

RESEARCH ARTICLE

Courts: An Effective Venue to Promote Government Transparency? The Case of the Court of Justice of the European Union

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This article aims to shed some light on the role of the Court of Justice of the European Union on transparency and access to documents. It uses case law as a method to investigate the potential of the Court of Justice jurisprudence for the protection of transparency as a general principle and access to documents as a fundamental right in the European Union. The article employs the concepts of Eurolegalism and the constitutionalisation of rights as a framework to examine the case law of the EU's highest court. It focuses on the trends established by the Court on access rights by looking at some of the most influential cases that had made history through the years and analyzing their potential to create a body of a reformed administrative law in the EU pertaining transparency. While the Court of Justice may not be the ultimate solution to the problems of transparency in the Union, it has established itself as a driving force in the development of transparency and access rights regime in the EU and may affect their future trajectories in the face of legislative challenges.

Keywords: courts; transparency; access to documents; fundamental rights; democratic deficit

Introduction

At the European Union (EU) level, there is an increasing concern about the democratic deficit, which means that the EU suffers from a lack of democracy and accessibility of the ordinary citizens to the EU institutions. Paul Craig provided a definition of the term 'democratic deficit' as encapsulating different features such as disjunction between power and electoral accountability (meaning that voters have no role in the legislative agenda), executive dominance (meaning that the Council dominates over other EU institutions), by-passing the democracy argument (meaning that technocrats and national interest groups dominate decision-making), distance issue (meaning the transfer of issues to Brussels away from nation states), and transparency and complexity (meaning that decision-making is complex with procedures behind closed doors).¹ The last feature of this definition is concerned with the secrecy that characterizes the process of decision-making in the EU. As a response to this prevailing culture of secrecy in the European politics, the need for transparency became inevitable. As H eritier argued, 'The debate about transparency and access to information came about because of the perceived lack of transparency and openness in the complicated European decision-making processes.'² The EU institutions, namely the Commission, the Council, and the European Parliament are seen responsible for generating this democratic deficit. Carruba argued that 'The Council of Ministers is not transparent enough in its decision-making, the Commission is not sufficiently accountable to the European public, and that the only directly-elected body of the European Union – the

¹ Paul Craig, 'Integration, Democracy and Legitimacy' in Paul Craig and Gr ainne de Burca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 30

² See eg, Adrienne H eritier, 'Composite democracy in Europe: the role of transparency and access to information' (2003) 10(5) *Journal of European Public Policy* 814, 821

European Parliament³ – does not have sufficient influence in the legislative process.⁴ There is a significant concern about the executive dominance in the EU which does not allow for much voice to the elected bodies and, as such, contributes to the democratic deficit. As Follesdall and Hix discussed ‘The design of the EU means that policy-making at the European level is dominated by executive actors: national ministers in the Council, and government appointees in the Commission’⁵.

To reduce this tension between the EU institutions and its citizens, the right of access to documents has been recognized at the EU level. This is a fundamental human right enshrined in both the EU Charter of Fundamental Rights,⁶ Article 42⁷ and in the Treaty on the Functioning of the European Union (TFEU),⁸ Article 15.⁹ Although these legal provisions place the access rights at the top of the hierarchy of the EU law, the access rights regime is characterized by controversy and conflicting realities between law and practice. Two of the most important institutions in the EU, namely the Council and the Commission, are often put into the spotlight for undermining the right to access to documents. In this context, there are many considerations and arguments on how to make access rights regime work and address problems with transparency, accountability and democratic functioning. One institution that is considered central to the effective functioning of any democratic system is the judiciary. In this context, at the EU level, the Court of Justice of the European Union (CJEU¹⁰) is a powerful institution, which deserves closer attention. Speaking of the role of the Court of Justice, Kelemen argued:

‘the fragmentation of power in the EU has enhanced the power and assertiveness of the ECJ. Divisions between the Council, the Parliament, and the Commission make it difficult for these political branches to act in concert to rein in the ECJ. The ECJ can take an assertive stance in enforcing EU law against noncompliant member states with little fear of political backlash.’¹¹

Although the CJEU is considered to be an important player in the EU, it tends to be abandoned in the deliberations about access rights. There is not much literature that speaks about the contribution of the CJEU to the development of access rights regime in the EU. Most of the literature on the role of the Court revolves around European integration and how the Court affected this process. For instance, scholars like Sweet,¹² Burley and Mattli,¹³ Weiler,¹⁴ and Stein¹⁵ have emphasized the role of the Court in the European integration. Carruba argued about the great potential of the court by saying ‘Prima facie evidence suggests that the ECJ is in fact quite powerful.... It facilitated compliance with existing EU law even when governments were in opposition.’¹⁶

³ The role of the EP with the introduction of the co-decision procedure is growing. However, because the legislative power in the EU is divided between the EP and the Council, very often it is the Council who takes over on most decisions.

⁴ See Clifford J. Carruba, ‘The European Court of Justice, Democracy, and Enlargement’ (2003) 4(1) *European Union Politics* 75, 76

⁵ See eg. Andreas Follesdall and Simon Hix, ‘Why there is a democratic deficit in the EU: A response to Mayone and Moravcsik’ (2006) 44(3) *JCMS* 531, 535

⁶ Charter of Fundamental Rights of European Union, 18.12.2000/C, 364/01, Official Journal of the European Communities, <http://www.europarl.europa.eu/charter/pdf/text_en.pdf> accessed 12 October 2014

⁷ Art 42 of the EU Charter ‘The right of access to documents’ says: ‘Any citizen of the Union, and any natural or legal person residing or having its registered office in Member State, has a right of access to European Parliament, Council and Commission documents’. The Charter gives the right to all persons and organizations residing in the Union

⁸ Consolidated Version of the Treaty on the Functioning of the European Union [2008], OJ C 115/47, Official Journal of the European Communities, See <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>> accessed 12 October 2014

⁹ Art 15 of TFEU (ie Art 255 TEC), para 1 states: ‘In order to promote good governance and ensure that the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.’ This article puts emphasis on the principle of openness of public affairs

¹⁰ Note that in some of the quotes used for this article you will see the abbreviation ECJ for the Court of Justice. It was the Lisbon Treaty in 2007 which made some changes to the jurisdiction and structure of the Court and changed the name of the Court from the European Court of Justice (ECJ) to the Court of Justice of the European Union (CJEU)

¹¹ See eg. Daniel Kelemen, ‘Suing for Europe: Adversarial Legalism and European Governance’ (2006) 39(1) *Comparative Political Studies* 101, 105

¹² See eg. Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP 2000); Alec Stone Sweet, *The Judicial Construction of Europe* (OUP 2004)

¹³ See eg. Anne-Marie Burley and Walter Mattli, ‘Europe Before the Court: A Political Theory of Legal Integration’ (1993) 47(1) *International Organization* 41

¹⁴ See eg. J.H.H. Weiler, ‘The Transformation of Europe’ (1991) 100 *Yale Law Journal* 2403

¹⁵ See eg. Eric Stein, ‘Lawyers, Judges and the Making of a Transnational Constitution’ (1981) 75 *American Journal of International Law* 1

¹⁶ Carruba (n 4) 76

This article aims to bring the CJEU to the discussions about transparency and access rights, and understand its potential in shaping these discussions, especially in times of political disagreement between other EU institutions regarding the status of these rights. The article contributes to the growing body of literature on the role of the courts on transparency with an analysis of the CJEU jurisprudence. The question to be asked is: 'What is the role of the CJEU in the promotion of transparency and the right of access to documents in the EU?' To tackle this question, the research engages with the previous literature on the role of the Court over the years, but especially after 2001 (year of the Regulation No 1049/2001¹⁷). I use case law as a method to investigate the potential of the CJEU jurisprudence to influence the protection of transparency as a general principle and access to documents as a fundamental right in the EU. Two concepts will be significant for this research: eurolegalism and consitutionalization of rights.

The article consists of four sections. In section one, I provide the theoretical foundations explaining the concepts of Eurolegalism and consitutionalization of rights, and exploring the meaning of democratic deficit and its implications. In section two, I analyze the relationship between transparency and access to documents and provide a case law analysis of the CJEU jurisprudence. This section focuses on the new trends that the Court has established in many decisions especially on those which have set new rules for the application of access rights, building on a new body of administrative law in the EU. In section three, I address some implications and counterarguments on the role of the courts, particularly the CJEU. Finally, in section four, I conclude by giving a summary of the potential of the Court in promoting transparency, protecting the access rights of the citizens and shaping the transparency legal framework.

