



‘Optimal’ versus ‘Maximal’ Public Access to Documents: a Brief Note on EU Case Law

Tinne Heremans

With the legislative reform of Regulation No 1049/2001 on Public Access to Documents stuck in a political deadlock for the last 3-4 years, this policy brief reflects on the main trends in the sizeable - not uncontroversial - body of case law by which the Court of Justice of the European Union has shaped to an important extent the right of public access to documents within the Union. Indeed, when policy-makers eventually manage to move beyond the current political stalemate, they will simply be obliged to take into account and respond to these jurisprudential interpretations. Hence, this policy brief aims to raise policy-makers' awareness of the different issues at stake in this dossier and pleads in favour of 'optimal' as opposed to 'maximal' openness.

Introduction

An important ongoing debate regarding the reform of Regulation No 1049/2001¹ on Public Access to Documents has managed to somewhat sail under the radar of European public and political debate. It is clear, however, that this is far from a 'marginal' political dossier and *de facto* affects all actors at the European scene. Its impact in terms of the legitimacy, accountability, democratic nature, public perception and functioning of the European Union concerns citizens, EU institutions and Member States alike.

Whereas the legislative reform process has found itself in a political stalemate for the last

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] O.J. L 145/43; European Commission, Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, 30 April 2008, COM(2008)229 final.

3-4 years², the Court of Justice of the European Union for its part has been increasingly called upon to interpret the provisions of Regulation No 1049/2001. Hence, while jurisprudence is not usually something which tends to arouse the interest of policy-makers, in the debate regarding the revision of Regulation No 1049/2001 on Public Access to Documents, it is nonetheless of the utmost importance. Indeed, in ruling on a multitude of issues raised by requests for access to documents, the Court has over the last ten years produced a sizeable - not uncontroversial - body of case law that *shapes* to an important extent the right of public access to documents within the EU. Therefore, when decision-makers eventually manage to move beyond the current political deadlock, they will simply be obliged to take into account and respond to these jurisprudential interpretations.

With this in mind, this policy brief reflects on some of the main tendencies in the case law on Regulation No 1049/2001 and, in doing so, hopes to raise policy-makers' awareness of what is at stake in this dossier. Far from questioning the necessity and value of transparency of legislative and administrative processes in a democracy, the author pleads

in favour of '*optimal*' as opposed to '*maximal*' openness.³

'Space to think'?

Probably the most controversial issue within the access to documents debate concerns the need for and justifiability of a so-called 'space to think' for policy-makers. The concept of a 'space to think' could be described as the shielding of internal deliberations that serve to prepare a decision or other policy action to be taken by a public authority from instant or even *ex post* publicity. Whereas the Regulation contains a specific exception aimed at protecting decision-making processes from being "seriously undermined" by the disclosure of documents (Art. 4 (3)), the Court has become less and less inclined to accept its applicability.

From its recent case law⁴, it can be inferred that the Court requires, on principle, complete openness of *legislative* processes, even if these are still *ongoing*. Indeed, the *Turco* judgment on appeal made it clear that opinions of the institutions' Legal Services, drawn up in support of the internal deliberation process in a legislative procedure, are to be made public even if the legislative procedure is still *ongoing*, unless it is proven that a *specific* legal opinion is of a "particularly sensitive nature" or "particularly wide scope [going] beyond the context of the legislative process in question".⁵

² This is due to fundamental disagreement between the European Parliament and the Council, as well as the Commission's (implicit) refusal to bring forward a revised proposal. Eventually the Commission proposed a very limited revision in March 2011 to align the Regulation with the Lisbon Treaty: European Commission, Proposal for a Regulation of the European parliament and of the Council amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, 21 March 2011, COM(2011) 137 final.

³ This Policy Brief builds on Egmont Paper 50 which provides a more elaborate analysis of the case law concerning Regulation No 1049/2001 as well as of its likely practical implications.

