

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**National practices with
regard to the
accessibility of court
documents**

STUDY



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

National practices with regard to the accessibility of court documents

STUDY

Abstract

This study examines national practices regarding access to court files. After presenting some national regimes giving the members of the public very broad access to court files, the study focuses on the accessibility of court files of the Court of Justice of the European Union. Finally, arguments in favour of greater access to the court files of the CJEU are analysed. Recommendations are developed on how to enable more comprehensive access by the general public to be achieved to the court files of the CJEU.

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LIST OF ABBREVIATIONS

| | |
|--------------|--|
| AAPI | Act on Access to Public Information (Slovenian national law) |
| AG | Advocate General |
| AOGA | Act on the Openness of Government Activities (Finnish national law) |
| APA | Administrative Procedures Acts |
| APCP | Act on the Publicity of Court Proceedings in General Courts (Finnish national law) |
| CJEU | Court of Justice of the European Union |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| EDPS | European Data Protection Supervisor |
| EEA | European Economic Area |
| EU | European Union |
| EDPS | European Data Protection Supervisor |
| FOI | Freedom of information |
| FOIA | Freedom of Information acts |
| OJ | Official Journal of the European Union |
| TEC | Treaty Establishing the European Community |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |
| RAPD | Right of access to public documents |
| RACD | Right of access to court documents |

EXECUTIVE SUMMARY

Background

Last year the European Parliament's Committee on Legal Affairs was contacted by a number of dissatisfied legal practitioners who had been denied access to certain documents held by the CJEU. The arguably emerging tendency, within the EU and in non-EU Member States, is towards submitting the judiciary to respect the principle of transparency. Various countries have adopted legislation which enables the general public to have access to court files. The CJEU does not allow general access to court files. This attitude is questionable in the context of the new fundamental rights architecture which requires all the institutions, including the CJEU, to work as openly as possible. The inaccessibility of court files proves even more difficult to justify given the fact that certain requested documents fall within the public domain in some EU Member States and are therefore publicly available.

Structure

This study will first present general considerations in relation to the right to access public information. It will then examine some national practices with regard to the accessibility of court documents in EU Member States (Finland, Slovenia) and in a non-EU State (Canada). Furthermore, access to EFTA Court documents will be briefly described, given the fact that its jurisdiction is comparable to the jurisdiction of the CJEU. One chapter is dedicated to a presentation of the current EU rules on access to public information, and more specifically to court files. Another chapter is dedicated to the inaccessibility of court files of the CJEU and (legal) problems stemming from that, including violation of some basic fundamental rights (such as equality of arms). The subsequent chapter contains recommendations as to how to remedy this situation and how to enable access to court files for the general public, without a need to employ significant resources, and without violating other rights (e.g. privacy).

The study aims to achieve the following objectives, namely to:

- present some of at present most liberal regimes on access to court files;
- analyse the present situation with regard to obtaining access to court files of the CJEU;
- examine legal problems stemming from the inability of third persons to access court files of the CJEU;
- present practical recommendations on how access to court files could be given to a wider public without using significant resources, and while keeping the right to access court files in balance with other legitimate interests. By implementing the recommendations, the CJEU could become a pioneer in promoting access to court files and accountability of the judiciary within the EU and beyond.

KEY FINDINGS

- A growing number of countries, both EU and non-EU Member States, grant access to court files to third persons. The judiciary is no longer automatically excluded from provisions on the right to access public documents.
- National regimes on accessibility of court documents are mostly partial, e.g. applicable only to certain types of courts, or types of documents. However, there is a clear tendency towards submitting also the judiciary to transparency requirements.
- Some countries (Finland, Slovenia, and Canada, being lead examples) have a comprehensive regime regarding access to court files. Even though a detailed examination of these regimes identifies significant differences, there is one thing they all have in common: the principle of giving the widest possible access to court files to the public.
- The CJEU is reluctant to give access to court files. Given the fact that an ever increasing number of countries grants access to court files, and that certain documents deemed by the CJEU to be confidential are publicly available in some Member States, it is recommended that the Court reconsider its position towards access to court files.
- Certain aspects of (in)accessibility of Court files cause serious legal problems, and may, arguably, even violate internationally recognised fundamental human rights, such as equality of arms.
- By giving access to court files, the CJEU would enable interested persons (legal practitioners, academia, journalists etc.) to acquaint themselves with various arguments used by the parties to the proceedings even if they are subsequently rejected by the CJEU. The same holds true for national judges, who would be able to better assess the necessity of submitting a reference for a preliminary ruling to the Court if they had access to the facts giving rise to a specific judicial dispute, and not only to the preliminary questions.
- Only minor changes would need to be introduced at the CJEU in order to allow broader access to court files. Such changes would contribute to a more comprehensive understanding of Court decisions (e.g. drafting of reports for hearing and their automatic publication, consistent publication of the views of the Advocate General related to urgent preliminary procedures). Some measures would be more difficult to implement, but no recommendations would necessitate significant resources (for example, extending the use of the current application e-Curia, which enables electronic filing and exchange of documents, to interested registered third persons would allow an efficient and secured access to court files).

1. INTRODUCTION

Administrative transparency is on the rise as a policy issue, but it is not new. Over the last twenty years, an impressive number of legislative measures and administrative reforms have been put in place both in EU Member States¹ and non-member States. This recent "acceleration" has several roots. Administrative transparency has been recognised by courts, constitutions and treaties as a fundamental right of the individual. More crucially, the promotion of the "right to know" of the people is increasingly perceived as an essential component of a democratic society.

In liberal democracies, the right of access to information held by public authorities serves three main purposes. First, it enables citizens to participate more closely in public decision-making processes. Second, it strengthens citizens' control over the government and thus helps in preventing corruption and other forms of maladministration. Third, it provides the administration with greater legitimacy, as it becomes more transparent and accountable, i.e. closer to an ideal "glass house"².

Even though legislation on access to public information relates to all the three branches of public authority – executive, legislative and judicial – the judiciary as such, or at least legal proceedings and deliberations, is normally exempt³ from the application of this legislation. However, this situation is now changing. Several countries have recognised the need for open and transparent courts, either through legislation or through practices and guidelines, which recognise a right for members of the public to access court files⁴.

1.1. The reasons for the study

The main reason for conducting this study were critics voiced by dissatisfied legal practitioners, who have complained to the Committee on Legal Affairs of the European Parliament that it is often impossible to follow the process by which EU case law is made because documents of the Court of Justice of the European Union are not accessible. In this connection they mentioned the following: firstly, the report for the hearing which is prepared by the judge *rapporteur* is not a fully public document as it is generally distributed at the hearing to participants (and is only available in the language of the case), but not published on the internet for those who are not able to attend. This compares unfavourably with the practice at the EFTA Court, where the report for the hearing is always made public on the website in all languages in which it is available. In this relation it should be noted that with the adoption of new Rules of Procedure of the Court of Justice a report for the hearing is no longer drawn up (see at 6.2.1.)

¹ Freedom of Information Acts (FOIA) have been enacted in Hungary (1992), Portugal (1993), Ireland (1997), Latvia (1998), the Czech Republic (1999), the United Kingdom (2000), Estonia (2000), Lithuania (2000), Poland (2001), Romania (2001), Slovenia (2003), Germany (2005), and at the European Union level (2001). See OECD, *The Right to Open Public Administrations in Europe: Emerging Legal Standards*, 19.11.2010, Sigma paper no. 46, at 7.

² *Ibid*, at 4.

³ Either explicitly or in practice; see Open Society Justice Initiative, *Report on Access to Judicial Information*, March 2009, at i, available at www.right2info.org/.

⁴ "Access to judicial records and to information about the judiciary is an important, yet often overlooked, aspect of transparency and access to information. While much legislative and scholarly attention has focused on promoting freedom of information and access to records with regard to the executive functions of government, much less has been done to secure or even evaluate access to judicial information." "Seventy countries have developed a framework for providing access to public information, and applying a comprehensive disclosure framework to the judiciary, while uniquely challenging, should be vigorously pursued." *Ibidem*, at i and v.

Secondly, whilst the opinion and the view of the Advocate General is generally made public, this is not a rule. The Advocate General may decide not to disclose certain opinions and views. It should be considered whether this option makes sense.

Thirdly, practitioners who want to follow the development of case law are not able to have access to the parties' pleadings or the documentary evidence underlying the case. In particular when the EU institutions and Member States take part in court cases, their position on individual issues would be very interesting for legal practitioners to have access to.

Fourthly, one should not overlook the impact of the evolution of IT technologies on the transparency improvement. We live in an information age where information is exchanged with lightning speed. This affects both the way courts provide information and the level of public expectation.⁵ Notably, giving electronic access to court files to parties to the procedure and enabling them to lodge documents electronically, is only a step away from enabling the right of access to court files (electronically) to everyone interested (e.g. in practice mainly to legal practitioners, researchers and journalists). Whilst the Court has decided to computerise the management of the files⁶, it still rejects applications of members of the public to access documents such as preliminary reports or parties' pleadings.

Certainly, the study is not limited to the abovementioned aspects only. On the contrary, other aspects are dealt with, too.

1.2. The aim of the study

The aim of the study is to critically assess the stance of the CJEU (not) to give access to court records, when compared to national legislation and good practices in an ever growing number of countries which allow and enable such an access. The aim of the study is not a comprehensive or comparative analysis of various national regimes governing the right of access to court files of the public. On the contrary, the part dedicated to national practices (national reports, chapter 4) includes only some regimes which are the most exemplary in this context. This may not be interpreted in a way that the three presented national models are the only three existing regimes granting access to court files in the world. On the contrary, it is possible that other jurisdictions have a very open access to court documents but are not included in this study for two reasons: i) the scope of this study does not allow for a comprehensive research of many national regimes; ii) difficulties in finding comprehensive regulation of the right of access to court files, mainly due to non-availability of national rules on access to court documents in other languages than the national official language(s).

However, if some countries already allow open access to court files (subject to some limitations), it is being claimed that there is then no reason why the CJEU should not become one of the pioneers in this domain, leading the way to judicial transparency and accountability.

The question of accessibility of court documents in this study actually encompasses two questions: the question of possibility of obtaining access to

⁵ See Voermans, W., Judicial transparency furthering public accountability for new judiciaries, in *Utrecht Law Review*, Volume 3, Issue 1 (June) 2007, at 150.

⁶ In 2011 the Court successfully launched the e-Curia project. This application allows agents and lawyers entitled to practise before the courts of a Member State or a State party to the European Economic Area Agreement, provided they have an account giving access to e-Curia, to lodge a procedural document using that application (see *infra*).

such documents, and the question of how to obtain such access. In other words, the first aspect touches upon the issue of (non)confidentiality of a requested court document: is it available to the public at all? The second aspect in fact tackles the issue of how simple (or difficult) it is for members of the public to get access to a requested document, e.g. do they need to go to a specific court personally to get access to it, would they obtain a hard copy only, or would they not need to go to a tribunal for they would obtain a scan of the requested document via email, or would they even be able to access it remotely, without any help and intervention by court personnel, using advanced communication tools, such as internet?

1.3. Methodology

The study was conducted on the basis of desk research from various sources, such as scholarly views, academic literature, articles, studies and reports, as well as analysis of national legislations and regimes governing access to public information in general, and more specifically to court files.

Academic literature is abundant on the right of access to information in general. The same holds true for various studies and reports conducted by/for international bodies and organisations with regard to this right. While the number of research papers drawn up in relation to the right of access to public documents (RAPD) is significant⁷, they do not concentrate specifically on the right to access court documents (RACD). In fact, this may not come as a surprise. When it comes to accessibility to information relating to a judiciary and, more specifically, to court files, the judiciary is either completely exempt from access to documents or only its administrative (operational) aspect is covered by RAPD, and not its adjudicative part⁸. Courts of various countries provide for access to final judicial decisions. However, such rules will not be presented in detail because, for example, decisions are only (physically) available at the court which pronounced the decision (and not online), or information is only available on closed files, not also on pending cases.

Only a few judicial systems seem to have developed a comprehensive and uniform system of disclosure⁹. However, even in this case wide access to court documents (the question whether a document can be obtained at all) does not amount automatically to enabling public access to all court documents remotely¹⁰.

⁷ To mention but a few: Scheuer et al.: *The Citizens' Right to Information - Law and Policy in the EU and its Member States*; OECD, *The Right to Open Public Administrations in Europe: Emerging Legal Standards*, op. cit.; ARTICLE 19, *the Global Campaign for Free Expression: Global trends on the right to information: a survey of South Asia*.

⁸ Courts as public bodies are excluded from the system of access to public information for example in Spain, Slovak Republic, Portugal, Netherlands, Malta, Latvia, Italy, Germany, European Union; countries where courts are included in the system as are other bodies of the public sector are, inter alia, UK, Sweden, Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Lithuania, Poland. See in Pirc Musar, N., *Access to court records and FOIA as a legal basis – experience of Slovenia*, at 3, available at https://www.ip-rs.si/fileadmin/user_upload/Pdf/clanki/Access_to_court_records_and_FOIA_as_a_legal_basis_-_experience_of_Slovenia.pdf.

⁹ For example, in Australia, access to court documents varies greatly from court to court, and there is a lack of clarity in the law. See Open Society Justice Initiative, *Report on Access to Judicial Information*, op. cit. at 37.

¹⁰ For example, even if members of the public generally have access to court files, the remote access is given only to certain types of documents (most frequently to final decisions) but not also to other documents constituting a specific court file.

Access schemes are often ad hoc and derive from many sources, and few countries have been able to create a comprehensive system of access to judicial information that takes full cognisance of the following principles:¹¹

- the presumption that all documents in a case file should be accessible to the public, subject to narrowly tailored exceptions;
- requirement of proactive publication of all decisions and opinions of all courts;
- requirement of registration and indexing of all official documents, and encouragement of publication in electronic databases;
- treating access to documents in civil and criminal cases;
- requirement of designation of a public official whose duty it is to respond to requests for documents that are unavailable in databases and provide them to those who request them.

Hence, "fishing for" information about the right to comprehensive access to COURT files has revealed itself as a very challenging undertaking¹². To wit, the trend of "opening" courts is very recent. It is an area about which little has been written and which historically has been approached at a local level¹³.

Therefore the study in the chapter dedicated to national regimes includes EU Member States (Finland and Slovenia) and a non-EU country (Canada). These three states provide for a general access to court files either via their legislation (binding rules – Finland and Slovenia) or via their internal guidelines (soft law – Canada). Consequently, two sets of national legislation on the right to access court files are analysed, as well as the Canadian Model Policy (see *infra*).

1.4. Terminology

The terms "right of access to public documents" and "right of access to public information" are used mainly as synonyms. However, there are some theoretical and practical differences between the two which will be discussed below (point 2.2.).

The same holds true for the notions "right" and "freedom". Notably, in the literature available on the right to access public information the same term is not consistently used (but the two are normally used as synonyms). In that context it should also be emphasised that "documents" or "information", for the purposes of this study, mean "public documents" and "public information", respectively (unless stated otherwise).

¹¹ *Ibidem*, at v and 37.

¹² In this relation it shall be understood that transparency of judiciary cannot be measured only based on (non)existence of specific rules governing access to court records for third persons. On the contrary, other measures can be taken into account, as well. For example, states of both Americas developed indicators of judicial openness, measuring inter alia how much information related to the judiciary is available on internet, or measuring perception of the independence of the judiciary by the public. Within the periodic surveys conducted by the Justice Studies Center of the Americas (CEJA), is the index of Online Access to Judicial Information on the Internet. This initiative aims to promote accessibility to information at the regional court, quantifying how accessible is the minimum information that judicial systems should make available to the public concerned in their websites. This indicator measures annually how accessible is the basic information that each country's judicial institutions make available to users on their web pages.

The results on the perception of the judicial independence are based on the question: Is the judiciary in your country independent from political influences of members of government, citizens or firms? See reports of the Justice Studies Center of the Americas (Centro de estudios de justicia de las Americas), available at http://www.cejamericas.org/reporte/2008-2009/muestra_seccion3ac3e.html?idioma=espanol&tiporeporte=REPORTE4&capitulo=ACERCADE.

¹³ *Ibidem*, at i.

2. RIGHT OF ACCESS TO PUBLIC INFORMATION

Freedom of information, including the right to access information held by public bodies, has long been recognised not only as crucial to democracy, accountability and effective participation, but also as a fundamental human right, protected under international and constitutional law^{14,15}.

It is emphasised that the right of access to information is a crucial underpinning of participatory democracy ("the oxygen of democracy"¹⁶), for without information citizens cannot possibly make informed electoral choices or participate in decision-making processes. There is also another aspect to this right, as was reiterated by the Constitutional Court of Colombia: "all persons [have] the right to inform and receive information that is true and impartial, [which is] a precaution that the constituent assembly introduced in order to guarantee the adequate development of the individual in the context of a democratic State."^{17,18} It is considered that this aspect is not only very original but also has a big potential for the further development of the case-law on the right of access to (judicial) information and the future (constitutional) justification of this right.

The right of access to information is also essential for accountability and good governance; secrecy is a breeding ground for corruption, abuse of power and mismanagement¹⁹. No government can now seriously deny that the public has a right of access to information, or those fundamental principles of democracy and accountability demand that public bodies operate in a transparent fashion²⁰.

The right of access to information held by the State has been recognised in Swedish law for more than two hundred and fifty years²¹. However, it was only in the last quarter of the 20th century that this right gained widespread recognition, both nationally and in international organisations. In this period national governments, intergovernmental organisations and international financial

¹⁴ Article 19, the Global Campaign for Free Expression: Global trends on the right to information: a survey of South Asia, at 7, available at <http://www.article19.org/data/files/pdfs/publications/south-asia-foi-survey.pdf>.

¹⁵ "The right of access to official information is now protected by the constitutions of some 60 countries. At least 52, and arguably 59 of these expressly guarantee a 'right' to 'information' or 'documents', or else impose an obligation on the government to make information available to the public. The top courts of an additional five countries [Canada, France, India, Israel and South Korea] have interpreted their constitutions to recognize the right implicitly." in Right2info, Constitutional protection of the right to information, available at http://www.right2info.org/constitutional-protections-of-the-right-to/constitutional-protections-of-the-right-to#_ftn1.

¹⁶ Such a name was given by the ARTICLE 19, a non-governmental organisation registered in UK whose aim is to promote freedom of expression (see op. cit).

¹⁷ Appeals Chamber of the Constitutional Court of Colombia. Judgement T-437/04, file T-832492, May 6, 2004, Legal argument 6, available at: <http://www.corteconstitucional.gov.co/relatoria/2004/T-437-04.htm>.

¹⁸ Office of the Special Rapporteur for Freedom of Expression, Inter American Commission on Human Rights, The Inter-American legal framework regarding the right to access to information, at 26 available at <http://www.oas.org/en/iachr/expression/docs/publications/ACCESS%20TO%20INFORMATION%20FINAL%20CON%20PORTADA.pdf>.

¹⁹ ARTICLE 19, op. cit., at 5 and 6.

²⁰ Ibidem, at 6.

²¹ In Sweden, the Freedom of the Press Act of 1766 granted public access to government documents. It thus became an integral part of the Swedish Constitution, and the first ever piece of freedom of information legislation in the modern sense. In Swedish this is known as the Principle of Public Access (*offentlighetsprincipen*), and has been valid since. Another early example of freedom of information legislation is Colombia whose 1888 Code of Political and Municipal Organization allowed individuals to request documents held by government agencies or in government archives.

institutions have adopted laws and policies which provide for a right of access to information held by public bodies²².