I. Theoretical and historical foundations

A. *The concepts of eurolegalism and constitutionalisation of rights*

The concept of eurolegalism is elaborated by Kelemen¹⁸ and other scholars.¹⁹ Kelemen defined Eurolegalism as 'a mode of governance through two mechanisms: the process of deregulation and juridical reregulation and reregulation by policy-makers in the context of a highly fragmented regulatory state with a powerful judicial system and a weak administrative apparatus.'²⁰ This concept as developed by Kelemen in his work²¹ underlines the importance of the CJEU regarding policy-making at the national and EU level. He argued about a connection between Eurolegalism and transparency. According to Kelemen 'the EU is encouraging the spread of 'Eurolegalism' – a mode of governance that relies on detailed rules containing strict transparency and disclosure requirements.'²²

The theory of consitutionalization of rights is developed by Hirschl in his book 'Towards Juristocracy: The Origins and Consequences of the New Constitutionalism'²³. Hirschl explains the growing role of the CJEU in the policy developments in the EU. According to Hirschl 'the consitutionalization of rights has recently become a booming industry. Many countries and several supranational entities (e.g., the European Union) have engaged in fundamental consitutional reform over the past three decades.'²⁴ If we see the EU, it has indeed transformed itself dramatically through treaty provisions which have set higher standards for many fundamental rights. One such right, the access to documents, was upgraded in about two decades from a right in the mere discretion of public officials to a fundamental right protected by the Charter and Treaty provisions. The Charter provisions, including those on access to documents, were influenced significantly by the European Convention on Human Rights²⁵. 'The Charter entrenches the rights and freedoms

¹⁷ Reg (EC) No 1049/2001 of European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents 31.05.2001, L 145/43, Official Journal of the European Communities. See <http://www.europarl.europa.eu/register/pdf/r1049_en.pdf> accessed 14 October 2014. The purpose of this regulation is to facilitate access to documents to these three EU institutions to the EU citizens and its residents

¹⁸ Kelemen refers to Eurolegalism as 'Judicialization of Politics and the spread of a distinct, juridified mode of governance'. See R. Daniel Kelemen, 'Eurolegalism and Democracy' (2012) 50(1) *Journal of Common Market Studies* 55, 55

¹⁹ Note that Sweet also talks about Eurolegalism explaining that the "judicialization of politics" concerns how judicial lawmaking – defined as the law produced by a judge through normative interpretation, reason-giving and the application of legal norms to facts in the course of resolving disputes – influences the strategic behaviour of non-judicial agents. See Alec Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance' (2010) 5(2) *Living Reviews in European Governance* 1

²⁰ R. Daniel Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press 2011) 8

²¹ See eg Kelemen (n 18)

²² Ibid 56

²³ See eg Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007)

²⁴ Ran Hirschl, 'The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions' (2000) 25(1) *Law & Social Inquiry* 91, 92

²⁵ European Convention on Human Rights, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf

enshrined in the Convention. When the Charter contains rights that stem from this Convention, their meaning and scope are the same.²⁶ Access to information/documents is protected under Article 10 'Freedom of Expression' of the Convention, and under Article 11 'Freedom of Expression and Information' of the Charter. The Charter's Preamble reaffirms that the Charter will be bound by 'the rights as they result,... from...the European Convention ...the case-law of the Court of Justice of the European Union and of the European Court of Human Rights'.²⁷ Indeed, both the CJEU and European Court of Human Rights (ECtHR)²⁸ have played a significant role in the upgrading of the right of access to documents and have provided many political solutions in this journey. Cichowski and Sweet explained:

Jurisdiction over constitutional rights radically expands the capacity of judges to participate in policy processes. There is no obvious way to separate rights protection from the making of public policy since rights, by definition, comprise substantive limitation on policy. Further, the judicial route to policy reform can be maximally efficacious, since judicial law-making grounded in an interpretation of a constitutional right is immune from legislative override; such rulings can be changed only through a subsequent judicial decision or by constitutional amendment...this can attract public interest groups on both sides of controversial political questions.²⁹

The CJEU produced jurisprudence that affected future developments of access rights regime, even before the Charter gained binding authority, and the right of access to documents gained constitutional status with the entry into force of the Lisbon Treaty.³⁰ Babayle argued that until 2001 the Court played a very important role in maintaining at least a 'minimum level of protection' for access rights. However, it was after the entry into force of the Regulation 1049 that the CJEU case law significantly influenced the expansion of access rights.

The involvement of the CJEU in the upgrading of access to documents has become a more prominent practice over the years. This practice has required, on many occasions, the immersion of the CJEU into political deliberations. Schepel and Blankenburg claimed that 'As a result of the constitutionalization process, the court is set to become more visible and more likely to be drawn into political battles. ... Judicial review inevitably blurs the boundaries between adjudication and lawmaking and draws courts squarely into political debates.'³¹ Sweet spoke with a highly positive tone about the Court arguing that 'The European Court of Justice (ECJ)... effectively 'constitutionalized' the European Treaty system, thereby constructing the conditions that enable and sustain judicialization.'³² Indeed, the upgrading process of the access rights was not exempt from being subject to the political battles and it still continues to be. In this context, the CJEU has found itself involved in many of these battles, most of them related to the implementation of Regulation 1049. Babayle argued that 'The interpretation of the text along with the list of the exceptions to public access stipulated by the regulation led ...the Court of Justice ...to increase the number of interventions. This body of case law has made a huge contribution to the specific content of the right of access.'³³

The Lisbon Treaty that entered into force on 1 December 2009 recognized the right of access to the EU documents as a fundamental human right. Babayle recognized the contribution of the CJEU in this recognition by

²⁶ European Commission, EU Charter of Fundamental Rights, available at http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm

²⁷ Official Journal of the European Union, C 326/391, 26.10.2012, Charter of Fundamental Rights of the European Union, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

²⁸ European Court of Human Rights has been very active in protecting access rights and has produced a rich body of jurisprudence pertaining to access to documents. It is often argued that the Court of Human Rights has clarified and further expanded the scope of the rights of access to documents in the context of the Convention of Human Rights. See: Florian Lehne and Paul Weismann, 'The European Court of Human Rights and Access to Information: Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria' (2013) 3(2) *International Human Rights Law Review*, 303 – 315

²⁹ Rachel A. Cichowski and Alec Stone Sweet, 'Participation, Representative Democracy and the Courts', in Bruce E. Cain, Russell J. Dalton and Susan E. Scarrow (eds), *Democracy Transformed?* (OUP 2003) 197

³⁰ Treaty of Lisbon, Amending the Treaty on European Union and the Treaty Establishing the European Community, 17 December 2007/C 306/01, Official Journal of the European Union, See <http://europa.eu/lisbon_treaty/full_text/index_en.htm> accessed 18 September 2014

³¹ H. Schepel and E. Blankenburg, 'Mobilizing the European Court of Justice', in Gráinne de Búrca and J. H. H. Weiler (eds), *The European Court of Justice* (OUP 2001) 12

³² See Sweet (n 12) 153

³³ Henri Babayle, "Openness, transparency and access to documents and information in the European Union", (2013), Policy Department C: Citizens' rights and Constitutional Affairs, The European Parliament PE 493.035, 14. <<http://free-group.eu/2014/02/11/henri-labayle-openness-transparency-and-access-to-documents-and-information-in-the-eu/>> accessed 12 October 2014

arguing that 'The constitutional progress represented by the Treaty of Lisbon has been boosted by advances in case law.'³⁴ The Lisbon Treaty further formally extended the right of access to documents beyond the three main EU institutions to all the Union institutions, bodies, offices and agencies. This extension has been considered³⁵ to constitute one of the major changes of the rights of access to documents since it was first introduced in the early nineties, but it still has to be reflected in the Regulation 1049. Since this change has yet to be included in the Regulation, it is the responsibility of the CJEU to protect access rights against any violations and make sure that the Treaty provisions are well interpreted in cases of uncertainty and conflict.

The CJEU established many well defined rights and an elaborate case law on the protection of fundamental rights on the basis of a vague concept of general principles of the EU.³⁶ This argument is brought forward by Cichowski who stated that 'As the ECJ rulings bring greater clarity to vague provisions...ECJ precedent can provide the opportunity for subsequent rights claims [...] defining what is and is not a lawful practice.'³⁷ Clarity is critical for access rights since there is often space for doubts and questions regarding what practices are considered lawful or not. There is a gap in the EU between the legal provisions and the practice. While the legal provisions seem to have evolved significantly in the last decade, practice has not followed the same path, probably, in part, because of these uncertainties. Sometimes the law is not clear and the line between exceptions and acceptance is blurry.

The situation becomes more complicated when the public officials assigned with processing information requests are not very sympathetic about transparency and purposely invent 'internal rules'³⁸ to by-pass the scope of the legislation. Faced with such behaviour from the public authorities - who should be the guarantors of access rights, but instead become barriers to the realisation of these rights - the citizens are left with only two choices: to file a complaint with the EU Ombudsman,³⁹ or file a claim in courts. In many cases there are not even two choices if the Ombudsman is not successful in his persuasive attempt to restore the denied request. Hence, the courts become the ultimate resort.

