STUDY

Requested by the PETI Committee

European Parliament

Regulation 1049/2001 on the right of access to documents, including the digital context

Policy Department for Citizens' Rights and Constitutional Affairs
Directorate-General for Internal Policies
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Regulation 1049/2001 on the right of access to documents, including the digital context

Abstract

Upon request of the Committee on Petitions (PETI), the Policy Department for Citizens' Rights and Constitutional Affairs commissioned the present study on Regulation 1049/2001 on access to documents with a twofold objective. First, to update the analysis conducted in a 2016 study for the PETI Committee with the latest developments in the case law of the CJEU and the activities led by the European Ombudsman since then – in particular focussing on access to legislative documents, documents relating to administrative proceedings, Court proceedings, infringement proceedings, protection of privacy, international relations, and special regimes. Second, to assess the possible future alignment of the Access Regulation with the evolving digital context, including a potential revision of the definition of document, access to user-friendly public registers and internet sites, access to agendas of officials and scheduled meetings with interest representatives, and access to videos of CJEU oral hearings. The research also incorporates illustrative and complementary cases and own initiatives by the European Ombudsman as indications of evolving challenges to institutional secrecy in the EU context.

This document was requested by the European Parliament's Committee on Petitions.

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LIST OF ABBREVIATIONS

AI	Artificial intelligence
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
DMA	Digital Markets Act
DSA	Digital Services Act
ECB	European Central Bank
EIB	European Investment Bank
EO	European Ombudsman
EP	European Parliament
EU	European Union
GC	General Court of the European Union
INGE	European Parliament's Special Committee on Foreign Interference in all Democratic Processes in the European Union, including Disinformation
LIBE	European Parliament's Committee on Civil Liberties, Justice and Home Affairs
NCA	National competent authority
NGO	Non-governmental organisation
PETI	European Parliament's Committee on Petitions
SRB	Single Resolution Board
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs upon request of the PETI Committee, examines the evolving landscape of the right of access to documents within the EU and its implications for citizen participation in democratic processes. It emphasises the **fundamental principle of openness enshrined in EU Treaties and the Charter of Fundamental Rights**, highlighting its significance in an increasingly digital world.

The **principle of participatory democracy**, as outlined in the Treaty of Lisbon, requires that **EU decisions be taken as openly and closely as possible to citizens**. Despite a robust legal framework for transparency, the actual practice often falls short. **Regulation No 1049/2001 on access to documents**, a cornerstone of EU transparency, appears to be outdated, having been enacted over two decades ago. The digital era presents new challenges and opportunities, from the proliferation of automated databases to the involvement of private parties in data collection and management. Despite ongoing discussions since 2008, meaningful **reform of the Access Regulation has stalled**, arguably reflecting a broader reluctance among EU institutions and Member States to enhance transparency and fears that revisions might lower transparency instead of enlarging it.

The role of the **CJEU and the European Ombudsman** in interpreting and enforcing the right of access to documents is pivotal. These bodies have targeted institutional resistance to transparency. The CJEU frequently adjudicates cases where access to documents is denied, and secretive practices are embedded. The European Ombudsman has been proactive in exposing these practices, launching inquiries and issuing recommendations. However, there is a troubling trend: while the legal framework demands transparency, **practical implementation by institutions frequently lags behind with systemic delays and reluctance to comply with rulings and recommendations**. Institutions must internalise and act upon the evolving case law to ensure citizens' right to access are upheld.

Digital developments have transformed the transparency landscape. The digital era, characterised by the rising use of AI and automated tools, introduces complexities that challenge the traditional concept of document. Traditional transparency, rooted in direct disclosure, appears to be increasingly supplanted by a logic of communication and explanation. This shift, while aimed at making complex processes understandable, risks reducing genuine transparency to mediated, potentially manipulated information. The EU's legislative response, including the Digital Services Act, Digital Markets Act, and the AI Act, risk to prioritise explainability over true transparency. This trend threatens to entrench secrecy, as institutions and private entities control the mediated narrative of what is disclosed.

Policy recommendations in the study emphasise the need for **proactive disclosure practices**, urging EU institutions to align more closely with the actual text and spirit of the Access Regulation, the case-law of the Court of Justice and the recommendations by the European Ombudsman. Key suggestions include better implementation of case-law and recommendations, improved record-keeping and accessibility of comitology documents, detailed documentation of interactions with interest representatives, and transparent trilogue processes. Our study advocates for the maintenance of traditional registers to ensure inclusivity for those less digitally adept and calls for internal guidelines on managing digital communications. The overarching goal is to **ensure that the principles of openness and accountability are not compromised by digital transformation**.

In conclusion, the study paints a **comprehensive picture of the current state of access to documents in the EU**, highlighting significant gaps between legal frameworks and institutional practices. It calls for a **reinvigoration of the principles of transparency and openness, adapted to the digital era**, to enhance the democratic legitimacy of the EU. The study underscores the **critical role of both the CJEU**

and the European Ombudsman in safeguarding these principles and emphasises that meaningful reform and proactive transparency are essential for the EU to meet its democratic obligations to its citizens.

1. AN EVER 'OPENER' UNION IN AN EVOLVING DIGITAL ENVIRONMENT?

Openness at the level of Treaty provisions of the European Union (EU) is fundamentally linked to specific Treaty articles on democracy and citizen participation introduced in the Treaty of Lisbon in 2009 and detailed in a preceding study of 2016 also carried out for the Committee on Petitions of the European Parliament.[1] The principle of **participatory democracy** remains particularly relevant. To guarantee the right of 'every citizen' to 'participate in the democratic life of the Union', the Treaty on the European Union (TEU) establishes that '[d]ecisions shall be taken as openly and as closely as possible to the citizen' and that both citizens and representatives should be given opportunities to 'make known and publicly exchange their views in all areas of Union action'.[2] These provisions inform the more specific **Article 15 of the Treaty on the Functioning of the European Union (TFEU)**, which places the legislature under an obligation to act publicly and establishes that citizens have the right to access documents held by all Union institutions, bodies and agencies. The right of access to documents, and its nature as a **fundamental right**, is further emphasised by **Article 42 of the Charter of Fundamental Rights of the EU (CFR)**, which enjoys 'the same legal value as the Treaties'.[3]

These general and fundamental principles frame **Regulation No 1049/2001 (hereinafter, the Access Regulation)**, the much earlier EU legislation on public access to the documents of the three legislative institutions, adopted some 23 years ago in 2001, and gradually taken over in general or in specific ways by other institutions, organs, and agencies. It is obvious that **the data environment in 2024** is a very different one to even a decade ago in terms of tools, the proliferation of (semi-)automated databases and the relatively recent adoption of specific digital legislation,[4] but also in terms of the actors inputting data into the digital environment–not just the supranational institutions and authorities, Member States, national public authorities, third countries but also, and increasingly, private parties.

Discussions on **the reform of the Access Regulation have been pending since 2008.** That is now a period of 16 years with really no legislative progress of any kind being made. The most recent initiative in this regard was by the European Ombudsman, but her (far-reaching) call for reform appears to have fallen on barren ground. The fear has always been that **a reform might lead to dilution,** since the discussions taking place some years ago mainly focussed on new ways to limit citizen access,[5] many of them in rather fundamental ways that seem to be at odds with the letter of the Treaties. These discussions, as was pointed out in the 2016 study, bear witness to what seems to be a change of

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1 For the 2016 study, see D Curtin and P Leino-Sandberg, 'Openness, Transparency and the Right of Access to Documents in the EU' (2016) Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament. Where appropriate we have drawn on certain elements from this study and complemented them.

2 Article 10(1) and (2) TEU on representative democracy; Articles 10(3) and 11 TEU on participatory democracy.

3 Article 6(1) TEU.

4 For example, the Digital Services Act (DSA), the Digital Markets Act (DMA) and the Artificial Intelligence Act (AI Act), among others. The first two acts are already published in the Official Journal, see Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, and Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1. For the AI Act, the Parliament approved the final text in March 2024 agreed in negotiations with Member States and is expected to be finally adopted before the end of the legislature. See European Parliament legislative resolution of 13 March 2024 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)).

5 See D Curtin and P Leino-Sandberg, 'Openness, Transparency and the Right of Access to Documents in the EU' (2016) Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, page 26.

paradigm and priorities when it comes to citizens' rights and openness. The Commission does not seem positively disposed to increasing transparency, as evidenced in legal observations before the Court of Justice of the European Union (CJEU), but also as shown on the occasion of the discussions on the recast of the Regulation and notably on EP amendments proposals,[6] and it has the backup of most of the Member States in the Council. This situation led LIBE Coordinators on 24 July 2024 to decide to request that the Parliament asks the Commission to withdraw the proposal for a Regulation on Public access to European Parliament, Council and Commission documents (2011/0073 (COD)), as it did already at the start of the two previous legislative terms.

Unfortunately, this **negative change of paradigm noted in 2016 has not shifted by 2024**, with a few legislative examples nonetheless strengthening the rights of citizens to access to documents further. The main example is the whistleblowing directive on the protection of persons who report breaches of Union law, which promotes access to information that could otherwise be considered confidential, for public authorities and the general public.[7] Furthermore EU institutions agreed to set up an independent EU ethics body[8] following on recent scandals and on 15 May 2024 the Commission hosted a ceremony with all participating institutions to formalise the agreement on the establishment of the Ethics Body.[9]

The COVID crisis prompted further discussion of what EU transparency should mean in the context of the development, purchase and distribution of COVID-19 vaccines[10] as well as prompting specific EU

6 See for instance https://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-revision-of-the-access-to-documents-regulation.

7 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 [2019] OJ L305/17.

8 It was in June 2023 when the von der Leyen Commission proposed the establishment of an interinstitutional Ethics Body in order to establish common ethics standards for all EU institutions, especially in the following domains: acceptance of gifts, hospitality and travel; conditionality and transparency measures for meetings with interest representatives; declaration of interests and assets; declaration of side or external activities as well as post-mandate activities; norms regarding monitoring compliance and publicity of information. See European Commission communication of 8 June 2023 on a proposal for an interinstitutional ethics body (COM/2023/311 final), which was followed with a European Parliament resolution that deemed the Commission's proposal unambitious (see European Parliament resolution of 16 February 2023 on the establishment of an independent EU ethics body [2023] OJ C283/31). On 25 April 2024, the European Parliament's plenary voted in favour of the interinstitutional agreement for the creation of a new Body for Ethical Standards.

9 See the EP press release on the EP vote of 25 April 2024 approving the body at https://www.europarl.europa.eu/news/en/press-room/20240419IPR20581/parliament-signs-up-for-new-eu-body-for-ethical-standards and the text as adopted at https://www.europarl.europa.eu/doceo/document/TA-9-2024-0372_EN.html, as well as the Commission press release of 15 May 2024 on the signature at https://ec.europa.eu/commission/presscorner/detail/en/MEX_24_2630: the ceremony was hosted by Vice-President for Values and Transparency Věra Jourová, with the participation of the Belgian Ambassador Willem van de Voorde, representing the Council of the EU; Koen Lenaerts, President of the Court of Justice of the EU; Tony Murphy, President of the European Court of Auditors; Oliver Röpke, President of the European Economic and Social Committee, and Luca Menesini, Vice-President of the Committee of the Regions. The European Parliament and the European Central Bank were represented via video messages from President Roberta Metsola and President Christine Lagarde, respectively. The Body will set common standards for ethical conduct of members and a formal mechanism for coordination and exchange of views on ethical requirements among institutions.

10 European Parliament resolution of 14 September 2017 on transparency, accountability and integrity in the EU institutions [2018] OJ C337/120 and notably European Parliament resolution of 21 October 2021 on EU transparency in the development, purchase and distribution of COVID-19 vaccines [2022] OJ C184/99.

agencies to undertake more radical forms of access to documents through self-regulation, for example the European Medicines Agency (EMA)[11] and the European Food Safety Agency (EFSA).[12]

A significant legislative change–that does not increase citizens' rights but is closely linked to access to documents–is the adoption by the EU legislature of **security rules on classified information**.[13] These rules previously existed as internal rules of the respective institutions, but they have now been amended and generalised to exist alongside and limit the legislative rules on access to documents.

Rather than strengthening the rights of citizens, contemporary institutional practice continues to travel in the opposite direction. The voices calling for more openness and citizen's involvement remain weaker and fewer than they were when the Access Regulation was adopted in 2001 – at least amongst the Member States' governments and the Commission.[14] The **European Parliament** in several resolutions does seek to keep the issue of strengthening citizens' rights on the agenda and the need to strengthen it institutionally.[15] In line with the Access Regulation itself there are however two actors that engage on the interpretation in practice of the access rules by the institutions: the EU courts and the European Ombudsman.

When it comes to assessing the **role of the CJEU**, it is apparent that the courts of the EU remain very much centre-stage with **litigants attempting to challenge a range of embedded secretive practices** across a range of institutions and tasks. This is applicable to both the General Court of the European Union (hereinafter, GC) which serves as the first-instance court where decisions denying access by EU institutions and bodies are initially brought for judicial review, and also to the Court of Justice *stricto sensu* (hereinafter, CJEU) which operates in some instances as the final court of appeal. The CJEU rules definitively on how the exceptions and wordings are to be interpreted and applied. Inevitably it is also dependent on the institutions following up in practice and in some cases changing their behaviour or practice. This does not always happen and in fact there have been several repeated court cases (eg *De Capitani*) on, broadly speaking, the same issue[16] or a 'feedback loop' between court case law and the European Ombudsman, the other actor supervising the application of the access rules

[11] European Medicines Agency, 'Transparency: Exceptional Measures for COVID-19 Medicines', available at www.ema.europa.eu/en/human-regulatory/overview/public-health-threats/coronavirus-disease-covid-19/ treatments-vaccines/transparency-exceptional-measures-covid-19-medicines. For a discussion on the transparency moves in the EU during the COVID health emergency, see D Curtin, 'Opening Executive Technocratic Bubbles: Gusts of Transparency in a Turbulent Europe' in F de Abreu Duarte and F Palmiotto Ettorre (eds), *Sovereignty, Technology and Governance after COVID-19: Legal Challenges in a Post-Pandemic Europe* (Hart Publishing 2022), 7.

[12] Regulation (EU) 2019/1381 of the European Parliament and of the Council of 20 June 2019 on the transparency and sustainability of the EU risk assessment in the food chain [2019] OJ L231/1.

[13] See, Council Decision 2013/488/EU of 23 September 2013 on the security rules for protecting EU classified information [2013] OJ L274/1, amended by Council Decision (EU) 2021/1075 of 21 June 2021 with the inclusion of two Appendixes on the equivalence of security classifications and on the list of national security authorities [2021] OJ L233/1.

[14] S Dahllöf, 'Guide to the battle of transparency – UPDATED', 9 June 2012, available at the EU wobbing website http://www.wobbing.eu/news/guide-battle-transparency-%E2%80%93-updated.

[15] See, for example, resolution of 21 October 2021 on EU transparency in the development, purchase and distribution of COVID-19 vaccines, or the European Parliament's report on public access to documents for the years 2019-2021 [2022] OJ C184/99, where the legislative chamber 'recalls the importance of transparency and access to documents in preventing and fighting corruption and in ensuring the accountability of persons performing public duties; notes that a high level of transparency, including access to documents, makes it easier to track activities related to the decision-making process and may help in exposing criminal activities; recalls the recommendations set out in its resolutions of 15 December 2022 and 16 February 2023 and calls for their swift and full implementation; resolution of 15 December 2022 on suspicions of corruption from Qatar and the broader need for transparency and accountability in the European institutions [2023] OJ C177/109; resolution of 16 February 2023 on following up on measures requested by Parliament to strengthen the integrity of the European institutions [2023] OJ C283/27.

[16] Case T-540/15 De Capitani v Parliament; Case T-163/21 De Capitani v Council.

in practice.[17] In the period under consideration the **work of the European Ombudsman has increased greatly in significance**, bringing specific secretive practices to light and tackling them both on a case-by-case basis and more structurally through a growing number of own initiative enquiries, some sequential. A significant part of this study is about the work of the courts and the Ombudsman, both separately and increasingly in relation to one another, albeit informally.

From a democratic point of view this **shifting responsibility from the EU legislator to the courts and the European Ombudsman** continues to be problematic. None of these actors can fully enforce their findings nor re-design the system in a manner that taking seriously citizens' rights would require.

We conclude with several **policy recommendations** for consideration.

[17] For the EO's attitude regarding access to documents specifically, see M Spoerer and RM O'Ferrall, 'The European Ombudsman's role in access to documents' (2022) 23 ERA Forum 253.

2. CASE LAW AND DEVELOPMENTS IN OMBUDSPRUDENCE

Openness and transparency constitute dynamic principles in the European Union that have been directly addressed by the CJEU in various cases presented here, to update and complete the study compiled for the EP in 2016. Although the last eight years show an overall trend of alignment with the previous jurisprudence, there have been some **key court cases** where the scope of the right to access to documents has been addressed in rather novel ways. Despite the mixed nature of CJEU proceedings, with both adversarial and investigative elements, the Court remains by its very nature a **reactive** actor since it requires a challenge to a prior decision by an institution that denied or restricted access to documents on the basis of one or more exceptions under Article 4.[18]

This intrinsically reactive nature of the Court contrasts greatly with the design and most of all the **evolving practice of the European Ombudsman** as a **more proactive** and self-reflective institution, arguably enabling it better to capture the dynamic logic of openness and transparency that are intrinsic to the right to access to documents.[19]

This chapter provides an **update of the CJEU case law** from the date of the last study, 2016, to 2024.[20] The multiple ways the Court has treated different instances of rejected access to documents show that access to documents is not necessarily a univocally absolute right, but rather an analogous and interpretative one that depends to a certain extent on complex institutional ecosystems and their interpretation. It is precisely in this context that judicial review can play an important role in ensuring that the various components of the executive power in the EU,[21] especially institutions in their administrative capacity as well as agencies and bodies that constitute satellite executive power, respect the law.[22] The CJEU is well equipped at least formally to check that institutions act according to the overarching principles of administrative law, as well as those constituting the EU's *sui generis* administrative law.[23] They include, first, that the institutions respect the principle of legality, especially with the Access Regulation and Article 42 CFR; second, that the institutions make decisions in a way that limits the possibility for discretion to turn into arbitrariness; and third, that the institutions operate

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18 See D Curtin and P Leino-Sandberg, 'Openness, Transparency and the Right of Access to Documents in the EU' (2016) Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament 24.

19 An output that manifests this proactive and self-reflective attitude of the EO is the European Code of Good Administrative Behaviour (2002). For general context on the institutional aspects of the EO, see N Vogiatzis, *The European Ombudsman and Good Administration in the European Union* (Palgrave Macmillan 2017); HCH Hofmann and J Ziller (eds), *Accountability in the EU: The Role of the European Ombudsman* (Edward Elgar Publishing 2017).

20 For a review of some landmark cases until the first quarter of 2023, see A Marcoulli and L Cappelletti, 'Recent trends and developments in the case law of EU Courts on access to documents' (2023) 23 ERA Forum 477.

21 For a thorough discussion on the articulation of this power in the EU, see D Curtin, *Executive Power of the European Union* (Oxford University Press 2009).

22 See HCH Hofmann, GC Rowe, and AH Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011); P Craig, *EU Administrative Law* (Oxford University Press 2012); DU Galetta et al, 'The General Principles of EU Administrative Procedural Law' (2015) Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament.

