

INTERNATIONAL JOURNAL OF OPEN GOVERNMENTS

REVUE INTERNATIONALE DES
GOUVERNEMENTS OUVERTS

Vol. 2 - 2015



ISSN 2553-6869

International Journal of Open Governments
Revue internationale des gouvernements ouverts

Direction :
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ISSN : 2553-6869

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À PROPOS DE NOUS

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ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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RECENT CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON PUBLIC ACCESS TO DOCUMENTS: REGULATION (EG) No. 1049/2001 AND BEYOND

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and **Wolfgang ROSCH**, Legal secretary at the Court of Justice of the European Union.¹

INTRODUCTION

This paper is about freedom of information in the European Union (hereafter: EU) in general and about Regulation (EG) No 1049/2001 in particular, which deals with various aspects of public access to documents.

When addressing the topic of freedom of information with regard to the EU, the provisions which promptly and prominently spring to mind are enshrined in its so-called primary law². In the EU's legal framework, the remarkable importance which nowadays is attached to transparency is evidenced by the fact that freedom of information, in the broader meaning of the word, is anchored in several outstanding provisions of primary law, amongst which can be numbered Article 15 of the Treaty on the Functioning of the European Union (hereafter: TFEU), and Article 11 and Article 42 of the Charter of Fundamental Rights³ (hereafter: Charter).

For the purpose of this paper, let us start with the Charter. Its Article 11, the scope of which is “freedom of expression and information”, provides for the freedom “to receive and impart information”. It must be noted, however, that Article 11 basically applies to publicly available information.

¹ The opinions expressed are personal to the authors and do not bind the Court of justice.

² Primary law, as may be noted for the reader uncommon with EU legal terminology, can be seen as the supreme source of law in the EU. It is at the apex of the European legal order. As it is, EU primary law consists mainly of the founding treaties of the European Union, as amended and adapted by different Treaties and Acts, and the Charter of Fundamental Rights of the European Union. As opposed to primary law, secondary sources of EU law are legal instruments based on the Treaties. Those instruments include unilateral secondary law (notably regulations, directives, decisions, and recommendations), conventions and agreements.

³ The Charter of Fundamental Rights of the European Union (OJ, 30.3.2010, C 83, p. 389, in its version as referred to in the consolidated Treaties on European Union and Functioning of the European Union) provides for specific rights conferred to European Union citizens and residents but also, in some cases, to third country citizens. Originally drafted by the European Convention, the Charter was proclaimed on 7 December 2000, but it only gained full legal effect, and equal rank to the treaties (*see* Article 6[1] TUE), in 2009 by virtue of the Treaty of Lisbon.

As far as access to documents is concerned, freedom of information is seconded by Article 42 of the Charter. That Article states that “[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium”.

A proud affirmation of principle, couched in general terms! It does not mean, however, that EU citizens are free to access to any EU document as they please. On the contrary, the Charter not only enshrines freedoms, but also provides for a general rule on limitations of those rights.

As Article 52 of the Charter puts it, “[a]ny limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.”

In the same line of thought, Article 15(3) TFEU also makes it clear that access to documents is “subject to [...] conditions”. “[L]imits on grounds of public or private interest governing [the] right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.” Moreover, “[e]ach institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to”.

In the light of the Charter and of Article 15 TFEU, it thereby ensues that even if certain “limits ... governing [the] right of access to documents” can be determined under EU law, any act which interferes with public access to documents must leave the “essence” of Article 42 of the Charter unblemished and, even more important, be “[s]ubject to the principle of proportionality”.

So much for the legal basis provided for by primary law. However, one would be mistaken if one imagined that the Charter was the birthplace of access to documents of EU institutions. As a matter of fact, the principle of granting access to EU documents is deeply rooted in the history of EU law, whereas the Charter is a comparatively recent instrument.

This being the case, it is appropriate to provide a very short overview of legislation on transparency within the EU.

As soon as in 1992, access to documents had been identified as a key issue in a “Declaration on the right of access to information”⁴, which was annexed to the so-called Maastricht Treaty. Following

⁴ Declaration on the right of access to information (OJ, 29.7.1992, C 101, p. 101): “The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.”

that Maastricht Declaration, not only a code of conduct was adopted⁵, but also a Council Decision⁶. That Decision shed some light on how access to documents was to be granted in practice. It triggered a rich case law of the Court of justice⁷.

As for now, however, Regulation (EC) No 1049/2001⁸ is to be considered the cornerstone of a wide-ranking, but rather scattered framework of EU secondary law⁹ on public access to documents. Therefore, and for purposes of simplification, Regulation (EC) No 1049/2001 shall be the center of interest of this paper. The paper will first give an overview of the Regulation's scope, before moving on to its legal basis. The most substantial portion of the paper will then dwell in some depth on elementary provisions of Regulation (EC) No 1049/2001 and, finally, examine the relevant case law of the Court of justice.

On the face of it, Regulation (EC) No 1049/2001 only applies to the European Parliament, the Council and the European Commission¹⁰, but the gist of the rules it contains goes way beyond. In fact, there are provisions in the very legal acts establishing various other bodies and agencies which make Regulation (EC) No 1049/2001 applicable to them as well. That is the reason why the Regulation rightly deserves to be deemed "the cornerstone" of the current legal framework governing access to documents.

