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## Transparency requirements in the course of a legislative procedure: *Council v. Access Info Europe*

Case C-280/11 P, *Council of the European Union v. Access Info Europe*, Judgement of the Court (First Chamber) of 17 October 2013, nyr

### 1. Introduction

Can the identity of EU Member States be hidden from public view during the legislative process? In this judgment, the Court of Justice had the opportunity to consider and clarify the extent of the transparency duty imposed by Regulation 1049/2001,<sup>1</sup> where the centralised institutions are acting in their legislative capacity. The appeal, brought by the Council against the decision of the General Court of 22 March 2011<sup>2</sup> posed the question of whether, under Article 4(3) of the Regulation,<sup>3</sup> the Council could refuse access to those parts of Council documents that disclosed the identity of Member States, who had submitted proposals that sought to amend draft Commission legislation. Specifically, the Commission legislation at issue was a proposal to recast Regulation 1049/2001 itself.

The Court of Justice, affirming the position adopted by the General Court answered this question in the negative. Supporting the view that the broad purposes outlined in recitals 1 and 2 of the Regulation<sup>4</sup> require that the principle of transparency should generally be prioritised over concerns about the effectiveness of the decision-making process, the appeal was dismissed. Furthermore, reiterating the reasoning that it had provided in *Sison v Council*,<sup>5</sup> *Sweden and Turco v Council*,<sup>6</sup> *Sweden and Others v API and Commission*,<sup>7</sup> and *Sweden v My Travel and Commission*,<sup>8</sup> the Court concluded the exceptions provided in the Regulation, such as they permit derogations from the principle of 'widest possible access to documents' contained in Article 1, must be interpreted and applied strictly. Thus, where access is refused, the institution concerned must provide compelling reasons for why disclosure of the requested information would impact specifically on the interest that is protected by the exception invoked under Article 4. Further, as per *Sweden v My Travel and Commission*,<sup>9</sup> the reasons should detail explicitly how the risk identified is both real and reasonably foreseeable.

It is ironic that – as was referred to in the judgment – the information the Council refused to provide in this case, and which it has since fought to remain secret through the EU's judicial processes, has nevertheless been publicly available since 26 November 2008, albeit as a result of

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<sup>1</sup> 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, O.J. 2001, L 145/43.

<sup>2</sup> Case T-233/-09 *Access Info Europe v. Council of the European Union* [2011] ECR II-1073.

<sup>3</sup> 'Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.'

<sup>4</sup> Recital 1: 'The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen' and Recital 2: 'Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system...'

<sup>5</sup> Case C-266/05 P *Sison v Council* [2007] ECR I-1233, para. 63.

<sup>6</sup> Joined Cases C-39/05 P and C52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, para. 36.

<sup>7</sup> Case C-523/07 P *Sweden and Others v API and Commission* [2010] ECR I-8533, para. 73.

<sup>8</sup> Case C-506/08 *Sweden v My Travel and Commission* [2011] ECR I-6237, para. 75.

<sup>9</sup> *Ibid*, para. 76.

unauthorised disclosure by the organisation Statewatch.<sup>10</sup> Notwithstanding this fact (which the Council claims it was unaware of at the time it took the contested decision), the Council maintains that Member State delegations must be allowed to submit proposals for amendments to legislation in secret, since the public pressure that would result from disclosure would bind those delegations to the positions submitted, thus debilitating the process of achieving consensus later on.

The stark contrast between the positions taken by the Court of Justice and the Council in this case reveal interesting, divergent approaches to transparency in the process of EU integration. On the one hand, contrary to the position adopted by the Council, it is almost impossible to quantify the realistic possibility of legislative breakdown, which perhaps suggests an intention to forestall further expansion of the scope of the Regulation, along with a desire to roll back the substantive reach of the general principle of openness that it arguably embodies. Further, the Council's position exposes its willingness to resort to a diplomatic culture of secrecy,<sup>11</sup> precisely at the moment when citizens (should) have an ever interest in the positions adopted by their representatives, thus casting a shadow over the notion that legislative transparency can or will promote further accountability in the EU's decision-making processes.<sup>12</sup> The Court of Justice, on the other hand, appears equally determined to rigidly adhere to the position it adopted in the *Turco* and *My Travel* decisions and the 'spirit' of the original Regulation. Here, it effectively determined that the general principle of openness underpinning the Regulation could itself be invoked as an overriding public interest requiring disclosure, since it 'enables citizens to participate more closely in the decision making process and guarantees that the administration enjoys greater legitimacy...'<sup>13</sup> This stance reveals the Court's trenchant unwillingness to proffer a graduated interpretation of the transparency principle, wise to its nuances and transaction costs.<sup>14</sup> Recalling that the original document requested in this case pertained to possible reforms to the transparency Regulation itself, the commitment displayed by the Council and the Court to their vehemently opposing and entrenched policy positions, suggests that EU transparency may have already reached its high-water mark if the Council is determined to revisit the scope of the Regulation in this way.

## 2. Facts

Access Info Europe is a civil society organisation established in Madrid, which according to its mission statement, is 'working to advance openness, transparency and the right to know'. On 3 December 2008, it applied to the Council under Regulation 1049/2001 for access to a note of 26 November 2008, from the General Secretariat to the Working Party that had been set up by the

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<sup>10</sup> Accessible at <http://www.statewatch.org/news/2008/dec/eu-access-to-docs-16338-08.pdf>, (accessed 12/11/2013).

<sup>11</sup> See for instance, Christiansen & Vanhoonacker, "At a critical juncture? Change and continuity in the institutional development of the council secretariat", 31(4) *West European Politics* (2008), 751. Historical institutional accounts of institutional development in the EU would suggest that continuity in institutional culture can be explained by the phenomenon of path-dependency, which is influenced heavily by prior institutional choices and the inertia of bureaucratic/regulatory processes.

<sup>12</sup> Cross, "The seen and the unseen in legislative politics: explaining censorship in the Council of Ministers of the European Union", 21(2) *Journal of European Public Policy* (2014), 268; Lindstedt & Naurin, "Transparency is not enough: making transparency effective in reducing corruption", 31(3) *International Political Science Review* (2010), 301.