B. Democratic deficit and transparency

The purpose of this article is not to make a detailed analysis of the democratic deficit in the EU, but rather to explore the correlation between the deficit and transparency in the Union and how the latter can help address the former. A good start for achieving this purpose is a proper understanding of the term. The definition from Paul Craig provided at the beginning of the introduction of this article encompasses the most important features of the democratic deficit problem. When explaining the meaning of the term, Craig looked at the disjunction between power and electoral accountability, the executive dominance, the by-passing of the democracy argument, the distance issue, and transparency and complexity.⁴⁰ As this last feature demonstrates, for Craig, there is a direct correlation between transparency and democratic deficit. In the European legal order, transparency is considered to be one of the most important tools to deal with the democratic deficit in the Union.

Transparency has been rendered a very significant role to the strengthening of democracy in the EU in broader terms. After the Maastricht Treaty⁴¹ came into force, the competences and domains of action of the Union were expanded substantially creating legitimacy concerns. As a result, the criticism on the democratic deficit of the EU institutions grew stronger, and the demand for more transparency became inexorable. In

³⁴ Ibid 5

³⁵ See Nikiforos Diamandouros, 'The European Ombudsman and good administration post-Lisbon', in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), *The European Union after the Treaty of Lisbon* (New York: Cambridge University Press 2012) 216. He argues that the Lisbon Treaty provides for greater openness and transparency in the activities of the Union institutions by extending the right of public access to documents

³⁶ Catherine Van de Heyning, 'The European Perspective: From Lingua Franca to a Common Language', in Monica Claes, Maartje de Visser, Patricia Polepelier and Catherine Van de Heyning (eds), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Intersentia 2012) 185

³⁷ Rachel A. Cichowski, *The European Court and Civil Society* (Cambridge University Press 2007) 45

³⁸ See Alasdair Roberts, 'Administrative discretion and the Access to Information Act: An "internal law" on open government?' (2002) 45(2) *Canadian Public Administration* 175. Roberts uses the term "internal law" to speak about the internal practices of the institutions while handling access to information requests which are designed to ensure the governments are not embarrassed by the release of politically sensitive information

³⁹ The EU Ombudsman is vested with only recommendation powers which in many occasions cannot do much for the individuals involved. However, there is growing evidence that the EU Ombudsman has distinctive authority among institutions at the EU considering his non-binding powers

⁴⁰ See Craig (n 1) 30

⁴¹ Treaty on European Union (Treaty of Maastricht), 29 July 1992, Official Journal C 191, See <<http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html>> accessed 17 September 2014

this context, the principle of transparency was embraced as an essential instrument in the pursuit of more democratic legitimacy. In response, a Declaration on the Right of Access to Information⁴² was attached to the Maastricht Treaty among 33 other Declarations attached to the Treaty. It is clear in this Declaration that transparency is a tool to strengthen the democratic nature of institutions (hence, to address the democratic deficit problem to some extent). The Declaration was followed by the adoption of a 'Code of Conduct' concretizing the rules on public access to the Council and the Commission documents.⁴³ Then, in 1997, the Amsterdam Treaty⁴⁴ introduced Article 255 EC⁴⁵ Treaty, which established a full right of access to documents.

In 2001 the 'Code of Conduct' was substituted by the current Regulation 1049, which is the European Union's equivalent of an access to information law. It grants members of the public and legal entities the right to access documents held, transmitted or received by EU institutions. This Regulation recognizes the importance of openness for the administration to enjoy greater legitimacy and ensure more accountability to the citizens. Legitimacy and accountability are some of the features of the democratic deficit that this Regulation attempts to address. The wording of the Regulation demonstrates that its intention is '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.'⁴⁶ Indeed, dealing with the democratic deficit requires addressing issues of power, distance and transparency (which are its features, according to Craig).

Because transparency has such a special role in the EU's democratic process, public access to documents becomes an important legal instrument for the practical application of the general principle of transparency. The EU law recognizes access to documents as a fundamental right, which serves a higher objective – it inspires and enhances democratic participation that reduces the democratic deficit. Kelemen argued that 'By emphasizing transparency, accountability and individual rights, European law is enhancing opportunities for public participation in governance and thus promises to improve the quality of democracy across Europe.'⁴⁷ The Lisbon Treaty has implanted the provisions on the right of access to documents at the beginning of the Treaty on the Functioning of the EU (TFEU) among those provisions of general application. Furthermore, with the Charter of Fundamental Rights having 'officially' gained obligatory legal status, the entry into force of the Lisbon Treaty has firmly granted the status of a fundamental right to access to documents. This recognition has influenced the interpretation of the scope, limitations and protection of access to documents right.

Now, I look closely to the Regulation 1049 and the role of the CJEU in its interpretation.

II. Transparency, Access to Information and the CJEU jurisprudence

A. The CJEU and Regulation 1049

Regulation 1049 protects the right to access to documents to the European Parliament, the Council and the Commission. The CJEU has been continuously involved in the interpretation of the Regulation regarding many of its articles, but especially those that deal with exceptions. The Regulation outlines two types of exceptions in Article 4. This Article includes cases in which access is automatically refused⁴⁸ justified by reasons of security, defense, military or privacy, and cases in which access is refused, except where there is an overriding public interest in disclosure.⁴⁹ Babayle contended that 'the issue of the exceptions disclosed by Article 4 of the Regulation has been the main bone of contention. Whether it concerns documents supporting international negotiations [...] or those relating to infringement or competition law procedures

⁴² This Declaration states that 'transparency of the decision-making process strengthens the democratic nature of the institutions and public's confidence in the administration'. See <<http://www.eurotreaties.com/maastrichtfinalact.pdf>> accessed 18 September 2014

⁴³ 93/730/EC: Code of conduct concerning public access to Council and Commission documents, Official Journal L 340, 31/12/1993 P. 0041–0042. See <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993X0730:en:HTML>> accessed 23 September 2014

⁴⁴ Treaty of Amsterdam amending the Treaty of European Union, the Treaties Establishing the European Communities and related Acts, 10 November 1997, Official Journal C 340, See <<http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html>> accessed 25 September 2014

⁴⁵ Art 255 of the Amsterdam Treaty says 'Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.'

⁴⁶ See Recital (1) of the Reg. 1049

⁴⁷ Kelemen (n 18) 66

⁴⁸ Art 4(1) includes refusals for reasons of public interest (a) (public security, defense and military matters, international relations and financial, monetary or economic policy of the Community or a Member State) and reasons of privacy and integrity of the individual (b)

⁴⁹ Art 4(2) includes commercial interests, court proceedings and legal advice, and inspections, investigations and audits

[...], both institutions [the Council and the Commission] have joined forces to curb as far as possible the right of access.⁵⁰

In addition, the Regulation includes a particular exception⁵¹ intended at protecting decision-making processes from being 'seriously undermined' by the disclosure of documents. Regarding this provision, the CJEU has become more stringent to admit its applicability. Cases like *MyTravel* (to which I will return below) demonstrate that the CJEU has made it harder for the institutions to apply this exception. This attitude of the CJEU has certainly given preferentiality to transparency over secrecy making it much tougher for the institutions to refuse requests without proper justification.

The role of the CJEU in construing the meaning of Regulation 1049 has been crucial. Heremas argued that 'In thus interpreting the Regulation, the Court of Justice of the European Union has produced a sizeable [...] body of case law which shapes to an important extent the right of public access to documents within the EU.'⁵² It can be concluded from the CJEU's recent case law (in cases like *Access Info Europe* and *Turco*) that, in principle, the Court calls for openness of legislative processes, even for those which are still ongoing. The Court has preferred to apply a broader concept of openness and its applicability, expanding the margins for the application of the principle of transparency and access regime, and creating more space for public participation in legislative processes.

An important role has been attributed to the CJEU especially to the recasting process⁵³ that has been haunting the Regulation 1049 over the last decade. During this time, every effort to change the Regulation has found itself in a political stalemate. The negotiations between the European Commission and Parliament have not been successful and there has been on-going tension from 2006. In 2008, the European Commission made available its proposed amendments to Regulation 1049.⁵⁴ There were concerns that some of the Commission's proposed changes would bring the Regulation 1049 below the prevailing European standard and the European Parliament strongly opposed the idea. Since the revisions of the Regulation are lingering for about six years in the stage of first reading in the European Parliament, the CJEU has been increasingly called upon to interpret the provisions of Regulation 1049. Many cases regarding provisions of the Regulation 1049 do not end up in the Court for many different reasons. However, those that have made their way up to the CJEU have created a body of jurisprudence which has significantly affected the interpretation and implementation of various articles in the Regulation. The result is a fast-growing body of case law pertaining to access to documents.