⁴ Case T-233/09, *Access Info Europe/Council* [nyr] (on appeal: pending Case C-280/11 P, *Council/Access Info Europe*); Joined cases C-39/05 P and C-52/05 P, *Sweden and Turco/Council* [2008] ECR I-4723.

⁵ *Sweden and Turco/Council*, para. 69, stressing the need for a detailed statement of reasons as well as a limitation in time of the potential invocation of the

Furthermore, in the case *Access Info*, the General Court renounced the Council's *general* practice, when disclosing working group documents, of blanking out the names of the delegations supporting a particular position or opinion. It thus imposed, on principle, the obligation to reveal the delegations' names in such documents forming part of a legislative procedure, while still leaving the Council the possibility to prove on a case-by-case basis that disclosure of a specific preparatory legislative document would harm its decision-making.

Likewise, the Court has made it considerably tougher to prove that disclosure of internal documents that are part of a *finalized administrative* decision-making process might "specifically and effectively" harm the institution's decision-making capacity. In the recent *Sweden/MyTravel and Commission* case, the ECJ did not consider the risk that the Commission's services would refrain from expressing frank and critical opinions or might even resort to oral rather than written working methods to be supported by any "detailed evidence", allowing it to be understood why, once the procedure had been closed, disclosure was still likely to seriously undermine its decision-making process.⁶ As regards 'ongoing' administrative procedures, it is still unclear to what extent the exception for the protection of the decision-making process can be relied upon. In her Opinion in *Sweden/MyTravel and Commission*, Advocate General Kokott explicitly recognized that *ongoing administrative procedures* merit greater protection so as to avoid undue influence by interested parties disturbing the serenity of the procedures,

exception to the period during which such protection is justified. (para. 70)

⁶ Case C-506/08 P *Sweden/MyTravel and Commission*, paras 89, 97-98, 100.

affecting the quality of the final decision as well as the Commission's capacity to respect the time-limits of the procedure.⁷ However, when a particular administrative procedure should be considered finalized, is still up for discussion. Indeed, in *Editions Jacob* the General Court deemed a merger procedure to have ended when the decision is adopted, regardless of any remaining appeal opportunity.⁸ Advocate General Kokott suggested on the contrary that a merger procedure is 'finalized' when the final decision can no longer be judicially challenged.⁹

Clearly, an exception protecting the decision-making process touches upon *the core of the "raison d'être" of the right to transparency and access to documents*, i.e. the transparency of the Union's decision-making and administration as a prerequisite for its democratic legitimacy and accountability. However, though transparency indisputably brings about major benefits – including for the quality of decision-making – too much transparency could entail significant costs and even prove to be counterproductive.

For instance, excessive transparency demands could very well harm the specific deliberation and negotiation process within the Council. Despite the hopes and aspirations of 'European federalists' who see the Council as a type of senate in a federal state system, the Council still resembles more closely a kind of permanent diplomatic conference in which sovereign Member States negotiate 'deals'. It thus seems rational to take into account the specific dynamics and 'psychology' of such negotiations, which might require a certain

⁷ Opinion of Advocate General in Case C-506/08 P *Sweden/MyTravel and Commission*, paras. 65-69.

⁸ Case T-237/05, *Editions Jacob/Commission* [nyr]

⁹ Opinion of Advocate General in *Sweden/MyTravel and Commission*, paras 70-73.

degree of confidentiality. In that sense, the Council's general practice, when disclosing working group documents in *ongoing* procedures, of blanking out the names of the delegations supporting a particular position or opinion, might indeed have been essential in persuading the Member States to accept that the reports drawn up of those meetings do display the positions taken by the different delegations. Hence, when made public *after* the end of the process they will constitute a valuable source of information and accountability *ex post*. Moreover, the fact that it is "a basic finding in social psychology [...] that public commitment to a position makes people more resistant to moderating their views in light of subsequent argument"¹⁰, illustrates that the fear for an '*entrenchment of positions*' once they are out in the open is not such a 'wild idea'. Furthermore, the risk of a *switch from written to oral procedures* would be particularly detrimental to the quality of decision-making in a context of seeking agreement between 27 Member State delegations that have to communicate back and forth with their capitals.