To get a solid grip on the Regulation and its scope, some remarks as to its legal basis are in order. As evidenced by its recitals, Regulation (EC) No 1049/2001 was solely based on Article 255(1)

⁵ Code of conduct (93/730/EC) concerning public access to Council and Commission documents (OJ, 31.12.1993, p. 41).

⁶ Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ, 31.12.1993, L 340, p. 43).

⁷ For a review of the case-law relating to that decision see C. Naômé, *The case-law of the Court of Justice and the Court of First Instance of the European Communities on transparency: from Carvel to Hautala (1995-2001)*, in INCREASING TRANSPARENCY IN THE EUROPEAN UNION?, 2002, pp. 147-198.

⁸ 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 (OJ, 31.5.2001, L 145, p. 43).

⁹ In addition to Regulation No 1049/2001, there are some more secondary law instruments granting access to documents, namely with regard to specific sectors: see, for instance, Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ, 14.2.2003, L 41, p. 26), and Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ, 25.9.2006, L 264, p. 13).

¹⁰ Specific rules apply e.g. to the European Economic and Social Committee, the Committee of the Regions, the Court of Justice, the Court of Auditors and the European Central Bank.

and (2) EC (now Article 15 [3] TFEU¹¹) and not on the Charter¹². Given that the Charter was not yet legally binding at the time Regulation (EC) No 1049/2001 was adopted, this does not come as a surprise. In the meantime, however, things have changed with the Charter coming into force, in the wake of the Lisbon Treaty, on 1 December 2009. The Charter now being part of EU primary law, the least that can be said is that applications for access to a document made since December 2009 indubitably fall within the substantive and temporal field of application of the Charter, as defined in its Article 51. Therefore, whatever its past and its background, Regulation (EC) No 1049/2001 is now to be construed in accordance with the rules and principles established in the Charter.

Those preliminary remarks now lead us to examine the provisions of Regulation (EC) No 1049/2001 in detail. The core of those provisions has been solid and stable for a substantial period of time, despite various proposals for recasting or amending. Some of them have been under way for quite a while. They reflect diverging opinions as to how Regulation (EC) No 1049/2001 should be recast. The ongoing process illuminates the interests at stake and deserves some explanatory observations.

§ 1 – REGULATION (EC) NO 1049/2001 AND RECAST PROPOSALS

Section A will deal with the legal pattern of the Regulation, whereas Section B will be about the recast proposals.

A) The legal pattern of Regulation No 1049/2001

The objectives the EU lawmaker pursued when adopting Regulation No 1049/2001 have been made apparent in the Regulation's preamble, which comprises 17 recitals. In a nutshell, and as demonstrated in those recitals, what the legislator had in

¹¹ Article 15(3) TFEU states:

“Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, *subject to the principles and the conditions to be defined in accordance with this paragraph*.

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph. The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.

The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph.” (emphasis added)

¹² It must be said, however, that the Charter is mentioned in the Regulation's preamble.

mind essentially amounts to open government – tempered by some important exceptions to prevent abuse.

According to recital 2, “openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in the [Treaties]¹³ and the [Charter]”. As recital 4 of Regulation No 1049/2001 puts it, the purpose of the Regulation is “to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with [the Treaties]”.¹⁴

If recital 2 refers to “administration” in the broad sense of the term, recital 6 particularly refers to legislative procedures, along the following lines: “wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, ... while at the same time preserving the effectiveness of the institutions’ decision-making process” (emphasis added)¹⁵. Such documents should be made directly accessible to the *greatest possible* extent.” Though stressing the principle of broad access, recital 6 alludes to possible limitations due to conflicting interests: Even though openness is to be given the fullest possible effect, there may be other interests at stake that ask for some limits. That restriction is perfectly in line with Article 15 TFEU.

What is more, the idea of limitations, as embodied in notions such as “greatest possible extent” or “fullest possible effect”, is even more vigorously pursued in recital 9 with regard to “certain documents”. That recital underlines that they could be given special treatment “on account of their highly sensitive content”.

As a more general rule, recital 11, although clinging to the principle that all kinds of documents should be accessible to the public, points out that “... certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks.”

In short, Regulation No 1049/2001, according to its recitals, contains a set of rules that is founded on the principle of access,

¹³ See also recital 1 of the Regulation and its reference to Article 1 TEU. That commitment to openness and transparency is also recognized and emphasized in case-law, such as in the judgment of 1 July 2008, *Sweden and Turco/Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 34, and more recently in the judgment of 27 February 2015, *Breyer/Commission*, T-188/12, (ECLI-code not yet available) paragraph 38.

¹⁴ That recital is frequently quoted in case-law: see for instance judgments of 1 February 2007, *Sison/Council*, C-266/05 P, EU:C:2007:75, paragraph 61; judgments of 18 December 2007, *Sweden/Commission*, C-64/05 P, EU:C:2007:802, paragraph 53, and *Sweden e.a./API and Commission*, EU:C:2010:541, paragraph 69; and judgment of 27 February 2015, *Breyer/Commission*, T-188/12, paragraph 39.

¹⁵ That idea is in keeping with the exception laid down in primary law with regard to CJ, ECB and EIB.

while allowing for a number of exceptions shaped in rather broad wording.