The recasting process of the Regulation has demonstrated that in a situation of a political failure and a fight for authority and power between the EU institutions, the CJEU situates itself as a powerful body which is able to stabilize the political imbalances in the EU. Babayle disputed that 'both the Council and Commission share a common reservation, if not a common hostility towards an open interpretation of Regulation (EC) No 1049/2001...It has fallen to the judicature to provide arbitration and define clear-cut rules of behaviour, by balancing the interests in play.'⁵⁵ When any negotiations between the European Parliament and the Commission seem helpless, the CJEU offers a way out by developing a body of case law which meaningfully influences the access to information regime in the EU. Due to this legislative 'paralyzed state', the Court is at present the main 'evolutionary force' in the EU's access to documents' policy. Hirschl explained: 'the rapid growth of supranational judicial review in Europe as an inevitable institutional response to complex coordination problems deriving from the systemic need to adopt standardized legal norms and administrative

⁵⁰ Babayle (n 33) 14

⁵¹ Art 4(3) includes documents for internal use; related to a matter where the decision has not been taken; containing opinions for internal use as part of deliberations and primary consultations

⁵² Tinne Heremas, 'Public Access to Documents: Jurisprudence between Principle and Practice (Between jurisprudence and recast)' *Egmond Paper No.50*, September 2011, 3, 3. <<http://aei.pitt.edu/33461/1/ep50.pdf>> accessed 15 November 2014

⁵³ The recasting process refers to the review of the Reg 1049, which has been going on for a while without success and a final agreement for changes. The European Parliament has expressed its disappointment with the fact that since December 2011, when it adopted its first reading position on the revision of Regulation (EC) No 1049/2001, no progress has been made, as the Council and the Commission do not appear to have been ready to embark on substantive negotiations See European Parliament – Committee on Civil Liberties, Justice and Home Affairs, 'Report on public access to documents' (European Parliament, 17 February 2014) <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2014-0148&format=XML&language=EN>> accessed 14 November 2014

⁵⁴ See Commission of the European Communities, 'Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents' Brussels, 30.08.2008 COM (2008) 229 final, 2008/0090 (COD) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0229:FIN:EN:PDF>> accessed 23 September 2014

⁵⁵ Babayle (n 33) 14

regulations [...]⁵⁶ Considering that any future legislative development will need to consider the Court's jurisprudence, its role becomes imperative.

B. CJEU Jurisprudence on transparency and access to documents

The legal framework of access to documents started to develop with the Maastricht Treaty, it was enhanced with the Amsterdam Treaty and perfected with the Lisbon Treaty. With the legal structure in place, a significant number of the Court of Justice cases on access to documents followed. Even though it was Amsterdam Treaty that introduced a self-standing right on access to documents, the CJEU cases on access rights date even earlier. Craig argued that 'the ECJ and CFI [Court of First Instance] were generally supportive of transparency even before the Treaty of Amsterdam reforms, but they refrained from far-reaching statements of principle that would enshrine a general right of transparency or access to documents.'⁵⁷ However, these cases were important because they laid the ground for rights-based protection. In addition, Craig argued that:

In earlier cases such as *Carvel* (Case T-194/94 *Carvel and Guardian Newspapers Ltd v Council* [1995] ECR II-2765, *Netherlands v Council* (Case C-58/94 *Netherlands v Council* [1996] ECR I-2169, *Hautala* (Case C-353/99 P *Huatala v Council* [2001] ECR I-9565) ECJ recognized the importance of access to documents, but not a general principle of "the right to information."⁵⁸

The CJEU's case law has led to a far-reaching guarantee of transparency and access to documents in Regulation 1049. The purpose of this regulation is described in recital (4) as 'to give the fullest possible effect to the right of public access to documents.'⁵⁹ Confirming these fundamental principles, the Court has emphasized in its established case law that exceptions to the right must be interpreted and applied strictly.

There is a growing body of jurisprudence that speaks about the importance of access rights in the EU. A significant number of cases on access to documents have been brought before the CJEU over the years from 2001–2013, which is the period I have studied. I looked at the statistics on the CJEU's website and noticed that the number of cases has increased gradually (however not in a pattern) after 2001, year of the Regulation 1049. For example: from 30/05/2001 to 21/10/2013 the General Court and the Court of Justice gave 5625 judgments (of which 117 were on access to documents, or 2.08 %) and issued 44964 documents (of which 511 were on access to information, 1.14%). Documents issued here include various forms such as applications, orders, views, judgments, removals, etc. Table 1 gives information on judgments and documents issued by the Court each year from 2001 to 2013 (October 21).

Years	Judgments on ATD ⁶⁰	Judgments in general	Documents issued on ATD	Documents issued in general
2001	4	247	6	1667
2002	2	492	10	2394
2003	8	519	17	2743
2004	10	472	9	3345
2005	9	508	11	3937
2006	5	531	12	4075
2007	9	521	21	4928
2008	8	460	17	4926
2009	4	499	26	4672
2010	20	536	33	4763
2011	15	521	51	5464
2012	11	463	26	3924
2013	12	432	23	3157

Table 1: CJEU activity 2001-2013. Source: Table prepared by the author using data from CJEU website⁶¹.

⁵⁶ See Hirschl (n 23) 36

⁵⁷ Paul Craig, *EU Administrative Law* (2nd edn, OUP 2012) 360

⁵⁸ *Ibid* 449

⁵⁹ In addition, the purpose of the Regulation is to lay down the general principles and limits on such access

⁶⁰ ATD = Access to documents

⁶¹ Court of Justice of the European Union. See <<http://curia.europa.eu/juris/recherche.jsf?language=en&jur=C,T,F&td=ALL>>

As can be seen in the table, the percentage of access to documents cases in comparison with all cases is fairly small, but not inconsequential. It is important to see that the number of cases and other documents issued by the Court is growing.

The chart (**Fig. 1**) below displays all judgments/documents issued by the CJEU on cases about access to documents specifically or related to them. A significant increase of activity is noticeable in the years 2010 and 2011. This is the year in which the Commission's proposal for changes in the Regulation 1049 had its first unsuccessful reading in Parliament. I suspect that this increase is attributed to the political deadlock associated with the recasting process of the Regulation 1049 which lead many EU institutions to seek guidance from the CJEU for the interpretation of this Regulation.

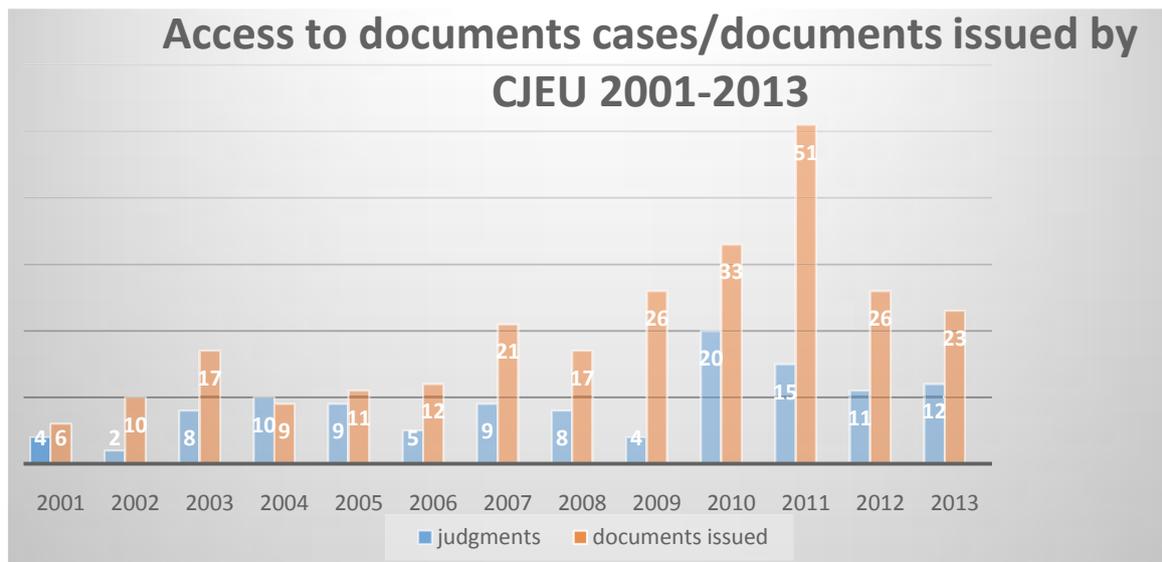


Figure 1: Source : Chart prepared by the author using data from CJEU website⁶².

Not all the cases brought before the CJEU carry the same weight and not all of them have been given the same treatment. There are some cases (which I will go over below) that deserve closer attention as landmark cases⁶³ that could significantly impact the future of policy-making and creating new a body of administrative law in the EU pertaining to transparency and access to documents.