<sup>13</sup> *Turco*, op.cit. note 6, para. 45.

<sup>14</sup> Heald, "Varieties of Transparency?", in Hood & Heald (Eds.), *Transparency: The Key to Better Governance* (OUP, 2008), pp. 25-43.

Council in connection with the amendment of that very Regulation. The requested document contained certain proposals for amendments, or for re-drafting, submitted by the delegations of a number of Member States at a meeting of the working party held on 25 November 2008.<sup>15</sup>

On 17 December 2008, the Council provided partial access to the requested document, having censored all references to the identity of the Member States who had submitted proposals. The Council cited, by means of justification, ‘the risk of seriously undermining the Council’s decision-making procedure [which] is reasonably foreseeable and not purely hypothetical’.<sup>16</sup> The Council claimed that disclosure would seriously undermine the decision-making process and that there was no public interest in disclosure, pursuant to Article 4(3) of Regulation 1049/2001.<sup>17</sup>

The Council’s position was further confirmed by a Decision adopted on 26 February 2009, (‘the contested decision’) pursuant to a confirmatory application made by Access Info Europe under Article 7 of the Regulation.<sup>18</sup>

### 3. Decision of the General Court

Access Info Europe brought proceedings in the General Court for annulment of the contested decision on the basis of a breach of Article 4(3) of the Regulation and for the Council’s failure to state sufficient reasons for its decision.

On 22 March 2011, the General Court upheld the action for annulment, having regard to the broad principle of the ‘widest possible’<sup>19</sup> access set out in the recitals to the Regulation and in Article 1 thereof,<sup>20</sup> it stated that exceptions to access can only be justified where an interest protected by an exception is actually and specifically undermined.<sup>21</sup> The Court emphasised the ‘effective exercise of their [citizens] democratic rights’,<sup>22</sup> and that a document concerning an interest protected by an exception does not provide sufficient reasoning, in and of itself, to justify application of that exception<sup>23</sup>. The General Court relied on its own previous jurisprudence and that of the Court of Justice of the EU (CJEU) to emphasise the democratic and participatory nature of the Regulation. The Council, in seeking to rely upon the exception in Article 4(3), must show the necessary ‘legal and factual standard’, and the Court was not swayed by the Council’s generic argument (supported by Greece and the UK) that discussions were ‘particularly sensitive’ in relation to this topic.<sup>24</sup>

The Court similarly dismissed the Council’s assertion that damage to the decision-making process was in fact reasonably foreseeable and not purely hypothetical.<sup>25</sup> Given that the discussions were still at an initial stage, the Court did not find that the process was at such a stage that the positions of the delegations could be entrenched.<sup>26</sup> The Court gave short shrift to the assertion by

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<sup>15</sup> Judgment of the CJEU, para. 5.

<sup>16</sup> *ibid*, para 10.

<sup>17</sup> *ibid*, para. 7.

<sup>18</sup> Where an institution has made a total or partial refusal, the applicant may, within 15 days of receiving a negative response, make a confirmatory application requesting that the institution concerned reconsider its position.

<sup>19</sup> Judgment of the General Court, para. 56

<sup>20</sup> *Ibid*, paras. 55-58.

<sup>21</sup> *Ibid*, paras. 59-60.

<sup>22</sup> *Ibid*, para. 57.

<sup>23</sup> *Ibid*, para. 59.

<sup>24</sup> *Ibid*, para 46.

<sup>25</sup> *Ibid*, para. 59.

<sup>26</sup> *Ibid*, para. 67-68.

the Council that disclosure of the identity of the Member States would result in public pressure to prevent any 'proposal tending towards the restriction of openness'.<sup>27</sup> Tellingly, the Court also stated that, 'By its nature, a proposal is designed to be discussed, whether it be anonymous or not, not to remain unchanged following that discussion if the identity of its author is known. Public opinion is perfectly capable of understanding that the author of a proposal is likely to amend its content subsequently'.<sup>28</sup> The Council had not engaged the procedure for defining the document as 'sensitive', as the Regulation permits in Article 9. In finding that the Council infringed the first subparagraph of Article 4(3) of the Regulation by precluding the disclosure, the Court did not find that it was necessary to assess whether there was an overriding public interest justification.

The Council sought leave to appeal to the Court of Justice. The opinion of Advocate General Cruz Villalón was delivered on 16 May 2013.

#### **4. Opinion of the Advocate General**

In his opinion, Advocate General Cruz Villalón helpfully amalgamated the various strands of the Council's appeal into one core argument, namely the failure to apply the Article 4(3) exception correctly, as a result of a failure to appropriately balance the relevant interests. He noted that the appeal rested on whether or not the General Court had adopted the correct interpretation of Article 4(3), highlighting that the Council's second and third grounds of appeal (alleged inconsistency with the case-law of the Court of Justice, and alleged error of law) if substantiated, are evidence of a misapplication of exception, rather than two independent grounds of appeal.<sup>29</sup>

Regarding the appropriate balance of relevant interests, the Advocate General began by examining the position of the Council acting in its 'legislative capacity' under primary law. He found that since the Treaty of Amsterdam, the concept of 'legislative' has a specific meaning in the lexis of the EU, where pursuant to Article 207(3) EC, subparagraph 2,<sup>30</sup> the Council was under a duty to define the instances in which it was acting in its 'legislative capacity'. That duty existed precisely to facilitate the effectiveness of Article 255(1), which provided for a right of access to documents of the institutions.<sup>31</sup> As such, in view of the particular importance that the Treaty has given to the concept of legislative capacity, and since the Union has provided access legislation, the right of access must apply precisely when the Council is exercising its legislative authority.<sup>32</sup> This position is further supported by recital 6 of the preamble to the Regulation, which provides that '[w]ider access should be granted...where the institutions are acting in a legislative capacity'.<sup>33</sup>

On the basis of this assessment of the principle of providing access where the Council is acting in a legislative capacity, the Advocate General further established that the Council is acting legislatively, according to its own rules of procedure in force at the relevant time.<sup>34</sup> This 'legislative

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<sup>27</sup> Ibid, para 68.

