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Access to Documents, Accountability and the Rule of Law—Do Private Watchdogs Matter?

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Abstract: *The ECJ has not so far developed a single, consistent approach to cases in which the right to access official documents is exercised by individuals and organisations pursuing their individual cause (private watchdogs). While in some cases the Luxembourg jurisprudence has followed a restrictive approach, supporting interests and secondary law provisions conflicting with transparency, in other it has unconditionally endorsed a supreme character of the access right. This contribution confronts both of the approaches whenever the access right exercised by private watchdogs has clashed with confidentiality stemming from secondary law provisions: from state aid, staff rules, data protection, antitrust and beyond. The article argues that most often the judicial standard restricting the access right interferes with a feedback relationship between transparency, accountability and the rule of law. This relationship, when properly construed and appraised, may form a basis for an arguably more uniform and stable judicial standard.*

I Introduction

The most significant piece of EU legislation dealing with access to documents—ie Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents[1]—highlights three main goals of openness in the EU.[2] These are: deliberativeness, legitimacy building and accountability.[3]

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[1] O. J. 2001 L 145/43.

[2] While openness is certainly a value broader than the right to access official documents (the right to information), the latter is one of the main instruments of achieving both the former and the related goal of transparency. For a broader account on the specifics of openness and transparency, see esp. D. Curtin, *Executive Power of the European Union* (OUP, 2009), at 204–245. Openness is in turn instrumental to the rule of law. As Harlow remarked in this context, 'open government or "government in the sunshine" came to be seen as one of the most powerful antidotes to arbitrariness in all its forms, including the "strong," unfettered and unstructured discretionary executive power that became the primary target of administrative law controls during the twentieth century': C. Harlow, 'Transparency in the European Union: "Weighing the Public and Private Interests"', in J. Wouters, L. Verhey and P. Kiiver (eds), *European Constitutionalism Beyond Lisbon* (Intersentia Uitgevers, 2009), at 210.

[3] 'Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy, and is more effective and more accountable to the citizen in a democratic system': Regulation 1049/2001, preamble, § 2.

According to the first goal, 'a significant objective of openness in democratic government is to enable effective *participation* in the policy process itself by means of effective access to the deliberative process and voice within it. The ability to participate in "social dialogue" depends to a large extent on accessibility of information and accessibility of the dialogue itself.'[4] The second goal—legitimacy building—is related to the assumption that open institutions are more trustworthy and more conducive to allegiance than the secretive ones. This argument should be important particularly to political structures that cannot—for historic reasons—develop allegiance based on tribal instincts. The goal of legitimacy building, however, should not be perceived in isolation from the other two, as it heavily depends on both. As Scharpf has put it famously, 'Under modern (Western) conditions . . . legitimacy has come to rest almost exclusively on trust in institutional arrangements that are thought to ensure that governing processes are generally responsive to the manifest preferences of the governed (input legitimacy, "government by the people") and/or that the policies adopted will generally represent effective solutions to common problems of the governed (output legitimacy, "government for the people"). Taken together, these two types of arguments constitute the core notions of democratic legitimacy.'[5] The input legitimacy, as Scharpf calls it, should be guaranteed by the already discussed deliberativeness of decision-making processes, while the output legitimacy is primarily secured—at least in any polity aspiring to be democratic—by accountability. Dyrberg framed the relationship between transparency (as a specific manifestation of the policy-making openness) and accountability very accurately, stating that: 'Transparency may be considered part of accountability or a prerequisite to it: how can the public hold public authorities accountable if the public is not allowed to know what goes on within the public authorities, or if what goes on is obscure?'.[6] By the same token transparency in general (and access to documents in particular) facilitates 'the citizens' *control* of the actions and inactions of public bodies, on the premise that power corrupts.'[7] What is most important, 'Without effective monitoring . . . some of these officials will be work-shy, careless, corrupt, or otherwise willing to abuse the power afforded by their government positions. Indeed, if they want to retain power and are given unrestrained discretion to manage information access, we might expect them to disclose information that makes the administration look public spirited, effective, and efficient, but withhold information to the contrary.'[8] The right to access documents is

[4] D. Curtin, 'The Fundamental Principle of Open Decision-Making and EU (Political) Citizenship', in D. O'Keeffe and P. Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Hart Publishing, 1999), at 71–91, 74. Quite remarkably, the Commission has framed the goal more narrowly, not as referring to any decision making, but only the one which is 'democratic'—arguably only political, esp. legislative: 'The main purpose of laws on freedom of information is to enable citizens to participate more closely in democratic decision-making': Green Paper. Public Access to Documents held by institutions of the European Community, 18 April 2007, COM(2007)185, 11.

[5] F. Scharpf, Problem Solving Effectiveness and Democratic Accountability in the EU, at 1, available at http://www.aei.pitt.edu.

[6] P. Dyrberg, 'Accountability and Legitimacy: What is the Contribution of Transparency?', in A. Arnull and D. Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press, 2002), at 83.

[7] D. Curtin, 'Citizens' Fundamental Right of Access to EU Information: An Evolving Digital Passepartout', (2000) 37 *CML Review* 7–41, 8.

[8] A. Samaha, Government Secrets, Constitutional Law, and Platforms for Judicial Intervention, The Chicago University Law School. Public Law and Legal Theory Working Paper, at 10.

therefore also instrumental to procedural justice[9] and in particular to the duty of care, which in turn consists of 'the duty of the competent institution to examine carefully and impartially all the relevant aspects in the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision.'[10]

The three goals behind the right to access official documents (as instrumental to transparency and ultimately to openness)—deliberativeness, legitimacy building and accountability—are not limited to the situations when the right is exercised by public watchdogs, ie individuals and organisations by default pursuing a public cause (non-governmental organisations (NGOs), journalists, etc.), or to documents produced within the legislative process. Regulation 1049/2001 recognises it when proclaiming that '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' (Article 2(1)). The right should therefore be equally available to a very broad group, regardless of the underlying motivations driving individual requests for information. Case-law of the European Court of Justice (ECJ) does not, however, corroborate such a simple conclusion. It is restrictive particularly in respect to the access right exercised by individuals and organisations, which—as opposed to public watchdogs—are primarily driven by private interests (private watchdogs). But, by the same token, it provides a very fertile background for an account on perceived—and misperceived—values underlying transparency and confidentiality of the decision making, as well as an analysis of how the relationship between those two should be protected. Finally, private watchdogs—quite naturally—are particularly interested in gaining access to administrative files, ie to files of individual cases. An examination of when and why their requests are refused is therefore telling for the efficiency of the access right, as—again quite naturally—it should address the (most secretive) administrative branch first and foremost.

This contribution will deal with those issues, by tracing case-law of the ECJ on the right to access official documents in administrative files, whenever the information request has been filed by a private watchdog. The scope of the administrative processes involved is broad, ranging from state aid to data protection to internal competitions to customs to antitrust and beyond. In each instance the right to information has been pitched against a contradictory value, most often anchored in another piece of secondary law. Whenever such a clash occurs, the Court has essentially two options. The first one is to consider values conflicting with the access right as hypothetical and the legal provisions they stem from as irrelevant to the case at hand. The conflict is avoided in such a scenario by simply removing one element (conflicting with the access right) from the equation and by perceiving the values behind transparency as independently determining the outcome. This approach will be named as decoupled throughout the rest of this contribution. According to the other option the Court considers that the values conflicting with the access right cannot be easily disposed of, and the legal bases they stem from deserve a corresponding recognition. In other words it admits a head-on clash between the access right and other legitimate interests (the linked approach).

[9] For a broader account on the procedural justice, see, eg K. Röhl and S. Machura (eds), *Procedural Justice* (Ashgate-Dartmouth, 1997).

[10] For example, Case T-151/05, *NVV and NBHV v Commission* [2009] ECR II-1219, § 163.

The decoupled approach makes it possible to maintain all the *effet utile* of the access right, by excluding contradictory rules whenever a request for access is filed in compliance with the general act enshrining the access right. The linked approach leads to an opposite result. Accordingly, the general right of information must yield whenever the refusal to disclose documents is supported by a supreme interest in confidentiality, whether it is or not anchored in some specific secondary law provisions. Whenever those provisions are established by a legal act external to the Regulation 1049/2001, the general right to information gets disabled either explicitly or implicitly by the standard interpretative tool of *lex specialis derogat legi generali*. In consequence institutions refusing access loose cases under the decoupled approach and win them under the linked approach.