No wonder that the very interpretation of those exceptions is in the focus of the case-law of the Court of justice¹⁶, and of the General Court as well. How to strike a balance between conflicting interests recognized in EU law? That is what is usually at the heart of the matter. As Article 1 of Regulation No 1049/2001 puts it, its very purpose is to establish a general balance by defining “the principles, conditions and limits on grounds of public and private interest governing the right of access to European Parliament, Council and Commission [...] documents [...]” and “to establish rules ensuring the easiest possible exercise of this right”.

Before having a closer look at some of the exceptions contained in Article 4 of the Regulation, and the way they affect the principle of openness, it might be helpful to describe the nature of the right of access, as granted by the Regulation. As a matter of fact, when it comes to the very nature of a right, it is essential to ascertain the identity of who can be its beneficiary (I), and its addressees (II), and to know what exactly is the subject-matter at hand, or, to be precise, what is meant by “documents”(III)?

I) The Beneficiary concept, as enshrined in Article 2(1) and (2) of the Regulation, calls for two remarks to be made.

First, and most importantly, it must be noted that “[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.” Pursuant to that definition, the Regulation also applies to natural persons who are third-country nationals.

As far as non-residents are concerned, however, different considerations arise. Indeed, Article 1(2) makes it clear that the institutions “may [...] grant access to documents to any natural or legal person not residing or not having its registered office in a Member State”. What that boils down to is the principle that EU “ins” get a better treatment than EU “outs”, whose access is left to the discretion of the institutions. Whatever the case, the number of potential applicants is nothing short of impressive.

In the light of Article 1, it might be interesting to know how many applications are actually made under the scope of the Regulation. Exact figures are not very easy to be established. However, the case law of the European Courts, as reported in their annual reports, may provide some insight into this practical aspect of the matter: In fact, a refusal to grant access to a document asked for under Regulation No 1049/2001 can be challenged in front of the

¹⁶ See judgment of 29 June 2010, *Commission/Technische Glaswerke Ilmenau*, C-139/07 P, EU:C: 2010:376, paragraph 51; judgments of 28 June 2012, *Kommission/Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 111, and *Commission/Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 53; judgment of 21 September 2010, *Sweden e. a./API and Commission*, C-514/07 P, C-528/07 P und C-532/07 P, EU:C:2010:541, paragraphs 69 and 70; judgment of 14 November 2013, *LPN and Finland/Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 53.

General Court by means of an action for annulment pursuant Article 263 TFUE, with a possibility of review by the Court.

So, for the sake of statistics, let us now for a moment leave the green pastures of the Regulation and move on to the more arid realm of sheer figures.

In fact, if we have a glance at some recent data collected in the annual reports of the Court of Justice (for the years 2010, 2011, 2012, 2013 and 2014¹⁷), it can be established that out of an overall of new cases registered for the respective years (ranging from 636 new cases in 2010 to 912 new cases for 2014), the General Court had to deal with an average of about twenty cases regarding Regulation No 1049/2001 and related matters¹⁸. As far as completed cases go, the ratio is more or less similar. On the basis of those figures, it can be argued that access to documents, which is but a tiny item of EU law, accounts for a significant portion of the General Court's case law.

As far as the Court of justice is concerned, the figures are less impressive. In 2014, just one appeal was lodged with the Court in a subject-matter concerning access to documents. 4 cases were completed in 2014, 6 in 2013, 5 in 2012, 2 in 2011 and none in 2010. When we look at the case material at hand, it is interesting to note that in many cases relating to Regulation No 1049/2001, where the refusal to grant access is confirmed by the General Court, it is not the applicant at first instance who lodges an appeal, but a Member State. In fact, as far as statistics go, there might be a difference in the perception of transparency and openness in general, and of public access to documents in particular, among the Member States. In fact, Northern Member States (Sweden, Denmark, Finland, Netherlands) seem to embrace openness with more enthusiasm than others (France, United Kingdom, Germany, Czech Republic, to name but a few).

II) Addressees of the right of access to documents are, in the first place, the institutions named in the title of Regulation No 1049/2001, i.e. Parliament, Council, and Commission. However, as highlighted in the latest proposal for an amendment¹⁹, the principle of access to documents extends to all the institutions of the European Union as named in Article 13(1) TEU, as well as to agencies, offices, and bodies. That idea is echoed in recital 8 of Regulation No 1049/2001, inviting the institutions – within the scope of the Regulation: Parliament, Council and Commission – to extend the applicability of this right to their agencies as well.

¹⁷ The annual reports are available on the curia homepage via the following link http://curia.europa.eu/jcms/jcms/Jo2_7000/ or by going to the curia homepage, scrolling to “The institution” and then “Annual Report”.

¹⁸ New cases (General Court): 2010 overall: 636, therein access to documents: 19; 2011 overall: 722, therein access to documents: 21; 2012 overall: 617, therein access to documents: 18; 2013 overall 790, therein access to documents: 20; 2014 overall 912, therein access to documents: 17.

¹⁹ COM(2011) 137 final/2 (30.3.2011), Proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) No. 1049/2001 regarding public access to European Parliament, Council and Commission documents.

As we will see now under section III, the nature of the addressee is closely linked to the nature of the document requested.

III) Article 3 lit. a of the Regulation defines what is meant by document.

What we are facing here is rather unique a concept.

To start with a specialty first, as provided for in Article 9. In that provision, the Regulation refines the term “document” by referring to a subsection, known as sensitive document. Since there is no definition of what is meant by that, it is initially up to the institution (but eventually up to the Courts) to decide whether a document is to be deemed “sensitive”. The institution also decides at first hand whether one of the exceptions laid down in Article 4 is applicable. Finally, it decides whether the document requested is in fact held, and/or whether there is a need for prior consultation with a third party in order to be able to make a decision.