23 Some authors consider EU administrative law to have a distinct autonomy, both conceptually and methodologically. See, eg, F Brito Bastos, 'Doctrinal Methodology in EU Administrative Law: Confronting the "Touch of Stateness"' (2021) 22 German Law Journal 593; and J Mendes, 'The Foundations of EU Administrative Law as a Scholarly Field: Functional Comparison, Normativism and Integration' (2022) 18(4) European Constitutional Law Review 706, recently echoed on Verfassungsblog (J Mendes, 'EU Law Through the State Lens: The Pitfalls of Comparison in Building EU Administrative Law' (VerfBlog, 20 March 2024) available at https://verfassungsblog.de/eu-law-through-the-state-lens/).

in a dialogical and supportive manner that fosters the spirit of the principle of good administration or good governance.[24]

As the institutional annual reports reveal, the number of requests to access documents of the institutions, agencies and bodies of the EU has **not decreased throughout the years**. Around **85% of all requests of access to documents are sent to the European Commission**. One persistent trend is the **extensive delays** in the Commission responding to requests for public access to documents. This perception led to the launching of a **strategic inquiry by the European Ombudsman in 2022**. In her **Special Report** sent to the European Parliament, the European Ombudsman alerts that **systemic and significant delays** occur in particular at the level of **confirmatory applications** requesting to review initial decisions refusing access.[25] Indeed, 85% of decisions on confirmatory applications were delayed and more than 60% took over twice the formal time limit. The European Ombudsman concluded that such systemic delays amounts to **maladministration** because, in her words, '**access delayed is access denied**'. After a series of interinstitutional exchanges, including through committee hearings on the Special Report,[26] the European Parliament's plenary adopted in March 2024 a far-reaching **resolution** with the European Parliament urging the Commission to implement the Ombudsman's recommendations, to provide proactive transparency, and to tackle current delays which are a significant obstacle to public scrutiny.[27]

Ever since the 2016 study, **the European Ombudsman and her office** have persevered in, and strengthened, their effort to promote good administration, transparency, and greater access to documents. The result is that by now in 2024 a real corpus exists of numerous special reports, initiatives, communications, and case decisions. As a result we take over and use the term **'ombudsprudence'** as an adequate way of capturing the dynamic role and output of the European Ombudsman.[28]

2.1. Legislative documents

Neither the institutional architecture of the EU nor the normative emphasis on legislative openness have undergone significant changes since the entry into force of the Treaty of Lisbon. The obligation on the co-legislators, Council and European Parliament, to legislate in the open remains intact in the primary sources[29] and echoed in the rules of procedure of each institution.[30] The principle

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24 The pan-European nature of general principles of administrative law, including legality, discretion, and good administration, was also part of the ReNEUAL 2.0 project of Research Network on EU Administrative Law (see http://reneual.eu/projects-and-publications/reneual-2-0).

25 European Ombudsman, Special Report for Case OI/2/2022/OAM.

26 The European Ombudsman reiterated the seriousness of delays at the hearing 'European Ombudsman on the time the European Commission takes to deal with requests for public access to documents' before the European Parliament's Committee on Civil Liberties, Justice and Home Affairs on 28 November 2023, which led to the adoption of a resolution by the LIBE Committee in January 2024.

27 European Parliament resolution of 14 March 2024 on the time the European Commission takes to deal with requests for public access to documents (2023/2941(RSP)).

28 Some uses of the term 'ombudsprudence' include, among others: HCH Hofmann and J Ziller (eds), *Accountability in the EU: The Role of the European Ombudsman* (Edward Elgar Publishing 2017); D Dragos and B Neamtu, 'Freedom of Information in the EU in the midst of Legal Rules, Jurisprudence and Ombudsprudence: the European Ombudsman as Developer of Norms of Good Administration (2017) 13(4) European Constitutional Law Review 641; M Krajewski, *Relative Authority of Judicial and Extra-Judicial Review: EU Courts, Boards of Appeal, Ombudsman* (Hart Publishing 2021).

29 Article 1(2) TEU (requiring that all activities are performed with the utmost transparency); Article 15 TFEU (requiring the co-legislators to ensure the publication of the documents relating to the legislative procedures; Article 42 Charter of Fundamental Rights (enshrining the right of access to documents).

30 Rule 7 of the Council's Rules of Procedure (Council Decision of 1 December 2009 adopting the Council's Rules of Procedure [2009] OJ L325/35) and Rule 121 of the European Parliament's Rules of Procedure (9th parliamentary term) [2019] OJ L302/1.

of legislating in the open also appears in Recital 6 of the Access Regulation[31] and it is materialised in Article 12(2) by setting out the requirements to **make legislative documents directly accessible** to the public:

> *In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.*[32]

Despite the generous promises of the law, **three challenges** for the right of access to legislative documents that were identified in the 2016 study remain present: access to key documents relating to **comitology** procedures; access to **legal opinions, impact assessments and other preparatory documents** predating the adoption of a formal legislative proposal; and access to key documents relating to **trilogues**.[33] The fact that **EU institutions fail to internalise the developing case law and the interpretative principles invoked by the CJEU poses serious problems** in overcoming these challenges. In fact, the European Ombudsman openly stated for the first time in a recent decision of March 2024 that **EU institutions are not giving effect to case law on public access to legislative documents**.[34] Likewise, the European Ombudsman has recently opened an **own-initiative inquiry** into how the EU institutions deal with requests for public access to legislative documents, where we can expect a granular assessment of this failure to enforce their legal obligations.[35]

2.1.1. Comitology documents

In principle, a systematic interpretation of the concept of legislative documents mentioned above should include those procedures for the adoption of regulations and directives, as well as the adoption of **delegated acts and implementing acts** connected to such legislation. Such broader understanding that includes **documents relating to comitology procedures** under legislative documents would resonate well with the linkage between public access with the principle of democracy recognised by the CJEU in *Turco*.[36] The **European Ombudsman** took the position that comitology documents, even if not legislative documents strictly speaking, should benefit from a high degree of transparency.[37]

In the 2022 case ***Pollinis v Commission***, a French non-governmental organisation requested **several emails and documents** including the Member States' views on the 2013 Guidance Document of the European Food Safety Authority on the risk assessment of plant protection products on bees. These documents circulated within the Standing Committee on Plants, Animals, Food and Feed (SCoPAFF). **The Commission denied access** on the basis that those documents were **part of an ongoing**

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31 Recital 6 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43: 'Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent'.

32 Article 12(2) of 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.

33 D Curtin and P Leino-Sandberg, 'Openness, Transparency and the Right of Access to Documents in the EU' (2016) Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament 7-9.

34 European Ombudsman, Decision on Case 1053/2023/MIK, para 26.

35 European Ombudsman, Case OI/4/2023/MIK, 'How the European Parliament, the Council of the EU and the European Commission deal with requests for public access to legislative documents', https://www.ombudsman.europa.eu/en/case/en/64321..

36 Joined Cases C-39/05 P and C-52/05 P Kingdom of Sweden and Maurizio Turco v the Council, paras 45-46.

37 See, eg, the ongoing own-initiative procedure in European Ombudsman, Case OI/2/2023/MIK (on the risk management of dangerous chemical substances by the European Commission in comitology procedures).

decision-making process.[38] The NGO contested that, pointing out that the Commission had used the term 'halted', which contradicts the notion of 'ongoing'.[39] The **General Court found that there were no further decision-making process concerning the 2013 Guidance Document** even if EFSA received a mandate to review it. Consequently, the General Court **granted Pollinis access** since the Commission could not rely on the exception of the first indent of Article 4(3) of the Access Regulation.

Two other relevant *Pollinis*-based discussions focused on the **confidentiality of the individual positions of the Member States in comitology procedures**. Indeed, Regulation No 182/2001 and notably the Standard Rules of Procedure elaborated on that basis state that 'the summary record shall not mention the individual position of the members in the committee's discussions' as well as that 'the committee's discussions shall be confidential'.[40] The **General Court**, applying the hierarchy of norms, stated that those provisions could not exclude certain documents from the scope of the Access Regulation and that the Commission cannot take the view that the individual positions of the Member States in the work of comitology are excluded from public access.[41] Secondly, the General Court overruled the Commission's argument that disclosure would expose Member States and the Commission itself to external pressure and 'would reduce [their] margin of manoeuvre as well as their flexibility when voting by seriously undermining the decision-making process'.[42] In the Court's view, the Commission neither established with certainty and evidence that external pressure could compromise the decision-making procedure nor provided 'any evidence allowing a link to between the external pressure (...) and the harm which would result from disclosure'.[43] The **Commission appealed the case to the Court of Justice** in September 2022 and a decision on the appeal is **pending**.[44]

Advocate General Emiliou delivered his Opinion on 27 June 2024 in support of the General Court's judgment and consequently against the Commission's grounds of appeal.[45] In particular, Advocate General Emiliou argues that 'the individual positions of the Member States in comitology procedures are not covered by the categories of documents which enjoy general presumptions of confidentiality'[46] and finds, just as the General Court did, that 'the Commission [did not] fulfil its obligation adequately to demonstrate a risk that the decision-making process in question would be seriously undermined in view of the specific reasons invoked and the relevant evidence adduced'[47].

The **European Ombudsman** has been actively engaged in the *Pollinis* case from the start.[48] Indeed, the EO recommended that the Commission should allow Pollinis to benefit from the wider access granted

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38 Joined Cases T-371/20 and T-554/20 Pollinis v Commission, paras 9 and 14.

39 Joined Cases T-371/20 and T-554/20 Pollinis v Commission, para 44.

40 Regulation (EU) No 182/2001 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing power, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32011R0182, and the Standard Rules of Procedure for committees, document 2011/C 206/06, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ%3AC%3A2011%3A206%3AFULL, and notably its Articles 10 on Minutes and summary record of meetings and 13 on Access to documents and confidentiality, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011R0182.

41 Joined Cases T-371/20 and T-554/20 Pollinis v Commission, paras 93 and 100.

42 Joined Cases T-371/20 and T-554/20 Pollinis v Commission, para 122.

43 Joined Cases T-371/20 and T-554/20 Pollinis v Commission, paras 125, 127, and 129.

44 Case C-726/22 P Commission v Pollinis.

45 Opinion of Advocate General Emiliou, Case C-726/22 P Commission v Pollinis.

46 Opinion of Advocate General Emiliou, Case C-726/22 P Commission v Pollinis, para 111.

47 Opinion of Advocate General Emiliou, Case C-726/22 P Commission v Pollinis, para 122.

48 European Ombudsman, Case 2142/2018/EWM (on the European Commission's refusal to grant access to Member State positions on a guidance document concerning the risk assessment of pesticides on bees).

to legislative documents under the Access Regulation.[49] Although the Commission dismissed the EO's intervention, the applicant NGO made use of the EO's recommendation in the court proceedings. This constitutes a good example of the **EO's power of influence** even if her office decides not to formally intervene before the court for reasons also linked to limited human resources.[50]

Another relevant case related to comitology procedures is *Covington & Burling and Van Vooren v Commission*, in which a lawyer specialised in life sciences practice was denied access to the documents relating to **the voting of the Member States in a comitology procedure** to amend the annex of the regulation on botanical species. This time again, just as in *Pollinis*, the committee responsible is the SCoPAFF and the **General Court favoured transparency and granted access to the votes of the Member States** as the result of the individual assessment of the content of the document that must be performed by the Commission. In effect, even if the votes of the Member States 'are the expression of their sovereign rights', access to their individual positions may be denied 'in duly justified cases' where their disclosure would specifically undermine the interests protected by the exceptions provided for in Article 4 of the Access Regulation.[51] Since the outcome of the individual votes of the Member States cast in the committees have indeed an influence on the Commission's internal decision-making process, those votes are 'cast as part of deliberations and preliminary consultations within the Commission concerning a draft amending regulation' and thus require an **individual case-by-case assessment**.[52] With reference to the possibility of precluding the right of access by virtue of the Standard Rules of Procedure, the General Court restated their view introduced in the *Pollinis* judgment and established that the Commission cannot rely on merely abstract reasoning relating to the maintenance of cooperation of the Member States in the comitology procedure to justify the confidentiality of the individual positions of the Member States.[53] **The Commission filed in August 2023 an appeal before the Court of Justice** which remains **pending**.[54]

2.1.2. Legal opinions, impact assessments, and other preparatory documents

Regarding legal opinions, impact assessments and other preparatory documents, the judgments in the *Philip Morris* cases and the *Herbert Smith Freehills* brought with them some pessimism with the limited degree of success, shortly after the previous study in 2016.[55] In a series of cases, the **tobacco companies requested access to different documents concerning the legislative procedure** that led to the adoption of the **Tobacco and Related Products Directive (TPD) in 2014**.[56] Regarding the **legal opinions of the Commission's Legal Service**, the **General Court upheld the Commission's view on the need for confidentiality to be maintained** in order to

> *protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice. Disclosure would put in the public domain internal opinions, drawn up under*

[49] Recommendation of the European Ombudsman on 10 May 2019 in Case 2142/2018/TE.
[50] See D Curtin et al, The European Ombudsman Investigated: From Old Battles to New Challenges (Hart Publishing 2024).
[51] Case T-201/21 Covington & Burling and Van Vooren v Commission, paras 40, 42, and 45.
[52] Case T-201/21 Covington & Burling and Van Vooren v Commission, para 43.
[53] Case T-201/21 Covington & Burling and Van Vooren v Commission, paras 68 and 73.
[54] Case C-540/23 P Commission v Covington & Burling.
[55] See D Curtin and P Leino-Sandberg, 'Openness, Transparency and the Right of Access to Documents in the EU' (2016) Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament 9.
[56] In 2001, the European Ombudsman launched a strategic initiative to monitor closely and assess the European Commission's transparency obligations in the context of the review of EU tobacco legislation. In a letter addressed to European Commission President Ursula von der Leyen, the EO reminded Ms von der Leyen that the Commission had not made much progress in publishing all information on interactions between the Commission and the tobacco industry in a proactive way (see European Ombudsman, Case SI/1/2021/KR).

> *the responsibility of the Commission's Legal Service and intended for the service responsible for preparing the proposed TPD, on highly sensitive issues that had become the subject of litigation*.[57]

On Philip Morris's request for accessing the **minutes of meetings** in the context of preliminary consultations and deliberations between various Directorates-General and the Legal Service, the **General Court** found that their **disclosure to the public 'could compromise the Commission's defensive position and the principle of equality of arms**, in so far as it would reveal the internal legal positions of its services on contentious issues although no similar obligation would be imposed on the other party'.[58]

Conversely, the **General Court granted partial access** to the applicant's request for access to the **exchange of emails** between the services of different various Directorates-General, but **only** disclosing those paragraphs that referred 'to the steps to be taken in drawing up the proposal for a revision of the TPD' and not those concerning criticisms of the conduct of other Commission services. The General Court deemed that 'the possibility of **expressing views independently** within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the **decision-making** process'.[59]

Of special interest is the nature of **legal opinions in the trilogue phase**. Despite the *Turco* jurisprudence requiring, in principle, disclosure of the legal opinions relating to a legislative process,[60] the **General Court rejected** Herbert Smith Freehills's requests to **access inter-institutional emails** discussing the scope of application of the TDP legislative proposal because the obligation to disclose the opinions of the Council's Legal Service relating to a legislative process does not preclude a refusal to disclose in the context of a specific legislative process. This is to say that even if the legal advice was drawn up in such context, **this is not in itself sufficient to establish an overriding public interest**.[61] In one of the two cases, the General Court qualified the role of the Legal Service in the following way:

> *The exchanging of legal views between the Legal Services of three institutions in order to reach a compromise regarding a legislative text in the context of a trilogue may, where appropriate, be described as legal advice and, as a result, may fall under the exception relating to legal advice. The Legal Services act under a mandate and with the aim of reaching an agreement. They thus simultaneously act as negotiators and advisers with regard to legal matters*.[62]

Yet there is some **room for optimism elsewhere, in particular regarding legal opinions**. In *Pech v Council*, the **General Court granted Professor Laurent Pech access to an opinion of the Council's Legal Service** concerning the 2018 legislative proposal on the rule of law conditionality mechanism for the Union's budget. The General Court found the **Council**'s statement of reasons to deny access **failed at establishing a risk of serious prejudice to the decision-making process**. **General assertions that do not disclose a sufficiently serious and reasonably foreseeable risk do not justify secrecy**. In the General Court's words, 'it is precisely **transparency concerning legal advice that contributes to conferring greater legitimacy on the institutions** in the eyes of European citizens and **increasing their confidence** in them by allowing divergences between various points of view to be openly debated'.[63] The General Court also noted that 'allegedly sensitive subject matter

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57 Case T-800/14 Philip Morris v Commission, para 36.
58 Case T-796/14 Philip Morris v Commission, para 98.
59 Case T-18/15 Philip Morris v Commission, paras 87 and 87.
60 Joined Cases C-39/05 P and C-52/05 P Kingdom of Sweden and Maurizio Turco v the Council, para 68.
61 Case T-755/14 Herbert Smith Freehills v Commission, para 73; Case T-710/14 Herbert Smith Freehills v Council.
62 Case T-755/14 Herbert Smith Freehills v Commission, paras 58 and 59.
63 Case T-252/19 Pech v Council, para 55.

cannot be confused with a sensitive document' and that 'the fact that the legal issues raised in the context of such a process may be controversial and are the subject of disagreements or that the Legal Service has dealt with those issues does not in any way alter this'.[64] The judgment was **upheld on appeal by the Court of Justice in June 2023**.[65]

Not all more recent case law was tilted to the secrecy side of the equation. This was especially so regarding **impact assessments and other preparatory documents**. In 2018, the Court of Justice made a bold move and reversed the General Court position of 2015 in case *ClientEarth v Commission*,[66] **expanding the scope of legislative documents** by establishing that:

> *not only acts adopted by the EU legislature, but also, more generally, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, fall to be described as 'legislative documents' and, consequently, subject to Articles 4 and 9 of that regulation, must be made directly accessible*.[67]

The higher degree of transparency that applies to legislative documents has led to the recognition by the CJEU of the **stakeholders' right to participate in, and contribute to, the decision-making process with information**. Consequently, the environmental non-profit organisation **ClientEarth was granted access to two draft impact assessment reports**, one relating to access to justice in environmental matters at Member State level in the field of EU environmental policy with an Impact Assessment Board's opinion, and another one regarding a proposed binding instrument setting a strategic framework for risk-based inspection and surveillance also with an Impact Assessment Board's opinion.

2.1.3. Trilogues

Access to other key documents during trilogues continues to be sought through the Court. The **De Capitani set of cases** dates back to **2015**, when Mr Emilio De Capitani, the previous head of the LIBE Committee Secretariat, **challenged the European Parliament's decision refusing full access to trilogue documents** arguing that granting access to them would not specifically, effectively, and in a non-hypothetical manner undermine the legislative decision-making process. The **General Court sided with Mr De Capitani in 2018 and granted him full access to the requested four-column documents** as well as stating that 'no general presumption of non-disclosure can be upheld in relation to the fourth column of trilogue tables concerning an ongoing legislative procedure'.[68] The General Court went on to say that

> *the expression of public opinion in relation to a particular provisional legislative proposal or agreement agreed in the course of a trilogue and reflected in the fourth column of a trilogue table forms an integral part of the exercise of EU citizens' democratic rights, particularly since (...) such agreements are generally subsequently adopted without substantial amendment by the co-legislators*.[69]

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64 Case T-252/19 Pech v Council, paras 57 and 85.
65 Case C-408/21 P Council v Pech.
66 Joined Cases T-424/14 and T-425/14 ClientEarth v Commission.
67 Case C-57/16 P ClientEarth v Commission, para 85.
68 Case T-540/15 De Capitani v European Parliament, para 84.
69 Case T-540/15 De Capitani v European Parliament, para 98.

