵⁷ Council Report 2007 36; Commission Report 2007 9.

¹⁵⁸ Case T-380/04 *Terezakis v Commission*, Judgment of 30 January 2008 (not yet published).

¹⁵⁹ *Terezakis* para 91.

¹⁶⁰ Ibid para 93.

[I]f all information relating to a company and its business relations were regarded as being covered by the protection which must be given to commercial interests [...], effect would not be given to the general principle of giving the public the widest possible access to documents held by the institutions.¹⁶¹

The court, having examined the content of the contract in accordance with Art 65 (b), Art 66 (1) and Art 67 (3) third subparagraph of the Rules of Procedure, found that “substantial passages in the contract clearly did not [...] concern the ‘specific cost components related to the project’ to which the Commission refers in the contested decision.”¹⁶² That they obviously contained information about the contracting parties and their business relations was not “sufficient to conclude that their disclosure would specifically and actually undermine the commercial interests of those parties.”¹⁶³

4.2.3.2 Court proceedings and legal advice (second indent)

Even though the Commission relied on this exception in 6% and the Council only in 0,8% of all initial refusals in 2007 its importance has repeatedly been underlined.¹⁶⁴

The ambit of the exception *court proceedings* is rather limited, applying only to documents specifically drawn up for particular court proceedings but not to administrative documents that become subject of (or are related to) such proceedings.¹⁶⁵ The exception includes “pleadings or other documents lodged, internal documents concerning the investigation of the case before the

¹⁶¹ Ibid.

¹⁶² Ibid para 96.

¹⁶³ *Terezakis* para 97.

¹⁶⁴ Council Report 2007 16, noting however: “While this exception is not the Council's most frequently invoked grounds for refusal [sic!], its importance for the proper functioning and effectiveness of the institution's work should nevertheless be emphasised.” Commission Report 2007 9.

¹⁶⁵ See for example Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2006] ECR-II 2023, paragraph 96 – 97: “Therefore, it is possible that a communication from OLAF to the national authorities, pursuant to Article 10(1) and (2) of Regulation No 1073/1999 or to an institution, pursuant to Article 10(3) of that regulation, would not lead to the opening of judicial proceedings at national level or disciplinary or administrative proceedings at Community level. (97) 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.”

court, but also correspondence concerning the case between the Directorate-General concerned and the Legal Service or a lawyers' office.”¹⁶⁶

Concerning the Commission's pleadings the CFI recently held in *Association de la presse internationale a.s.b.l. (API)*¹⁶⁷ that access can be denied without necessity “to carry out a concrete assessment of [the] content”¹⁶⁸ before the pleadings have been debated in the court at the hearing. This is also interesting as it de facto establishes a category of documents that is precluded from access without being subject to the standards of scrutiny described above.

The express protection of *legal advice* was introduced by the Regulation in 2001. Still, the courts had already interpreted public interest in a way comprising legal advice.¹⁶⁹ The two different categories of advice covered concern opinions in the legislative process on the one hand and opinions in court proceedings on the other hand. In a very recent judgment of imminent significance, *Turco and Sweden*¹⁷⁰, the Court of Justice turned the CFI's approach to the former category upside down:

¹⁶⁶ *Interporc* paras 40 – 42, at 41 (supra FN 15). Upheld on appeal in Case C-41/00 P *Interporc Im-und Export GmbH v Commission* [2003] ECR I-2125.

¹⁶⁷ Case T-36/04 *Association de la presse internationale a.s.b.l. (API) v Commission* [2007] ECR-II 3201. Three appeals are pending, C-514/07 P, C-528/07 P and C 532/07 P.

¹⁶⁸ *API* para 81.

¹⁶⁹ See for example Order of the President of the Court of First Instance of 3 March 1998 in Case T-610/97 R, *Carlsen i. a. v Council* [1998] ECR II-485 where “the maintenance of legal certainty and the stability of Community law”, and “the Council's being able to obtain independent legal advice” (para 4) were held sufficiently to reject a request to disclose particular draft legislation. The disclosure of such “working instruments” (para 5) could result in a public (or inter-institutional) debate on legality and scope of an intended measure and thereby lead to “uncertainty with regard to the legality of Community measures and have a negative effect on the stability of the Community legal order and the proper functioning of the institutions.” (Paragraph 5). See also Case T-44/97, *Ghignone i.a. v Council* [2000] ECR II-1023, para 48: “En effet, il serait contraire à l'intérêt public qui veut que les institutions puissent bénéficier des avis de leur service juridique, donnés en toute indépendance, d'admettre que de tels documents internes puissent être produits par des personnes autres que les services à la demande desquels ils ont été établis dans un litige devant le Tribunal sans que leur production ait été autorisée par l'institution concernée ou ordonnée par la juridiction.”

¹⁷⁰ Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council*, Judgment of 1 July 2008 (not yet published, hereinafter *Turco and Sweden*). Mr Turco had been denied access to an opinion of the Council's legal service concerning a proposal for a Council directive laying down minimum standards for the reception of applicants for asylum in Member States. The CFI had dismissed the application insofar as it concerned access to the opinion.

The ECJ – before dealing with the appellants’ pleas – seized the opportunity to generally outline the proper examination to be undertaken by the Council when access to legal service documents is sought, reiterating the principles described above (at 4.1). One additional detail clarified is that the nature of the document as such has to be assessed and it has to be decided which parts of it are covered by the exception. A document’s heading is not sufficient to entitle it to the protection provided for legal advice.¹⁷¹

The court then found that “it is *incumbent on the Council* to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would thereby be [reasonably foreseeably and not purely hypothetically] undermined.”¹⁷² This also means that the Council is required to balance the interest in non-disclosure against, *inter alia*, the public interest in increased openness, raising the level of citizens’ participation as well as the administration’s legitimacy, effectiveness and accountability.¹⁷³

As a result and contrary to the CFI’s judgment the ECJ holds that the Regulation “imposes, in principle, an obligation to disclose the opinions of the Council’s legal service relating to a legislative process.”¹⁷⁴ The CFI had stated that potential “lingering doubts as to the lawfulness of the legislative act in question”¹⁷⁵ as well as the “independence of the opinions of its legal service”¹⁷⁶ would authorise the Council to *generally maintain* the confidentiality of legal advice. Contrariwise, concerning the first reason, the ECJ holds that it is too little information and debate that makes the decision-making process suspicious. “[P]recisely openness in this regard

¹⁷¹ *Turco and Sweden* paras 38 – 39.

¹⁷² *Ibid* para 44 (emphasis added).

¹⁷³ *Turco and Sweden* para 45. For the CFI’s overruled line of argument, namely that the overriding interest cannot consist of the general interest in more openness, as such already enshrined in the Regulation and above all applicable to any case see *Turco* paras 82 – 85 and similarly *API* para 97.

¹⁷⁴ *Turco and Sweden* para 68.

¹⁷⁵ *Turco* para 78.

¹⁷⁶ *Ibid* para 79.