Below is an analysis of the main themes around which the jurisprudence of the CJEU has been developing over the last decade. This analysis is illustrated with some cases that serve as excellent examples of the CJEU's jurisprudence tendency to contribute to the solution of unclear and contested issues on access to documents. The recurring themes are divided into four groups:

1. Protecting the democratic nature of the Union is the primary concern when dealing with issues of transparency.

Transparency is critical to protect democracy. The access rights serve to enhance transparency; this guarantees greater legitimacy of institutions, which translates to a more democratic nature of the institutions. The CJEU has recognized this truism repeatedly in a number of cases.

For instance, in the landmark case *Access Info Europe (Council v Access Info – C–280/11)*⁶⁴, the CJEU had the unique opportunity to provide guidance on the exceptions under Article 4(3)⁶⁵ of the Regulation 1049.

⁶² Ibid

⁶³ Note that landmark cases are court cases that are studied because of their historical and legal significance. They have a lasting effect on the application of a certain law, often concerning individual rights and liberties. According to the Law Dictionary a landmark case is "a case of importance that it will establish a new law and set new precedents." See <<http://thelawdictionary.org/landmark-case/>>

⁶⁴ Note that there are two cases here- case T-233/09 was before the General Court and then it was appealed to the Court of Justice. The appealed case is C-280/11 P, *Council of the European Union v Access Info Europe*. The case is not published yet in the European Court Reports. For reference see <<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-280/11>> accessed 25 September 2014 [Access Info Europe]

⁶⁵ This article has to do with exceptions regarding an institution's decision-making process; opinions of internal use as part of deliberations and preliminary consultations

The Access Info case offered to the CJEU, for the first time in its history, the chance to clarify the precise extent of the duty to ensure transparency imposed by the Regulation on the institutions when they are acting not only in their legislative capacity, but also in the course of a legislative procedure. The case was between Access Info Europe⁶⁶ (AIE) and the EU Council. When the proposal for changes to the Regulation 1049 was made, AIE submitted a request to the Council for a copy of the report which contained information on the Member States' reactions to the Commission's proposal for the reform of Regulation 1049. The Council only granted AIE partial access to the documents requested by providing the transcripts of discussions but not the names of the countries that were putting forward proposals for the modification of the Regulation. After the refusal for full access, AIE filed an appeal with the General Court, which ruled on 22 March 2011⁶⁷ in favour of AIE. It provided AIE with full access to legislative documents, including the names of Member States putting forward proposals. The Council appealed the decision at the CJEU which ruled on 17 October 2013 in favour of AIE and about disclosing the requested documents by the Council.

The case has implications for issues of accountability and democratic nature of the EU representatives who should make transparent not only their final decisions, but also ongoing conversations among each other when it comes to significant legislative changes. The decision gains more relevance since the European Parliament (EP) has recognized the importance of this case for the future of transparency in the EU and had joined the case on behalf of Access Info Europe. Just after the CJEU ruled on the case, the EP came out with a statement from Michael Cashman, a Member of the EP and rapporteur for the original Regulation 1049. He said 'I congratulate Access Info Europe for helping, through this case, to clarify EU legislation and keeping all of us accountable. I am proud our House has stood by EU citizens and stood for what it has been continuously fighting for: more transparency of the decision-making process.'⁶⁸

The case was considered a tremendous victory among access to information advocates, but especially NGOs engaged with human rights issues. Since an NGO won the case, this may have further implication in the future for better NGO involvement in the EU decision-making in the course of a legislative procedure.

In another case, known as *Turco* (*Turco and Sweden v Council*)⁶⁹, the CJEU made it clear that legal opinions on legislative procedures should be disclosed to the public even if the procedure is still ongoing. However, if a specific legal opinion is of a particularly sensitive nature or particularly wide scope going beyond the context of the legislative process in question, it should not be disclosed. *Turco* is particularly important because it sets the rules for legislative procedures which should be opened to scrutiny. This decision confirms that the principles of transparency and openness are guiding principles for the CJEU, because as the Court put it 'Openness contributes to strengthening the principles of democracy and respect for fundamental rights.'⁷⁰ In addition, it could have significant ramifications for a review of freedom of information legislation (the recast of the Regulation 1049), currently underway in the European Parliament. Ruling on this case, the CJEU stated that '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.'⁷¹ This case is about whether there is an 'overriding public interest' in the disclosure of documents containing the advice of an institution's legal service on legal questions arising when legislative initiatives are being debated.

The case dates back to 2002 when a former Italian Member of the European Parliament, Maurizio Turco, asked for copies of documents discussed by the EU Justice Ministers on a proposed directive on the reception of asylum applicants. Turco also asked to see the legal advice the Council had received from its in-house legal department on the proposed legislation. The Council declined to release the legal opinion, claiming that the advice was restricted to those with privileged access and that there was no overriding public interest in its disclosure. The Court of First Instance subsequently refused to annul the Council's decision, holding that the public interest in disclosure did not apply in this case. Backed by Sweden, Turco appealed the decision to the CJEU. The Court emphasized that the importance of transparency in the legislative process

⁶⁶ Access Info Europe is a non-government organization which promotes access rights in Europe and has been very active recently in organizing various events on the matter

⁶⁷ Case T-233/09 *Access Info Europe v Council of the European Union* [2011] ECR II-01073

⁶⁸ European Parliament, 'European Parliament stands in Court for the EU's citizens right to know' - Press Release (European Parliament, October 22, 2013) <<http://www.europarl.europa.eu/news/es/news-room/content/20131022IPR22801/html/European-Parliament-stands-in-Court-for-the-EU%E2%80%99s-citizens-right-to-know>> accessed 25 November 2013

⁶⁹ Joined cases C-39/05 & C-52/05 *Kingdom of Sweden and Maurizio Turco v Council of the European Union* [2008] ECR I-04723; See also <<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:209:0002:0002:EN:PDF>> accessed 25 September 2014 [Turco]

⁷⁰ *Ibid* para 5(2), which is taken from the wording of the Regulation 1049

⁷¹ *Ibid* para 5(6)

and the strengthening of the democratic rights of European citizens justified disclosure. The CJEU reasoned in favour of the appellant and ordered the disclosure of the Council legal service opinion defending the democratic right of European citizens to scrutinize the information that has formed the foundation of a legislative act.

2. Access must be maximized and exceptions construed tightly.

Granting access as openly and as closely as possible is a rule introduced in the Regulation 1049 in Recital (1), and than reintroduced in Recital (6), which emphasizes this principle for cases, where the institutions are acting in their legislative capacity. The CJEU jurisprudence has established that a wider access should be granted in these cases to reduce the internal 'space to think' or the 'negotiation space', which the institutions want. The idea is that institutions cannot create their 'own free-thinking zone' in which they can be totally free from public scrutiny. The CJEU has confirmed that in order to protect the decision-making process within the Union it is necessary to exclude any general confidentiality in the field of legislation. The Court recognized this principle in cases such as the Access Info, Turco, (which were analyzed above) and MyTravel.

In MyTravel (C-506/08 P)⁷², the CJEU acknowledged that Recital 4 and Article 1 of the Regulation 1049 are intended to give the fullest possible effect to the right of public access to documents. However, the Court also recognized that the right is subject to certain limitations based on grounds of public or private interest. Since the exceptions derogate from the principle of the widest possible public access to documents, those exceptions must be understood and applied firmly. Thus, if the institution concerned decides to reject access to a document which it has been asked to disclose, it must, in principle, explain how the exposure of that document could specifically and effectively destabilize the interest protected by the exception. Moreover, the risk of that undermining must be reasonably foreseeable and not purely hypothetical.⁷³ The CJEU established in this case that legal opinions conveyed in the context of administrative procedures need to be disclosed to the public once that the administrative process has ended. Regarding the outcome of this decision Babayle contended that 'In myTravel the Court recognized that not only legislative matters but also administrative activity falls under the scope of the Regulation 1049 emphasizing the benefits of transparency in the legitimacy of the Union.'⁷⁴

In MyTravel, the CJEU reversed the judgment of the European General Court which had given more flexibility to the institutions to reject the disclosure of legal advice provided in the context of administrative procedures. The case is between the Kingdom of Sweden and MyTravel (a travel company which sells tickets and package holidays) and the European Commission concerning requests for access to preparatory documents of the Commission on the control of concentration. The Commission refused this disclosure. The General Court dismissed the action brought by MyTravel against the Commission's decision with the argument that the Commission had properly applied the exception concerning the protection of the decision-making process. The General Court also explained that the report in question fell within the purely administrative functions of the Commission.⁷⁵ In addition, the General Court did not find the principle of the 'public interest override' to be applicable in this case. The Kingdom of Sweden responded to these arguments by emphasizing that:

...any exception to the principle of transparency must be strictly interpreted and its application requires an examination of the content of the document specifically concerned. Next, the principle of transparency applies to all activities within the Union, without a distinction being made between the administrative or legislative nature of the procedure to which the document concerned by a request for access refers...⁷⁶