In addition, the General Court rather proactively pointed out to the legislator, that 'the absence of **detailed and uniform minutes**, and the variable disclosure thereof, do not therefore mitigate the lack of transparency of ongoing trilogue work'.[70]

Following this case, **Professor Päivi Leino-Sandberg**, conducting research on transparency in trilogues, **requested access to the European Parliament's initial decision to refuse full access** to Mr Emilio De Capitani to the four-column tables that were the object of the original case. The European Parliament **denied** Professor Leino-Sandberg access but the **General Court reversed** that decision after a long judicial procedure between the General Court and then the Court of Justice.[71]

In a more recent yet parallel case, **Mr De Capitani** requested access to some documents exchanged within the **Council's Company Law working group** relating to a legislative procedure. Besides **granting De Capitani access**, the General Court made some far-reaching remarks about their views on the Access Regulation and rejected the idea that the legal text has become obsolete. In their opinion, there is continuity in this area

> *between the EC Treaty and the FEU Treaty and to the continuing relevance of that regulation following the entry into force of the FEU Treaty and the Charter. If the authors of the Charter had wished to govern the right of access to documents in a way that was substantially different from the regime in force under the EC Treaty, they would have indicated this in the explanations relating to that treaty*.[72]

Despite Mr De Capitani's persistent efforts to promote legislative transparency, **actual meaningful changes have not yet been translated into practice**.[73]

The **European Parliament** did echo Mr De Capitani's cases in their own-initiative **reports on access to documents both in 2021 and 2023**.[74]

Moreover, the **European Ombudsman took action, including initiating a strategic inquiry** concerning the **transparency of discussions on draft legislation in the preparatory bodies of the Council**.[75] Her recommendations to the Council in 2018 included to **record the identity of the Member States governments** when they express positions in Council preparatory bodies, to develop clear and publicly-available criteria for how it designates **documents as 'LIMITE'**, and systematically **review** the 'LIMITE' status of documents at an early stage, before the final adoption of a legislative act and also before informal negotiations in trilogues.[76] In her final decision, **the EO suggested to conduct a review of how the Council makes legislative documents directly-accessible**; to adopt **guidelines** concerning the types of documents that should be produced by preparatory bodies the context of legislative procedures and the information to be included in those documents; to **update the Council's rules of procedure** to reflect the current practice of disclosing legislative documents

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70 Case T-540/15 De Capitani v European Parliament, para 108.
71 Case T-421/17 RENV Leino-Sandberg v European Parliament.
72 Case T-163/21 De Capitani v Council, para 49.
73 Mr De Capitani brought a new action before the General Court against the Council's decision to refuse access to certain documents drawn up for internal use, arguing that it violates the obligation of legislative transparency (Case T-590/23 De Capitani v Council).
74 See European Parliament resolution of 10 February 2021 on public access to documents (Rule 122(7)) – annual report for the years 2016-2018 (2019/2198(INI)) [2021] OJ C465/54; European Parliament resolution of 13 July 2023 on public access to documents – annual report for the years 2019-2021 (2022/2015(INI)).
75 European Ombudsman, Decision on Case OI/2/2017/TE. Also, individual cases such as Case 1499/2021/SF (finding maladministration in the Council's refusal to give full public access to documents related to negotiations on the draft 'Digital Markets Act').
76 European Ombudsman, Decision on Case OI/2/2017/TE, para 16.

containing Member States' positions; to **list all types of documents in its public register**, irrespective of their format and whether they are fully or partially accessible or not accessible at all; to **improve the user-friendliness and 'searchability'** of the public register of documents; and to develop a dedicated and up-to-date **webpage for each legislative proposal**, following the example of the European Parliament's Legislative Observatory.[77]

2.2. Documents relating to administrative proceedings

Accessing documents relating to administrative proceedings remains as much a **challenge** in 2024 as it was in 2016. Indeed, the 2016 study observed that more presumptions of secrecy appear when the activities of the Commission are managerial or administrative.[78] Indeed, as consistently established by the CJEU in its case law over the years, the **Commission's administrative activity does not require the same breadth of access to documents** as that required by the legislative activity of an institution of the Union.[79]

The relevant **exceptions** used to deny access to documents of administrative matters include **investigations, commercial interests, and the protection of the decision-making process or 'space to think'**. As regards these exceptions, it is worth noting that they are subject to the **possibility of being overridden by a public interest** in disclosure; in other words, rather than being absolute exceptions they may be defeated in a **balancing exercise**.[80] The challenge remains determining whether the requested documents fall within the scope of application for the exception. This judgment requires an **enhanced statement of reasons** that addresses in what specific and realistic ways disclosure would undermine the interest protected by the exception. In practice, however, this situation allows the institution to **deny access based on general presumptions**. According to the Court of Justice in *ClientEarth v Commission*, those presumptions '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'.[81] Simply put, those presumptions are often applied **extensively**, if not **abusively**, when an institution expects that similar requests for access would have equivalent outcomes. In the Court's words,

> *the objective of such presumptions is thus the possibility, for the EU institution concerned, to consider that the disclosure of certain categories of documents undermines, in principle, the interest protected by the exception which it is invoking, by relying on such general considerations, without being required to examine specifically and individually each of the documents requested.*[82]

However, presumptions are *iuris tantum* and the applicant for accessing a document can, at least theoretically, defeat them with arguments that prove a higher public interest in disclosure.[83] It was not until very recently, in March 2024, that an applicant was successful for the first time in proving an **overriding public interest** in disclosure before the courts. In *Public.Resource.Org and Right to Know v Commission*, the **Court of Justice set aside the judgment of the General Court and granted the two pro-transparency NGOs access** to four harmonised standards adopted by the European Committee

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77 European Ombudsman, Decision on Case OI/2/2017/TE, para 18.
78 D Curtin and P Leino-Sandberg, 'Openness, Transparency and the Right of Access to Documents in the EU' (2016) Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament 10-11, 23.
79 See, eg, Case C-506/08 P *Sweden* v *MyTravel and Commission*, para 87; Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau*, para 60; Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others* v *API and Commission*, para 77.
80 See, eg, Case T-827/17 Aeris Invest v ECB confirmed in April 2023 by Case C-782/21 P Aeris Invest v ECB.
81 Case C-57/16 P ClientEarth v Commission, para 51.
82 Case C-57/16 P ClientEarth v Commission, para 52.
83 See, eg, C-139/07 P Commission v Technische Glaswerke Ilmenau, para 62.

for Standardisation regarding safety of toys. The Court found that since those harmonised standards form part of EU law, public access should be granted given that 'individuals must be able to ascertain unequivocally what their rights and obligations are.'[84]

When it comes to the challenge for the protection of the purpose of **inspections, investigations, and audit** as stated in the third indent of Article 4(2) of the Access Regulation, the **General Court established in case *Homoki v Commission* a list of presumptions**. These concern administrative documents relating to a procedure for reviewing **state aid**; documents exchanged between the Commission and other parties in a **merger control procedure**; documents within an infringement procedure during the **pre-litigation stage**; administrative documents relating to a procedure against **cartels**; and documents relating to an **EU Pilot** procedure.[85]

Regarding **infringement procedures and EU Pilot cases**, the persistent presumptions of secrecy that were identified in the 2016 study were **clarified and softened** with the 2020 *Campbell v Commission* case, where the General Court explicitly outlined certain overarching responsibilities for an institution intending to rely on a general presumption.[86] The case originated in Mr Campbell's application seeking access to documents held by the Commission related to Ireland's adherence (or lack of) to specific Council Framework Decisions. Mr Campbell is an Irish national who was arrested in December 2016 based on a European arrest warrant issued by the Lithuanian authorities. The **Commission rejected the application**, stating that the requested documents were part of **closed EU Pilot procedures awaiting a decision on the formal infringement procedure**. Consequently, access was denied based on a **general presumption**. The applicant contested this decision before the General Court, asserting that despite the rebuttable nature of such a presumption, the circumstances unfairly burdened them with proving that the disclosure of the documents posed no risk, despite uncertainty about their existence, nature, form, or content.[87]

The **General Court sided with the applicant**, emphasising that the application of a general presumption does not allow the institution to broadly assert that **all requested documents fall under a general presumption without specifying or listing them**. The General Court stressed that without such identification, the applicant could not argue against the presumption, rendering it effectively irrebuttable. The General Court highlighted that **the institution must identify the documents** covered by the access request before categorising them based on common characteristics, same nature, or belonging to the same file. Only then can a general presumption be applied.[88] The General Court underlined that while a general presumption negates the need for an individual examination of each document, it does not excuse the institution from specifying which documents fall under the presumption and providing a list to the applicant, including details like date, nature, and the administering body, without disclosing content.[89]

Applying these principles to the specific case, the General Court determined that for the Commission to correctly rely on the general presumption regarding documents related to an **EU Pilot procedure**, it needed to, in the refusal decision, **first identify the documents** covered by the access request, then **classify** them (by category or file), and finally **establish that they were part of an EU Pilot procedure**. Since the Commission failed to identify the documents in question, the General Court concluded that

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84 Case C-588/21 P Public.Resource.Org and Right to Know v Commission, para 81.
85 Case T-517/19 Homoki v Commission, para 53.
86 Case T-701/18 Campbell v Commission.
87 Case T-701/18 Campbell v Commission, paras 20-22.
88 Case T-701/18 Campbell v Commission, para 45.
89 Case T-701/18 Campbell v Commission, para 52.

the institution did not appropriately apply the general presumption, leading to the **annulment of the Commission's refusal decision**.[90] This is a **significant step forward in challenging the blanket nature of general presumptions**.

2.3. Documents relating to Court proceedings

The discussion about disclosure of documents relating to judicial proceedings again came back before the CJEU, questioning once again what documents provided before the CJEU are included in the Article 3(a) definition and are yet not subject to the **general exception for documents of court proceedings** under Article 4(2) of the Access Regulation. In *Breyer v Commission*, the **Commission argued that written submissions drawn up by a Member State in infringement proceedings** before the CJEU are **excluded from the right of access to documents** because they should be regarded as documents of the Court, or not as documents at all. On the latter point, the **General Court** developed a more nuanced definition of 'document':

> *the definition contained in Article 3(a) of Regulation No 1049/2001 is essentially based on the existence of content that is saved and that may be copied or consulted after it has been generated, it being understood that the nature of the storage medium on which content is saved, the type and nature of the content stored, and the size, length, volume or presentation of the content have no bearing on the question whether or not it falls within the abovementioned definition and that the only restriction on the content that falls within that definition is the condition that it must relate to the policies, activities or decisions of the institution in question*.[91]

Additionally, the General Court specified that **the exception for documents of court proceedings should not exclude the institutions' litigious activities from the public's right of access** but rather **protect those documents whose disclosure would undermine the proceedings** to which those documents relate.[92] This finding was **confirmed on appeal** in 2017.[93]

The special role of the Commission in cases before the Court was highlighted by Professor John Morijn as part of his 2024 study on the enforcement of EU law in the Area of Freedom, Security and Justice. In particular, **Morijn advocates that all Court observations made by the Commission, notably in relation to preliminary rulings, should be made public**.[94] On this matter, the European Parliament's Committee for Legal Affairs (JURI) unanimously voted in favour of a set of amendments to **Protocol No 3 on the Statute of the Court of Justice of the European Union** that would **give the public the right to access documents relating to judicial proceedings before the EU courts**. In February 2024, the final compromise text of the provisional agreement between the JURI Committee and COREPER received the green light in plenary completing the European Parliament's first reading,[95] which was then **approved** unanimously by the Council in March 2024.[96] As per the **new drafting of Article 23 related to preliminary rulings**,

> *Statements of case or written observations submitted by an interested person pursuant to this Article shall be published on the website of the Court of Justice in the European Union within a*

[90] Case T-701/18 Campbell v Commission, para 67.
[91] Case T-188/12 Breyer v Commission, para 42.
[92] Case T-188/12 Breyer v Commission, paras 57 and 103.
[93] Case C-213/15 P Commission v Breyer, paras 53 and 54.
[94] J Morijn, 'Enforcement of EU law in the Area of Freedom, Security and Justice' (2024) Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament 82.
[95] European Parliament legislative resolution of 27 February 2024 on the draft regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union.
[96] Council of the European Union, Voting result 8001/24, 19 March 2024 (ST 8001 2024 INIT).

> *reasonable time after the closing of the case, unless that person raises objections to the publication of that person's own written submission.*[97]

In a joint statement, the Member States of Austria, Cyprus, France, Greece, Italy and Malta manifested that while they would not object the final compromise, and they did not, the publication on the internet of judicial acts by the parties

> *Is not in itself required by the principles of good administration of justice or the Rule of law, [and therefore] it cannot be considered as an EU standard of transparency to be applied internally by EU Member States.*[98]

In terms of preliminary rulings, the six Member States requested that written submissions not be automatically published on the Internet with open access, and they rather advocated for a case-by-case approach that would take into account the main national proceeding in progress. Likewise, the Member States requested that in the event of an objection by one party, all the texts of the acts of the other parties which contain information or references to the content of the texts of the party objecting be redacted.[99]

2.4. International relations

The use of the **Article 4(1)(a) exception** enabling the refusal of access where disclosure would undermine the **protection of the public interest** extends to different policy areas that could be described as closely linked to more general ideas of state sovereignty. This is the case of **public security, defence and military matters, international relations, and the financial, monetary or economic policy**. What these domains of executive action have in common is that the width of **discretion** that authorities enjoy is overall greater than in other areas. In effect, matters of international affairs are often **sensitive** in nature and may arguably require certain degrees of confidentiality, if not secrecy, to guarantee efficiency.[100] However, **case law of the CJEU has ruled that transparency cannot be 'ruled out in international affairs**, especially where a decision authorising the opening of negotiations involves an **international agreement which may have an impact on an area of the European Union's legislative activity**'.[101] Such determination requires the exercise of particular care and certainly a margin of appreciation by the institution involved, especially given that the **exceptions set out in Article 4(1) of the Access Regulation** are framed in **mandatory** terms and institutions are thus **obliged to refuse access** in those circumstances.[102]

As with every other paragraph under Article 4, the international relations exception must be **interpreted and applied strictly** because it constitutes a derogation from the principle of the widest possible public access to documents.[103] According to the Court in *Council v in 't Veld*, the use of the public interest exception for international relations requires the institution to **explain how disclosure**

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97 Council of the European Union, General position PE-CONS 85/23, 6 March 2024 (PE 85 2023 INIT).

98 Council of the European Union, 'I/A' Item Note 7296/24, Statement by Austria, Cyprus, France, Greece, Italy and Malta, 8 March 2024 (ST 7296 2024 ADD 1).

99 Council of the European Union, 'I/A' Item Note 7296/24, Statement by Austria, Cyprus, France, Greece, Italy and Malta, 8 March 2024 (ST 7296 2024 ADD 1).

100 The CJEU already emphasised in Case C-350/12 P *Council v Sophie in 't Veld* that the 'particularly sensitive and essential nature of the interests' relating to international affairs leads to 'complex and delicate' decisions on access that require the exercise of 'particular care' and presumes 'some discretion' (para 108).

101 Case T-529/09 *Sophie in 't Veld v Council*, para 89.

102 See, inter alia, Case C-266/05 P *Sison v Council,* para 35; Case T-264/04 WWF European Policy Programme v Council, paras 44 and 45; Case T-331/11 Besselink v Council, para 44.

103 See, *inter alia*, Case C-266/05 P *Sison v Council*; Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council*; Case C-280/11 P *Council v Access Info Europe*.

of the documents would specifically and actually undermine the EU's position vis-à-vis a third country.[104] This requirement was echoed later in 2018 in *Access Info Europe v European Commission*, where the **Commission justified the refusal to grant access** to some documents containing legal advice on an EU-Turkey statement because of the fear that disclosure would reveal '**divergent views on the selection and legality of certain measures' implementing** the statement.[105] In this case, the Commission argued that dialogue between the EU and Turkey should be conducted 'in a climate of mutual trust' and releasing internal legal advice would upset the balance between the parties.[106] The **Court** found that the Commission's explanations met the principle of strict construction by providing (i) plausible ways in which disclosure could specifically and actually undermine the protection of the EU's international relations, and (ii) a reasonably foreseeable and not purely hypothetical risk.[107]

The fact that **institutional positions in international relations** are frequently provisional and used for further discussions and negotiations has led the Court to make somewhat **contradictory** statements. On the one hand, in *Sophie in 't Veld v the Council* from 2009 the General Court stated that 'the public interest in the **transparency of the decision-making process would become meaningless** if (...) it were to be taken into account only in those cases where the decision-making process has come to an end'.[108] On the other hand, the same Court later stated in *Access Info Europe v European Commission* that the provisional nature of internal documents suggesting amendments to a bilateral text **fall under the Article 4(1)(a) exception** precisely because they would only enter into force if approved in the context of bilateral negotiations.[109] When it comes to email communications from a DG to the Legal Service, the criterion used by the Court in a parallel case with the same parties was to **grant access** whenever the documents 'did not per se contain any stated position of the European Union concerning the Republic of Turkey and, more generally, did not relate to the EU's international relations'.[110]

With regard to different arguments to **enable judicial review of the third indent of Article 4(1)(a)** of the Access Regulation, the **General Court distinguished between errors of law, manifest error of assessment, and failure to state reasons** in *ClientEarth v Commission*.[111] In this 2018 case, the Court recognised the European Union's competence to submit to the decisions of a judicial body when concluding international agreements within the framework of the principles and objectives of the European Union's external action.[112] Only after the alignment with Treaty provisions is clarified, can disclosure of material used in negotiations be subject to individual assessment. In the specific case, the General Court stated that

> *the disclosure of material connected with the objectives pursued by the European Union, in decisions, in particular when that material deals with the specific content of an envisaged agreement or the strategic objectives pursued by the European Union in negotiations, would damage the climate of confidence in the negotiations which were ongoing at the time the contested decision was adopted*.[113]

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[104] Case C-350/12 P *Council v Sophie in 't Veld*, para 64.
[105] Case T-852/16 *Access Info Europe v Commission*, para 25.
[106] Case T-852/16 *Access Info Europe v Commission*, para 31.
[107] Case T-852/16 *Access Info Europe v Commission*, para 41.
[108] Case T-529/09 *Sophie in 't Veld* v *Council*, para 101.
[109] Case T-852/16 *Access Info Europe v Commission*, paras 46 and 48.
[110] Case T-851/16 Access Info Europe v Commission, para 52.
[111] Case T-644/16 ClientEarth v Commission, para 30.
[112] Case T-644/16 ClientEarth v Commission, paras 40 and 41.
[113] Case T-644/16 ClientEarth v Commission, para 47.

Consequently, the **General Court rejected the applicant's plea in law and found that the international relations exception operates** in this case and disclosing the requested documents and legal analysis would **reveal the strategic objective of the EU in the context of negotiations**. As the General Court puts it,

> *in the context of international negotiations, the positions taken by the European Union are, by definition, subject to change depending on the course of those negotiations, and on concessions and compromises made in that context by the various stakeholders. The formulation of negotiating positions may involve a number of tactical considerations on the part of the negotiators, including the European Union itself. In that context, it is possible that the disclosure by the European Union, to the public, of its own negotiating positions, even though the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating position of the European Union*.[114]

The **Court in 2020 dismissed CientEarth's appeal** and rejected their arguments, including one suggesting that the right of access to documents depends on whether the Commission's partners taking part in international negotiations have equal transparency obligations. Indeed, the Court reminded that 'in the context of international negotiations**, the European Union's negotiating position may be affected if its negotiating positions are disclosed** whereas its partners' negotiating positions are not known'.[115]

The role played by **civil society associations** in requesting access to documents on international affairs cannot be underestimated. In *CEE Bankwatch Network v Commission*, a Czech association of non-governmental organisations requested access to a 2013 Loan Facility Agreement between Ukraine and the European Atomic Energy Community, as well as supporting materials such as inter-service consultations, formal communications between the Commission and Ukraine, the EIB recommendation, and any communication received from the Ukrainian government.[116] The level of analysis performed by the General Court when assessing the **Commission's** reasons justifying how disclosure would **compromise negotiation efforts** as well as have a **negative diplomatic impact** is remarkably deferential towards the institution. This is not surprising since **Article 4(1) exceptions are categorical and not subject to a balancing exercise**, thus in principle undefeatable. As an example of this deference to the Commission's judgment, the Court found that

> *the Commission expressly stated that Ukraine had accepted to pass 'stress tests' on a voluntary basis, that they had enabled the Commission and Ukraine to gain a better understanding of existing risks, and that it was clearly in the interest of the European Union to maintain such quality relations and promote the highest level of EU nuclear safety standards in neighbouring countries. The Commission also explained that any subsequent disclosure to third parties of the agreement in its entirety would deteriorate the quality relations established, with all the resulting implications for nuclear safety.*[117]

The issue of **minutes of bilateral meetings** was at the core of the case *Bronckers v Commission*, where Marco Bronckers, a law professor and practising lawyer requested full access to the minutes of two meetings of the Joint Committee on Spirit Drinks between the Commission and Mexico. The Commission argued that considering the **Mexican authorities' opposition** to disclosure of the

[114] Case T-644/16 ClientEarth v Commission, para 74.
[115] Case C-612/18 P ClientEarth v Commission, para 77.
[116] Case T-307/16 *CEE Bankwatch Network v Commission*. Disclosure of Euratom documents was previously discussed in depth by the European Ombudsman in Case 2335/2008/(VIK)CK.
[117] Case T-307/16 *CEE Bankwatch Network v Commission*, para 92.

documents at issue, including their arguments on the content of the documents requested, their disclosure risked compromising the workings of the joint committee. In the Commission's view,

> *disclosure of the documents requested, against the opinion of the third country partner, could be regarded by that country as a breach of trust and could result in a refusal to send certain information to the Commission, in particular to the joint committee, in the future. Consequently, that would have a negative impact on the workings of the joint committee and on all future cooperation concerning geographical indications and their protection in the European Union*.[118]

The **General Court accepted the Commission's position** and was deferential towards their assessment of the risks that may result from disclosure, stating that even in those cases where a third party opposes it, the Commission 'must independently examine all the relevant circumstances and take a decision within its margin of discretion' because third-party opposition would not automatically imply a **risk to international relations**.[119]

As discussed in the 2016 study, **international agreements can effectively substitute legislation** and, *ad minimum*, may have quasi-legislative effect.[120] However, the recent 2023 case *Foodwatch v European Commission* rejected access to preparatory documents to the *Forum de cooperation en matière de réglementation*, an institutional arrangement created by the free trade agreement between Canada and the EU.[121] According to the applicant, the Commission failed to prove how public interest would require confidentiality and also failed to prove plausible risk that is not purely hypothetical.[122] Referencing *In 't Veld v Commission*, the **General Court** reasoned that **revealing the negotiating positions could compromise their success**. The Court expanded the scope of the international relations exception by granting confidential treatment also to those EU-Canada Forum meetings that, although not technically part of the trade agreement negotiation, are part of its implementation.