[...] contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated.”¹⁷⁷

The independence of the legal service is indeed one of the core issues protected by the exception. Nonetheless, the Council’s arguments were held to be neither sufficiently substantiated nor suitable to prove a more than hypothetical risk of an undermining effect. As a matter of fact any *real* undermining effect would result from external pressure, not access to legal opinions as such. Therefore the Council would clearly be responsible to inhibit any improper influence.¹⁷⁸ Moreover, even if the legal service’s independence were undermined by disclosure of its documents, overriding public interests would have to be considered. A specific legal opinion – either because of its sensitive nature or wide scope – can be kept confidential if the institution provides a detailed reasoning for the refusal.¹⁷⁹

However, opinions of the legal service in court proceedings are treated differently. In *Austria v Council*¹⁸⁰ the Commission, intervening on part of the Council sought an order to remove a document containing an opinion by its legal service from the case-file. The court agreed that unauthorised use of such documents in court proceedings could compromise the independence necessary for the legal service’s work. To allow the (external) dissemination of internally given legal advice “risks prejudicing the proper working of the Community institutions. The exchange of views within the Commission could suffer because its services thereby come to hesitate in seeking written advice on the part of the legal service.”¹⁸¹

¹⁷⁷ *Turco and Sweden* para 59.

¹⁷⁸ *Ibid* paras 62 – 64.

¹⁷⁹ *Turco and Sweden* paras 67 and 69.

¹⁸⁰ Order of the Court in Case C-445/00 *Austria v Council* [2002] ECR I-9151.

¹⁸¹ Order para 7.

4.2.3.3 Inspections, investigations and audits (third indent)

Though at a low in 2007 (23,48% compared to 30,72% in 2006 and 41,80% in 2005) this exception remains of utmost importance for the Commission dealing with access requests.¹⁸² Different kinds of procedures (infringement procedures, state aid cases or national proceedings dealing with alleged fraud etc) are treated distinctly, however the general principles, requiring inter alia individual assessment, also govern these cases.

Early cases had been concerned with documents relating to infringement procedures. In *Petrie* the CFI held that the comprehensive application of this exception to infringement procedures was justified as “an amicable resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment” should not be thwarted.¹⁸³

However, extending the timely scope of protection of the various documents related to such investigations “until the follow-up action to be taken has been decided [...] would make access to those documents dependent on uncertain events. [...] Such an approach would be contrary to the objective of guaranteeing the widest possible public access to documents emanating from the institutions, with the aim of giving citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers.”¹⁸⁴

This question was addressed again in *Franchet and Byk v Commission*¹⁸⁵ concerning national proceedings on alleged fraud against two former Union officials: Although principally found to make access to such documents “dependent on an uncertain, future and possibly distant

¹⁸² Commission Report 2007 9. The Council did not invoke this exception, Council Report 2007 36.

¹⁸³ *Petrie* para 68 (supra FN 29). Or for documents in cases of a potential infringement proceeding: *WWF UK* (supra FN 50); *Bavarian Lager*.

¹⁸⁴ API paragraphs 139 – 140.

¹⁸⁵ Supra FN 124.

event, depending on the speed and diligence of the various authorities”¹⁸⁶ the CFI held on the other hand, even partial access to certain documents¹⁸⁷ “could compromise the effective use of this material by the national authorities, given that the persons implicated in the suspected irregularities could [act] in such a way as to prevent the efficient conduct of the various procedures or investigations which those authorities might decide to initiate.”¹⁸⁸

Besides, at the time the relevant decision was taken “a reasonable period to decide what action to take in the light of the information sent by OLAF had not yet elapsed”¹⁸⁹ and consequently the Commission’s assessment that access to the documents would undermine the protection of the purpose of inspections, investigations and audits and its subsequent refusal were correct.¹⁹⁰

Another case of relevance is *Ilmenau*:¹⁹¹ the Commission first had argued that the applicant – by resorting to Regulation 1049/2001 – was trying to “circumvent the procedural rules in respect of State aid.”¹⁹² However, it changed this strategy in the hearing, admitting that Regulation 1049/2001 was applicable and instead focussed on the exceptions in Art 4 (2) to justify the refusal.¹⁹³ The Commission tried to apply the court’s position in *Petrie* to a state aid

¹⁸⁶ *Franchet and Byk* paras 108 – 111, at 111.

¹⁸⁷ Including in the concrete case “audit reports of companies, reports of interviews with Eurostat officials, reports concerning the checking of expenses and inspection reports, the disclosure of which could have informed the persons concerned about the actions which the national authorities were going to take.” Para 122.

¹⁸⁸ *Franchet and Byk* para 122.

¹⁸⁹ *Ibid* para 123.

¹⁹⁰ *Franchet and Byk* para 124.

¹⁹¹ *Supra* FN 120. The appeal C-139/07 P is currently pending.

¹⁹² *Ilmenau* para 30. The Commission was supported by an intervening competitor, who claimed that Regulation 1/2003 (access to the file) was a *lex specialis* to the general right to access to documents.

¹⁹³ Consequently the intervener’s argument was found inadmissible, *ibid* para 40: “Under the fourth paragraph of Article 40 of the Statute of the Court of Justice, which applies to the Court of First Instance by virtue of Article 53 of that Statute, an application to intervene must be limited to supporting the form of order sought by one of the parties. In addition, under Article 116 (3) of the Rules of Procedure of the Court of First Instance, the intervener must accept the case as it finds it at the time of its intervention. Although those provisions do not preclude an intervener from using arguments different from those used by the party it is supporting, that is nevertheless on the condition that they do not alter the framework of the dispute and that the intervention is still intended to support the form of order sought by that party.”

procedure, arguing that similarly “proper cooperation in good faith”¹⁹⁴ was required which would accordingly exclude the applicant (the concerned undertaking!) from access.

The CFI replied somewhat sharply:

92 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.

After reiterating the principles developed so far¹⁹⁵, the court underlines the necessity of “a concrete, individual assessment of the content of documents [...] as a matter of principle [...], which applies to all the exceptions in paragraphs 1 to 3 of Article 4 of Regulation No 1049/2001, whatever may be the field to which the documents sought relate, and which concerns, in particular, that of cartels as in the case which gave rise to the judgment in *VKI*, or of that of the control of public subsidies.”¹⁹⁶

Based on these principal considerations the court found that the Commission’s assessment was flawed, lacking the necessary concrete examination, especially in regard of possible partial access.

4.2.4 Art 4 (3) – Protection of the decision making process

Protection of the decision making process is one of the most important exceptions in the institutions’ practice. In 2007 around 12% of the Commission’s refusals concerned the protection of the decision making process where the decision had not been taken yet. In more

¹⁹⁴ *Ilmenau* para 69.

¹⁹⁵ See *supra* 4.1.

¹⁹⁶ *Ilmenau* para 85.

than 19% the decision had already been taken, but still access was refused. The Council invoked Art 4 (3) in 38% of the cases of refusal.¹⁹⁷

Aiming at restraining external pressure, the exception can only be invoked if disclosure would “seriously undermine” the decision making process. The difficulty to delineate “undermine” and “seriously undermine” has been mentioned above. The question what seriously undermining means was addressed (however not decided) in *Muñiz v Commission*:¹⁹⁸

That is the case, in particular, where the disclosure of the documents in question has a substantial impact on the decision-making process. The assessment of that serious nature depends on all of the circumstances of the case including, inter alia, the negative effects on the decision-making process relied on by the institution as regards disclosure of the documents in question.¹⁹⁹

Another source of potential tensions results from the fact that the Regulation “ignores the interinstitutional nature of decision-making at Community level.”²⁰⁰ Whereas one aspect of the decision-making process, namely the Commission’s involvement is complete with forwarding its proposal to Parliament and Council, this only opens a new “stage in the Community decision-making process.”²⁰¹

Again, in *Muñiz* a similar issue was at stake as well: A lawyer requested access to working group documents related to matters where the Nomenclature Committee had not yet taken a decision.²⁰² The CFI found that the informal character of the working group, relied upon by the Commission, does “not alter in the slightest the fact that documents emanating from the Working Group ‘can be disclosed’.”²⁰³ The principally legitimate “protection of the decision-making

¹⁹⁷ Council Report 2007 36; Commission Report 2007 10.