II State Aid

The administrative procedure used to control whether national state aid is compliant with the internal market of the EU essentially involves two parties: a Member State—as a provider of the state aid, and the European Commission (EC)—as an authority controlling compliance. The aid, however, always has a recipient, ie a private company. The recipient has an economic interest in the Commission's clearance of the aid. Most often it also has competitors interested in finding the aid illegal. The piece of legislation governing the state aid control procedure—Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty[11]—recognises that both categories of private undertakings may be helpful in the administrative process. Despite, however, those undertakings are called 'interested parties,'[12] sectoral rules do not grant them far-reaching procedural rights.[13] Regulation 659/1999 does not, in particular, mention the right to request file documents as one enjoyed by interested parties. But—on the other hand—it does not explicitly preclude such a right. Can, therefore, the Commission reject a request of an interested party to access a state aid control file if this party draws the access right from a separate Regulation 1049/2001? In its famous *Technische Glaswerke* decision, the lower court of the ECJ—the General Court (GC)—responded in the negative,[14] but then the higher court—the Court of Justice (CoJ)—answered in the affirmative.[15]

The Technische Glaswerke—a German company—sought documents from two files of state aid control procedures conducted by the Commission. In one it was itself

[11] Council Regulation of 22 March 1999, O. J. 1999 L 83/1.

[12] According to Article 1(f) Regulation 659/1999, an interested party is 'any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.'

[13] Article 20 Regulation 659/1999 provides that:

1. Any interested party may submit comments . . . following a Commission decision to initiate the formal investigation procedure. Any interested party which has submitted such comments . . .

2. Any interested party may inform the Commission of any alleged unlawful aid and any alleged misuse of aid. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for taking a view on the case, it shall inform the interested party thereof. Where the Commission takes a decision on a case concerning the subject matter of the information supplied, it shall send a copy of that decision to the interested party.

3. At its request, any interested party shall obtain a copy of any decision . . .'

[14] Case T-237/02, *Technische GlaswerkeIlmenau v Commission* [2006] ECR II-5131.

[15] Case C-139/07 P, *Commission v Technische GlaswerkeIlmenau GmbH* (Technische Glaswerke) [2010] ECR I-5883.

a beneficiary of a state aid provided by Germany, while in the other it was a beneficiary's competitor (in the latter case it made it clear that its request did not cover documents protected by business secrets). The Commission refused the requests, contending that the disclosure would undermine the purpose of inspections, investigations and audits, ie an interest protected by an exception to the access right as provided in Article 4(2) Regulation 1049/2001.[16] The GC reversed because it considered the arguments used by the institution as excessively abstract and general. The Commission could not substantiate them any further, considering that the requests referred only to documents from already closed investigations. The individual purpose of those proceedings—issuing a decision—had therefore been achieved, and so a subsequent disclosure of file documents could not undermine it. The decoupled approach chosen by the GC was therefore justified by the absence of a legitimate interest capable of restricting the access right. There was no substantial value that could be pitched against the disclosure.

The CoJ decided otherwise because it followed the linked approach. It opined that, because Regulation 659/1999 does not provide for the access right, 'the system for the review of State aid would be called into question' if 'interested parties were able to obtain access, on the basis of Regulation no. 1049/2001, to the documents in the Commission's administrative file' (§ 58). In other words, 'the system for the review of State aid' came into conflict with the right to information and should prevail.

Choosing the linked approach in *Technische Glaswerke* is, however, problematic, primarily because it was based on the premise that a limitation to the access right could stem from a missing provision. The Court's conclusion ignored the fact that interested parties do enjoy another procedural right which, just like the access right, does not stem from Regulation 659/1999: the right to bring before the ECJ an appeal against the Commission's state aid control decision.[17] In other words, contrary to what the CoJ pronounced in *Technische Glaswerke*, rights of interested parties may stem from legal bases decoupled from Regulation 659/1999. And if interested parties are empowered to appeal the administrative decision, they should logically be entitled to inspect the file first, for the underlying documents may be quite important to effectively exercise the right to appeal. On the other hand, the approach of the CoJ logically (even though irrationally) should lead to the conclusion that the right of interested parties to appeal state aid control decisions also 'calls into question the system for the review of State aid.' After all, the right to access administrative files is instrumental and collateral to the right to appeal and—more generally—to the right to judicial review. Neither one nor the other is envisaged in Regulation 659/1999.

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[16] Article 4(2) Regulation 1049/2001 provides: 'The institutions shall refuse access to a document where disclosure would undermine the protection of:

— commercial interests of a natural or legal person, including intellectual property,
— court proceedings and legal advice,
— the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.'

A broader analysis of the above provision exceeds the scope of this contribution. For a more comprehensive discussion see, eg: D. Adamski, 'Approximating a Workable Compromise on Access to Official Documents: The 2011 Developments in the European Courts', (2012) 49 *CML Review* 521–558, at 522–524.

[17] See, eg Case T-335/08, *BNP Paribas and Banca Nazionale del Lavoro SpA (BNL) v Commission* [2010] ECR II-03323, § 66.

Of course the Court would never question the right to judicial review, for it is universally—and quite rightly—perceived as an important factor legitimising the administrative process by rendering administration more accountable.[18] But then why was the ancillary right to information treated as one undermining the administrative process? Only the judges deciding the case could answer this question, but their argumentation suggests that they simply seemed to balk at the idea of recognising private watchdogs as rightful beneficiaries of the access right. They also seemed to have assumed that the access right was established for the sake of the whole society and that individuals should not use it to pursue their own interest.

Whether indeed decisive in *Technische Glaswerke* or not, such an idea is flawed, as again it flies in the face of the very right to judicial review. Appellants, too, are essentially private watchdogs, and precisely for this very reason judicial review is a powerful accountability tool and a rampart against an abuse of power. In *Technische Glaswerke* the right to information was used in the same context and therefore constituted an element of the same mechanism.

Vulnerabilities of the approach the CoJ took in *Technische Glaswerke* are further magnified when this decision is confronted with another one—*NLG v. Commission*—issued by the GC in 2011.[19] In many respects the context of *NLG* was strikingly similar to *Technische Glaswerke*. The NLG—an Italian private ferry company—requested certain analytical data on costs incurred by a group of other companies providing transportation services in Southern Italy. Those services were qualified as of general economic interest and reimbursed by the Italian state with public funds. The Commission—running the state aid control procedure in which the NLG was an interested party—possessed the data but refused to disclose it. It contended that the disclosure would run foul (among others) of the exception protecting commercial interests of the beneficiaries and could earn their competitors (the NLG was one of them) an unfair advantage (§ 20). The GC revoked the refusals on procedural grounds of wanting statements of reasons (§ 81–93, 196–202). This procedural peculiarity is instructive for the current discussion because—according to the logics of *Technische Glaswerke*—in *NLG* the Court should have rather confirmed the refusal outright. After all, the CoJ assumed in *Technische Glaswerke* that applications for documents from state aid control files did not deserve much attention, as the disclosure would in each case undermine the control system.[20] Consequently, the court undertaking judicial review should uphold an access refusal whenever it realises that the request for documents refers to a state aid control file. In *NLG*, however, the GC denied such an oversimplified approach based on the linked approach, soberly alluding that it would deprive the access right of its *effet utile*. It therefore did undertake a detailed analysis of the requested data. It also demanded that grounds of the refusal be correspondingly detailed.

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[18] As the GC noted in another context: 'The requirement of judicial review reflects a general principle of European Union law which flows from the constitutional traditions common to the Member States and which is laid down in Arts 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. The right to an effective remedy has, furthermore, been reaffirmed by Art 47 of the Charter of Fundamental Rights of the European Union': Case T-190/10, *Egan and Hackett v Parliament*, judgment of 28 March 2012, n.y.r., § 46.

[19] Joined Cases T-109/05 and T-444/05, *NLG v Commission*, [2011] ECR II-02479.

[20] Interestingly, the GC followed precisely such an approach, anchored in *Technische Glaswerke*, in Joined Cases T-494/08 to T-500/08 and T-509/08, *Ryanair v Commission* [2010] ECR II-05723.