The intervention of the **European Ombudsman** in this field has been limited but fairly successful. Indeed, **in several instances institutions have released documents in the course of an EO's inquiry**,[123] **encouraged disclosure or proactive transparency**,[124] or in others found no maladministration.[125]

2.5. Special regimes

Some domains of administrative action in the EU foresee a distinctive way to guarantee the right to access to documents. This is the case of the **supervisory procedures of the European Central Bank (ECB)** as well as some **environmental matters**. This section gives an account of the case law

[118] Case T-166/19 Bronckers v Commission, para 28
[119] Case T-166/19 Bronckers v Commission, para 46.
[120] See D Curtin and P Leino-Sandberg, 'Openness, Transparency and the Right of Access to Documents in the EU' (2016) Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament 24.
[121] Case T-643/21 Foodwatch v Commission.
[122] Case T-643/21 Foodwatch v Commission, para 54.
[123] See, eg, Case 789/2016/EIS (on the Political Dialogue and Cooperation Agreement between the EU and Cuba).
[124] See, eg, Case 935/2018/EA (on handling of EUNAVFOR Med Operation Sophia's documents); Case 1839/2020/OAM (on the European Defence Industrial Development Programme).
[125] See, eg, Case 2011/2018/MIG (on priorities for the military capability development); Case 1713/2019/FP (on briefing material on EU's relations with Israel); Case 1029/2020/DL (on Member States' troop contributions to EU missions and operations); Case 786/2021/LM (on annual report on the implementation of the Permanent Structured Cooperation of the EU in 2020); Case 1366/2021/MIG (on EU-funded security projects in Mali); Case 29/2022/TM (on EU funding provided to Palestinian civil society organisations); Case 130/2022/SF (on the situation at the Belarus-Poland border); Case 952/2022/MIG (on the suspension of political parties in Ukraine); Case 141/2023/NH (on the EU-Israel dialogue on counter-terrorism).

developments in those **special regimes** that regulate the right to access to documents beyond the general Access Regulation, a topic which was introduced only succinctly in the 2016 study.[126]

2.5.1. ECB supervisory procedures

The **European Central Bank**, given its independent status and its specific responsibilities, is in a unique place in the institutional architecture of the European Union.[127] When it comes to measures relating to due process, the ECB challenges the general Treaty principles that favour openness and transparency and instead prioritises the need for secrecy in its work and **puts confidentiality centre stage as the general presumption** behind how the ECB performs its tasks. However, as stated in the 2016 study, the Treaty of Lisbon only allows an access-free zone in terms of policy-making activities.[128]

As might be expected, **the right of access to an administrative file** is somewhat dissociated from that of access to ECB documents in general. As for the former, it is regulated in **Article 32 of Regulation 468/2014 of the European Central Bank of 16 April 2014** establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities (NCAs) and with national designated authorities (SSM Framework Regulation). This provision defines **files in an ECB supervisory procedure** as 'all documents obtained, produced or assembled by the ECB during the ECB supervisory procedure, irrespective of the storage medium'[129] and it **reinforces the protection of business secrets and confidential information**, which 'may include internal documents of the ECB and NCAs and correspondence between the ECB and an NCA or between NCAs'.[130]

As for the access to documents in general, **Decision (EU) 2015/529 of the European Central Bank of 21 January 2015 on public access to European Central Bank documents** defines 'the conditions and limits according to which the ECB shall give public access to ECB documents and to promote good administrative practice on public access to such documents'.[131] Article 4 foresees a **list of exceptions** to grant access to documents that mirrors that of Article 4 of the Access Document and adds as part of public interest the confidentiality of the proceedings of the ECB's decision-making bodies, the internal finances of the ECB or of the national central banks, and protecting the integrity of euro banknotes. Paragraph 3 of Article 4 also exempts access to those documents that contain opinions for internal use as part of deliberations and preliminary consultations unless there is an overriding public interest in disclosure.

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126 D Curtin and P Leino-Sandberg, 'Openness, Transparency and the Right of Access to Documents in the EU' (2016) Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament. On the ECB, the authors questioned whether it remains justified for the ECB to be excluded from the provisions of the Access Regulation in the longer term with regard to its policy-making and other tasks (page 24) and recommended that there be no blanket exemption or access-free zone (page 26). On environmental matters, the authors referenced the Aarhus Convention in regard to Joined Cases C-514/11 P and C-605/11 P *LPN and Finland v Commission* (page 14).

127 See the ECB's self-characterisation available at https://www.ecb.europa.eu/ecb/tasks/europe/cooperation/html/index.en.html.

128 See D Curtin and P Leino-Sandberg, 'Openness, Transparency and the Right of Access to Documents in the EU' (2016) Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament 24.

129 Article 32(2) of Regulation 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities [2014] OJ L141/1.

130 Article 32(5) of Regulation 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities [2014] OJ L141/1. Article 2(9) of the same legislative text makes a cross-reference to define NCA as a national competent authority as defined in point (2) of Article 2 of the SSM Regulation.

131 Decision (EU) 2015/529 of the European Central Bank of 21 January 2015 amending Decision ECB/2004/3 on public access to European Central Bank documents (ECB/2015/1) [2015] OJ L84/64.

There have been a number of significant cases regarding the ECB in the period under review both positive and negative. For example, the 2018 judgment in *Espírito Santo Financial (Portugal) v ECB* was welcomed as a significant advancement of the transparency culture in the decision-making of the ECB.[132] **The General Court annulled the ECB decision of 31 August 2016 that partially refused to disclose** the amount of credit indicated in the **extracts of the minutes** recording a decision of the **Governing Council of the ECB** and the information redacted from the proposals of the Executive Board.[133] The Court did so by providing detailed information about the requirements for an adequate statement of reasons to deny access. Whereas the General Court accepted that disclosure of the overall amount of credit provided by the central bank would open the door to speculation by market participants on the liquidity position of Novo Banco, thereby posing a concrete risk of undermining its commercial interests,[134] it rejected the explanation from the ECB to justify how disclosure of the ceiling for the provision of emergency liquidity would undermine the public interest as regards the confidentiality of proceedings, establishing that the Governing Council's deliberations are not to be covered under such principle.[135] Unfortunately, what could have been a landmark case in a number of important respects was **overturned by the Court in 2019 on appeal**. The Court found that the Director-General Secretariat's power to decide whether access to the outcome of deliberations should be granted encroached on the **exclusive competence conferred on the Governing Council**, concluding that

> *in order to safeguard that competence, the view must be taken that Article 4(1)(a) of Decision 2004/258, read in conjunction with the second sentence of Article 10.4 of the Protocol on the ESCB and the ECB, must be interpreted as safeguarding the confidentiality of the outcome of deliberations of the Governing Council, without it being necessary that the refusal to grant access to documents containing that outcome be subject to the condition that the disclosure thereof undermines the protection of the public interest*.[136]

Put simply, the Director-General Secretariat's decision effectively interfered with the exclusive competence conferred on the Governing Council in this regard unless it had already decided to make that outcome public in whole or in part. Thus, the Court is of the view that 'the Director-General Secretariat of the ECB is required to refuse to grant access to the outcome of deliberations of the Governing Council, unless the latter has decided to make that outcome public in whole or in part'.[137]

There are other cases where the Court has made conceptual contributions for example to the (more general) **concept of 'manifest error of appreciation'** even if in the end the applicants, two German journalists of *Der Spiegel,*[138] were not successful in obtaining access to two documents concerning the **public deficit and the public debt of the Greek Republic**. The **General Court dismissed** the action for annulment of the decision of the Executive Board of the ECB on the grounds that the evidence to be provided by applicants undermining the plausibility of the ECB's 'appreciation' should be sufficient and cannot be substituted by the Court's own judgement of complex facts.[139]

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[132] See, eg, the European Ombudsman's Report on the meeting of the European Ombudsman's inquiry team with ECB representatives in 2020 (case 1871/2020/OAM).
[133] Case T-251/15 Espírito Santo Financial (Portugal) v ECB.
[134] Case T-251/15 Espírito Santo Financial (Portugal) v ECB, para 62.
[135] Case T-251/15 Espírito Santo Financial (Portugal) v ECB, para 81.
[136] Case C-442/18 P ECB v Espírito Santo Financial (Portugal), para 43.
[137] Case C-442/18 P ECB v Espírito Santo Financial (Portugal), para 44.
[138] Case T-116/17 Spiegel-Verlag Rudolf Augstein and Sauga v ECB.
[139] Case T-116/17 Spiegel-Verlag Rudolf Augstein and Sauga v ECB, para 39.

Another important exception is the one included in the second indent of Article 4(2) of Decision 2004/258, whereby the ECB shall refuse access to a document **where disclosure would undermine the protection of court proceedings and legal advice**. In another case concerning the Greek crisis, public access was sought to the external legal advice that the ECB supposedly requested in 2015 concerning the emergency liquidity assistance granted by the Greek Central Bank to Greek banks.[140] The General Court denied the request for public access but recognised that the documents in question containing legal advice are to be considered as documents for internal use only and part of deliberations and preliminary consultations within the ECB within the meaning of the first subparagraph of Article 4(3) of Decision 2004/258.

Specific cases have been brought in the context of banking resolution. A shareholder of Banco Popular requested **public access to ECB documents on the resolution scheme** once the Single Resolution Board (SRB) found that the bank was failing or was likely to fail.[141] The **General Court** focussed on answering the following questions: how to determine what constitutes information of public nature? Is disclosure likely to negatively affect the interests of the natural or legal person who provided the requested information or of third parties, or of the proper functioning of the prudential supervision and resolution system? Could the shareholder be considered a person concerned by those documents? **On appeal, the case was dismissed** finding the shareholder's allegation of an infringement of Article 47 CFR as partly inadmissible and partly unfounded, and therefore rejecting their view that access to the documents in question were necessary in order to bring a judicial review challenge.[142]

This point came up again in another case where **a Spanish consumer rights association** was not given access to the complete administrative file (including all relevant documents from different institutions) on the grounds that there is no right to access the file since it did not produce any specific legal obligations for them. As a consequence, the association could not claim to have a right of access to the administrative file as part of their defence rights.[143]

The **distinction between access to documents and access to files** in the context of ECB supervisory procedures was echoed in a later case.[144] Whereas both access to documents and access to files concern the rights of the parties,[145] the General Court found that the ECB should have examined the Maltese bank's request to access the administrative file by which the ECB classified the bank as a less significant institution for legal purposes by considering the general principles on access to documents established by ECB Decision 2004/258.[146] Following this, the **General Court grants access to documents concerning supervisory decisions** as it did before in another earlier case with regard to the documents placing a bank under temporary administration.[147] Since banking supervision is in functional terms an administrative task of the ECB, the general rules on access to documents should indeed be applicable.[148]

Another distinctive aspect of the ECB regime of access to documents is the modest **use of alternative remedies** to challenge a refusal of access other than judicial proceedings before the CJEU. Indeed,

[140] Case T-798/17 De Masi and Varoufakis v ECB.
[141] Case T-827/17 Aeris Invest v ECB.
[142] Case C-782/21 P Aeris Invest v ECB.
[143] Case T-15/18 OCU v ECB.
[144] Case T-72/20 Satabank v ECB.
[145] On this, see O Issing, 'The Eurosystem: Transparent and Accountable or "Willem in Euroland"' (1999) 37(3) Journal of Common Market Studies 503.
[146] Decision ECB/2004/3 of the European Central Bank of 4 March 2004 on public access to European Central Bank documents.
[147] Case T-552/19 Malacalza Investimenti v ECB.
[148] See D Curtin, '"Accountable Independence" of the European Central Bank: Seeing the Logics of Transparency' (2017) 23(1-2) European Law Journal 28.

although the Statute of the European Ombudsman does not exclude the ECB from its scope,[149] the fact that applicants of access to documents are banks with robust legal departments makes it more likely that cases will be brought to the courts. This has a limiting result since Banco Popular[150] established that once facts are or have been the subject of legal proceedings, the European Ombudsman may not examine complaints and must close the case without further action. However there have been several cases where the applicants for access to documents did not go to court but brought the ECB's negative confirmatory applications to the EO.[151]

Other efforts to increase transparency in the functioning of the ECB have been led by the European Ombudsman. In particular, the **EO recommended disclosure of further information** from individual letters in the Supervisory Review and Evaluation Process after a certain point in time[152] and intervened proactively in the context of access to documents on the German constitutional court's ruling on the ECB's Public Sector Purchase Programme that the ECB authorised.[153]

2.5.2. Environmental matters

A second area where the right of access to documents is subject to a special regime is the one dealing with **environmental matters** according to the **obligations stemming from the Aarhus Convention (1998)**.[154] Its implementation in the EU is regulated by **Regulation 1367/2006**, and the specific provisions give rise to some special challenges with a relatively distinct conceptual and legal framework, most notably the introduction of a **right of public access to environmental information**.[155] The term environmental information embraces any available information, in any form or format, on the environment itself, its elements (air, water, soil, landscape and natural sites, marine areas, etc.) and its various components, as well as information concerning factors and measures affecting or likely to affect the environment.[156]

When it comes to the exercise of the right of public access to environmental information, however, the **rules under the Access Regulation apply by virtue of a cross-reference in Article 3 of the Aarhus Regulation**.[157] It follows that access to documents containing environmental information is granted subject to the general rules on access to documents in the EU, including the exceptions set out in the Access Regulation. However, the **exceptions regime** is adapted to environmental information with **two specific rules**: (i) where information requested relates to **emissions into the environment**, the

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[149] Article 1(3) of Regulation (EU, Euratom) 2021/1163 of the European Parliament of 24 June 2021 laying down the regulations and general conditions governing the performance of the Ombudsman's duties (Statute of the European Ombudsman) and repealing Decision 94/262/ECSC, EC, Euratom [2021] OJ L253/1.

[150] See European Ombudsman, Case OI/1/2018/AMF; Case 727/2019/FP; Case 723/2019/FP; Case 761/2019/FP.

[151] See, eg, Case 1990/2020/MIG (no maladministration found); Case 1874/2020/MAS (no maladministration found); Case 1871/2020/OAM (no maladministration found); Case 1327/2022/SF (no maladministration found).

[152] Case SI/10/2016/EA.

[153] Case 1871/2020/OAM.

[154] United Nations, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998).

[155] 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 [2006] OJ L264/13. Likewise, 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 [2003] OJ L41/26, requires Member States to ensure that public authorities make environmental information available.

[156] For a careful analysis, see the European Ombudsman guide on the right of public access to EU documents (2022) https://www.ombudsman.europa.eu/en/document/en/163353.

[157] 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 (Aarhus Regulation) [2006] OJ L264/13.

public interest in disclosure is deemed to override the interests in exceptions set out in the first and third indents of Article 4(2) of the Access Regulation; and (ii) access to environmental information may be refused where disclosure of such information would **adversely affect the protection of the environment** to which the information relates, such as disclosing the breeding sites of rare species.[158]

A number of cases have come before the Court to delineate the scope of **environmental information**. In the *Greenpeace* case, an environmental NGO sought access to Germany's draft assessment report on glyphosate but was **denied**, affirming a broad interpretation of 'information relating to emissions into the environment' concerning pesticides. As per the Access Regulation, EU institutions cannot disclose information harming a third party's commercial interests unless an overriding public interest exists. **In cases involving emissions into the environment, disclosure functions as an irrebuttable presumption stressing public interest**. Indeed, the **General Court** established that the Aarhus Regulation:

> *requires the disclosure of a document where the information requested relates to emissions into the environment, even if there is a risk of undermining the interests protected by [commercial interests], and that that interpretation cannot be called into question under the pretext of an interpretation that is consistent, harmonious, or in conformity with [fundamental right to property, intellectual property regulation, or sectorial rules for plant protection products].*[159]

The Commission appealed the decision and the **Court of Justice set aside the General Court's judgment** arguing that the concept of information that relates to emissions into the environment:

> *may not, in any event, include information containing any kind of link, even direct, to emissions into the environment. If that concept were interpreted as covering such information, it would to a large extent deprive the concept of 'environmental information' [...] of any meaning. Such an interpretation would deprive of any practical effect the possibility [...] for the institutions to refuse to disclose environmental information on the ground, inter alia, that such disclosure would have an adverse effect on the protection of the commercial interests of a particular natural or legal person and would jeopardise the balance which the EU legislature intended to maintain between the objective of transparency and the protection of those interests. It would also constitute a disproportionate interference with the protection of business secrecy ensured by Article 339 TFEU.*

The Court of Justice not only set aside the judgment of first instance, but it also **referred the case back to the General Court**, who in 2018 established that the concept of 'information relating to emissions into the environment' of Article 6(1) of Regulation 1367/2006:

> *must be understood to include, inter alia, data that will allow the public to know what is actually released into the environment or what, it may be foreseen, will be released into the environment under normal or realistic conditions of use of the product or substance in question, namely those under which the authorisation to place that product or substance on the market was granted and which prevail in the area where that product or substance is intended to be used. Consequently, that concept must be interpreted as covering, inter alia, information concerning the nature, composition, quantity, date and place of the actual or foreseeable emissions, under such conditions, from that product or substance.*[160]

[158] Article 6 of Regulation 1367/2006, paras 1 and 2 respectively.
[159] Case T-545/11 Stichting Greenpeace Nederland and PAN Europe v Commission, para 46.
[160] Case T-545/11 RENV Stichting Greenpeace Nederland and PAN Europe v European Commission, para 56.