3. General confidentiality does not cover documents supplied by Member States

The CJEU has offered excellent guidance to the institutions by deciding on cases that deal with information that comes from the Member States, but are on the possession of the Union institutions and are

⁷² Case C-506/08 P *Kingdom of Sweden v European Commission and MyTravel Group plc*. [2011] ECR I-06237. The case was ruled on 21 July 2011. See <<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d63e031d98f9cb406bb35f9ea4ca3963c3.e34KaxiLc3eQc40LaxqMbN40aNiLe0?text=&docid=107935&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=438236>> accessed 15 October 2014 [MyTravel]

⁷³ Ibid paras 73–76

⁷⁴ Babayle (n 33) 24

⁷⁵ *MyTravel* (n 69), paras 19–21

⁷⁶ Ibid para 51

requested on the basis of Regulation 1049. One of such cases is *Sweden v Commission (C-64/05 P)*⁷⁷ ruled on 18 December 2007. This is a leading case because it sets new rules for the Member States regarding their access to documents regime. The case establishes that Member States do not have a right of veto over their documents. It is up to the institution to have the final say on whether the document will be released as they are the ones that are legally liable for that decision before the CJEU. The Member State must explain how and why that document is covered by one of the exceptions found in Regulation 1049/2001 and they cannot simply refer to their national law on access to information. The Court acknowledges that Member States do not have 'an unconditional right of veto', but they can object to the disclosure of documents, only if it gives proper reasons grounded on the exceptions set out in the Regulation.

This case sets new grounds for the relations between Member States rules and the EU rules of access to documents. Concerning Member State documents in the possession of the EU institutions, the CJEU has restricted the Member State's discretion in rejecting their disclosure. The Member State is mandated to give reasons for its refusal, and, more essentially, these reasons should be able to fall under the exceptions outlined in Article 4(1)–(3) of the Regulation 1049 or relate to the specific protection accorded to sensitive documents.⁷⁸

The case is about the application of IFAW Internationaler Tierschutz-Fonds GmbH⁷⁹ to the Commission for access to certain documents which the Commission had received from Germany. The request on documents was regarding a procedure which ended with the Commission giving an opinion favourable to the carrying out of an industrial project. The Commission refused its request and the case went to the Court of First Instance. This Court ruled on 30 November 2004⁸⁰ that the Commission had acted properly since the German authorities were opposed to the disclosure of those documents under Article 4(5) of Regulation 1049. Sweden lodged an appeal against that judgment, claiming that the Court of First Instance had committed an error in law in so far as it interpreted Article 4(5) of Regulation 1049 as conferring on Member States a right of absolute veto, without the need to state any reasons, on the disclosure of documents originating from it.⁸¹ The CJEU ruled in favour of the appellant clarifying its positions in regards to one of the exceptions in the Regulation 1049. In this regard, Craig noticed that 'In *Sweden v Commission* [...] it was a legal meaning of an exception to Regulation 1049/2001 that came before the ECJ.'⁸²

In another decision, the CJEU had the opportunity to settle issues involving a national law which prohibits a third party access to documents. In the case *Donau Chemie (C-536-11)*,⁸³ decided on 6 June 2013, the CJEU confirmed that the right of access to documents strengthens the functioning of EU competition law. In addition, the case establishes boundaries and provides guidelines for the national courts on how they should consider cases on access to documents. The Court concluded that the exercise of weighing up the interests of disclosure must be conducted by national courts on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case. Only once this exercise has been completed can a national court refuse access to certain documents. Otherwise, access should not simply be systematically denied.

In *Donau Chemie* the Court asked whether a national law that prohibits access is compatible with EU law. In this case the CJEU stroke down an Austrian law which made access to documents, including leniency materials, on a Court's cartel file almost impossible for third party damages applicants. The Austrian provision did not allow for any balancing of interests, since access to the file could only be granted with the consent of the addressees of the decision. The CJEU noted that the public interest in an effective leniency programme should be balanced against the applicant's interest in disclosure and that this balancing act

⁷⁷ Case C-64/05 P *Kingdom of Sweden v Commission of the European Communities and Others* [2007] ECR I – 11389; See also <<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=71934&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=719178>> accessed 15 October 2013

⁷⁸ Art 9, Reg 1049

⁷⁹ IFAW is an animal rights organization based in Hamburg, Germany

⁸⁰ Case T-168/02 *IFAW Internationaler Tierschutz-Fonds gGmbH v Commission of the European Communities* [2004], ECR II-04135. Also see <<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49711&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=719543>> accessed 15 October 2014 [IFAW]

⁸¹ In Case C-64/05 P (n 59) para 4(15) says: 'Even though it is neither the object nor the effect of this Regulation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions.'

⁸² Craig, *supra* (n 57) 364

⁸³ Case C-536/11 *Bundeswettbewerbshilfe v Donau Chemie AG and Others*. The case was ruled on 6 June 2013 and has not yet been published on the ECR. For reference see <<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-536/11>> accessed 15 October 2014 [Donau Chemie]

should be made for every single document on a case file. Therefore, the Austrian provision was in violation of European law which gives individuals the right to claim damages for loss and entitles them to seek full compensation for their actual loss, as well as for loss of profit, plus interest.

4. The protection of privacy and public security may reduce the scope of transparency and the rights of access.

A. Privacy protection

Regulation 1049 includes privacy as one of its exceptions in Article 4(1). Privacy is considered to be of great significance in the EU and, as such, enjoys the protection of a mandatory exception in the Regulation. Among the most important cases brought before the CJEU that deal with the circumstances when the rights of access conflict the rights of privacy is the *Bavarian Lager v Commission (C-28/08 P)*⁸⁴. In this case the CJEU had to provide guidance on balancing of the relationship between Regulations 45/2001 on Personal Data Protection⁸⁵ and 1049/2001 on Public Access to Documents - a very delicate and controversial relationship. There has been an on-going debate among lawyers and scholars regarding the rights of privacy/personal data and information/access to documents. When they conflict each other there has to be a balance of these rights without one undermining the other. The most important thing is to be able to identify when there is a conflict and which one should take precedence over the other, privacy or access. This balance has to be stricken only on a case by case basis. The CJEU and General Court were in opposition to each other on this case just because of this blurred and complex relationship.

In *Bavarian Lager*, the CJEU had to clarify that 'communication of personal data appearing in a document held by an institution constitutes not only public access to a document under Regulation 1049, but also a processing of personal data under Regulation 45, which the General Court did not take into account.'⁸⁶ Although the ruling in this case was not in favour of access to documents, the decision will definitely have a significant impact on the future relationship between privacy and access to documents rights of the EU citizens.

*Bavarian Lager*⁸⁷ required access to the full minutes of the meeting held in the context of an infraction procedure against the UK- a procedure following from a *Bavarian Lager* complaint lodged at the EU Commission. Despite its demand, *Bavarian Lager* had not been invited in the meeting. The Commission decided to release the substance of the document, but blanked out the names of the five EU trade organization representatives who had not given their consent for disclosure. To justify its decision, the Commission depended on Regulation 45/2001 and stated that the applicant had failed to establish an express and legitimate purpose or need for such disclosure. Hence, the Commission declined to grant access, based on the exception for the protection of the private life and integrity of those participants contained in Article 4(1)(b) of Regulation 1049.

The case went to the General Court which ruled to invalidate the Commission's decision of rejecting the *Bavarian Lager*'s request. Then, this case was appealed by the Commission to the CJEU where the General Court's decision was reversed. The CJEU found that names fell under the concept of 'personal data' and that the making those names public amounted to the 'processing of personal data'. While investigating the potential undermining of the public interest, the European General Court in its decision⁸⁸ relied on the ECtHR case law. ECtHR's jurisprudence distinguishes what constitutes an 'unjustified interference in the private life' within the meaning of Article 8 of the European Convention on Human Rights.⁸⁹ The General Court

⁸⁴ Case C-28/08 P *European Commission v The Bavarian Lager Co. Ltd.* [2010] ECR I-06055. The case was ruled on 29 June 2010. See <<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004A0194:EN:HTML>> accessed 15 October 2014 [Bavarian Lager]

⁸⁵ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, 12.01.2001, L 8/1, Official Journal of the European Communities, See <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:008:0001:0022:en:PDF>> accessed 20 October 2014

⁸⁶ *Bavarian Lager* (n 84), para 46

⁸⁷ This is the name of a beer producer /company established in the UK 'on 28 May 1992 for the importation of German beer for public houses and bars in the United Kingdom' (Case C-28/08, para 19(15))

⁸⁸ Case T-194/04 *Bavarian Lager v Commission* [2007] ECR II-04523

⁸⁹ European Convention of Human Rights <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 20 October 2014, Article 8 'Right to respect for private and family life' states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

concluded, however, that despite the breadth of the meaning of 'private life' not all personal data are necessarily covered by the concept and not all personal data are able to destabilize the private life of the person concerned. Hence, the General Court assessed whether the sole disclosure of the names of the participants to a meeting, not including the specific opinions expressed by them, would truly and effectively undermine the protection of their privacy and integrity. It concluded that this was not the case since the participants had appeared in the meeting in their professional capacity as part of a collective body.