Likewise, as regards the administrative accountability of the institutions, there is once again a balance to be struck between 'stimulating' and 'paralyzing' openness. Indeed, the risk that "anything you say may be used against you" will logically lead civil servants to avoid asserting criticisms, at least on paper, which could discredit a later Commission action or decision. Quite likely the fear for disclosure has already diminished

¹⁰ MACCOUNC, R.J., "Psychological Constraints on Transparency in Legal and Government Decision Making", (2006) *Swiss Political Science Review* 12(3), 116-117, referring to, among others, JELLISON, J.M. and MILLS, J., "Effect of Public Commitment Upon Opinions", (1969) *Journal of Experimental Psychology* 5(3), 340-346.

the 'paper trail' via 'selective conservation', i.e. an *ex post* screening of the documents which are to be kept as part of a file. However, if also documents forming part of ongoing procedures would become subject to disclosure, a shift from written to oral procedures in controversial or sensitive matters seems plausible. Indeed, some have argued that this is precisely what has happened under the Swedish system, resulting in so-called "empty archives"¹¹. Clearly, this would hamper the efficiency of the Commission's decision-making process as well as *de facto* reduce the degree of transparency.

Legal opinions from the institutions' Legal Services

A related contentious matter is the degree of public access to be granted to legal advice provided by the institutions' internal Legal Services. Since *Turco* it is clear that legal opinions in *legislative* procedures are to be made public even if the procedure is still *ongoing*, unless it is proven that a *specific* legal opinion is of a "particularly sensitive nature" or "particularly wide scope [going] beyond the context of the legislative process in question"¹². Less clear up to now is the position of legal opinions in *administrative* procedures. Whereas the General Court seemed intent on upholding the legal advice exception in administrative procedures¹³, the

¹¹ AHLENIUS, I., "Rätten att granska tomma skåp", (2004) *Dagens Nyheter* 040423, as cited by NAURIN, D., "Public deliberation – a contradiction in terms? Transparency, deliberation and political decision-making", (2006) *Översikter och meddelanden* Vol. 108(2), 192.

¹² *Sweden and Turco/Council*, para. 69.

¹³ Case T-403/05, *MyTravel Group plc. v. Commission* [2008] ECR II-2027 (reversed on appeal in *Sweden/MyTravel and Commission*); *Éditions Jacob*. In *Agrofert* such protection of a legal opinion rendered in the course of an administrative procedure which

ECJ considered that at least in respect of *finalized* administrative procedures such legal opinions should be made public.¹⁴ It remains to be seen what the ECJ will decide in the pending appeals in the *Éditions Jacob* as well as *Agrofert* cases¹⁵, and whether it might even go as far as to extend public access to legal opinions which form part of an *ongoing* administrative procedure.¹⁶ In her Opinion in *Sweden/MyTravel and Commission* the Advocate General conceded that disclosure of opinions in the course of *ongoing* administrative procedures merits greater protection so as to avoid undue influence by interested parties that could disturb the serenity of the procedures as well as affect the quality of the final decision and the Commission's capacity to respect the time-limits in procedures for the control of concentrations.¹⁷

However, contrary to the ECJ's findings in respect of both legislative and administrative procedures, it does not seem "purely hypothetical"¹⁸ that such publicity could prejudice the institutions' Legal Services' *frankness and independence* when asked for their opinion, or even cause them to resort to expressing these opinions *orally*. Indeed, as also espoused by Advocate General Maduro in *Turco*, it seems foreseeable that a Legal Service will display more caution and reserve in drafting an opinion to avoid affecting the

had ended more than a year ago was not accorded since the Commission had failed to provide specific and non-hypothetical evidence substantiating the risk of harm. Case T-111/07, *Agrofert Holding/Commission* [n.r].