<sup>28</sup> Ibid, para 69.

<sup>29</sup> Opinion, para. 32 .

<sup>30</sup> Now Article 240 TFEU, however, the subparagraph under discussion here has been removed.

<sup>31</sup> Opinion, para. 39

<sup>32</sup> Ibid.

<sup>33</sup> Opinon, para. 40 .

<sup>34</sup> Opinion, para. 41. Article 7 of the Council's Rules of Procedure stated '[t]he Council acts in its legislative capacity within the meaning of the second subparagraph of Article 207(3) of the EC Treaty when it adopts rules which are legally binding in or for the Member States, by means of Regulations, directives, framework decisions or decisions, on the basis of the relevant provisions in the Treaties...'

capacity' he considered to be analogous to national 'legislative procedure' within the Member States, wherein both processes, 'have in common the need to satisfy the imperative requirements of democratic legitimacy'.<sup>35</sup> Further, the characteristics of Union legislation, namely their general application, binding nature, and ability to override conflicting sovereign national legislation, require 'a certain level of democratic legitimacy and this can only be bestowed by a procedure based on the principles that have traditionally governed the workings of national legislatures that are representative in nature'.<sup>36</sup>

Having clarified the expectation that the Council should maintain the principle of openness, the Advocate General went on to consider the nature of the requested document in light of the wording and purpose of the exception contained in Article 4(3) of the Regulation. Here he accepted that the document was, *prima facie* an internal 'note' that had been drawn up by the General Secretariat for one of the 'Working Parties', such as are mentioned in the Council's internal Rules of Procedure.<sup>37</sup> The document contained 'proposals for amendments, or re-drafting, entered by a number of Member States.'<sup>38</sup> As such, in accordance with the Council's Rules of Procedure, the document could be viewed as a 'document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned', pursuant to Article 4(3).<sup>39</sup>

Nevertheless, the Advocate General proceeded to distinguish between 'ordinary' internal use and internal use as part of a legislative procedure, which, irrespective of the stage at which it occurs in the negotiation process, is legislative all the same. Further, he argued that the scope of the exception in Article 4(3) is scarcely appropriate in the context of a legislative procedure, where it might even be said that there can be no such thing as an 'internal opinion'.<sup>40</sup> Therefore, whilst the exception might not be *a priori* inapplicable to the Council's legislative procedure, when making an assessment of the likelihood of disclosure causing serious harm versus the existence of an overriding public interest in disclosure, the scale is tipped in favour of the latter.<sup>41</sup>

The Advocate General thus concluded that in balancing the relevant interests, the General Court appropriately considered the range of competing considerations, determining that the applicant should be given access to the names of Member States who had submitted the various proposals contained in the note. In doing so, he further reiterated his opinion that the legislative process must be public, dismissing the submissions of intervening Member States before the General Court, who argued that transparency, and democratic debate were ensured by granting access to the material content of the proposals. The Advocate General concluded that this was a barrier to accountability,<sup>42</sup> as such, a general refusal to provide the identity of Member States in submitting amendments as part of a legislative procedure cannot be accepted.<sup>43</sup>

In approaching the second and third grounds for appeal, the Advocate General expeditiously found no inconsistency with the previous case law of the Court of Justice. Though the Council

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<sup>35</sup> Opinion, para. 42.

<sup>36</sup> Opinion, para. 43.

<sup>37</sup> Article 19(3) 'committees or working parties may be set up by, or with the approval of Coreper, with a view to carrying out certain preparatory work or studies defined in advance.'

<sup>38</sup> Opinion, para. 48.

<sup>39</sup> Opinion, para. 49.

<sup>40</sup> Opinion, para. 51.

<sup>41</sup> Opinion paras. 52-53.

<sup>42</sup> Opinion paras. 63-71.

<sup>43</sup> Opinion, paras. 59-60.

alleged that it could rely on general, rather than specific, reasons to refuse disclosure, the Advocate General highlighted that this was a rebuttable presumption that relates only to certain documents belonging to a particular 'class', where disclosure would affect the procedure to which those documents belong. Further, the contested document did not belong to a category of documents for which there is a presumption against disclosure; rather the Council had submitted that it should not be disclosed because of its particularly sensitive nature.<sup>44</sup>

Finally, in respect of the alleged errors of law, the Advocate General concluded that the General Court had appropriately considered the state of progress of discussions to which the contested document related, along with its purported 'sensitive nature'. Further, the General Court had correctly applied the law, requiring the Council to evidence actual harm to the interest protected by the exception it had tried to invoke.<sup>45</sup>

## 5. Judgment of the Court

In its judgment, the Court dismissed all the grounds of appeal brought by the Council (and supported by several Member States) against the judgment of the General Court. The Court relied, like the Advocate General, on the broader legal context in which Regulation 1049/2001 operates, i.e. to give effect to the commitment made in Article 1 TEU. This Court did not however make reference to the Council's 'legislative capacity' in primary Union law. The Court's judgment differs from the Advocate General's opinion in that greater reliance is placed on the Court's recent case law from 2008 (*Sweden and Turco; Sweden v Commission* and *Sweden v MyTravel*) to show the consistency of its approach in interpreting and applying exceptions to the principle of the widest possible public access strictly. Pursuing the now established reasoning it presented in the various Swedish cases, the Court found that the application of the exceptions provided for in Article 4 of the Regulation are to be applied restrictively. The institution concerned must in principle explain how the disclosure would specifically and actually undermine the interest that is protected by the exception, and further, the institution concerned must weigh the particular interest to be protected against the public interest in the document being made accessible.<sup>46</sup>

The Court then proceeded to rebut the Council's claim that the General Court had failed to adequately weigh the risk to its decision-making processes. The Court also rejected arguments made by the Czech Republic and Spain, who claim that the content of the proposals was disclosed, thus guaranteeing the objective set out in recitals 1 & 2 of the Regulation. By refusing to disclose the identities of the delegations submitting those proposals, the Court found that the disclosure fell short of conferring as 'wide a right of access as possible'.<sup>47</sup> Here the Court does not render its reasoning as explicit as that provided by the Advocate General: '[d]emocratic political debate involves, above all, accountability; and to have accountability it is essential to know the identity of those participating in the debate, and in particular, the terms on which they are doing so.'<sup>48</sup> Nevertheless, both appear to assume a symbiotic relationship between transparency and accountability, stemming from recital 2 of the Regulation, since both conclude that partial disclosure fails to obtain the objective inherent in Regulation 1049/2001.