According to Article 2(3), the right of access refers to documents held by an institution. In that regard, a document held is a document “drawn up or received by it [the institution] and in its possession, in all areas of activity of the European Union”. Thus, documents in “all areas” can be asked for²⁰, and, at least with regard to what is said in Article 2(3), there is no specific authorship rule, providing an exclusive right to grant or refuse access. However, there may, in some cases, arise an obligation to consult the author. In fact, the latter may be considered a third party in the sense of the definition laid down in Article 3 lit. b. According to Article 4(4) “the institution shall [as regards third-party documents] consult the third party...”²¹

Although Member States are included in the definition of a third party in the sense of Article 4(4), Article 4(5) provides an additional right for Member States in the process of consultation. As a matter of fact, a Member State may specifically ask for non-disclosure of a document. When looking at the inner workings of Article 4, the co-existence of paragraphs 4 and 5 might appear confusing at first sight. It has been argued whether Article 4 (5) may be seen as conferring a veto-right on a Member State against disclosure.²² The wording (“without [the Member State’s] prior agreement”) is a support to this view, but the mere fact as such, when looked at more closely, may not be so very puzzling: Whereas an authorship

²⁰ See the Advocate General Kokott’s opinion in *Commission/Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2009:520, paragraph 59: Emphasis seems to be put there on the consideration that there is no a priori exemption of documents in a special area (for example state aids) and the requirement that any refusal has to be explained within the framework of one of the exceptions provided for in Article 4.

²¹ Article 4(4) clearly calls for consultation and does not imply any veto. This issue was alleged in *Case T-301/10* (judgment of 19 March 2013) by the applicant; the General Court did not decide in *re materiae*, but dismissed this plea on procedural grounds (see paragraph 103 of the judgment).

²² For a very detailed and comprehensive analysis see A. Barav, *Opacité et Transparence ou le droit d’empêcher: la jurisprudence en matière d’accès aux documents provenant des États membres détenus par les institutions communautaires, Chemins d’Europe*, in *MELANGES EN L’HONNEUR DE JEAN-PAUL JACQUE*, 2010, p. 29 – 62.

rule does not apply in the Regulation and mere holdership, or possession, of a document is what counts, “originatorship” may be different and confer special rights.²³ And indeed, in the case of documents originating from a Member State, it is the much broader concept of origin that entitles the Member State to either request non-disclosure, or agree to disclosure²⁴. That idea also underlies Article 5 (“Documents in Member States”) according to which, where a Member State receives a request for a document in its possession, but originating from an institution, the Member State shall consult with the institution concerned.

B) Proposals for recasting or amending No 1049/2001

In conclusion of that first part of the paper, several Commission proposals²⁵ for recasting or amending Regulation No 1049/2001 deserve mentioning.

The 2008 proposal, which was subject to corrections made in 2009, concerns a comprehensive recast. The third proposal, submitted in March 2011, suggests punctual amendments, and notably tackles the matter of the so-called institutional scope²⁶ in the light of the Lisbon Treaty.

In the recitals of its explanatory memorandum, the third proposal reads that “[t]he Treaty of Lisbon has entered into force on 1 December 2009. The legal base for public access to documents is now Article 15(3) of the consolidated version of the Treaty on the Functioning of the European Union. This new provision extends the public right of access to documents *of all the Union institutions, bodies, offices and agencies. The Court of Justice, the European Central Bank and the European Investment Bank are subject to this provision only when exercising their administrative tasks.* The present Regulation only directly applies to the European Parliament, the Council, and the Commission.

However, its application has been extended to the agencies by virtue of a specific provision in their respective founding acts.

²³ Judgment of 18 December 2007, *Sweden/Commission*, C-64/05 P, EU:C:2007, 802, paragraphs 45, 47 and 50: Under Article 4(5) “disclosure of that document by the institution requires the prior agreement of that Member State to be obtained. Since an ‘agreement’ is legally different from a mere ‘opinion’, the very wording of Article 4(5) of Regulation No 1049/2001 precludes an interpretation to the effect that the provision merely confers on a Member State making use of the possibility given by that provision the right to be consulted by the institution before the institution decides, possibly despite the opposition of the Member State in question, to allow access to the document concerned.

²⁴ Judgment of 18 December 2007, *Sweden/Commission*, C-64/05 P, EU:C:2007, 802, paragraph 61: “Article 4(5) ... potentially concerns every document ‘originating’ from a Member State, whoever their author may be, that a Member State transmits to an institution. Thus the only relevant criterion is the origin of the document and the handing over by the Member State concerned of a document previously in its possession.”

²⁵ COM(2011) 137 final 2 (mentioned above) and COM(2008) 229 final (30.4.2004) as well as COM(2009) 665.

²⁶ See for a very detailed analysis M. Maes, *Le droit d'accès aux documents des institutions européennes : où en est la révision du règlement 1049/2001*, REVUE DU DROIT DE L'UNION EUROPÉENNE 3/2014, pp. 475 – 497.