¹⁴ *Sweden/MyTravel and Commission*, paras 109-119; see also the Opinion of Advocate General in *Sweden/MyTravel and Commission*, para. 92.

¹⁵ *Éditions Jacob* (C-404/10 P), *Agrofert* (C-477/10 P)

¹⁶ In particular when the Court deems the administrative document to be of a policy nature resorting effects beyond the individual case.

¹⁷ Opinion of Advocate General in *Sweden/MyTravel and Commission*, paras. 65-69, 92.

¹⁸ *Sweden and Turco/Council*, para. 63. Mytravel

institution's scope for decisions.¹⁹ For the Council in particular, such a *loss of frank, written legal opinions*, aside from reducing rather than increasing transparency, would be detrimental to the quality of decision-making, given the context of seeking agreement between 27 Member State delegates, with differing backgrounds, who have to communicate back and forth with their capitals.

Access to Member State documents

Member States need to hand over documents to the EU institutions in a variety of contexts, such as to the Commission during state aid, infringement, etc., procedures. As regards such documents, the Court has limited the Member State's discretion "to request the institution not to disclose a document originating from that Member State without its prior agreements" (Art. 4(5)). Whereas *a prior (dis)agreement* of the Member State is still, in principle, binding on the EU institution confronted with the demand for disclosure, this does not confer an unconditional and general veto right on those Member States. Indeed, the Member State is obliged to *state reasons* for its refusal, and, more importantly, these reasons should be able to fall under the *exceptions set out in Art. 4(1) - (3) of Regulation No 1049/2001* or relate to the specific protection accorded to *sensitive documents* (Art. 9).²⁰ The Court further clarified that the Community judicature should conduct a *complete judicial review* (as opposed to a mere *prima facie* review), examining whether the refusal was validly based on those exceptions, regardless of whether this refusal followed the assessment and application of these

¹⁹ Opinion of Advocate General in *Sweden and Turco/Council*, para. 40.

²⁰ Case C-64/05 P, *Sweden/Commission* ("IFAW I") [2007] ECR I-11389, paras 83, 87-88

exceptions by the institution itself or by a Member State.²¹ However, up to now, the Court has not yet clarified the *nature of the institutions' oversight* over the Member State's arguments. Hence, the Court left the question as to who, the institution or the Member State, has the *final word* on disclosure of the document unresolved.

Special versus general access to documents regime

An important trend in the ECJ's recent case law is its willingness to accept that *specialized legislation or rules* organizing access to documents in a particular domain, for example the rules on state aid review procedures, should be *presumed* to prevail over the more general rules on access set out in Regulation No 1049/2001.²² Hence, if the specialized rules do not grant access to the documents at hand, there will be a *rebuttable general presumption* against disclosure. This jurisprudence breaks with the Court's traditionally strict stance on the requirement of a concrete case-by-case analysis, and its rejection of arguments based on *categories of* rather than on individual documents. Yet, the fact that Regulation No 1049/2001 affects such a wide variety of domains and situations, characterized by a multitude of conflicting interests, does indeed seem to plead in favour of relying on the legislator's *specific* balancing act conducted in a *specific* policy context. Whereas a general exemption of situations governed by specialized access rules from the scope of application of Regulation No 1049/2001 would in theory

be a better solution, this would arguably require a revision of those sectorial regimes to ensure that they adequately take into account the *public* interest in transparency. Since this is unlikely to happen soon, the application of general presumptions that remain rebuttable on the basis of an overriding public interest in transparency is probably the best option. Indeed, it has the potential to relieve the institutions from the burden of having to establish in respect of every single document - from files which often contain thousands of pages - the risk of harm from disclosure, in domains where specific rules on access exist and the applicants are mainly motivated by other reasons than increased accountability or democracy. Yet, unlike in some of the recent judgments, the burden of proof as regards an overriding public interest should remain on the institutions who must *ex officio* (i.e., of their own motion) consider whether such an overriding public interest in disclosure is present.