2.1. Foundation of the right to access public information

The primary human right or constitutional source of the right to information is the fundamental right to freedom of expression, which includes the right to seek, receive and impart information and ideas²³ – although some constitutions also provide for a separate, specific protection for the right to access information held by the State. In a more general sense, the right to access public information can also be derived from the recognition that democracy, and indeed the whole system for protection of human rights, cannot function properly without freedom of information. In that sense, it is a foundational human right, upon which other rights depend²⁴.

The right to access information is fundamentally twofold: in its content and in its personal application. From the point of view of its scope, it is one of the most essential rights on which other fundamental rights are based (e.g. the right to association). Regarding its personal application, first legal instruments (either national or international) mentioning this right initially limited its application to citizens and residents of relevant territories to which these instruments were applicable²⁵. In recently adopted legal instruments, no such mention is included²⁶, or courts simply interpret this right as universal, not imposing any formal obligations for appellants to prove any conditions related to citizenship or residence in a certain state²⁷. This trend reflects the recognition of the RAPD to anyone, regardless of his or her (political) ties with a specific country. Considering the fact that the right to access information has been increasingly recognised as the right for everyone to know, then – it is claimed – it follows that it is universal in that every human being is its beneficiary, not only citizens or residents of a certain state.

The wide (national, European and international) recognition of the right of access to official documents as a fundamental principle has important ramifications. Firstly, the fundamental nature of the right requires a strict interpretation of any limitation to the exercise of that right. Secondly, public authorities must subject any such limitation to a scrutiny of proportionality: the principle of proportionality requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view. Thirdly, and most crucially, transparency regimes should be revised so as to guarantee the widest possible access to official documents.²⁸

²² ARTICLE 19, op. cit., at 8.

²³ The Universal Declaration of Human Rights of the UN declares in its article 19 that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

²⁴ E.g., within the UN, freedom of information was recognized early on as a fundamental right. In 1946, during its first session, the UN General Assembly adopted Resolution 59(1) which stated: "Freedom of information is a fundamental human right and [...] the touchstone of all the freedoms to which the UN is consecrated."

²⁵ In this sense the article 255 TEC limited *rationae personae* application of the right to access documents of the institutions only to citizens and residents of the EU.

²⁶ E.g. Slovenian FOIA (see *infra*).

²⁷ In this way the right of access to documents is also interpreted by the EU institutions (see *infra*).

²⁸ OECD, op. cit., at 12.

2.2. Object of the right to access public information

According to some legislative acts on transparency, the right of access concerns “documents”, whereas, according to other regulations, the right of access concerns “information”. How relevant is this terminological distinction? Does it imply a substantive difference in the object of the right²⁹?

In abstract terms, the two notions are different. The former right allows the requester to view a document and extract a copy of the same. The latter right allows the requester, in addition, to ask the public authority to disclose whatever information it has, even when it is not included in a document. Thus, the first notion is narrower than the second, even though the notion of document is usually defined in very broad terms either by domestic courts or by legislators themselves³⁰.

Many FOI regimes clearly state the right of access to information and impose on the public authority the duty not only to disclose an already existing document, but also to process information and elaborate data not yet available to the public^{31,32}. The rationale is evident: if the purpose of FOI regimes is to promote participation in decision-making processes and tighter public control on the government, the mere fact that information is included in a document or not should not make any difference. Despite that, there are FOI regimes that define the object of the right of access by reference to the notion of “document”. Even then, some “remedies” are put in place, which tend to smooth the contradiction. A first example is the Portuguese FOIA. In defining the object of the right of access, it refers to the notion of “administrative documents”, but then it admits the right of everyone to ask for both “administrative documents” and “information as to the administrative documents’ existence and content”.³³

A second case in point is provided by the EU. Regulation No 1049/2001³⁴ explicitly connects the right of access to “documents”. However, the CJEU soon adopted an expansive teleological reading of this notion: since the aim pursued by the regulation on transparency is to ensure that citizens have the widest possible access to information, it would be “wrong” to submit that the decision of the requested institution “concerns only access to ‘documents’ as such rather than to the information [...]”.^{35,36}

2.3. Beneficiaries of the right to access public information

The recognition of the public’s right to information implies that “everyone” is entitled to access³⁷. Two aspects related to the beneficiaries of this right deserve a closer look: a) the relevance of the distinction between citizens and non-citizens; b) the justification of requests and the identification of the requesting party.

²⁹ Ibidem, at 20.

³⁰ Ibidem.

³¹ In this sense see Right2Info, op. cit.

³² In some countries transparency does not encompass the public sector only but also private entities exercising functions of a public nature or providing under a contract made with a public authority any service whose provision is a function of that authority, or companies that, despite their private form, are owned by the state or another public entity. See OECD, op. cit., at 18-19.

³³ See OECD, op. cit., at 20.

³⁴ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

³⁵ See Case C-353/99 P, Hautala, para. 23, [2001] ECR I-09565.

³⁶ See OECD, op. cit., at 21.

³⁷ Ibidem, at 16.

2.3.1. Citizens and non-citizens

What is the actual meaning of "everyone"? Should the right of access be granted not only to citizens, but also to non-citizens, whether they are residents or not?

The emerging common European standard provides an affirmative answer to the second question³⁸. In the past, access to information had been restricted to citizens. This solution, adopted by old legislation such as the Finnish Act on Openness of Government of 1951, is no longer followed. Access to documents has been gradually extended to non-citizens, thus becoming a fundamental right. In the area of transparency, the possibility for public authorities to discriminate on the basis of citizenship would not be supported by any legitimate or reasonable means³⁹. Moreover, if access to documents has the nature of a fundamental right, then the exclusion of non-resident aliens is also questionable⁴⁰. Article 2 of Regulation No 1049/2001 grants the right of access to citizens and to resident aliens: non-resident aliens seem to be excluded. However, EU institutions have never applied the existing distinction to the detriment of non-residents, implicitly acknowledging the inconsistency of the distinction, which is currently under revision⁴¹.

Therefore, as other examples show⁴², European legal orders are converging toward a unitary common standard: access to public information is granted to "everyone", understood as also including non-citizens, whether they are residents or not.

2.3.2. Justification of requests

A second question related to a beneficiary of the right to access public information is whether the beneficiary should justify the request and identify himself. The Council of Europe's Convention on access to official documents⁴³ aptly summarises the relevant standards. First, the right of access to public information is a "right of everyone, without discrimination on any ground" (Article 2.1). Second, "an applicant for an official document shall not be obliged to give reasons for having access to the official document" (Article 4.1). Third, member states "may give applicants the right to remain anonymous except when disclosure of identity is essential in order to process the request" (Article 4.2)⁴⁴.

European FOIAs exhibit a high level of convergence in this respect. Access to public information occurs without having to show any individual interest (legal or actual). The requesting person is free to state their motives, but cannot be obliged to do so.⁴⁵ Identification is generally required, essentially for practical reasons: it helps the administration to ensure an ordinate processing of the requests. Yet, in some legal orders – as in Finland⁴⁶ or Sweden⁴⁷ – the protection of the right to anonymity may determine the adoption of the opposite rule, namely that public authorities cannot inquire into a person's identity on account of her/his request of access. Only when there are countervailing public or private

³⁸ Ibidem.

³⁹ Ibidem.

⁴⁰ Ibidem.

⁴¹ On the revision of the Regulation No 1049/2001 see more below at 5.1.2.

⁴² For instance, Germany, Portugal, Slovenia and Sweden.

⁴³ It is open to signature from 18th June 2008. In order to enter into force, it needs 10 ratifications. At the time when this study went to print, 6 countries had ratified it.

⁴⁴ OECD, *op. cit.*, at 17.

⁴⁵ Ibidem, at 17.

⁴⁶ Section 13.1 of the Finnish Openness of Government Act.

⁴⁷ Article 14.3 of the Swedish Freedom of Press Act.

interests to confidentiality does the requester need to identify him/her (e.g. in case for request to access one's own file containing personal data)⁴⁸.

2.4. Exceptions

Just like any other fundamental right, the right of access to information is not unlimited. Exceptions to the right of access to information represent the most crucial part of FOI regimes⁴⁹. They are aimed at ensuring that disclosure of information held by public authorities does not harm relevant public or private interests⁵⁰. Yet, the obvious risk is that, provided that the grounds for exemption are defined and interpreted too broadly, the right to know may be defeated⁵¹.

2.4.1. Legitimate public and private interests

The very common approach of FOIAs is to define certain legitimate public and private interests as grounds for exemptions to the right to information. Not all the public interests justify the limitation of the public's right of access to documents. Legitimate public interests usually referred to in national and European regulations can be divided in two main groups.⁵² The first includes "sovereign functions" of the state, including four public interests: defence and military matters; international relations; public security or public order or public safety; and the monetary, financial and economic policy of the government. The second group of public interest exemptions typically includes information related to so called "internal documents"⁵³: court proceedings; the conduct of investigations, inspections and audits; and the formation of government decisions. Not finalised versions of internal documents (documents which are not yet "drawn up"), or preliminary drafts are not considered official documents, and, thus, can neither be listed in the register of documents, nor be released⁵⁴.

FOIAs usually contain three types of private interests as grounds for exemptions: trade, business and professional secrets; commercial interests and personal data. Conflict of norms on protection of personal data and norms on access regimes is one of the main problems concerning FOIA⁵⁵. According to data protection regimes, it is incumbent upon the public authority to verify whether the data subject has given her/his consent for disclosure of personal data⁵⁶.

⁴⁸ OECD, *op. cit.*, at 17.

⁴⁹ *Ibidem*, at 20.

⁵⁰ *Ibidem*, at 21.

⁵¹ *Ibidem*, at 20.

⁵² *Ibidem*, at 22.

⁵³ This second ground for refusal of access refers more to particular categories of acts rather than to generic public interests. Internal documents encompass for example documents relating to a matter where a decision has not been taken and documents containing opinions for internal use as part of deliberations and preliminary consultations within the government.

⁵⁴ See sections 3.1. and 7 of Swedish Freedom of Press Act.

⁵⁵ OECD, *op. cit.*, at 22.

⁵⁶ Regulation No 45/2001 on personal data protection (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 (OJ L 8, 12.1.2001, p. 1-22)) defines "personal data" as "any information relating to an identified or identifiable natural person"; and "an identifiable person" is "one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity" (see also *infra*).

2.4.2. Absolute and relative exemptions

In relation to the exemptions to the right of access to information, legal standards have been developed. Their purpose is to limit administrative discretion by ranking interests at stake (establishing a hierarchy) so that public authorities are required to assess the concrete relevance of those interests⁵⁷. The most commonly used legal standards in this relation are the harm test (absolute exemptions) and the balancing test (relative exemptions).

The typical formula used to construe an absolute exemption runs as follows: "Public authorities shall refuse access to a document where disclosure would harm⁵⁸ the protection of the following interests [...]". The purpose of such a provision is to guarantee an enhanced level of protection to certain public or private interests, owing to their specific relevance in a given legal order.⁵⁹

The effect is that the public authority is not entrusted with a discretionary power. No balancing can be exercised since the protected interest is put, on an abstract scale of interests shaped by the legislator, in a superior position vis-à-vis the public interest in transparency. When the public authority is satisfied that disclosure of the information requested would harm interest protected by the exemption, confidentiality prevails⁶⁰.

The harm test involves an assessment that can be conceptually divided into two parts. Firstly, the public authority has to establish the nature of the impairment that might result from disclosure. Secondly, the likelihood of the detriment to occur has to be convincingly established.

Regarding the nature of the harm to the public interest it is necessary to identify and qualify the specific detriment that would endanger the interest protected by the exemption. A distinction can be drawn between the potential and the actual risk of damage. The best judicial and administrative practices tend to reject the former notion and to converge on the latter: in order to apply an exemption, the risk of impairment should be more than an abstract possibility. If exceptions to the rule of access have to be interpreted restrictively, it follows that a request can only be rejected if disclosure is capable of actually and specifically⁶¹ undermining the protected interest⁶².

Regarding the likelihood of the detriment, a public authority needs to show that there is a causal relationship between the potential disclosure and the impairment of the public interest. Once it is ascertained that the risk of impairment is actual and specific, the degree of the risk for it to occur should be assessed. Two options are available. One is based on the distinction between plausible and likely impairment: a requirement of a plausible harm is more stringent than the requirement of a harm that is merely likely. Another variant of this technique involves the distinction between the straight and reverse harm test: a straight requirement of damage favours the granting of access whereas a reverse requirement of damage assumes secrecy to be the main rule^{63, 64}.

⁵⁷ OECD, op. cit., at 24.

⁵⁸ Or other words can be used such as: impair, undermine, hinder, prejudice or damage.

⁵⁹ The category of absolute exemption usually includes grounds for exemption corresponding to the "sovereign functions" of the state; defence, international relations, public order and alike.

⁶⁰ OECD, op. cit., at 24.

⁶¹ In other words, the damage is reasonably foreseeable and not purely *hypothetical*.

⁶² OECD, op. cit., at 24.

⁶³ This can, in turn, have an influence on who bears the burden of proving that certain information shall be disclosed – public administration (straight harm test) or the person requiring access (reversed harm test).

Relative exemptions (balancing test) are usually set according to such a wording: "Public authorities shall refuse access to a document where disclosure would harm the protection of the following interests [...] unless there is an overriding public interest in disclosure". The final addition (in italics) marks the difference from absolute exemptions.

The possibility that the public interest in transparency could override a public or private interest protected by the exemption implies that the conflicting interests are put on an equal foot. There is no presumption in favour of protecting one of the two at legislative level. It is for the public authority to weigh the two competing interests and the latter is entrusted with full discretion. A proper application of the balancing test requires a preliminary harm test⁶⁵. If the harm is not relevant (or not likely to occur), there is no need for balancing: the public interest in disclosure would prevail without being "weighed". The second step, specific to the balancing test, involves weighing the potential damage against the corresponding benefits arising from the disclosure⁶⁶. The relevant criteria for balancing are the general ones pertaining to the exercise of administrative discretion and, thus, may vary from one legal tradition to the other. Nonetheless, since the right of access is recognised as a fundamental right it imposes the adoption of strict scrutiny over the discretionary power of public authorities. Therefore such scrutiny should be carried out in light of the principle of proportionality.⁶⁷

⁶⁴ OECD, *op. cit.*, at 25.

⁶⁵ In order to decide whether to apply the exemption, the first step is – again – to assess the relevance and the likelihood of the harm to the protected purpose.

⁶⁶ According to consistent EU case-law, this principle involves a tripartite standard: that measures adopted by the public authority do not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued (suitability); that, when there is a choice between several appropriate measures, recourse must be had to the least onerous (necessity); that the disadvantages caused must not be disproportionate to the aims pursued (proportionality *stricto sensu*). These three sub-tests may help courts preventing discretionary exemptions to become an instrument of arbitrariness in the hands of public authorities.

⁶⁷ OECD, *op. cit.*, at 25.

3. FOCUS OF THE STUDY

Chapter Two briefly presented the (general) right of access to public information. Given the scarcity of literature available on the right to access court files, it was not possible to properly construct its theoretical underpinnings, and the content⁶⁸ thereof. However, the right of access to court files is one of many manifestations of the right of access to information. Hence, considerations valid in relation to the general right (access to information) should, in principle, also be valid for the specific right (access to court files).

As can be deduced from the title of this study, its focus is on the right of access to court documents. Stated differently, the analysed object of this study is the right of non-parties to the judicial proceedings to obtain court documents.

The study concerns the right of access to court documents relating to the jurisdictional functioning of the judiciary, and not relating to the administrative functioning thereof. Therefore the notion of "court documents" should in this study be understood as referring to the court documents that form a specific court file (such as an application, motion, recordings, etc.), and does not include documents related to administrative operation of the judiciary (such as budget, procurement, expenses or judges' assets and income disclosure statements).

It stems from the abovementioned that the focus of the study is not one of the following questions:

- right of an interested party to access documents in an administrative procedure⁶⁹;
- availability of court records to the judiciary and court personnel;
- (special) rights of media/journalists as well as consumer organisations and environmental groups or the like to access court files;
- special regimes on press reporting methods of court proceedings⁷⁰;
- right to protection of personal data and right to access personal data (even though the collision of the right to protection of personal data with the right of access to information will briefly be, in the context of the EU legislation, discussed below);
- legislation/policies on archiving material.

Given the fact that (specific) legislation on the right of access to court files is scarce and a newly emerging trend on one hand, but also a very dynamic legal discipline gaining ground very fast, on the other hand, the study encompasses legislation/good practices of some countries who give a comprehensive access to court files to members of the public.

⁶⁸ It should be reminded that the scope of this right – if acknowledged at all – varies considerably across countries and that for the time being one cannot talk about its minimal content, which would be recognised by a significant number of states.

⁶⁹ Such a right gives a party to an administrative procedure the possibility to access, in the framework of this procedure, documents held by the public administration, which may affect an incoming administrative decision (the right of access to documents in an administrative procedure is expression of procedural transparency); OECD, *op. cit.*, at 7. On national level is the right to access documents in an administrative procedure level implemented by means of Administrative Procedures Acts (APAs) This is for example the case in Austria, the Czech Republic, Estonia, Germany, Italy, Poland, Portugal, Slovenia, Spain, and Sweden. In few other countries, the right of access to documents in individual cases is not protected by an APA, but by other means: namely, by a specific piece of legislation or directly by the courts (as in the United Kingdom). See OECD, *op. cit.*, at 10.

⁷⁰ In many countries restrictions apply to press reporting methods of court proceedings. The more intrusive and direct the reporting method (i.e. live broadcasted television), the stricter the limitations put thereon. See Voermans, *op. cit.*, at 53.

4. RIGHT OF ACCESS TO COURT DOCUMENTS

The reason why the judiciary is in the majority of cases exempt from access to documents is the protection of its authority and impartiality⁷¹. It is claimed that in order to preserve the courts' independence and efficiency it is necessary to apply specific publicity rules. However, the same argument is nowadays used by scholars in discussions to support the view why courts should also allow access to their files⁷²; in order to actively promote transparency, courts should enable circulation of the concerned documents beyond their walls.

The reasons most commonly stated in relation to giving access to court files are enhancing efficiency, effectiveness, public confidence in the judicial system, and fair administration of justice (including the public's perception of the judiciary and judicial decision-making)⁷³. In addition to promoting public confidence in the judiciary, allowing the public to access judicial proceedings and records encourages judges to act fairly, consistently and impartially, allowing the public to "judge the judge"⁷⁴. "To work effectively, it is important that society's [...] process satisfy the appearance of justice [...] and the appearance of justice can best be provided by allowing people to observe it"⁷⁵.

Only a few states have, until now, adopted either legislation⁷⁶ which enables members of the public to access court documents⁷⁷, or guidelines governing this right⁷⁸. In the first case, binding legislation provides for such a right, in the second case the courts themselves establish rules giving access to court files. Apart from these two scenarios case-law also contributes to the construction and validation of the right to access court documents. Especially in Latin America, various supreme and/or constitutional courts have confirmed the existence of such a right and defined its scope in specific cases of which they were seized⁷⁹. Considering the role supreme and constitutional courts play in the judiciary system, the resonance of such rulings in the national law system should not be

⁷¹ OECD, *op. cit.*, at 6 and 7.

⁷² See for example Leino, P., Just a little sunshine in the rain: the 2010 case law of the European Court of Justice on access to documents, in *Common Market Law Review* 48, at 1251 and 1252; and Voermans, W., *op. cit.*, at 149.

⁷³ Open Society Justice Initiative, *op. cit.*, at ii.

⁷⁴ See Rodrick, S., Open Justice, the Media and Avenues of Access to Documents on the Court Record, in *The University of New South Wales Law Journal*, 90, 93-95 (2006) in Open Society Justice Initiative, *op. cit.*, at iii.

