

Transparency principle as an evolving principle of EU law: Regulative contours and implications

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I. Introduction

Since the nineties, transparency has gained significant attention in the eu context, being mainly viewed as a response to the lack of legitimacy and as a mean to cope with the democratic deficit. Furthermore, the notion of transparency has emerged in a wide range of other areas, ranging from legislation on financial matters to social law and to recruitment by the EU Institutions¹. Despite the divergences in the way it is applied in various areas, one can recognize a common-core element in the notion of transparency, which can be described as the opposite of opaqueness and secretiveness. In this context, the definition given by the Advocate General R.J. Colomer in the case C-110/03 (Belgium v. Commission) can be regarded as satisfactory to describe the general contours of that loose notion. According to this definition, *transparency is concerned with the quality of being clear, obvious and understandable without doubt or ambiguity*². Beyond that general definition, the precise meaning of transparency depends on the context in which it is used and the function that it is expected to fulfil.

Furthermore, what is highly interesting is how the notion of transparency is applied at the distinct but interrelated levels of governance within the framework of the European Union. In particular, at the EU level, transparency applies directly to the relationship between the EU and the Member States and the relationship between the European institutional organs and individuals, including the business sector, and indirectly to the relationship between the authorities of the Member States and the citizens or businesses.

The main aim of this paper is to focus upon those aspects of transparency which have a normative effect both on the institutional organs of the EU, when acting either in a legislative or an administrative capacity, and on the member-states and their administrations. Subsequently, beyond the scope of this paper are those aspects of transparency that emerge in certain areas of European Economic Law, such as the state aid and the public procurement law, and relate to the obligations of the public authorities to facilitate or supervise market transparency, mainly by providing adequate information to market participants.

¹ See S. Preschal/M. E. De Leeuw, *Transparency: A General Principle of EU Law?* in : U. Bernitz/J. Nergelius/C. Cardner (eds), *General Principles of EC Law in a Process of Development*, Kluwer Law International, Great Britain, 2008, p.. 204 and 229 ff.

² See Opinion of AG Ruiz-Jarabo Colomer of 16 December 2004 in C-110/03 Belgium v. Commission, 2005, ECR I-2801, point 44.

To this end, the first part of the analysis (II) will focus on the normative foundations of the transparency principle in the European Union Law. In the second part of the analysis (III), the different aspects of the transparency principle, including *inter alia* the openness of the decision-making procedures, the right of access to documents, the duty to give reasons and the clarity of the terminology (legal clarity) are going to be analyzed, taking into consideration the relevant jurisprudence of the Court of the European Union and of the General Court.

The fourth section of the paper will examine whether this multi-faceted principle, as described above, can be recognized as a general principle of EU Law, while the next section (V) will briefly explore the influence of the notion of transparency on the national legal systems. The paper ends with an epilogue.

II. The normative foundations of the transparency principle

A. Transparency and the principle of democracy

Transparency is closely linked to the principle of democracy, which is established in Article 6 of the Treaty of the European Union as one of the fundamental principles of EC Law. Before analyzing the relationship between transparency and democracy, certain clarifications have to be made. First of all, it should be underlined that the context of the unional principle of democracy should not be identified with that of the relevant state-centric principle, although certain elements of the latter belong to the core of the former³. This is due to the fact that the European Union is based on a dual structure of legitimacy, namely the European citizens and the peoples of the European Union as organized by their respective Member State constitutions⁴, as it is clearly established in Article 10 par. 2 of the revised Treaty of the European Union⁵. Subsequently, this dual structure of legitimacy defines decisively the regulative context of the unional principle of democracy. Furthermore, the newly introduced provisions of the revised Treaty of the European Union (TEU) are important for the specification of the unional principle of democracy. Prominent among them are Article 10 par.1 that foresees that the functioning of the European Union shall be founded on the representative democracy⁶ and Article 11 par. 1-3, which establishes

³ See D. Th. Tsatsos, *The European Symptomology- Towards a new democratic discourse*, Bryland Publications, 2009, p. 41 ff; .

⁴ See A.v.Bogdandy, *Grundprinzipien* in: A.v.Bogdandy/J.Bast (Hrsg), *Europäisches Verfassungsrecht*, Springer Verlag, 2009, p. 67.

⁵ Article 10 par. 2 of the Treaty of the European Union states: Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

⁶ This means in particular that decisions at the Union's level are not taken directly by the European citizens but by the institutional organs which are directly or indirectly legitimized

principles and mechanisms of participatory democracy⁷, as the functioning of the representative mechanisms faces more difficulties at the supranational European level than at the national level.

The systematic interpretation of the provisions of the primary Union law that specify the context of the unional principle of democracy in conjunction with Article 1 par.2 of the TEU (decisions are to be taken as openly as possible and as closely as possible to the citizen) lead to certain conclusions concerning the relationship between democracy and transparency at the European Union level: a) Transparency is regarded as an inextricable element of the unional principle of democracy⁸, as it is quite clearly recognized in the provisions of Article 11 par. 1-3 of the TEU. *Only when citizens know who, why and how decisions have been made can they participate in the electoral process and in other forms of political participation beyond elections in an informed and enlightened manner.* b) As democracy and accountability are intertwined notions, transparency is also a quintessential precondition for making European Union organs accountable for their actions in the sense that they must be able to explain to the citizens that they have exercised their powers properly⁹. c) *The close link between transparency and democracy is recognized in a more clear and unequivocal way in the primary European law than in the constitutions of the Member States*¹⁰. This is due to the fact that transparency of the governmental action, the possibility of attributing accountability and the establishment of several forms of participation, such as consultation with stakeholders, are viewed as a means to compensate for the existing “democratic deficit”. Subsequently, the introduction of the above-mentioned

by the European citizens. See Geiger in: Lenz/Bochard (Hrsg), EU Veträge, Kommentar nach dem Vertrag von Lissabon, 5th ed, Art. 10, ref.nr 3-9.