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<sup>44</sup> Opinion, paras. 74-78.

<sup>45</sup> Opinion, paras. 79-84.

<sup>46</sup> Judgment, paras. 27-32.

<sup>47</sup> Judgment, para. 40.

<sup>48</sup> Opinion, para. 71.

Rejecting the first ground as unfounded, the Court of Justice considered next the Council's third ground of appeal, namely that the General Court erred in law. The Court of Justice dismissed this as a misreading by the Council of the judgement under appeal, finding the ground for appeal to be partly unfounded and partly inadmissible.<sup>49</sup> The Council had attempted to submit here that lengthiness of the legislative procedure in question was evidence of the sensitive nature of the requested document. As such the General Court had erred in suggesting that this could be accounted for by a range of political and legal factors stemming from the passage of the Lisbon Treaty. The Council, for its part, submitted to the Court of Justice that the delay was attributable, at least in part, to a decline in candour and completeness of discussion in the working parties following the unauthorised disclosure, which had diminished the effectiveness of the decision-making process within the Council.<sup>50</sup> The Council further suggested that the delay over the legislative dossier was attributable also, at least in part, to the fact that Member States found it difficult to move beyond their initial negotiation positions following the unauthorised disclosure.<sup>51</sup>

The Council's arguments here point essentially, as indicated by the Advocate General, to the suggestion that the General Court failed to adequately take into account the nature of the risk of disclosure on the effectiveness of the decision-making process. The Court of Justice adopted a strict reading of the Regulation; it stated that there is nothing in the exception that would justify non-disclosure on the basis of the preliminary nature of the discussions.<sup>52</sup> Further, the Court of Justice then relied on Article 256 TFEU and its own settled case-law, to argue that the General Court had exclusive jurisdiction to make findings of fact.<sup>53</sup> It had exercised that jurisdiction in finding that the Council's submissions did not establish that its decision-making process had been undermined. Accordingly, since the Council had not submitted, nor did the Court accept, that there had been a clear distortion of evidence, there was no point of law to answer and the ground was therefore partly inadmissible.<sup>54</sup>

Finally the Court of Justice considered the Council's second ground of appeal, namely that the General Court erred in not finding that the Council was able to rely on general considerations as justification for refusing access to the requested document. Here, the Court determined that institutions are in fact allowed to base non-disclosure decisions on general presumptions applying to certain categories of document, since similar general considerations are likely to apply to requests for disclosure for documents of a similar nature. Nevertheless, the Court went on to find that the reasons provided by the Council to the General Court, in respect of needing to protect the delegations' room for manoeuvre, did not constitute a sufficient basis for the application of the exception under the first paragraph of Article 4(3).<sup>55</sup> Accordingly, the appeal was dismissed.

## 6. Commentary

The outcome of *Council v Access Info Europe* is interesting for three principal reasons which merit comment here. First, with only a limited number of opportunities to consider the exceptions to

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<sup>49</sup> Judgment, paras. 58, 61 & 68.

<sup>50</sup> Judgment, para. 49.

<sup>51</sup> Judgment, para. 50.

<sup>52</sup> Judgment, para 60.

<sup>53</sup> Case C-510/06 P *Archer Daniels Midland v Commission* [2009] ECR I-1843, para. 105; Case C-626/10 P *Agapiou Joséphidès v Commission and EACEA* [2011] ECR I-169, para. 107.

<sup>54</sup> Judgment, para. 65.

<sup>55</sup> Judgment, para. 74.

transparency provided under Regulation 1049/2001, the Court has clarified for the first time the quality of reasoning that must be supplied by the institutions when they invoke Article 4(3) in the context of a legislative procedure. Second, on a related but distinct point, the decision can be characterised as an emphatic defence by the Court of the general principles underpinning Regulation 1049/2001 and the legislative-administrative distinction. This is particularly significant given the reform process of the Regulation itself which formed the backdrop to the case, a process that has been forestalled by much political disagreement and controversy. Finally, the arguments used by the Council, and the response by the Court of Justice bring into focus the factors at play in the potential recasting of the Regulation and transparency in the EU.

a. *The nature and effects of article 4(3) in relation to 'legislative' documents.*

Both the General Court and the Court of Justice concluded that the Council had not established to the requisite standard that its decision-making process would be adversely affected by disclosure of a document that detailed the positions of Member State delegations in relation to a legislative proposal. In doing so, the Court of Justice has aligned the standard for exceptions under Article 4(3) with its settled case-law on the exception relating to legal advice provided in Article 4(2).<sup>56</sup> What is therefore notable about this case is the similar line of reasoning pursued by the General Court, the Advocate General and the CJEU itself. This can be contrasted with both *Sweden v Turco* and *MyTravel*, where the Court of First Instance (as it was) and CJEU reached different results, with the CJEU being markedly less impressed by what it saw as the 'general' arguments made by the Council, in respect of the need to protect its documented legal advice from 'external pressure'.<sup>57</sup> Following the *MyTravel* litigation, the General Court was required to address the exception in article 4(3) for the first time in *Muñiz*,<sup>58</sup> which was not subsequently appealed. In *Muñiz*, the General Court seemed more reluctant to accept the Commission's arguments that its decision-making process would be concretely and effectively undermined, if it were required to disclose documents relating to the preliminary meetings of a working group, pursuant to an ongoing legislative procedure. It classified the Commission's arguments in this matter as predominantly procedural and stated that there would need to be evidence of external pressure. The General Court does not go as far as the Court of Justice later does when it attempts to disassociate the act of disclosure from any resultant