⁷⁵ Words of United States Supreme Court Chief Justice Warren Burger, in Open Society Justice Initiative, *op. cit.*, at iii.

⁷⁶ When talking about adopting legislation on the right of access to court files two options are included: (i) either there are specific rules for judiciary allowing for the access to the court files or (ii) there are no specific rules derogating from the general rules so that no exemption applies to the judicial branch of public authorities.

⁷⁷ For example Finland and Slovenia.

⁷⁸ For example the Supreme Court of Canada.

⁷⁹ For example, between in 2008, Mexico's Supreme Court of Justice conducted a series of public hearings in the framework of a case that examined the constitutionality of abortion. In a process that stirred a major debate in Mexican society, the Court analyzed the reforms introduced a year before by the Federal District's Legislative Assembly, allowing free access to abortion at the simple request of women in Mexico City during the first quarter of pregnancy. The hearings were held to hear the positions of the groups in favour and against the law. Both the hearings and the sessions of the Court were recorded and are available (not only in video format but also as transcripts and summaries) on a website set up by the Supreme Court to allow for an adequate monitoring of the case by citizens. Using this mechanism, the Court informed society of the development of the process that was followed in order to resolve a sensitive issue in accordance with the constitution. See Herrero et al., *Access to information and transparency in the judiciary, a guide to good practices from Latin America, 2010*, at 30, available at http://siteresources.worldbank.org/WBI/Resources/213798-1259011531325/6598384-1268250334206/Transparency_Judiciary.pdf.

underestimated. Indeed, one single judicial decision is sufficient to pave the way to such a right, and it might even define it as a constitutional or fundamental right.

An independent judiciary is critical to protecting individual rights, preserving the rule of law, and preventing unwarranted concentration of power by the executive.⁸⁰ It is claimed that the role of modern judiciaries has substantially changed over the years. Their bearing and weight as lawmakers have increased vis-à-vis the administration and legislature owing to the growing complexity of society (and the conflicts resulting there from) and the internationalisation of the law, among other reasons. It is emphasized that this new judiciary is being activist, with new responsibilities in the field of law-making and even policy-making. This is partly the result of a global trend of judicialisation owing to, for example, the growth of international (human rights) law, partly the result of the need to empower the judiciary vis-à-vis the other government branches, and partly the effect of a legislative attitude to rely more and more on the judiciary to decide on controversial issues, in order to develop balanced case law.⁸¹

In answering the question what might be the proper way to hold the judiciary accountable without compromising its independence, some scholars⁸² make a distinction in this regard between more "traditional" forms of – hard – accountability, and more modern, "soft accountability". Hard accountability for the judiciary entails that judges can only be indirectly scrutinised and held answerable for their professional functioning (e.g. via the mechanisms of an appeal system, through recruitment, appointment, promotion, permanent education, disciplinary action and so on). Hard accountability methods are traditionally very aloof in order not to compromise judicial independence⁸³. Soft accountability, on the other hand, deals with the openness and representation of the judiciary in a more direct way⁸⁴. This type of accountability demands procedural transparency, representation and sensitivity as regards different interests and needs of a changing social environment. This is a two-way process whereby courts need to open up to the public, to enter into a dialogue and at the same time to be more sensitive to values and the needs of the community (social accountability)⁸⁵. Soft accountability is by no means a new concept for the judiciary, but the increase of soft accountability instruments such as a more open complaints processes, and a more open attitude as regards access to information, are indicative of a trend in which soft accountability instruments are used to answer growing public pressure for greater social accountability as regards the judiciary⁸⁶.

4.1. National legislation and good practices on the right to access court documents

As mentioned above, specific rules on access to court files for third persons are a newly emerging legal discipline. In some states they are written (in laws or constitute a part of rules on internal administration of national courts), in other states they are paving their way through decisions of (mostly) supreme or

⁸⁰ See Open Society Justice Initiative, *op. cit.*, at ii.

⁸¹ See Voermans, *op. cit.*, at 148-149.

⁸² See K. Maleson, *The New Judiciary; the effects of expansionism and activism*, 1999, and G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, 2007, at 17, both cited in Voermans, *op. cit.*, at 149-150.

⁸³ See Voermans, *op. cit.*, at 150.

⁸⁴ *Ibidem.*

⁸⁵ *Ibidem.*

⁸⁶ *Ibidem.*

constitutional courts establishing the right of access to court documents through case law.

In this subchapter three national legislations (Finland and Slovenia) / practices (Canada) will be presented. Since the length of this text does not allow for a very detailed insight of each of these national regimes on the right to access court files, each of them will only be presented in its basic features.

The three country reports included in this study are comparable only to some extent. This is not only owing to the fact that some countries have cogent whereas other have soft, guiding rules on access to court documents, but also due to the fact that various jurisdictions (from first instance tribunals to supreme and constitutional courts) responsible for conducting different judicial procedures (from civil to administrative and criminal) are included in the study. Furthermore, mutual comparison of the various regimes is not one of the aims of the study, as already explained above. One of the main goals hereof is to present different existing models of access to court files which could potentially – subject to some necessary changes (country-specific solutions might not be readily exported to another setting⁸⁷) – serve as a model for the CJEU when adopting and adapting its rules on access to court files for third persons.

The degree of access to court documents varies across the three counties, as well. While all of them enable a very broad access to court files (question of getting access to court files), only Canadian rules also impose the availability of remote access to the public (i.e. via internet) to all court documents, and not only on the premises. Regimes on access to court documents in Finland and Slovenia do not include such an express general obligation⁸⁸.

4.1.1. Finland

The transparency of court proceedings is governed by the Act on the Publicity of Court Proceedings in General Courts (370/2007; hereafter APCP) whose main principle is publicity: "Court proceedings and trial documents are public unless provided otherwise [...]"⁸⁹. This Act, which entered into force on 1st October 2007,⁹⁰ provides for the publicity of court proceedings and trial documents in the High Court of Impeachment, the Supreme Court, the Court of Appeal, the District Court, the Labour Court and the Military Court⁹¹. Under certain conditions this act applies also to cases considered by the Market Court⁹².

Unless provided otherwise in the APCP, provisions of the Act on the Openness of Government Activities (621/1999; hereafter AOGA) apply in courts. Hence, APCP is a *lex specialis* in relation to legislation on access to public documents.

In section 3 of the APCP the crucial terminology is defined; court proceedings refers to oral and written proceedings and to deliberations by the court; oral

⁸⁷ Ibidem, at 159.

⁸⁸ However, in Finland, if a judicial (final) decision is available in a computerised register of decisions, then the access to it generally should be provided by issuing a copy in magnetic media or in some other electronic form. Access to other court documents could be provided in such a form, as well but this remains in the discretion of the requested court. In Slovenia all the judicial decisions are available online in a central database. Other court documents are accessible, in practice, in the premises of the requested court. For more details on that see *infra*.

⁸⁹ Section 1 APCP. Unofficial English translation of this act is available at: <http://www.finlex.fi/fi/laki/kaannokset/2007/en20070370.pdf>.

⁹⁰ Section 35 APCP.

⁹¹ Section 2(1) APCP.

⁹² Section 2(2) APCP.

proceedings refers to the main hearing, the preparatory session, judicial review or other court proceedings where a party has the right to be present or where someone is heard in person; written proceedings refers to written presentation or another stage of court proceedings that is based solely on written trial documentation; deliberations by the court refers to the deliberations by the members of the court and the referendary for the purpose of reaching a decision. Definition of a trial document further refers to a very broad definition of an official document in the AOGA : "An official document is defined as a document in the possession of an authority and prepared by an authority or a person in the service of an authority, or a document delivered to an authority for the consideration of a matter or otherwise in connection with a matter within the competence or duties of the authority. In addition, a document is deemed to be prepared by an authority if it has been commissioned by the authority; and a document is deemed to have been delivered to an authority if it has been given to a person commissioned by the authority or otherwise acting on its behalf for the performance of the commission."⁹³

Every person has an unconditional right to receive information from a public trial document. This right is unconditional in the sense that it does not depend on proof of any kind of interest by the person requesting a trial document (which is often the case in other countries⁹⁴). Trial documents become public after a certain period of time, specified in detail in section 8 of the APCP. The APCP knows both types of exceptions (absolute and relative) as to the publicity of the trial documents⁹⁵.

Some documents are to be kept secret because they contain sensitive information⁹⁶ (absolute exception). Categories of such information are listed exhaustively. For them, the exception is to be applied automatically (documents to be kept secret) and refers to, e.g., information which, if made public, would probably endanger the external security of the State⁹⁷, or sensitive information regarding matters relating to the private life, health, disability or social welfare of a person⁹⁸. Within this category fall also deliberations of the court. The period of secrecy for such trial documents is (not less than) 60 years; however, for some categories it is 80, and for some 25 years⁹⁹.

The second exception (relative) may be applied if the information is to be kept secret on the basis of the provisions of another act and revealing this information would probably cause significant detriment or harm to the interests that said secrecy obligation provisions are to protect¹⁰⁰. It is to be emphasised that the use of this exception is – unlike as the abovementioned – neither necessary nor automatic; the court may apply it or not, on its own motion or the request of a party (documents ordered secret). The period of secrecy for such trial documents is at most 60 years (protection of private life) or at most 25 years (any other reason for secrecy)¹⁰¹.

Unless the secrecy of a trial document is provided for (documents to be kept secret or documents ordered secret), a trial document becomes public as follows:

⁹³ Section 5 of the Finnish AOGA.

⁹⁴ Such as legitimate interests, overriding interests etc.

⁹⁵ Section 7 APCP.

⁹⁶ Section 9 APCP.

⁹⁷ Section 9(1)(1) APCP.

⁹⁸ Section 9(1)(2) APCP.

⁹⁹ Section 11(1) APCP.

¹⁰⁰ Section 10 APCP.

¹⁰¹ Section 11(2) APCP.

- for a case being considered in the first court instance, a trial document submitted to court other than in a criminal case becomes public when the case has been considered in oral proceedings or, if no oral proceedings are to be held in the case, when a decision is issued on the principal claim¹⁰²;
- for a case being considered in the first court instance, a trial document submitted to court in a criminal case becomes public once the decision has been reached; however, it may become public at an earlier stage if it is apparent that making the document public would not cause detriment or suffering to participants in the case or if there is a weighty reason for making the document public¹⁰³;
- a trial document submitted to court in non-criminal proceedings becomes public when the court considering the case has received it¹⁰⁴;
- a trial document submitted to court in written criminal proceedings becomes public when the consent of the defendant to consideration of the case in such proceedings has arrived at the District Court;
- a presentation memorandum prepared in court for the members of the court and a comparable other trial document drafted for the preparation of a case becomes public when consideration of the case has been concluded in the court in question;
- any other trial document drafted in court becomes public when it has been signed or confirmed in a corresponding manner.

As in the case of a trial document relating to a criminal case, a similar – yet reversed rule – exists in relation to trial documents relating to a non-criminal procedure. The court may order that such a trial document become public at a stage later than provided, however, at the latest during the oral proceedings in the case or, if no oral proceedings are held in the case, at the latest when a decision is issued on the principal claim. The condition for this is that making the trial document public earlier than ordered by the court would probably cause detriment or suffering to a participant and there is no weighty reason for making it public earlier than ordered by the court, or would prevent the court from exercising its right to order on the secrecy of the trial document.

A court decision is public unless the court orders on that it be kept secret (information which is to be kept secret by virtue of this act or information which has been ordered to be kept secret by the court¹⁰⁵). The trial document containing the decision is public¹⁰⁶. It becomes public when it has been issued or made available to the parties¹⁰⁷.

The rationale for distinction between a court decision and a trial document containing a court decision is the following: even if a court decision itself is to be kept secret (the public doesn't know about the content of a secret court decision), the public still maintains the right to know about the existence of such a decision.

¹⁰² Section 9(1)(1) APCP.

¹⁰³ Section 9(1)(1) read in conjunction with section 9(2) APCP.

¹⁰⁴ Section 9(1)(13) APCP.

¹⁰⁵ Section 24(1) APCP.

¹⁰⁶ Section 22 APCP.

¹⁰⁷ Section 22(2) read in conjunction with section 8(1)(4) APCP.

And even if a decision is secret, the conclusions of the decision and the legal provisions applied remain public¹⁰⁸.

If the court orders that a decision be kept secret and the case has social significance or it has caused considerable interest in public, a public report shall be prepared regarding the decision to be kept secret. The public report contains a general account of the case and of the reasons for the decision. In addition, a public report of a particularly sensitive offence involving private life of a person shall be published in a manner that does not reveal the identity of the injured party¹⁰⁹.

When court proceedings are pending or thereafter on the request of a party or also for a special reason, the court may decide again on the publicity of court proceedings or of a trial document not containing the decision of the court ("rehearing")¹¹⁰, if the circumstances have changed after the court had previously decided on the matter or there are otherwise weighty reasons for this¹¹¹. After court proceedings are no longer pending, the question of the publicity of a trial document not containing the decision of the court may be considered anew, if this is requested by a third party who is affected by the information contained in the trial document, and he or she had not been able to give a statement on the matter during the court proceedings¹¹².

In relation to methods of issuing a trial document, the APCP refers¹¹³ to the AOGA which states that access to an official document shall be given by explaining its contents orally to the requester, by giving the document to be studied, copied or listened to in the offices of the authority, or by issuing a copy or a printout of the document. Access to the public contents of the document shall be granted in the manner requested, unless this would unreasonably inconvenience the activity of the authority owing to the volume of the documents, the inherent difficulty of copying or any other comparable reason¹¹⁴. Access to public information in a computerised register of the decisions of an authority shall be provided by issuing a copy in magnetic media or in some other electronic form, unless there is a special reason to the contrary. Similar access to information contained in any other official document shall be at the discretion of the authority, unless otherwise provided in an Act¹¹⁵.

Since the basic principle underlying the Finnish APCP is comprehensive access to court documents, it is generally assumed that all court documents are publicly accessible from a certain moment. This is also reflected in the procedural provisions of the APCP. A party or a person concerned in the case may request the court to decide on the secrecy of a trial document or a part thereof only while the case is still pending. Only exceptionally, if the said person could not have made the request when the case was pending or there was another justified reason for failure to make the request, the court may decide on the secrecy after the proceedings are no longer pending¹¹⁶.

¹⁰⁸ Section 24(2) APCP.

¹⁰⁹ Section 25 APCP.

¹¹⁰ As stated before, a trial document containing the decision of the court is always public.

¹¹¹ Section 32(1) APCP.

¹¹² Section 32(2) APCP.

¹¹³ Section 13(1) APCP.

¹¹⁴ Section 16(1) AOGA.

¹¹⁵ *Ibidem*.

¹¹⁶ Section 25 APCP.

Case-law is available in Finlex¹¹⁷ which consists of over ten databases. The precedents of the following courts are available: The Supreme Court (Korkein oikeus, in Finnish and Swedish), the Supreme Administrative Court (Korkein hallinto-oikeus), the Courts of Appeal (Hovioikeus), the Administrative Courts (Hallinto-oikeus), the Commercial Court (markkinaoikeus, in Finnish and Swedish), the Labour Court (Työtuomioistuin) and the Insurance Court (Vakuutus-oikeus). In addition, there are databases with the summaries of judgments of the European Court of Human Rights and the Court of Justice of the EU. The database on Case-law in Legal Literature is available in English. Finlex is accessible free of charge.

The APCP also provides for a legal remedy in relation to a decision made by a court on the basis of the APCP. Such a decision is subject to a separate ordinary appeal following the procedure for the decision of the court on the principal claim¹¹⁸. The court decision shall be followed regardless of appeal. If the seeking of appeal would otherwise be frustrated, the court may order that the decision shall not be enforced before it has become legally final, unless the appellate court orders otherwise¹¹⁹. Violation of the obligation to keep a document secret is punishable in accordance with rules of the Finnish Criminal Code¹²⁰.

4.1.2. Slovenia

The Judiciary of the Republic of Slovenia (Sodstvo Republike Slovenije) has its own, centralised, webpage¹²¹ giving further electronic access to all the courts and tribunals in Slovenia (general – civil and criminal; and specialised – labour, social and administrative), in all the instances (local, district, the Supreme court, as well as the Constitutional Court of Slovenia¹²²). The webpage is very informative, giving information on the Slovenian judicial system, types of procedures, lists of oral hearings, latest news, etc. All judicial decisions are electronically available there, too, as well as (unofficial) English translations of key Supreme court judgements.

Access to information of public character is regulated by the Act on the Access to Information of Public Character (AAPI¹²³), which has introduced the principle of openness and transparency to all the three branches of the State: executive, legislative and judiciary. Slovenia therefore has a uniform regulation on access to public information which exposes to public scrutiny the judiciary as a whole, not just its administration or so-called court management¹²⁴.

Public information is defined as information stemming from the field of the working activity of the public administration which is in the form of a document, file, register, record or documentary material (hereinafter referred to as a "document"), which a public body has created itself, in collaboration with other bodies, or has acquired from a third entity¹²⁵.

¹¹⁷ <http://www.finlex.fi/en/oikeus/>.

¹¹⁸ Section 33(1) APCP.

¹¹⁹ Section 33(2) APCP.

¹²⁰ Section 34 APCP.

¹²¹ Available at <http://www.sodisce.si/>.

¹²² To be noted that the Constitutional Court of Slovenia does not form part of the judicial system, it is an independent and autonomous state authority.

¹²³ Zakon o dostopu do informacij javnega značaja (published in Official Gazette RS, No. 24/2003). English translation available at <https://www.ip-rs.si/index.php?id=324>.

¹²⁴ See Pirc Musar, N., op. cit., at 1.

¹²⁵ Article 4 AAPI.

Additionally, access to court documents for third persons is governed by procedural legislation. An applicant who wishes to view or obtain a copy of a court file has to demonstrate a legitimate interest (in criminal proceedings) or justifiable benefit (in civil and other judicial proceedings). More specifically, anyone having a justified interest may be permitted to review or obtain a copy of an individual criminal file. As long as the proceeding is pending, the access is allowed by the court deciding on the case. Once the case is closed, the access is granted by the president or an officer appointed by the former. If the requested documents are held by a prosecutor, the request should be addressed to him. Review and transcription of individual criminal records may be refused if this is dictated by the specific grounds of defence or national security, or if the public has been excluded from the trial. Against such a decision an appeal can be filed which does not stay its execution.¹²⁶

As long as a procedure is pending, access to court files in non-criminal cases may be allowed by the president of the requested court. Once such a case has been closed, the president or an officer appointed by the former may grant such access to the file¹²⁷.

Contact details of such officials are available on the presentation page of the website of each court, failing which the applicant can submit his/her request to the president of the court.

There are some uncertainties as to the relationship between procedural rules governing access to a specific court file on the one hand and the material rules of the AAPI on the other hand. Some claim that the two sets of rules govern different situations: the AAPI the general right of everyone to access documents of public character, whereas the procedural rules govern rights of individuals (those having a specific interest) to access a specific court file.¹²⁸ Others claim that procedural rules are a *lex specialis* in relation to the AAPI which implies that those procedural rules which derogate from the AAPI prevail over the latter¹²⁹. If this is true, than anyone requesting access to a specific court file should first demonstrate his legitimate interest (in criminal proceedings) or justifiable benefit (in civil and other judicial proceedings) in accessing documents, whereas the requested court (or a public prosecutor's office) would need to decide whether the access might be granted, taking in account both provisions of procedural rules and the AAPI, assessing the legitimate interest/justifiable benefit of the applicant and weighting it against the potential overriding interest for non-disclosure governed in the AAPI (see *infra*).