⁷ Article 11 par 1-3 foresee : a)The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action (par. 1) b) The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society (par. 2) c) The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent (par. 3).

⁸ The close link between transparency and democracy was for the first time clearly recognized in the Declaration No 17 on public access to documents, which was attached to the Treaty of Maastricht. The Declaration emphasized that transparency of decision-making process strengthens the democratic nature of the institutions and the public's confidence on administration. Furthermore, this link was for first time reaffirmed by the Advocate General Tesouro in the case *Netherlands versus Council* (C-58/94). In particular, the Advocate General was of the opinion that the principle of democracy, which constitutes one of the cornerstones of the Community edifice, is the basis for the right of access to documents. See Opinion of the Advocate General Tesouro of November 1995, Case C-58/94 (*Netherlands v. Council*), point 14-16.

⁹ See M. Bovens, *Analyzing and Assessing Public Accountability*, European Governance Papers., <http://www.connex-network.org/eurogov>. (Accountability is defined as a relationship between an actor and a forum, in which the actor has an obligation to explain and justify his or her conduct, the forum can pose questions and pass judgment and the actor may face consequences).

¹⁰ See A.v. Bogdandy, *Doctrine of Principles*, Jean Monnet Working Paper 9/03, available at : <http://centers.law.nyu.edu/jeanmonnet/archive/papers/03/030901-01.pdf> (last accessed on 10.4.2012).

innovative elements has shaped at least to some extent the regulative context of democracy at supranational level. Yet it should be underlined that there are no concrete criteria for measuring how a deficit in electoral legitimacy could be compensated for.

B. Transparency and the rule of law principle

Certain aspects of the multi-faceted transparency principle are also founded in the “rule of law principle”, which can be defined as an “umbrella-principle” which contains numerous (sub-)principles that aim at the rational exercise of public power and protect qualified interests of its subjects¹¹. In particular, the aspect of transparency which relates to the legal clarity in terms of setting clear, simple and understandable laws, can be founded, even indirectly, on the “rule of law” principle. This is due to its close relationship with the principle of legal certainty, which is recognized as an integral part of the rule of law principle and contributes to the creation of a “foreseeable” legal environment¹². Furthermore, the duty to give reasons, which is also recognized as a specific aspect of transparency, can be conceived both from the perspective of the “rule of law” and the principle of democracy, because the knowledge of motives (of the legislator) is fundamental both as a guarantee to the exercise of public power and as a prerequisite for effective democratic control by the citizens.

In conclusion, it should be underlined that the different aspects of transparency can be founded on the two most fundamental principles of EU law. What has to be examined is whether the common core of these different aspects can constitute a new self-standing principle of EU law.

III. The different aspects of transparency

A. Openness in the decision-making process

The principle of openness was established for the first time in Article 1 of the Treaty of the European Union (after its modification with the Treaty of Amsterdam), which states that decisions in the EU are to be taken as openly as possible. The systematic interpretation of the above-mentioned provision with the provisions of Article 10 par. 2 lit.3 (which has identical meaning with Article 1 par.2), Article 11 par.2 and 3¹³, Article 16 par. 8 TEU and Article 15 par.1 and 2 TFEU leads to the conclusion *that openness is not only a principle of*

¹¹ The “rule of law” principle is established as one of the founding principles of EU primary law. See A.v. Bogdandy, *supra* note 10, p. 21.

¹² For the recognition of the legal clarity as an aspect of transparency see S. Preschal/M. E. De Leeuw, *supra* note 1, p. 219. For the principle of legal certainty as a specific aspect of the rule of law principle see T. Tridimas, *The General Principles of EU Law*, Oxford University Press, 2nd edition, 2006, p. 242.

¹³ It is worth-mentioning that in par. 3 of Article 11, an unequivocal reference to transparency is made for the first time in a document of primary European Union Law (It is stated that the consultations of the European Commission with the interest parties serve the purpose of ensuring coherence and transparency of the Union’ actions).

the European primary law but is also closely linked with transparency in the sense that it can be recognized as one of most prominent features of the latter (transparency).

The principle is applicable to all the activities of the institutions and bodies of the EU and means that decisions are taken in such a way that accessibility to the relevant discussions and documents, at least to some extent, can be ensured. The most important specification of the principle relates to the context of internal rules of procedure of the European institutional organs in terms of ensuring accessibility to the decision-making procedures¹⁴, especially when they act in a legislative capacity. The emphasis on an increased grad of transparency in the legislative process is based on the assumption that citizens need to be fully informed in order for them to exercise their democratic rights¹⁵. It also reflects the tradition of western democracies, according to which legislative bodies meet in public¹⁶.

In this context, it should also be mentioned that the principle of openness is firmly applied by the European Parliament, because the internal rules of procedure stipulate that both the plenary and the committee sessions be public¹⁷. This was realized only recently with regards to the Council, as only after the entry into force of the Treaty of Lisbon a provision was introduced stating that the Council shall meet in public¹⁸ when it deliberates and votes on a draft legislative act (Article 16 par. 8 of the revised Treaty of the European Union). In conclusion, it should be underlined that, although the legislative process has largely opened up, a significant part of it still takes place behind closed doors. This is the case not only because the Conciliation Committee decides under secrecy¹⁹ but mainly because a great part of the legislation adopted under the co-decision procedure is agreed upon in the so-called informal trilogues, where representatives of the Council, Commission and the Parliament meet under secrecy and try to reach an early agreement between the two co-legislators²⁰. Subsequently, in cases where an agreement

¹⁴See S. Preschal/M. E. De Leeuw, *supra* note 1, p. 207.