¹⁹⁸ Case T-144/05 *Muñiz v Commission*, Judgment of 18 December 2008 (not yet published).

¹⁹⁹ *Muñiz* para 75.

²⁰⁰ Commission Report 2004 23.

²⁰¹ Commission Report 2004 23.

²⁰² *Muñiz* paras 68 – 69.

²⁰³ *Ibid* 82.

process from targeted external pressure”²⁰⁴ has to deal with a more than hypothetical risk that has been established with certainty.

In another case of relevance, *MyTravel*²⁰⁵, the court accepted the Commission’s argument that disclosure of a certain working group report would compromise the authors’ freedom to express their views. The underlying mandate had encouraged them to put forward critical ideas and comments, inter alia, on a judgment of the Court of First Instance²⁰⁶ to enable the responsible Member of the Commission to decide whether or not to appeal against the judgment and “propose possible improvements to the administrative procedure applying to the control of concentrations or to other areas in the field of competition law.”²⁰⁷

The court highlighted that the principle of transparency aiming at increasing the citizens’ participation in the decision-making process “does not carry the same weight in the case of a document drawn up in an administrative procedure intended to apply rules governing the control of concentrations or competition law in general.”²⁰⁸ In such circumstances the disclosure would seriously undermine the Commissioner’s right to be confronted with “frankly-expressed and complete views of its own services.”²⁰⁹ Awareness of such a duty to disclose could moreover lead to increased “self-censorship [... and deprive the Commission of] a constructive form of internal criticism, given free of all external constraints and pressures and designed to facilitate the taking of decisions as regards whether an appeal should be brought [...] or the improvement

²⁰⁴ Ibid 86.

²⁰⁵ Case T-403/05 *MyTravel Group plc v Commission*, Judgment of 9 September 2008 (not yet published). The appeal C-506/08 is pending.

²⁰⁶ Case T-342/99 *Airtours v Commission* [2002] ECR II-2585.

²⁰⁷ *MyTravel* paras 47 – 48.

²⁰⁸ Ibid paragraph 49: characterised as the exercise of “purely administrative functions”.

²⁰⁹ *MyTravel* para 50.

of its administrative procedures relating to the control of concentrations or, more broadly, competition law.”²¹⁰

The court furthermore finds that this risk “is reasonably foreseeable and not purely hypothetical [... as] it appears logical and probable”²¹¹ that written statements would be substituted by informal, oral discussions (avoiding the drawing up of a document) which “would cause significant damage to the effectiveness of the Commission’s internal decision-making process, especially in areas in which it is required to carry out complex legal, factual and economic assessments and to examine particularly large amounts of documents, as in the case of the control of concentrations.”²¹²

As a consequence the court holds that “the Community institutions must be allowed to protect their internal consultations and deliberations where, as in the present case, it is necessary in the public interest in order to safeguard their ability to carry out their tasks, in particular when they are exercising their administrative decision-making powers, as in the case of the control of concentrations.”²¹³

4.2.5 The Exception to the Exception

The relative grounds for refusal of access (Art 4 (2) and (3)) are subject to a balancing of interests: when it is established that disclosure would (seriously) undermine one of the legitimate interests described above this harm has to be weighed against a public interest in disclosure. Is the latter found to be “overriding”, access is granted. It has to be noted that a merely individual interest – how crucial it may be – is never sufficient to “justify disregarding an exception.”²¹⁴

²¹⁰ Ibid para 52.

²¹¹ Ibid para 54.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Commission Report 2004 24.

The question when an interest is overriding cannot be solved theoretically but is subject to an evaluation on a case-to-case basis.

4.2.6 Art 4 (4) Third Party Documents

Unless it is obvious that a document can or cannot be granted access to, the institution has to consult the third-party before deciding on whether or not to disclose it. At all events, the ultimate decision is taken by the institution, which is not bound by the third parties opinion.

4.2.7 Art 4 (5) Documents Originating from Member States

The somewhat ambiguous wording had led to the question how to deal with a Member State's *prior disagreement* to disclosure. Would it *de facto* (and *de iure*) constitute an absolute veto or was the institution empowered to make a final decision. The CFI construed Art 4 (5) as a *special right* conferred on the Member States, especially to prevent circumvention of national access rules. In order not to render it meaningless, a Member State's *request* had to be binding.²¹⁵ However, this approach has been overruled by the ECJ in a quite remarkable way in *Sweden v Commission*²¹⁶, appealing against the *IFAW* judgment:

The court recognises that Art 4 (5) contains an *option*. If a Member State – by request – decides to make use of it, disclosure of a document originating from that Member State requires its prior agreement.²¹⁷ However, the CFI's interpretation of the scope of this prior agreement has been flawed. According to the ECJ, construing Art 4 (5) as an absolute veto is incompatible with the objectives behind Regulation 1049/2001.²¹⁸ In addition nothing in Regulation 1049/2001

²¹⁵ Case T-76/02 *Messina v Commission* (2003) ECR II-0000 paras 40 – 41. Case T-168/02 *IFAW Internationaler Tierschutz-Fonds gGmbH v Commission* [2004] ECR II-4135 paras 57 – 60. T-187/03 *Scippacercola v Commission* [2005] ECR-II 1029, para 62.

²¹⁶ Case C-64/05 P *Sweden v Commission* [2007] ECR I 1389.

²¹⁷ *Sweden v Commission* paras 47 – 50.

²¹⁸ *Sweden v Commission* paras 51 – 56. These objectives are found in (or deduced from) various recitals in the preamble (2 – 4, 10), Art 1 (a), Art 2 (3), Art 3 (b), the abolishing of the authorship rule as well as the substantive exceptions provided for in Art 4 (1) to (3), Art 2 (5) and Art 9.

prefigures Art 4 (5) as a conflict-of-laws rule: First, its scope extends to *all* documents held by one of the institutions. Second, recital 15 – stating that the Regulation neither intends to nor in its effect does amend national legislation – is related to Art 5 and “not capable of affecting the scope to be given to Article 4 (5).”²¹⁹

Structural as well as teleological interpretation lead the court to the conclusion that Art 4 (5) deals with the *process of decision-making*: thus it contains the Member States’ right – within the (material) limits of the substantive exceptions – to “take part in the Community decision. [... A] form of assent confirming that none of the grounds of exception under Article 4 (1) to (3) is present.”²²⁰

The judgment is also remarkable insofar as the court goes on and gives a detailed explanation (or instruction) how the decision has to be implemented on the administrative level:

If a Member State makes use of Art 4 (5) the joint implementation of Community law measures has to be guided by the principle of loyal cooperation (Art 10 EC). “[A] genuine dialogue concerning the possible application of the exceptions laid down in Article 4 (1) to (3)”²²¹ shall be initiated and if the Member States objects to the disclosure, it is bound by the duty to give reasons with reference to the exceptions in Art 4 (1) to (3).²²²

“Where, despite an express request by the institution to the Member State to that effect, the State still fails to provide the institution with such reasons, the institution must, if for its part it considers that none of those exceptions applies, give access to the document that has been asked

²¹⁹ Ibid paras 65 – 70, at 70.