Furthermore, a number of institutions and bodies have adopted voluntary acts laying down rules on access to their documents which are identical or similar to Regulation (EC) No 1049/2001. [...] Even if, in practice, most institutions, bodies, offices and agencies of the European Union apply Regulation (EC) No 1049/2001 or similar rules on a voluntary basis, *there is a legal obligation to extend the right of access to all of them in compliance with the Treaty*. Since most of the institutions, bodies, offices and agencies of the European Union apply the Regulation or similar rules, the institutional scope of the current Regulation can be extended to all of them, subject to the limits provided for by the Treaty regarding the Court of Justice, the European Central Bank and the European Investment Bank. The Commission considers, therefore, that Regulation (EC) No 1049/2001 *should be amended in view of extending its institutional scope in compliance with the new legal basis for access to documents provided for under Article 15(3) of the Treaty on the Functioning of the European Union without further delay*.” (emphasis added)

That proposal seems well-founded in law, since, as the Commission points out, “[m]ore than one year after the entry into force of the Treaty of Lisbon, there is still no perspective for the adoption of a new Regulation regarding public access to documents that will replace Regulation (EC) No 1049/2001. The discussions in the European Parliament and the Council have shown strongly diverging views about amending the Regulation.” And indeed, by May 2015, there has been neither an amendment in the above-mentioned, very narrow sense (that is to say, in a sense that the Regulation is put in closer keeping with primary law, on the addressees’ side of the medal), nor has there been a comprehensive recast of Regulation No 1049/2001 as proposed by the 2008/2009 Commission initiative.

Those former and comprehensive proposals were made on account of experience gained in applying the Regulation, and with hindsight to the case-law relating to the Regulation. This led the Commission to the assumption that the institutions were – by 2008/2009 – “in a position to reassess the working of the Regulation and to amend it accordingly”. Though that assumption may be correct, these proposals seem to reveal that diverging positions (held by the Parliament, the Council, and within the Council, by various groups of Member States) are still far from being reconciled²⁷.

To name but one example: According to the Commission, the scope of the Regulation is to be clarified. Indeed, a re-definition of the scope seems appropriate so it can be aligned with related acts²⁸, such as Regulation No 1367/2006 on the application of the provisions of the Aarhus Convention. The Regulation’s scope may also need clarification where it collides with the scope of personal data protection, provided for by Regulation (EC) No 45/2001 on

²⁷ M. Maes, *Le droit d'accès aux documents des institutions européennes : où en est la révision du règlement 1049/2001*, REVUE DU DROIT DE L'UNION EUROPEENNE, 3/2014, p. 475 (482).

²⁸ See COM(2008) 229 final, p. 6 and p. 12.

the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data²⁹.

In fact, the Commission suggested to reframe Article 2 along the following lines: “This Regulation shall not apply to documents submitted to Courts by parties other than the institutions [...] Without prejudice to specific rights of access for interested parties established by EC law, documents forming part of the administrative file of an investigation or of proceedings concerning an act of individual scope shall not be accessible to the public until the investigation has been closed or the act has become definitive. Documents containing information gathered or obtained from natural or legal persons by an institution in the framework of such investigations shall not be accessible to the public.”³⁰

Those are quite material modifications suggested as to the Regulation’s framework!

Most probably, the Commission proposal, if it were to come true, might affect the very core of the Regulation by transforming its scope and, as a consequence, give way to quite an upheaval. Needless to say that on the one hand, a limited scope means a restricted right of access, which is strangely contradicting the emphasis laid on openness and transparency in the preamble of the Regulation. On the other hand, a wide scope allowed for by Regulation No 1049/2001 – as it is – is consistent with the firm commitment to those principles set forth in the preamble (and in primary law as well). It remains to be seen what course the EU legislator will finally choose, in the light of the by now abundant case-law which provide both the General Court and the Court of justice.

Since that case law has a clear focus on the exceptions provided for in Article 4(2) and (3), they shall be treated in the next part of this paper.

§ 2 – THE EXCEPTIONS PROVIDED FOR IN ARTICLE 4(2) AND (3), AND RELATED CASE-LAW

The second portion of this paper will concentrate on the exceptions provided for to the right of access (Article 4 of the Regulation). This implies a concise presentation of those exceptions (A), to be followed by a brief summary of some of the recent case-law (B).

A) Pattern of the exceptions laid down in Article 4(1), (2) and (3)

I) To start with, it seems appropriate to provide an overview of what the exceptions contained in Article 4(1) and (2), (3) are dealing with.

²⁹ OJ, 8.12.2001, L 8, p. 1.

³⁰ COM(2008) 229 final, p. 16. See also, within the explanatory memorandum, p. 7 (paragraph 3.2).

Paragraph 1 contains several possibilities for refusal of access. Under lit. a, public interests that may receive protection are numbered (public security, defense and military matters, international relations, financial, monetary or economic policy of the Community [Union] or a Member State).

In contrast, lit. b refers to private interests (privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data). It should be noted that access to a document may be refused only where disclosure would “undermine the protection” of the interests at stake. That is made clear by the wording of paragraph 1.³¹

According to Paragraph 2, access is (in principle, *see* under II for further particulars) to be refused where disclosure would undermine the protection of commercial interests, court proceedings, or the purpose of inspections, investigations and audits (the latter frequently alleged by the Commission in competition cases, or at a certain stage of an infringement procedure). It may be noted that, as opposed to paragraph 1, paragraph 2 does not draw a distinction between public and private interests.

