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EU Freedom of Information and Data Protection in tension: the right of access to documents and separately the right to access information within the ambit of EU law

1. INTRODUCTION

1.1 Freedom of information was not one of the 'four freedoms' which formed the foundations of the European project. The freedoms which a European common market¹ and customs union² were intended to herald were simply:

- a) the ability freely to ship goods for trade across national boundaries³;
- b) the freedom of workers to 'up sticks' and go and take jobs abroad⁴;

¹ Art 26(2) TFEU states that:

'The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.'

² Art 30 TFEU:

'Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.'

³ Art 28(1) TFEU:

'The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.'

⁴ Article 45(1) TFEU:

'Freedom of movement for workers shall be secured within the Union.'

- c) the freedom of individuals and companies to offer their economic services⁵ and, if so minded, to establish their businesses abroad⁶; and
- d) the freedom to transfer money across European borders.⁷

1.2 But, of course, the ambitions of the EU have long since outgrown the purely functionalist economic free trade area aims which were first set out in the 1957 Treaty of Rome. For example, one of the EU's aims now is to establish a common 'area of freedom, security and justice'⁸ in which, among other things, a common EU policy on asylum in, and immigration into, the EU may be developed⁹, police action may be coordinated,¹⁰ criminal law may be harmonised,¹¹ and the judgments of national courts in criminal¹² and in civil matters¹³ may be recognised and given effect Europe-wide. To this end, information on individuals might be shared among the public authorities of the Member States.

⁵ Art 56(1) TFEU:

'... [R]estrictions on freedom to provide services [normally provided for remuneration] within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.'

⁶ Art 49 TFEU

'[R]estrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms...'

⁷ Art 63 TFEU:

'[A]ll restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited [and] ... all restrictions on payments between Member States and between Member States and third countries shall be prohibited.'

⁸ See Art 3(2) TEU; and Arts 67–89 TFEU.

⁹ Arts 78–79 TFEU.

¹⁰ Arts 87–89 TFEU.

¹¹ Art 83 TFEU.

¹² Art 82 TFEU.

¹³ Art 81 TFEU.

1.3 This official need to share information of course, immediately, brings up the possibility of abuse, and hence the need for regulation to ensure that the interests of the individual potentially informed upon or against are duly taken into account. Thus data protection laws can be seen as the necessary corollary in a national or supra-national polity which aspires to respect the principles of the rule of law in this information age.

1.4 A further realisation of the rule of law in the context of the information age is the ideal of transparency: that members of civil society should be able to ascertain the factual and legal bases on which official decisions are being made. This leads to the need for rules governing the possibility of access by interested parties to information held by public authorities.

1.5 In Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd* ECLI:EU:C:2014:238 [2015] QB 127 the Grand Chamber CJEU noted (at §32) that the retention of data for the purpose of possible access to them by the competent national authorities “*derogates from the system of protection of the right to privacy*” established under EU law, (specifically the Electronic Communications Directives 95/46 and 2002/58). Clearly, then, there is going to be a constant (productive?) tension and possibility of conflict between these two information age rule-of-law principles, namely:

- a) the right of individuals as individuals to protection against the misuse of data on them held by public authorities ('data protection laws'); and
- b) the right of individuals as members of civil society to know what information is being used by public authorities in making decisions in the public sphere ('freedom of information' laws).

1.6 This tension is paralleled by – but does not completely mirror – the tensions already implicit in the law between:

- a) the recognition of an individual's right to privacy as against the public's 'right to know' proclaimed by a free press; and

b) an individual's legitimate expectation to respect for confidentiality as against another's right to free expression.

2. TREATY PROVISIONS

2.1 The twin principles of freedom of information and of data protection are expressly recognised within the provisions of the TFEU.