The General Court, applying this interpretation to the specific case of glyphosate, understood that since the active substance 'is not intended to be released into the environment as such, but may be released only once integrated in a plant protection product subject to authorisation, the information contained in the document at issue cannot be covered by the concept of information relating to emissions into the environment'.[161] This is a **problematic** granular distinction because even if it is true that the approval of the pesticide is a necessary precondition for its release, an assessment of the expected environmental impact would indeed concern citizens. **The General Court then dismissed the action** because, in their view, 'the **Commission correctly weighed up the relevant interests**, having set out precisely and specifically the way in which the commercial interests of producers of glyphosate or plant protection products containing it would be jeopardised by the disclosure of the document at issue'.[162]

Glyphosate has also been the object of further judicial cases, including against the European Food and Safety Agency (EFSA). In one of them, the **General Court reversed EFSA's decision to deny** a toxicology consultant access to **two studies on foreseeable emissions** which were part of the renewal dossier as plant protection product.[163]

In another case **an MEP was granted access** to the parts 'material, experimental conditions and methods' and 'results and discussion' of 12 carcinogenicity studies that were submitted to EFSA even if the agency deemed them as unnecessary for the purpose of verifying the scientific risk assessment carried out in accordance with the pesticide regulation.[164]

However, overall it can be said that **the Court takes a restrictive approach** when it comes to identifying a **higher public interest to grant access or considering what exactly constitutes information relating into emissions in the environment**. One example of this approach includes the General Court's protection of the geographic identification of coke production infrastructures as commercial interests in detriment to granting access to the volumes of CO2 emissions of those infrastructures.[165] In another case, the General Court established that assessments and proposals from automobile manufacturers and refrigerant producers do not constitute information relating to emissions into the environment because those documents do not allow to assess what is actually released into the environment or what which will be predictable upon the use of a refrigerant.[166] Other cases rejected general and vague references to environmental protection or to the principles of transparency and democracy for being insufficient to override public interest in disclosing environmental information.[167] Moreover, in the case about **safety of toys** mentioned above,[168] the **General Court** considered harmonised standards to be merely descriptive and designed to comply with safety requirements, yet not containing *stricto sensu* any information relating to hypothetical emissions affecting or likely to affect the elements of the environment referred to in the Aarhus Regulation.[169] The **Court of Justice quashed this decision on appeal** considering that it is **in the public interest** to disclose harmonised standards on the ground that those rules form part of EU law.[170]

[161] Case T-545/11 RENV Stichting Greenpeace Nederland and PAN Europe v European Commission, para 93.
[162] Case T-545/11 RENV Stichting Greenpeace Nederland and PAN Europe v European Commission, para 115.
[163] Case T-716/14 Tweedale v EFSA.
[164] Case T-329/17 Hautala and Others v EFSA.
[165] Case T-643/13 Rogesa v Commission.
[166] Case T-498/14 Deutsche Umwelthilfe v Commission, para 114.
[167] Case T-581/15 Syndial v Commission, para 45; Case T-727/15 Association Justice & Environment v Commission, para 79.
[168] See chapter 2.2, *supra*.
[169] Case T-185/19 Public.Resources.Org and Right to Know v Commission, paras 126 and 127.
[170] Case C-588/21 P Public.Resources.Org and Right to Know v Commission, paras 77, 80, 83-87.

Another successful transparency case involves the compliance of the European Union with the Aarhus Convention. In *ClientEarth and Leino-Sandberg v Council*, an environmental NGO and a law professor brought legal proceedings after being denied access to **an opinion of the Council's legal service** on the Commission's legislative proposal to amend the EU's Aarhus Regulation.[171] The Council argued that public debate on this question constituted 'external pressure' and would thus prevent efficient decision-making in the Council.[172] The **General Court** decided in March 2024 that neither the NGO's activity nor the professor's blog entry posed a reasonable risk of undermining the institution's ability to receive frank legal advice, even when that pressure was applied for the purpose of influencing the content of the Council's legal opinion.[173] Additionally, the General Court found that the fact that there is a link to ongoing international negotiations is insufficient to justify secrecy.[174]

The **European Ombudsman** has taken seriously the special regime of environmental matters, and has actively engaged in it. In September 2022 she launched a **public consultation on transparency and participation in EU decision making related to the environment**.[175] In its questionnaire, the EO explicitly asked for concrete instances where EU institutions did not recognise that 'environmental information' was at stake in requests for access to documents and, thus, did **not apply the higher transparency standards required by the EU Aarhus Regulation**. As an example of this, the EO mentions in a case concerning the **Innovation and Networks Executive Agency's (INEA) refusal to grant public access to a cost-benefit analysis of the Brenner tunnel project, where the Ombudsman proposed to INEA to review its position with a view to granting the widest possible access, a solution that was accepted by the institution**.[176]

Other relevant cases where the European Ombudsman was successful at persuading EU institutions, bodies or agencies to grant access include cases related to **scientific materials** as well as cases related to **meeting documents**. When it comes to scientific materials, **the Ombudsman suggested active dissemination of the conformity checking research studies in the field of EU environmental law, which the Commission accepted.**[177] In another case, the Ombudsman **proposed granting public access to maritime pollution statistics, which the European Maritime Safety Agency accepted**.[178]

As for **meeting documents**, the **Ombudsman interacted actively with the Commission on granting access** to documents related to the EU's participation in the environment committee of the UN **International Civil Aviation Organisation**[179] and also on encouraging transparency for preparatory documents of international agreements such as meeting documents of the **EU-Canada CETA**.[180]

Conversely, the **EO's recommendations were not followed** by the institutions or agencies in some recent cases. In one inquiry, an environmental organisation requested documents held by the Council relating to the process for adopting the annual regulation on total allowable **catches of certain fish stocks** in the EU. The Ombudsman found that the Council did not record the positions of the Member States and keeps **an incomplete register of documents**, to which the Council argued that legislative transparency must be sacrificed in order to achieve political consensus. To this day, **the Council**

[171] On access to legal opinions, see chapter 2.1.2, *supra*.
[172] Joined Cases T-682/21 and T-683/21 ClientEarth and Leino-Sandberg v Council, paras 32 and 33.
[173] Joined Cases T-682/21 and T-683/21 ClientEarth and Leino-Sandberg v Council, para 67.
[174] Joined Cases T-682/21 and T-683/21 ClientEarth and Leino-Sandberg v Council, para 112.
[175] European Ombudsman, Public consultation SI/5/2022/KR.
[176] European Ombudsman, Case 311/2021/TE.
[177] European Ombudsman, Case 367/2017/CEC.
[178] European Ombudsman, Case 129/2022/OAM**.**
[179] European Ombudsman, Case 236/2019/TE.
[180] European Ombudsman, Case 1264/2021/ABZ.

chooses not to follow the Ombudsman's recommendation to proactively publish those documents that in her view constitute both legislative documents and environmental information. Other cases where the institutions did not agree with the Ombudsman's positions include one referred to the disclosure of the **minutes of meetings of the Technical Committee on Motor Vehicle**, where the **Commission rejected partial access as suggested by the Ombudsman**;[181] a case where the Ombudsman found an overriding public interest in **disclosing statistical data** on **pesticide** active substances in Spain, which was **rejected by the Commission** on the grounds of statistical confidentiality;[182] or an inquiry where the **Ombudsman expressed concern about the Commission's restrictive application of the Aarhus Regulation to deny access to a Horizon 2020 mineral exploration research project**.[183]

[181] European Ombudsman, Case 1275/2018/THH.
[182] European Ombudsman, Case 1170/2021/OAM.
[183] European Ombudsman, Cases 1132/2022/OAM and 1374/2022/OAM.

3. DIGITAL DEVELOPMENTS AND 'BLACK BOX' TRANSPARENCY

3.1. Transparency in the digital context

It can perhaps be considered surprising that only eight years ago in 2016 there was **no mention whatsoever in the study of the digital component of access to documents**. The matter was not part of the debate, there were no court cases specifically on it and little footprint in the sphere of operation of the European Ombudsman. The authors were also not anticipating at that time the need for the regulation to be adapted either formally or as a matter of interpretation to **new ways of storing and sharing information** that had to do both with the increased use of AI and automated tools by public administrations around the world as well as well as pushing the boundaries of the meaning of what constitutes a document. Moreover, during the COVID crisis serious questions arose whether **text messages** were too ephemeral to be considered as documents although they concerned hugely publicly salient topics of contracts for vaccines, and **the issue was raised both before the European Ombudsman and later before the Court** where it is still pending. This raises important but novel questions that are particularly important given the stalemate around **revising the Access Regulation in a manner adapted to the digital era and in line with the fundamental Treaty objectives of more openness and transparency in the interests of the citizens in a democracy**. This chapter will detail further from several relatively specific angles what the case law and/or the European Ombudsman's input have been in relation to a relatively novel digital component.

The current study is focused on access to documents and this limits consideration of the evolving digital context in the EU to the interplay with principles of transparency and openness. There are two main digital arenas developing in the EU: one is in the context of the growth in the number of public **databases that use AI tools** to assist in a semi-automated fashion decision making and the challenges of applying access to documents in this context not to say the impossibility; the other is the (near) adoption of several **important legislative measures that apply in the digital context to digital monopolies** (eg, the DSA and the DMA) **as well as the AI Act** that attempts to regulate how AI is used and the obligations of providers as well as the role of supervisory authorities of one kind or another. There is already in the past few years a burgeoning literature on both strands of the debate, but very little linking with existing notions of openness or transparency, not to mind the more specific access to documents rules.

There is however a **vigorous debate** on the meaning and reach of transparency which has, in turn, impacted how transparency is being legislated in this area. Transparency in this context is shifting in many instances from its original meaning of unmediated disclosure to the application of a different logic involving explanation or mediation, namely the logic of communication. There is a growing scholarly literature on what is termed the false promises of transparency. As Koivisto puts it, transparency, as a normative metaphor, 'promises legitimacy by making the object or behaviour visible.' Transparency is thus an invisible *medium* 'through which content is brought to our attention, into the visible realm.'[184] The logic of *disclosure or public access* comes closest to the core meaning of transparency as encapsulated in the Access Regulation. This amounts to the public release of information through the direct disclosure of documents (such as reports, meeting transcripts, etc.). [185]

[184] See I Koivisto, 'Thinking Inside the Box: The Promise and Boundaries of Transparency in Automated Decision-Making' in D Curtin and M Catanzariti (eds), *Data at the Boundaries of European Law* (Oxford University Press 2023) 66.

[185] See further, M Busuioc, D Curtin and M Almada, 'Reclaiming transparency: contesting the logics of secrecy within the AI Act' (2023) 2 European Law Open 79, 82.

What is arguably new is a **different way of thinking about transparency in the digital context**. This is more about the logic of ***communication or explanation***. In its essence it is about **describing, communicating, or explaining** aspects of what is kept hidden or not revealed. The disclosure involves a triad between the subject listening, the object not being seen and the secret keeper revealing the rationale or explanation. According to this logic it is the *target* of transparency (ie, the institution or public actor or private provider) that determines, shapes, and influences the content of what is made visible to the public and outside world as well as the deployer or user, for example a public authority.

Transparency in the disclosure sense privileges seeing over understanding and for this reason **explainability** (and related concepts such as 'explicability' or 'understandability') tend to dominate the debate on AI transparency and governance debates, with explainability advanced as a way to address transparency problems raised by opaque black-box models. With its emphasis on explainability, the discourse on transparency in relation to AI has re-interpreted and reshaped transparency in fundamental ways, away from its original and literal meaning that is also very much present in the Treaty provisions mentioned in chapter 1 and in the Access Regulation.

The conceptual substitution of transparency for explanation risks reinforcing secrecy in this context. In an institutional world where transparency is substituted with explainability, the **AI 'black box' no longer needs to be opened and disclosure as such becomes seemingly redundant**. The corollary is that **secrecy and proprietary protections can then be kept, expanded, and legitimised**, with transparency in its core meaning discarded as 'inadequate'. [186]

Black boxes, produced by technical and/or legal opacity, become the accepted norm. And this reframed logic feeds directly into how AI transparency is to be legislated in practice in this context, **weakening accountability** of providers and use by public authorities with transparency becoming a rudimentary facsimile of its former self.

3.2. Access to documents goes digital?

The right of access to documents as enshrined by Article 42 CFR and articulated by the Access Regulation is not separate from, nor immune to, the use of **digital tools by public administration**. Whereas some of the challenges are considered endogenous to the legal acts that regulate effective access to documents in the EU, there are newer challenges that can be considered exogenous to the law as they are being posed by the digital context. Of particular importance is the work conducted by the **European Ombudsman**, especially in identifying and diagnosing circumstances where the legislative text on access to documents seems unclear or inapplicable, as well as responding with dynamic, analogical interpretations that favour public access in order to secure the highest possible levels of transparency and accountability.

The introduction of digital elements by the EU administration also poses opportunities for **enhancing broader access to documents** and thus more robust transparency. First, thanks to the digitalisation of notes, records and other documents used in the pre-decisional phase of administrative procedures, granting access to those documents should **reduce the costs in terms of timing** to the bare minimum. This is to say, having digitised documents and files **allows for their immediate disclosure** as soon as the right to public access is duly recognised. This scenario allows for time-sensitive disclosure that limits, if not eliminates, the time gap. **Openness is reinterpreted as immediacy**. Access to documents thus becomes **almost automatic** in its facilitation. Digitalisation is an opportunity to attempt to ensure

[186] See M Busuioc, D Curtin and M Almada, 'Reclaiming transparency: contesting the logics of secrecy within the AI Act' (2023) 2 European Law Open 79.

that the logic of transparency as disclosure is not jeopardised by the ability of authorities to take time and replace it with a form of communication.

Second, digitalisation simplifies the process of redacting documents which leads to a **greater array of possibilities to ensure that access is as wide as possible**. Thanks to digitalisation, access can escape the binary logic of receiving or not receiving a document while allowing for a nuanced and careful analysis of its different parts. Indeed, the introduction of digital elements could help resituate the presumption of openness at the core of the right to access, thereby ensuring that the normative commitment enshrined in the Treaties is guaranteed.

This section discusses **new scenarios** with the desirable reconsideration of the scope of the Access Regulation through the definition of document, the use and promotion of user-friendly public registers and internet sites, access to the calendars and schedules of both political and bureaucratic officials, as well as access to the broadcasting of CJEU hearings in Court proceedings. This list does not aim to be exhaustive but is rather indicative of certain areas where, or key forms in which, digitalisation is impacting the effective exercise of the right to public access to documents.

3.2.1. Revising the definition of document

Article 3(a) of the Access Regulation defines document as 'any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audio-visual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility'. In principle, the textual analysis of the definition suggests that the two main variables, **content and medium**, are to be understood extensively without restrictions. However, this definition and its vagueness have been the object of robust discussion between supporters and detractors in different fora including judicial, institutional, and academic.

This matter is of the utmost importance when considering that the Access Regulation grants public access to **'documents' rather than 'information'**. In this sense, applicants find themselves obliged to mention the word 'documents' when submitting requests to the institutions even if they would perhaps not use that term normally to refer to a digital product.[187] Failure to do so could lead to requests being processed under the broader 'right of information' included in the European Code of Good Administrative Behaviour but which does not have the same timelines nor possibilities for appeal.[188]

The boundaries of the **scope of what constitutes a document** have been slowly yet steadily redefined by case law. Indeed, in *Dufour v Commission*, the General Court granted a doctoral researcher writing his dissertation on the sociogenesis of the ECB access to the **databases** that the ECB used to compile statistical analyses for their reports on staff recruitment and mobility.[189] Denmark and Sweden, two Scandinavian countries with a long tradition of transparency, supported the researcher's petition with different arguments on the matter. Whereas **Denmark** considered that a database is not a document because it should be a well-defined and existing item, they were of the view that the ECB should have granted access if the information could be extracted from the database by means of a normal search. **Sweden**, on the contrary, argued that access to data stored in electronic form in a database should prevail over the actual existence of a specific document. The **ECB** maintained that a database would

[187] This suggestion is explicitly mentioned as a 'tip' by transparency NGO Access Info Europe in their *Guide on Access to EU Documents* (2013) https://www.access-info.org/wp-content/uploads/EN_ONLINE_Guide_on_access_to_EU_Documents.pdf.
[188] Article 22 of the European Code of Good Administrative Behaviour.
[189] Case T-436/09 Dufour v Commission.

only constitute a document under Article 3(a) if a printed version of it existed. The **General Court** then presented an argument based on the aggregation of items that:

> *a database could, at most, contain documents that were more than mere data items. Indeed, the elements which comprise such a database, that is to say, the data items, are independent one from another. They are not, as a general rule, presented in any fixed, immutable order, but may be presented in a multitude of different combinations, using the technical and other means available. If it were to be accepted that each of these elements is not necessarily a document and, in addition, that there is no fixed combination for several of them, such as might constitute a document, it would be logical to conclude that the mass of data contained in a database is not, taken as a whole, a 'document'.*[190]

The General Court continued saying that 'the terms used in that definition necessarily imply that even content of minuscule proportions, such as a single word or figure, is, if it is stored (for example, if it is written on a piece of paper), sufficient to constitute a **document'**.[191]

The view that the **results of normal database searches should be interpreted as documents** under the Access Regulation was also shared by the Commission in their observations as part of a complaint made to the European Ombudsman.[192] As to what a normal database search entails, the EO established a principle that the content of a database that can be retrieved using existing software solutions available to end-users is covered under the right of public access to documents. The Commission did so as part of a 2020 case where a journalist requested the Commission access to the detailed contents of a database used to audit how Member States pay Common Agricultural Policy subsidies to farmers.[193] In a different case, the EO encouraged institutions to evaluate possible technical solutions to facilitate downloadable versions of databases in the future.[194]

Another case on the determination of databases as new or existing documents is *Typke v Commission*. Mr Typke was a staff member of the European Commission taking part in the admission tests for open competitions of the European Personnel Selection Office. He suspected that different language groups were treated unequally and requested a **table with information** about the candidates relating correct answers, type of question, and language. In this case, the **General Court declined access** by stating that such list **would require the Commission to create a new document** and the obligation to grant access to databases only stands 'if the requisite search can be carried out using the search tools which it has available for the database in question'.[195] In 2017, the **Court dismissed the grounds of appeal** clarifying that:

> *the information contained in databases, depending on the structure and the restrictions imposed by the programming of such databases, may be regrouped, linked and presented in different ways using programming languages. However, the programming and IT management of such databases are not included among the operations carried out in the context of general use by final users. Those users access information contained in a database by using preprogrammed search tools. Those tools enable them to perform standardised operations easily in order to display the information*

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[190] Case T-436/09 Dufour v Commission, para 107

[191] Case T-436/09 Dufour v Commission, para 108.

[192] European Ombudsman, Case 1693/2005/PB (where the Commission accepted that outputs of 'routine operations' that do not require complex new programming could be considered as documents).

[193] European Ombudsman, Case 1782/2019/EWM (where no maladministration by the European Commission was found for not creating new specific search tools).

[194] European Ombudsman, Case 739/2016/JAP (where no maladministration was found in the European Union Intellectual Property Office's refusal to grant access to a downloadable version of its case law database).

[195] Case T-214/13 Typke v Commission, para 56.

> *which they usually need. A substantial investment on their part is, in general, not required in that context*.[196]

A different aspect that has developed through case law is what constitutes **documents held by an institution**. In the *Gameart v Commission*, the **General Court** considered that documents which originate in the Member States and are exchanged with the Commission during a procedure for failure to fulfil obligations should not be subject to the Access Regulation but rather to **national legislation**.[197]

In the 2022 case *Saure v Commission*, the General Court granted access to the *Bild* journalist Hans-Wilhelm Saure to copies of all **correspondence between the Commission and AstraZeneca** as well as the federal government of Germany regarding the quantity of Covid-19 vaccines and delivery times. As part of that correspondence, the **Commission had partially refused access** to several **email exchanges between the Commission and AstraZeneca** on the basis of the exception relating to the protection of court proceedings. Furthermore, the Commission also claimed that some of the documents were subject to a confidentiality agreement and that their disclosure would undermine the protection of AstraZeneca's commercial interests. The **General Court** clarified this point by contending that

> *the Commission cannot, by means of a mere agreement concluded with a third-party company, restrict the right which every EU citizen derives directly from Article 2(1) of Regulation No 1049/2001 of access to documents held by that institution. Similarly, to accept that an institution can rely on such an agreement in order to refuse access to documents which it holds would amount to authorising it to circumvent its obligation to give access to those documents, except where their disclosure would undermine one of the interests protected by Article 4 of Regulation No 1049/2001*.[198]

The **General Court reversed the Commission's decisions and granted access** to the documents that did not include business secrets or privacy violations because no other court proceedings were pending, or even imminent, that could be undermined by the disclosure of arguments previously used in support of a legal position.[199]

In contrast with the inevitably reactive attitude of the CJEU, the **European Ombudsman** has proactively led several initiatives to revise the definition of document under the Access Regulation. Of special interest for our discussion is the analogous case to *Saure v Commission*, that initiated by Mr Alexander Fanta, also a journalist, directly before the EO instead of the CJEU.[200] In May 2021, Mr Fanta asked the Commission for access to the '**text messages** and other documents relating to the exchange between President Ursula von der Leyen and Albert Bourla, the chief executive of Pfizer, since January 1, 2021' based on a report from the New York Times on April 28, 2021.[201] The **Commission** answered to the journalist that they **did not identify any text message**, which was reiterated in July 2021 in the confirmatory application and led to presenting a **complaint before the EO**. The EO's inquiry team met with representatives the Commission and the inquiry showed that,

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196 Case C-491/15 Typke v Commission, para 36.
197 Case T-264/15 Gameart v Commission, paras 53 and 54.
198 Case T-524/21 Saure v Commission, para 64.
199 Case T-524/21 Saure v Commission.
200 European Ombudsman, Case 1316/2021/MIG (on the European Commission's refusal of public access to text messages exchanged between the Commission President and the CEO of a pharmaceutical company on the purchase of a COVID-19 vaccine).
201 See Mr Fanta's initial request at https://www.asktheeu.org/en/request/exchange_between_president_von_d.