However, contrary to the General Court's reasoning, the CJEU found that it had to respect the 'equilibrium' which the legislator has established for the protection of a person whose personal data could, in certain cases, be transferred to the public. Thus, the CJEU agreed with the General Court that the communication of the full minutes of the meeting, including the list of participants would amount to a 'processing of personal data' within the meaning of Article 2 of Regulation 45/2001. However, the Court held that the Commission was correct to seek the consent of the data subjects and to remove the names of participants whose consent had not been given.

The Redaction principle here should always be evaluated against the consent principle. Only when consent is explicitly given, the names of the participants of a meeting can be disclosed. Because the Commission had already released the substance of the document and simply blanked out those five names, the CJEU determined that the Commission had fulfilled its duty of openness and 'the Commission was right to verify whether the data subjects had given their consent to the disclosure of personal data concerning them.'⁹⁰

B. Public security protection

The protection of public security, just as the personal privacy, is guaranteed in the Regulation 1049 and for this reason they are part of the same group of exceptions, included in Article 4 (1). The CJEU jurisprudence is very valuable in settling issues that concern public security protection. *Sison v Council* (C-266/05 P)⁹¹ is considered to be a landmark decision in this regard. This case has received an adverse treatment, just as the Bavarian Lager case, with the CJEU refusing the request for disclosure. However, despite its treatment, the case sets an important precedent because it serves as a guidance to subsequent cases that deal with the balance between 'the right to documents' and 'the public's interest.' According to the CJEU, the purpose of the Regulation 1049 is to protect the public's right to access documents, as opposed to the interest of a particular individual⁹². It further held that the exceptions under Article 4(1)(a) of the Regulation were mandatory and once they were invoked, there was no need 'to balance the requirements connected to the protection of those interests against those which stem from other interests.'⁹³ As Craig argued 'The *Sison* case concerned the standard of judicial review [...] The fact that Article 4(1)(a) was a mandatory exception [...] served to reinforce the ECJ's conclusion.'⁹⁴

The *Sison* case dealt with public security exceptions and sensitive documents and the CJEU was asked to evaluate the application of the public security exception under the Regulation 1049 regime. In 2003⁹⁵, the applicant Jose Maria Sison, a Filipino national residing in the Netherlands, requested access to all documents which had led the Council to adopt Decision 2002/974 maintaining him on the list of persons who were suspected terrorists and whose financial assets were frozen. He also requested the disclosure of the identity of the States which had provided certain documents in that connection. The Council refused and the case went to the Court of First Instance⁹⁶ that dismissed all appellant's actions. According to Article 9(3) of the Regulation 1049, 'sensitive classified documents' can only be recorded in the register or disclosed if consent is obtained from the originator. When justifying a refusal of access, the institution needs to guarantee that its statement of reasons does not distress the interests protected in Article 4. The case went to the General Court and then to the CJEU which both ruled against the appellant. The CJEU stated that:

Documents held by the public authorities concerning persons or entities suspected of terrorism and coming within the category of sensitive documents as defined by Article 9 of Regulation

⁹⁰ *Bavarian Lager* (n 84) para 75

⁹¹ Case C-266/05 P *Jose Maria Sison v Council of the European Union* [2007] ECR I-01233; The case was ruled on 1 February 2007; See <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005CJ0266:EN:HTML>> accessed 20 October 2014 [Sison]

⁹² *Ibid* paras 43 and 48

⁹³ *Ibid* para 46

⁹⁴ Craig (n 57) 364

⁹⁵ Note that the case was first heard before the General Court in 2003 (T-110/03)

⁹⁶ Case T-110/03 *Jose Maria Sison v Council of the European Union* [2005], ECR II-01429; See <<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=58796&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=721083>> accessed 20 October 2014

No 1049/2001 must not be disclosed to the public in order not to prejudice the effectiveness of the operational fight against terrorism and thereby undermine the protection of public security.⁹⁷

Sison is a unique case because it analyses the meaning of sensitive documents, which in many cases is subject to interpretation. Heremas argued on Sison:

Up to now only one case has required the Court to interpret Art. 9 and clarify how sensitive documents are to be treated in the context of Regulation No 1049/2001. In *Sison*, both the General Court (EGC) and the Court of Justice (ECJ) affirmed that the originator of a sensitive document could refuse not only the disclosure of the document's content but also its very existence. In addition, the identity of the Member States from which the documents originated, could be kept secret.⁹⁸

III. Preliminary implications and counterarguments

There are some concerns that deserve attention and need to be taken into consideration about the role of the courts in general, and in particular the CJEU. First, it should be understood that the Court cannot order the EU institutions to release documents. Instead, it has a more limited power to annul an institution's refusal to release them. As Sarmiento put it 'CJEU has no power to annul national legislative, executive or judicial acts; it can only declare their compatibility or incompatibility with EU law.'⁹⁹ Despite this fact, the governments have shown a satisfying level of compliance towards the Court's rulings. This could be explained by eurolegalism, which informs that judicialization of the policy-making process makes the governments keen to obey to the court decisions. By achieving this goal, Blauberger observed that 'the ECJ triggers broader reforms at the national level.'¹⁰⁰ In the case of the access rights and transparency regime, the CJEU jurisprudence has provided many precedents that deal with the relationship between national and union policies and legislation (IFAW, the Donau Chemie).

In addition, there is some opposition in accepting the role of the courts to address issues with the democratic deficit and transparency. The main arguments are grounded in the counter-majoritarian difficulty,¹⁰¹ used by the opponents of the legitimacy of the courts to highlight that courts are not democratic institutions since they are not elected by voters. Scholars like Waldron,¹⁰² Kramer,¹⁰³ Tushnet¹⁰⁴ or Bellamy¹⁰⁵ argued that courts cannot resolve problems of democratic deficit, because they are part of this problem; they are not democratic, legitimate or accountable. However, in the European context, Nolte contended that the EU 'is less confronted with the "countermajoritarian difficulty – objection."¹⁰⁶ The same argument is made by Rosefeld who explains that 'The Court of Justice does not face 'the countermajoritarian difficulty problem' since there is less democracy at the European level.'¹⁰⁷ However, Hinarejos observed that the CJEU does not enjoy a high degree of social support 'in part because of the mentioned lack of social consensus as to the specific values that the Court is seen to be promoting.'¹⁰⁸ In addition, Komarek argued that 'the conflict

⁹⁷ *Sison* (n 91) para 66

⁹⁸ Heremas (n 52) 20

⁹⁹ Daniel Sarmiento, 'Half a case at a time: Dealing with judicial minimalism at the European Court of Justice', in Monica Claes, Maartje de Visser, Patricia Polepelier and Catherine Van de Heyning (eds), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Intersentia 2012) 15

¹⁰⁰ Michael Blauberger, 'With Luxembourg in mind ... the remaking of national policies in the face of ECJ jurisprudence' (2012) 19(1) *Journal of European Public Policy* 111

¹⁰¹ Alexander Bickel, *The Least Dangerous Branch* 16, (Vail-Ballou Press Inc., 2nd ed. 1986)

¹⁰² See Jeremy Waldron, 'Rights and Majorities: Rousseau Revisited' in *Liberal Rights: Collected Papers 1981–1991*, (Cambridge University Press, 1993); Jeremy Waldron, *Law and Disagreement*, (OUP 1999); Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115(6) *Yale Law Journal* 1346

¹⁰³ Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (OUP2004)

¹⁰⁴ Mark Tushnet, 'Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory' (1980) 89(6) *Yale Law Journal* 1037; Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999)

¹⁰⁵ Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007)

¹⁰⁶ Georg Nolte, 'European and US Constitutionalism: Comparing essential elements', In Georg Nolte ed. *European and US Constitutionalism* (Council of Europe Publishing, 2005) 22

¹⁰⁷ Michel Rosefeld, 'Comparing constitutional review by the European Court of Justice and the US Supreme Court' (2006) 4(4) *International Journal of Constitutional Law* 618, 631

¹⁰⁸ Alicia Hinarejos, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars*, (OUP 2009) 191

between the EU and its Member States can be read as a kind of countermajoritarian difficulty, since the Court deals with their decisions.¹⁰⁹