Freedom of Information and the Principle of Public Transparency

2.2 The Grand Chamber of the Court of Justice has noted:

“The principle of transparency is stated in Articles 1 TEU and 10 TEU and in Article 15 TFEU. It 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...¹⁴”

2.3 Article 15(1) TFEU (formerly Article 255 EC) sets out the general principle that 'in order to promote good governance and ensure the participation of civil society', the EU institutions 'shall conduct their work as openly as possible', noting in particular, in Article 15(2), that the European Parliament shall meet in public (as shall the Council when considering and voting on a draft legislative act) and, under Article 15(2)(v) TFEU, 'shall ensure publication of the documents relating to the legislative procedures'. Nothing is said, however, of the need for openness or publication of the workings of the Commission.

2.4 Article 15(3) TFEU confirms the general right of any EU resident or citizen to have access to EU documents. This is subject to particular EU regulation on the issue specifying the 'general principles and limits on grounds of public or private interest'. Consistently with such general EU regulation, each EU body is then required to 'ensure that its proceedings are transparent' and to set out in its own particular Rules of Procedure specific provisions regarding access to its documents, although the CJEU and the ECB and the EIB are said to be subject to these transparency and document access requirements 'only when exercising their administrative tasks.'

¹⁴ See Joined Cases C-92/09 & C-93/09 *Volker und Markus Schecke GbR v Land Hessen* [2010] ECR I-11063 at para 68, citing Case C-41/00 P *Interporc v Commission* [2003] ECR I-2125, para 39, and Case C-28/08 P *Commission v Bavarian Lager*, 29 June, [2010] ECR I-6055, para 54.

Data Protection and Respect for an Individual's Private Life

2.5 Article 16(1) TFEU (formerly Article 286 EC) states that

'everyone has the right to the protection of personal data concerning them'.

2.6 Article 16(2) TFEU provides an express Treaty basis for the adoption of EU legislation concerning the processing of data on individuals, both by the EU and by the Member States when carrying out activities falling within the scope of EU law. Such EU legislation shall be aimed at protecting the individual's interest in such 'personal data' and regulating its free movement. Due compliance with these rules is subject to the control of independent authorities.

2.7 In the sphere of the EU's Common Foreign and Security Policy, Article 39 TEU requires the Council to adopt a decision laying down rules relating to the protection of individuals and free movement of data with regard to the processing of personal data by the Member States when carrying out activities which fall within the scope of the Common Foreign and Security Policy. Again, compliance with these rules is subject to the control of independent authorities. The rules adopted on the basis of Article 39 TEU are by way of derogation from the general EU rules on data processing adopted on the basis of Article 16 TFEU.

The Treaties and Fundamental Rights

2.8 None of the rights set out in the EU Charter of Fundamental Rights is being newly introduced to EU law by the fact of their inclusion in the Charter. All of them have already been prefigured in the "fundamental rights as general principles" jurisprudence of the CJEU. The Charter rights are to be understood and applied against the background of this earlier fundamental rights/general principles jurisprudence, since the recognition of the rights, freedoms and principles set out in the Charter of Fundamental Rights and the according to them "the same legal value as the Treaties" effected by Article 6(1) TEU did not mark a disruption or break from the CJEU's prior fundamental rights case law, but rather its confirmation. Our approach to the Charter then may be described as one involving a "hermeneutic of continuity" with the body of case law based on unwritten fundamental rights as general principles of EU law. This is consistent with the Declaration by all Treaty signatories concerning

the Charter of Fundamental Rights of the European Union was appended to the Lisbon Treaty in the following terms

“The Charter of Fundamental Rights of the European Union, which has legally binding force, confirms the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the member States. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties.

2.9 There is, however, still life in the case law of the CJEU on fundamental rights as general principles. This has been given an express basis in the Treaties by Article 6(3) TEU which states that

“fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law.”

2.10 As Advocate General Sharpston has noted:

“Article 6(1) and (3) TEU merely represents what the United Kingdom terms in its observations a ‘codification’ of the pre-existing position. They encapsulate, to put it another way, a political desire that the provisions they seek to enshrine and to protect should be more visible in their expression. They do not represent a sea change of any kind”¹⁵

¹⁵ In Case C-396/11 *Radu* [2013] QB 1031, CJEU (Grand Chamber) Opinion of Advocate General Sharpston of 18 October 2012 at para 51

3. THE RIGHT TO ACCESS/RECEIVE INFORMATION AS A FUNDAMENTAL RIGHT

Charter of Fundamental Rights

3.1 Article 42 of the Charter of Fundamental Rights (CFR) provides, under the heading 'Right of access to documents', 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 (whether in hard copies, or in electronic or other form) of the EU's institutions, bodies, offices and agencies.