¹⁵ See General Court of the European Union, T-233/09, Case *Access Info Europe/Council* (on appeal: pending Case C-280/11 P, *Council/Access Info Europe*); Court of the European Union, C-39/05 P and C-52/05 P, (Joined Cases) *Sweden and Turco/Council*, 2008, ECR I-4723.

¹⁶ See Opinion of the Advocate General Tesouro in Case *Netherlands versus Council* (C-58/94), point 19.

¹⁷ See Article 103 (transparency of Parliament's Activities) of European Parliament's Rule of Procedure.

¹⁸ It is worth mentioning that since June 2006 Council deliberations on legislative acts to be adopted under co-decision procedure take place in public. (See Article 8 of Council's Rules of Procedure of 15 September 2006, 2006/683/EC, OJ 2006., I. 285/47)

¹⁹ The Court of European Justice ruled that the fact that the Conciliation Committee legislates under closed doors does not undermine the principle of representative democracy. This is due to the fact that the Parliament itself participates in the Committee, whose composition takes into account the relative size of each political group in the Parliament, and the joint text is examined by the Parliament the proceedings of which takes place in conditions of transparency. See European Court of Justice C-344/04, Case *IATA*, 2006, I-0403, paras. 60-61.

²⁰ See H. Farrell/A. Héritier, *The Invisible Transformation of Codecision: Problems of Democratic Legitimacy*" *Sieps Report* No. 7, June/2003, Swedish Institute for European Policy Studies; A.

is reached in those meetings, the public dialogue especially in the European Parliament becomes meaningless, as there is hardly any leeway to change even “a dot or comma” of the compromised position.

As already indicated, there is no need for the administrative and executive procedures to fulfil the increased transparency requirements applied in the legislative processes. From this point of view, the provision of Article 9 of the Internal Rules of Procedure of the European Commission, according to which meetings of the Commission shall not be public and discussions shall be confidential²¹, can be seen, at least to some extent, as justified. Despite the greater leeway given to confidentiality of administrative procedures, a *“paradigm shift” that is related to the gradual transition from a strict hierarchical and secretive model to a more open and participatory administrative model, exerted influence on the way that Commission acts*²². A characteristic example of moving in this direction is the strengthening of the “visibility” of the activity of the Commission through the publication of the general policy goals, the strategic guidelines, and the designed actions in several fields as well as the time-frames for their implementation.

In conclusion, although transparency in terms of ensuring accessibility to the decision-making processes (openness) is undoubtedly a prerequisite for both the effective exercise of the democratic participatory rights of the European citizens and for enhancing the accountability of the European organs, the necessity of safeguarding that the European organs have a “space to think and to negotiate” should not be undermined. Such an approach, which is more relevant for administrative procedures, takes into consideration the particularities of the decision-making processes in a European Union composed of 27 member-states as well as the general limitations that faces a governance model defined by unrestricted openness.

B. The right of access to documents

a) The relevant provisions of primary EU Law

The Amsterdam Treaty embedded the right of access to documents of the European Parliament, Council and Commission to all natural and legal persons residing or having their registered office in one of the Member States (Article 255 of EC Treaty). The right of access has been implemented in Regulation No 1049/2001 on public access to European Parliament, Council

Rasmussen/M. Shakleton, *The scope for action of the European Parliament Negotiators in the legislative process: lessons learned of the past and for the future*, 2005.

²¹ See Rules of Procedure of the Commission, (C (2000) 3614), OJ L 308, 8.12.2000, p. 26, as lately amended by the Commission Decision 2007/65/EC of 15 December 2006, OJ L 32, 6.7.2007, p. 144

²² See D. Curtin, *The Commission as Sorcerers Apprentice? Reflections on EU Public Administration and the Role of Information Technology in holding the bureaucracy accountable* in : C. Joerges/Y.Meny/J. Weiler (eds), *Mountain or Molehill? A Critical Appraisal of the White Paper on Governance*, Initiative of EUI and New York School of Law, available at : <http://www.jeanmonnetprogram.org/papers/01/010601/html> (last accessed on 11.4.2012).

and Commission documents. It is worth mentioning that Article 15 par.3 of the Treaty of Functioning of the European Union (TFEU) has extended both the personal scope of the right of access to documents, as it applies to all EU institutions, bodies and agencies (including the Court of Justice, the European Central Bank and the European Investment Bank, only when they act in an administrative capacity) and the material scope (whatever the medium)²³. In addition, the right of access to documents is also established in Article 42 of the Charter of Fundamental Rights. The inclusion of the above-mentioned right in the section where the political rights of the European citizens are established, indicates its great importance for the democratic functioning of the European Union. Furthermore, the systematic interpretation of the provisions of the Primary European Law, where the right of access is established, with other relevant provisions (i.g those relating to the openness and the principle of democracy) leads to the following conclusion: the right of access to documents *is conceived not only as a precondition for the application of the democracy principle at unional level, but also for ensuring the transparency of the Union's action as a means to increase democratic legitimacy, while it is intertwined with openness as an aspect of transparency.*

b) The Regulation 1049/2001/EC

In order to understand the specific regulative contours of the right of access to documents, it is important to analyze the “philosophy” and the directions underpinning the Regulation 1049/2001, which aims to define the principle, conditions and limits governing the above-mentioned right (Article 1). A first general remark could be that the Regulation follows the Nordic approach²⁴ concerning access to documents and establishes the principle of the widest possible access as its central principle. In the scope of application of the Regulation No. 1049/2001 fall “all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union²⁵”. From the wording of this

²³ See Kotzur in: Geiger/ Khan/Kotzur, VEU/AVEU-Kommentar, Artikel 15 AEUV, Ref. nr. 4; Zerdick in: Lenz/Bochard, EU Veträge-Kommentar nach dem Vertrag von Lissabon, Artikel 15 AEUV, Ref. nr 11.