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<sup>56</sup> *Sweden and Turco v Council*, supra n.6; *Sweden v MyTravel & Commission*, supra n.8. In these cases, the General Court had made a distinction between legal advice made pursuant to a legislative procedure, and legal advice made pursuant to an administrative procedure, arguing that the Regulation required greater openness in the case of the former. The Court of Justice modified this position in *MyTravel*, determining that full access should in principle also be provided where an administrative process has ended. Article 4(2) provides for a number of exceptions based on categories of document, including the protection of "commercial interests of a natural or legal person, including intellectual property; court proceedings and legal advice; the purpose of inspections, investigations and audit." The exceptions in Article 4(2) are mandatory, in the sense that the institutions concerned must refuse disclosure where the interest concerned would be undermined. In the case law of both the Court of Justice and the General Court however, the institution seeking to rely on one or other of the exceptions has been procedurally required to show that it has conducted a 'concrete and individual examination' of the documents concerned, Case T-380/04, *Terezakis v Commission*, ECR II-11; Case T-237/05 *Editions Jacob v Commission*; Case T-111/07 *Agrofert Holdings v Commission*. Further, in *Sweden & API v Commission*, supra n.7, both courts reiterate that although the 'overriding public interest' element of the exception should be distinct from the general requirement of openness underpinning the Regulation, the requirement of openness itself may become overriding in the particular circumstances of the case.

<sup>57</sup> See Arnall, 46(2) CMLRev, p. 1228 et seq.

<sup>58</sup> Case T-144/05 *Muñiz v Commission* [2008] ECR II-335.

pressure, but this nevertheless seems to be the point at which judicial interpretation in both courts begins to align. *Muñiz* is not cited by the General Court in the *Access Info Europe* decision.

As the Advocate General stated, *Access Info Europe* was the first opportunity to consider the precise extent of duty to ensure transparency on institutions where they are acting not only in their legislative capacity (as in *Sweden and Turco v Council*) but in the course of a legislative procedure. As such, the judgment does not refer extensively to other case law and is distinguished from *Turco*<sup>59</sup> save for where it helps fuse legislative procedure and legislative capacity within a general meaning of 'legislative'.<sup>60</sup> The Advocate General provides some robust comments and insight into how the concept of acting in a legislative capacity is to be understood in the Treaties. Concluding that although the Council's *modus operandi* in legislative terms may characteristically be described as intergovernmental, the Union's own legislative process should be viewed as entirely analogous to the process that takes place in the Member States, as such it is fundamentally bound by the same standards of democratic legitimacy, thus necessitating the fullest possible transparency.

#### b. The 'legislative' and 'administrative' distinction

In the light of this judgment, the legislative procedure cannot be seen as a narrowly defined concept. As a related issue, *Access Info Europe* is also helpful in terms of our understanding of the differences between 'legislative' and 'administrative' in the post-Lisbon legal order of the EU. As the Advocate General succinctly explained as a justification for a wide concept in terms of legitimacy, '[I]n the context of this public procedure, transparency therefore plays a key role that is somewhat different from its role in administrative procedures. While, in administrative procedures, transparency serves the very specific purpose of ensuring that the authorities are subject to the rule of law, in the legislative procedure it serves the purpose of legitimising the law itself and with it the legal order as a whole'.<sup>61</sup> Whilst the Court did not repeat verbatim such a formulation in its decision, the overall tone of the Court's dicta in its rebuttal of the Council's arguments, exhibits just such an understanding of the legislative. The Court's reference to recitals 2 and 6 of Regulation 1049/2001 and the 'particular relevance' of citizens' participation in the decision-making processes, casts a large net over what is caught by 'legislative' and the legitimising effect that this wider access has.<sup>62</sup>

This point is also supported by the continuing theme detectable in the Court of Justice's reasoning which comes to the fore in *Access Info Europe*. Both the *Turco* and *MyTravel* decisions suggest a certain ambivalence by the Court towards any sensitivities underlying the tense political consensus that has influenced much of the wording of the Regulation,<sup>63</sup> focussing intently on the legitimacy enhancing potential of the Regulation in enabling citizens to participate more closely in the life of the Union. This is not the case in *Access Info Europe*, as demonstrated by the Court's rebuttal of the Council's arguments.

This consistency – and strengthening of the language – might suggest that the Court is acting as the 'saviour' of the spirit of the transparency Regulation, a discussion which is addressed in the following section. However, for Arnall, the failure to give appropriate consideration to the

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<sup>59</sup> Judgment, para. 5.

<sup>60</sup> Ibid. para 42.

<sup>61</sup> Opinion, para 64.

<sup>62</sup> Judgment, paras. 32 & 33.

<sup>63</sup> The nature of the political compromise underpinning the terms of the Regulation was specifically highlighted by Denmark in Case C-64/05 P, *Sweden v. IFAW*, [2007] ECR I-11389, para. 33.

Regulation's underlying political sensitivities was a notable weakness in the reasoning of the General Court, insofar as it is indicative of a failure to balance competing considerations that might tend towards non-disclosure. This is particularly the case when considered alongside basic principles that the Court has established in the interpretation of the exceptions, which themselves already seek to maximise openness.<sup>64</sup> Nevertheless, whilst there might be compelling reasons for which the confidentiality of legal advice given in the course of a legislative procedure ought to be protected, in the interests of ensuring both candour and effectiveness,<sup>65</sup> the same weight cannot be attached to the submissions of delegations of the Member States. The most compelling and frequently cited argument is that the practice of the Council's Legal Service will shift towards providing more oral and less candid advice, which cannot later be disclosed in a request for documents, and which would have the consequence of diminishing the effectiveness of the service. This is however an argument that has been received with some scepticism. Arnall's own variation of this argument pertains to the nature and format of the Council Secretariat's legal advice and the circumstances in which it is given. He believes that such advice is best characterised in terms of the principle of professional privilege, which underpins the very existence of Article 4(2) and the exception contained therein. In addition, he believes that given the detailed and technocratic nature of such advice, its disclosure would contribute little, if anything to promote legitimacy in the eyes of EU citizens.