²²⁰ Ibid paras 76 – 81, at 76. Member States trying to protect their legitimate interests have “to confine themselves to the substantive exceptions laid down in Art 4 (1) to (3) [...] or the] special rules for sensitive documents laid down in Article 9.” (at para 83).

²²¹ Ibid para 86.

²²² Ibid paras 85 – 87.

for.”²²³ In case a Member State objects (validly) the institution must mention the reasons given by that Member State. Thereby the unsuccessful applicant can “understand the origin and grounds of the refusal of his request and the competent court to exercise, if need be, its power of review.”²²⁴ Finally the court holds that the Member State’s involvement has no bearing on the community nature of the decision taken and hence the applicant’s possibility to bring an action under art 230.²²⁵

4.2.8 Art 4 (6) – Partial Disclosure

The Regulation has adopted the approach on partial access taken in *Hautala* in Art 4 (6). An important case clarifying the true scope of Art 4 (6) was *Verein für Konsumenteninformation*. An Austrian consumer organisation sought access to a voluminous Commission file²²⁶ on a cartel found in the banking sector (the “Lombard Club”). The Commission arguing, inter alia, that “a detailed examination of each document, which was necessary for any partial consultation, would have represented an excessive and disproportionate amount of work”²²⁷ rejected the application.

The CFI held that in view of the fact that the parts of the Code of Conduct reproduced in Art 4 of Regulation 1049/2001 maintain the conditional form (*could* undermine), “the case law developed in connection with the code of conduct is capable of being applied to (the) Regulation.”²²⁸ Thus the Commission – principally – has to consider individually for every document whether disclosure undermines one of the interests protected, unless “due to the particular circumstances of the individual case, it is obvious that access must be refused or, on

²²³ Sweden v Commission paragraph 88.

²²⁴ Ibid para 89.

²²⁵ Ibid paras 90 – 94.

²²⁶ More than 47 000 pages, excluding internal documents. *VKI* para 17 (supra FN 51).

²²⁷ Ibid para 20.

²²⁸ Ibid para 72.

the contrary, granted.”²²⁹ Unfounded refusal of proper examination generally constitutes a violation of the principle of proportionality. However the CFI acknowledged that there might be – exceptional – cases of unreasonably burdensome requests, irreconcilable with the interest in good administration, which outweighs the interest in individual examination.²³⁰

4.2.9 Art 4 (7)

According to Regulation No 354/83²³¹ as amended by Regulation No 1700/2003²³² all documents (with very limited exceptions) in the archives of Community institutions, bodies and agencies become publicly accessible after thirty years. This idea is restated in Art 4 (7), similarly providing exceptions for “documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents.”

4.3 Summary

The most important developments in the case law are briefly reiterated:

Beyond doubt the really problematic case is *Sison*: The judgment presents a highly intricate interlinking of problems, namely: First, the duty to carry out an individual assessment will often be reduced to a procedural formality. Second, the duty to give reasons is reduced to an absolute minimum by the argument that any additional information would curtail the very purpose of the exception. Third, the exceptions concerning public interest are absolute, no balancing of interests will be carried out. Fourth and finally, the exception interferes with some

²²⁹ VKI paragraph 75.

²³⁰ That exceptions to the right of access to documents must be interpreted strictly follows by analogy from *British American* para 40 (supra FN 54); also Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal v Commission* [2000] ECR I-1, para 27. VKI paras 100-115. In the present case the CFI held in favour of the applicant and annulled the Commission’s decision. A recent case where Art 4 (6) was – unsuccessfully – invoked is Case T-264/04 *WWF European Policy Programme v Council* [2007] ECR II-911.

²³¹ OJ 1983 L 43/1.

²³² OJ 2003 L 243/1.

core constitutional rights (the presumption of innocence, the freedom of property etc) without giving any realistic chance to challenge the potentially drastic decision.

A much more favourable decision for access to documents is *Turco and Sweden*, three aspects of which are noteworthy: First the ECJ held that there is a principle obligation to disclose legal service documents relating to the legislative process (whereas the CFI had found that confidentiality of legal advice may generally be maintained). Another real change of paradigm is the finding that ascertaining the existence of an overriding public interest is incumbent on the institution. Relieving the applicant of the burden of proof. Lastly, a further very important aspect of the judgment is that it recognises the public interest in increased openness, raising the level of citizens' participation as well as the administration's legitimacy, effectiveness and accountability as not "consumed" by the purpose of the Regulation as such.

How this interpretation will influence the apparently very closely related exception protecting the decision making process (from undue external pressure) remains unclear: a few months after the *Turco and Sweden* decision the CFI handed down the *MyTravel* judgment (the appeal is currently pending): Disclosure of a working group report was held to compromise the authors' freedom to express their views freely. The CFI argued that in the constellation of this case (concerning a document dealing with ideas how to improve the administrative procedure concerning the control of concentrations and competition law in general) the principle of transparency (aiming at increased participation in the decision making process) was of less significance.

The decision in *Bavarian Lager* is another expression of the weight that transparency has in the European legal system: In the conflict of two coequal concepts, data protection and transparency, openness was found to prevail largely, finding its limits only at the core interests of data protection.

In *Ilmenau*, the CFI held that the concrete and individual assessment has to be carried out independently from the field to which the documents requested relate. This leads to the preliminary conclusion that the exceptions under Art 4 (2) and (3) are generally not substantially differentiating by the topical background. Whereas on the whole the regulation provides a uniform set of procedural rules that have to be respected, variances can result from factual discrepancies, which can easily occur under the exception protecting inspections, investigations and audits (e.g. when the purpose of the procedure clashes with the requirements of transparency in fraud proceedings or [potential] infringement procedures).

Finally the most active approach was probably taken in *Sweden v Council*, where the ECJ degraded the Member States' right to request confidentiality from an absolute veto to a procedural right to participate in the institutions' decision-making process. Another remarkable aspect of this judgment is the detailed explanation how the decision has to be implemented on the administrative level.

5. Analysis in Numbers

At the outset it has to be mentioned that the following numbers are primarily informative, merely supporting a better understanding of the reality of access. The institutions have a dissimilar way of presenting their annual reports and the relevant data. This is partially a result of the (considerably) different tasks carried out, which e.g. make some of the exceptions more or less relevant. Moreover they pursue varying policies on the publishing of data, which also might distort the overall impression one gets when studying the annual reports.