3.2 Article 42 CFR echoes the terms of Article 15 TFEU and the EU secondary legislation adopted thereunder (notably Regulation (EC) No 1049/2001,¹⁶ the terms of which are considered more fully below).

3.3 Separately Article 41 CFR guarantees a 'right to good administration' in individuals' dealings with and within the EU, including the right of every person to have access to his or her file. As the CJEU noted in *SGL Carbon AG v Commission*:

*'[I]n all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of Community law which must be complied with even if the proceedings in question are administrative proceedings.'*¹⁷ ...

*Observance of the rights of the defence requires, in particular, that the undertaking under investigation is put in a position during the administrative procedure to put forward its point of view on the reality and the relevance of the alleged facts and also on the documents used by the Commission.'*¹⁸

These procedural rights (and the implicit promise of an 'open, efficient and independent European administration') are now set out in Article 41 of the EU Charter of Fundamental Rights (CFR), which guarantees a 'right to good administration' in the following terms (so far as relevant):

"1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

¹⁶ [2001] OJ L145/43.

¹⁷ See, in particular, Case C-194/99 P *Thyssen Stahl v Commission* [2003] ECR I-10821, paragraph 30)

¹⁸ Case C-310/93 P *BPB Industries and British Gypsum v Commission* [1995] ECR I-865, paragraph 21)

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.”¹⁹

3.5 In *H. N. v Minister for Justice, Equality and Law Reform, Ireland* where the Court stated that an individual could rely upon the EU law right to good administration in claims made against national authorities, when they are acting within the scope of EU law, noting :

“49. ...[T]he right to good administration, enshrined in Article 41 of the Charter, ... right reflects a general principle of EU law.

50 Accordingly, where, in the main proceedings, a Member State implements EU law, the requirements pertaining to the right to good administration, including the right of any person to have his or her affairs handled impartially and within a reasonable period of time, are applicable in a procedure ... which is conducted by the competent national authorities. ²⁰

3.6 But just weeks later in *YS v Dutch Ministry for Immigration, Integration and Asylum* the Court denied that individuals could rely directly upon the *Charter* right to good administration to seek recovery of their files in immigration matters falling within the scope of EU law, noting

“67. .. It is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union. ²¹ Consequently, an applicant for a resident permit cannot derive from Article 41(2)(b) of the Charter a right to access the national file relating to his application [for a residence permit].

68 It is true that the right to good administration, enshrined in that provision, reflects a general principle of EU law. ²² However, by their questions in the present cases, the referring courts are not seeking an interpretation of that

¹⁹ Case C-328/05 P *SGL Carbon AG v Commission* [2007] ECR I-3921 at paras 70–71

²⁰ Case C-604/12 *H. N. v Minister for Justice, Equality and Law Reform, Ireland* 8 May [2014] ECR I-nyr ECLI:EU:C:2014:302 at paras 49-50

²¹ See, to that effect, the judgment in C-482/10 *Teresa Cicala v. Sicily* [2011] ECR I-14139 paragraph 28

²² Judgment in *HN*, C-604/12, EU:C:2014:302, paragraph 49

general principle, but ask whether Article 41 of the Charter may, in itself, apply to the Member States of the European Union.”²³

European Convention on Human Rights

3.7 Article 52(3) CFR is the provision which ensures that the ECHR is a base-line for fundamental rights protection within the ambit of EU law. It provides as follows:

Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

3.8 There is no direct provision in the European Convention on Human Rights guaranteeing a right of access to individual²⁴ or general information²⁵ held by public authorities as distinct from the right guaranteed – under both Article 10 ECHR and Article 11 CFR – freely to express and to receive and impart information and ideas one already has, without interference by public authority and regardless of frontiers. The European Court of Human Rights has, in its more recent case law, begun to tease out the implications of the right to 'receive ... information' set out in Article 10 ECHR.²⁶ The Strasbourg Court has begun to develop the idea implicit in Article 10 ECHR of a positive obligation on the State authorities – for example, in implementation of the State's responsibility to nurture and further the freedom of the press to carry out its

²³ Joined Cases C-141/12 and C-372/12 *YS v Dutch Ministry for Immigration, Integration and Asylum* 17 July [2014] ECR I-nyr ECLI:EU:C:2014: 2081 at paras 67-8

²⁴ See *Leander v Sweden* (1987) 9 EHRR 433 at para 74:

'Article 10 ECHR does not ... confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.'

²⁵ See *Loiseau v France – admissibility decision* [2003] ECHR 46809/99 (Second Section, 18 November 2003):

'It is difficult to derive from the ECHR a general right of access to administrative data and documents...'

²⁶ See, eg, *Sdružení Jihočeské Matky v Czech Republic – non-admissibility decision* [2006] EHRR 19101/03 (Fifth Section, 10 July 2006), where the Strasbourg Court articulated a broader interpretation of the notion of 'freedom to receive information' and in so doing moved closer towards the recognition of a positive right of access to information.

investigative functions in the public interest.²⁷ This may entail the State actively removing obstacles which exist solely because of the historic fact of public authorities holding a monopoly on information.

3.9 Thus, in *Kenedi v Hungary*²⁸ the Strasbourg Court held that Hungary's refusal to allow a professional historian access to historical documentation (which access had been authorised by a court order) was incompatible with his rights under Article 10 ECHR, given that access to original documentary sources for legitimate historical research was an essential element of the exercise of his right to freedom of expression.²⁹

3.10 Further, in *Társaság a Szabadságjogokért v Hungary*,³⁰ the European Court of Human Rights upheld the complaint of the Hungarian Civil Liberties Union that the decisions of the Hungarian courts denying it access to the details of a parliamentarian's complaint pending before the Constitutional Court, had amounted to a breach of the Union's right to have access to information of public interest. In the Strasbourg Court's view, the submission of an application for an *a posteriori* abstract review of this legislation – especially by a Member of Parliament – undoubtedly constituted a matter of public interest. Consequently, the European Court of Human Rights found that the applicant – a recognised human rights NGO which the Court considered was properly exercising the function of 'social watchdog'³¹ and so was entitled to similar Convention protection to that

²⁷ See, eg, *Chauvy and Others v France* (2005) 41 EHRR 29 at para 66:

'The Court has on many occasions stressed the essential role the press plays in a democratic society. It has, inter alia, stated that although the press must not overstep certain bounds, in particular in respect of the rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.'

²⁸ *Kenedi v Hungary* [2009] ECHR 31475/05 (Second Section, 26 May 2009)

²⁹ See Case Commentary, '*Kenedi v Hungary*: access to documents – civil right' (2009) 5 *European Human Rights Law Review* 694.

³⁰ *Társaság a Szabadságjogokért v Hungary* [2009] ECHR 37374/05 (Second Section, 14 April 2009).

³¹ See, eg, *Vides Aizsardzības Klubs (Environmental Protection Club v Latvia* [2004] ECR 57829/00 (First Section, 27 May 2004) at para 42; and *Riolo v Italy* [2008] ECHR 42211/07 (Second Section, 17 July 2008) at para 63.

afforded to the press³² – was involved in the legitimate gathering of information on a matter of public importance. In these circumstances, the Strasbourg Court considered that the refusal on the part of the Hungarian Constitutional Court to release the requested information 'amounted to a form of censorship' contrary to the requirements of Article 10 ECHR. It is difficult to see how the decision of the Grand Chamber of the Court of Justice in *Sweden and Association de la Presse Internationale asbl (API)*,³³ refusing press and public access to the court pleadings lodged before the Court of Justice, can, in the light of the above decision of the European Court of Human Rights, be said to be Convention compatible. We discuss this further below under reference to the UK open justice principle.