Practically, the answer to the question whether the applicant will be granted access will primarily be given depending on how the notions of 'legitimate interest' and 'justifiable benefit' will be interpreted case-by-case. If their interpretation is lenient, then applicants will not face serious obstacles in order to obtain a certain court file (e.g. journalists, legal practitioners, academia, historians, etc). Neither should the fact that procedural rules govern access to a specific file only and not a general access to court files seriously hamper in practice the accessibility to several files simultaneously. If a requestor would like to obtain the access to several files then he will need to state them specifically in his request.

¹²⁶ Criminal procedure Act (Zakon o kazenskem postopku, Official Gazette No 63/1994), Article 128.

¹²⁷ Civil procedure Act (Zakon o pravdnem postopku, Official Gazette No 26/1999), Article 150.

¹²⁸ Such an interpretation is for example advocated by the Information Commissioner of Republic of Slovenia. See Pirc Musar, N., *op. cit.*, at 6.

¹²⁹ Such an interpretation can be also found on the portal of the Judiciary of Republic of Slovenia. See http://www.sodisce.si/sodna_uprava/informacije_javnega_znacaja/.

If one departs from the viewpoint that the procedural rules governing access are a *lex specialis* in relation to the AAPI, then once the applicant has demonstrated his legitimate interest (or justifiable benefit), the authority treating his request will apply the provisions of the AAPI.

According to the AAPI public information is freely available to legal or natural persons (applicants¹³⁰). Each applicant shall obtain public information in a form requested by him – by enabling him to review or to obtain a transcript, a copy or an electronic record. Exceptions to the right to access public documents are listed in Article 6 AAPI. For the purpose of this study three exceptions need special attention, all of them relating to court proceedings. A request for access is (partially¹³¹) rejected if:

- 1) information was obtained or compiled for criminal persecution purposes or in connection with the latter, or for the purposes of a misdemeanour procedure¹³²;
- 2) information was acquired or drawn up for the purposes of civil, non-litigious civil procedure or other court proceedings, and its disclosure would prejudice the implementation of such procedures¹³³;
- 3) information is contained in a document that is in the process of being drawn up and is still subject to consultation by the body, and the disclosure of which would lead to misunderstanding of its contents¹³⁴.

A document in process of elaboration in the context of judiciary, for the purposes of this study, in practice means a document relating to deliberations of the court in a specific case. Such a document could be available, unless its disclosure would lead to misunderstanding of its content.

Other exemptions that also might be relevant in a context of judicial proceedings, in which case the court shall also deny the applicant the access to requested information, are¹³⁵:

- 1) information defined as a business secret in accordance with the Act governing companies¹³⁶;
- 2) personal data the disclosure of which would constitute an infringement of the protection of personal data in accordance with the Act governing the protection of personal data¹³⁷;
- 3) information the disclosure of which would constitute an infringement of the tax procedure confidentiality or of a tax secret in accordance with the Act governing tax procedure¹³⁸.

¹³⁰ Which means that there is no limitation as to the citizenship or residence. Everyone has access to public information.

¹³¹ If a document only partially contains information that may not be revealed and the latter can be extracted from a document without compromising its confidentiality, confidential information is removed from the document so that the applicant is granted access to the remainder of the document. Article 7 AAPI.

¹³² Article 6(1)(6) AAPI.

¹³³ Article 6(1)(8) AAPI.

¹³⁴ Article 6(1)(9) AAPI.

¹³⁵ The list is not exhaustive; see Article 6(1).

¹³⁶ Article 6(1)(2) AAPI.

¹³⁷ Article 6(1)(3) AAPI.

¹³⁸ Article 6(1)(5) AAPI.

It should be noted that in none of the abovementioned cases is access to information refused automatically but only if its disclosure would be detrimental to the operation of the procedure, and public interest for disclosure does not prevail over another public interest or interest of other persons to disclose the requested information (balance test)¹³⁹. However, in some cases the harm test applies; even though there might be an overriding public interest prevailing over other interests to disclose information, the request to access court files should be denied, inter alia, if:

- the information is, pursuant to the Act governing classified data, denoted with one of the two highest levels of secrecy;
- the information contains, or is prepared based on, classified information of another country or an international organization, with which the Republic of Slovenia concluded an international agreement on the exchange or transmission of classified information;
- the information contains, or is prepared based on, tax procedures, transmitted to the bodies of the Republic of Slovenia by a body of a foreign country.

If a document or a part of a document only partially contains confidential information, and the latter may be excluded from the requested document without jeopardizing its confidentiality, an authorized person of the body shall exclude such information from the document and refer the contents or enable the re-use of the rest of the requested document to the applicant.¹⁴⁰

Thus, unlike under the Finnish legislation, the access of members of the public to trial documents according to Slovenian legislation is conditional in the sense that applicants need to demonstrate their legitimate interest. However, the judiciary as such is not excluded from the scope of application of the legislation on access to public information.

The officer decides on the request of the applicant immediately, and no later than 20 working days from the receipt of a complete application. In exceptional circumstances, this period may be extended by order by a further 30 working days. Should the application be refused or dismissed, the applicant can commence an appeal procedure before the Information Commissioner¹⁴¹. Against the decision of the Information Commissioner, an action can be brought before administrative court.

As mentioned before, all judicial decisions are available online. In order not to reveal the names of the parties involved, online publications do not contain them. Names are substituted by generic notions, such as: applicant, defendant, appellant, etc. In this regard other legislation also applies, e.g. specific rules on

¹³⁹ Article 6(2) AAPI.

¹⁴⁰ Article 7 AAPI.

¹⁴¹ Information Commissioner is an autonomous and independent body, established on 31st December 2005 with the Information Commissioner Act (ZInfP, published in Official Gazette, No 113/2005). The body supervises both the protection of personal data, as well as access to public information. Under the AAPI, the Information Commissioner decides on the appeals against the decisions by which another body has refused or dismissed the applicant's request for access, and supervises the implementation of the Act governing access to public information and regulations adopted within the framework of appellate proceedings. English version of its website is available on <https://www.ip-rs.si/?id=195>.

the protection of the identity of victims in criminal procedure, or of minors (victims, as well as juvenile offenders¹⁴²).

Consultation on the spot of the requested information is free of charge. The person requesting access to court files may be charged only for the material costs of the transmission of a transcript, copy or electronic record of the requested information¹⁴³.

4.1.3. Canada

In Canada, the right of the public to open courts is an important constitutional rule¹⁴⁴. The right of an individual to privacy is a fundamental value as well. However, the right to open courts generally outweighs the right to privacy.¹⁴⁵ As a result, in Canada all court files are accessible to the public under the existing presumption that all court records are available to the public at the courthouse. If technically feasible, the public shall also be entitled to remote access to court files.

Given that in Canada court files are generally accessible to the public in the courthouse, the question of accessing them has, in the last decade, with the arrival of new technologies, been concentrated on two aspects: (1) that the realisation of the open courts principle may be significantly enhanced through the adoption of new information technologies; and (2) the possibility that unrestricted electronic access might facilitate some uses of information that are not strongly connected to the underlying rationale for open courts and which might have a significant negative impact on values such as privacy, private and public security, the protection of confidential business information, the proper administration of justice and the timely conduct of judicial proceedings. In other words, the debate is concentrated on the question of how to reconcile two fundamental values: the right of the public to transparency in the administration of justice and the right of an individual to privacy.

It seems that Canada is not only pioneering in terms of its leading role in facilitating remote access to court records for the wider public. It has even made a step further: courts that offer electronic access should examine compliance with accessibility standards for the physically impaired in the virtual world.¹⁴⁶

Background considerations

On the basis of a discussion paper¹⁴⁷ and public comment on it, the Canadian Judicial Council adopted, in September 2005, a Model Policy for Access to Court

¹⁴² The course of criminal proceedings involving minors and the judgement rendered therein may not be published without the permission of the court. Only that part of proceedings or of the judgement may be published as is provided for by the permission of the court, and even in that case the name of the minor and other information from which his identity could be inferred may not be published. Criminal procedure act, Article 460 (Official Gazette of RS, No 32/12).

¹⁴³ Article 34 AAPI.

¹⁴⁴ The right of the public to open courts derives from the fundamental right of expression which is guaranteed in the Canadian Constitution Act 1982 (Part I, Canadian Charter of Rights and Freedoms), Article 2.(b): "Everyone has the following fundamental freedoms: [...] (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; [...]"

¹⁴⁵ Model Policy for Access to Court Records in Canada, September 2005; further referred to as the "Model Policy", available at http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_AccessPolicy_2005_en.pdf.

¹⁴⁶ In this sense it is for example suggested that for documents posted on websites courts may want to make their web pages compliant to the W3C's Web Content Accessibility Guidelines (online: <http://www.w3.org/TR/WCAG10/wai-pageauth.html>).

¹⁴⁷ Discussion paper prepared by the Judges Technology Advisory Committee (JTAC) entitled "Open Courts, Electronic Access to Court Records, and Privacy", prepared for the Canadian Judicial Council.

Records in Canada which will be presented below. The purpose of this Model Policy is "not to state legal rules governing access to court records. Its purpose is rather to provide courts with a framework to deal with new concerns and sensitive issues raised by the availability of new information technologies that allow for unprecedented access to court information. This model policy was designed to help Canadian courts develop their own policies of access to their records, thus assuming their supervisory and protective power over these records, in a manner that is consistent with the consensus that is emerging in Canada and in other countries on these issues. [...] This model policy is also consistent with the current constitutional framework that applies in Canada with regard to the balance that needs to be struck between the open courts principle and other important values, such as privacy, security and the administration of justice." Acknowledging that "[t]here is disagreement about the nature of the exemptions to the general rule."¹⁴⁸, the challenge for courts is to construct a policy for access to court records that can maximise the many benefits of new information technologies with respect to the realisation of the open courts principle while determining what kinds of exemptions are warranted.

Reviewing the jurisprudence of the Supreme Court of Canada, the Discussion Paper generated 33 conclusions on various issues connected with the constitutional right of the public to open courts, the right of individuals to privacy and many of the policy and logistical issues pertaining to access to court records if electronic and remote access is granted to the public. One of the conclusions was that the Canadian Judicial Council has a leadership role in initiating discussions and debate about the development of electronic access policies and that such policies should be as consistent as possible throughout Canada¹⁴⁹.

Canadian courts have consistently held that the openness of court proceedings is an important constitutional principle that fosters many fundamental values, including public confidence in the judicial system, the integrity of the court system, better understanding of the administration of justice, and judicial accountability. Included within the open courts principle is the public's right of access to court records.¹⁵⁰ It should be noted, in this relation, that court records are exempt from provincial and federal access to information legislation.

In Canada, openness is the core principle. Therefore, traditionally, court records have been accessible in paper format to any member of the public at the courthouse, with some exceptions (records that are sealed by a court order or pursuant to a statutory requirement). However, in general anyone who can come to the court registry may ask a court clerk to see all documents and information pertaining to a specific court case.

Since this traditional way of obtaining access to court records is becoming more and more obsolete, several courts in Canada have adopted electronic filing, which potentially increases the availability of records since the information and actual documents in the court file may be stored in digital formats. Moreover, many courts make recent court decisions publicly available on the internet at no charge. The overwhelming trend, therefore, is for courts to adopt digital formats for court records in order to make preparation, storage and access to court information easier and more efficient.

In addition to this trend towards the adoption of court records in digital format, there is an increased availability of electronic networks such as the internet that

¹⁴⁸ See the Model Policy, op. cit., the Issues at Stake.

¹⁴⁹ See the Model Policy, op. cit., executive summary.

¹⁵⁰ See the Model Policy, op. cit., Issues at Stake.

could be used to obtain remote and bulk access to court information, along with the use of powerful search tools. Through these new technologies it will become possible to retrieve more information about court proceedings and their participants than ever before, not only in terms of quantity, but also in terms of quality since such information can be aggregated or combined with other publicly available information. The resulting ability to break down the practical barriers to access to court records has the potential to greatly enhance the realization of the open courts principle for all members of the public.¹⁵¹

However, the Model Policy clearly recognises that there are also potential drawbacks to the adoption of new technologies in relation to court records: new technologies increase the risks that court information might be used for improper purposes such as commercial data mining¹⁵², identity theft, stalking, harassment and discrimination.¹⁵³ Such uses can undermine the proper administration of justice¹⁵⁴ and threaten the rights and interests of participants in judicial proceedings, including their privacy and security interests. In many ways, the “practical obscurity” of paper-based records, because it created a barrier to access, also provided de facto protection for some of these other values, such as privacy. If these barriers to access are to be dramatically reduced, the question of whether and how to protect such values in the context of access to court records becomes much more salient. It should be noted that as new information technologies can raise new issues with respect to access to court records, such technologies can also offer new solutions. Exemptions to the general rule of openness have led to the use of such judicial tools as publication bans and sealing orders¹⁵⁵. New technologies can provide a much more careful tailoring of restrictions on access, including segregating some kinds of sensitive data in records and utilising drafting protocols that minimize the insertion of personal data in the court record. Besides, use of advanced information management systems may also reduce court administration costs, and overall may result in global savings¹⁵⁶.

The Model Policy

The Model Policy in principle¹⁵⁷ applies to court records in civil and criminal proceedings, at both trial and appeal levels,¹⁵⁸ whereby it is understood that distinctions may need to be made depending upon the type of proceeding, e.g. family, criminal or youth protection proceedings. There might also be distinctions to make between trial and appeal levels of court. The Model Policy covers all court records in any form¹⁵⁹, whether these records are created, stored or made available on paper or in digital format.¹⁶⁰ Other laws on access to court records, such as statutory or common law provisions regarding access to, or publication of, court records, remain applicable.

In terms of the Model Policy, “access” should be understood as “the ability to view and to obtain a copy of a court record”¹⁶¹. “Court record” is defined broadly and

¹⁵¹ Ibidem.

¹⁵² If commercial entities could engage in forms of data-mining.

¹⁵³ See the Model Policy, *op. cit.*, Issues at Stake.

¹⁵⁴ If court records are accessed and utilized for improper purposes or in a manner that subverts justice, then public confidence in the administration of justice might be undermined.

¹⁵⁵ Provided for in various statutory provisions and common law measures.

¹⁵⁶ See the discussion under the rule 4.2. of the Model Policy, *op. cit.*

¹⁵⁷ Unless otherwise indicated.

¹⁵⁸ Rule 1.2.1 of the Model Policy, *op. cit.*

¹⁵⁹ The Model Policy is technologically neutral and should be adaptable to the possibilities of emerging technologies.

¹⁶⁰ Rule 1.2.3 of the Model Policy, *op. cit.*

¹⁶¹ Rule 1.3.1 of the Model Policy, *op. cit.*

includes "any information or document that is collected, received, stored, maintained or archived by a court in connection with its judicial proceedings"¹⁶². It encompasses elements that constitute a "case file" such as pleadings, indictments, exhibits, warrants and judgments¹⁶³, docket information and documents in connection with a single judicial proceeding¹⁶⁴, as well as other information. It is court records to which the public have (presumptively) access.

The Model Policy also addresses the issue of personal data identifiers. They are used by institutions to authenticate a person's identity, apart from an individual's name, and typically allow direct contact with an individual. Since they are the subset of personal information that is the most important and valuable to any individual, unrestricted public access to this type of personal information would entail serious threats to personal security, such as identity theft, stalking and harassment. "Personal data identifiers" are defined as "personal information that, when combined together or with the name of an individual, enables the direct identification of this individual so as to pose a serious threat to this individual's personal security. This information includes: a) day and month of birth; b) addresses (e.g. civic, postal or e-mail); c) unique numbers (e.g. phone, social insurance, financial accounts); and d) biometrical information (e.g. fingerprints, facial image). Personal data identifiers do not include a person's name."¹⁶⁵ "Personal information" is further defined as "information about an identifiable individual"¹⁶⁶ and should be given the common meaning of this term; "information about an identifiable individual singles out a person as a unique individual, allows for this person's identification or allows someone to learn something about this person"¹⁶⁷. Depending upon the context, certain personal information is considered private and other personal information is considered public. The Model Policy acknowledges that an access policy to court records should limit the level of personal information found in court records to that required for the disposition of a case.

It is considered that the risks stated above normally occur when elements related to personal information are combined with an individual's name, therefore the name of an individual per se is not perceived as a personal data identifier.

As mentioned above, one of the aims of the Model Policy is to enable the general public to access court records while fully preserving the privacy of individuals and other values (e.g. privacy, business secrecy etc.). Therefore, a significant part of the rules is dedicated to different levels of remote access.

"Registered Access" is defined as "access that entails identification of the person who is granted certain rights of access. This means of access may also involve the logging of requests made by this person during a session."¹⁶⁸ In the discussion following this rule of the Model Policy it is further explained that "registered access is a technical means of granting various levels of access to identified

¹⁶² Rule 1.3.3 of the Model Policy, op. cit.

¹⁶³ Rule 1.3.2 of the Model Policy, op. cit. In fact, case files are the repositories of all documents pertaining to the court's cases.

¹⁶⁴ Explicitly excluded from the definition of court records are documents that do not relate to a single court proceeding and might be maintained by court staff, but that are not connected with court proceedings, such as license and public land records, any information that merely pertains to management and administration of the court, such as judicial training programs, scheduling of judges and trials and statistics of judicial activity, any personal note, memorandum, draft and similar document or information that is prepared and used by judges, court officials and other court personnel.

¹⁶⁵ Rule 1.3.7 of the Model Policy, op. cit.

¹⁶⁶ Rule 1.3.8 of the Model Policy, op. cit.

¹⁶⁷ See the discussion under the Rule 1.3.8 of the Model Policy, op. cit.

¹⁶⁸ Rule 1.3.9 of the Model Policy, op. cit.

persons, in accordance with the access policy. The person must provide identification, either as an individual or as a member of an organization, with a user identification code and a password. Registered access may also be used to keep track of this person's activities during a logged session. The log may contain a record of every request that was made and of each piece of information that was consulted. This is useful to check for unlawful or abusive uses of an individual's rights of access. Of course, user tracking should be governed by a strict privacy policy, of which the user should be made aware. This privacy policy should minimally guarantee that only necessary information will be collected, that the log will be kept confidential, that it will be consulted by a limited number of authorized court staff, and only if needed for the purpose of verifying whether the user is breaching the terms and conditions of access or is performing other unlawful or abusive activities¹⁶⁹.

The Model Policy uses registered access as a potential condition in special access agreements – especially for remote extended access – to ensure that, where access is granted on certain conditions, it is used in compliance with those conditions.

According to the Model Policy "remote access means the ability to access court records without having to be physically present where the records are kept, and without needing the assistance of court personnel"¹⁷⁰. This definition describes what usually constitutes remote access to an electronic repository of information, available through the internet or any other distant connection. It doesn't encompass access via telephone (such as when a person calls a court clerk by phone to request that a copy of a court record be prepared and sent by mail); this type of access is treated like any access at the courthouse, since it poses the same very low level of risk. However, nothing precludes the courts from including traditional means of remote access in their access policy, should they so wish.

Remote access is more likely to represent privacy and security risks since the court relies on technology to provide access and there is no court staff to filter each access request. It will typically require special safeguards and may be governed by terms and conditions included in an access agreement.