5.1 Initial Requests and Institutions' Reactions

5.1.1 Commission

The number of initial requests concerning undisclosed documents has been increasing constantly, from around 1000 in 2002 to 4196 in 2007, 355 more than in the previous year.²³³

	2005	2006	2007
Access	64,43	73,83	72,71
Partial access	3,65	2,94	3,88
Refusal	31,92	23,22	23,40

Table 1 Commission reaction to initial requests in % (Source Commission Report 2007)

Whereas the percentage of at least partially positively handled applications has been quite stable in 2006 and 2007, the number of confirmatory requests virtually doubled from 140 to 273. While two thirds of these led to a confirmation of the original decision in 2007, more than 18%

²³³ As the definition of requests has been changed, the data before 2005 differs from later results: e.g. in the Commission's 2005 report according to Art 17 (1) the number of initial requests was 3173, in later reports this number has been raised to 3396. Commission Report 2007 8-9.

of the contested decisions were partially and more than 15% fully revised (compared to 8,57% of full revision in 2006).²³⁴

5.1.2 Council

Requests made to the Council were fluctuating in the previous years. In 2007 the number of initial requests dropped to 1964. A glance at the number of documents requested makes this fluctuation even more obvious: While in 2004 almost 13000 documents were initially requested this number dropped to approximately 9500 in 2005, rose again to more than 11000 in 2006 and fallen to less than 8000 in 2007. It has to be noted however that the Council has the most comprehensive register, including, inter alia, all those documents access has been granted to in full. By the end of 2007 this register contained more than 700000 directly downloadable documents.²³⁵

	2005	2006	2007
Access	66,42	74,44	66,60
Partial access	13,26	10,17	12,15
Refusal	20,32	15,39	21,25

Table 2 Council reaction to initial requests in % (Source Report Council 2007)

Whereas in 2006 40 confirmatory applications were made, this number fell to 18 in 2007. Regarding the number of documents requested, this decline is even plainer: 142 in 2006 correspond to 30 in 2007, 15 of which were granted access to (6 fully, 9 partially).

²³⁴ Commission Report 2007 9.

²³⁵ Council Report 2007 8-9. At the same time the Commission register comprised approximately 87000 documents. See Commission Report 2007 2.

5.1.3 Parliament

The Parliament had to deal with 1865 requests, 334 of which related to previously unpublished documents. The number of requests has been relatively stable over the last three years and access was granted in more than 80% of the cases. Four confirmatory applications were made in 2007, one of which resulted in full revision of the contested decision.²³⁶

5.2 *Who Seeks Access – Applicants' Profile*

The question that actually seeks access to documents is of particular relevance: the aim of the Community efforts is to grant the public widest possible access. Apparently three groups of applicants make most frequent use of the right to access: Under the heading civil society interest groups' and NGOs' requests are recorded in the statistics. The academic world, comprising research and libraries are the second and lawyers the third group, which considerably benefit from the right to access. Interestingly journalists are relatively rarely seeking access to either of the three institutions documents (just about 3% of the applications).²³⁷ Finally it has to be noted that there remains a rather large number of unspecified requests potentially altering the findings.

5.2.1 Commission

On the one hand applications from the civil society sector dropped sharply from 29,44% in 2005 to 17,27% in 2006 and remained stable since (2007: 17,77%). On the other hand, requests from the academic world present an almost inverse picture. Requests rose from 10,49% in 2005 to 32,08% in 2006 and remained at that high level in 2007 (31,85%). Lawyers' requests made to the Commission have been abating slightly over the past years (2007: 9,69%). In addition public

²³⁶ Parliament Report 2007 A.

²³⁷ Commission Report 2007 11, Council Report 2007 31, Parliament Report 2007 E.

authorities (other than EU institutions) have to be mentioned as another interested party for Commission documents (15,69% in 2007).²³⁸

5.2.2 Council

Whereas access sought to Council documents by civil society has been gradually waning over the past years (2003: 21,4%; 2005: 17,2%; 2007: 14,2% in 2007), requests from the academic world have constantly been increasing, amounting to 40% in 2007 (2003: 26,5%; 2005: 32,3%). Lawyers brought 8,8% of all initial applications in 2007 (2003: 13%; 2005: 10,2%).²³⁹

5.2.3 Parliament

The profile of applicants seeking access to Parliament documents is rather stable. More than 20% of the requests come from civil society, around 40% from the academic world. Lawyers' interest in Parliament documents, while varying slightly, has remained rather steady over the years as well (5,84% in 2003 compared to 6,49% in 2007).²⁴⁰

5.3 Fields of Application and Types of Documents Requested

5.3.1 Commission

Concerning Commission documents, the main areas of interest in 2007 were justice, freedom and security (8,45%), energy and transport (7,54%), competition (7,32%), the internal market (6,46%) and the environment (6,11%).²⁴¹

²³⁸ Commission Report 2007 11.

²³⁹ Council Report 2007 31.

²⁴⁰ Parliament Report 2007 E.

²⁴¹ Commission Report 2007 13.

5.3.2 Council

The largest number of applications to the Council has been made in the areas justice and home affairs (26,7%). Another area of intensive interest concerns external relations (CFSP, 18,1%). Finally agriculture and fisheries made up almost 7% of the requests in 2007.²⁴²

5.3.3 Parliament

The applications made to Parliament are not registered by the subject they relate to but by different categories of documents. Among those relating to parliamentary activity (notably more than 40% of the requested documents in the previous three years) plenary documents play an important role, e.g. adopted texts as well as motions for resolutions or reports. Other categories are documents containing general information (around 20% in 2006 and 2007), documents of other institutions (applications in this category, now 12%, have been more than doubled between 2005 and 2007) or documents of third parties (more than 14% in 2007).²⁴³

5.4 Exceptions

The frequency of the application of individual exceptions has been mentioned in the discussion of the individual provisions. The following overview is intended to illustrate the exceptions' relative importance and development over the past few years at a glance. Thus only the four most frequently invoked exceptions will be put on record.

²⁴² Council Report 35.

²⁴³ Parliament Report 2007 H – I.

5.4.1 Commission

	2005	2006	2007
Protection of inspections investigations and audits	41,80	30,72	23,48
Decision-making process [decision already taken]	27,09 [14,36]	33,36 [19,06]	31,31 [19,29]
Protection of the public interest as regards international relations	4,17	7,06	10,98
Protection of Commercial interests	7,78	8,94	10,79

Table 3 Exceptions frequently relied on by the Commission (Source Commission Report 2007)

Other exceptions, invoked less frequently in 2007 have been e.g. protection of privacy (5,04%), protection of court proceedings and legal advice (6,08%) or refusal upon a Member State's request (7,64%).²⁴⁴

5.4.2 Council

	2005	2006	2007
Decision-making process	48,3	43,2	38
Several reasons together (or other reasons)	6,1	20,2	30,2
Protection of the public interest as regards international relations	20,6	12,3	15,1
Protection of the public interest as regards public security	15,8	17,1	13,3

Table 4 Exceptions frequently relied on by the Council (Source Report Council 2007)

²⁴⁴ Commission Report 2007 9-10.

The second category, where more than one exception is invoked at the same time, mostly concerns the simultaneous application of public security and international relations. But also the exceptions protecting the decision making process and the public interest as regards international relations were invoked concurrently (e.g. negotiations on trade etc). Interestingly, the importance of the exception concerning the protection of court proceedings and legal advice is explicitly mentioned in the annual report, though hardly invoked in 2007 (0,8% of the initial refusals; 2006: 2%)²⁴⁵

5.4.3 Parliament

	2005	2006	2007
Protection of privacy and integrity of the individual	77,78	24,44	39,58
Decision-making process	5,56	40	33,33
Protection of commercial interests	1,85	8,88	10,42
Protection of court proceedings and legal advice	12,96	24,44	8,33

Table 5 Exceptions frequently relied on by the Parliament (Source Parliament Report 2007)

The most significant rise of the application of the exception relating to the decision making process (in 2006) has to be traced back to “the increase in the number of requests for comitology documents at a stage in the procedure where these documents cannot yet be made available to the public means that this exception is invoked relatively frequently.”²⁴⁶

²⁴⁵ Council Report 2007 16.