From a conceptional standpoint, commercial interests of a natural or legal person (under the first indent³²), court proceedings and legal advice (under the second indent³³), and the purpose of inspections, investigations and audits (under the third indent³⁴), may appertain either to the public or to the private sector, but the fundamental pattern remains the same, the common factual denominator being that there is always some on-going activity at stake (trade/commercial activities, judicial and legal counselling activities, or investigative activities).

Paragraph 3 explicitly refers to documents for internal use in (on-going) decision-making processes; structurally it is, with regard to its requirements, similar to paragraph 2.

II) In contrast to paragraph 1, any exception based on an interest named in paragraph 2 or 3 requires that disclosure of the document in question would not only undermine the protection of a

³¹ To paragraph 1 lit. a *see* (also below for further discussion): judgment of 4 May 2012, *Sophie in't Veld/Council*, T-592/09, and on appeal: judgment of 3 July 2014, C-350/12 P, *Council/Sophie in't Veld* (relating to lit. a, third indent “international relations”).

³² As an example in case-law relating to Article 4(2) first indent (“commercial interests of a natural or legal person, including intellectual property”): General Court: judgment of 20 March 2014, *Reagens SpA/Commission*, T-181/10, EU:T:2014:139 [also referring to the exception according to the third indent].

³³ Examples in case-law relating to Article 4(2) second indent (“court proceedings and legal advice”): General Court: judgment of 27. February 2015, *Breyer/Commission*, T-188/12; Court of justice: judgment of 21 July 2011, *My Travel Group*, C-506/08 P, EU:C:2011:496.

³⁴ Examples in case-law relating to Article 4(2) third indent (“the purpose of inspections, investigations and audits”): General Court: judgment of 16 April 2015, *Schlyter/Commission*, T-402/12 (ECLI-code not yet available); judgment of 25 September 2014, *Spirlea/Commission*, T-306/12; Court of justice: judgment of 14 November 2013, *LPN and Finland/Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738.

protected interest, but also that there is no overriding public interest in disclosure.

In summary,

- for paragraph 1, a two-step-test is required: The document must be covered by an interest as named in the provision, and disclosure would undermine the protection of that interest. In the light of the emphasis laid on transparency, that assessment involves striking a balance between the interests at stake³⁵, with an onus placed on the institution to show why and how the protected interest is undermined;
- for paragraphs 2 and 3, three-step-test is in order: first, a protected interest has to be identified, the disclosure of which would undermine its protection³⁶. As a result of that, access may be refused “unless there is an overriding public interest in disclosure”, which again calls for a balancing of interests.

B) Case-law concerning especially the exceptions set out in Article 4 of regulation No 1049/2001

I) There are two requirements as to the level of substantiation on why and how disclosure of a document would undermine the alleged interest: first it must be shown that disclosure of the requested document would specifically and actually undermine the protected interest, and then there must be a foreseeable and not purely hypothetical threat (or risk) that the protected interest is undermined.

As stated above, Regulation No 1049/2001 is intended to give the fullest possible effect to the right of public access to documents of the institutions. In the light of that, it is settled case-law that since the exceptions laid down in Article 4 of Regulation No 1049/2001 derogate from that principle, they must be interpreted and applied strictly.³⁷

Thus, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, “explain *how disclosure of that document could specifically and actually undermine the interest protected by the exception* – among those provided for in Article 4 of Regulation No 1049/2001 – upon which it is relying”³⁸. “The mere fact that a document concerns an interest protected by an exception cannot justify application of that exception. Such application may “be justified only if the institution

³⁵ Judgment of 17 October 2013, *Council/ Access Info Europe*, C-280/11 P, EU:C:2013:617, paragraph 32.

³⁶ The notion that Article 4 is based on balancing of opposing interests under a given situation is settled case law: see judgment of 27 February 2014, *Commission/ EnBW Energie Baden-Württemberg*, C-365/12 P, EU:C:2014:112, paragraph 63.

³⁷ See judgment of 1 February 2007, *Sison/ Council*, C-266/05 P, EU:C:2007:75, paragraph 63; judgment of 18 December 2007, *Sweden/ Commission*, C-64/05, EU:C:2007:802, paragraph 66; judgment of 17 October 2013, *Council/ Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 30; and more recently judgment of 20 March 2014, *Reagens SpA/ Commission*, T-181/10, EU:T:2014:139, paragraph 87.

³⁸ Judgment of 3 July 2014, *Council/ Sophie in't Veld*, C-350/12 P, paragraph 52.

has previously assessed, firstly, whether access to the document would specifically and actually undermine the protected interest and, secondly, in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, whether there was no overriding public interest in disclosure. Further, the risk of a protected interest being undermined must be *reasonably foreseeable and not purely hypothetical*.³⁹

In other words, there is a high burden regarding onus and proof which is placed on the institution that wants to make use of an exception, with regard to sufficiently substantiate why and how disclosure would undermine the alleged interest (*specifically and actually*). The risk alleged must not be just abstract or hypothetical, but it “must be *foreseeable and not purely hypothetical*”.

II) That general rule has been alleviated with regard to several categories of cases.