> *in dealing with the request for public access, the Commission had not made a full search for the text messages requested but had limited its search to registered text messages. The inquiry also showed that the Commission's policy is, de facto, not to register text messages. Thus, the manner in which the Commission dealt with the request was clearly inadequate. The Commission did not verify whether it actually had the text messages. In spite of the news report that such messages do exist, the Commission limited its search to registered messages, which it must have known, given its policy on registration, would produce the result that there were no text messages*.[202]

Consequently, the European Ombudsman made the **recommendation to the Commission to 'ask the President's cabinet to search again for relevant text messages, making it clear that the search should not be limited to registered documents or documents that fulfil its recording criteria' so that once identified, an assessment could subsequently take place**.[203] The **Commission** accepted that text messages are documents within the meaning of the Access Regulation but **limited its search to registered documents only**.[204] The EO's assessment after the recommendation urged the Commission to deal with requests for public access to documents in a way that is 'response, forthcoming and citizen-friendly'.[205] The EO established as a principle that '[t]here is no doubt that text messages (whose content relates to the policies, activities and decisions falling within the institution's sphere of responsibility) are considered EU documents by Regulation 1049/2001', stressed that whether text messages are registered is legally not relevant for the definition of a 'document', and **launched a strategic initiative** to establish good practice guidelines on **modern communication tools such as text and instant messages**.[206] The strategic initiative concluded in **July 2022** with **recommendations** for all eight EU institutions, bodies, offices and agencies.[207] Given the high public interest of the matter of the **acquisition of COVID-19 vaccines in the European Union**, **the European Public Prosecutor's Office launched an investigation on the matter as early as October 2022, including the allegations of deleting SMS text messages between President von der Leyen and Pfizer's CEO Albert Bourla**.[208]

Also related to the **purchase agreements for COVID-19 vaccines**, the **General Court** established in its judgment of 17 July 2024 that **the Commission did not give the public sufficiently wide access in matters such as indemnification, as well as conflict of interest declarations**.[209] The case was brought up by four Members of the European Parliament (Ms Margrete Auken, Ms Tilly Metz, Ms Jutta Paulus and Ms Kimberly van Sparrentak) and the successor in law of Ms Michèle Rivasi, a deceased Member of the European Parliament. The six requested access to 'the different contracts–advance purchase agreements–signed between the Commission and the pharmaceutical companies for the

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202 European Ombudsman, Decision on Case 1316/2021/MIG, para 9.
203 European Ombudsman, Decision on Case 1316/2021/MIG, para 11.
204 European Ombudsman, Decision on Case 1316/2021/MIG, para 12.
205 European Ombudsman, Decision on Case 1316/2021/MIG, para 14.
206 European Ombudsman, Decision on Case 1316/2021/MIG, paras 15, 17, and 19.
207 European Ombudsman, Closing note for Case SI/4/2021/MIG (on the strategic initiative on how EU institutions, bodies, offices and agencies record text and instant messages sent/received by staff members in their professional capacity) made a number of specific recommendations concerning document management rules and practices including the ever-increasing use of text and instant messaging. For example, the decision to record a certain piece of information in the administration's document management system should not be dependent on the medium - be it a letter, an email, a text or instant message - but on its content. Issue clear guidance to staff on how text and instant messages that meet the criteria on document recording should be extracted, transferred and recorded. All staff using electronic devices for work should be able to understand how to extract and transfer text and instant messages from messaging apps or platforms to the relevant document management system.
208 European Public Prosecutor's Office, 'Ongoing EPPO investigation into the acquisition of COVID-19 vaccines in the EU' available at https://www.eppo.europa.eu/en/news/ongoing-eppo-investigation-acquisition-covid-19-vaccines-eu.
209 Case T-689/21 Auken and Others v Commission.

purchase of COVID 19 vaccines'. The **Commission granted partial access** and the **MEPs contested this decision for redacting important elements such as prices**. The General Court found that a producer is liable for the damage caused by a defect in its product and its liability cannot be limited or excluded vis-à-vis the victim by a clause limiting, or providing an exemption from, liability under Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. Even when the Commission argued that indemnification provisions had been incorporated into the agreements, the General Court found that **the Commission did not demonstrate that wider access to those clauses would undermine commercial interests**. The Court also noted that the Commission did not take sufficient account of all the relevant circumstances in order to weigh up correctly the interests at issue and notably the public interest in the disclosure of the **conflict of interest declarations** and the personal data of the **members of the team** who negotiated the purchase of the vaccines. Similar reasonings were included in *Courtois and Others v Commission*, an analogous case brought up this time by private individuals.[210]

Considering the relevance for the public opinion, as well as the fact that the judicial decisions were published on the eve of President von der Leyen's re-election as President, the Commission issued a **statement** 'taking note of the judgments of the General Court' and promising to 'carefully study the Court's judgments and their implications'. The statement also reiterates that the General Court followed the Commission on most claims and that in the General Court's view, 'the Commission should have provided more explanations to justify refusing access to certain provisions in the contracts'.[211]

A specific type of document is the **work email account of an EU staff member**. The rule of thumb is that the right of access should in principle apply if emails are work-related, and not apply if the email is related to the private life of a staff member or outside of the institution's sphere of responsibility. As part of an inquiry concerning the European Research Council Executive Agency, the **EO** argued that an institution may ask a staff member provide copies of **substantive work-related emails** sent to or from the **staff member's private email account**, which is consistent with the subject-focused definition of document instead of one focused on the means.[212]

Finally, the **2023 European Parliament's own-initiative report on access to documents** recalled that 'it is not a document's medium or the fact that it has been registered that make it a document of a particular institution, but rather whether its content concern matter relating to policies, activities and decisions falling within that institution's sphere of responsibility' and echoed the Ombudsman's practical recommendations on how to record text and instant messages, especially **urging the Commission to 'bring its internal guidelines on document registration in line** with Regulation (EC) No 1049/2001 and to **register text messages related to its policies, activities and decisions'**.[213]

3.2.2. User-friendly public registers and internet sites

Article 11 of the Access Regulation **requires each institution to provide access 'in electronic form' to a register of documents**. The entry for each document must contain a **reference number, the**

[210] Case T-761/21 Courtois and Others v Commission.

[211] Statement by the Commission on the General Court's judgments on the access to documents cases concerning the purchase agreements for COVID-19 vaccines, 17 July 2024, available at https://ec.europa.eu/commission/presscorner/detail/en/statement_24_3866.

[212] European Ombudsman, Case 66/2016/DK (where no maladministration was found on the European Research Council Executive Agency's request of work-related emails to a staff member).

[213] European Parliament resolution of 13 July 2023 on public access to documents – annual report for the years 2019-2021 (2022/2015(INI)), paras 24 and 29.

subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. This legal requirement was preceded by the establishment of the **historical archives** by which institutions would open them to the public after the expiry of a period of 30 years starting from the creation of the document or record.[214]

Even if registers as described in these pieces of legislation was a key effort in providing openness, they do not seem to respond adequately to the needs of the digital era, where digital skills and technical capabilities have reconfigured citizens' expectations of immediacy and accessibility. The success of registers as conceived in the Access Regulation depends on whether it allows citizens to become aware of the existence of some documents.[215] The Commission updated the institutional rules on their record management in 2021, yet the impact of this decision remains to be seen.[216] The challenges are many, notably when an old-fashioned characterisation of registers may arguably compromise their role in making effective citizens' access rights.[217]

Some scholars argue that there exists an inversely proportionate correlation between the breadth and depth of registers and archives with the culture of transparency.[218] This was particularly notorious with the counterintuitive scarcity of governmental archives in Sweden, a pioneer in transparency.[219] Conversely, other views suggest that disclosure leads to the chilling effect or to behavioural changes in the way that public officials record their information. When it comes to assessing how **EU registers** work in practice, scholars have pointed out **several deficiencies** to a point that they can be considered '**structurally incomplete, albeit to varying degrees**.'[220]

The legal requirement to have adequate registers remains intact and should not be underestimated. Indeed, registers continue to play a role, albeit limited, for specialised researchers who are capable of, if not used to, navigating complexity. As an example, the **Commission** continues to list **four different registers that are active as of 2024**: register of Commission **documents** (main register of Commission documents containing proposals, impact assessments, delegated and implementing acts, other Commission decisions, etc.); **competition cases** register (documents related to state aid, merger, anti-trust and cartel cases); register of **delegated and implementing acts** (documents and information related to the whole lifecycle of Commission delegated and implementing acts); **comitology** register (documents related to the work of the committees in the context of comitology procedures); as well other sources for information about Commission **infringement decisions, publications, and documents older than 30 years in the historical archives**.[221]

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[214] Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community [1983] OJ L43/1.

[215] See D Curtin, 'Citizens' Fundamental Right of Access to EU Information: An Evolving Digital *Passepartout?*' (2000) 37 Common Market Law Review 7, 18, where the author connects citizens' requests for access to documents with the prior awareness of their existence.

[216] Commission Decision (EU) 2021/2121 of 6 July 2020 on records management and archives [2021] OJ L430/30.

[217] See, eg, Case T-436/09 Dufour v Commission, para 29; and Case T-42/05 Williams v Commission, para 71.

[218] See A Flinn and H Jones, *Freedom of Information. Open Access, Empty Archives?* (Routledge 2009).

[219] See K Österberg and F Erikson, 'The problematic freedom of information principle: the Swedish experience' in A Flinn and H Jones, *Freedom of Information. Open Access, Empty Archives?* (Routledge 2009) 113.

[220] See M Haller and D Rosani, 'EU Document Registers: Empirical Gaps Limiting the Right of Access to Documents in Europe' (2024) 61 Common Market Law Review 449. An earlier version of the main arguments in M Haller, *Transparency by disclosure: tracking the evolving landscape of EU document registers* (LLM thesis, European University Institute 2021).

[221] Available at https://commission.europa.eu/about-european-commission/service-standards-and-principles/transparency/access-documents/how-access-commission-documents_en.

The EU institutions, organs and bodies have started to develop **portals** that are in contrast **more open, user-friendly, and machine-readable than traditional registers**. Portals have key features to make open access to documents and public information **more accessible** to the public without necessarily having the advanced research skills that are required to navigate registers. The possibilities for portals become numerous when they are responsive to the digital expectations of the public and when they operate in a collaborative way by narrowing the gap between citizen and administration. Some examples include the **European Parliament's Legislative Observatory** or the **Legislative Train Schedule**, tools designed for monitoring the EU decision-making process and which are of daily use for EU affairs professionals due to their **intuitive, visual, and accessible nature**.[222] These digital portals coexist with the main register of Parliament documents where persons and interested parties can submit requests for access to Parliament documents.[223] Another noteworthy example is **EFSA's portal** where, upon registration, parties can engage with EFSA by checking the Frequently Asked Questions, consult and submit comments to EFSA's public consultations, and send requests for access to documents.[224]

The alignment with the evolving digital context also affects the way institutions and their public officials register, attribute and handle the applications for access to documents, especially by **developing and updating IT systems**. The **Electronic AccesS to European Commission Documents** (or '**EASE'**) constitutes an example of a new tool that was launched by the Commission in **2022**.[225] EASE has replaced GestDem, the previous internal IT system for handling initial and confirmatory requests for access to documents, and in the Commission's view, it 'brings efficiency gains and contributes to making the whole process of submitting and handling applications for access to Commission documents **more automatised, clearer and transparent, both for citizens and the Commission'**.[226] EASE consists in an **online portal** that allows citizens to 'learn more about access to documents, submit initial and confirmatory applications, receive guidance, follow ongoing and past cases, manage their personal data, communicate with the Commission, receive the reply electronically, search for documents disclosed to other applicants'.[227]

The **European Ombudsman** has also played a pivotal role in this area, especially through an **own-initiative strategic inquiry** on the **transparency of the Council legislative process**. In her **recommendation in February 2018**, the Ombudsman recommended the Council: to systematically record the **identities of Member States** expressing positions in preparatory bodies; to develop clear and publicly available criteria for the application of the **'LIMITE'** status; and to systematically **review** the 'LIMITE' status at an early stage before the final adoption of a legislative act, thus including informal negotiations during trilogues.[228] After finding that **working documents** are not automatically listed in the public register and the difficulties of performing a complete search for all documentation concerning one piece of legislation, the Ombudsman suggested to **list all types of documents in the Council's public register**, 'irrespective of their format and whether they are fully accessible, partially

[222] Available at https://oeil.secure.europarl.europa.eu/oeil/home/home.do and https://www.europarl.europa.eu/legislative-train, respectively.
[223] Available at https://www.europarl.europa.eu/RegistreWeb/home/welcome.htm?language=en.
[224] Available at https://connect.efsa.europa.eu/RM/s/.
[225] Available at https://ec.europa.eu/transparency/documents-request/home.
[226] Report from the Commission on the application in 2022 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (COM(2023) 523 final) 3, 13 September 2023.
[227] Report from the Commission on the application in 2022 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (COM(2023) 523 final) 3, 13 September 2023.
[228] European Ombudsman, Recommendation in Case OI/2/2017/TE of 9 February 2018 (on the transparency of the Council legislative process).

accessible or not accessible at all' as well as to 'improve the user-friendliness of the public register of documents and its search function', encouraging the **Council to 'develop a dedicated and up-to-date webpage for each legislative proposal**, following the example of the European Parliament's Legislative Observatory'.[229] Given the **Council's fail to respond**, the Ombudsman sent in May 2018 a Special Report to **Parliament, which endorsed her findings**.[230] As a consequence, **the Council took some transparency steps in 2020** to 'enable the public better exercise its democratic right to have its say in EU law making through following the legislative process'. Some of the measures include proactively publishing **progress reports** on negotiations on draft laws.[231]

Two other relevant cases for our discussion involve **Frontex**. In the first one, a non-profit organisation complained that Frontex **did not have a public register of documents** and that the agency did not include information about sensitive documents in its annual reports on public access. The **Ombudsman commended Frontex's efforts towards establishing a register of documents** and took note of its distinct characteristics, yet **proposing the agency to publish the number of sensitive documents it holds that are not included in the register**.[232] The **European Parliament**, in its penultimate own-initiative resolution on access to documents of **2021**, echoed the Ombudsman's recommendations and **urged the agency to update the register of documents and publish the number of sensitive documents** it holds that are not included in its register of documents.[233] **Frontex accepted** the Ombudsman's proposal for a solution.

In the second one, the Ombudsman problematised the agency's obligation for applicants requesting public access to documents to use its online access portal instead of emails. In June **2022, the Ombudsman recommended** the agency to 'ensure seamless technical communication with applicants allowing them to communicate with it by **email** in full and without resorting to its current access to documents portal' as well as to 'draw up a detailed **manual** on how [Frontex] handles public access requests and publish that manual'.[234] **Frontex rejected these recommendations** and stated that emails are no longer 'a main common means of communication'.[235]

Finally, two open cases brought to the Ombudsman's attention the **exclusion of the names of all EU staff members from the online directory of EU staff (Whoiswho)**. In both cases, the complainant asked the Commission to grant public access relating to its decision to no longer publish the names of all EU staff members, but **only senior managers**, in the Whoiswho portal.[236] The Ombudsman decided to open an **inquiry in November 2023** with the Commission arguing that 'a **balance of interests** has to be done between transparency of information towards the general public and the security of

[229] European Ombudsman, Recommendation in Case OI/2/2017/TE of 9 February 2018 (on the transparency of the Council legislative process), especially Annex 2.

[230] European Parliament resolution of 17 January 2019 on the Ombudsman's strategic inquiry OI/2/2017 on the transparency of legislative discussions in the preparatory bodies of the Council of the EU, https://www.europarl.europa.eu/doceo/document/TA-8-2019-0045_EN.html

[231] Council, 'I' Item Note of 14 July 2020 on strengthening legislative transparency (9493/20) available at https://data.consilium.europa.eu/doc/document/ST-9493-2020-INIT/en/pdf.

[232] European Ombudsman, Decision in Case 2273/2018/MIG of 3 February 2021 (on Frontex's public register of documents).

[233] European Parliament resolution of 10 February 2021 on public access to documents (Rule 122(7)) – annual report for the years 2016-2018 (2019/2198(INI)) [2021] OJ C465/54, para 44.

[234] European Ombudsman, Recommendation in Cases 1261/2020/PB and 1361/2020/PB of 21 June 2022 (on how Frontex communicates with citizens in relation to its access to documents portal).

[235] European Ombudsman, Decision in Cases 1261/2020/PB and 1361/2020/PB of 15 December 2022 (finding maladministration on how Frontex communicates with citizens in relation to its access to documents portal).

[236] European Ombudsman, Case 1647/2023/NH (on how the Commission dealt with a request for public access to documents concerning its online directory of EU staff); European Ombudsman, Case 1983/2023/ET (on the Commission's decision to no longer publish the names of all EU staff members in the online directory of EU staff).

Commission staff' and that only the contact details of staff occupying management positions, eg heads of unit, advisers, directors, deputy-directors general and directors-general, should be in full accessible to the public in order to uphold their duty of care towards its staff.[237] The inquiry remains **ongoing** as of March 2024.

3.2.3. Calendars of officials and scheduled meetings with interest representatives

Another area where digital tools can contribute to increase transparency is by granting fast and easy access to the **calendar of officials** and their **scheduled meetings with interest representatives**. Although meetings could be considered as log entries to calendars and schedules, and in fact are so under the norms applied by the Commission and the European Parliament, the analogy with documents that are listed in a public register is not optimal for several reasons.

Firstly, a document leaves a digital footprint that can be traced with the appropriate digital capabilities whereas **a meeting, formal or informal,** may remain unknown unless a paper agenda or a digital calendar mentions it. The interpersonal character of a meeting places trust and confidence at the centre of the discussion about secrecy and transparency. Unlike with documents, the only evidence to establish the coordinates and the content of a meeting could potentially be witness or whistleblowing.

Secondly, although there exist mechanisms to escape the formal, on-the-record procedure when communicating written documents, such as the reported and hardly traceable use of post-it notes among officials, the formal or informal nature of a personal meeting is not always fixed and it can indeed alter through time. It is not uncommon that what was intended to be a friendly discussion over coffee ends up playing a decisive role in forming the official's opinion on a policy topic. This interdependence between the parties to establish the tone and character of a meeting, if not its existence entirely, is a singular element that distinguishes meetings from documents.

Without entering into a discussion about the nature of schedules and calendars, the European Ombudsman released in May 2017 some **practical advice** for public officials' interaction with interest representatives in which she encouraged public officials to 'maintain good record keeping habits, including the meeting date/location, names of participants, organisations and/or clients, and issues discussed', to 'use [the] organisation's official file management system', and to 'respect the applicable disclosure requirements, for example in the Commission, disclose details of meetings between interest representatives and Commissioners, Cabinet members and Directors-General'.[238]

More problematic is the situation concerning the **transparency of preparatory bodies** rather than with interest groups, for the openness that can be expected from internal institutional meetings is greater at least in theory than the one involving third parties. The European Ombudsman shared some good practices to promote proactive transparency in her 2019 strategic inquiry on the bodies involved in preparing Eurogroup meetings. In particular, she found that draft annotated agendas, President's remarks, and minutes or summing-up letters are published on the Council's website following these meetings but she encouraged the Council and the Commission, as well as the Eurogroup itself, 'to take further steps in this direction so that as much information as possible is made proactively available' and recognised the **importance of publishing the dates on which the preparatory bodies meet** as well as 'the draft (non-annotated) **agendas** of the Eurogroup meetings (...) ***some days ahead*** of Eurogroup

[237] Reply of the European Commission to the European Ombudsman, Case 1983/2023/EMT.

[238] European Ombudsman, Practical recommendations for public officials' interaction with interest representatives, Correspondence of 24 May 2017, Case SI/7/2016/KR, paras 7 and 8.

meetings'.[239] Of interest in our discussion is precisely that emphasis on timely delivery which constitutes, we contend, a key component of digitalisation.