²⁴ The Nordic approach is characterized by openness of the governmental and administrative action, which is, to a great extent realized, by ensuring fast total access to documents. Such an approach is contradictory with the central-European administrative model, which was characterized, at least till recently, by secretiveness, so that access to (administrative) documents was possible, only when certain strict requirements were fulfilled. See R. Grössner, *Transparente Verwaltung: Konturen eines Informationsverwaltungsrechts*, Veröffentlichungen der Vereinigung der deutschen Staatsrechtler (VVDStRL) 2003, p. 346ff.

²⁵ It is worth mentioning that in November 2005, the Commission started a review of Regulation 1049/2001, which led to the adoption of a proposal for a new Regulation in April 2008, aimed at achieving more transparency in legislative process. The Commission's proposal provoked a vivid debate among European institutions, so that no progress on its adoption has been achieved. In March 2011 the Commission adopted a new proposal to amend the Regulation in order to align it with the provisions of Article 15 par. 3 of the Treaty of Functioning of the European Union.

provision it can be unequivocally assumed that the disputed authorship rule²⁶ is abandoned, while other categories of documents, such as the internal and the “sensitive” documents, are also excluded as such from its scope of application. In line with the above-mentioned provisions and the main goal of the Regulation for ensuring the widest possible access, the term “document” is also defined broadly²⁷. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State is, according to Regulation, a beneficiary of the right to access. Furthermore, in line with its philosophy that transparency *per se* serves the public interest, Article 6 par. 1 of the Regulation stipulates that a person seeking access to a document will not need to state any reasons justifying his request.

As any regime of access to information, the Regulation 1049/2001 contains also certain exceptions that limit or preclude access. These exceptions vary in nature. The first category of exceptions set out in Art. 4(1) of Regulation No 1049/2001 is the so-called category of “mandatory exceptions²⁸”. To the mandatory exceptions belong the exceptions relating to public security, defence and military matters, international relations, the financial, monetary or economic policy of the Community or a Member State. The second category of exceptions set out in Article 4 par.2 are of a “discretionary” nature. This means that the institutions invoking them will need to *balance* the protected interest against a possible “overriding public interest in disclosure²⁹”.

c) The relevant jurisprudence

The European Courts have produced a sizeable but not always uncontested body of case-law which mainly relates to the interpretation of the exceptions, while shaping, to a significant extent, the right of public access to documents within the EU framework. In this context, the Courts ruled that the relevant exceptions are to be interpreted and applied as restrictively as

²⁶ This rule was foreseen in the Code of Conduct and established that the European organs cannot disclose documents, even if in their position, which originated from third parties.

²⁷ As a document is defined “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” (Art. 3(a)) of the Regulation).

²⁸ The interests protected by these exceptions are deemed to be of such importance that once a likely risk of harm is established, the institutions are under the obligation to refuse access, without them having any remaining discretion to weigh up these interests against the interest in public access. For the mandatory exceptions see Court of First Instance T-264/04, Case *WWF European Policy Programme/Council (“WWF EPP”)*, 2007, I-911, para 44. See also D. Adamski, “How Wide Is “The Widest Possible”? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited” (2009) *C.M.L.Rev.* 46, p. 521-549.

²⁹ To the discretionary exceptions belong the protection of commercial interests, the protection of the court proceedings, the legal advice exception and the protection of the purpose of inspections, investigations and audits. Furthermore, the Regulation contains a specific exception that aims at protecting decision-making processes from being “seriously undermined” by the disclosure of documents. See T. Heremans, *Public Access to Documents: Jurisprudence between principle and practice*, Egmont Papers No. 50, September 2011, p. 31f, available at : <http://www.egmontinstitute.be/paperegm/ep50.pdf> (last accessed on 18 April 2012).

possible³⁰, a thesis based on the assumption that the principle of the widest possible access constitutes the basic principle that underpins the Regulation. The Courts require any request for access to documents to be subjected to a *concrete and individual examination*³¹.

The tendencies underpinning the body of case-law can be described as follows: a) The Courts *demand complete openness of the legislative process on principle in terms of ensuring complete access to the relevant documents even of the ongoing procedures* (Case Turco versus Council, Case Access Info), position which is in line with the increased transparency requirements concerning general policy choices. *Complete access to the documents concerning relevant administrative procedures remains also the principle* (Case Sweden/My Travel and Commission). Such an approach relates mainly to the ended administrative procedures, as it is explicitly recognized that documents relating to *ongoing administrative procedures* merit greater protection so as to avoid undue influence by interested parties disturbing the serenity of the procedures and affecting the quality of the general decision³². b) The Court of Justice of the European Union has accepted a restriction of transparency when other fundamental values, such as the protection of personal data or the right to fair trial, could be undermined due to the publication of the relevant documents. In particular, in three recent judgements the Court of Justice of the European Union interpreted the relevant exceptions invoked in the light of more specific rules contained in the Personal Data Protection Regulation (Case Bavarian Lager), the State Aid Regulation (Case Technische Glaswerke) and its own Rules of Procedure (Case API). It is worth mentioning that although the Court did not base the relevant reasoning in the above-mentioned judgements on the principle *lex specialis derogat generalis*, it clearly emerges from the case-law that the Regulation cannot deprive these specific access rules of their “effectiveness”³³. c) Although the Court of Justice of the European Union generally requires a *concrete case by case analysis* (by the

³⁰ See European Court of Justice C-353/99, Case *Council/ Hautala*, 2001, I-9565, para. 25 ; European Court of Justice, Joined Cases C-174/98 και C-189/98 (Netherlands and van der Val/Commission), 2000, I-1, para. 27; European Court of Justice C-64/05, Case Sweden/Commission (IWAF-1), 2007, I-11389, para. 66.