Furthermore, in *NLG* the GC did what the ECJ does by far too rarely when it revokes decisions on procedural grounds—it hinted on how the Commission should approach the request will the applicant file it again. Merits of the hint, however, are not foolproof: the Court remarked that the requested information corresponded with profit and loss accounts of the beneficiary and—as sensitive internal information—should be shielded from its competitors (§ 138–142). It opined, in other words, that the disclosure is barred by the exception protecting commercial interests of the beneficiaries. Such an interest may indeed be capable of triggering an access exception, according to Article 4(2) Regulation 109/2001.[21] But applying it to state aid cases is problematic. In *NLG* the Court treated the financial information requested by the applicant as if it were an inherently private internal commercial information of its competitor. This conclusion, however, ignores the fact that the detailed costs were not interesting for the NLG because they were an internal information, but because the Italian state reimbursed them. It could be argued, therefore, that both other suppliers of ferry services and taxpayers did have a paramount interest in knowing those costs, to make sure that the reimbursement does not betoken an interference with market forces and that it does not translate into a particularly pernicious act of wasting public funds. From this perspective the whole picture looks different than the GC painted it. While indeed the NLG pursued its own private cause, it inadvertently did also protect interests of other ferry companies and Italian taxpayers. In other words, purposefully a private watchdog, it acted as (an accidental) public watchdog as well. The GC left this aspect unconsidered when it opined that the interest underpinning the request was merely individual (§ 148). In this particular case such a conclusion might have mattered, at least in principle, because the cause pursued by the applicant could not in consequence aspire to be branded as manifesting an overriding public interest in disclosure—a category justifying the release of information even if it otherwise jeopardises interests protected by an exception established in Article 4(2) Regulation 1049/2001.[22] On the other hand, the reluctance to admit an overriding public interest in disclosure is not endemic to *NLG*, but exemplifies a broader problem typical for the whole case-law of the ECJ on the right to information. On many occasions the Court has indicated what the 'overriding public interest in disclosure' is not to mean. But never has it said what it is. Nor has it ever admitted the overriding public interest in disclosure, even when an NGO wanted to learn details of an environmentally controversial project.[23] So, if a public watchdog is not capable of effectively invoking an overriding public interest in disclosure, how could one expect a private watchdog to be more persuasive?

III Staff and Customs Cases

Staff cases further demonstrate—in yet another context—the (unnoticed) convergence between a cause pursued by a private watchdog and a public interest in disclosure.

[21] See *supra* note 16.

[22] To use the explicit wording of Regulation 1049/2001, its Article 4(2) bars disclosure when it would undermine the protection of (among others) commercial interests of a natural or legal person, unless there is an overriding public interest in disclosure.

[23] See, eg Case T-29/08, *LPN v Commission*, judgment of 9 September 2011, n.y.r. (appeals pending: Cases C-514/11 P and C-605/11 P).

Two disputes—*Hendrickx*[24] and *Le Voci*[25]—instantiate this finding. In both applicants took written exams as a part of the internal competition for higher positions in European institutions. Both were awarded a failing score and so were not admitted to another stage of the competition. They were both surprised by the results and requested copies of their exams with notes of the selection board. Both requests were refused because the institutions considered that only original copies of the exams—without the notes—could be disclosed. The legal argument behind stemmed from Staff Regulations, which provide that: 'The proceedings of the Selection Board shall be secret.'[26] Finally, in both cases the GC admitted an open conflict between Regulation 1049/2001 and Staff Regulations, and settled it according to the *lex specialis* interpretation.[27]

Such a linked approach has its advantages. First, it admits what is otherwise clear even to a lay person—two norms contradictorily determine the status of certain official documents. Second, it provides a simple, standard method of determining which of those two should apply. The Court knew that both Mr Hendrickx and Mr Le Voci had individual interests in receiving access to the notes, while the selection board had a conflicting interest (the comfort of proceeding independently, without an external scrutiny or any other disruption). If approached from such a perspective, those interests are indeed comparable, and it is hard to tell why not to solve a conflict between the norms protecting them pursuant to the *lex specialis* interpretation.

But this simple solution is, by the same token, essentially mechanic and non-reflexive. Those disadvantages are all the more perplexing in cases—as *Hendrickx* and *Le Voci*—decided after 2001, when the right to access official documents was enshrined as a fundamental right by the Charter of Fundamental Rights of the EU.[28] Even though rights stemming from the Charter have not been treated too seriously by the European Courts, in both of the staff cases (as in the state aid cases discussed earlier) there was an additional dimension, which—if recognised—should have weighed in favour of the applicants. The latter essentially wanted to see the notes to ascertain whether the selection board was sufficiently impartial and diligent when awarding a failing score. In other words, by pursuing their individual cause they—even though incidentally and inadvertently—sought a very important institutional goal of improving decision-making accountability. This goal is so fundamental that it should be most properly described as constitutional and fundamental rather than merely administrative. But if the applicants sought the goal—no matter if purposefully or incidentally—then the access right they exercised should not be perceived as an isolated entitlement stemming from secondary law and disablable by another secondary law provision. The point is all the more acute considering that the values protected by the requirement of secrecy—as provided in the Staff Regulations—are less convincing. The requirement of secrecy established by the Staff Regulations

[24] Case T-376/03, *Hendrickx v Council* [2005] ECR—staff cases I-A-209.

[25] Case T-371/03, *Le Voci v Commission* [2005] ECR—staff cases I-A-83.

[26] Article 6 of Annex 3 to the Regulation no. 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of officials and the conditions of employment of other servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission, O. J. 1968 L 56/1, with amendments.

[27] *Hendrickx*, § 55; *Le Voci*, § 122.

[28] Its Article 42 provides that: '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.'

assumes that transparency of its proceedings exerts a pressure on the board members, and the pressure encroaches on the requirement of independence and hence impartiality. Such an assumption is, however, less forceful than it may seem at first glance. Accountability—and transparency as its collateral—is precisely to secure independence of decision makers by properly incentivising them to avoid any suspicion of partiality. They therefore back up the requirement of independence with proper enforcement measures. Secrecy cripples accountability by refusing access to necessary source information. By the same token, when protecting institutional independence of the selection board, Staff Regulations weaken the institutional immunity against partiality of decision makers. What is even more problematic, secretive decision making is always dubious and therefore undermines legitimacy of the whole process. It is very probable that both in respect to Mr Hendrickx and Mr Le Voci, the selection board worked with due care and impartially. But the refusals to disclose some details of the process simply made it impossible to prove that the procedure had not been manipulated. For why to insist on following secret procedures if there is nothing to hide? In none of the two cases this question could be answered satisfactorily, opening gates to varying speculations and accusations.

For all those reasons it may be argued that the principle of transparency should not yield to the institutional comfort of selection boards. Perceiving individual interests of the applicants in a broader perspective would have helped the Court to see this point and to decide the case according to the other available (decoupled) approach. The Court could, in particular, proclaim that the request for information manifested—in this particular case at least—a fundamental value that may not be restricted by a conflicting secondary law provision.

Such an argument is not merely an academic proposition. It was—ironically enough—developed by the GC itself. The relevant case—*JT's Corporation*[29]—concerned a request for documents from an administrative file remote from staff cases. The applicant was subject to an investigation that resulted in a withdrawal of an exemption from import duties for textiles imported from Bangladesh. So much for the differences, though. In every other aspect the case resembled the two staff cases discussed earlier. The applicant was dissatisfied with the administrative decision, questioned its legality and sought access to the administrative file. The request was refused. The refusal was based, among others, on the existence of an open conflict between the right to information—on the one hand—and specific customs rules providing for confidentiality of the requested information—on the other.[30]

Had the GC admitted the conflict and chosen the linked approach as a result, the Commission—as the institution refusing access—would have easily won the case. The

[29] Case T-123/99, *JT's Corporation v Commission* [2000] ECR II-3269.

[30] Article 19 of Council Regulation no. 1468/81 of 19 May 1981 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters, O. J. 1981 L 144/1, and Article 45 of the subsequent Council Regulation no. 515/97 on mutual assistance between the administrative authorities of the Member States, and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, O.J. 1997 L 82/1. Section 1(1) of the latter provides: 'Regardless of the form, any information transmitted pursuant to this Regulation shall be of a confidential nature, including the data stored in the CIS. It shall be covered by the obligation of professional secrecy and shall enjoy the protection extended to like information under both the national law of the Member States receiving it and the corresponding provisions applicable to Community authorities.'

