



# Report of the Roundtable on “Public Access to Documents”

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Against the background of the problematic legislative recast/review process of Regulation No 1049/2001, which found itself in a political deadlock for 3 years yet recently seems to have been revitalized, and on occasion of the recent publication of [Egmont Paper No 50](#) “Public Access to Documents: Jurisprudence between Principle and Practice”, a roundtable was organized to discuss some of the “hot potatoes” permeating the debate on public access to documents. Four topics were singled out for discussion: (1) a space to think and/or negotiate, (2) Member State documents, (3) investigations, and (4) legal advice. More generally, the participants were invited to reflect on the question whether the EU has adopted a balanced approach that aims for an *optimal* level of transparency. Given that over the last couple of years the main driver of development in this domain has inevitably been the European Court of Justice, the discussion (also) focused on the likely impact of the Court’s recent case law.

## Space to think

With the space to think undoubtedly being one of the most controversial topics in the debate on public access to documents, it was not surprising that opinions on this matter were divided. Though transparent decision-making is core to the democratic legitimacy and regulatory accountability of the EU, it was questioned whether *full* transparency at *all* stages of the decision-making process is necessary and desirable.

Clearly confidentiality requirements differ across the ***different decision-making settings***. Hence, in international negotiations the Commission’s negotiating position should be protected. Indeed, early disclosure of proposed positions, fallback options, input from Member States or stakeholders could reduce the Commission’s room for manoeuvre. Up to now the Court has accepted non-disclosure of these documents on the basis of the protection of ‘international relations’ up until the signature and ratification of the agreement at hand. As regards *ongoing* legislative procedures, it was argued that the Commission’s preparatory

work, preliminary drafts, internal consultations deserve to be shielded off. Likewise, the European Parliament's decision-making process most probably requires the confidentiality of its political group meetings, coordinators committee meetings, and some other informal meetings. Within the Council the necessary climate of confidence is arguably created by the practice of disclosing the substance of the different positions taken within the Working Group meetings *without* attributing these to the respective Member State delegates up until the final decision is adopted. Once the legislative act has been adopted, the Commission does not disclose documents revealing internal political discussions, in so far as this would undermine the Commission's consensus based decision-making. In addition, legal opinions by the institutions' Legal Services that were not followed and that concern legislative acts that can still be challenged, would seem to deserve confidentiality. As regards documents forming part of *non-legislative ongoing* procedures there is generally a low public interest in disclosure, while they deserve to be protected from undue pressure, as was recognized by Advocate General Kokott in *Sweden/MyTravel*. Documents concerning closed non-legislative procedures should only be protected if there is a risk of harm to personal data protection or commercial interests.

In its *recent case law* the Court has not shown much enthusiasm to accept the need for a space to think. Hence, in *Access Info* the General Court decided that the Council should on principle fully disclose its documents forming part of a legislative process, even if that process is still *ongoing*. Therefore, the EGC condemned the Council's general practice of blanking out, when disclosing Working Group documents,

the names of the delegations linked to particular viewpoints, until the legislative decision is adopted, though the substance of the arguments and proposals for amendments themselves were fully disclosed. In addition, in *Sweden/MyTravel* the ECJ concluded that internal documents forming part of a *finalized* administrative procedure could not be protected from disclosure on the basis of the Commission's need for a space to think, unless "specific reasons" were offered. In both cases the Court imposed a high "requisite legal and factual" standard of proof.

Yet, despite the Court's reticence, there are *arguments in favor* of some degree of space to think and negotiate. Though far from abundant, there does exist some academic research which looked into the cost-side of too much or premature transparency of decision-making processes, finding certain effects that may *prevent* a decision or agreement from being reached or have a negative impact on its *quality*. The phenomenon of 'entrenchment', for example, implies that once people publicly commit to a position, they find it difficult to alter it, thus precluding genuine deliberation. In addition, for the best ideas to develop, there must be room for trial and error, with civil servants not needing to fear that their ideas could (later) compromise the institution's position. Furthermore, since political decisions are very often compromise-packages, it might prove very difficult for a politician to justify his position on one particular matter as long as negotiations on the whole package are still ongoing. In addition, the risk that too much or premature transparency imposed on decision-making processes will trigger *evasion practices* is, contrary to the Court's view, very real. Indeed, the risk of selective conservation of documents, of documents with less substance being drawn up, and of a shift

from written to oral communication has already materialized to a certain degree in the EU's institutions. Legal opinions, for example, have become less clear and outspoken with the real core message often only being conveyed orally. Likewise, the minutes of several types of meetings can be seen to contain much less substance than ten years ago. Hence, the goal should be to find a balance between confidentiality and disclosure that ensures that the number and the quality of documents being drawn up do not suffer.