Conclusion – a plea for ‘optimal’ as opposed to ‘maximal’ transparency

While the answer as to what precisely is the ‘optimal level of transparency’ is all but clear-cut, and the difficulty of the Court's balancing act should thus be fully recognized, it nonetheless seems that part of the recent case-law is driven by a “principled approach” which risks to defeat its own purpose. Rather than doubting the Court's willingness to “strike the right balance”, it seems that too little voices critical of the ‘maximal transparency’ objective could be heard *outside* of the institutions.²³ Indeed, for a long time,

²¹ Case T-362/08, *IFAW Internationaler Tierschutz-Fonds/Commission* (“IFAW II”) [nyr]

²² Joined cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden/API and Commission* [nyr]; Case C-28/08 P, *Commission/Bavarian Lager* [nyr]; Case C-139/07 P, *Commission/Technische Glaswerke Ilmenau* [nyr].

²³ An exception being for instance: ARNULL, A., “Joined Cases C 39/05 P & C 52/05 P, Sweden and Turco v. Council, judgment of the Grand Chamber

legal-political academic debate seems to have assumed increased openness to be unequivocally beneficial.²⁴ And quite likely, such a fervent pro-transparency attitude was legitimate as long as the scales in the EU were tipped heavily towards secrecy. However, over time the EU institutions' attitude and openness have evolved significantly. Hence, I argue that the EU adopt should a balanced approach and strive for an optimal level of transparency rather than pursue a maximal transparency which is likely to come at the expense of other valid interests such as effective decision-making. Indeed, even the Parliament, which has played a crucial role in attaining the current level of openness, should concede that its work benefits from closed meetings such as the Coordinators' meetings as well as the (unofficial) pre-meetings between the rapporteur and shadow-rapporteurs for a particular dossier.

Hence, the Court should avoid imposing a *de facto* "prohibitive" *standard of proof* on the parties who argue for the need for some degree of 'space to think' and who point out the risk of evasion practices. Indeed, if not, it risks to harm the specific deliberation and negotiation process within the Council, to deprive the Commission of 'frank expert advice', to rob the institutions from a free exchange of ideas and opinions that are given the time to mature without the constraints of self-censure, etc. More generally, it can be argued that Regulation No 1049/2001 should be reoriented towards its *core business* of increasing the accountability and democratic legitimacy of the EU. Indeed, given that a

non-negligible (and increasing) amount of requests for disclosure come from lawyers seeking access to large quantities of documents to support their clients' case in e.g. infringement or competition law cases, it seems that a lot of people and resources are being invested for reasons that do not correspond to the ones which inspired the adoption of the Regulation. Hence, in a world of limited resources it makes sense to rely on the specific rules on access designed for these situations and reorient the 'general' Regulation to its original purpose. Moreover, some of these transparency efforts could probably even be usefully *redirected* to address other concerns such as the remaining obscurity of the lobbying-phenomenon.

Dr. Tinne Heremans is Senior Research Fellow at Egmont - Royal Institute for International Relations.

The European Policy Brief is a publication of Egmont, the Royal Institute for International Relations

EGMONT

Royal Institute for International Relations
Naamsestraat 69
1000 Brussels
BELGIUM

> www.egmontinstitute.be

The opinions expressed in this Policy Brief are those of the authors and are not those of EGMONT, Royal Institute for International Relations

of 1 July 2008, not yet reported" (2009) *C.M.L.Rev.* 46, 1219-1238.

²⁴ For a critical examination of some of these assumptions, see CURTIN, D. and MEIJER, E.J., "Does transparency strengthen legitimacy?" (2006) *Information Polity* 11, 109-122.