Some instruments regulating the **nature of meetings with lobbyists** include the **Code of Conduct for the Commission's members**,[240] which entered into force in February 2018 and, in the words of the European Parliament, 'increases transparency primarily in relation to the meetings held between the Commissioners and interest representatives, as well as to the costs of the business travels of individual Commissioners'.[241] Under transparency requirements, the Code of Conduct requires Commissioners and their members of Cabinet to meet 'only those organisations or self-employed individuals which are registered in the Transparency Register' as well as to 'make public information on such meetings'.[242] However, the way in which that information is made public follows a rule which in effect considers meetings as log entries that 'shall be published in a standardised format on the websites of the Members of the Commission within a period of two weeks following the meeting'.[243] Although digitised, such standardised and ***ex post* logging system,** if not rigid and delayed, fails to capture the full potential of the digital developments which can offer nuance and expediency as discussed above.[244]

With the notable rise of corruption cases in the EU institutional architecture such as Qatargate and other instances of foreign interference in the political processes of the Union, the citizenry and the media continue to put pressure on the EU institutions to defend robustly their autonomy by increasing transparency when it comes to calendars and schedules. This is truer in the case of the European Parliament, whose democratic nature makes it more responsive to potential political gains, threats, and losses.

Indeed, the EP set up the **Special Committee on Foreign Interference in all Democratic Processes in the European Union, including Disinformation (INGE)** from March 2021 to March 2022 and extended its term of office with a **second Special Committee (ING2)** from March 2022 to August 2023.[245]

The 2022 final recommendations of the **first INGE Special Committee** included, among other elements, a call to 'identify sectors at risk of interference attempts and provide regular training and exercises for staff working in these sectors in how to detect and avoid interference attempts', a call to 'ensure that all non-profit organisations, think tanks, institutes and NGOs that are given input in the course of parliamentary work into the development of EU policy or any consultative role in the lawmaking process are fully **transparent, independent and free from conflicts of interest** in terms

[239] European Ombudsman, Case OI/1/2019/MIG (concerning the Council of the European Union and the European Commission and their involvement in preparing Eurogroup meetings), paras 19 and 21.

[240] Commission Decision of 31 January 2018 on a Code of Conduct for the Members of the European Commission [2018] OJ C65/7.

[241] European Parliament resolution of 10 February 2021 on public access to documents (Rule 122(7)) – annual report for the years 2016-2018 (2019/2198(INI) [2021] OJ C465/54, para 13.

[242] Article 7 of Commission Decision of 31 January 2018 on a Code of Conduct for the Members of the European Commission [2018] OJ C65/7. The Transparency Register was updated most recently in Interinstitutional Agreement of 20 May 2021 between the European Parliament, the Council of the European Union and the European Commission on a mandatory transparency register [2021] OJ L207/1.

[243] Article 4(1) of Commission Decision of 25 November 2014 on the publication of information on meetings held between Members of the Commission and organisations or self-employed individuals (2014/839/EU, Euratom) [2014] OJ L343/22.

[244] See Section 3.2, *supra*.

[245] European Parliament decision of 18 June 2020 on setting up a special committee on foreign interference in all democratic processes in the European Union, including disinformation, and defining its responsibilities, numerical strength and term of office (2020/2683(RSO)) [2021] OJ C362/186; European Parliament decision of 10 March 2022 on setting up a special committee on foreign interference in all democratic processes in the European Union, including disinformation (INGE 2), and defining its responsibilities, numerical strength and term of office (2022/2585(RSO)) [2023] OJ C283/60.

of their funding and ownership', a call 'on Parliament's governing bodies to improve security clearance procedures for staff and tighten rules and checks for access to its premises to prevent individuals closely linked with foreign interests from having access to confidential meetings and information', and a call ' for the EU institutions to **reform the Transparency Register**, including by introducing more stringent transparency rules, mapping **foreign funding** for EU-related lobbying, and ensuring an entry which allows for the identification of funding from foreign governments'.[246]

In June 2023, the final recommendations of the **second ING2 Special Committee** echoed the previous ones and were also captured by the own-initiative **report on access to documents**, with the European Parliament 'reiterates its call for the introduction of a mandatory requirement for all MEPs, accredited parliamentary assistants and staff members to **make public all scheduled meetings with people external to Parliament** when these meetings **relate to a European Parliament report, initiative report or resolution**'.[247] Additionally, the European Parliament presented in July 2023 some additional recommendations for reform of EP's rules on transparency, integrity, accountability and anti-corruption among which they affirm that:

> *rules addressing MEPs, former MEPs, political group staff, APAs and officials of Parliament and other European institutions should be inspired by the highest standards of transparency, integrity and accountability; insist that potential loopholes in the institutions' rules and procedures that allow unlawful behaviour need to be systematically identified and thoroughly closed by effective reforms and control capacities; [and] highlight that some current mechanisms need to be reviewed with the aim of preventing conflicts of interest, enhancing transparency, and preventing, deterring and detecting foreign interference and corruption*;[248]

and most emphatically for the purposes of **calendars and meetings**, the European Parliament

> *commits to implementing the Bureau Decision to create an entry log, which complies with the EU data protection framework, for all persons aged 18 years old and above who visit Parliament, indicating information such as the date, time and purpose of the visit, including identification of the MEPs, MEPs' staff, group staff or administrative units they meet, their contact details and the person responsible for them during the visit and including the possibility that different MEPs' offices may share responsibility for visitors*.[249]

In sum, the characterisation of calendars of officials and their meetings with interest representatives as documents remains **incomplete** and underestimates the opportunities that digital and technological developments offer in terms of reducing the time window between a meeting takes place and its registration, as well as the capacity to provide some details about the purpose as the EP suggested.[250]

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[246] European Parliament resolution of 9 March 2022 on foreign interference in all democratic processes in the European Union, including disinformation (2020/2268(INI)) [2022] OJ 347/07, paras 30, 91, 112, 118.

[247] European Parliament resolution of 1 June 2023 on foreign interference in all democratic processes in the European Union, including disinformation (2022/2075(INI)) [2023] OJ C/2023/1226; European Parliament resolution of 13 July 2023 on public access to documents – annual report for the years 2019-2021 (2022/2015(INI)), para 18.

[248] European Parliament resolution of 13 July 2023 on recommendations for reform of European Parliament's rules on transparency, integrity, accountability and anti-corruption (2023/2034(INI)), para 5.

[249] European Parliament resolution of 13 July 2023 on recommendations for reform of European Parliament's rules on transparency, integrity, accountability and anti-corruption (2023/2034(INI)), para 16.

[250] European Parliament resolution of 13 July 2023 on recommendations for reform of European Parliament's rules on transparency, integrity, accountability and anti-corruption (2023/2034(INI)), para 16.

3.2.4. Live-streaming CJEU hearings

A discussion about access to documents would be incomplete if the CJEU were to be excluded from it. Indeed, the general commitment to openness and transparency enshrined by the Treaties also extends to the CJEU as an institution of the Union, even if the Access Regulation is not applicable to Court documents in an explicit or direct manner.[251] However, the CJEU stated in July 2017 that

> *the fact that Regulation No 1049/2001 does not apply to applications for access to documents in the possession of the Court of Justice of the European Union does not mean that documents linked to that institution's judicial activity are, as a matter of principle, outside the scope of the regulation where they are in the possession of the EU institutions listed in the regulation, such as the Commission*.[252]

Also in the *Commission v Breyer* case, the **CJEU continues by clarifying that procedural documents that are in the hand of an institution subject to the Access Regulation are to be included** under its definition of document. In the Court's words,

> *neither the Statute of the Court of Justice of the European Union nor the rules of procedure of the EU Courts provide for a right of access by third parties to written submissions filed in court proceedings, while that fact is indeed to be taken into account for the purpose of interpreting the exception laid down in Article 4(2) of Regulation No 1049/2001 (...) it cannot, on the other hand, have the consequence that the regulation does not apply to applications for access to written submissions that have been drawn up by a Member State for the purpose of court proceedings before the EU judicature and are in the possession of the Commission*.[253]

This 2017 case was key to establishing that the **written submissions before the CJEU are considered documents that can be accessed under the Access Regulation without undermining the protection of court proceedings** by ensuring compliance with the principles of equality of arms and the sound administration of justice.[254] The latest developments regarding the Protocol No 3 have been presented in the previous chapter.[255]

Once the accessibility of key procedural documents from the parties is clarified, the focus can turn to the **oral hearings** that take place in Luxembourg in some cases. Professor Alberto Alemanno requested the President of the CJEU already back in October 2021 during the Covid pandemic to live stream hearings using a set of legal arguments and policy considerations.[256] President Lenaerts's head of cabinet responded that 'livestreaming of CJEU's hearings is, however, a complex and costly matter' in terms of language interpretation as well as concluding that

> *the CJEU is responsible for all aspects of the organisation of its hearings, which is part of its general duty to ensure a fair trial. It cannot allow private initiatives to interfere, in any way, with that*

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[251] As applicable primary law, see the fourth subparagraph of Article 15(3) TFEU, whereby the Court of Justice of the European Union is subject to the system of access to documents of the institutions, laid down in the first subparagraph of that provision, only when exercising its administrative tasks; Article 15(1) TFEU, which provides that the institutions, bodies, offices and agencies of the EU are to conduct their work as openly as possible; the second paragraph of Article 1 TEU and Article 298 TFEU with the principle of openness; and Article 42 of the Charter of Fundamental Rights of the European Union and the enshrining of the right of access to documents.

[252] Case C-213/15 P Commission v Breyer, para 38.

[253] Case C-213/15 P Commission v Breyer, para 45.

[254] Case C-213/15 P Commission v Breyer, para 53.

[255] See chapter 2.3, *supra*.

[256] See the correspondence on https://www.thegoodlobby.eu/a-letter-to-the-president-of-the-court-of-justice-of-the-european-union-to-live-stream-hearings/.

responsibility and, ultimately, with that duty, by giving up any control over the quality and contents of a possible livestream of its hearings.[257]

The Court in April 2022 innovatively put in place a **streaming service** granting **live access to cases only assigned to the Grand Chamber**.[258] In addition, the Court launched a six-month **pilot project** enabling the hearings to be seen and listened to in a recording offered later on the same day from 14.30pm (for hearings that took place that morning) or the following day from 9.30am (for hearings that are held in the afternoon). However, it remained not possible to consult these hearings after those specific times.[259] The **European Parliament has complimented the CJEU** for broadcasting the delivery of its judgments and the reading of the Advocate Generals' opinions live on its website, which allows citizens to follow hearings under the same conditions as if they were physically present.[260] Likewise, the Parliament also **called on the CJEU to broadcast all hearings live** in its resolution of 13 July 2023.[261]

Similarly, other legal actors such as the Council of Bars and Law Societies of Europe encouraged the CJEU to secure offline accessibility of video/audio files of hearings in the language in which they are held and case management meetings by **video-conferencing broadcasting**.[262] In a comparative perspective, other national and international courts already broadcast their hearings such as the Polish *Trybunał Konstytucyjny*, the French *Conseil Constitutionnel*, the Supreme Court of the United Kingdom or the European Court of Human Rights. However, it is also true that other courts reject audiovisual access to court proceedings, such as the German *Bundesverfassungsgericht* in its ruling of 24 January 2001[263] or the Supreme Court of the United States.[264]

Using digital technologies to facilitate the public's access to the judicial activity of the CJEU is a measure that could increase openness and transparency in the proceedings of a seemingly remote and opaque institution, usually less visible or accessible to the general public. Its operations, however, should also be bounded by the principle of transparency without compromising the necessary confidentiality of judicial deliberations where judges can express internally and debate provisional positions. Granting access to those activities where parties take part by facilitating the broadcasting, whether live or recorded or both, constitutes a way to ensure that the public can hold judges and other legal operators to account as public officials of the Court.

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[257] See the correspondence on https://www.thegoodlobby.eu/a-letter-to-the-president-of-the-court-of-justice-of-the-european-union-to-live-stream-hearings/.

[258] Court of Justice of the European Union, Press Release No 63/22 of 22 April 2022.

[259] Court of Justice of the European Union, Press Release No 63/22 of 22 April 2022.

[260] European Parliament resolution of 13 July 2023 on public access to documents – annual report for the years 2019-2021 (2022/2015(INI)), para 20.

[261] European Parliament resolution of 13 July 2023 on public access to documents – annual report for the years 2019-2021 (2022/2015(INI)), para 20.

[262] Council of Bars and Law Societies of Europe, 'CCBE comments on the functioning of the General Court' of 4 September 2020, 15 available at https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/PD_LUX/PDL_Position_papers/EN_PDL_20200904_CCBE-comments-on-the-functioning-of-the-General-Court.pdf; R Pelicarić, Contribution to the colloquium 'Le Tribunal de l'Union européenne à l'ère du numérique' (Report of the colloquium, 25 September 2019) 161 https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-12/actes_collogque_30ans_du_tribunal_final_web.pdf.

[263] See P Zumbansen, 'Federal Constitutional Court Affirms Ban of TV-Coverage of Court Proceedings' (2001) 2(3) German Law Journal, available at https://www.cambridge.org/core/services/aop-cambridge-core/content/view/74056F69DBB427F2D1236BE35490C5CD/S207183220000331Xa.pdf/federal-constitutional-court-affirms-ban-of-tv-coverage-of-court-proceedings.pdf.

[264] The Supreme Court of the United States allows live and recorded oral recordings but not audiovisual broadcasting. Some arguments against televising Supreme Court proceedings can be found in J Hohmann, 'Why Supreme Court proceedings shouldn't be televised' (The Washington Post, 24 March 2021) https://www.washingtonpost.com/opinions/2021/03/24/keep-cameras-out-supreme-court/.

4. OVERVIEW OF POLICY RECOMMENDATIONS

4.1. General recommendations on transparency, openness, and access to documents

1) **The guiding principle of Regulation 1049/2001 is to encapsulate a fundamental right of access to documents.** Taken in its wider context, **EU institutions, bodies, offices, and agencies should apply the spirit and text of the EU Treaties** (Article 15 TFEU on openness and transparency, Articles 265 and 298 TFEU on an open, efficient and independent European administration) **and of the Charter of Fundamental Rights** (Article 42 on the Right of access to documents and Article 41 on the Right to good administration) **by aligning these provisions with one another**. **This fundamental right requires all documents to be put in a timely and accessible fashion in public registers** to facilitate citizens and civil society to obtain access.

2) Parliament should ask EU institutions, bodies, offices, and agencies to **report formally on the implementation of the case-law of the Court of Justice of the EU and of the European Ombudsman's recommendations**;

3) Parliament should **request EU institutions, bodies, offices, and agencies to officially motivate and give reasons for their refusal to implement the case-law of the Court of Justice of the EU and the European Ombudsman's recommendations**;

4) Parliament should **ensure that the European Ombudsman's human and budgetary resources are sufficient** to perform their tasks adequately whilst taking into consideration that their workload may increase due to unexpected circumstances as a result of its dynamic and proactive character;

5) The Commission and the Council should **pro-actively disclose comitology documents, including agendas, attendance lists, summary records, draft measures, votes and individual positions of the Member States**;

6) The Commission should **ensure that the Comitology Register is complete and consistent** across policy areas and types of committee;

7) The Commission should **provide robust evidence of how external pressure could undermine the decision-making process** when denying access;

8) The European Ombudsman should **establish internal guidelines for her Office to intervene before court, clarifying when it is in the public interest to do so,** without affecting their existing role and nature;

9) EU institutions should **cease to consider legal opinions, impact assessments, and other preparatory documents as a "no access zone"** and **promote transparency through disclosure as the general rule**;

10) EU institutions should **give adequate and robust reasons in cases where they believe a serious prejudice to the decision-making process** would be caused by granting access;

11) EU institutions should **guarantee citizens' democratic right to know and influence the decision-making process, notably when it of legislative nature, as well as stakeholders' participatory right to provide information** during the legislative procedure;

12) EU institutions should **proactively and by default publish and grant access to the four-column documents of trilogues**;

13) EU institutions should **publish detailed and uniform minutes of the trilogue meetings** to facilitate citizens' oversight of the decision-making process;

14) The Council should **restrict the use of 'LIMITE' status for trilogue documents** in a clear, publicly-available, and consistent way;

15) EU institutions, bodies, offices, and agencies should **ensure public access to every norm, rule, and non-legislative instrument that is part of EU law** and has the capacity to alter a party's legal situation by establishing rights and obligations;

16) EU institutions, bodies, offices, and agencies should **give robust and adequate reasons for each requested document** in cases where they deny the existence of an overriding public interest in disclosure;

17) EU institutions, bodies, offices, and agencies should **cease to consider Article 4(2) exceptions as unrebuttable presumptions** where confidentiality is the norm and disclosure is the exception, and undertake an individualised proportionality test instead;

18) The Commission should **publish or make publicly available all their observations to the Court**, especially in relation to preliminary rulings;

19) EU institutions should **give robust and adequate reasons when determining that some documents may pose a risk to international relations** in order to facilitate judicial review;

20) EU institutions should **reconsider the Article 4(1)(a) exemption for international relations given that international agreements may establish rights and obligations for citizens**;

21) The ECB should in each specific case **give adequate reasons when invoking the presumption of confidentiality** by performing an individualised proportionality test;

22) The ECB should **examine requests to access the administrative file as related to, yet conceptually different from, access to documents,** in order to determine the applicable legal regime;

23) EU institutions should **reconsider the exclusion of the ECB from the scope of the Access Regulation** and replace the blanket exception with existing exceptions to the general rules on public access where the requirements of secrecy should prevail;

24) EU institutions, bodies, offices, and agencies should **promote the exercise of the right of public access to environmental information without restrictive interpretations of the Access Regulation exceptions**, thus recognising the special public interest of granting access to environmental information;

25) As for Recommendation 16, EU institutions, bodies, offices, and agencies should **give robust and adequate reasons for each requested document** in cases where they deny the existence of an overriding public interest for the disclosure specifically of **environmental information;**

26) EU institutions, bodies, offices, and agencies should **recognise the special role of environmental stakeholders, including non-governmental organisations, and protect their participatory rights to provide information** during legislative procedures as well as during on-going negotiations.

4.2. Specific recommendations on access to documents in the digital era

27) EU institutions, bodies, offices, and agencies should **promote transparency, disclosure and access to documents also in the digital context**, thereby echoing the European Ombudsman's call for proactive transparency while distinguishing it from mediated forms of communication;

28) EU institutions should **maintain the extensive definition of document under the Access Regulation**, since it has proven to be capable of capturing newer forms of content and medium in the digital context, such as databases or work emails;

29) EU institutions **shall consider and clarify that text and instant messages are clearly to be considered as documents** under the Access Regulation and establish clear internal guidelines of their own in this sense;

30) EU institutions, bodies, offices, and agencies should **favour disclosure when expanding the definition of document** to newer forms of content and medium in the digital context;

31) EU institutions, bodies, offices, and agencies should **continue developing open, user-friendly, and machine-readable online portals** which enhance transparency, access to documents and information and accountability as well as the right to a good administration by facilitating disclosure and participation;

32) EU institutions, bodies, offices, and agencies should **maintain traditional registers** which remain valuable for specialised audiences and inclusive to those without digital skills;

33) The Council should adopt the European Ombudsman's recommendations and **list all types of documents of the Council legislative process** in the institution's public register;

34) Frontex should adopt the European Ombudsman's recommendations and **accept emails as a common means of communication** for access to documents requests;

35) EU institutions, bodies, offices, and agencies should **keep good and comprehensive records of their interaction with interest representatives**;

36) EU institutions, bodies, offices, and agencies should **publish diligently and promptly** the dates on which **preparatory bodies** meet as well as the draft agendas;

37) EU institutions, bodies, offices, and agencies should **shorten the time window** for public officials to log their meetings with lobbyists;

38) Parliament should **implement the recommendations from the Special Committees**;

39) The Court should **make the necessary changes to use digital technologies to facilitate the public's access to its judicial activity** without compromising the confidentiality of judicial deliberations.