Nevertheless, here the parties are engaged in an entirely politically motivated, and fundamentally deliberative, process of establishing the scope of the provisions of a new legislative act, which – according to one reading of the general principles established by the Regulation - should take place publicly. Allowing Member State delegations to submit proposals in secret risks that they subsequently seek to evade national accountability, it may also de-legitimise their role as Member State representatives by allowing a culture of diplomacy to prioritise expediency over openness, honesty and fairness. Indeed, when operating under a veil of secrecy, it appears that the capacity to act deceitfully correspondingly increases the temptation to do so, a phenomenon in which certainly national ministers appear to have form, as the earliest (pre-Regulation 1049/2001) litigation on transparency lays bare.<sup>66</sup>

Notwithstanding these concerns, some commentators have highlighted that fundamentally legislative activities in Council still take place in a setting that is also highly politically sensitive. This can have serious transaction implications for the positions submitted by delegations, which may become subjugated by the cat-calls of savvy interest groups.<sup>67</sup> The Court however has chosen to place minimal, if any emphasis, on arguments raising such concerns, reasoning steadfastly in favour of openness. Equally steadfastly, the Council persisted here in submitting in its defence, an argument framed in almost identical terms to that which had been used by the Commission in the *Turco* decision:

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<sup>64</sup> Arnall, *op. cit.*, n.57, at p. 1231.

<sup>65</sup> see Arnall, *ibid.*

<sup>66</sup> See Case T-194/94 *Carvel v Council of Ministers* [1996] All ER (EC) 53 at 62, where the Council submits that its working practices are characterised by “negotiation and compromise, in the course of which its members freely express their national preoccupations and positions. It is essential that those positions remain confidential, particularly if members are forced to move away from them in order that agreement may be reached, sometimes to the extent of abandoning their national instructions...”

<sup>67</sup> This point is raised by Birkinshaw, “Transparency and Access to Documents”, in Birkinshaw & Varney (Eds.) *The European Legal Order After Lisbon*, (Kluwer Law International, 2010), pp. 229-254. See also, Heald, *supra*, n.14.

‘More specifically, the Council...argues that its legislative process is very fluid and requires a high level of flexibility... That room for manoeuvre would be reduced if the identity of delegations were disclosed too early in the procedure, in that it would have the effect of triggering pressure from public opinion, which would deprive the delegations themselves of the flexibility needed to ensure the effectiveness of the Council’s decision-making process.’<sup>68</sup>

In *Turco* the Court had responded to this argument by deftly sidestepping whether increasing transparency might result in public pressure damaging the effectiveness of the legislative procedure, by establishing a rigid, if also artificial, distinction between the act of disclosure and the risks associated with any public pressure resulting from it:

‘It would be that pressure, and not the possibility of the disclosure of legal opinions, which would compromise that institution’s interest in receiving frank, objective and comprehensive advice... As regards the Commission’s argument that it could be difficult for an institution’s legal service, which had initially expressed a negative opinion regarding a legislative act...subsequently to defend the lawfulness of that act...it must be stated that such a general argument cannot justify an exception to openness provided for by Regulation No. 1049/2001.’<sup>69</sup>

Here, somewhat predictably, the Court gives the Council’s effectiveness arguments equally short shrift. It determines that the General Court had found that none of the Council’s substantive arguments could ‘prove that disclosure of the information relating to the identity of the Member States in question would have given rise to a genuine risk of seriously undermining the interest protected by the exception...’,<sup>70</sup> adding curtly that: ‘Moreover, to the extent that the Council’s criticism could be seen as an attempt to put in question the General Courts assessment of those arguments, it must be state that the council does not, in support of this ground of appeal, put forward anything to refute the General Court’s conclusion...’<sup>71</sup>

Overall, whilst it can be appreciated that in the instant case, the risk of Council delegations speaking with ‘two tongues’ is likely to tip the scales in favour of openness, the implications of this judgement, when read with alongside the *Turco* decision, reveal that there are very few appreciable circumstances in which the Council ordinarily could refuse to disclose any document that has been drawn up in its legislative capacity. This demonstrates something of an extreme interpretation of recital 6 of the Regulation’s preamble: ‘Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity...while at the same time preserving the effectiveness of the institutions’ decision-making process.’<sup>72</sup>

Indeed, the prioritisation of recitals 1 & 2 indicates a failing of the Court to appreciate the nuanced implications of transparency in different circumstances. Transparency as democracy may very well exist for the purposes of facilitating better decisions, but it ought not to be judicially endorsed as a mechanism of public control that is an end in itself. Deferring to populism is a guarantee only of decision-making that satisfies the lowest common denominator.<sup>73</sup> In addition, the Court’s continuing willingness to default to a simplistic interpretation of the relationship between transparency and legitimacy, in which the two are characterised as symbiotic, wilfully ignores

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<sup>68</sup> Judgment, para 24.

<sup>69</sup> Judgment, para. 64 & 65.

<sup>70</sup> Judgment, para 38.

<sup>71</sup> Judgment, para 39.

<sup>72</sup> Emphasis added.