³¹ The requirement of a *concrete or specific examination* means that the institutions need to examine “in a concrete manner” for each document whether its disclosure is likely to “specifically and actually” undermine one of the interests protected by the exceptions. See Court of First Instance T- 2/03, Case *Verein fur Konsumenteninformation/ Commission*, 2005, II-1121, para.69; Court of First Instance, T-211/00, Case *Kuijjer/Council (Kuijjer II)*, [2002, II-485, para. 55.

³² See Opinion of the Advocate General J. Kokott in Case C-506/08 P *Sweden/My Travel and Commission*, paras. 65-69.

³³ See Court of the European Union, C- 28/08, Case *Commission v. Bavarian Lager*, 2010, I-6055, paras 58-59; Court of the European Union, C-139/07, Case *Technische Glaswerke Ilmenau*, 2010, I-5885, paras. 58-61; Court of the European Union, Joined Υποθέσεις C-514/07 (Sweden and API/Commission) , C-528/07 (API/Commission) και C-532/07 (Commission/API), Decision of 21st September 2010, paras. 86-88. See also G. Godin, “Recent Judgments Regarding Transparency and Access to Documents in the Field of Competition Law: Where Does the Court of Justice of the EU Strike the Balance?”, *Journal of European Competition Law & Practice*, 2011 Vol. 2, No. 1, p.22-23.

competent institutional body) as a basis for any decision concerning the application of the exemptions, it has changed this line of reasoning in the above-mentioned cases (*Technische Glaswerke*, *Bavarian Lager*, *API*). In particular, the Court adopted the technique of general presumptions in favour of non-disclosure for certain categories of documents, in order to deal with the broad scope of the 1049/2001 Regulation. It would be preferable, though, that a general exemption from the scope of application of the Regulation 1049/2001 is established for situations which are governed by specific rules. Furthermore, contradictory to the above described jurisprudential tendency is the standard of proof required mainly by the Court of Justice of the European Union as regards the risk of disclosure, as, in accordance with the Court's view the (competent) institution has to establish *the requisite legal and factual standard* that disclosure would seriously undermine the protected interest³⁴. d) Finally, the interpretation of the above-mentioned exemptions by the European Courts demonstrates that, although the Courts have taken seriously into consideration the limits of transparency, realized by access to documents, when conflicting with other fundamental values, such as the serenity of the judicial procedures or more ambiguously the protection of personal data, this is not the case with the consideration of the risk of undermining the decision-making procedures or endangering the existence of "a space to think and to negotiate" by the publication of certain documents. In particular, the Courts and more specifically the Court of Justice of the European Union have set a high standard of proof for the European institutional organs, in order to demonstrate that the publication of certain documents either would affect the ability of the administration to express frank and independent opinions or would seriously undermine the decision-making procedure³⁵.

In conclusion, it should be underlined that, although access to documents is the most developed aspect of transparency, it has, due to its embodiment in the Treaty of Functioning of the European Union and the Charter of Fundamental Rights as well as its detailed elaboration in the secondary legislation, evolved into a self-standing principle of EU law.

C. Transparency in sense of legal clarity

As already mentioned, another aspect of transparency relates to the clear drafting of the legal norms. In a broader sense, it can be perceived as the accessibility of the legal norms that requires that legislation should be clear, understandable and coherent as a body of law. In a more limited context, it relates to the way that the European and national norms are drafted. In particular, in accordance with the so-called "standard case law", the principle of legal certainty, which is recognized as a general principle of Community

³⁴ See European Court of Justice, Joined cases C-39/05 P and C-52/05 P, *Sweden and Turco/Council*, 2008, I-4723, para. 63&66; Court of First Instance, T-166/05, *Case Borax Europe/Commission*, 2009, II-28, para. 44-50.

³⁵ See Court of Justice of the European Union, C- 506/08, *Case Sweden/My Travel and Commission*, Judgment o 21 July 2011, paras. 76-78, 102, 115-116.

law³⁶, requires that every measure having legal effects be clear and precise and be brought to the notion concerned³⁷. The natural (or the legal) person must be able to ascertain exactly the time at which the measure comes into being and to know the extent of the obligations that it imposes on them.

It is worth mentioning that the legal clarity in the above-described sense becomes more relevant at the European than at the national level, because, due to the institutional particularities of the unional institutional system (i.g dual legitimacy structure), legislative acts are produced in more complex processes than those at the national level, and their context often reflects the compromises made in order to achieve an agreement. This can result in the use of ambiguous terms, a situation which can pose significant problems to the application of the EU law, because it renders its translation into the languages of the member states more difficult³⁸.

As indicated earlier, the legal clarity in terms of drafting clear, precise and unambiguous norms is merely perceived as an element of the principle of the legal certainty, as it is also the case with the German legal order, where the principle of legal certainty is recognized as a sub-principle of the rule of law principle³⁹. What is interesting, though, is that at the European level is also linked with transparency. In particular, the relationship between transparency and clarity of the legal norms is quite explicitly recognized in the Opinions of the Advocate Generals⁴⁰, while that linkage is not so clear in the judgements of the European Courts. The Opinion of the Advocate General Ruiz-Jarabo in the Case Belgium/Commission (C-110/03) can be cited as a very characteristic example towards this direction. In this case, Belgium sought the annulment of the (group) Regulation 2204/2002 on aid

³⁶ See T. Tridimas, *supra* note 12, p. 249; P. Craig, *European Administrative Law*, Oxford University Press, 2006, p. 608-609.

³⁷ See Court of the European Union C-215/82, Case *Deutsches Milchkontor*, 1983, I-2633ff; Court of the European Union, C-212-217/80, Case *Amministrazione delle Finanze dello Stato v Srl Meridionale Industria Salumi*, 1981, I- 2734, para. 10

³⁸ See .H. Xanthaki, *The problem of Quality in EU Legislation: What on earth is really wrong?* *Common Market Law Review* 2001, p. 652 ff.