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ANNEX: TABLE ON THE VARIOUS CASES AND DOCUMENTS MENTIONED IN THE STUDY

Case or document	Issue at stake	Requested institution	General Court (GC) or European Ombudsman (EO)	Further issues
Joined Cases T-371/20 and T-554/20 Pollinis (French NGO) v Commission Opinion of Advocate General Emiliou, Case C-726/22 P Commission v Pollinis	Access to comitology documents and emails - including Member States views - on the 2013 Guidance Document of the European Food Safety Authority on the risk assessment of plant protection products on bees	The Commission denied access: part of an ongoing decision-making process (first indent of Article 4(3) of the Access Regulation)	- GC granted access: no further decision-making process concerning the 2013 Guidance Document, notwithstanding the plan to revise it - first indent of Article 4(3) of the Access Regulation is inapplicable here	- Ombudsman's ongoing own-initiative procedure, Case OI/2/2023/MIK (on the risk management of dangerous chemical substances by the European Commission in comitology procedures) - Ombudsman intervened supporting access to documents - Commission appealed the General Court decision in 2022 at the Court of Justice, decision is pending - Advocate General Emiliou backed in his opinion of 27 June 2024 the General Court's decision favouring access and narrowing down the exception of Article 4(3)(1) of the Access Regulation.
	Confidentiality of the individual positions of the Member States in comitology procedures	The Commission denied access: - individual positions of the Member States in the work of comitology are excluded from public access as in the Standard Rules of Procedure - external pressure could seriously undermining the decision-making process	The GC - judged that on the basis of the hierarchy of norms, comitology provisions cannot exclude certain documents from the scope of the Access Regulation - rejected the Commission view that the Standard Rules of Procedure allow for an exclusion from public access - did not find a certain and evident link between access to documents, external pressure and undermining of the decision-making process	

Case T-201/21 Covington & Burling and Van Vooren v Commission Case C-540/23 P Commission v Covington & Burling	Lawyer specialised in life sciences practice requesting access to the documents relating to the voting of the Member States in a comitology procedure to amend the annex of the regulation on botanical species	The Commission denied access	GC favoured transparency and granted access to the votes of the Member States access to their individual positions - access may be denied based on an individual case-by-case assessment 'in duly justified cases' where their disclosure would specifically undermine the interests protected by the exceptions provided for in Article 4 of the Access Regulation	- Commission filed in August 2023 an appeal before the Court of Justice, decision is pending
(Tobacco companies) - Case T-800/14 Philip Morris v Commission - Case T-18/15 Philip Morris v Commission - Case T-796/14 Philip Morris v Commission EO Case SI/1/2021/KR	Access to different documents concerning the legislative procedure that led to the adoption of the Tobacco and Related Products Directive (TPD) in 2014, including legal opinions of the Commission's Legal Service	The Commission denied access to the legal opinions	GC judged that confidentiality is to be maintained: highly sensitive issues + under litigation	- European Ombudsman 2001 strategic initiative to monitor and assess the Commission's transparency obligations in reviewing the EU tobacco legislation: letter to Commission President von der Leyen to publish all information on interactions between the Commission and the tobacco industry proactively (see European Ombudsman, Case SI/1/2021/KR)
	Access to minutes of meetings related to preliminary consultations and deliberations, between various Directorates-General and the Legal Service	The Commission denied access	GC judged that disclosure 'could compromise the Commission's defensive position and equality of arms	
	Access to the exchange of emails between the services of different various Directorates-General	The Commission denied access	GC granted partial access only for procedural parts (and not on the criticism) to protect internal	

			independent debate and decision-making	
Case T-755/14 Herbert Smith Freehills v Commission Case T-710/14 Herbert Smith Freehills v Council	Access to legal opinions in the trilogue phase	The Commission denied access	GC rejected access to inter-institutional emails on the scope of application of the TDP legislative proposal: the obligation to disclose legal service opinions relating to a legislative process does not preclude a refusal to disclose in a specific legislative process: it can be legal advice also if given in a legislative procedure and there is no automatic overriding public interest in disclosure	
Case T-252/19 Pech v Council Case C-408/21 P Pech vs Council 8 June 2023	Access to a Council's Legal Service opinion on the 2018 legislative proposal on the rule of law conditionality mechanism	The Council denied access	GC granted access: - Council failed at establishing a risk of serious prejudice to the decision-making process - legal advice transparency confers greater legitimacy and confidence	Council appealed but Court of Justice in June 2023 upheld the GC judgment
Joined Cases T-424/14 and T-425/14 ClientEarth v Commission Case C-57/16 P ClientEarth v Commission	Access to draft impact assessment reports	The Commission denied access	GC supported the Commission	In 2018 the Court of Justice reversed the General Court position of 2015 and expanded the scope of legislative documents to cover documents drawn up or received in the course of procedures
Case T-540/15 De Capitani v European Parliament	Trilogues	The EP denied full access to 4 columns' tables		- EP resolutions on access to documents

Case T-163/21 De Capitani v Council EO Decision on Case OI/2/2017/TE EO Case 1499/2021/SF EP resolution of 10 February 2021 on public access to documents; EP resolution of 13 July 2023 on public access to documents			GC upheld access in 2018 by granting full access and stated that - no general presumption of non-disclosure can be upheld for ongoing legislative procedures - this is related to EU citizens' democratic rights	- EO strategic inquiry on transparency of discussions on draft legislation in the Council preparatory bodies: 2018 recommendations to the Council, Decision on Case OI/2/2017/TE
Professor Päivi Leino-Sandberg	Requested access to the EP's initial decision to refuse full access to Mr De Capitani to the four-column tables	The EP refused access	GC granted access	
Case T-590/23 De Capitani v Council	Access to certain documents drawn up for internal use	The Council denied access	Case is pending	
Case T-827/17 Aeris Invest v ECB confirmed in April 2023 by Case C-782/21 P Aeris Invest v ECB Case C-57/16 P ClientEarth v Commission	Access to documents relating to administrative proceedings		GC judged that access can be denied based on general presumptions for certain documents	

C-588/21 Public.Resource.Org and Right to Know v Commission C-139/07 P Commission v Technische Glaswerke Ilmenau	Access to four harmonised standards adopted by the European Committee for Standardisation regarding safety of toy		GC denied access	- Court of Justice set aside the judgment of the General Court and for the first time accepts the existence of an overriding public interest in disclosure
Case T-517/19 Homoki v Commission	Inspections, investigations, and audit ex third indent of Article 4(2) of the Access Regulation		GC established a list of presumptions: reviewing state aid; merger control procedures; infringement procedure pre-litigation stage; procedure against cartels; EU Pilot procedure	
Case T-701/18 Campbell v Commission	Access to a document related to a Pilot and to an infringement proceeding (application of general presumptions)	The Commission refused access on a EU Pilot and infringement proceeding presumption	GC granted access: the institution must in any case identify the documents, no blanket exceptions for presumptions	
Case T-188/12 Breyer v Commission Case C-213/15 P Commission v Breyer	Documents related to Court proceedings	The Commission argued that written submissions drawn up by a Member State in infringement proceedings before the CJEU are excluded from the right of access to documents, because they should be regarded as documents of the Court, or not as documents at all.	GC judged that institutions' litigious activities should not be excluded from the public's right of access	confirmed on appeal in 2017
Case T-529/09 Council v in 't Veld	International relations	The Council denied access	GC underlined that the institution is required to explain how disclosure of the documents	case law of the CJEU has ruled that transparency cannot be 'ruled out in international affairs,

Case C-350/12 P Council v Sophie in 't Veld			would specifically and actually undermine the EU's position vis-à-vis a third country	especially where a decision authorising the opening of negotiations involves an international agreement which may have an impact on an area of the European Union's legislative activity'
Case T-852/16 Access Info Europe v European Commission Case T-851/16 Access Info Europe v Commission	International relations and negotiations	The Commission refused access to legal advice on an EU-Turkey statement for fear that disclosure would reveal 'divergent views on the selection and legality of certain measures' implementing it	GC upheld the Commission refusal as the international relations exception applies: risk of damaging the confidence	
Case T-644/16 ClientEarth v Commission Case C-612/18 P ClientEarth v Commission	International negotiations		- GC distinguished between errors of law, manifest error of assessment, and failure to state reasons - the international relations exception applies : disclosing the requested documents and legal analysis would reveal the strategic objective of the EU in the context of negotiations (and could have a negative effect) - dismissed the appeal in 2020	
Case T-307/16 CEE Bankwatch Network v Commission	International negotiations and relations	The Commission refused access as it would compromise negotiations	GC supported the Commission	

		and have a negative diplomatic impact		
Case T-166/19 Bronckers v Commission	Minutes of bilateral meetings	The Commission refused access as Mexico opposed release	GC supports the Commission: Commission must evaluate	
Case T-643/21 Foodwatch v European Commission	International negotiations and relations	The Commission refused access to preparatory documents of a EU-Canada forum	GC sided with the Commission: revealing the negotiating positions could compromise their success	
In various cases (see study for details)	International relations		Ombudsman intervention led to publication of documents	
	ECB supervisory procedures - Presumption of confidentiality but Treaty of Lisbon protects it only for policy-making activities - Article 32 of Regulation 468/2014 of the European Central Bank of 16 April 2014 (SSM Framework Regulation) - Decision (EU) 2015/529 of the European Central Bank of 21 January 2015 on public access to European Central Bank documents, which has a list of exceptions			
Case T-251/15 Espírito Santo Financial (Portugal) v ECB	Access to information in the minutes of a decision of the ECB Governing Council and	The ECB partially refused access	GC annulled ECB decision	CJ overturned GC judgment in 2019 on appeal

Case C-442/18 P ECB v Espírito Santo Financial (Portugal)	in the Executive Board proposals			
Case T-116/17 Spiegel-Verlag Rudolf Augstein and Sauga v ECB (Journalists of Der Spiegel)	Access to two documents concerning the public deficit and the public debt of the Greek Republic	The ECB refused access	GC supported ECB decision	
Case T-827/17 Aeris Invest v ECB Case C-782/21 P Aeris Invest v ECB	Access to ECB documents on the resolution scheme once the Single Resolution Board (SRB) found that the Banco Popular bank was failing or was likely to fail		On appeal, the case was dismissed as deemed partly inadmissible and partly unfounded	
Case T-15/18 OCU v ECB	Access to the complete administrative file on the lack if right to access due to lack of legal obligations	The ECB denied access	GC supported ECB	
Case T-545/11 Stichting Greenpeace Nederland and PAN Europe v Commission Case T-545/11 RENV Stichting Greenpeace Nederland and PAN Europe v European Commission	Environmental matters: Aarhus Convention (1998), Regulation 1367/2006	The Commission refused access	GC granted access	CJ supported the Commission refusal to grant access and sent it back to the GC, that dismissed the action and justified the Commission
Case T-716/14 Tweedale v EFSA		The European Food and Safety Agency (EFSA) refused access to two studies on foreseeable emissions which were part of the renewal	GC grated access to the studies	

		dossier as plant protection product of glyphosate		
Case T-329/17 Hautala and Others v EFSA	Access to the parts 'material, experimental conditions and methods' and 'results and discussion' of 12 carcinogenicity studies that were submitted to EFSA	The EFSA refused access	GC granted access	
Case T-643/13 Rogesa v Commission Case T-498/14 Deutsche Umwelthilfe v Commission			Court takes a restrictive approach on a higher public interest to grant access or considering what exactly constitutes information relating into emissions in the environment, eg the protection of the geographic identification of coke production infrastructures as commercial interests, in detriment to granting access to the volumes of CO2 emissions of those infrastructures, or on assessments and proposals from automobile manufacturers and refrigerant producers, that are deemed not as information relating to emissions into the environment	
Case T-185/19 Public.Resources.Org and Right to Know v Commission	Safety of toys / environmental matters		GC denied access, as it considered harmonised standards to be merely descriptive and designed to comply with safety requirements, yet not containing stricto sensu any information relating to hypothetical emissions affecting or likely to affect the	CoJ granted access, considering that it is in the public interest to disclose harmonised standards on the ground that those rules form part of EU law

Case C-588/21 P Public.Resources.Org and Right to Know v Commission			elements of the environment referred to in the Aarhus Regulation	
Cases T-682/21 and T-683/21 ClientEarth and Leino-Sandberg v Council	Access to an opinion of the Council's legal service on the Commission's legislative proposal to amend the EU's Aarhus Regulation	The Council denied access	GC granted access	
EO Case 311/2021/TE EO Public consultation SI/5/2022/KR	public consultation on transparency and participation in EU decision making related to the environment	The Innovation and Networks Executive Agency's (INEA) refused to grant public access to a cost-benefit analysis of the Brenner tunnel project	EO proposed revision of the refusal, which is effectively done	
EO: - Case 236/2019/TE - Case 1264/2021/ABZ	Access to meeting documents of - the environment committee of the UN International Civil Aviation Organisation - EU-Canada CETA	The Commission accepted EO proposals to grant access		
EO	Access to environmental information and notably on the positions of the Member States on catches of certain fish stocks	The Council refused access / did not record the positions of the Member States	EO noted that the Council kept an incomplete register of documents in violation of legislative transparency related to the environment, Council did not follow up	
EO Case 1275/2018/THH		The Commission refused partial disclosure of the minutes of meetings of the	EO proposed partial access, Commission rejected the recommendation	

		Technical Committee on Motor Vehicle		
EO Case 1170/2021/OAM	statistical data on pesticide active substances in Spain	The Commission refused access as EO suggested	EO found overriding public interest in disclosing	
EO 1132/2022/OAM and 1374/2022/OAM	Horizon 2020 mineral exploration research project	The Commission refused access	EO expressed concern about the Commission's restrictive application of the Aarhus Regulation	
Case T-436/09 Dufour v Commission	ECB access to the databases used to compile statistical analyses for reports on staff recruitment and mobility	The ECB denied access	GC granted access as a database and its elements are documents	
Case T-214/13 Typke v Commission Case C-491/15 Typke v Commission	Access to information related to an EPSO competition preselection test	The Commission denied access	GC declined access	Court of Justice dismissed the appeal
Case T-264/15 Gameart v Commission	Documents held by the institution		GC considered that Member States' documents exchanged with the Commission during a procedure for failure to fulfil obligations should not be subject to the Access Regulation, but rather to national legislation	
Case T-524/21 Saure v Commission	Access to the copies of all correspondence between the Commission and AstraZeneca, as well as the federal government of Germany, on the quantity of	The Commission partially refused access to email exchanges between the Commission and AstraZeneca on (based on the exceptions relating to the protection of	General Court granted access	

	Covid-19 vaccines and delivery times	court proceedings and on the confidentiality of the agreement to protect AstraZeneca's commercial interests		
EO Case 1316/2021/MIG (on the European Commission's refusal of public access to text messages exchanged between the Commission President and the CEO of a pharmaceutical company on the purchase of a COVID-19 vaccine)	Access to the 'text messages and other documents relating to the exchange between President Ursula von der Leyen and Albert Bourla, the chief executive of Pfizer, since January 1, 2021' as reported by the New York Times on 28 April 2021	The Commission stated they did not identify any text message, and reiterated this also in July 2021, in its reply to the confirmatory application	EO recommendation: the Commission should 'ask the President's cabinet to search again for relevant text messages, making it clear that the search should not be limited to registered documents or documents that fulfil its recording criteria' so that once identified, an assessment could subsequently take place	
Case T-689 Auken and others v Commission Case T-761/21 Courtois and others v Commission 17 July 2024	Access to the purchase agreements for Covid-19 vaccines, the agreements' provisions on indemnification, and the declarations on the absence of conflict of interest of the members of the negotiating team	The Commission granted partial access, but denied access to certain parts of the agreements and to the personal and professional data of the negotiating team	GC upheld the two actions in part and annulled the Commission's decisions due to irregularities: the Commission did not demonstrate that wider access to documents would actually undermine the commercial interests of the undertakings, and did not take sufficient account of relevant circumstances when denying access to personal and professional data of the negotiating team	See statement by the Commission on the General Court's judgments on the access to documents cases concerning the purchase agreements for COVID-19 vaccines, 17 July 2024
EO Case SI/4/2021/MIG	- strategic initiative to establish good practice guidelines on modern		EO made specific recommendations concerning document management rules and	

	communication tools such as text and instant messages - ended in July 2022		practices, including the ever-increasing use of text and instant messaging	
EPPO investigation on the acquisition of COVID-19 vaccines in the EU	- Started in October 2022 - including on the allegations of deleting SMS text messages between President von der Leyen and Pfizer's CEO Albert Bourla			
EO Case 66/2016/DK			EO argued that an institution may ask a staff member provide copies of substantive work-related emails sent to or from the staff member's private email account	
EP 2023 own-initiative report on access to documents	Called Commission to register text messages and adapt internal guidelines			
EO Recommendation in Case OI/2/2017/TE of 9 February 2018, own-initiative strategic inquiry on the transparency of the Council legislative process EP resolution of 17 January 2019 on the Ombudsman's strategic inquiry OI/2/2017 on the transparency of legislative discussions in the preparatory bodies of the Council of the EU	EO recommendations issued in February 2018: - systematically record the identities of Member States' positions in preparatory bodies - criteria for the application of the 'LIMITE' - review it - list all types of documents in the Council's public	The EP fully supported EO recommendations in its 2019 resolution The Council took some transparency steps in 2020, including by proactively publishing progress reports on negotiations on draft laws		

	register (for ex. working documents) - improve the user-friendliness of the register and of the search function - develop a dedicated and up-to-date webpage for each legislative proposal			
EO Decision in Case 2273/2018/MIG of 3 February 2021 (on Frontex's public register of documents) + EP resolution of 10 February 2021 on public access to documents	Frontex: - lack of public register of documents - no information on sensitive documents EO suggested to - create public register - publish the number of sensitive documents it holds that are not included in the register	Frontex accepted		
EO Recommendation in Cases 1261/2020/PB and 1361/2020/PB of 21 June 2022 (on how Frontex communicates with citizens in relation to its access to documents portal)	Frontex refusal to accept requests for access to docs by email EO recommended - to accept emails	Fontex rejected EO recommendations		

	- to publish a manual on access to documents			
EO: - Case 1647/2023/NH (on how the Commission dealt with a request for public access to documents concerning its online directory of EU staff); - Case 1983/2023/ET (on the Commission's decision to no longer publish the names of all EU staff members in the online directory of EU staff)	- November 2023 inquiry on Whoiswho and on the exclusion of the names of all EU staff members from the online directory of EU staff, which now contains only senior managers - Inquiry in process			
EO Practical recommendations for public officials' interaction with interest representatives, Correspondence of 24 May 2017, Case SI/7/2016/KR	Calendar of officials and their scheduled meetings with interest representatives: - EO May 2017: practical advice for public officials' interaction with interest representatives - EO 2019 strategic inquiry on the bodies involved in preparing Eurogroup meetings: with good practices to promote proactive transparency - EP (calls for) reforms in the reports by INGE, ING2, access to documents reports: strengthen			

	transparency including of meetings			
Case C-213/15 P Commission v Breyer EP resolution of 13 July 2023 on public access to documents	Live-streaming CJEU hearings and access to written submissions of Member States for court proceedings before the CJEU: - Access Regulation is not applicable to Court documents in an explicit or direct manner - CJEU broadcasts the delivery of its judgments and the reading of the Advocate Generals' opinions live on its website (but are not retrievable after) - EP 2023 resolution complimented the CJEU and called for all hearings to be broadcasted live			CJEU affirmed that - the Access regulation applies to applications for access to written submissions that have been drawn up by a Member State for the purpose of court proceedings before the EU judicature and are in the possession of the Commission - they are documents that can be accessed under the Access Regulation without undermining the protection of court proceedings

Upon request of the Committee on Petitions (PETI), the Policy Department for Citizens' Rights and Constitutional Affairs commissioned the present study on Regulation 1049/2001 on access to documents with a twofold objective. First, to update the analysis conducted in a 2016 study for the PETI Committee with the latest developments in the case law of the CJEU and the activities led by the European Ombudsman since then – in particular focussing on access to legislative documents, documents relating to administrative proceedings, Court proceedings, infringement proceedings, protection of privacy, international relations, and special regimes. Second, to assess the possible future alignment of the Access Regulation with the evolving digital context, including a potential revision of the definition of document, access to user-friendly public registers and internet sites, access to agendas of officials and scheduled meetings with interest representatives, and access to videos of CJEU oral hearings. The research also incorporates illustrative and complementary cases and own initiatives by the European Ombudsman as indications of evolving challenges to institutional secrecy in the EU context.

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