Court, however, opined that the access to official documents is an 'essential right,' one which 'was adopted with the aim of making the Community more transparent, the transparency of the decision-making process being a means of strengthening the democratic nature of the institutions and the public's confidence in the administration' (§ 50). The right to information—formally stemming from the secondary law—was therefore one 'whose fundamental objective is to give citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers' (*Id.*). The legal basis for the access to documents could in consequence be distinguished from other secondary law by its significance, even though the Court did not go as far as to recognise the right to information as a fundamental right. Such a manoeuvre disabled the *lex specialis* interpretation. In consequence, the decoupled approach was chosen because the other approach—one particularly appealing for its simplicity—would disrespect the 'fundamental objective' pursued by the access right. The *lex specialis* interpretation, implied the Court, would treat both secondary law norms as equal, while the right to information was structurally more paramount than the competing value (integrity of the customs procedure).What is even more interesting, the GC implied in *JT's Corporation* that a request for documents filed by a private watchdog should not be less favourably treated than requests of public watchdogs, as both pursue the same fundamental goal. From this perspective the Court could also properly discern the values involved and avoid interpretation methods contradictory to those values. It is also ironically remarkable that it came to all those conclusions in 2000, when the Charter was not yet existing. And it is paradoxical that the judicial approach to transparency was then more friendly than in staff cases decided a few years later.

IV Data Protection

In the staff cases and the state aid control cases—on the one hand—and in *JT's Corporation*—on the other—the Court followed two entirely different approaches as to how the access right should be reconciled with conflicting norms. But at least it used the same standards within the same categories of cases. Disputes involving the right to information—on the one hand—and data protection—on the other—are more disturbing from this perspective, as the judicial approach here has kept swinging, despite essentially the same issues were considered within precisely the same legislative framework.

The well-known *Bavarian Lager* case is a perfect instantiation of how the approach may shift radically within a lifespan of a single case and how controversial the change may become.[31] The dispute stemmed from a request of a private company for information on individuals representing an industry association, who met with the Commission when it was contemplating actions against the UK for an alleged breach of the European law. The Court must have decided whether names of the industry representatives who met with EU officials were protected against disclosure by data protection rules stemming from the Regulation 45/2001,[32] or should their interactions with the EU institution be governed by the principle of transparency. Had the first

[31] Case C-28/08 P, *Commission v Bavarian Lager* [2010] ECR I-6055.

[32] Regulation 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, O. J. 2001 L 8/1.

option been upheld, the public would not have a chance to learn who advises European institutions because personal information of the industry representatives—names, whom they represent, business contact data, etc.—would generally be confidential (confidentiality is a guiding principle of the data protection system). The other option would render lobbyists of all sorts and purposes, as well as the institutions meeting with them, more accountable to the public opinion.

The legal picture was highly convoluted. On the one hand Article 4(1) (b) Regulation 1049/2001 provides that: 'The institutions shall refuse access to a document where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.' On the other, Article 5(b) Regulation 45/2001 states: 'Personal data may be processed, if processing is necessary for compliance with a legal obligation to which the controller is subject.' Furthermore, according to Article 8(a) Regulation 45/2001: 'Without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients (. . .) if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority.' Conversely, Article 6(1) Regulation 1049/2001 provides that: 'The applicant is not obliged to state reasons for the application.'

As usually when reconciling the basic right to information with diverging provisions, the ECJ could have followed one of the two basic approaches—decoupled or linked. The choice was essentially contingent on whether it considered that a commercial entity like Bavarian Lager pursues any important public interest when requesting the names.

The GC responded in the affirmative and decided the case along the decoupled approach.[33] It opined that the goal to be primarily protected in this case is one of the broadest possible access to official documents. Therefore, confidentiality—as a guiding principle of the data protection system—should not effectively block the access right. To avoid interference with the data protection system, the Court considered that transparency is a legal obligation put on the Commission. The right of a data subject to refuse consent for processing personal data does not matter in such a situation, as processing remains licit nonetheless—pursuant to Article 5(b) Regulation 45/2001. Furthermore, because Article 8(a) Regulation 45/2001 is to be applied without prejudice to Article 5 thereof, then—argued the Court—the requirement to establish an interest in disclosure does not matter, either (§ 106–107). The case is—the Court concluded—entirely governed by the Regulation 1049/2001. The data protection system may not impact on its *effet utile*.

This solution promotes transparency of the administrative decision making within the Commission and strengthens accountability of its participants. It was compliant with the positions expressed before the Court by the European Data Protection Supervisor, the European Ombudsman and the European Parliament. As the European Ombudsman framed it earlier on, after the Parliament issued a resolution supporting disclosure of the data requested by the Bavarian Lager: 'The EU institutions should take decisions as openly as possible. The Commission has wrongly tried to use the Data Protection Directive to keep secret information about how it discharges its responsibilities as Guardian of the Treaty. I hope that the Commission will

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

stop trying to distort the purpose of data protection rules so as to use them as a cloak of secrecy for its own activities.'[34]

The Ombudsman could not be more mistaken. The Commission appealed and the CoJ revoked the judgment of the GC. It admitted an implicit conflict between the two legal regimes and—as a result—replaced the previous decoupled approach with the linked one. The judges pointed out that the Regulation 1049/2001 clearly provides that the data protection exception to the access right should be applied in accordance with the Community legislation regarding the protection of personal data, so the latter legislation cannot become automatically inapplicable (§ 59–63). In consequence the applicant should have justified its application, as required by Article 8 Regulation 45/2001. It did not do so (the request for documents was based on Regulation 1049/2001, which does not require applicants to state reasons) and thus ultimately lost the case.

The interpretation given by the CoJ reflects the literal wording of both Regulations and is formally as well as logically impeccable. It does not entirely deprive the access right of its *effet utile*, either (it does not automatically admit anonymous lobbying in the EU). But it gives the institutions much more space to protect confidentiality in their dealings with lobbyists, as the access to the personal data of the latter is possible only when the applicant establishes a 'necessity' of receiving the information. Hence, the Court's pronouncement leads to highly questionable results, significantly handicapping transparency where it is an absolute prerequisite for accountability. By the same token it could be argued that the linked approach used by the Court did more harm than good to the constitutional foundations of the Union. Nor was it unavoidable, as the logics used by the Court could have led it to the solution functionally tantamount to the decoupled approach had it added just one more nexus to its reasoning. Namely, even assuming that the recipient of personal data is obliged to establish that 'the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority,' the Court could have decided that an explicit justification in this respect is not required if the necessity can otherwise be inferred directly from the context. It could have added that the latter requirement is fulfilled whenever the data subject seeks to influence a decision of a European institution. Had the Court done so, it would switch to the decoupled approach automatically whenever the primacy of the data protection would lead to systemically deleterious results (anonymous lobbying). Finishing its chain of reasoning a step before reaching this conclusion, the Court stuck to the linked approach and replaced transparency with secrecy as default. By barring access to information in such a case, the CoJ curtailed accountability of the EU administration, rendering irregularities more difficult to trace and remedy.[35]

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[34] A statement given in December 2001, available at http://www.ombudsman.europa.eu/press/release.faces/en/100/html.bookmark. In 1998, when the Commission first refused the request for personal data of individuals participating in the meeting, Bavarian Lager filed a complaint with the Ombudsman (No. 713/98/(IJH)GG). In 2000 the Ombudsman issued a decision asking the Commission to disclose all the requested information. He also submitted a special report to the Parliament. In a resolution issued in 2001 the latter fully endorsed the Ombudsman's position.

[35] Not only did the GC, Sweden, Denmark, Finland and the European Data Protection Supervisor (EDPS) (intervening for Bavarian Lager in the case) oppose such a solution (pursued by the Commission, the Council and the UK). Also the Advocate General Sharpston, in her opinion to *Commission v Bavarian Lager*, of 8 October 2009, argued that when personal data is only incidental to the main body of the requested document, data protection rules should not bar disclosure—§ 189.

Borax I and *Borax II*, two cases decided by the GC in 2009,[36] as well as *Egan and Hackett* decided in spring 2012,[37] corroborate that a clash between freedom of information and data protection does not have to lead to the former yielding to the later pursuant to a crude form of the linked approach.

The *Borax* cases related to a meeting of experts in reproductive toxicity, during which they advised to include substances produced by Borax—a private company—into a list of toxic substances. Borax requested a transcript, unabridged minutes and sound recordings of the meeting (*Borax I*), as well as drafts of the summary record and comments made by the experts and industry representatives (*Borax II*). The Commission invoked privacy and integrity of the experts as a ground for its (partial) refusal.[38] Borax justified its request for personal data by stating that publicly available documents 'did not reproduce either accurately or fully the experts' statements, comments or conclusions.'[39] The Court, however, did not embroil into determining whether such a statement substantiates that 'the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority,' as it should according to Article 8(a) Regulation 45/2001. Instead, it simply held that the Commission's arguments were too general and hypothetical.[40] In other words, the GC—contrary to what the CoJ did a year later in *Bavarian Lager*—did not shift default from the access right protected by Regulation 1049/2001 to the confidentiality of personal data established by Regulation 45/2001. It was, therefore, still the Commission—not the applicant—to carry the burden of proof. By the same token, and quite typically for the decoupled approach, the Court interpreted legal provisions conflicting with the access right as essentially irrelevant, shrewdly acknowledging a clear imbalance, in this particular case, between the values underpinning transparency—on the one hand—and data protection—on the other.