3.11 In *Haralambie v Romania*,³⁴ the Strasbourg Court reiterated the vital interest for individuals who were the subject of personal files held by the public authorities to be able to have access to them. The European Court of Human Rights emphasised that the authorities had a duty to provide an effective procedure for obtaining access to such information, and that their failure to provide for an effective and accessible procedure to enable the applicant to obtain access to his personal security files within a reasonable time constituted a violation of Article 8 ECHR.

3.12 In *Gillberg v Sweden* ³⁵ the Strasbourg Grand Chamber held that a criminal conviction imposed on a university professor for misuse of office following his refusal to comply with a court order requesting the release of confidential information concerning children who had participated in a research study did not, in all the circumstances, breach his negative rights under either Article 8 or Article 10 ECHR not to release information pertaining to others. Indeed the Grand Chamber found that the professor's refusal to

³² See, eg, *Dammann v Switzerland* [2006] ECHR 77551/01 (Fourth Section, 25 April 2006) at para 52.

³³ See Joined Cases C-514, C-528 & C-532/07 P *Sweden and Association de la Presse Internationale asbl (API) v Commission* ECLI:EU:C:2010:541 [2011] 2 AC 359

³⁴ *Haralambie v Romania* [2009] ECHR 21737/03 (Third Section, 27 October 2009).

³⁵ *Gillberg v Sweden* [2012] ECHR 41723/06 (Grand Chamber, 3 April 2012); 31 BHRC 471

allow other *bona fide* academic researchers access to the information collected in his studies would “impinge on their rights under Article 10 ECHR ... to receive information”.

3.13 The case law of the Strasbourg Court on the right under Article 10 ECHR to request and obtain information has been summarised by the Strasbourg Court in its decision in *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*. The Court found that the refusal (apparently on the basis of lack of time and resources) by the relevant Austrian authorities to provide a research NGO with suitably anonymised details of application to it for approval of transfers in agricultural/forest land had “made it impossible for the applicant association to carry out its research ... and to participate in a meaningful manner in the legislative process concerning amendments of real property transaction law in Tyrol” and so breached the NGO’s right to receive information. The Court noted that the issue of land transfers was a matter of considerable public interest and the authorities held an information monopoly of this. It summarised its approach to the Article 10 ECHR right to receive information thus:

*33. The Court has consistently recognised that the public has a right to receive information of general interest. Its case-law in this field has been developed in relation to press freedom, the purpose of which is to impart information and ideas on such matters. The Court has emphasised that the most careful scrutiny on its part is called for when measures taken by the national authorities may potentially discourage the participation of the press, one of society’s “watchdogs”, in the public debate on matters of legitimate public concern.*³⁶

*34. Furthermore, the Court has held that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom.*³⁷ *However, the function of creating forums for public debate is not limited to the press. That function may also be exercised by non-governmental organisations, the activities of which are an essential element of informed public debate. The Court has therefore accepted that non-governmental organisations, like the press, may be characterised as social “watchdogs”. In that connection*

³⁶ See *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 26, 14 April 2009, with references to *Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239; *Jersild v. Denmark*, 23 September 1994, § 35, Series A no. 298; and *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 64, ECHR 1999-III)

³⁷ See *Dammann v. Switzerland* (no. 77551/01, § 52, 25 April 2006)

*their activities warrant similar Convention protection to that afforded to the press.*³⁸³⁹

3.14 The Convention right to receive information as guaranteed under Article 10 ECHR was most recently confirmed by the decision of the Strasbourg Court Grand Chamber in *Magyar Helsinki Bizottság (Hungarian Helsinki Committee) v. Hungary* [2016] ECtHR 18030/11 (Grand Chamber, 8 November 2016) at paras 156-7, 161-2:

“156. .. The Court continues to consider that “the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him.”

Moreover, “the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion”.

The Court further considers that Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual.

However, as is seen from the above analysis, such a right or obligation may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force (which is not an issue in the present case) and, secondly, in circumstances where access to the information is instrumental for the individual’s exercise of his or her right to freedom of expression, in particular “the freedom to receive and impart information” and where its denial constitutes an interference with that right.