The Model Policy vests a great portion of responsibility regarding the transmission of personal information on the parties themselves. It is their responsibility not to reveal, when filing documents, more than is necessary for the disposition of a case¹⁷¹. The rules governing the filing of documents prohibit the inclusion of unnecessary personal data identifiers and other personal information in the court record¹⁷². Therefore the court shall also inform the public (including participants to the judicial system) of the extent to which court record information is made available to the public, and of the measures that are taken pursuant to the Model Policy to protect their personal information¹⁷³. When a person is entering the judicial process, whether as a party or as a witness, this person should be informed of the key elements of the policy pertaining to their personal information. This could be achieved by providing them with a brochure

¹⁶⁹ See the discussion under the rule 1.3.9 of the Model Policy, *op. cit.*

¹⁷⁰ Rule 1.3.10 of the Model Policy, *op. cit.*

¹⁷¹ Rule 2.2. of the Model Policy, *op. cit.*: "Responsibilities of the Parties: When the parties prepare pleadings, indictments and other documents that are intended to be part of the case file, they are responsible for limiting the disclosure of personal data identifiers and other personal information to what is necessary for the disposition of the case."

¹⁷² Rule 2.1 of the Model Policy, *op. cit.*, states that "[s]uch information shall be included only when required for the disposition of the case and, when possible, only at the moment this information needs to be part of the court record."

¹⁷³ Rule 7 of the Model Policy, *op. cit.*

summarising the access policy. Particular emphasis must be given to the public availability of the documents that will be widely accessible through the internet, namely judgments. This is a key to ensuring that all participants in judicial proceedings are made aware, and in some cases reassured, about the level of privacy protection they can expect¹⁷⁴. Accordingly, the judiciary is "responsible for avoiding the disclosure of personal data identifiers and limiting the disclosure of personal information to what is necessary and relevant for the purposes of the document"¹⁷⁵ .¹⁷⁶

As mentioned above, members of the public have a presumptive right of access to all court records.¹⁷⁷ In order not to weaken this principle in practice, the rule on fees states that they should not impede access to court records¹⁷⁸. The Model Policy acknowledges that tailored access to court information in electronic format might require the acquisition and operation of advanced information management systems that would necessitate users to contribute. In this case, however, it is estimated in the Model Policy that the mid- and long-term implementation of such systems will have positive effects; case management systems could contribute to global savings. The latter should, in turn, serve the purpose of open courts and contribute to the reduction of access fees. In any case, traditional access on the court premises remains possible at no extra cost for members of the public¹⁷⁹.

The principle of open courts is further developed by stating that "[m]embers of the public are entitled to know that a case file exists, even when a case file is sealed or subject to a non-publication order"¹⁸⁰. Public knowledge of the existence of a case file is a minimal requirement for openness, this being all the more important when the file is sealed. In such cases, the disclosure of the existence of a case file should be made in a manner that does not disclose its content. However, given the fact that other laws governing access to court records remain applicable, information on the existence of a file can also be subject to any statutory or common law provision prohibiting the disclosure of the existence of a file, e.g. any applicable provision related to national security.¹⁸¹

The Model Policy allows for a progressive transition from paper records (traditional form of access) to digital documents (more advanced technologies), while taking into account that each court may want to state more specifically which formats of access are actually provided to the public, e.g. paper, electronic, or both¹⁸². Therefore Rule 4.4 states that "[m]embers of the public are entitled to access court records in the format in which they are maintained".

Merely giving access (remote or in the premises) to court records to the public is not sufficient. Search functions should be made available to users who have access to court records. The availability of search tools should depend upon the type of court record accessed and the level of risk of improper use of personal information associated with the means of access provided. For instance, search

¹⁷⁴ See the discussion under the rule 7 of the Model Policy, op. cit.

¹⁷⁵ Rule 2.3. of the Model Policy, op. cit.

¹⁷⁶ The onus of limiting personal information in the court record rests on the persons who draft or prepare documents that are intended to be part of this record, as these persons are in the best position to be aware of the presence of such information. Judges drafting judgments should also follow a document prepared by the Canadian Judicial Council entitled "Use of Personal Information in Judgments and Recommended Protocol".

¹⁷⁷ Rule 4.1 of the Model Policy, op. cit.

¹⁷⁸ Rule 4.2 of the Model Policy, op. cit.

¹⁷⁹ See the discussion under the rule 4.2. of the Model Policy, op. cit.

¹⁸⁰ Rule 4.3 of the Model Policy, op. cit.

¹⁸¹ See the discussion under the rule 4.3 of the Model Policy, op. cit.

¹⁸² See the discussion under the rule 4.4 of the Model Policy, op. cit.

tools can be designed in a manner that limits the technical possibility of aggregation of information (for example allowing searches only in certain fields of information and not allowing full text searches).

The Model Policy contains specific recommendations as to what search functions should be made available to the public with regard to specific types of records and means of access.¹⁸³ The public shall have access to all judgments¹⁸⁴ on-site and, if available, also remote access. In relation to them, the question of protection of sensitive data (personal information¹⁸⁵) remains controversial in Canada. Given the fact that there is no federal legislation on access to court records, restrictions on publications and disclosures are regulated by judges themselves, case by case, which results in considerably different evaluation of the level of risk associated with the publication of sensitive personal information throughout Canada. However, many jurisdictions already provide for such protection by way of legislation. In jurisdictions where such restrictions are not put in place, judges are sometimes reluctant to post the full text of decisions on the internet¹⁸⁶. In relation to judgments, the most powerful search functions available are recommended, including field search (e.g. by docket number, by date of judgment, by case name, etc.) and full text search.¹⁸⁷ It is understood that if judgments are posted on the internet, a good practice is to prevent indexing and cache storage from web robots or "spiders"¹⁸⁸. Such indexation and cache storage of court information makes this information available even when the purpose of the search is not to find court records, as any judgment could be found unintentionally using popular search engines. Moreover, when the judgment is cache stored by the search engine, it is available to internet users even if the court decides to withdraw the judgment from public access. To prevent such problems, very simple technical standards can be implemented^{189, 190}.

Broad public access shall be provided also to docket information because it is essential for ensuring the openness of court proceedings. Therefore docket information shall be accessible on-site and, if available, remotely, provided that

¹⁸³ Ibidem.

¹⁸⁴ Subject to any applicable statutory or court-ordered publication ban.

¹⁸⁵ For example, judgments containing personal information about vulnerable persons involved in certain categories of cases, such as children and adults in need of protection.

¹⁸⁶ The Canadian Judicial Council addressed this issue in the abovementioned document "Use of Personal Information in Judgments and Recommended Protocol".

¹⁸⁷ See the discussion under the rule 4.6.1 of the Model Policy, op. cit.

¹⁸⁸ Search engines (such as Google, Bing, Yahoo etc.) use a spider (an application that reads webpages and stores these pages in a database) to "crawl" (or "to spider") the internet and store a cached version of each webpage in their index in the datacenter of the search engine. Not only is a cached version problematic for several reasons (copyright, privacy, sensitive data); moreover, it cannot be changed by the owner of the data/owner of the originating website. Because the cached data is stored at the datacenter of a search engine, the owner of the data (webmaster of the website, or author of the file or webpage) cannot remove the page. For example, if someone publishes a judgement with confidential data and a search engine indexes this site - which means that it stores this page in its datacenter - before the webmaster had a chance to remove the data, as a result, a member of the public, while using a search engine, could find such a page and read the information included in it, even though the owner of the data has removed it from the originating website. To wit, a document can be removed from the originating website, but remains to appear in search results while using search engines and the confidential data is still accessible via search engines even though it has been removed from the originating website.

To avoid this in advance, it is possible to block search engines from crawling/spidering a website, or part of a website. The spider has to observe the rules set in a robots.txt file. An example of such a file can be found also on the EP website: <http://www.europarl.europa.eu/robots.txt>. Such a robot file is read by a spider of a search engine and decides whether the page can be spidered or not. Unfortunately not all spiders follow the rules set in the robots.txt files.

¹⁸⁹ See the Robots exclusion protocol and the Robot Meta tag standard, online: <http://www.robotstxt.org/wc/exclusion.html>.

¹⁹⁰ See the discussion under the rule 4.6.1 of the Model Policy, op. cit.

personal data identifiers are not made remotely accessible.¹⁹¹ For the purposes closely linked with the rationale for open courts, search by docket number, names of parties and type of proceedings will suffice in most situations. Full text search function usually will not be required, and may not even be appropriate.

The approach of the Model Policy in relation to remote access to case files could be perceived, at first sight, to be rather reluctant. It states that “[m]embers of the public shall only have on-site access to case files, unless otherwise provided in this access policy.”¹⁹² However, when reading this provision in combination with other provisions, it becomes clear that the approach is not that restrictive because a specific court may determine that: i) specific court records should be made available remotely; ii) persons who are granted extended access may access them; or iii) certain types of documents are available remotely¹⁹³.

The reason why not to give a presumptive remote access to case files is practical. The Model Policy acknowledges that documents composing a case file (pleadings, indictments, exhibits, warrants and judgments) “include information such as personal data identifiers and other personally identifiable data, business proprietary information, details about financial situations and medical conditions of individuals, affidavits, exhibits, many of which are only partially relevant for the disposition of the case. The pleadings may also contain unsubstantiated and sometimes outrageous allegations, which may provide little assistance to the public’s understanding of the judicial process or even be defamatory in nature. Consequently, there are many risks to individual and public rights and interests associated with unrestricted ^[194] remote access to materials contained in the case file, and often unclear benefit with regard to the open courts principle.”¹⁹⁵

It should be noted that “[a]ny member of the public may make a request for access to a portion of the court record that is otherwise restricted pursuant to [the Model Policy]”¹⁹⁶. Taking into account that the access policy should be adaptable to the particular needs of certain members of the public, and that it is foreseeable that certain categories of individuals will ask for extended access (e.g. academics, legal researchers and practitioners, or journalists, but any member of the public should also be able to make such a request), the court may design tailored access agreements adapted to those categories of users. When granted, extended access will typically be governed by an “access agreement”¹⁹⁷ (it shall be noted, however, that such an agreement is not imposed by the Model Policy). If remote electronic access to case files is granted, a provision prohibiting massive downloading of files might be included.¹⁹⁸

The request for extended access is to be made in the form prescribed by the court. The Model Policy prescribes three criteria which shall be taken into consideration in deciding whether extended access should be granted, and what specific terms and conditions should be imposed. The three criteria actually

¹⁹¹ Rule 4.6 2 of the Model Policy, op. cit.

¹⁹² Second part of the rule 4.6 3 of the Model Policy, op. cit.

¹⁹³ The Model Policy contemplates the possibility that specific courts may determine that some types of records can be made remotely available to the public without engaging serious risks to individual privacy, security, or to the proper administration of justice. If a specific court grants remote access to certain types of documents, then their policy should contain subsections listing those records.

¹⁹⁴ Emphasise added.

¹⁹⁵ See the discussion under the rule 4.6.3 of the Model Policy, op. cit.

¹⁹⁶ See the first sentence of the rule 5.1 of the Model Policy, op. cit.

¹⁹⁷ Such an agreement may include terms and conditions primarily designed to minimize the risks that extended access will be used to undermine the privacy and security rights of individuals or the proper administration of justice. Such terms and conditions could provide for the rights and obligations of the user regarding registered access, applicable fees, etc.

¹⁹⁸ See the discussion under the rule 5.1 of the Model Policy, op. cit.

constitute a combination of three different tests: a) a causal-relationship test; b) a risk-analysis test; and c) an availability-of-remedies test.¹⁹⁹

Bulk access can be considered as a special sort of extended access. Bulk access is the ability to have systematic and direct access to all or to a significant subset of court record information or documents, including compiled information. Unlike (normal) extended access, which is to be provided by courts, courts do not need to provide bulk access²⁰⁰. However, if the court permits bulk access, a special access agreement should be concluded between the court and the entity requesting bulk access which should contain pre-defined terms and conditions: "a) the information should be regularly checked against the source of the court record for accuracy, if this information is to be published or re-distributed; and b) any use of the information contained in the court record should comply with provincial and federal privacy and credit reporting legislation, as well as any other applicable law".²⁰¹ The court may also require that access be registered.

The purpose for which individuals or private or governmental organisations request bulk access may range from academic research to commercial publication. Publishers of case law will traditionally be granted bulk access to judgments, as their purpose is closely related to open access. Various entities can have a legitimate interest in bulk access not only to judgments, but also to case files, such as statistical offices, credit or insurance agencies, private investigators, etc. However, should be granted bulk access only in jurisdictions where their use of information is regulated in such a manner that does not undermine the proper administration of justice and the rights and interests of participants in judicial proceedings.

The Model Policy emphasises the idea that every access policy based on it shall be an "ongoing work in progress". The policy must include guidelines to ensure its ongoing maintenance and development. It should be adapted to the court's specific environment, as that environment changes²⁰². For this purpose, a steering committee shall be established, composed of representatives from each relevant court service, which is responsible for various aspects of this policy's maintenance and development, including implementation, evaluation, reviewing, recommending modifications, dissemination and seeking and receiving comments²⁰³.

Implementing the Model Policy, the Supreme Court of Canada adopted its own access to court records policy in February 2009²⁰⁴.

¹⁹⁹ In deciding whether an extended access should be granted, the following criteria shall be taken into consideration: "[...] a) the connection between the purposes for which access is sought and the rationale for the constitutional right to open courts; b) the potential detrimental impact on the rights of individuals and on the proper administration of justice, if the request is granted; and c) the adequacy of existing legal or non-legal norms, and remedies for their breach, if improper use is made of the information contained in the court records to which access is granted. This includes, but is not restricted to, existing privacy laws and professional norms such as journalistic ethics". See the rule 5.1 of the Model Policy, *op. cit.*

²⁰⁰ First part of the rule 5.2 of the Model Policy, *op. cit.*: "The court may permit bulk access to a portion or to the entirety of the court record."

²⁰¹ Second part of the rule 5.2 of the Model Policy, *op. cit.*

²⁰² See the discussion under the rule 8 of the Model Policy, *op. cit.*

²⁰³ Rule 8 of the Model Policy, *op. cit.*

²⁰⁴ Supreme Court of Canada: Access to Court Records: Policy for Access to Supreme Court of Canada Court Records, available at: <http://www.scc-csc.gc.ca/case-dossier/rec-doc/pol-eng.asp#s31>.

5. RIGHT OF ACCESS TO DOCUMENTS IN THE EU

5.1. Introduction

The EU has undergone a number of major institutional changes over the years. The EU's predecessors – the European Economic Community, the European Atomic Energy Community and the European Coal and Steel Community – were essentially completely opaque in terms of information disclosure. Meetings were often held in secret and minutes were not published. Moreover, public access to documents held by the Communities was not generally regulated by rules, but was a matter of wide, often arbitrary, discretion.²⁰⁵

The Maastricht Treaty represented the first major step towards openness and included a Declaration on the Right of Access to Information²⁰⁶ which stated: "The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions." This Declaration was put into effect by the Commission and the Council through the adoption in 1993²⁰⁷ and 1994²⁰⁸, respectively, of a Code of Conduct on public access to Commission and Council documents²⁰⁹. The Code of Conduct was guided by the general principle that "[t]he public will have the widest possible access to documents held by the Commission and the Council." The European Parliament adopted its own rules on public access, which provided that "[t]he public shall have the right of access to European Parliament documents pursuant to the conditions laid down in this Decision."²¹⁰

Neither the Declaration nor the Code of Conduct²¹¹ explicitly conferred a legal right to access official information held by the Commission and Council, and the Court has refused to read such a right into them.²¹² However, the Amsterdam Treaty did effectively recognise this right in its Article 255: any natural or legal person residing or having its registered office in a Member State had a right of access to European Parliament, Council and Commission documents. To give effect to this Treaty right, the Council adopted a regulation on access to European

²⁰⁵ ARTICLE 19, op. cit., at 33.

²⁰⁶ Annexed as Declaration 17 to the Final Act of the Treaty on European Union, signed in Maastricht on 7 February 1992 (OJ C 191, 29.7.1992).

²⁰⁷ 93/731/EC: Council Decision of 20 December 1993 on public access to Council documents (OJ L 340, 31.12.1993, p. 43).

²⁰⁸ 94/90/ECSC, EC, Euratom: Commission Decision of 8 February 1994 on public access to Commission documents (OJ L 46, 18.2.1994, p. 58).

²⁰⁹ 93/730/EC: Code of Conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41).

²¹⁰ 97/632/EC, ECSC, Euratom: European Parliament Decision of 10 July 1997 on public access to European Parliament documents (OJ L 263, 25.9.1997, p. 27).

²¹¹ Legally the Code of Conduct was internal regulations of administrative nature, not proper binding EU legislation.

²¹² See the case C-58/94 Netherlands v. Council, ECR I-2169. The Netherlands brought an action to partially annul this Code of Conduct. The ECJ decided that the Code of Conduct did not constitute an act having legal effects and therefore did not qualify as challengeable act. The Court emphasised that the Code merely reflected the agreement reached between the Commission and the Council on the principles governing access to the documents of the two institutions, while inviting the institutions to implement those principles by means of specific regulations, thereby not confining any right to individuals.

Parliament, Council and Commission documents. It replaced the Code of Conduct and the European Parliament rules on public access.²¹³

The Lisbon Treaty has maintained this provision of constitutional importance as Article 15 TFEU. Its scope has nevertheless been widened to reflect a concept of openness or transparency which is broader than mere public access to official documents. It provides that, in order to promote good governance and to ensure the participation of civil society, not only the Union's institutions, but also bodies, offices and agencies shall conduct their work as openly as possible²¹⁴.

The contribution made by the TFEU is twofold. Firstly, the right of access to documents is no longer confined in its former isolation. It is replaced in a context highlighting its meaning and its authority. The Lisbon Treaty organises a voluntary relationship between three related notions: the principle of openness, the principle of transparency, and the right of access to documents. On the grounds of Article 15 TFEU, it is clear that the principle of openness requires transparency in institutions' actions to allow the exercise of the fundamental right of access to documents.²¹⁵ Secondly, as already mentioned above, the right to access documents is no longer confined to documents from Parliament, the Council and the Commission but aims generally to apply to all the institutions, bodies and agencies.

Furthermore, the entry into force of the Lisbon Treaty coincides with the entry into binding force of the Charter of Fundamental Rights of the European Union. The right of access to documents is a fundamental right, guaranteed by Article 42 of the Charter²¹⁶. Nonetheless, even before the Charter became legally binding, Advocate General Maduro emphasised, in one of his opinions that the right of access is "a fundamental right of constitutional importance linked to the principles of democracy and openness²¹⁷".

5.2. Regulation No 1049/2001

At EU level, access to public documents is principally governed by Regulation No 1049/2001 which has been complemented by other legal standards²¹⁸.

The purpose of the Regulation is to give the fullest possible effect to the right of public access to documents and to lay down general principles on and limits to such access²¹⁹. In principle, all documents of the institutions should be accessible to the public. The preamble states that openness enables citizens to participate

²¹³ ARTICLE 19, op. cit., at 34.

²¹⁴ In addition, the recital 7 of the preamble to the TEU states that the EU desires "to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out [...] the tasks entrusted to them". This idea is later confirmed by several articles of the TEU, especially in Articles 10 and 11 TEU.

²¹⁵ Labalye, H., Classified information in light of the Lisbon Treaty, Policy Department C study, May 2010, European Parliament, available at <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=31293>.

²¹⁶ "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium."

²¹⁷ Opinion of the Advocate General Maduro in case C-64/05 P, Kingdom of Sweden v Commission, para. 42.

²¹⁸ Such as by the Directive 2003/4/EC of 28 January 2003 on public access to environmental information, repealing Council Directive 90/313/EEC; Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (data protection directive); Directive 2003/98/EC of 17 November 2003 on the re-use of public sector information.

²¹⁹ Article 1 (and recital 4 of the Regulation No 1049/2001).

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 system²²⁰. Openness contributes to strengthening the principles of democracy and respect for fundamental rights.