²⁴⁶ Parliament Report 2006 8.

5.5 Summary

The institutions' annual reports are helpful to get a better picture of the reality of access however there are two shortcomings: First, the data is presented dissimilarly which makes them mainly informative. Second, the one-dimensional structure – many aspects are covered but each is depicted in isolation. To give the public a sound picture it would be useful to interrelate certain sets of data e.g. the field of application, the applicants' profile, the success rate and the exceptions relied on.

6. Outlook

6.1 *The Review Process*

The 2005 “European Transparency Initiative” has triggered a review process aiming at the adaptation of Regulation 1049/2001 in the pursuit of more openness. It resulted in a Green Paper²⁴⁷, which itself was conceived as the starting point for public consultation. Since the entry into force of Regulation 1049/2001 the legal playing field had changed considerably: on the one hand, the Community courts have developed a substantial body of case law on access to documents, on the other hand Regulation 1367/2006²⁴⁸ applying the Århus Convention, dealing, inter alia, with access to documents in environmental matters, had been adopted.

6.2 *The Draft Amendment*

The draft amendment²⁴⁹ largely concerns minor changes and clarifications as well as the alignment with the Århus approach (Art 4 (1) and (4) as amended) and the incorporation of some of the major decisions by the courts (e.g. *Bavarian Lager*, *Sweden v Commission*, *VKI* or *API*). However, the Member States do neither share one vision of transparency in general nor of access to documents in particular. A Working Party Report from March 2009²⁵⁰ summarises the positions held by the Member States in form of footnotes to the recasting proposal. The short

²⁴⁷ Green Paper “Public Access to Documents held by institutions of the European Community - A review” - COM(2007) 185.

²⁴⁸ Regulation (EC) No 1367/2006 of the European Parliament and the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ 2006 L 264/13.

²⁴⁹ Contained in “Proposal for a Regulation of the European Parliament and the Council Regarding Public Access to European Parliament, Council and Commission Documents” COM(2008) 229 final (hereinafter: Proposal).

²⁵⁰ Working Party of Information Report of 4 March 2009 5671/1/09 REV 1.

outline presented will focus on the Commission's proposal (and explanations) as the Member States have not agreed to any concrete changes but have simply stated their opinions.

In line with Regulation 1367/2006 any natural or legal person (regardless of nationality or residence) shall have the right to access. This also coincides with the institutions' current practice, however the amendment would go beyond the wording of Art 255.

A new paragraph 5 shall be added to Article 2, clarifying that documents submitted to courts by other parties than the institutions do not fall within the scope of the Regulation.²⁵¹ Likewise the newly added paragraph 6 shall make clear that the general right enshrined in this regulation does not entitle to access to "documents forming part of the administrative file of an investigation or of proceedings concerning an act of individual scope [before] the investigation has been closed or the act has become definitive." This limitation of the scope of the right to access is itself limited in terms of time. After a decision has been taken the rationale, protecting the law enforcement process, will not justify a comprehensive limitation of access.

The existence of a document shall – according to Art 3 (a) as amended – depend on the condition that the content has been "formally transmitted to one or more recipients or otherwise registered", including data contained in electronic systems "if they can be extracted in the form of a printout or electronic-format copy." According to the Commission this does not narrow down the scope of the Regulation but simply clarifies when *content* becomes *document* and hence accessible. It is also important that registered does mean the public register only but also comprises any internal registration.²⁵²

Pursuing the aim of aligning public access to documents with the regime based on the Aarhus Convention, protection of the environment is added to the exceptions in Art 4 (1). Art 4

²⁵¹ Proposal 7.

²⁵² Working Party Report FN 4.

(4) states that where a request concerns emissions, an interest overriding commercial interests “shall be deemed to exist.” As this consideration does not in the same way apply to intellectual property rights, the two exceptions have been separated (Art 4 (2) (a) and (b)).²⁵³

The exception *court proceedings* will be expanded, explicitly comprising arbitration and dispute settlement proceedings and an additional exception, guaranteeing the secrecy in staff selection procedures will be added under Art 4 (2)(e).²⁵⁴

Art 4 (1)(b) which protects privacy and the integrity of the individual shall be repealed and the issue regulated less restrictively in Art 4 (5) as amended. This new formulation is actually a codification of the *Bavarian Lager* decision, which is currently under appeal:

Names, titles and functions of public office holders, civil servants and interest representatives in relation with their professional activities shall be disclosed unless, given the particular circumstances, disclosure would adversely affect the persons concerned. Other personal data shall be disclosed in accordance with the conditions regarding lawful processing of such data laid down in EC legislation on the protection of individuals with regard to the processing of personal data.

Art 4 (4) and (5), which have been categorised as procedural rules, will be restated in Art 5 (as amended). The new Art 5 (2), codifying *Sweden v Council* makes clear that the Member States will be consulted and can state reasons for non-disclosure based on the exceptions listed in Art 4. If a Member State fails to provide proper reasons (which is assessed by the institution) within the time limit (currently five working days) access will be granted.²⁵⁵

²⁵³ Working Party Report FN 13.

²⁵⁴ Here Cases T-371/03 *Le Voci v Council* [2005] FP-I-A-209 ECR II-957 paras 121 – 124 and T-376/03 *Hendrickx v Council* [2005] FP-I-A-83 ECR II-379 paras 54 – 57 should be mentioned; the court held that Art 6 of Annex III to the Staff Regulations, based on Art 283 EC, and explicitly granting secrecy to the Selection Board’s proceedings takes precedence over the general right of access to Council documents (on the basis of the principle *lex specialis derogat legi generali*).

²⁵⁵ Working Party Report FN 15.

Interestingly the time limit for handling confirmatory applications, which – requiring a formal decision – has proven time-intensive and practically most difficult to comply with, has been doubled (thirty working days, Art 8 as amended).²⁵⁶

Finally Art 12 will contain a policy of “active dissemination”²⁵⁷ for documents “drawn up or received in the course of procedures for the adoption of EU legislative acts or non-legislative acts of general application.”

6.3 Register and Code of Conduct

The latest advance of the Commission in connection with the European Transparency Initiative is the introduction of a (voluntary) register and Code of Conduct for interest representatives.²⁵⁸

Generally interest representation covers all “activities carried out with the objective of influencing the policy formulation and decision-making processes of the European institutions.”²⁵⁹ Those falling under the definition (and are not subject to one of the exceptions, e.g. social partners engaging in the social dialogue) are expected to register online. Moreover they shall agree to comply with the Code of Conduct or a comparable professional code.²⁶⁰

The Code “contains seven clear and verifiable rules”²⁶¹, for example identification, declaration of interests, abstaining from inducing “EU staff to contravene rules and standards of behaviour”²⁶² etc.

²⁵⁶ Proposal 8.

²⁵⁷ Ibid 9.

²⁵⁸ Communication from the Commission – European Transparency Initiative, A framework for relations with interest representatives (Register and Code of Conduct) SEC(2008) 1926 COM(2008) 323 final.

²⁵⁹ COM(2006) 194 final 3.

²⁶⁰ COM(2008) 323 final 4.

²⁶¹ COM(2008) 323 final 4.

²⁶² COM(2008) 323 final 7.