157. Whether and to what extent the denial of access to information constitutes an interference with an applicant’s freedom-of-expression rights must be assessed in each individual case and in the light of its particular circumstances.

...

161. Maintaining this approach, the Court considers that the information, data or documents to which access is sought must generally meet a public-interest test in order to prompt a need for disclosure under the Convention. Such a need may exist where, inter alia, disclosure provides transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance by the public at large.

162. The Court has emphasised that the definition of what might constitute a subject of public interest will depend on the circumstances of each case. The public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern

³⁸ See *Társaság a Szabadságjogokért*, cited above, § 27, and *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 103, 22 April 2013

³⁹ *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria* [2013] ECHR 39534/07 (First Section, 28 November 2013)

it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about.

...

168. ... The Court would also note that given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information,⁴⁰ the function of bloggers and popular users of the social media may be also assimilated to that of "public watchdogs" in so far as the protection afforded by Article 10 is concerned."

...

197. The Court notes that the subject matter of the survey concerned the efficiency of the public defenders system (see paragraphs 15-16 above). This issue was closely related to the right to a fair hearing, a fundamental right in Hungarian law (see paragraph 33 above) and a right of paramount importance under the Convention. Indeed, any criticism or suggested improvement to a service so directly connected to fair-trial rights must be seen as a subject of legitimate public concern. In its intended survey, the applicant NGO wished to explore its theory that the pattern of recurrent appointments of the same lawyers was dysfunctional, casting doubt on the adequacy of the scheme. The contention that the legal-aid scheme might be prejudiced as such because public defenders were systematically selected by the police from the same pool of lawyers – and were then unlikely to challenge police investigations in order not to be overlooked for further appointments – does indeed raise a legitimate concern. The potential repercussions of police-appointed lawyers on defence rights have already been acknowledged by the Court in *Martin v. Estonia* (no. 35985/09, 30 May 2013). The issue under scrutiny thus going to the very essence of a Convention right, the Court is satisfied that the applicant NGO intended to contribute to a debate on a matter of public interest (see paragraphs 164-65 above). The refusal to grant the request effectively impaired the applicant NGO's contribution to a public debate on a matter of general interest."

- 3.15 Although this line of Strasbourg case law seems to privilege the right to obtain information to recognised "public watchdogs" such as journalists and campaigning groups,⁴¹ the trend at least in UK law has been to accept that individual members of the public may have sufficient interest in or commitment to a matter such as to give them standing to raise court actions to prevent violations of (public) law, particularly

⁴⁰ See *Delfi AS v. Estonia [GC]*, no. 64569/09, § 133, ECHR 2015

⁴¹ See to similar effect *Roşiianu v. Romania* [2014] ECHR 27329/06 (Third Section, 24 June 2014) where the court held that the applicant, a journalist, had been involved in the legitimate gathering of information on a matter of public importance, namely the activities of the Baia Mare municipal administration. Given that the journalist's intention had been to communicate the information in question to the public and thereby to contribute to the public debate on good public governance, his right to impart information had clearly been impaired.

as regards matters having an environmental impact where the courts have accepted that private individuals may be able to “demonstrate that they have a genuine interest in the aspects of the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence, a representative capacity”.⁴² In essence such individuals are acting in a public watchdog role and they too in principle should be able to pray in aid Article 10 ECHR in support of a right to information.

3.16 In Case T-727/15 *Association Justice & Environment z.s. v Commission* (General Court, 23 January 2017) the General Court appeared less than impressed by this line of Strasbourg case law when upholding the Commission’s refusal to grant the applicant NGO access to certain documents contained in the file of the infringement procedure 2008/2186 which had been taken by the Commission against the Czech Republic in relation to the application of Directive 2008/50/EC on ambient air quality and cleaner air for Europe. The General Court noted that the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument formally

⁴² *Walton (formerly Roadsense) v. Scottish Ministers* [2012] UKSC 44, 2013 SC (UKSC) 67 per Lord Reed at para 94:

[94] In many contexts it will be necessary for a person to demonstrate some particular interest in order to demonstrate that he is not a mere busybody. Not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority’s violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no one was able to bring proceedings to challenge it.