<sup>73</sup> Schauer, “Transparency in Three Dimensions”, 4 University of Illinois Law Review (2011), p. 1348 et seq; Etzioni, “Is Transparency the Best Disinfectant?”, 18(4) Journal of Political Philosophy, (2010), p. 389.

institutional evidence outlining the limits of the Regulation in terms of its capacity to enhance citizen participation.<sup>74</sup>

Bearing these considerations in mind, the approach of Advocate General Maduro in *Turco*, highlights how it would be possible for the Court of Justice to take a more sophisticated or nuanced approach in its interpretation of the Regulation, balancing openness with political realities. In line with the previous jurisprudence of the Court of Justice, the Advocate General finds that transparency has acquired the status of a fundamental right and that secrecy can only be justified to the extent that it upholds the public interest in justifying derogation from the principle of transparency.<sup>75</sup> He then determined that the institution subject to the request must assess the likelihood of whether the requested document would ‘specifically and actually undermine the protected interest,’ the risk must be reasonably foreseeable and not purely hypothetical.<sup>76</sup> Beyond this, once the Court has established that an individual assessment of the requested document had been carried out, which identified the extent to which it falls within the scope of the relevant exception, it should be aware of the rationale underlying political choices made on the part of the Community legislature when it drafted the exceptions enumerated in the Regulation.<sup>77</sup>

Though Advocate General Maduro was specifically assessing the scope of the exception contained in article 4(2), rather than the more broadly framed article 4(3) which concerns us here, it is apparent that there is significant overlap in the rationale underpinning both exceptions, since both concern EU institutions being furnished with frank, objective and comprehensive opinions to facilitate the legislative process. On the basis of that assessment, it is to be recalled that the Council in this instance assessed the requested document and disclosed to the applicant association the content of the delegations’ proposals to the working party, redacting only the names of those delegations for the purpose of ensuring their continued candour.

Notwithstanding any potential technical and substantive shortcomings that may characterise the Court’s approach to the exceptions in the Regulation, the Court’s position is influenced by the particular institutional context which has enveloped the Union’s approach to transparency and reform of the Regulation on access in particular.<sup>78</sup> Power cleavages within and between the

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<sup>74</sup> Annual reports on the application of Regulation 1049/2001 consistently show that the most active categories of applicants are academics and law firms. In 2012, civil society and other interest groups constituted only 10.32% of applicants, questioning the broader ‘citizen’ reach of the Regulation. Report from the Commission on the application in 2012 of Regulation (EC) No. 1049/2001 regarding public access to European Parliament, Council and Commission documents, COM (2013) 515 final. As early as 2004 the Commission noted that the Regulation served predominantly as an access tool for European specialists. Report from the Commission on the implementation of the principles in EC Regulation No. 1049/2001 regarding public access to European Parliament, Council and Commission documents, COM (2004) 45 final.

<sup>75</sup> Opinion, para. 32

<sup>76</sup> *Ibid.*

<sup>77</sup> Opinion, paras 36-39. This approach seems to have been supported by the General Court when it heard the *MyTravel* case. Taking advantage of the fact that the instant decision related to administrative rather than legislative procedures, the Court appeared to conclude, in relation to the application of article 4(2) that there would be real difficulties caused to the effectiveness of the Commission’s internal decision-making procedure if its legal service chose to confine itself to providing oral advice alone, in order to prevent documentary disclosure, Case T-403/05 *MyTravel*, [2008] 3 CMLR 49, para 54. This position was departed from by the Court of Justice on appeal.

<sup>78</sup> Interestingly, the Court itself has been excluded from the transparency requirements of the Treaties, save for when it is acting in an administrative capacity. Its institutional position is informed extensively, as has been highlighted herein, by the ‘broad logic’ of the Regulation, see *API*, supra n. 7, para. 76. Nevertheless, its own exclusion from the Regulation has resulted in a less stringent approach to the exception in Article 4(2) in

institutions have prevented a successful outcome of negotiations on the content of reform to the Regulation, motivating the Court of Justice to attempt to entrench its own institutional position. This in turn begs the questions as to whether we have already reached the high-water mark for transparency in EU law-making.

c. *The future of the EU transparency Regulation: have we reached the high-water mark?*

Arnull characterised *Turco* as perhaps one of the Court's 'most adventurous decisions to date on public access to documents'.<sup>79</sup> It seems that both the Court and the General Court have followed this line by prioritising the overall aims of the directive over the technical claims as to what 'counts' in terms of legislative procedure. The General Court's explicit point to the ruling in *Turco* supports this assertion, even if it did not underline the consistency of the ruling with previous case law as strongly as the Court of Justice.

The Court however is firmly committed to the articulation of transparency as a principle of wide public access to documents, a vision that was reflected in the positions of the other centralised institutions in an earlier period of EU transparency, which coincided with the introduction of the Regulation. In the context of the Union's ongoing – but also increasingly contested – constitutionalisation, deadlock has stymied further developments in EU transparency policy, but it has also effectively prevented a shifting alliance of Council members from rolling back the frontiers.

As such, the significance of the *Access Info Europe* decision is perhaps less about the text and more about the subtext. The Council's own position on the scope of the exception is remarkably consistent not only with that presented by the Commission in *Turco*, but it reiterates arguments it submitted before the Court of Justice in *Carvel*, the very first 'transparency' litigation emerging from the Joint Code on Access,<sup>80</sup> the precursor to Regulation 1049/2001.

The Council's position on the scope of the exceptions to the Regulation has been compounded in recent years by an observable phenomenon of 'transparency fatigue'.<sup>81</sup> In 2007, the Commission initiated a consultation procedure on the revision of Regulation 1049/2001, as part of a broader re-examination of transparency policy within the Union, eventually producing a draft proposal on the recasting of the Regulation in April 2008.<sup>82</sup> Whilst some expected this to provide a catalyst for renewed change in the Union's transparency Regulation, the outcome of the consultation revealed a degree of inertia amongst Council members, which was reflected in the terms of the Commission's draft proposal.<sup>83</sup> Subsequently, the European Parliament took an informal vote, approving several substantive amendments to the proposal, which the Council

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relation to court proceedings, where it has determined that the 'serenity of the judicial proceedings' need protection from external pressure. The Court is thus quite capable of adopting a nuanced understanding of transparency, though it would appear that the inherently political contexts in which the other centralised institutions operate, and the requirements of democratic legitimacy attendant upon those political environments, weigh heavily in favour of disclosure. See Adamski, "How wide is "the widest possible"? Judicial interpretation to the right of access to official documents revisited", 46 (2) CMLRev (2009), p. 534.

<sup>79</sup> Arnull, *supra* n.57, p. 1238

<sup>80</sup> 93/731/EC OJ L 340/(31 December 1993) and 94/90/ECSC, EC, Euratom OJ 46/58 (18 February 1994)

<sup>81</sup> Hillebrandt, Curtin & Meijer, "Transparency in the EU Council of Ministers: An Institutional Analysis", 20(1) European Law Journal (2013), p. 15 et seq.