³⁹ For the relationship between the rule of law principle with legal certainty and the later with legal clarity in the German legal order see K-A. Schachtscheider, *Das Rechtsstaatsprinzip des Grundgesetzes*, JA 1978, p 185ff; A. v. Arnault, *Rechtssicherheit –Perspektivische Annäherungen an idée directrice des Rechts*, Möhr Siebeck Verlag, Tübingen 2005.

⁴⁰ The principle of transparency is also cited in the Opinion of the Advocate General E. Sharpston in the Case *Commission v. Greece* that concerned the question whether Article 2 par. 1 of the Regulation No. 3577/92 concerning maritime cabotage also covered towage. In particular, the Advocate General pointed out that “...in the interests of legal certainty, the proper discharge of member state’ s obligation and transparency (so that Community nationals may readily ascertain the scope of their rights under community law), it seems to be essential that, in legislation that expressly purports to apply the principle of freedom to provide services in the field of transport, definitions should be clear and unambiguous in indentifying the classes of services concerned”. See Opinion of the Advocate General E. Sharpston, of 14 September 2006 in Case C-251/05, Case *Commission v. Greece*, 2007, I-0067. It is worth mentioning that the Court agreed with the ambiguity in terms of context but treated it as a matter of legal certainty.

employment⁴¹ based on the argument that, although Regulation 994/98 (enabling Regulation) requires exemption regulations to “increase transparency and legal certainty”, Regulation 2202/02 lacked completely *in clarity in terms of both context and content* (emphasis added). In this context, the Advocate General noted at first that the preamble or the introductory recitals are not binding, and therefore, any failure to take the principle of transparency into account cannot lead to the annulment of the Regulation. What is important though is that he (Advocate General) recognized that “both the principle of transparency and legal certainty must be respected by the legislature as sources of Community law, and a failure to do so would, under 230 EC, constitute an infringement irrespective of whether they are referred to in the preamble to Regulation 994/98⁴²”. Subsequently, the Advocate General examined whether the Regulation lacks transparency in sense of the “quality of being clear, obvious and understandable without doubt or ambiguity” and after such an examination, he concluded that there was no breach of the principle⁴³. It is worth mentioning that in contrast to the Advocate General, the European Court of Justice did not follow his argumentation and did not refer to the principle of transparency. In particular, in accordance with the Court’ s view, the Belgian argument that the Regulation lacks in clarity concerned a breach of the general principle of legal certainty which requires “that rules should be clear and precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are and may take steps accordingly⁴⁴”. After examining the Regulation under this prism, the Court ruled that the principle was observed by the Regulation.

Furthermore, the regulative influence of the principle of legal certainty and its linkage to transparency is not limited within the framework of the European legal order but is also extended to the national legal systems regarding the transposition of EU Directives. In particular, in accordance with the so-called “standard case-law”, provisions of Directives must be implemented in national law “with precision, clarity and transparency required in order to comply fully with the requirement of legal certainty⁴⁵”.

In conclusion, it should be underlined that legal clarity in terms of drafting clear, precise and unambiguous norms is merely linked by the jurisprudence to the principle of legal certainty, which undoubtedly constitutes a general principle of EU law. Legal clarity is also linked to the transparency principle, because clarity and precision are some of its

⁴¹ Acting under the powers granted by Regulation No 994/98, which specified the provisions of Article 89 of the EC Treaty, the Commission adopted Regulation 2204/2002, which was contested by Belgium. The contested Regulation aimed to specify the schemes of state aid employment that are compatible with the Articles 87, 88, 89 of EC Treaty.

⁴² See Opinion of AG Ruiz-Jarabo Colomer, *supra* note 2, point 36.

⁴³ See Opinion of AG Ruiz-Jarabo Colomer, *supra* note 2, point 44.

⁴⁴ See European Court of Justice, C-110/03, Case Belgium v. Commission, 2005, I-2801, para. 30.

⁴⁵ See European Court of Justice, C-417/99, Case Commission v. Spain, 2001, I-6015, para. 40.

constitutive elements. In particular, in some Opinions of Advocate Generals transparency is viewed as an autonomous principle in terms of ensuring legal clarity, while in other cases it is invoked alongside the principle of legal certainty, in order to establish requirements for legal clarity. It is therefore obvious that *the relationship between legal certainty and transparency is not very clear*. Despite this fact, it should be mentioned that the principle of legal certainty cannot be effectively applied without transparency in the sense of legal clarity and that this aspect of transparency could not have a different meaning than that of clarity as an element of the principle of the legal certainty.

Furthermore, taking the relevant jurisprudence into consideration, it can be argued that *it is quite early to recognize the transparency principle as an autonomous principle in terms of ensuring legal clarity*. Such a position should not, though, lead to the conclusion that the linkage of transparency to legal clarity does not have additional value. In particular, its specific importance *lies in the strong obligation set for the legislators to ensure the cognizability of the law*.

D. The duty to give reasons as an aspect of transparency in a broader sense

Another important aspect of transparency in a broader sense relates to the duty to give reasons for legislative acts, because transparency requires *knowledge of motives*⁴⁶. In particular, it is worth mentioning that the primary European law makes it a requirement to give reasons not only for administrative but also for legislative acts (Article 296 par.2⁴⁷ of the Treaty for the Functioning of the European Union, former Article 253 of the EC Treaty). The obligation for the statement of reasons for legislative acts constitutes an innovation of the European legal system, because something like this is hardly known in the national legal systems⁴⁸. This innovation should be seen as an implication of the supranational nature of the European Union in the context that due to the complexity of the decision-making processes and the lack of legitimacy of the kind provided by the general elections at the national level, *the statement of reasons concerning legislative acts creates the necessary conditions for ensuring the accountability of the European organs and enhancing the visibility of their actions*. In this context, *the duty to give reasons especially for legislative acts can be seen as an aspect of transparency*. In particular, by outlining

⁴⁶ See A.v. Bogdandy, *supra* note 10, p. 30; D. Chalmers/C.Hadjimmanuil/ G. Monti/ A. Tomkins, *European Union Law*, Cambridge University Press 2006, p.446.