In addition the *sui generis nature of the Council*, which is still much more a permanent diplomatic conference than a second legislative chamber, with Member State delegates having to constantly communicate back and forth with their national capitals, was pointed out. Not only do the negotiations within the Council require a climate of confidence, evasion practices like a shift from written to oral communication would be especially detrimental given that the often complex information needs to be transmitted by 27 delegates with different backgrounds to their respective capitals. Moreover, fear of premature disclosure of the delegates' positions could significantly slow down the decision-making process with the delegates constantly seeking prior approval from their capitals rather than taking individual initiatives.

Yet, when evaluating the need for a space to think, account should also be taken of the *natural tendency of institutions to feel threatened by (newly imposed) transparency requirements*. Hence, it should be kept in mind that the Regulation requires the decision-making process to be “*seriously* undermined”, thus mere discomfort experienced by the institutions is not sufficient. As regards the institutions' fear of targeted external pressure

on their decision-making, it was questioned where this differs from the formal consultations with stakeholders already conducted.

Several participants emphasized the *need to link the discussions on the definition of 'a document' and the space to think-exception* within the legislative debate, since both operate as “communicating vessels”. Under the current Regulation, a very broad definition of ‘a document’ is employed and includes internal, informal as well as third party documents. Given that the Nordic countries are so often looked at as examples of transparent government, the manner in which their laws deal with this linkage deserves to be closer examined. Indeed, their definitions of what constitutes a document are much more limited than the one in Regulation No 1049/2001. Nonetheless, several participants preferred to keep a wide definition of what constitutes a document, rather than exempting certain documents from the outset, and proceed via the avenue of exceptions.

## Legal Opinions

Given that the institutions' Legal Services are ‘in house lawyers’ who play the dual role of advisors and agents in litigation, some confidentiality of their opinions seems justified. Indeed, sound decision-making requires that the institutions can rely on their Legal Service to deliver full and frank legal advice. Nonetheless, in *Turco* the Court decided that legal opinions delivered by the Council's Legal Service in an *ongoing legislative process* should in principle be disclosed, unless they are of a particularly sensitive nature or of a particularly wide scope going beyond the context of the legislative process in question. Yet, as mentioned, it is far from “mere hypothesis” that this has caused a shift from

written to oral opinions so as “not to affect the institution’s scope for decisions”. As regards legal opinions provided in a finalized administrative procedure, the Court clarified in *Sweden/MyTravel* that these need to be made public. Disclosure of a legal opinion which was not followed by the institution in its final decision, can clearly affect the Legal Service’s capacity to defend that decision in Court. Moreover a decrease in the quality and number of written legal opinions would seriously affect the Council’s functioning where delegates with differing (often non-legal) backgrounds from 27 Member States need to communicate back and forth with their capitals.

### Third party and Member State documents

It was pointed out that requests for access to *third party documents* impose upon the institutions a potentially difficult risk assessment of sensitive business information in cartel, merger and antidumping case files, or concerning intellectual property rights in for example GMO notifications. When it discloses such documents against the will of third parties (1) the Commission can be exposed to claims for damages, (2) the willingness of third parties to co-operate may be reduced (e.g. leniency applicants), (3) external sources may ‘dry up’ for fear of being subjected to damages actions,...

The disclosure of Member State documents in the EU’s possession poses its own set of possible problems. In its recent case law the Court found that prior (dis)agreement of a Member State is still, in principle, binding on the EU institutions, yet that the Member State has no unconditional veto right and will need to state reasons capable of failing within the exceptions of Art. 4(1) – (3) of the Regulation or under the specific protection

accorded to sensitive documents. Yet, given that there is no harmonisation of the laws on access to documents/information, the question arises whether national legislation can be ‘circumvented’ via the EU rules? In addition, the Court has not yet decided to what extent the institutions should assess the reasons given by the Member State. Here as well there is a real risk that Member States will become reluctant to provide information in writing.

### Investigations

In *ongoing* infringement and state aid cases, the Court has accepted a general presumption that disclosure would be harmful (*Petrie, TGI, LPN*). Although the General Court has been strict on the proof of concrete harm in Merger cases (*Agrofert, Editions Odile Jacob*) and the Court has yet to rule on cartel cases, it seems arguable that a general presumption of harm should also apply to *ongoing* cartel, merger and antidumping cases since there also special access rules apply. As regards *ongoing* anti-fraud and disciplinary investigations, the Court has accepted a presumption that disclosure would harm the investigation and the rights of investigated parties. In *closed* anti-fraud and disciplinary investigations there will be a right of access for investigated parties, yet no third party access if this would risk causing harm to privacy or commercial interests.