6.4 Summary

In a nutshell the recasting proposal will not contain any revolutionary new facets. It is above all limited to clarifying some notions and codifying the most important decisions from the courts' case law. As regards the beneficiaries for example: The institutions are not rejecting applications from persons not falling under the present definition (e.g. non-residing non-citizens). First of all this limitation could be circumvented easily, second, hundreds of thousands of documents are available online. However, the extending of the scope is seen critically by a number of Member States in the Working Party as Art 255 EC does not cover it. Whether or not the text will finally be amended, the institutional practice will stay the same. Another problem that becomes evident concerns the codification of the case law: The recasting process is quite time intensive. There is always the danger that new judgments will again not be considered, as for example *Turco and Sweden* in the present proposal. Other judgments like *Bavarian Lager* on the other hand, shape the new text even though they are still under appeal. As the generally vague or open concept of the regulation will not be changed, the courts will maintain their outstanding position under the new regulation.

Conclusion

Beyond doubt, the system set out in the Regulation is a legislative masterpiece. Drafted vaguely enough to comprise principally any area of interest and any document, without any preliminary limitations, it is flexible but at the same time it is not overly vague, hence meaningless. Moreover, the high quality of Regulation 1049/2001 becomes self-evident when taking into account that the proposed amendments in the recasting process deal more or less with minor details. By and large the Regulation deserves to be called a success story. Notwithstanding, some aspects require critical assessment.

A large part of this development stems from the courts' case law. Whereas in the last years the courts have had the opportunity to comment on most of the exceptions provided for elements of uncertainty remain. Apart from general separation of powers considerations there are at least two concrete concerns: First the element of unpredictability, caused by the flexibility of the Regulation. Second the duration of proceedings will often not be an incentive for (ordinary) citizens to pursue what they consider to be their right. The information requested might easily lose its value for the applicant while waiting for a court decision, a problem that does not bother strategic litigants. The three significant groups seeking access to documents, can all be labelled *specialists*. As far as the Regulation aims granting the widest possible access to the public and thereby strengthening the democratic legitimacy, these findings are sobering: The public's benefit will often be only indirect.

Another critical point that deserves to be mentioned briefly is the problem of “not seeing the wood for the trees.” A plethora of hundreds of thousands of documents available online does

not necessarily lead to more openness but may also block the ordinary citizen's view of the essential.

A few years back the progress towards more openness seemed to die down: In three decisions of utmost importance (*Sison*, *Turco* and *IFAW*) the CFI had taken a conservative standpoint to say the least. Two of these decisions were however overruled by the ECJ in relatively recent decisions (*Turco and Sweden* as well as *Sweden v Council* [appealing the *IFAW* judgment]). The fact that the third decision, *Sison*, has been upheld indicates where the line of demarcation runs:

The only real difference now seems to exist between the absolute and the relative exceptions, more precisely between public interest protection and the protection of other interests. The courts, and especially the ECJ, tend to be eager to grant the widest possible access. To that end they have developed a sophisticated system of procedural safeguards, which can be summarised as (a) a duty to state reasons and (b) carry out an individual and concrete assessment of each and every document (or even parts of it). The main categorical exception concerns highly political information falling under the protection of public security and international relations (It fits into the picture that documents related to (potential) infringement procedures under Art 4 (2) are treated most similarly: the opportunity of saving the face and finding an amicable solution for the dispute prevails over the public's right to know). In *Council v Hautala* the ECJ had held "that the principle of proportionality requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view."²⁶³ To illustrate how far these derogations can go when the protection of public interest is at stake, we have to recall the decision in *Sison*:

²⁶³ *Council v Hautala* para 28.

It makes the precarious consequences of the reduced approach taken by the courts obvious and raises a fundamental issue: What is the value of an individual's rights in a really serious case (a clash with counter-terrorism efforts being only one example)? A parallel to the historical English criminal procedure does not seem too far fetched: for centuries it rested "on the principle that a person accused of having committed a serious crime should not be represented by counsel at trial"²⁶⁴ "The rule forbidding defense counsel was subject to some major limitations. Perhaps the most important, and certainly the most curious, was that the rule applied only to cases of felony and treason, not to cases of misdemeanor. Hence, defense counsel was freely allowed in cases of petty crimes, but not where life was at stake."²⁶⁵

The entire right to access can be said to come down to a set of procedural minimum requirements, which the institutions have to respect. With its extremely broad scope this successful, generalising approach is not really surprising. But exactly these safeguards fail to work and leave the individual bereft of any meaningful protection: First, the duty to carry out an individual assessment is reduced to a procedural formality when sensitive documents are concerned. Second, the duty to give reasons is reduced to an absolute minimum by the argument that any additional information would curtail the very purpose of the exception. Apparently this argument is able to distort the essence of the very idea behind the regulation. Third, the exceptions concerning public interest are absolute, no balancing of interests will be carried out. Fourth and finally, the exception interferes with some core constitutional rights (the presumption of innocence, the freedom of property etc) without giving any realistic chance to challenge the decision. In the light of the minimum procedural safeguards this seems to be a blatantly disproportionate.

²⁶⁴ Langbein, *The Origins of Adversary Criminal Trial* (Oxford: OUP, 2003) 10.

²⁶⁵ Langbein, *The Criminal Trial before the Lawyers*, in *The University of Chicago Law Review* 45 (1978): 263 at 308 (accessed via <http://www.jstor.org/stable/1599166> 16 March 2009)

It would be an immoderate exaggeration to conclude that the granting of access was deeply utilitarian, furthering only the institutions' interest in increasing legitimacy to consolidate their own position. However the case reveals the constraints of the right, stem from its hybrid character (being an individual right with a collective rationale). This becomes even more conspicuous when we compare the right to access and the competition law concept access to the file: the latter is an expression of the rights of defence and equality of arms. Whereas it cannot be denied that these individual-directed rights serve a collective purpose as well, the rationale of access to documents inversely is directed at a collective value, namely enhancing democracy (legitimacy, accountability and effectiveness) by means of granting access to the individual. While the position taken in *Sison* raises some complicated question it is consistent with the nature of the underlying principles.

Concerning the other exceptions we can generally speak of their uniform formalistic character. As the CFI stated in *Ilmenau*, the topical background does not change the assessment of the court, which follows – step by step – a set of procedural minimum safeguards. The determinant core elements as mentioned above are a duty to state reasons as well as the traceability of the balancing of interests, resulting from a concrete and individual assessment. In this way the courts try to make the decision making process itself as comprehensive and transparent as possible. However – with the extremely broad scope of the Regulation maybe not surprisingly – in relatively abstract terms: the purpose is to grant the *widest possible access*, the undermining effect has to be *assessed specifically and actually*, the risks must be *reasonably foreseeable and not purely hypothetical* and the exceptions have to be *interpreted strictly*.

Finally attention shall be drawn to the positive development in the recent case law as well as the convergence between access to documents and other Community instruments dealing with related issues.

As to the first point, two of the CFI's less transparency-oriented judgments have been impressively overruled by the ECJ, contributing to the dynamic development of access to documents and further approximation of the individual exceptions:

In *Turco and Sweden* the ECJ established three important (new) principles: First, there is a principle obligation to disclose legal service documents relating to the legislative process (whereas the CFI had found that confidentiality of legal advice may generally be maintained). Second, ascertaining the existence of an overriding public interest is incumbent on the institution, relieving the applicant of the burden of proof. Third, the public interest in increased openness, raising the level of citizens' participation as well as the administration's legitimacy, effectiveness and accountability as not completely absorbed in the purpose of the Regulation as such.