⁴⁷ See Heitmeir in : Lenz/Bochard, *EU Veträge-Kommentar nach dem Vertrag von Lissabon*, 5Aufl, Artikel 296 AEUV.

⁴⁸ See P. Skouris, *Die Begründung von Rechtsnormen*, Baden-Baden 2002, p. 169; A.v.Bogdandy, *supra* note 10, p. 30. In this context, it is worth mentioning that fast all national legal systems establish a duty to provide reasons for both administrative acts as well as judicial decisions. Furthermore, in some national constitutions, such as the Greek Constitution, there is a specific constitutional provision which provides that court judgments must be specifically and thoroughly reasoned (Article 93 par.3 lit.1).

the rationale behind every legislative choice, European citizens can form a comprehensive view concerning the purposes of the European policies and more generally the direction of the European Union itself. Such knowledge is crucial for them (citizens) in order to exercise their democratic rights. Furthermore, the statement of reasons for legislative acts facilitates, to a significant extent, their judicial review. This is due to the fact that, in contrast to the national legal systems, the European legal order is to a large extent shaped by the existence of general principles of law, which are mainly shaped by the jurisprudence and constitute a measure for judging the legality of community acts⁴⁹. Subsequently, in the cases where the compatibility of a certain legislative act is measured against some fundamental principles of EU law, such as the principle of subsidiarity or the principle of proportionality, the judge can search for its purpose, as it is defined in its reasoning, in order to judge its compatibility with the relevant principle⁵⁰. In addition, the reasoning of the legislative acts is of specific importance in cases where national legal acts are reviewed in terms of their compatibility with the EU law, because it facilitates the interpretation of the relevant EU provision both by the European and the national courts by shedding light on its purpose. It becomes obvious, therefore, that in a multi-layered legal order, such as the European, where there is not a well-established rule concerning the hierarchy of different legal norms⁵¹, *the emphasis is, to some extent, shifted from ensuring the compatibility of a legal norm with norms of a higher rank (i.g constitutional), to providing a comprehensive reasoning, which can also be used as a measure for checking the compatibility of different categories of norms. Furthermore, the emphasis on the reasoning of the legislative acts, which also includes reference to all documents and elements on which its adoption was based, not only enhances the transparency of EU actions but also indicates the strong emphasis of the European legal culture on rationality.*

Finally, it should be mentioned that although the duty to give reasons is regarded as an aspect of transparency in the broader sense, it also constitutes, due to its embodiment in the European Primary law, an

⁴⁹ See B. de Witte, *Institutional Principles : A Special Category of General Principles of EC Law* in : U. Bernitz/J.Nergelius, *General Principles of European Community Law*, Kluwer Law International, 2000, p. 143.

⁵⁰ See E. Trova, *Powers and Transparency. From controlling the constitutionality of laws to controlling the reasoning of regulations*, Ant. N. Sakkoulas Publications, Athens, 2005, p. 97 (in Greek).

⁵¹ It is worth mentioning that the Draft Constitutional Treaty of the European Union included a provision which clearly recognized the primacy of the European law in accordance with the "standard case-law" of the European Court of Justice (Article I-6: The Constitution and law adopted by the institutions of the Union in exercising their competencies conferred on it shall have primacy over the law of the Member States). The Lisbon Treaty did not include this provision. Instead of that, a Declaration (No 17) was attached to the Treaties, which is the following: "*The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law*".

independent principle, the violation of which can justify the annulment of a Union act.

IV. Can transparency be recognized as a general principle of EU law?

The above analysis of the various elements of the transparency principle raises the question whether it can be recognized as an (evolving) general principle of EU law. Before answering that question, it should be noted that, in order for a general principle to be identified as a general principle of EU law, it must incorporate a minimum ascertainable legally binding context⁵². Additionally, such a principle should be justifiable at least as a standard of review of the Union acts⁵³. Using the above-described clarifications for the definition of the general principles of EU law as a departing point, it has to be examined whether transparency can be recognized as a general principle of EU law.

As we have seen, transparency is an umbrella notion encompassing various notions and values but with varying intensity. In its general appearance as an umbrella-notion, *transparency cannot be regarded as a general principle of EU law, because it seems that it does not have an autonomous normative concept, such as another umbrella principle, and more precisely the rule of law principle*. In particular, although the visibility of both the content of the relevant policy decisions and of the relevant procedures themselves constitutes a common denominator of the different aspects of transparency, this has not yet crystallized to such an extent that it would constitute an autonomous principle⁵⁴. The accessory nature of the principle is also supported by the fact that there have been no clear cases yet in which acts have been annulled on the basis of the violation of the transparency principle.

This is not the case, though, for at least one aspect of transparency which has evolved into a self-standing principle. In particular, as already indicated, access to documents, due to its embodiment in the European Primary law, its detailed elaboration by the secondary legislation, and the existence of a sizeable body of case law, can be regarded as a self-standing principle and even as a general principle of EU law⁵⁵, although it is not formally recognized by the Court of Justice of the European Union as such. Such a thesis is also supported by the fact that all Member States have introduced legislation concerning access to documents. Furthermore, the provisions of the European primary law that establish openness of the decision-making procedures in conjunction with the newly established provisions concerning forms of political participation beyond elections and the right to good administration (Article 41 of the Charter of the Fundamental Rights) as well crystallize to a significant extent the content of the principle of openness. Under this prism, openness, although recognized as a prominent feature of transparency, can also be regarded as an evolving self-standing

⁵² See T. Tridimas, *supra* note 12, p. 26.

⁵³ See B. de Witte, *supra* note 48, p. 143.