The Regulation is under revision owing to the new fundamental rights architecture within the EU established by the Lisbon Treaty and the Charter, and to the constitutional value of the right to access in that structure (see *infra*).

In this subchapter, basic features of the Regulation on access to documents will be presented, and some case law on access developed by the Court which was the addressee of the requests for access to documents.

According to Article 15(3)(4) TFEU, the Court is bound by an obligation to provide access to documents only when exercising its administrative tasks²²¹. However, the general obligation to conduct its tasks as openly as possible in Article 15(1) still applies²²².

The scope of this study does not allow for a detailed presentation of the content of the Regulation. However, in the section below, its essential features are presented, with a focus on those that are relevant for the Court when treating requests for access to court files.

Article 2 of the Regulation, in its first paragraph states that "[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions subject to the principles, conditions and limits defined in this Regulation". The third paragraph of the same article defines which documents are subject to the Regulation: "all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union".

As already mentioned above, the CJEU is not specifically mentioned in the Regulation as being under an obligation to give access to its court files. However, after the adoption of the Regulation, the Lisbon Treaty came into force, obliging all the institutions (and other bodies) to work "as openly as possible". Therefore some authors emphasize that the Court, too, should strive for the greatest openness possible²²³.

In this regard – and again, not going into all the details – the following exception is the most relevant for the CJEU: if the protection of court proceedings would be undermined, the CJEU is to refuse access to a document, but only if there is no overriding public interest in disclosure. The weighting is thus done in two steps: i) first the Court shall examine, case by case, if giving access to the requested document would undermine a court proceeding; even if this were the conclusion, it should further investigate whether ii) there is an overriding interest in disclosure of the requested document.

²²⁰ Recital 2 of the Regulation 1049/2001.

²²¹ Pursuant to Article 15(3) of the TFEU, the CJEU has, by its decision of 11 December 2012, put in place rules concerning public access to the documents held by it in the exercise of its administrative functions. See the Decision of the Court of Justice of the European Union of 11 December 2012 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (OJ C 38, 9.2.2013, p. 2-4).

²²² See Leino, P., *op. cit.*, at 1220.

²²³ *Ibidem*, at 1220.

In its 2008 landmark ruling in the Turco case²²⁴, the Court stressed the importance of openness of an institution and its contribution to the greater legitimacy of the decision-making process of the institution concerned.

This case concerned a request by Mr Turco for access to the documents appearing on a specific Council meeting agenda, including an opinion of the Council's legal service relating to a legislative file. Arguing that there was no overriding public interest in disclosure, the Council had refused the application. The Court rejected the arguments of the Council that the disclosure of an opinion of its legal service relating to a legislative proposal could lead to doubts as to the lawfulness of the legislative act concerned: "it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole" (para. 59).

Why is the case Turco mentioned, even though it does not concern court documents? The rationale behind the inclusion of this case into the study is the following: arguments of the Court used in this judgment are in principle transposable to cases relating to access to court files, and thus transposable to cases in which the Court itself is the addressee of requests for access to documents.

The API case²²⁵ concerned access to documents relating to Court proceedings. More specifically, the Court had to give an answer as to what extent the principles of transparency of judicial proceedings and publicity of trials require members of the public to be allowed access to the written submissions filed with the Court by the parties to a case.

API, a non-profit-making organisation of foreign journalists, applied to the Commission in August 2003 under Regulation No 1049/2001 for access to the written pleadings lodged by the Commission before the General Court or the Court of Justice in proceedings relating to fifteen cases at different stages, including the Open Skies cases²²⁶. The Commission granted access to documents in respect of the pleadings lodged in two preliminary ruling cases. Access to two pleadings was refused, essentially because the cases were pending. The same exception applied also to the pleadings in a closed case that was closely connected with another pending case. The Open Skies cases were closed, but they concerned infringement proceedings and could thus, in the view of the Commission, be protected under the relevant exception. Finally, the Commission found that there was no overriding public interest in disclosure. To sum up, the Commission put forward the argument that the documents requested did not come under the scope of the Regulation.

²²⁴ Joined Cases C-39 & 52/05 P, Kingdom of Sweden and Maurizio Turco v. Council of the European Union.

²²⁵ Joined cases C-514/07 P, C-528/067 P and C-532/07 P, Sweden and other v. API and Commission.

²²⁶ Open skies cases: Case C-466/98, Commission v. United Kingdom, and cases C-467/98, Commission v. Denmark; C-468/98, Commission v. Sweden; C-469/98, Commission v. Finland; C-471, Commission v. Belgium; C-472/98, Commission v. Luxembourg; C-475/98, Commission v. Austria; C-476/98, Commission v. Germany.

In its ruling²²⁷, the General Court²²⁸ underlined that, in principle, documents should be examined individually (whatever field those documents relate to), but acknowledged the principle that individual examination of each document is not required in all circumstances²²⁹ (para 58 of judgment T-36/04). It emphasised that the purpose of the exception for the protection of court proceedings is primarily to ensure observance of the right of every person to a fair hearing by an independent tribunal (paras. 59-61, 63 of judgment T-36/04).

In relation to documents relating to pending cases, the General Court established that such documents are manifestly covered in their entirety by the exception relating to the protection of court proceedings, and that remains the position until the proceedings in question have reached the hearing stage. This finding was not affected by the fact that disclosure of procedural documents is possible in a number of Member States, and that it is also provided for, as regards documents lodged with the European Court of Human Rights, in the ECHR²³⁰.

The Rules of Procedure of the EU courts do not provide for a third-party right of access to procedural documents lodged at their registries by the parties (paras. 84 and 85 of judgment T-36/04); however, these rules, which provide that the pleadings of the parties are in principle confidential, cannot be, in the view of the General Court, relied on after the hearing, because they do not prevent the parties from disclosing their own written submissions (paras. 86 to 89 of judgment T-36/04). The General Court held that API had failed to raise overriding public interests capable of justifying disclosure of the documents in question (para 100 of judgment T-36/04).

In the closed cases, the General Court held that the Commission's refusal was not justified.

Both API and the Commission, as well as Sweden, appealed against the General Court's ruling, on different grounds, and the Court decided to join the cases²³¹. The three cases concerned, inter alia, the following questions: i) whether the General Court had erred in finding that access should be granted to pleadings after the hearing stage in pending cases; ii) access to pleadings in "closed" cases; iii) the question of "general presumption" versus "individual examination" and iv) the nature of the "public interest" that might require access to be granted even when an exception under Regulation No 1049/2001 applied in principle.

²²⁷ See the judgment in case T-36/04, API v. Commission.

²²⁸ The name General Court will be consistently used in this study, even if the designation – depending on the context – refers to the Court of First Instance (before entry into force of the Lisbon Treaty on 1st December 2009).

²²⁹ The so called "VKI principle" was established in the case T-2/03, Verein für Konsumenteninformation v. Commission. In 2005, the General Court showed some understanding for the Commission concerns when the latter was addressed with a request to access a cartel file consisting of more than 47 000 pages. The General Court ruled that, in principle, an institution receiving an application for access to documents must carry out a concrete, individual assessment of the content of the documents referred to in the request in order to assess the extent to which an exception to the right of access is applicable and the possibility of partial access. However, "such an examination may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted. Such could be case, inter alia, if certain documents were either, first, manifestly covered in their entirety by an exception to the right of access or, conversely, manifestly accessible in their entirety, or, finally, had already been the subject of a concrete, individual assessment by the Commission in similar circumstances." (para. 75). See Leino, P., op. cit., at 1222-23.

²³⁰ Ibidem, at 1229-30.

²³¹ Denmark and Finland intervened in support of Sweden, and UK in support of the Commission.

In his opinion²³², AG Maduro did not at any point offer his reading of the relevant provisions of Regulation No 1049/2001 but rather concentrated on expressing how he felt the matter should be solved²³³. He pointed out the fundamental problem with API's request, namely that it had been made to the Commission and not to the Court²³⁴. This is not because values of transparency did not apply to the judiciary, but because "the Court is master of the case" during litigation and thus "in a position to weigh the competing interests and to determine whether the release of documents would cause irreparable harm to either party or undermine the fairness of the judicial process" (paras. 13 and 14 of his opinion). For him the "best conclusion" – reached without any analysis of the applicable provisions – "would be to find that all documents submitted by parties in pending cases fall outside the scope of Regulation No 1049/2001".²³⁵ In cases that are closed, "it is reasonable to adopt a general principle favouring access" with the possibility for the Court to decide to impose an "obligation of confidentiality" on the parties "if it considers that it is fair and just to do so" (para. 39 of his opinion)²³⁶.

Furthermore he noted that the practice of various international tribunals suggests that there is no reason to fear that the disclosure of documents relating to judicial proceedings will undermine the judicial process: all submissions are public unless there are exceptional reasons for keeping them confidential. This approach would seem to coincide with the basic principle of Regulation No 1049/2001. In this respect, AG Maduro also noted that the "tendency seems to be that the more remote the judicial body, the greater its concern with the transparency of its judicial proceedings" (para 26).²³⁷

AG Maduro also touched upon the concern relating to public pressure in the context of access to legal opinions. This concern was clearly dismissed by the Court in the Turco case (see supra) in which the Court ruled that "[a]s regards the possibility of pressure being applied for the purpose of influencing the content of opinions issued by the Council's legal service, it need merely be pointed out that even if the members of that legal service were subjected to improper pressure to that end, 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 and it would clearly be incumbent on the Council to take the necessary measures to put a stop to it"²³⁸). In the API case, AG Maduro considered whether the same conclusion would be valid in the context of access to Court proceedings, and argued that it was "no less valid in the context of improper pressure on the judiciary and the parties to judicial proceedings" (para. 25)²³⁹.

The Court confirmed in its ruling²⁴⁰ that an institution may base its decisions on general presumptions which apply to certain categories of document. Even though this time the justification for invoking a "general assumption" no longer related to the workload caused by the application but to the nature of the activity

²³² See the opinion of AG Maduro, delivered on 1 October 2009 in case API (joined cases C-514/07 P, C-528/07 P and C-532/07 P).

²³³ See Leino, P., *op. cit.*, at 1230.

²³⁴ *Ibidem*.

²³⁵ *Ibidem*.

²³⁶ *Ibidem*, at 1230-31.

²³⁷ *Ibidem*, at 1234.

²³⁸ Court's judgement in Turco, cited supra note 224, para 64.

²³⁹ *Ibidem*, at 1232-33.

²⁴⁰ See judgment of 21 September 2010, Sweden and others v. API and Commission (C-514/07 P, C-528/07 P and C-532/07 P). To be noted that the Lisbon Treaty was already valid at the time of the delivery of this judgement.

to which the documents related, the Court did not address this issue.²⁴¹ Instead, it was to be determined whether general considerations supported a presumption that the disclosure of pleadings relating to direct actions that were pending would undermine the court proceedings and that the Commission was, thus, not under an obligation to carry out a specific assessment of the content of each of those documents (paras. 75 and 76).²⁴² The reply was affirmative. For the Court, “[i]t is clear, both from the wording of the relevant provisions of the Treaties and from the broad logic of Regulation No 1049/2001 and the objectives of the relevant EU rules, that judicial activities are as such excluded from the scope, established by those rules, of the right of access to documents” (para 79). For the Court, it was evident from the wording of ex Article 255 EC that the Court is not subject to the obligations of transparency laid down in that provision, clarified further by Article 15 TFEU²⁴³.

The Court was also unconvinced by the General Court’s choice of the oral hearing as the decisive point in time: “the exclusion of judicial activities from the scope of the right of access to documents, without any distinction being drawn between the various procedural stages, is justified in the light of the need to ensure that, throughout the court proceedings, the exchange of argument by the parties and the deliberations of the Court in the case before it take place in an atmosphere of total serenity” (para 92). For this reason, the Court judged it appropriate that there should be “a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings [...] while those proceedings remain pending” (para 94). Consequently, “the effectiveness of the exclusion of the Court of Justice from the institutions to which the principle of transparency applies [...] would be largely frustrated” (para 95)²⁴⁴.

As regards pleadings that had been lodged in closed cases, the Court pointed out that once proceedings have been closed by a decision of the Court, there are no longer grounds for presuming that disclosure of the pleadings would undermine the judicial activities of the Court and the “general presumption” thus no longer applied.

Regarding the concern relating to public pressure in the context of access to legal opinions, which had been dismissed by the Court in the *Turco* case and in relation to which AG Maduro, in his opinion in the *API* case, confirmed that the same reasoning should apply with respect to judicial activity (see *supra*), the conclusion of the Court in the *API* case was the opposite. It deferred to the point about public pressure with reference to equality of arms: “if the content of the Commission’s pleadings were to be open to public debate, there would be a danger that the criticism levelled against them, whatever its actual legal significance, might influence the position defended by the Commission before the EU Courts” (Court’s judgment in case *API*, para. 86). Moreover, not only the members of the Commission legal service would risk being affected by such pressure, but the Court proceedings themselves would be at risk: “Disclosure of the pleadings in question would have the effect of exposing judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings” (Court’s judgment in case *API*, para. 93)²⁴⁵.

²⁴¹ See Leino, P., *op. cit.*, at 1231.

²⁴² *Ibidem*.

²⁴³ *Ibidem*.

²⁴⁴ *Ibidem*, at 1232.

²⁴⁵ *Ibidem*, at 1233.

This judgement was met with criticism by some experts who were concerned that one could conclude dramatically that the vision of openness, legitimacy and citizen participation seems to have reached its culmination in the Court's ruling in the Turco case²⁴⁶. Since then, if the case law of the CJEU "serves as any kind of an indicator, the destination is getting blurred, as the Court has given its authoritative blessing to some of the Commission's most serious attempts to limit citizens' access and, what is more, has done so against the specific wording of Regulation No 1049/2001"²⁴⁷. The API judgment can be considered an obvious continuation of the VKI ruling²⁴⁸ but, unfortunately, "does not achieve the same level of transparency, since the threshold for accepting a 'general presumption' is now significantly lowered – and the story will continue. One may now only hope that the development will not lead to a situation where the Regulation, which after all was supposed to apply to all documents held by the institutions in all policy areas, would effectively be emptied of contents through 'general presumptions' applying to entire policy fields. As a question of principle, a general presumption of no access is problematic in a regime which is based on the opposite assumption: that everything is in principle open and accessible unless there are justified grounds to deny access."²⁴⁹

5.3. Proposals to change Regulation No 1049/2001

During the ten years of application of the Regulation, the European Parliament has repeatedly called on the Commission to present a proposal to reform it. These calls were strengthened by the anticipation that the Lisbon Treaty would enter into force, with its explicit aim of enhancing transparency and citizen involvement in decision-making. In the context of possible reform, it has also been discussed whether the Courts' case law would give reason to either incorporate some of the jurisprudence in the Regulation or, alternatively, to amend or clarify some of the relevant provisions²⁵⁰.

In 2007, the Commission initiated the reform process by issuing a Green Paper, followed in 2008 by a legislative proposal to recast the Regulation. Since 2009, negotiations on the file have been shelved because Member States are divided in the Council between those thinking reform represents a step forward, and those others wishing to take a step back²⁵¹.

The recast proposal for the Regulation was inspired by the case law of the Court at that time, including the API case (as adjudicated by the General Court in the first-instance procedure), but not identical with it. With reference to the General Court's ruling, the Commission argued that written submissions to the Courts were manifestly covered by the exception aimed at protecting court proceedings before an oral hearing has taken place. It proposed adding a new paragraph to Article 2 clarifying that documents submitted to Courts by other parties than the institutions do not fall within the scope of the Regulation at all²⁵². The Commission argued that the disclosure of written submissions to the Courts under Regulation No 1049/2001 would circumvent the Courts' own rules and the Protocol on the Statute of the Court of Justice, which is an integral part of the

²⁴⁶ Ibidem, at 1551.

²⁴⁷ Ibidem.

²⁴⁸ See supra note 229.

²⁴⁹ Ibidem, at 1251-52.

²⁵⁰ Ibidem, at 1215.

²⁵¹ Ibidem, at 1216.

²⁵² Ibidem, at 1233.

Treaty. The European Parliament indicated that carving out such categories of documents from the scope of the Regulation is not the right way forward^{253, 254}.

The new Commission proposal²⁵⁵ of March 2011 aims at a more faithful transposition of Article 15 TFEU: while expanding the institutional scope to also cover the Court of Justice, its implementation would be limited to the administrative tasks of the Court only²⁵⁶. The new proposal does not prejudice the ongoing (and practically blocked) procedure for a recast of Regulation No 1049/2001 on the basis of the Commission's proposal of April 2008.

While adopting additional EU legislation to fill the gaps in the current secondary legislation (confidential information, see *infra*) and to modernise it (amendments to Regulation No 1049/2001, and relationship between the public access regulation and the data protection regulation, see *infra*), the following aspects should be borne in mind: a strong presumption in favour of disclosure (the principle of maximum disclosure); broad definitions of information and public bodies; positive obligations to publish key categories of information; clear and narrowly drawn exceptions (for the protection of legitimate public and private interests), subject to a balancing test and with defined overriding public interests.²⁵⁷

At the same time, the wide interpretation of the RACD may not be an instrument leading to obtaining information through the back door which normally cannot be obtained differently (e.g. illegal data mining²⁵⁸).

²⁵³ T6-0114/2009.

²⁵⁴ Leino, P., *op. cit.*, at 1233.

²⁵⁵ See Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, 21 March 2011, COM(2011)137 final.

²⁵⁶ Article 2, paragraph 3 of the proposal for the abovementioned Regulation.

²⁵⁷ ARTICLE 19, *op. cit.* at 8.

²⁵⁸ In 2003, the Supreme Court of Canada handed down a ruling in the case *Information Commissioner v. Canada*. The case was on a request for information on the positions and postings of five policemen, made by a citizen under the Canadian Access to Information. The relevant authority submitted partial information, limiting itself to reporting the current posting of its four active members and the last posting of the retired police officer involved in the request for access. It argued that the information on previous postings was "personal" information. The case was reviewed in court. The first instance court found that it was only necessary to turn over information on current police employees, and on the last posting in the case of the retired officer. The Appeals Court rejected this interpretation and found that the law does not contain a temporal limitation on the access to information on State employees. However, the judges ruled that a request for information of this kind should be specific in relation to time, scope, and location, and cannot be used to "fish for" information with general requests. See Office of the Special Rapporteur for Freedom of Expression, at 38.

6. ACCESS TO COURT FILES OF JURISDICTIONS OF THE EUROPEAN ECONOMIC AREA

The aim of the European Economic Area (EEA) Agreement is to guarantee the free movement of persons, goods, services and capital; to provide equal conditions of competition and to abolish discrimination on grounds of nationality in all 30 EEA States – the 27 EU States and 3 of the EFTA States. By removing barriers to trade and opening up new opportunities for over 500 million Europeans, the EEA stimulate economic growth and adds to the international competitiveness of the EEA States. The successful operation of the EEA depends upon uniform implementation and application of the common rules in all EEA States. To this end, a two-pillar system of supervision has been devised: the EU Member States are supervised by the EU Commission, and the EFTA States party to the EEA by the EFTA Surveillance Authority. The latter has been given powers corresponding to those of the Commission in the exercise of its surveillance role. A two-pillar structure has also been established in respect of judicial control; the EFTA Court operates in parallel to the CJEU.