<sup>82</sup> Commission proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, COM(2008)229 of 30 April 2008

<sup>83</sup> For an analysis of the proposal see Harden, "The Revision of Regulation 2019/2001 on Public Access to Documents", 15(2) European Public Law (2009), p. 239.

considered procedurally inadmissible, owing to the constraints of the ‘recasting process’.<sup>84</sup> This began a process of institutional deadlock, which was temporarily abated in 2012 when the Council reluctantly recommenced negotiations in order to establish a common position. Those negotiations have since also ground to a halt.<sup>85</sup>

Whilst interventions before the Court suggest that a minority of Council members favour increased transparency, which is supported by the Parliament, there is also evidence of a shift in allegiance amongst the remaining majority. Particularly since *Turco*, a more restrictive interpretation of the Regulation has prevailed, with members such as the UK and France also championing an interpretation of transparency policy generally that is cognisant of potential efficiency and effectiveness trade-offs.<sup>86</sup> The EU institutions and their working logics have changed dramatically since the Regulation was first passed, partly due to the addition of thirteen new Member States and the apparent bringing to the fore a form of ‘new intergovernmentalism’ and bargaining between them.

In addition, the preoccupation amongst Member States working to secure financial stability, particularly within the Eurozone area, has provided further impetus for the Council to resort to a secretive diplomatic culture and modes of working. In this respect, the European Ombudsman found very recently an instance of maladministration, following the Council’s refusal to disclose aspects of the legal advice it had received in relation to Article 8 of the Fiscal Compact Treaty, a provision that would give the Court of Justice oversight of Member State compliance with the ‘balanced budget rule’. The Council in principle sought to distinguish this request from the request made by the applicant in *Turco*, highlighting that the Fiscal Compact Treaty is an intergovernmental agreement, falling outside the scope of the Treaties. It nevertheless proceeded to process the access request on the basis of the principles contained in Regulation 1049/2001, citing the *protection of the financial, monetary or economic policy of the Union* (Article 4(1)(a)) and the protection of legal advice under Article 4(2). The Ombudsman found, pursuant to Article 4(2) of the Regulation, and the jurisprudence of the Court of Justice, that the Council had failed to identify specifically how disclosure would undermine the interest concerned and that it had failed to supply reasons that were ‘foreseeable and not purely hypothetical’. Further, though the interest protected in Article 4(1)(a) is not subject to an overriding public interest test, the Ombudsman found that the Council’s reasoning again failed to identify how disclosure would undermine the interest protected by the exception, the risk of inciting legal or political debate about the Court’s role in overseeing the ‘balanced budget rule’, could not be regarded as undermining the protection of the Union’s economic policy.<sup>87</sup>

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<sup>84</sup> Council, Note on Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission Documents, accessible <http://statewatch.org/news/2009/may/eu-access-reg-council-table-7791-09.pdf> 20 March 2009, (accessed 06/01/2014).

<sup>85</sup> Council, proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, state of play, <http://www.statewatch.org/news/2013/nov/eu-council-access-reg-15698-13.pdf> (accessed 06/01/2014).

<sup>86</sup> Heremans, “Public Access to Documents: Jurisprudence Between Principle and Practice (Between Jurisprudence and Recast”, 50(3) Egmont Royal Institute for International Relations Working Paper (2011), 50(3), accessible <http://www.right2info.org/resources/publications/eu-heremans-tinne-public-access-to-documents> (accessed 06/01/2014)

<sup>87</sup> Decision of the European Ombudsman closing her inquiry into complaint 167/2013/RT against the Council of the European Union, accessible at: <http://www.ombudsman.europa.eu/en/cases/decision.faces/en/53191/html.bookmark>, accessed 21/01/2014

In conclusion, whilst the Court may be criticised on the one hand for failing to afford adequate importance to the sensitive nature of Union political compromise, it must also be congratulated for guarding against the rolling back of transparency gains and for its commitment to ensuring openness, legitimacy and integrity within the closed technocratic machinery of the institutions. As the Advocate General put it, the Court should not be swayed by arguments of political expediency: ‘Inconvenient though transparency may be, when carrying out legislative as well as non-legislative functions, it must be said that it has never been claimed that democracy made legislation ‘easier’, if easy is taken to mean ‘hidden from public scrutiny’, as public scrutiny places serious constraints’.<sup>88</sup> This logic is even more important given the uncertainty that shrouds the future of the access to documents Regulation. Hitherto institutional deadlock has procured relative stability, but it is no guarantee against sudden change in the future.

Given the Court’s robust refusal to allow any of the grounds of appeal made by the Council, the importance of the decision is found in what it reveals about the Council’s determination to make use of the exceptions provided for in the Regulation. It is also notable that the Council has found explicit support from several Member States in support of its arguments before the Court. Once again it must be borne in mind that this dispute arose in the context of possible changes to the Regulation itself and cannot therefore be seen as an isolated instance of brinkmanship. In short, this is an issue which is likely to confront the institutions repeatedly,<sup>89</sup> whatever the outcome of any proposed reform to the Regulation. It would seem that any reform would likely result in a rolling-back of the principles underpinning the Regulation, unless this proves unacceptable to the (uncertain number of) Member States in Council who maintain a commitment to openness.<sup>90</sup> The *Access Info Europe* decision tells us that the Court is unlikely to budge.

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<sup>88</sup> Opinion, para 67.

<sup>89</sup> It might also be noted here that the Court itself is facing increased questioning of its own openness: Alemanno and Stefan, “Openness at the Court of Justice of the European Union: Toppling a Taboo”, 51(1) CMLRev (2014), 97.

<sup>90</sup> Recent research indicates that even Member States traditionally militant on the issue of transparency, such as Sweden and the Netherlands, are now more receptive to political compromise on the scope of Union transparency, see Hillebrandt, Curtin & Meijer, *supra* n. 81.