To start with, a passage taken from the *Commission v. EnBW* judgment may provide an illustration of the practical impact of the problem: “in order to justify refusal of access to a document the disclosure of which has been requested, it is not sufficient, in principle for that document to be covered by an activity mentioned in Article 4(2) and (3) of Regulation No 1049/2001. The institution concerned must also provide explanations as to how access to that document could specifically and actually undermine the interest protected by an exception laid down in that article. [...] However, the Court has acknowledged that it is open to the EU institution concerned to base its decision in that regard on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature”.⁴⁰ That means that according to well-established case-law, the serious requirements placed on the institutions have to be attenuated under certain circumstances: Though the principle remains unabashed (relying on the specific and actual undermining of a protected interest, with a prognosis that there must be a foreseeable, and not purely hypothetical risk, to be evidenced for every single document in question), practice has shown that there are documents similar to each other by nature. When such documents are at stake, it can be sufficient for an institution to fulfill the above-mentioned requirements by furthering considerations in more general terms, in other words: to rely on a general presumption with regard to certain categories of documents⁴¹ – or, one might add – with regard

³⁹ Judgment of 4 Mai 2012, *Sophie in't Veld/Council*, T-529/09, EU:T.2012:215, paragraph 20.

⁴⁰ Judgment of 27 February 2014, *Commission/EnBW Energie Baden-Württemberg*, C-365/12 P, EU:C:2014:112, paragraphs 64 and 65.

⁴¹ Documents that can be described by means of the type of procedure in which they are exchanged and/or by means of specific regulatory schemes governing access to documents in particular areas. For the latter see, for example, Advocate General Cruz Villalón's opinion in Case C-365/12 P, *Commission/ EnBW Energie Baden-Württemberg*, EU:C:2013:643, paragraph 38. In that specific case, Regulation No 1/2003 on the implementation of the rules of competition laid down in Articles 81 [EC] and 82 [EC] is

to certain situations, or types of procedures, involving documents of a similar nature⁴².

Accordingly, the Court has acknowledged the existence of such presumptions in various instances, and most prominently,

- with regard to the documents in the administrative file relating to a procedure for reviewing State aid (see *Commission v. Technische Glaswerke Ilmenau*, paragraph 61);
- with regard to the documents exchanged between the Commission and notifying parties, or third parties, in the course of merger control proceedings (see *Commission v. Éditions Odile Jacob*, paragraph 123, *Commission v. Agrofert Holding*, paragraph 64);
- with regard to the pleading lodged by one of the institutions in court proceedings (see *Sweden and Others v. API and Commission*, paragraph 94)⁴³;
- with regard to the documents concerning an infringement procedure during its pre-litigation phase (see *LPN and Finland v. Commission*, paragraph 65);
- with regard to the set of documents in a file relating to a cartel procedure (see *Commission v. EnBW Energie Baden-Württemberg*, paragraph 81).

It is not yet clear, however, whether documents in EU pilot procedures – i. e. procedures of rather a general nature that in some cases may lead to a pre-litigation procedure – also form a consistent and homogeneous enough group for a general presumption to be applicable (see judgment of the General Court in *Spirlea v. Commission*, paragraphs 57 to 63, actually on appeal under case number C-562/14 P, *Sweden v. Commission*).

What is typical of those cases is that the request for access does not apply to just one document, but (not in all actual cases, but in most of them) to a large set of document (so-called bulk requests). In that type of situation, recognition by the Court that there can be a general presumption enables the institution concerned to deal more swiftly with a global application and reply thereto accordingly⁴⁴.

The principle of refusal proceedings boils down to this: for each document, it has to be assessed, and shown, why and how access to it could specifically and actually undermine the alleged protected interest. However, with regard to certain categories of documents

such a specific regulatory scheme. The Advocate General holds that “a holistic interpretation of the regulations applicable in the [respective] area is necessary” (paragraph 39) and emphasizes once again on the considerations of the Court in *Commission/Agrofert Holding*, C-477/10 P, paragraph 50, that there is “an inevitable interaction between... Regulation No 1049/2001 and particular... EU legislative instruments concerning access in relation to certain proceedings” (paragraph 40 of the opinion).

⁴² Judgment of 1 July 2008, *Sweden and Turco/Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 50.

⁴³ And recently judgment of 27 February 2015, *Breyer/Commission*, T-188/12, paragraph 77.

⁴⁴ See with specific reference to the judgment of 20 March 2014, *Reagens Sp.A/Commission*, T-181/10, EU:T:2014:139: Ch. Charalambous, “Reagens: Access to Documents Re the Inability of an Undertaking to pay the fine”, JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 2014, Vol. 5 No. 7, pp. 466 – 468.

(and, apparently, types of procedures), the institution concerned can base its refusal on general presumptions which apply to categories of documents, insofar as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature.

It could be argued that accepting general presumptions in quite a number of categories has inversed onus and burden of proof between the institution and the applicant. However, the alleging of a general presumption is open to full judicial review⁴⁵: in other words, an institution may – in the above-mentioned categories – rely on a general presumption and provide explanations and reasons why it considers it to be applicable. But that may be challenged by the applicant⁴⁶, who was refused access on the grounds of such a general presumption, before the General Court, and eventually, on appeal, be taken to the Court.

III) Apart from that, different levels of transparency are to be identified, depending on whether an institution is acting in its legislative capacity or for example in its administrative activity.

Recital 6 of Regulation No 1049/2001 states: “Wider access should be granted to documents in cases where institutions are acting in their legislative capacity [...]”. Accordingly, the EU Courts find that non-legislative activity “does not require such extensive access to documents as that required by the legislative activity of an EU institution”⁴⁷. It is not yet clear whether that is to be construed as allowing for a kind of alleviation when it comes to state reasons for a refusal of access and/or relying on a general presumption for such a refusal.