And per Lord Hope at paras 152-3

152. ...An individual may be personally affected in his private interests by the environmental issues to which an application for planning permission may give rise. Noise and disturbance to the visual amenity of his property are some obvious examples. But some environmental issues that can properly be raised by an individual are not of that character. Take, for example, the risk that a route used by an osprey as it moves to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines. Does the fact that this proposal cannot reasonably be said to affect any individual’s property rights or interests mean that it is not open to an individual to challenge the proposed development on this ground? That would seem to be contrary to the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf. ...So there has to be some room for individuals who are sufficiently concerned, and sufficiently well informed, to do this too. It will be for the court to judge in each case whether these requirements are satisfied.”

incorporated into EU law: Case C-398/13 P *Inuit Tapiriit Kanatami and Others v Commission* EU:C:2015:535, paragraph 45. It also reiterated that the obligation to ensure consistency between the rights contained in the Charter and the corresponding rights guaranteed by the ECHR, was always subject to an obligation not adversely to affect the autonomy of EU law and that of the Court of Justice of the European Union: C-601/15 PPU *N*, EU:C:2016:84, paragraph 47, and Case C-294/16 PPU *JZ*, EU:C:2016:610, paragraph 50. The General Court then dismissed the NGO's attempt to rely upon the Strasbourg case law by noting (at para 73):

“None of those judgments concerned a request for access to documents in the context of a regime comparable to that of Regulation No 1049/2001. On the other hand, none of the cases concerned a refusal of access to documents in order to protect the purpose of investigations and, in particular, preserve the atmosphere of necessary confidentiality in the pre-litigation stage of an infringement procedure. Therefore, contrary to the applicant's claim, the cited case-law of the European Court of Human Rights cannot be applied by analogy to the present case.”

4. DATA PROTECTION/RESPECT FOR PRIVACY AS A FUNDAMENTAL RIGHT

Charter of Fundamental Rights

4.1 Article 7 CFR parallels Article 8 ECHR in setting out the fundamental EU right to respect for private and family life, home and communications ⁴³. The EU Charter of Fundamental Rights also contains the following provision, specifically dealing with protection of personal data, which has no direct parallel in the text of the Convention. Article 8 CFR provides that:

1. *Everyone has the right to the protection of personal data concerning him or her.*
2. *Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*
3. *Compliance with these rules shall be subject to control by an independent authority.*

4.2 Article 8 CFR is clearly based on terms of the primary European Treaty provisions of Article 39 TEU and of Article 16 TFEU noted above. It is also based on provisions of secondary EU legislation already made under the Treaties – notably the Data Protection Directive 95/46/EC⁴⁴ and Regulation (EC) No 45/2001⁴⁵ – the provisions of each of which are considered more fully below.

4.3 The Grand Chamber of the Court of Justice has noted:

[T]he right to respect for private life with regard to the processing of personal data, recognised by Articles 7 and 8 of the Charter, concerns any information relating to an identified or identifiable individual ⁴⁶ and the limitations which

⁴³ Although the terms of Article 8 ECHR refer to the protection of “correspondence, the case law of the ECtHR has confirmed that this also covers phone-calls (*Alison Halford v United Kingdom* (1997) 25 EHRR 523) and E-mails (*Copland v United Kingdom* (2007) 45 EHRR 37).

⁴⁴ [1995] OJ L281/31.

⁴⁵ [2001] OJ L8/1.

⁴⁶ See, in particular, European Court of Human Rights, *Amann v Switzerland* [GC], no 27798/95, § 65, ECHR 2000-II, and *Rotaru v Romania* [GC], no 28341/95, § 43, ECHR 2000-V)

*may lawfully be imposed on the right to the protection of personal data correspond to those tolerated in relation to Article 8 of the Convention.*⁴⁷

4.4 In Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd* ECLI:EU:C:2014:238 [2015] QB 127 the Grand Chamber CJEU observed (at §33) - with reference to its previous judgment in Joined Cases C-465/00 & C-138,9/01 *Rechnungshof v Österreichischer Rundfunk* [2003] ECR I-4989 at § 75 - that an interference with privacy is constituted irrespective of

“whether the information on the private lives concerned is sensitive or whether the persons concerned have been inconvenienced in any way”.