6.1. EFTA Court

The EFTA Court has jurisdiction with regard to EFTA States which are parties to the EEA Agreement (at present Iceland, Liechtenstein and Norway). The EFTA Court is mainly competent to deal with infringement actions brought by the EFTA Surveillance Authority against an EFTA State with regard to the implementation, application or interpretation of an EEA rule, for the settlement of disputes between two or more EFTA States, for appeals concerning decisions taken by the EFTA Surveillance Authority and for giving advisory opinions to courts in EFTA States on the interpretation of EEA rules. Thus the jurisdiction of the EFTA Court mainly corresponds to the jurisdiction of the CJEU over EU States. The proceedings before the EFTA Court consist of a written part and an oral part and all proceedings are in English except in cases where an advisory opinion is sought by a national court of an EFTA State party to the EEA. In the latter case, the opinion of the EFTA Court will be in English and in the national language of the requesting court.

For each case, a report for the hearing is prepared. A report for the hearing outlines the dispute and contains the factual and legal background, pre-litigation history, forms of order sought by the parties, a brief summary of written procedure before the EFTA Court and summary of the pleas in law and arguments submitted. It is public and available on-line as soon as it is drafted (in English and also in the language of the state which made the request for the advisory opinion). The reports for the hearing are available not only for decided cases but also for pending cases.²⁵⁹

For pending cases the chronological order of the filing of documents in a certain dossier is also publicly available on-line. This enables every interested person to learn at which stage of the procedure any given pending case is.

Even though, as mentioned above, the jurisdiction of the EFTA Court mainly corresponds to the jurisdiction of the CJEU over EU States, this does not hold true concerning the accessibility of its court documents. Whereas the reports for the hearing of the EFTA Court are published on the internet, the reports for the

²⁵⁹ See the webpage of the EFTA Court, available at <http://www.eftacourt.int/>.

hearing written by a judge-rapporteur of the CJEU used to be only publicly available to persons attending a hearing (see *infra*).

Persons having an interest may consult the register at the Registry and may obtain copies or extracts on payment of a charge on a scale fixed by the Court.²⁶⁰ The parties to a case may on payment of the appropriate charge also obtain copies of pleadings and authenticated copies of judgments, advisory opinions and orders.²⁶¹

As it will be seen below, the arrangements enabling consultation of the register by third persons are very similar to the ones applicable before the CJEU which will be analysed more in detail at 6.2.1.

6.2. CJEU

6.2.1 Introduction

The Court of Justice of the European Union is composed of the Court of Justice, the General Court and the Civil Service Tribunal. Bearing in mind that the content of disputes varies significantly across these three jurisdictions, it shall be understood that not every conclusion related to the CJEU generally necessarily relates to each of them (and/or to the same extent).

Its database on case-law is available in all the official languages. The CJEU systematically publishes all pronounced judgements and orders on its webpage (www.curia.eu), and normally also the opinions and views of Advocate General (see *infra*).

Many tools exist in order to facilitate finding relevant case law, e.g. InfoCuria - Case law of the Court of Justice; numerical access; alphabetical table of subject-matter; important pre-accession case law. In addition, the reader can also learn which academic literature was relied upon when writing a court decision by consulting "Notes relating to the decisions" in the "Minidoc" system (only available in French - Notes aux arrêts de la Cour de justice); notes relating to a judicial decision are also published in the EUR-Lex database under the "Doctrine" section.

In every case, a preliminary report is drawn up by the Judge-Rapporteur when the written part of the procedure is closed, and presented to the general meeting of the Court. The preliminary report contains, *inter alia*, proposals as to whether particular measures of organisation of procedure, measures of inquiry, or requests to the referring court or tribunal for clarification should be undertaken. The Court then decides, after hearing the Advocate General, what action to take on the proposals of the Judge-Rapporteur.

While reports for the hearing (very similar as to the content of the EFTA Court's reports for the hearing, and including, *inter alia*, summary of the pleas in law and arguments submitted) used to be distributed at oral hearings and were available for everyone attending them, they were not published on the internet of the CJEU, and in the paper version they were available only in the language of a case (even though a French version existed internally, too). However, from November

²⁶⁰ EFTA Court, Rules of Procedure, Article 14(5), first subparagraph, available at http://www.eftacourt.int/images/uploads/RoP_amendments_2010_draft_EN.pdf.

²⁶¹ *Ibidem*, Article 14(5), second subparagraph.

2012 on, with the entry into force of the new Rules of Procedure, they are no longer drawn up and therefore not available to the public at all²⁶².

Court records are accessible for a third person only upon a written request related to a specific court file and access to a requested document is granted only if the parties to the proceedings agree with its transmission to the third person.

As already mentioned this study was actually initiated by dissatisfied legal practitioners who raised several points in relation to the CJEU and the transparency of the administration of justice. To briefly summarise, the following points were raised: i) reports for the hearing were available only in the language of the case at an oral hearing; ii) even though these documents were distributed to the public attending an oral hearing, they were not published; iii) judgments from national courts in Member States submitting references for preliminary rulings under Article 267 of the TFEU are not (necessarily) available on the internet; iv) case summaries are not available on the internet of the CJEU even though that might be the case in Member States; v) the availability of documents drafted by AG.

The rules governing access to case files of the EU courts are contained in the Statute of the Court of Justice, the Rules of Procedure of the three jurisdictions²⁶³ and the Instructions to the Registrar of each of the three jurisdictions. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice (hereafter: Statute), which also applies to the General Court, written submissions are communicated to the other parties and to the institutions whose decisions are in dispute. Everyone may consult the register at the Registry and may obtain copies or extracts on payment of a charge on a scale fixed by the Court on a proposal by the Registrar (Article 22(1) of Rules of Procedure). In practice this means that a third persons requests in writing the access to a specific court file. If the parties to the proceedings agree that the requested document be transmitted to the requestor, the access will be granted (parties to the proceedings have access to all procedural documents related to their specific case; Art 22(2) Rules of Procedure). Third persons can also obtain, on payment of the appropriate charge, certified copies of judgments and orders (Article 22(3) Rules of Procedure). The scale of registry charges is defined in the Instructions to the Registrar (Article 20 Rules of Procedure); an authenticated copy of a judgment or order, or a certified copy of a procedural document costs 60 LUF²⁶⁴ per page.

The judicial calendar is published on the internet. A brief description as to the case (key words), coupled with the docket number, names of the litigants and time and place of the hearing provides the reader, most probably in majority of case, with information enabling him to assess whether a public hearing is relevant to him.

In 2011, the Court launched a project named "e-Curia". E-Curia is an application of the CJEU that is intended for lawyers and agents of the Member States and of the institutions, bodies, offices and agencies of the European Union, and which allows the exchange of procedural documents with the Registries of all of the

²⁶² It is claimed by the legal professionals that one of the downsides of this change is not only that this document is no longer available to the public but that it is also more difficult for the parties to verify the accuracy of the translation of their written submissions.

²⁶³ If there is no specific mention as to which Rules of Procedures are meant, then the referral is made to the Rules of Procedure of the Court of Justice.

²⁶⁴ 1 EUR equals 40,3399 LUF.

three courts, exclusively by electronic means²⁶⁵. It is to be noted that the application can be only used by the counsels of the parties to the proceedings so that third persons who are not parties to the proceedings cannot use it.

6.2.2. Problematic issues

The inaccessibility of court documents to third persons creates various problems. Some of them will be discussed below in detail. They are divided into two categories. The first category concerns problems related to individual judicial proceedings, while the second category concerns more general issues. In this relation it is understood that such a categorisation is rather artificial and that various aspects and legal issues raised are interconnected.

6.2.2.1. Problematic issues in specific cases

Problems related to individual judicial proceedings are: a) the possibility for third persons to intervene; b) the problem of reversing the burden of proof in relation to exemptions from the access to documents, c) the possibility for interested persons to increase their expertise; d) the equality of arms for a party to a proceeding.

As the General Court decided in the API case, court documents in pending cases are manifestly covered by the exception relating to the protection of court proceedings, until the proceedings in question have reached the hearing stage. It is to be noted that this decision was later quashed by the judgment of the Court. However, even if we depart from the General Court's standpoint that the breaking point in terms of access to documents is the hearing stage, the following question arises: how do third persons know when the hearing stage begins?

They do not; and that may have serious procedural and substantial legal consequences for them. For example, the moment of opening the oral procedure determines whether an application for intervention is admissible. Normally, an application to intervene must be submitted within six weeks of the publication of the notice²⁶⁶ in the Official Journal of the European Union²⁶⁷. However, consideration may be given to an application to intervene which is made after the expiry of this six-weeks period but before the decision to open the oral part of the procedure²⁶⁸ (in cases when the oral part of the procedure is opened without an inquiry) is made. For third persons, it is impossible to determine this moment as this date is only communicated to the parties to the case and, moreover, only after the adoption of the Court's decision.

A real example of such a scenario is the following case: a Dutch MEP, Ms Sophie in 't Veld, brought an action for annulment²⁶⁹ of a decision of the Commission of 4 May 2010 refusing full access to documents concerning the negotiations of the Anti-Counterfeiting Trade Agreement, requested by her pursuant to Regulation No 1049/2001. Parliament was deliberating whether to intervene in the proceedings. By the time this decision had been adopted, the court proceedings passed the

²⁶⁵ See Decision of the Court of Justice of 13 September 2011 on the lodging and service of procedural documents by means of e-Curia (OJ C 289/7, 1.10.2011).

²⁶⁶ Notice regarding an application initiating proceedings.

²⁶⁷ Article 130(1) Rules of Procedure of the Court of Justice.

²⁶⁸ Article 129(4) Rules of Procedure of the Court of Justice.

²⁶⁹ Case T-301/10, Sophie in 't Veld v. Council, judgement delivered on 4th May 2012.

stage of the written procedure so that it was no longer possible for this institution to intervene²⁷⁰.

The quality of justice is arguably enhanced when the public can know what parties are presenting to the court. Interested parties should therefore be able to make an informed decision whether to intervene (or become involved as a friend of the court, *amicus curiae*)²⁷¹.

If it is assumed, again, that the moment from which documents could become publicly available is the beginning of the hearing stage of the proceedings, then, from that moment on at the latest, reports for the hearing could be accessible on internet (provided the CJEU decides to re-introduce them again). If the line of reasoning of the Court's ruling in the API case is followed and, at that stage, the report for the hearing still may not be published online because deliberations of the Court should take place in an atmosphere of total serenity, this document could be automatically available on the internet (in the language of the case and in French) once the case has been closed.

A further problematic issue of the current situation of non-access to court documents for third persons arises from the fact that once the existence of a "general presumption" is admitted, the procedural roles of a requestor for a document and of the addressed institution are basically reversed. According to Regulation No 1049/2001, it is the institution – thus the CJEU – which needs to conclude (after making a two-step assessment in relation to the court proceedings exception) that the requested document might (not) be disclosed. For the applicant, no obligation exists to state any reasons for disclosure. However, in practice, accepting the existence of a general presumption would mean that the applicant needs to prove that, in a specific case, the general presumption does not apply. The result thereof is that the burden of proof is actually reversed. According to some scholars such a situation is contrary to the spirit of Regulation No 1049/2001²⁷².

Furthermore, during the hearing at which a third person is physically present, a party may refer to written observations (either to its own or of the opposite party) lodged with the court before, in the phase of the written procedure. Even though the third person is present at the hearing, she might not be able to properly understand the discussion. Hence, even the actual presence of the interested audience at the oral hearing – which is conducted in public – does not allow the obtention of documents referred to during the course of oral submissions. An individual request to obtain such documents will most probably, under the doctrine of the API case, be refused. As a critical UK legal practitioner stated in this relation, "[...] there should be an overriding interest in those documents being accessible on request. Otherwise, the Court proceedings are quite opaque." If formulated differently: it is claimed that being able to follow the

²⁷⁰ On 21 June 2012, the Legal Affairs Committee recommended to the President of the EP, under Rule 128(4), to intervene on behalf of Parliament in case T-301/10 in support of Ms in 't Veld. On 12 July 2012, the President gave instructions to the Legal Service to proceed following the recommendation of the Legal Affairs Committee. The Parliament's request to intervene was lodged with the Court of Justice on 13 July 2012. On 29 August 2012 the European Parliament was notified of the decision of the General Court to dismiss the request of the Parliament, because it was lodged with the Court after its decision to open the oral procedure. When Parliament lodged the request with the Court, it was not aware that only *one* day earlier the Court had already decided to open the oral procedure.

²⁷¹ Open Society Justice Initiative, *op. cit.*, at iv.

²⁷² See for example Leino, P.,: "As a question of principle, a general presumption of no access is problematic in a regime which is based on the opposite assumption: that everything is in principle open and accessible unless there are justified grounds to deny access." in Leino, P., *op. cit.*, at 1251-52.

development of the case law of the Court, and to familiarise one's self with arguments used by one or the other party, should be considered an overriding interest, so that the exception related to court proceedings will not apply and those documents will be accessible to third persons (e.g. practicing lawyers, journalists etc.) on request.

The question of overriding interest is a question of how to interpret this term. It is claimed that, until now, the CJEU was quite reluctant to grant access to documents (of other institutions) when an overriding interest overlapped with a particular private interest of the person requesting documents. For example, in the MyTravel case²⁷³, the General Court stated that by referring to a wider (overriding) interest, the applicant merely sought "in substance, to assert that those documents would allow [it] to argue its case better in the action for damages" (para. 65). In the view of the General Court, this objective alone did not "constitute an overriding public interest in disclosure which is capable of prevailing over the protection of confidentiality". The General Court argued that "[t]hat interest must be objective and general in nature and must not be indistinguishable from individual or private interests, such as those relating to the pursuit of an action brought against the Community institutions, since such individual or private interests do not constitute an element which is relevant to the weighing up of interests" (para. 65).²⁷⁴

Consequently, even if members of the interested public make a request to access specific documents on a case-by-case basis, it seems that the argument that documents would further someone's expertise will not succeed because, in the eyes of the CJEU, it serves a particular private interest, and does not qualify as an overriding public interest. It is argued that such an attitude of the CJEU is especially problematic given the fact that at least one specific category of legal practitioners – namely national judges – needs to get acquainted not only with preliminary rulings delivered by the Court, but also with the background of disputes giving rise to preliminary references. In this relation it is emphasised that the greater access national judges have to court files of the CJEU, the smaller the likelihood that they will address the same references for preliminary questions to the Court as their colleagues already did before.

Another aspect of the inaccessibility of court files is equality of arms. This problem is very real and practical. The same UK legal practitioner mentioned above is instructed in a procedure before a national court. His client is in an unequal position as opposed to the other party to the proceedings (national taxation authority) if he cannot get access to a document of the European Commission (written observations) to which the opposite party expressly refers and of which it purports to summarise the effects in certain regards²⁷⁵.

The fair trial is one of the most fundamental principles of procedural law to be respected (in criminal and non-criminal cases). It is guaranteed by many international conventions, and also by the Article 6 of the ECHR. One of its aspects is the equality of arms (equal procedural guarantees; *audiatur et alter pars*) and it means that anyone who is a party to a judicial procedure should have a reasonable opportunity to present his case before the court in conditions that

²⁷³ Case T-403/05, MyTravel Group plc v. the Commission.

²⁷⁴ See Leino, P., *op. cit.*, at 1244-45.

²⁷⁵ If the information provided by an UK barrister is true, then the following happened: In the context of a court case in the UK in which he is instructed, the Revenue & Customs Commissioners have written to a UK court, with an express reference to the written observations of the European Commission, and purporting to summarise the effect thereof in certain regards. The barrister, not having possibility to read the written observations, could not assess whether the summary was complete or partial, accurate or inaccurate.

do not place him at a substantial disadvantage vis-à-vis his adversary. The right to effective judicial protection of which the meaning and the scope²⁷⁶ should correspond to the right enshrined in Article 6 of the ECHR is explicitly recognised in Article 47 of the Charter.

It can be argued that, in a case where one party has access to a certain document to which she also refers, but to which the adversary party does not have access, the right to a fair trial is violated.

6.2.2.2. Problematic issues in general

Apart from problems mentioned in the previous point, which relate to third persons in a particular judicial procedure, there are general problems related to the inaccessibility of court records of the CJEU.

Firstly, the EU judicial system is a decentralised one where all national courts are also Union courts. In such a system, it is claimed, the CJEU cannot afford to be minimalistic if it wants to give convincing and effective guidance for lower courts to apply law in future cases. Given the fact that all decisions are presented as unanimous and that therefore judges cannot express dissenting opinions – the situation being partially remedied by opinions of the AG – it is all the more important that the CJEU reintroduce reports for the hearing and that the latter be automatically available online. It is argued that since frequently decisions of the CJEU are brief, terse and cryptic (a result of minimal unanimous consent as a minimal common denominator), access not only to the AG's opinion, but also to the reports for the hearings, would shed much more light on the arguments used in the deliberations of the Court. Obviously, this argument is closely related to the argument related to the overriding interest of the public to acquaint itself with arguments put forward by the parties to court proceedings, analysed in the previous point.

The reference for a preliminary ruling (e.g. a judicial decision of a national court to submit a preliminary question to the Court) is not published by the CJEU. Questions referred to in a preliminary reference are published in the OJ. However, facts giving rise to those questions are not published (neither in the OJ nor on the website of the Court). Preliminary references are considered to be an internal document of the Court. It is argued that understanding the questions posed would be largely facilitated if preliminary references were available on the website of the CJEU. It is expected that interlocutors of the national judge referring a question – other national judges – would be better placed to evaluate whether a certain topic needs a further clarification and whether they need to refer additional questions to the Court or not if they had access to preliminary references. Any other interested person would benefit from getting access to such a source of information, too: e.g. legal practitioners, academia and the like.

Given the fact that some Member States give access to national judicial decisions to refer a preliminary question to the Court, it is questionable whether the attitude of the Court not to enable access to them is meaningful. For example, it is possible to access the full national judgment (preliminary reference) on the Bulgarian courts' website – in Cyrillic. By using a translation application into

²⁷⁶ Charter of Fundamental Rights of the European Union, Article 51(3): "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

another language, an interested third person is able to assess whether a particular case is actually relevant in relation to his or her interest/expertise²⁷⁷.

Similarly it is possible to access online Dutch judicial decisions to submit a preliminary reference to the CJEU, as well as judicial decisions of lower courts, as the case may be, whose decision was challenged before a higher court which submitted the preliminary question to the CJEU²⁷⁸.

Secondly, some issues pertain to the transparency of the AG. Where it has been decided that an oral hearing will be held, the case is argued at a public hearing, before the bench and the AG. Some time later, the opinion of the AG is delivered before the Court of Justice, again in open court. The AG analyses in detail legal aspects of the case and suggests, completely independently from the Court, the response which he or she considers should be given to the problem raised²⁷⁹. This marks the end of the oral stage of the proceedings²⁸⁰.

It is claimed that opinions of the AG help understand the genesis of the decision reached by the Court²⁸¹. From this point of view, the opinion of the AG is a valuable tool for any interested person to better familiarise himself with the grounds of the judicial decision. However, it must be understood that the AG delivers his/her opinion only before the Court, and not before the General Court or Civil Service Tribunal. Only exceptionally will the General Court be assisted by an AG. If it is considered that the legal difficulty or the factual complexity of the case so requires, a chamber of the General Court may be assisted by an AG²⁸². The decision to designate an AG in a particular case shall be taken by the General Court sitting in plenary session at the request of the Chamber before which the case comes. The President of the General Court shall designate the Judge called upon to perform the function of AG in such a case²⁸³.

In two different sets of scenarios no opinion of an AG will be delivered before the Court. In the first scenario it has been decided not to hold a hearing if the Court considers, on reading the written pleadings or observations lodged during the written part of the procedure, that the Court has sufficient information to give a ruling²⁸⁴ (no oral phase). In the second scenario, if the case raises no new question of law, the Court may decide, after hearing the AG (oral phase), to give judgment without an opinion²⁸⁵.