### General tendencies in case law

Traditionally, the Court requires any request for access to documents to be subjected to a *concrete and individual examination*. Before refusing access, the institution should prove that there is a risk that disclosure would inflict *concrete and effective harm* on the protected interest. The Court’s case law has

considerably limited the protection of legislative documents (*Turco, Borax, Muñiz*), legal opinions (*Turco, Sweden & MyTravel*) and closed cases (*Batchelor, Sweden & MyTravel*).

However, recent case law has shown an opposite evolution facilitating the proof of harm in certain contexts. Indeed, a presumption of harm has been accepted in situations where specific rules apply. Examples are the personal data protection rules (*Bavarian Lager*), the Rules of Procedure of the EU Courts in respect of court proceedings (*API*) and the State aid rules (*Technische Glaswerke*). Nonetheless, this general presumption practice has been criticized for undermining the traditional requirement of an individual and concrete examination.

### Optimal and/or maximal transparency?

The importance of public access to documents and transparency more generally is beyond doubt. Hence, the institutions should on principle act as openly as possible and disclose information pro-actively. Nonetheless, transparency is not a **goal** in itself but an **instrument** in the pursuit of objectives like regulatory accountability, democratic legitimacy, democratic participation, etc. However, remarkably enough, there seems to be no unequivocal common view as to what *precisely* transparency should achieve within the EU. Both within academic discourse and within the institutions themselves, such a clear vision on the finality of transparency is lacking. It is plain that the EU started to embrace transparency in an attempt to provide an answer to the gap between citizens and the EU. Yet, whether it is ex post accountability or real time citizens' participation or something in between which is aimed for, remains unresolved.

Nonetheless, each of these objectives has different implications for the EU's policy on public access to documents.

Regardless of the *precise* objectives aimed for by EU transparency policies, including public access to documents, they ought to be pursued in a **balanced manner**, considering both their *benefits* and their *costs*. Indeed, it could be argued that academic literature as well as several recent court decisions have focused mainly on the perceived benefits of transparency. With only limited scientific research having been conducted on the cost-side of transparency, the few dissonant voices mostly originate from within the institutions based on their 'practical experience'. Yet, if transparency and more specifically access to documents is to genuinely serve the public interest, its real benefits in terms of democratic legitimacy, regulatory accountability, etc., need to be weighed against its actual costs in terms of effective or qualitative decision-making, protection of investigations, etc. Indeed, even if it is difficult to determine where exactly that balance lies, a balanced approach is necessary since "the best can be the enemy of the good".

Concerning the potential benefits of access to documents in terms of democratic legitimacy and regulatory accountability, it is important to note that many access requests are based on private rather than public interests and come from businesses, law firms, lobbies. These requests often relate to litigation as regards cartels, State aid, anti-dumping, infringements. Hence, given that this is not the Regulation's core business, it can be argued that in a world of limited resources the Regulation could better be redirected towards its original goal.

As to how a balanced approach should be achieved, it was suggested that the starting

point should remain maximal transparency which could then be “optimized” via the application of *exceptions*. Such an approach would help to “keep the institutions sharp”. It seems, however, that by imposing an almost ***prohibitively high standard of proof*** for the invocation of these grounds of exception, in some instances almost requiring proof of actual harm rather than of a risk of harm, the Court has in its recent case law considerably narrowed this route of “optimization”.

Yet, according to some participants the goal of the Regulation and the case law is precisely to raise the bar and “*to make maximal transparency optimal*”. Indeed, rather than relying too much on the (acclaimed) discomfort and problems experienced by the institutions confronted with greater transparency, it should be recalled that “bad habits die hard”. Hence, it might be necessary to adopt transparency rules which force the institutions out of their comfort zones and oblige them to “change their ways”, before transparency can truly prove its value.

### Legislator should act

Ten years after the adoption of Regulation 1049/2001 it seems time for the legislator to act once again. Indeed, whether or not one agrees that the Regulation was a good first attempt at regulating public access to documents, some changes on the basis of the

experience with its implementation and the Court’s interpretations are justified. Indeed, whereas the political deadlock of the last couple of years has placed too much importance on the Court’s interpretative role, it should be the legislator rather than technocrats who sets out the lines of the Union’s access to documents policy. Nonetheless, some experts warned not to block the case law’s “natural evolution” on certain relatively unexplored issues, such as the protection of legal advice, by undertaking a premature attempt at codifying or reversing the case law.

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