⁵⁴ See S. Preschal/M. E. De Leeuw, *supra* note 1, p. 238.

⁵⁵ See S. Preschal/M. E. De Leeuw, *supra* note 1, p. 240.

principle *that underpins the relationship between the European citizens and the EU organs irrespective of whether they act in a legislative or and in an administrative capacity.*

The following remarks should not lead to the conclusion that because the transparency principle has not yet been recognized as a general principle of EU law, it does not also have a specific normative significance for the European legal system. In particular, *the various normative values and elements encompassed under the umbrella notion of transparency give the already-mentioned principle a meaning which goes beyond that which is summed up by its different facets due to their elaboration within this new concept.* In this context, transparency represents an umbrella-notion, which places emphasis on quite new models of decision-making processes underpinned by openness, on the congruability of the law and on the visibility of the reasoning of the legal norms as a means to explain the purpose of their adoption and to check their compliance with the fundamental principles of the European legal order. All the above-described elements of this umbrella notion constitute to a significant extent “innovations” in comparison to the relevant regulative trends of the national legal systems, indicating thus the innovative nature of this notion itself. Such an observation has to be seen in conjunction to the fact that *in the case of transparency, national principles did not serve as a source of inspiration, as was the case with other important principles of the EU law.* It was rather the particularities and the needs of the European Union as a supranational governance system that gave rise to its creation. Finally, it remains to be seen how the principle is going to be further developed in terms of the crystallization of its content, a process which goes hand in hand with the (future) institutional developments of the European Union itself.

V. The influence of the transparency principle on the national legal systems

The regulative influence of transparency is not limited to the European legal order. It is also extended to the national legal systems due to their close interdependence and (due to) the “competition of the legal systems” within the framework of the multi-level governance system. An important field where the regulative influence of the transparency principle is evident relates to the legislation on access to documents. In particular, in the cases where national legislations were not underpinned by the Nordic model of the widest possible access to documents, they have been influenced, to a significant extent, by the quite progressive provisions of both the primary and the secondary (Regulation 1049/2001/EC) law in this field. Furthermore, the relevant case-law developed by the European Courts provides in certain cases significant impulses for the harmonization of the national legislations in terms of increasing transparency. In this context, the ruling of the Court of Justice of the European Union in the IWAF-I case constitutes a characteristic example, according to which Member States do not have an unconditional veto-right when they refuse the disclosure of documents transmitted by them to the EU

organs. Such a thesis is based on the assumption that those member-state documents which form part of the core information on the basis of which the EU institutions decide, “take a community nature”, with the relevant consequences concerning the conditions of their disclosure⁵⁶. Finally, the secondary legislation introduced detailed information and participation requirements in sensitive areas, such as environmental law or food safety law. For example, Directive 2003/4/EC establishes far-reaching access to environmental information, as it does not require the (natural or legal) person asking for information to prove any legal interest thereof. Such an approach is based on the assumption that the environment constitutes matter of interest for everybody. The transposition of these Directives into the national legal systems contributes to the creation of both a new “informed public sphere” and of an administrative culture underpinned by transparency and participation in sensitive areas such as the environmental protection.

The notion of transparency in the sense of legal clarity has also exerted influence on the national legal systems within the framework of any relevant effort aimed to improve the “quality of the legislation”. As already indicated, in accordance with the standard case-law, member states must transpose the provisions of the EU Directives into national law with precision, clarity and transparency in order to enable individuals to ascertain their rights and obligations. The influence of the requirement of the legal clarity is not limited, though, to national measures implementing EU Directives but is also extended to legal frameworks as such, because it is regarded as an inextricable element of any initiative for “better regulation⁵⁷”. Last but not least, it should be underlined that the innovative nature of the duty to give reasons for legislative acts, being viewed as an element of transparency in a broader sense, is not without significance for the national legal systems. This is due to the fact that such an obligation is gradually recognized, although not yet in hard law, both as a precondition for the quality of the legislation as such and as a means for making legislative choices understandable to the citizens, so that accountability mechanisms can function.

VI. Epilogue

The fairly brief analysis of the multi-faceted principle of transparency indicates that although there is still a way for this principle in its general

⁵⁶ See Court of Justice of the European Union, C-64/05, Case *Swedem v. Commission* (I WAF I), 2007, I- 11389, paras. 62-64 and 73-74. See also General Court of the European Union T-59/09, Case *Germany v. Commission*, Judgement of 12 February 2012, where the Court ruled that “the exclusion of a great many documents originating from the Member States from the scope of the right of access under Article 255(1) EC would conflict with the objective of transparency sought by that provision and established by Article 42 of the Charter of Fundamental Rights, subject to certain exceptions which must be narrowly construed” (para. 42).

⁵⁷ In this context, it should be mentioned that the Better Regulation Initiative, which was introduced by the European Commission as an implementation measure of the European Governance Initiative and serves the purpose of transparency in a broader sense, has also exerted influence on the reform efforts of the national legislations in this direction.

appearance to be recognized as a general principle of EU law, it has exerted significant regulative influence on the way that the (EU) institutional organs, bodies and agencies function. The general contribution of the notion of transparency goes, though, further than ensuring openness of the decision-making processes and widest possible access to the relevant documents in a multi-level governance model. It also relates to (some) qualities that the legal norms should have, such as the cognizability of their context and the visibility of the motives of the legislator (though the statement of the reasons for their adoption), qualities that can be seen as preconditions for both the acceptability and the effective application of the law itself. In conclusion, it should be underlined that although the multi-faceted principle of transparency builds upon well-established legal values, such as democracy and legal certainty, the elaboration of its elements in an integrated manner and in accordance with the particularities of the EU model gives it a new dynamic, although not yet fully crystallized, concerning the “qualities” of the law and the “modus” of governance at supranational level. Such developments are also of importance for the national legal systems.