In *Egan and Hackett* the GC painted essentially the same picture. The applicants—former assistants to two Members of the European Parliament (MEPs)—realised, after their employment with the Parliament had been ceased, that they would receive no pension. They discovered that the MEPs who had employed them signed up two other persons as their assistants for the purposes of the pension scheme. The applicants therefore wanted to know—among others—the names of the two beneficiaries and explained that they needed this information to complete legal proceedings against the two MEPs and the EU. They also requested 'all lists of names of MEP assistants which are, or ought to be, open to the public for inspection' as well as 'a copy of all public registers of MEP assistants' financial interests' (§ 3). The Parliament turned down their request as undermining the protection of privacy and the integrity of MEP assistants. This decision was challenged 'so far as it refuse(d) to grant the applicants the access sought to the public registers of assistants to former MEPs' (§ 22) both by the applicants and—which is particularly telling—by the EDPS.

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[36] Case T-121/05, *Borax Europe Ltd v Commission (Borax I)* [2009] ECR II-00027; Case T-166/05, *Borax Europe Ltd v Commission (Borax II)* [2009] ECR II-00028.

[37] Case T-190/10, *Egan and Hackett v Parliament*, judgment of 28 March 2012, n.y.r.

[38] *Borax I*, § 9; *Borax II*, § 11. It is remarkable that the applicant consented to receiving anonymised sound recordings of the meeting. The Commission refused it as well, stating that 'since an individual can be identified by his or her language, accent or references to the national context, merely removing their names would not be sufficient to make the experts unidentifiable': *Borax I*, § 22 and *Borax II*, § 25.

[39] *Borax I*, § 8 and *Borax II*, § 8.

[40] *Borax I*, § 44–45; *Borax II*, § 51 and 53.

The Parliament contended that the information on who was employed by a given MEP discloses political opinions of the assistants and is therefore sensitive data meriting particular protection (§ 84), while 'the applicants do not seek access to names in any public interest but for their own private interest, in order to prepare legal proceedings' (§ 85), and therefore their right does not deserve protection.

No matter how comically those arguments may sound, it could be argued that the names were not entirely indispensable for the plaintiffs to pursue a case against the MEPs and the EU. The necessity of personal data is of paramount importance under the system of data protection. The applicants could therefore easily lose the case were the court to choose the linked approach, and if it in consequence required that the request for documents established a convincing explanation why the data was necessary for the applicants. But the Court considered that—because, according to the Regulation 1049/2001, grounds of requests for documents do not have to be explained by an applicant—reasons for filing them should not matter in granting, or refusing, access, either (§ 99). This presupposition, which demonstrates that the Court took the decoupled approach, clearly distinguishes *Egan and Hackett* from *Bavarian Lager*. For, while reasons of the request for information are irrelevant according to the system of access to public documents, they do matter under the Regulation 45/2001. And it is the latter piece of legislation, which—according to *Bavarian Lager*—should have ultimately determined the standard. Furthermore, in *Egan and Hackett*, the GC proclaimed that 'the Parliament systematically took the view that the public should not have access to documents revealing the identity of former MEP assistants, and it did not carry out an examination to show that that access would specifically and effectively undermine their privacy within the meaning of the provisions in question, nor did it verify whether the risk of the protected interest being undermined was reasonably foreseeable and not purely hypothetical' (§ 84). In other words, the Court found the arguments against the disclosure insufficiently substantiated by the Parliament's refusal and therefore as incapable of weighing against the access right. This aspect resembles *Borax*. But while it similarly led to the annulment of the refusal, it left one important aspect unresolved. Namely, in none of the two cases did the Court elucidate on the very nature of the data requested and on whether the institutions could ever properly substantiate their refusals in the given circumstances. In both it simply stated that the actual refusals were insufficient. This could be read as implying that some other, more carefully framed, refusal to disclose names of experts advising the institutions or of MEP assistants could be admitted. Such a conclusion may be misleading, as in both cases the GC seemed particularly unconvinced by the very position of the institutions. But then, by refraining from highlighting the relevance of the requested personal data to the principle of accountability, the Court suggested that the refusals were only wanting procedurally and that the roots of its reasoning are much shallower than they should be (and most probably were).

The point is particularly important, as *Egan and Hackett* clearly diverges from the standard used by the same Court only four months earlier, in *Dennekamp*.[41] In the latter case a journalist requested names of MEPs participating in a very similar pension scheme. The Parliament refused again, contending that the disclosure would undermine the protection of privacy and the integrity of the MEPs. And the refusal was upheld by the GC, even though the applicant reasonably argued that the public

[41] Case T-82/09, *Dennekamp v Parliament*, judgment of 23 November 2011, n.y.r.

should know the names of the beneficiary MEPs voting for the allotments, to detect who might be in a conflict of interest.

Dennekamp is arguably one of the most disturbing cases on access to documents ever handed down by the ECJ. It entirely ignores the relationship between transparency and accountability, which was particularly strong and obvious in this case. But if the Court confirmed a refusal to disclose names of MEPs participating in a pension scheme to a public watchdog, one could hardly expect it to act any different when—as in *Egan and Hackett*—the request was filed by private watchdogs. And yet the Court did act differently.

V Antitrust

For many reasons cases involving access to documents from antitrust files merit attention in the current discussion. First, requests for those documents are, as a matter of principle, filed by applicants pursuing private causes and not NGOs or journalists. Second, the relationship between those requests and socially beneficial public goals is less obvious than in the cases discussed earlier. Third, obligations of non-disclosure established by secondary law are much more explicit. And yet in each case on access to documents from antitrust files (*Éditions Odile v. Commission*,[42] *Agrofert Holding v. Commission*[43] and *CDC Hydrogene*[44]) steadily stuck to the decoupled approach. The CoJ first followed the suit (*MyTravel*[45]), only to switch to the linked approach in its most recent judgments (*Commission v. Agrofert Holding*[46] and *Commission v. Éditions Odile*[47]). This evolution has produced serious tensions and dilemmas, which are discernible clearly when it is followed chronologically.

In *Éditions Odile* the applicant sought documents from a merger control file of already closed proceedings referring to another undertaking. The Commission refused, arguing—akin to *Technische Glaswerke*—that the purpose of the merger control would be jeopardised had it accepted the request. It also invoked Article 17(1) Merger Regulation,[48] which states that: 'Information acquired as a result of the application of this Regulation shall be used only for the purposes of the relevant request, investigation or hearing,' in order to demonstrate that a continuously applicable provision more specific than the Regulation 1049/2001 bars access.

The linked approach proposed by the Commission would lead to finding a conflict between the right of access and the Merger Regulation. As a result, the former should yield not to undermine the latter. The linked approach would therefore translate into the Commission winning the case. But in *Éditions Odile* the GC chose the decoupled approach, routinely used to enshrine the access right and to reject counterarguments. Typically for this approach the Court bypassed the Commission's argument based on Article 17(1) Merger Regulation, by noting that the Merger Regulation determines rights and obligations within the merger control procedure only. Requests based on

[42] Case T-237/05, *ÉditionsOdile Jacob v Commission* [2010] ECR II-2245.
[43] Case T-111/07, *Agrofert Holding v Commission* [2010] ECR II-128.
[44] Case T-437/08, *CDC Hydrogene Peroxide v Commission*, judgment of 15 December 2011, n.y.r.
[45] Case C-506/08 P, *Sweden v Commission and MyTravel Group plc*. (*MyTravel*), judgment of 21 July 2011, n.y.r.
[46] Case C-477/10 P, *Commission v Agrofert Holding*, judgment of 28 June 2012, n.y.r.
[47] Case C-404/10 P, *Commission v Éditions Odile Jacob*, judgment of 28 June 2012, n.y.r.
[48] Council Regulation (EC) no. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, O. J. 2004 L 24/1.

the general access right are independent and trigger separate procedures (§ 89). Sector specific rules cannot substantially curtail them.