²⁷⁷ In practical terms the procedure of obtaining information in order to assess the relevance of a certain case is the following (according to the UK barrister); he learned how to navigate the Bulgarian courts' website, even though it is in Cyrillic. By using an on-line translation services, he obtains (more or less accurate) translation of the national judicial decision to refer a preliminary question to the Court. Based on this unofficial text, he assesses the relevance of the latter for him.

²⁷⁸ For example, it is possible to access a decision of the Dutch Raad van State to submit a preliminary reference to the Court, as well as it is possible to access judgements of lower court(s) whose decision was later appealed against before the Raad van State (and who joint various procedures, as the case may be). They are available at <http://www.raadvanstate.nl>.

²⁷⁹ Article 252(2) TFEU.

²⁸⁰ Article 82 Rules of Procedure of the Court of Justice.

²⁸¹ See Rasmussen, M., *The First Advocate Generals and the Making of European Law*, forthcoming as a European University Institute Working Paper.

²⁸² Article 18(1) Rule of Procedure of the General Court.

²⁸³ Article 18(2) Rule of Procedure of the General Court.

²⁸⁴ Article 76(2) Rules of Procedure of the Court of Justice.

²⁸⁵ Article 20 of the Statue of the Court of Justice.

Apart from cases in which no opinion is delivered, the Court can decide, following its internal rules, that in a specific case the opinion of the AG, or in an urgent preliminary ruling procedure²⁸⁶ the view of the AG will not be published²⁸⁷.

As a result, in various cases the AG either does not draft any document that would help an interested person better understand the underpinnings of a judicial decision in a specific case, or such a document is not published.

Thirdly, both the TFEU and the Charter guarantee access to documents. Transparency is the rule, confidentiality an exception, and the exceptions are to be, arguably, interpreted narrowly. Hence, only in very exceptional cases might it be admissible not to give (full) access to court files. Consequently, it is doubtful whether the interpretation of Regulation No 1049/2001 to exclude all court documents related to a pending case from its scope of application “*en bloc*” is compatible with Article 15 TFEU and Article 42 of the Charter²⁸⁸. It is argued that such an interpretation is even less compatible when taking into account that the use of the general exception *de facto* reverses the burden of proof.

If it is assumed that such a general exemption does not violate the Treaty and the Charter, it should be further examined whether an overriding interest does not prevail so as to give (at least) automatic access to preliminary reports (and reports for the hearing if they are going to be reintroduced), and possibly also access to court files in general. Some examples of overriding interest can be: a) the right of the public (in particular: academics, practicing lawyers, researchers, NGOs and journalists) to learn about the arguments used by the parties; b) the right of the public to learn about the arguments used by the courts (arguments of the Judges, the Judge-Rapporteur and the AG) in the course of the proceedings, even though certain arguments did not prevail in the decision and were not retained; c) the need of the general public to trust the judiciary (the more transparent the judiciary, the greater the trust of the public). Indeed, the latter might be the most convincing one: the public has an overriding interest in the sound administration of justice²⁸⁹.

Furthermore, with an increased role for fundamental rights in the architecture of the EU²⁹⁰, the CJEU assumes a role of guarantor of fundamental rights, similar to the role of the ECtHR²⁹¹. If transparency is not merely to remain a right on paper, then the CJEU needs to play a more proactive role and deny (full) access to documents only under very specific circumstances²⁹². Such exceptional circumstances would be, for example, present in cases of a request to access documents relating to minors, victims of criminal offences, juvenile offenders, medical issues, public security or fight against terrorism etc²⁹³.

²⁸⁶ Title III, Chapter 3, Rules of Procedure of the Court of Justice.

²⁸⁷ Since there is no legal obligation for the Court to publish AG opinions it can decide to do so in their relation, too.

²⁸⁸ See again Leino, P., *op. cit.*, at 1251-52: “[...] Regulation, which after all was supposed to apply to *all* documents held by the institutions in *all* policy areas, would effectively be emptied of contents through ‘general presumptions’ applying to entire policy fields. As a question of principle, a general presumption of no access is problematic in a regime which is based on the opposite assumption: that everything is in principle open and accessible unless there are justified grounds to deny access”.

²⁸⁹ *Ibidem*, at 1244.

²⁹⁰ Fundamental rights were not mentioned in the founding Treaties and, initially, the Court resisted attempts to be transformed into a guarantor of fundamental rights.

²⁹¹ Lenaerts, K., *Exploring the Limits of the EU Charter of Fundamental Rights*, in *European Constitutional Law Review*, 8, 2012, at 402.

²⁹² In this sense see European Data Protection Supervisor: *Public access to documents containing personal data after the Bavarian Lager ruling*, at 2, available at <http://www.edps.europa.eu>.

²⁹³ In this relation it needs to be mentioned that on the EU level, there is no general principle applicable to documents containing sensitive information and requiring to be classified as a whole.

6.2.3. Recommendations

After the presentation of (legal) problems stemming from the inaccessibility of court files of the CJEU to third persons, this section focuses on recommendations on how to remedy this situation. The recommendations are practically oriented so that they would, in order to be implemented, only necessitate the use of minor resources (human and financial).

Firstly, it is recommended that the CJEU reintroduce reports for the hearing and make them publicly available (in the language of the case and in French) on its internet webpage; preferably in the course of a specific judicial procedure (e.g. once the oral phase has begun) and, at the latest, once the case has been closed.

Secondly, given the fact that the Court is slowly but surely migrating towards a completely non-paper, electronic management of court files, enabling electronic access to interested members of the public (in a comparable way to Canada, for example) is considered being only a step further from the situation existing currently. The e-Curia application allows for the electronic filing and exchange of documents between legal counsels of parties and the Court. It would be worth considering to up-grade it so that access to court files could be granted also to interested third persons. Such access for third persons could be subject to having a special authorisation.

Thirdly, it is suggested that the CJEU generally enable access to court files subject to certain limitations in specific cases. It seems that the argument that court files may not be (fully) accessible owing to personal data protection is not justified. Even though the Court ruled in the Bavarian Lager case²⁹⁴ that

Article 9 of Regulation 1049/2001 only tackles the issue of access to such documents. Its first paragraph gives definition of classified documents by stating that they are ‘‘documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as ‘TRES SECRET/TOP SECRET’, ‘SECRET’ or ‘CONFIDENTIEL’ in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.’’ They are only registered or issued with the consent of the original authority, and only persons authorised to acquaint themselves with these documents may deal with requests to give access to those documents. In the opinion of the scholars, the rules on their access breach the common law established in Regulation No 1049/2001. Basically, there is a legal void in the secondary legislation relating to sensitive documents (e.g. precise justifications behind a document’s classification, regarding the concrete modalities of this classification, including its length and a potential control of the grounds justifying the restriction to the right of access). For the time being, the secondary legislation merely addresses the particular dimension of public access to these documents. Concerned institutions should handle the issue comprehensively in their rules in force. Stated differently, the institutions prescribe rules on what are classified documents, and how to deal with them, themselves. The problem is not only that any limitation to the fundamental right of access to documents, guaranteed by both the Treaty and the Charter, should be governed by a legislative act instead of with internal rules of a specific institution. Furthermore, it can happen that the original authority will deny the mere existence of such a document. See Labayle, H., op. cit., at 6-7.

²⁹⁴ See case C-28/08 P, *Commission v Bavarian Lager*. The director of Bavarian Lager, a UK importer of German beer, requested the Commission for public access to the minutes of a meeting in October 1996 with UK government representatives and representatives of the European beer industry (organised within the scope of an infringement procedure initiated by the Commission upon the complaint of Bavarian Lager to the Commission about UK legislation which limited his ability to sell his beer to public houses). The Commission provided access to the minutes except for the names of five persons. Two of these persons had expressly refused to consent to the disclosure of their identity after the Commission had asked them so. The Commission had been unable to contact the other three persons. The General Court annulled the Commission decision not to disclose those five names (case T-194/04, 8 November 2007, [2007] ECR II-04523). However, the Court, ruling on Commissions appeal, set this judgement aside and confirmed the Commission decision to refuse the disclosure of the names. It held that once a public access request was made for a document containing personal data, it should further be dealt with under the data protection rules (*renvoi theory*), thereby rejecting the *threshold theory*. The latter means that it should first be established that the privacy of the persons involved is affected (affected privacy as a threshold before the data protection rules would

“surnames and forenames may be regarded as 'personal data'” (paras. 68 and 69), it can, on its own motion, apply a more proactive approach. Such a proactive approach is advocated by the European Data Protection Supervisor: the “[o]penness of EU activities is not achieved only through (positively) answering to requests for public access. Institutions and bodies must also aim as far as possible for transparency of their activities of their own motion, i.e. by actively providing the public with information and documents [...]”^{295//296}.

A proactive approach means that in order to achieve a fair balance between the right to data protection and the public interests of transparency, institutions should assess the possible public nature of personal data already at the stage of collecting such data, and not only at the moment they receive a request for public access to a document containing personal data. The EDPS “takes the view that institutions should assess in advance the extent to which the processing includes or might include the public disclosure of the data. If such disclosure is envisaged, they should make this clear to data subjects before or at least at the moment that the data are collected [...] Being proactive implies that the balance between the public interests which underlie openness and the interests protected by the data protection rules is already established before or at least at the moment that the data are collected and thus before a public access request is being made. It goes without saying that there are many cases in which the balance between the different interests at stake favours the non-disclosure of personal data. For example, there is no doubt that medical files of EU civil servants should not be made public. On the other hand, there are also situations in which the balance favours openness. Generally speaking, such could be the case with personal data contained in documents relating to a public figure acting in his or her public capacity or relating solely to the professional activities of the person concerned.”

In fact, what the EPDS proposes (to institutions in general) is very similar to how the Canadian judicial system functions: counsels and parties are informed, prior to filing a document within a court, that court files are accessible to third persons and that is therefore their responsibility to disclose only the necessary (and to assume the consequences of disclosing too much). It would be worth considering whether such a system could be implemented at the CJEU. Indeed, it seems that it would only necessitate an adaptation of the existing relevant guidance given by the three EU courts to counsels and parties, respectively²⁹⁷. This way parties (/their counsels) would know in advance that every filing ought to be prepared carefully, bearing in mind that it might be subject of a request for access to documents. It goes without saying that in the particular circumstances of a case the access to a file would be (partially) denied, applying the rules of Regulation No 1049/2001, relating to exemptions (e.g. privacy of persons²⁹⁸).

become applicable). Within the EU, in various member states (e.g. Germany, UK, France, Italy and Spain) personal data is subject to the balancing test so that in case of collision of the request for access to a public document containing personal data and the privacy (data protection), the request is individually examined. Stated differently, the exemption related to privacy is not absolute but relative. See OECD, *op. cit.*, at 28.

²⁹⁵ Emphasis added.

²⁹⁶ European Data Protection Supervisor, *op. cit.*, at 6.

²⁹⁷ At the Court, such guidance is given by Notes for the guidance of Counsel in written and oral proceedings before the Court of Justice of the European Communities; at the General Court by Practice Direction to Parties; at the Civil Service Tribunal by Practice Directions to Parties on judicial proceedings before the European Union Civil Service Tribunal (OL L 69/131, 3.3.2008).

²⁹⁸ It is clear that, owing to the nature and content of cases pending before the Civil Servants Tribunal, it is more likely for the latter to be in need to apply the exemption relating to the privacy than the other two jurisdictions. However, this would not preclude requestors for documents from getting (partial) access to files in at least some cases.

Additionally, if according to the Canadian Model Policy personal names and surnames are not considered personal data (per se), and the same approach is advocated by the EPDS²⁹⁹, it is recommended that the CJEU reconsider its attitude towards requests for access to court files containing personal data.

It must also be recalled that documents available on the website of the CJEU do contain – and reveal – various strains of personal information or information which, if aggregated, potentially reveals a lot about an individual (whether a person has children, names of their children, date of birth of their children, place of residence, marital status, duration of marriage, age etc.). Indeed, it seems that they reveal more than what is normally requested by third persons who would like to obtain, for example, written submissions of an EU body who is a party to the proceedings. If such (personal) information is already made publicly available via certain types of documents (e.g. orders, judgments, opinions of the AG), it would be meaningful to consider that other documents (e.g. parties' pleadings) also be available to third persons (with implementation of the rule that parties themselves shall not disclose more than what is strictly necessary for the adjudication of the case).

Fourthly, it is suggested – in order for third persons to make an informed decision on whether to intervene – that decisions to open the oral stage of the procedure be published on the CJEU website.

Fifthly, it would be considered a good practice³⁰⁰ if all the opinions of the AG were published upon their presentation by the AG, in the language of the case (and later in other languages), as well as all views of the AG related to urgent preliminary ruling procedures.

Sixthly, it is being advocated by legal practitioners that a base of summaries of cases based on Article 267 TFEU (preliminary rulings) be established. Given the fact that case summaries are in some countries in the public domain and already accessible to anyone interested (though only after going through a cumbersome and time-consuming procedure, as explained above), the Court could consider publishing preliminary references on its website once they have been translated into French (French being the working language of the Court), together with other documentation submitted by the national judge who is referring the question to the Court.

²⁹⁹ European Data Protection Supervisor, op. cit, at 6: ‘ ‘Generally speaking, such could be the case with personal data contained in documents relating to a public figure acting in his or her public capacity or relating solely to the professional activities of the person concerned.’ ’

³⁰⁰ Which is advocated by the EDPS, see European Data Protection Supervisor, op. cit, at 2.

CONCLUSION

There is a tendency across various countries (EU and non-EU members) toward actively to give access to public documents. Following the first attempts at making the public administration more transparent for parties involved in administrative procedures, by adopting rules governing administrative procedure, many more steps have been taken. The next step was to adopt the FOIA rules, giving access to public documents upon request. The following step, chronologically coupled with the arrival of new communication technologies (internet), was that public authorities started publishing public information of their own motion. Recently it has been understood that transparency does not extend only to the executive and the legislature, but also to the judiciary.

To summarise, public authorities are moving away from confidentiality for the protection of the public interest to the protection of democracy, from a general rule of secrecy to the general rule of openness, the latter being more and more understood as their positive obligation to act proactively and publish documents of their own motion.³⁰¹

The rules of Finland, Slovenia and Canada applicable to access to court files – even though very different in their nature – nevertheless depart from the same standpoint; that court files are also in principle accessible to the public. Each of these countries resolved accessibility-related issues differently, with nearly incomparable approaches, but with a common denominator: the transparency of the judiciary. The presented models could serve as a source of inspiration should the CJEU decide to grant greater access to its court records to third persons.

The CJEU could significantly, using only minor additional resources, strengthen the procedural rights of individuals within the EU and increase the possibility of accessing court files for the public by implementing the following recommendations: i) elaborate reports for hearing and make them available (in the language of the case and in French); ii) upgrade the e-Curia application, to allow access to court files also to interested third persons (having a special authorisation); iii) reconsider its attitude towards requests for access to court files containing personal data; iv) publish decisions to open the oral stage of the procedure on its website; v) publish all AG opinions and views; and vi) establish a database of case summaries based on Article 267 TFEU (references for preliminary rulings).³⁰²

³⁰¹ In this relation considerations should be given to the Convention on the Rights of Persons with Disabilities (Convention of the UN; at the time of finishing this report, 155 countries were signatories to this Convention), which came into force in May 2008. It enshrines the principle that persons with all disabilities must be able to enjoy basic human rights and fundamental freedoms. For the first time, an international human rights agreement includes an explicit articulation of the right of persons with disabilities to access information and communications technologies and systems on an equal basis with others and without discrimination. This mandate, set out under Article 9, has a far reaching impact since access to information and communication technologies affects the right to access all other basic human rights, such as the right to access to information, transportation, social and cultural life and entertainment, as well as right to education and employment. In ‘‘Making mobile phones and services accessible for persons with disabilities. A joint report of ITU – The International Telecommunication Union and G3ict – The global initiative for inclusive ICTs’’, August 2012 available on http://www.itu.int/ITU-D/sis/PwDs/Documents/Mobile_Report.pdf

³⁰² Whereby it must be understood that the abovementioned recommendations are not the only possible way forward. Quite to the contrary, this study does not aim to exclude any other remedies and does not want to prevent further discussion which would be based on other proposals. Again – quite to the contrary – it is hoped that this study will encourage a further debate on how to open the CJEU and grant access to its court files to third persons.

Access to court files is a two-sided coin: it combines the right to access a specific type of accurate public information – court files – with the accountability of the CJEU and public trust in it. The more the Court is open, the more trust it will enjoy in the eyes of the public - arguably.

Calls for greater openness of the CJEU come from interested citizens (e.g. legal practitioners), academia (e.g. Leino) and also from within the Court (e.g. AG Maduro when he was Advocate General). The EDPS, as an independent EU authority, specialised in questions related to data protection, and having significant expertise related to this, is calling for greater openness as well as for a reassessment of the CJEU's attitude to disclosing personal data contained in court files.

Greater access to court files for third persons is not only recommended, it is necessary in view of the abovementioned problems ranging from some inconveniences to infringements of procedural rights, acknowledged as a fundamental human rights (i.e. right to fair trial and equality of arms).

The existence of rules on access to court files is a recent development. National regimes on granting access to court records to third persons vary widely in terms of their content (to which courts they apply and which procedures) and form (legislation, statutory rules, guidelines etc). Some states have already passed the stage of discussing whether to enable access to court files for third persons or not. They are focused now on the question of how to enhance the transparency of the judiciary by using modern communication technologies, and how to perceive these technologies not as an obstacle but as a valuable opportunity to reconcile sometimes conflicting rights: the right of the public to know as opposed to other rights (e.g. privacy, family life, etc.). Furthermore, the discussion has not only concentrated on the issues of enabling remote access to court files but also how, by providing such an access, not to discriminate against members of the public based on their disabilities.

Courts and judiciaries are increasingly using information strategies as a means to open up to the public, i.e. to further the transparency of the courts' functioning and thereby increase public accountability and responsiveness (social accountability)³⁰³. The transparency of a court's functioning is commonly perceived as a very valuable common good, so much so that courts themselves feel the need to actively advance information provision and come up with policies as regards transparency and openness.³⁰⁴

It is considered that the CJEU still has time to move from being a jurisdiction where decisions are being adopted in "obscurity" to becoming a lighthouse on the horizon of accessing court records. "It might be wise for both the Court and the legislature to return to some of the basics of open government – if this principle is indeed still an ideology with some foothold in the European Union. This would require putting the consideration of potential harm back to the core of questions of public access. Quite simply: when there is no harm in releasing a document, then there is no reason to limit access either. Requests for access to documents are hardly ever convenient for the administration that is under an obligation to deal with them. And yet transparency is specifically one of the keys to enhance the trust of the citizens in the very same institutions."³⁰⁵

³⁰³ Voermans, W., op. cit., at 159.

³⁰⁴ Ibidem.

³⁰⁵ Leino, P., op. cit., at 1252.

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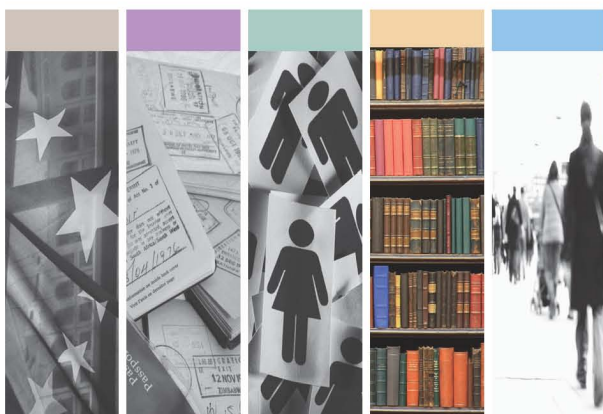
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