IV) The last portion of this paper now deals with the assessment of overriding public interests.

When relying on an exception provided for in Article 4 (2) and/or (3), the institution in question has to examine on its own accord whether there might be such an overriding interest; on the other hand, the applicant can invoke it in order to challenge a refusal of access.

First of all, it has to be kept in mind that the interest has to be a public one.

Secondly, it should be stressed that it is not possible to invoke an overriding public interest against a refusal based on Article 4(1). As

⁴⁵ As a rule: full review, *see* in that sense with distinguishing arguments, judgment of 3 July 2014, *Council/ Sopie in't Veld*, C-350/12 P, paragraphs 62 to 68.

⁴⁶ *See* judgment 21 May 2014, *Catinis/Commission*, T-447/11, paragraph 43 (second sentence concerning the applicant's possibility to challenge the applicability of a general presumption).

⁴⁷ Judgment of 27 February 2014, *Commission/EnBW Baden-Württemberg*, C-365/12 P, EU:C:2014:112, paragraph 91. *See also* General Court, judgment of 20 March 2014, *Reagens SpA/Commission*, T-181/10, EU:T:2014:139, paragraph 140: “... the interest of the public in obtaining access to a document pursuant to the principle of transparency ... does not, where a document relates to an administrative procedure intended to apply rules governing competition law in general have the same weight as where the document relates to a procedure in which the institution in question acts in its capacity as a legislator.”

the General Court in *Sophie in't Veld v. Council* (T-301/10, paragraph 110) points out: “it is clear from the wording of Article 4(1)(a) of Regulation [...] 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would damage the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests.”

However, when the exceptions set out in paragraphs 2 and 3 are at stake, overriding public interest may be alleged by the parties.

What is meant by an overriding public interest can best be explained in the field of competition law, in which undertakings rather often seek to gather information by means of an application under Regulation No 1049/2001.

In a case already mentioned in this paper, the Commission found that a number of undertakings, including the applicant Reagens, had infringed Article 101 TFEU by participating in cartels. During the cartel (investigation) procedure, the applicant and two other undertakings requested that their inability to pay the fine be taken into account. Only one request submitted by one of the other two undertakings was accepted. This led Reagens to ask for access under Regulation No 1049/2001 to the non-confidential version of the cartel files. Reagens was denied access by the Commission, and the General Court confirmed this refusal.

The applicant alleged an overriding public interest. However, such an interest is defined in case law as “an interest that is objective and general in nature and not indistinguishable from individual or private interests that would outweigh for example the need to protect the interests of individual companies having made an application [...] to maintain confidentiality of their applications and the related documents”⁴⁸.

The General Court admits the relevance of such an interest, but only to the extent that the requested information reflects the Commission’s policy and is not specific to the undertakings at issue. In the Reagens case, the applicant had claimed access to information with regard to undertakings, in order to gather further material for an individual request that inability to pay the fine be taken into account. That is a subjective interest and cannot constitute an overriding public interest.

In other word, the interest to take into account having to be a public one, any request for access to the institutions’ documents is likely to fail if the applicant seeks information for his own sake, i. e. in order to prepare an action, for example an action for damages.

⁴⁸ Judgment of 10 March 2014, *Reagens SpA/Commission*, T-181/10, EU:T:2014:139, paragraph 131. More generally speaking, in the context of an overriding public interest “the right of access to documents does not depend on the nature of the specific interest which the applicant may or may not have in the information requested” (see *Sison/ Council*, C-266/05 P, paragraph 44, and recently judgment of 21 May 2014, *Catinis/ Commission*, T-447/11, paragraph 61).

The latter aspect is illustrated by the *Spirlea* cases⁴⁹, in which Mr. and Ms. *Spirlea* had made requests in order to obtain access to certain documents the Commission held. The Commission had gained possession of the documents within an EU pilot procedure with the German authorities. That procedure had been launched by the Commission on a complaint of *Spirlea* against those authorities for having infringed EU regulation in the field of medical therapies. The background of that case is sad, the motive for the complaint being that the *Spirlea* child allegedly died due to a wrongful therapy. However, their allegation of overriding public interest, invoked against the refusal based on Article 4(2) and (3), was dismissed by the General Court. It held that their request is essentially aimed at obtaining documentary proof for support of an action for damages, and that it cannot be admitted that the Commission – or any institution – is used as an instrument in order to gain access to proof that otherwise is not available.⁵⁰

CONCLUSION

What can be concluded from the legal framework and its case law? Three points spring to mind.

First, it is obvious that the intentions of the EU lawmaker with regard to openness and transparency are to be applauded. Second, there can be no denying that the conflicting interests at stake ask for constant vigilance, both on the legislator's side as on the side of the Courts. Finally, case law has shown the utter imaginativeness of some applicants to use transparency proceedings for ends those proceedings were probably not meant for. Perhaps it is now up to the legislator to strike a new and clear balance, in the light of the case law of the Court.

⁴⁹ Judgments of 25 September 2014, *Spirlea/Commission*, T-669/11 and T-306/12.

⁵⁰ Judgments of 25 September 2014, *Spirlea/Commission*, T-669/11, paragraph 99, and T-306/12, also paragraph 99.