It should be repeated at this point that the Court never chooses the decoupled approach for the sake of simplicity. The linked approach is simpler to use and more comfortably sticking to the wording of the relevant secondary law. But, by the same token, it often does not properly discern values behind the two sides of the conflict and is therefore blind to their broader systemic picture. The Court's reasoning in *Éditions Odile* confirms this hypothesis. The GC first noted that the disclosure of the requested documents cannot undermine the goal ostensibly protected by the Commission's refusal (the purpose of an investigation) because the procedure had already been accomplished when the Commission decided the merger case (§ 76 in particular). In other words, the argument of the Commission was deemed as essentially hollow—there was no value worth protection in the case at hand. The GC was equally unwilling to accept the claim vindicated by the CoJ in *Technische Glaswerke*, according to which a request for file documents generally calls into question the system of merger review. All in all, as values behind the refusal to disclose information were essentially non-existing, the provisions pursuing them should not—in this particular case at least—be applicable, either.

On the other hand the claimant did demonstrate a substantial value supporting its request, according to the Court. The value—'the most effective control of the legality of the public authority' (§ 75)—could not yield to the institutional independence (comfort) of EU institutions. The decoupled approach is a technical depiction of such an assessment, one which allows to properly enshrine the relationship between transparency and accountability. It also aptly implies that the relationship—based on the overarching goal of maintaining 'the most effective control of the legality of the public authority'—does not depend on whether transparency is pursued by a private or a public watchdog. Quite to the contrary, a private interest is a strong motivation supporting the general value behind the right to access. This value may therefore be accomplished only when the access system properly acknowledges the gravity of private interests.

Éditions Odile was decided shortly before the CoJ passed its entirely different judgment in *Technische Glaswerke*. But the same line was vindicated shortly after by the GC in *Agrofert Holding*. In the latter case the applicant, a Czech corporation, sought access to a file on notification and pre-notification procedures regarding an acquisition of the Czech Unipetrol by the Polish PKN Orlen. As usually, the Commission refused, arguing that the disclosure of any documents from the file would undermine the purpose of investigation. It would, in particular—contended the Commission—violate the institution's obligation of professional secrecy in respect to merger investigations (§ 10). This obligation stems from another provision of the Merger Regulation—Article 17(2)—according to which: 'the Commission and the competent authorities of the Member States, their officials and other servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.'

This argument could be valid only under the linked approach. But the GC rejected it in *Agrofert Holding*. It pointed out that Article 17(2) Merger Regulation does not set forth an unconditional obligation of secrecy. Instead, the obligation may only be referred to the information 'of the kind covered by professional secrecy' (§ 69). The

Commission is thus obliged—the Court argued—to verify which information is, and which is not, covered by the obligation of secrecy, and any general exclusions of access are unacceptable. On a more substantive account, the GC indicated that the Commission issued its decision almost two years after the merger control procedure had been closed. The disclosure of documents could not therefore conceivably undermine the already materialised outcome of the investigation (§ 98–99). Finally, the Court denied the argument that the disclosure would undermine the climate of trust and mutual cooperation between the Commission and the parties to the proceedings. It found it too general, vague, hypothetical and disentangled from the required standard of concrete and individual standard of assessment (§ 100 *et seq*). Its judicial approach was therefore again tuned to the overarching purpose of safeguarding 'the most effective control of the legality of the public authority' and again recognised that private interests are a powerful driver in achieving such a goal.

The tenor of both GC decisions—in *Éditions Odile Jacob* as well as in *Agrofert Holding*—clearly differed from *Technische Glaswerke*. But it might have seemed—erroneously, as it finally turned out—that the applicants did have good chances to win the appeals because in *MyTravel*, a 2010 decision, the CoJ openly rejected the linked approach in a context firmly anchored in an antitrust case. The latter case was a splinter of a well-known merger dispute with *Airtours*—a predecessor of *MyTravel*—lost by the Commission before the GC. As an aftermath of the defeat, the internal service of the then Competition Commissioner Monti prepared a report advising whether the Commission should appeal the judgment, clarifying mistakes that the Commission had made in this case and offering feasible remedies. The Commission finally did not decide to file an appeal, and *MyTravel* sued the institution for damages.[49] To verify some of the arguments it was raising before the ECJ, the company requested the report and accompanying documents. The Commission largely refused, and the GC fully supported the refusal.[50] It contended that the disclosure would seriously undermine the right of the Commissioners to frankly expressed and complete views (§50), as well as would 'lead the legal service to display reticence and caution in the future in the drafting of such notes in order not to affect the Commission's decision-making capacity in areas in which it is involved in its administrative capacity' (§ 125).[51] Such an approach admits a conflict between the right of access and institutional interests. It therefore triggers the linked approach, in which a clearly underplayed access right must be seriously squashed in scope, to accommodate superior institutional values protected by the requirement of confidentiality. As a result the access right is fundamentally curtailed in order to protect interests framed in very general terms and ignoring the idea of institutional accountability. Thus, while MyTravel was not interested in the dispute after it lost its case for damages, Sweden and three other most transparency-friendly Member States (Denmark, the Netherlands and Finland) filed their appeals. They acted as public watchdogs and picked up the case where the private watchdog dropped it.

The CoJ shared their reservations in entirety, finding the general arguments of the GC on the values worth protection by far too general. Its remarks on the refusal to

[49] Case T-212/03, *MyTravel Group plc v Commission* [2008] ECR II-1967.

[50] Case T-403/05, *MyTravel Group plc v Commission* [2008] ECR II-2027.

[51] For a broader discussion of this decision, see: D. Adamski, 'How Wide is the "Widest Possible"? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited', (2009) 46 *CML Review* 521–549, at 541–544.

disclose the report are particularly worth quoting in this context: 'taken by the General Court as being sufficient to justify the Commission's refusal of MyTravel's request for access are not in any way supported by detailed evidence, having regard to the actual content of the report, allowing it to be understood why disclosure of the latter would have been likely seriously to undermine the Commission's decision-making process, even if the procedure to which that document relates had already been closed' (§ 89). Such a statement strikingly differs from the logics of *Technische Glaswerke*. Yet the Court differentiated the two cases by stating that in the latter a direct follow-up procedure was still pending (court proceedings on the legality of the Commission's State aid review decisions) when the request for documents was refused.

Subsequently, the GC confirmed its attachment to the decoupled approach in *CDC Hydrogene Peroxide* and in *EnBW Energie*[52]—cases decided in December 2011 and May 2012, respectively.

The dispute in *CDC Hydrogene Peroxide* begun two years after the Commission found a breach of competition law by a cartel. The applicant—a company established by competitors of the infringers to pursue claims against the latter—requested only one document from the administrative file: the statement of contents. The Commission turned down the request, claiming that the disclosure would undermine commercial interests of the undertakings participating in the cartel as well as the purpose of investigation activities. It asserted in particular that the disclosure would render participants to the cartel more vulnerable to claims of the applicant and therefore would harm their commercial interests. It would also militate prospect subjects of competition investigations against cooperating with the Commission within the leniency programme, as well as would affect other court proceedings related to the cartel investigation (§ 29–31 and 55–57).

In other words, the Commission saw a conflict between the values supporting the access right and preventing it, and emphasised the latter. This trick worked well in *Technische Glaswerke* but misfired in *MyTravel*. And the *CDC Hydrogene* case confirms that the GC—at least in cases on access to documents from antitrust administrative proceedings—follows the logic endorsed by the CoJ in *MyTravel*. The Court found that a threat to commercial interests of the participants to the cartel was purely hypothetical,[53] and the very goal of avoiding litigation cannot be properly regarded as worthy of legal protection (§ 49). Furthermore, no investigation involving the cartel case was pending when the Commission decided about the request. So the purpose of this individual investigation could not be hampered, either. The Commission's arguments that the disclosure could undermine some abstract court proceedings or the leniency programme in general were found equally vague (§ 62, 70–77). The clash between the access right and conflicting values was therefore a false supposition. The latter values were too artificial and too general to substantiate Commission's arguments. There was no substantiation for the linked approach.

[52] Case T-344/08, *EnBW Energie Baden-Württemberg AG v Commission*, judgment of 22 May 2012, n.y.r.

[53] *CDC Hydrogene*, cited *supra*, note 44, § 45: 'It is only if one of the columns in the statement of contents (. . .) were to contain, in regard to one or more of those documents, information concerning the business relations of the companies concerned, the prices of their products, their cost structure, market share or similar information that disclosure of the statement of contents could be regarded as prejudicing the protection of the commercial interests of those companies.'