To answer to these claims Kelemen argued that ‘judicialization and the rise of Eurolegalism are not undermining democracy in Europe, as some critics would suggest, but are changing its character.’¹¹⁰ Eurolegalism captures a regulatory policy in which private enforcement of legal rights is done through the courts. The judicialisation of regulatory policy shifts power from bureaucrats to judges. While this might seem to erode democratic controls, judicialization pressures states to enhance transparency, legal certainty and access to justice in their national regulatory processes. According to Kelemen, EU law-makers and the CJEU have together established a host of new substantive and procedural rights for individuals guaranteed under EU law.¹¹¹

Another answer to the lack of legitimacy of the courts comes from Hirschl and his theory of constitutionalisation of rights. The access rights regime in the EU has seen a significant upgrading to the constitutional level. This process was facilitated by the CJEU’s interpretation of these rights. As I have mentioned in the first section of this article, it was after Regulation 1049 took effect, that the Court took a stricter approach in protecting access rights, which spilled over the policy-making process in the EU. It was then finalized with the Treaty of Lisbon. Hirschl argued that the judicialization of public policy-making is a process that more than anywhere else is evident in Europe where the CJEU has been awarded an increasingly important status by legislators, executives, and judiciaries.¹¹² Hirschl used Dworkin’s¹¹³ idea on judicial review and role of the courts. He said:

Ronald Dworkin, perhaps the champion proponent of constitutionalization and judicial review on normative grounds, agrees ultimately “the proof of the pudding is in eating”. Democracy, he argues, is fundamentally concerned with treating people as equals. If courts can do this as effectively as representative institutions elected by universal suffrage, it is irrelevant whether if doing so they overrule majority will.¹¹⁴

In other words, as long as the courts deliver justice and act as guardians of citizens’ rights it does not matter if they are elected or not. Regarding the access rights courts have proven that they have played a significant role in upgrading those rights to a higher status which in turn has provided better rights’ protection.

IV. Conclusions

The role of the courts in transparency and access to information is important in two ways. First, courts are guardians in protecting citizens’ rights of access and providing remedies against any abuse of such rights by the government. Second, the role of the courts becomes exceptional when they act as reformers in transforming access rights regimes.

Courts are considered to be mechanisms that uphold the rule of law. In democracies, they are deemed to be the main pillars in maintaining the balance of power among the three branches of government. The CJEU, in particular, has established a high reputation not only at the EU level, but internationally as well. Sweet argued that ‘The CJEU is today one of the most powerful high courts in the world.’¹¹⁵ Regarding the access rights regime, the examples brought in this article from the CJEU jurisprudence demonstrate that this Court has the potential to transform this regime and act as an ‘evolutionary’ force in bringing about change.

Both Eurolegalism and the constitutionalization of rights serve as a useful framework for assessing the role of the CJEU in promoting access to documents as a fundamental human right and transparency as a principle which encompasses this right. As Kelemen put it ‘For enthusiasts, Eurolegalism may promise heightened legal certainty and transparency.’¹¹⁶ In addition, employing the constitutionalisation of rights, one understands the empowerment of the Court. The Court contributed through case law to raise access

¹⁰⁹ Jan Komarek, ‘Institutional Dimension of Constitutional Pluralism’ in Matej Avbejl and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing Ltd. 2012) 236

¹¹⁰ Kelemen (n 18) 55

¹¹¹ Kelemen (n 20)

¹¹² Ran Hirschl, ‘The Judicialization of Politics’ in Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Calderia, (eds), *The Oxford Handbook of Law and Politics* (OUP 2008), (eBook, paragraph 8 of the article)

¹¹³ Ronald Dworkin, *Freedom’s Law* (Harvard University Press 1996) 34

¹¹⁴ Hirschl (n 23) 3

¹¹⁵ Alec Stone Sweet, ‘The European Court of Justice’ in Paul Craig and Gráinne de Burca, *The Evolution of EU Law* (2nd edn, OUP 2011) 121

¹¹⁶ Kelemen (n 18) 62

rights at the constitutional level. In this sense, the Court's case law has led to the empowerment of the fundamental rights. Much of the increased powers of the CJEU, the creeping constitutionalization through case law and the value of an independent judiciary point to political constitutionalisation at the EU level. Hirschl claimed about a 'constitutionalization of rights and the empowerment of courts as inevitable outcomes of a social and political need.'¹¹⁷ This theory may explain the increasing transparency and public accountability of legislative and executive branches by means of a strong and independent judiciary. The CJEU oversees a strong body of administrative law, and acts as a federal-like multi-level court system that can hold these two branches (executive and legislative) to such a body of administrative and constitutional law. As Sweet argued, 'the legal system ... sustained an on-going judicialization of policy-making within many important domains. The Court's rulings routinely required the Member States and the EU's legislative organs to produce new law.'¹¹⁸ While this alone may not suffice to address the problem of democratic deficit in the EU, which encompasses various problems, it can influence some of its features beginning from transparency.

The CJEU has had a significant role in the interpretation of the right of access, and settling disputes arising from the violations of this right. In the *Turco* case, the CJEU ascertained that all documents drawn up in the course of a legislative procedure shall be made 'directly accessible'. Moreover, in *Access Info*, the Court ruled that possible criticism by the public and media are not sufficient reasons to withhold disclosure during the legislative processes. In the light of the CJEU case law, national provisions can only be invoked when the Member States' documents do not have an EU character. Moreover, as IFAW has settled Member States must prove the adequacy of their national provisions under the conditions laid down in Article 4(1)–(3) of the Regulation 1049.

As shown above, the CJEU has developed a case law which will affect the future developments of the EU Administrative Law. It has created guiding principles for the EU institutions to follow in administrative procedures. Recently, with the recasting process of Regulation 1049 being stuck in a political deadlock, the role of the Court becomes more prominent. The Court's decisions have offered solutions when political negotiations have failed. In this context, the Court relaxes tensions created in the political realm.

Regarding the data gathered for this research, one can notice that the number of the cases on access to documents is not very high. However, given that the right-to-know is never a huge portion of the Court docket, the numbers are significant. The increasing number shows that the Court is seen more and more as a reliable institution which strives for a balance of interests, but leaning towards public interest most of the times.

Considering the case law of the Court it is very difficult to judge whether the public right of access to documents has had a considerable practical impact in improving the legitimacy of the EU institutions and the degree of its acceptance by the European citizens. However, *prima facie* evidence suggests that the CJEU is in fact quite powerful since it has facilitated compliance with existing EU law even when governments were in opposition. As de Waele argued 'the Court always attempts to do justice, and strike the right balance between the interests of the European legal order, the institutions and citizens, and the rightful claims of the Member States.'¹¹⁹ In pursuing this mission the CJEU actually helps addressing the EU on-going problem – that of democratic deficit. 'By examining the interaction between the European Court of Justice, civil society and governance' – Cichowski highlighted – 'how courts can provide important democratic participatory opportunities for citizens and groups by engaging them in the development, monitoring, and enforcement of law.'¹²⁰ Cichowski also theorized the connection between courts, constitutional rights, and the changing nature of democratic participation.¹²¹

The growing case law of the Court has to a certain degree been able to transform operational concepts and methods in the European public administration. Indeed, as Sweet argued, 'as the ECJ interprets EC law, it gradually rewrites it.'¹²² Increased public interest in cases before the Court is simply a reflection of the Court's ever-growing influence and should be seen as an opportunity. Even though the number of cases on access to documents still remains small, it is a step forward and should be appreciated since the Court is creating a new body of administrative law and administrative procedure. Cichowski acknowledged 'The European Court of Justice (ECJ) today is one of the main motors of governance in Europe. It has turned a

¹¹⁷ Hirschl (n 24) 99

¹¹⁸ Sweet (n 115) 132

¹¹⁹ Henry de Waele, 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment' (2010) 6(1) *Hanse Law Review* 3, 22

¹²⁰ Cichowski (n 37) 260

¹²¹ Rachel A. Cichowski, 'Courts, Rights and Democratic Participation' (2006) 39(1) *Comparative Political Studies* 3, 14

¹²² Sweet (n 12) 184

relatively young body of law into a dynamic and coherent legal system governing and protecting public interest and civil society.¹²³

In recent years, the CJEU has paid particular attention to ensure respect towards transparency and particularly the right of access to documents. Since the entry into force of Regulation 1049 13 years ago, the Court has ruled on many issues raised by requests for access to documents. While interpreting the Regulation, the CJEU has created a considerable body of case law which contours to an important degree the right of public access to documents within the EU. Especially now, when the recasting procedure of the Regulation 1049 has been a hostage of political disagreement, the interpretation of the Regulation by the Court, becomes even more imperative. Every step in the recasting process should pay careful consideration to the case law of the CJEU. On a last note, one should be prudent to not overestimate the role of the Court in the protection of access rights and promotion of transparency as a panacea to the problem of democratic deficit. However, the findings in this article enforce the idea that the CJEU could transform access rights regime in meaningful ways.

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¹²³ Cichowski (n 37) 242

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