The decision in *Sweden v Council* is remarkable because of two aspects: first of all the ECJ applying sophisticated structural and teleological interpretation turns around the meaning given to Art 4 (5) by the CFI completely. The latter had construed the provision as an absolute veto, however the ECJ reclassified it as a procedural right to take part in the institution's decision-making process. Second, the Court of Justice gave a detailed explanation how the judgment has to be implemented on the administrative level (which is a good example for the separation of powers issue mentioned above).

But also the CFI has contributed to the development of the concept of openness. The decision in *Bavarian Lager* is at the same time a *crossover* to the second point mentioned above, the convergence. The decision clarified the effect of the cross-wise references between Regulation 1049/2001 and 45/2001. Additional prerequisites were found to undermine the *telos* of Regulation 1049/2001, which is to grant widest possible access. Hence Art 4 (1)(b) only comprises information that can undermine a person's privacy or integrity. The decision is a

noteworthy expression of the prominent position, transparency occupies within the European legal order: There is no principal hierarchy between the antagonistic principles of data protection (privacy) and openness, however the latter prevails.

The courts tend to neutralise conflicts by “corrective” interpretation. Gradually contradictions on the surface seem to even out. In *Bank Austria* the notion professional secrecy in Regulation 17 was curtailed by the following consideration: It would be absurd if data, which can be accessed according to Regulation 1049/2001 were inaccessible under Regulation 17. Therefore only information covered by the exception in Art 4 or other secondary legislative acts also falls under *professional secrecy*. The remaining differences concern specific aspects, emanating from procedural particularities e.g. in competition cases: minor violations will only lead to the exclusion of a document as a piece of evidence.

From the foregoing it becomes clear that a uniform right to access is emerging with few but serious limitations. Rooted in the hybrid character of the right to access these limitations cannot exactly be said to curtail the purpose of access to documents, however difficult questions arise, especially when longstanding constitutional guarantees are at stake. Generally a uniform set of procedural requirements and interest balancing crystallises. Likewise different instruments dealing with access related questions are synchronised. Substantial differences can only be found where the institutions and courts have to deal with highly political requests. This controversial aspect will pose future challenges, which may not be solved within the framework of access to documents alone and it is merely a matter of time before the courts will have to deal with it. If only I would not be so curious!

Bibliography

Chalmers/Tomkins, *European Union Public Law* (Cambridge: CUP 2007).

Craig, *EU Administrative Law* (Oxford, New York: OUP 2006).

Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ 2005 C 325/07.

Communication from the Commission – European Transparency Initiative, A framework for relations with interest representatives (Register and Code of Conduct) 27 May 2008, SEC(2008) 1926 COM(2008) 323 final. http://ec.europa.eu/transparency/docs/323_en.pdf

Council, Annual report on access to documents – 2005.
http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/ENCounAnnRep_acces05.pdf

Council, Annual report on access to documents – 2006.
<http://www.consilium.eu.int/uedocs/cmsUpload/ENacces2006int.pdf>

Council, Annual report on access to documents – 2007.
http://consilium.europa.eu/uedocs/cmsUpload/ACCESS_int.en08.pdf

Council Working Party of Information Report of 4 March 2009 5671/1/09 REV 1.
<http://www.statewatch.org/news/2009/mar/eu-access-reg-council-4-march-5671-rev1-09.pdf>

Curtin, *Citizens' Fundamental Right of Access to EU Information: An Evolving Digital Passepartout?* in CMLR (2000) 37: 12.

De Búrca, *The Quest for Legitimacy in the European Union* In The Modern Law Review (1996) 59: 349.

Diamandouros, *Transparency, Accountability and Democracy in the EU* (Lecture of the European Ombudsman, Professor P. Nikiforos Diamandouros, at the School of Advanced International Studies of the John Hopkins University, Bologna, 17 October 2006).
<http://www.ombudsman.europa.eu/speeches/en/2006-10-17b.htm>

Dyrberg, *Accountability and Legitimacy: What is the Contribution of Transparency?* In Arnulf/Wincott (eds.) *Accountability and Legitimacy in the European Union* (Oxford: OUP, 2002) 81 – 96.

European Parliament Annual Report 2005 on Public Access to Documents.
http://www.europarl.europa.eu/RegData/PDF/FINAL_605496_1_EN.pdf

European Parliament Annual Report 2006 on Public Access to Documents.
http://www.europarl.europa.eu/RegData/PDF/605496_1_EN-final.pdf

European Parliament Annual Report 2007 on Public Access to Documents
http://www.europarl.europa.eu/RegData/PDF/719142_1_EN.pdf

Green Paper "Public Access to Documents held by institutions of the European Community - A review" - COM(2007) 185 final. http://ec.europa.eu/transparency/revision/docs/gp_en.pdf

Heliskoski/Leino, *Darkness at the Break of Noon: The Case Law on Regulation No. 1049/2001 on Access to Documents*. CMLR (2006) 43: 735.

Héritier, *Composite democracy in Europe: the role of transparency and access to information*. Journal of European Public Policy 10:5 (October 2003) 814.

Langbein, *The Criminal Trial before the Lawyers*, in *The University of Chicago Law Review* 45 (1978): 263 at 308

Langbein, *The Origins of Adversary Criminal Trial* (Oxford: OUP 2003)

Lenaerts, “*In the Union We Trust*”: *Trust-Enhancing Principles of Community Law*. Common Market Law Review (2004) 41: 317.

Kranenborg, *Access to Documents and Data Protection in the European Union: On the Public Nature of Personal Data*. CMLR (2008) 45: 1079.

Lodge, *Transparency and Democratic Legitimacy*. Journal of Common Market Studies (1994) 32: 343.

OECD Policy Brief, Public Sector Modernisation: Open Government

Proposal for a Regulation of the European Parliament and the Council Regarding Public Access to European Parliament, Council and Commission Documents COM(2008) 229 final
http://ec.europa.eu/commission_barroso/wallstrom/pdf/com_2008_229_en.pdf

Report from the Commission on the implementation of the principles in EC Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents of 30 January 2004 COM(2004) 45 final.
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0045:FIN:EN:PDF>

Report from the Commission on the Application of Regulation (EC) No 1049/2001 of 24 September 2007 COM(2007) 548 final.
http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0548en01.pdf

Report from the Commission on the Application of Regulation (EC) No 1049/2001 of 20 December 2007 COM(2007) 841 final. http://ec.europa.eu/transparency/access_documents/docs/rapport_2006/en.pdf

Report from the Commission on the Application of Regulation (EC) No 1049/2001 of 10 October 2008 COM(2008) 630 final. <http://www.statewatch.org/news/2008/oct/com-access-annual-report-for-2007.pdf>

Special Report by the European Ombudsman to the European Parliament following the own initiative inquiry into public access to documents (616/PUBAC/F/IJH)
<http://www.ombudsman.europa.eu/cases/specialreport.faces/en/378/html.bookmark>

Toth, *Access to the file*, in Toth (ed) *The Oxford Encyclopaedia of European Community Law – Volume III Competition Law and Policy* (Oxford, New York: OUP, 2008)

<http://www.ombudsman.europa.eu/cases/summary.faces/en/3797/html.bookmark>

<http://europa.eu/scadplus/leg/en/lvb/l26042.htm>