Similarly, in *EnBW Energie,* a company considering itself as affected by a cartel, requested file documents from an investigation in which the Commission found that a group of undertakings had involved in price fixing, bid rigging and market sharing. The institution refused access categorically. In its view no third party should gain access to antitrust files, no matter if administrative proceedings were still open or—as in *EnBW Energie*—closed several months before the request for documents was filed. Even though the Commission did not invoke any legal ground independent of the Regulation 1049/2001, it alleged that the access right should yield to conflicting interests—in particular to the interests of the cartel undertakings sharing information with the Commission within the leniency programme, to the purpose of cartel investigations (bond of trust with subjects of antitrust proceedings), as well as to the institution's interest in being able to express opinions for internal use in the decision-making process without any external pressure (§ 49). This was a *Technische Glaswerke* type of argument. The Court rejected it again, however, holding that the linked approach was justified in *Technische Glaswerke* by the very existence of a *lex specialis* regulation justifying the general presumption of non-disclosure (§ 56).[54] No similar reasoning could apply when an exception entirely stems from the Regulation 1049/2001,[55] in which situation an access refusal could only be triggered after a concrete substantiation of exceptions in respect of each requested file document (and not the whole file in general). The Court drew this differentiation from the fact that the specific state aid regulation is silent on the access right, while specific procedural rules of antitrust regulations establish specific access rights both for subjects of cartel proceedings and complainants in those proceedings (§ 59–60). Despite that it is disputable whether such a distinction could matter in this particular case, considering that no specific antitrust access entitlement had been invoked by the applicant, the Court used it as a vehicle for disposing of the linked approach. Like in earlier antitrust cases, in *EnBW Energie* it came to the conclusion that no potent interest warrants confidentiality, particularly that relevant antitrust proceedings had been closed a long time earlier.

It is rather ironic that the existence of the specific provisions on access in antitrust acts led the CoJ to an opposite conclusion on the availability of documents in its appeal decisions to *Agrofert Holding* and *Éditions Odile*, handed down in June 2012. Those decisions followed an unconditional linked approach in respect to almost all documents in antitrust files and will certainly have far-reaching consequences for the availability—or, to be more precise, for the non-availability—of administrative documents in general. This is because their logics and consequences can be applied to any request for official documents from any other administrative file, at least as long as the case has not been formally closed and the applicant is a private watchdog.

The verdicts differentiate two types of an administrative file documents: exchanged by the Commission with the notifying parties or with third parties—on the one hand—and internal documents—on the other hand. In respect to the first category, the Court held it that the access right stemming from Regulation 1049/2001 clashed

[54] The Court also opined that the linked approach *à la Technische Glaswerke* could only apply as long as the relevant investigation is pending (§ 57, see also § 117–119).

[55] The arguments invoked by the Commission were anchored either in Article 4(2) or 4(3) Regulation 1049/2001.

with specific antitrust rules stemming from Regulation 139/2004.[56] As it continued, '[t]hose regulations do not contain a provision expressly giving one regulation primacy over the other. Therefore, it is appropriate to ensure that each of those regulations is applied in a manner that is compatible with the other and which enables a coherent application of them.'[57] Of course, both the linked and the decoupled approach attempt to achieve precisely this result, using—however—contradictory mechanisms. While the GC strived to achieve 'the coherent application' through the decoupled approach, the CoJ considered that—in respect to documents exchanged by the Commission with notifying parties or with third ones—the cases should be governed by a general presumption of non-disclosure because otherwise 'the scheme instituted by that legislation would be undermined.'[58] This is precisely the *Technische Glaswerke* variant of the *lex specialis* argument underpinning the linked approach. This argument was, according to the Court, justified by the fact that documents comprising this category generally represent confidential commercial information. Additionally, the prospect of disclosing them might discourage future subjects of antitrust proceedings from cooperating with the Commission.[59]

Heavy constraints, even if temporarily limited, were also imposed on the availability of the other category: internal documents. The CoJ essentially concluded that—as long as the antitrust decision has not yet been issued or is still subject to an appeal—a disclosure would seriously undermine the institution's decision-making process and would run foul of the legal advice exception to the access right, as it would give the applicant an unjustified advantage whenever it is also a party to ongoing proceedings.[60] This rule would apply only as long as the decision closing the administrative process has not been final (either because no appeal against that decision has been filed or because the appeal has been definitively adjudicated). From this point in time the access rule would operate on a decoupled basis.[61]

The Court therefore considered that specific rules restricting access should apply in respect to this category of documents as long as any (direct) follow-up procedure is still pending. Then their heavy grip of unconditional non-disclosure should fade away. It will, on the other hand, last arguably forever in respect to documents exchanged with parties to the proceedings as well as with third parties. In other words those documents will simply not be available under Regulation 1049/2001. And it is always the latter category of documents that comprises almost all the administrative antitrust file. If the disclosure of those documents in antitrust proceedings would 'undermine the scheme instituted by that legislation,' then the presumption of non-disclosure may be freely extrapolated to any documents exchanged between a EU decision maker and anyone else within any administrative process. All despite the open decision making and access to documents are enshrined in the primary EU law (Article 15 TFEU, Article 42 Charter of Fundamental Rights of the EU).

[56] *Agrofert Holding*, cited *supra*, note 46, § 51, and *Éditions Odile*, cited *supra*, note 47, § 109.
[57] *Agrofert Holding*, cited *supra*, note 46, § 52, and *Éditions Odile*, cited *supra*, note 47, § 110.
[58] *Agrofert Holding*, cited *supra*, note 46, § 63, and *Éditions Odile*, cited *supra*, note 47, § 122.
[59] See also *Agrofert Holding*, cited *supra*, note 46, § 66, and *Éditions Odile*, cited *supra*, note 47, § 124.
[60] *Éditions Odile*, cited *supra*, note 47, § 130–132.
[61] See also *Agrofert Holding*, cited *supra*, note 46, § 74–79.

VI Analysis

The jurisprudence discussed so far is puzzling both because it is inconsistent (and hence unpredictable)[62] and because the emerging approach largely questions the role of private watchdogs as rightful beneficiaries of the right to information.

The inconsistencies may be partly attributed to the highly political character of transparency and the apparently diverging opinions among the ECJ judges on how to handle this. It is telling in this context that since 2007 the CoJ has revoked every single decision of the GC on the issue.[63] But it is of course more problematic that the overall evolution of the case-law essentially leads, first, to disabling the access right in regard to any documents from administrative files exchanged by a decision maker with anyone else and, second, to handicapping it similarly—even if temporarily—when it comes to the few remaining documents (internal use documents).

It is worth to remind in this context that the GC considered in *Éditions Odile* that the right of private watchdogs to access administrative files essentially aims to safeguard 'the most effective control of the legality of the public authority.' This argument emphasises the relationship among transparency, accountability and the rule of law. But more recently the CoJ came to an opposite conclusion in the same case, considering that access to information would impair legal accountability and the rule of law. Is, therefore, the right to access or is it not a manifestation of a socially beneficial and fundamentally important value?

A quest for an answer should start with referring to the jurisprudence of the European Court of Human Rights (Court of Human Rights) in Strasbourg, which seems to suggest—at first sight at least—that the first question should be responded in the negative. In 2009 the Court of Human Rights decided *TASZ v. Hungary*,[64] in which it held that the Hungarian Constitutional Tribunal violated the fundamental freedom of expression when it refused access to pleadings submitted to the Tribunal by one of the members of the Hungarian Parliament.[65] The applicant in this case, however, was a classic public watchdog—an NGO with statutory goals of promoting fundamental rights, civil society and the rule of law. Furthermore, the case to which the pleadings referred to involved a clear matter of public interest: a restriction of the country's antidrug policy. Both tenets—which are absent in the cases discussed earlier—were foundational for the Court's assessment (§ 26–28). What is even more important, they were both considered as insignificant in the most recent case decided

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[62] In consequence '[i]t is not so much the absence of freedom of information . . . legislation in EU law of which we should complain but the fact that the law is piecemeal, its coverage patchy and its location often obscure—an offence to transparency in almost all its senses': Harlow, cited *supra*, note 2, 237.

[63] The only confirmed was Case C-266/05 P, *Sison v Council* [2007] ECR I-01233.

[64] Case *Társaság a Szabadságjogokért v Hungary*, Appl. no. 37374/05, judgment of 14 April 2009.

[65] According to Article 10 European Convention on Human Rights:

'1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . .

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, . . . for the protection of the reputation or rights of others, [or] for preventing the disclosure of information received in confidence, . . .'

by the ECJ, in which a journalist was seeking access to documents on a matter of a particularly significant public interest.[66]

So how important is the right to information when private watchdogs exercise it, considering that they do not seek information to participate in a public debate? The answer is unclear as long as the relationship between the right to information and accountability of public authorities remains unravelled, as in the most recent case-law of the ECJ. The argument of this contribution and of the case-law either openly pursuing the decoupled approach or refusing the linked one suggests that in general, the right to access public documents by private watchdogs and the constitutional advantages of accountability go hand in hand. The former is instrumentally related to the latter. The Advocate General Kokott seems to have been at a very similar point when she wrote that: 'as a result of openness citizens are to receive information enabling them to properly assess and, if necessary, criticise the workings of the administration.'[67] This statement rightly refers to 'citizens,' no matter what cause they pursue—private or public. Public watchdogs exercise the right to information to participate in a public debate, ie to put a case before the court of public opinion. Private watchdogs seek official documents to—as the GC framed it in *Éditions Odile*—'control the legality of the public authority.' Both types of accountability follow different paths, but both are equally fundamental for the legitimacy of public authorities. The first spurs democratic discourse, while the other supports the rule of law. It may be argued that, whenever such a relationship between the right to information exercised by a private watchdog and the rule of law occurs, it should be resolutely protected.

The other, and currently prevailing, line of judicial thinking is based on the assumption that the right to access documents may interfere with legal accountability (judicial control of administrative decision making),[68] as devised by standard procedural arrangements. It is because decision makers and parties to proceedings would need to be constantly aware that anything they say or do during the administrative procedure may be used by an unpredictable recipient for unpredictable purposes. The CoJ apparently is appalled by such a prospect and its (potential) restraining effects both when it comes to decision makers and parties to the proceedings. It has therefore disabled the access right either temporarily (internal documents; as long as the relevant procedure—administrative or judicial—is pending) or permanently (documents exchanged with other parties than the decision maker), and has sent a clear message that it is not ready to tolerate attempts to enhance the decision-making accountability beyond traditional mechanisms of the judicial review. This approach has been developed essentially to protect the decision-making autonomy of the administration (primarily the Commission) and its leeway in contacts with other parties.

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[66] In Case T-590/10, *Gabi Thesing and Bloomberg Finance v ECB*, judgment of 29 November 2012, the applicant requested certain documents on very risky (and ultimately highly wasteful) use of derivative transactions in the Greek government debt management. The GC held, though, that the predicate of the ECHR in *TASZ v Hungary* could apply only to cases which 'concern alleged private data of a public figure' (§ 78). In other words the GC distinguished the two cases on a minor feature of the factual background to which the ECHR did not pay much attention and entirely ignored the elements emphasised by the ECHR (a request by a public watchdog for existing documents on a 'matter of public interest'), which were clearly also present in *Gabi Thesing*.

[67] Opinion of the Advocate General Kokott of 8 September 2009 to *Technische Glaswerke*, § 97.

[68] The Court fully confirmed this very hypothesis in Joined Cases C-514/07 P, 528/07 P and 532/07 P, *Sweden v API*, *API v Commission* and *Commission v API* (*Sweden and API*) [2010] ECR I-08533.

This may seem like a fair compromise between, on the one hand, the institutional interest in acting without an excessive external pressure and, on the other, the necessity to preserve the rule of law by maintaining the basic right to appeal administrative decisions. No doubt, however, that less transparency means less accountability. This point is important because there are many factors influencing decision making, and some of them are both clearly inappropriate and intractable within the orthodox setting. A sober remark by an expert practitioner, uttered in the context of the Commission's powers to alter draft antitrust decisions, accurately depicts the problem: 'changes made by the Commissioners may result either from lobbying or from policy considerations. Companies might be able to guess what policy considerations might be thought relevant, but have no way of knowing what lobbyists may have written to other Commissioners.'[69] The data protection cases discussed earlier, as well as state aid cases (where a Member State may have an interest in lobbying for certain decisions) further demonstrate the tension between transparency in tandem with accountability—on the one hand—and the independence protected by secrecy of procedures—on the other. It does not require a lengthy analysis to realise that lobbying often betokens decision-making biases, which are akin to an encroachment on the impartiality of the decision makers and thus undermine the rule of law, understood as law equally applicable to all. Quite symptomatically, the institutions—when refusing access—routinely contend that transparency would undermine their independence, but never that it would curtail their impartiality. But the problem is that corresponding confidentiality may undermine impartiality, while protecting independence. And, after all, the goal of accountability and the rule of law is to protect impartiality, while the decision-making independence should be protected only as long as it supports the same goal.

The relationship between the decision-making transparency and the rule of law is not always so straightforward, however. Sometimes the former is just indifferent to the latter (eg when the access right is exercised merely for commercial purposes). And sometimes transparency may fall foul of the rule of law, eg when the access right is invoked by a subject to a criminal investigation who purports to use it to chicane. A distinction between such a situation and the one where a bond between transparency and the rule of law exists may be tricky, however. Another case—*Franchet and Byk*[70]—exemplifies such a dilemma. It concerned a request for information from a file of proceedings pursued by OLAF (European Anti-Fraud Office) against the applicants on the grounds of an alleged fraud. The Commission claimed that the access could impair follow-up proceedings instituted before national courts as well as disciplinary proceedings within the Commission. On the other hand, the applicants claimed that their right to information should be respected nonetheless, to protect the overriding public interest in fair hearing. In other words, they argued that their right to access public information was additionally backed up by a fundamental right. The Court dismissed this argument, stating that '[i]t is certainly true that the right to a fair hearing is in itself a general interest. However, the fact that this right is manifested in the present case by the applicants' individual interest in defending themselves implies that the interest which the applicants invoke is not a general, but rather a private, interest' (§ 138). Such a downplaying of the right to fair hearing, as an interest behind transparency in this

[69] J.T. Lang, 'Three Possibilities for Reform of the Procedure of the EC in Competition Cases under Regulation 1/2003', 18 November 2011, available at http://www.ceps.eu.

[70] Joined cases T-391/03 and T-70/04, *Franchet and Byk v Commission* [2006] ECR II-02023.

particular case, is logically problematic because the rule of law is largely based on individuals with an individual interest seeking judicial remedy and exercising their (individual) right to fair hearing. The public interest in the rule of law is therefore an outcome of pursuing private interests.

In this particular case, however, the Court seems to have been wary of vindicating the access right primarily due to fact that follow-up proceedings were still open. It appears to have considered that the right to fair hearing contradicted the arguably more profound general interest in completing those proceedings without an external interference. This might be a perfectly legitimate argument, but only as far as a real danger of interference exists. In such a situation, indeed, a bond between the rule of law and transparency would not be substantiated. Instead, the rule of law would go hand in hand with confidentiality. But *Franchet and Byk* is not such a case. The requests referred to dossiers produced by the OLAF and transmitted to other authorities. By knowing contents of the dossiers, the applicants could hardly preclude any actions of the receiving public authorities. But they could provide their views on the results of the investigation conducted by the OLAF, which would support both the accountability of the antifraud office and its compliance with the rule of law. This aspect is all the more valuable, considering that the receiving public authorities would otherwise be prone to take for granted the claims and statements stemming from OLAF investigations closed without giving the accused a chance to express their views. Thus, in this particular case, the rule of law and the idea of controlling OLAF's claims disclosed to other public authorities indeed heavily weighted for endorsing the access requests and the right to fair hearing (as its flipside).[71]

This case, therefore, further corroborates the major argument of this contribution: transparency is of paramount importance whenever it is instrumental to holding public authorities to account and so when it prevents an abuse of power. Sometimes private watchdogs may not be in a position to contribute to accountability and the rule of law, but this eventuality is an exception to the general principle. The GC clearly came to the same conclusion in *Agrofert Holding* and *Éditions Odile*. The CoJ disagreed with this conclusion in its most recent judgments, finding that the right to access official documents may only exceptionally be worth protection when exercised by private watchdogs. But it may be argued that such a relationship among transparency, accountability and private watchdogs should be cherished and sheltered because it propels the rule of law, a fundamental feature of any well-functioning polity. It is therefore an extremely important purifier, disinfectant and a policeman of the institutional system.

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[71] It is pertinent to notice in this context that in a separate case the ECJ awarded Franchet and Byk damages for institutional breaches of their procedural rights. More specifically, the Court found that the OLAF violated Article 4 of the Commission Decision 1999/396/EC of 2 June 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests, O. J. 1999 L 149/57, by refusing them a chance to express their views on the facts which concerned them. It emphasised that '[f]ailure to apply those provisions, which lay down the conditions under which observance of the rights of defence of the official concerned may be reconciled with the requirements of confidentiality inherent in any investigation of that kind, constitutes an infringement of the essential procedural requirements applicable to the investigation procedure': Case T-48/05, *Franchet and Byk v Commission* [2008] ECR II-01585, § 129.