At §37 the Court emphasized that the fact that

“data are retained and subsequently used without the subscriber or registered user being informed is likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance”.

The Court also emphasized (at §48) that the judicial review of the EU legislature's discretion *“should be strict”* because of

“the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference with that right caused by the Data Retention Directive 2006/24”

In addition, the Court emphasized that even highly important objectives such as the fight against serious crime and terrorism cannot justify measures which lead to forms of interference that go beyond what is *“strictly necessary”*: §51. The Court concluded (at §54) that it was a condition of the lawfulness of this data retention legislation that it

“lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards so that the persons whose data have been retained have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data.”

4.5 In Case C-362/14 *Schrems v Data Protection Commissioner* EU:C:2015:650 the CJEU Grand Chamber confirmed that legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as

⁴⁷ See Joined Cases C-92/09 & C-93/09 *Volker und Markus Schecke GbR v Land Hessen* [2010] ECR I-11063 at para 52.

guaranteed by article 7 of the Charter. The CJEU also ruled that Commission Decision 2000/520 (that the United States ensured an adequate level of protection of the personal data transferred there from the EU) made no reference the existence of effective legal protection against unlawful interference and that this did not respect the essence of the fundamental right to effective judicial protection as enshrined in article 47 of the Charter. It followed that Decision 2000/520 had to be declared invalid. The CJEU noted (at §95):

4.6 Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB* (21 December 2016), the Grand Chamber CJEU confirmed the foregoing *Schrems* line of case law and ruled that Article 15(1) of the E-Privacy Directive 2002/58/EC, read in the light of Articles 7, 8 and 11 and Article 52(1) CFR precluded national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication. It also precluded national legislation governing the protection and security of traffic and location data and, in particular, access of the competent national authorities to the retained data, where the objective pursued by that access, in the context of fighting crime, was not restricted solely to fighting serious crime, where access was not subject to prior review by a court or an independent administrative authority, and where there was no requirement that the data concerned should be retained within the European Union.

4.7 Finally In Case C-131/12 *Google Spain SL* EU:C:2013:424 [2014] QB 1022 confirmed that there was even a fundamental right to be forgotten and for still accurate but aging data no longer to be made readily publicly available in relation to an individual. The Grand Chamber noted at §§93-7 at §§93-7:

“93 .. [E]ven initially lawful processing of accurate data may, in the course of time, become incompatible with the Directive where those data are no longer necessary in the light of the purposes for which they were collected or processed. That is so in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed.

94 Therefore, if it is found, following a request by the data subject pursuant to article 12(b) of Directive 95/46, that the inclusion in the list containing true information relating to him personally is, at this point in time, incompatible with article 6(1)(c) to (e) of the Directive because that information appears, having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue the information and links concerned in the list of results must be erased....

...

95.....[I]t must be pointed out that in each case the processing of personal data must be authorised under article 7 for the entire period during which it is carried out....

...

96. ... [I]t is not necessary in order to find such a right that the inclusion of the information in question in the list of results causes prejudice to the data subject.

97 ..[T]he data subject may, in the light of his fundamental rights under articles 7 and 8 of the Charter, request that the information in question no longer be made available...”

European Convention on Human Rights

4.8 In *S and Marper v United Kingdom*, the Grand Chamber of the European Court of Human Rights found that the protection of personal data was of fundamental importance to a person’s enjoyment of and respect for his private and family life under Article 8 ECHR, particularly when such data were the subject of automatic processing and were being used for police purposes.⁴⁸

4.9 In *Alison Halford v United Kingdom*,⁴⁹ the European Court of Human Rights also recognised that the individual has rights of respect for private life even within the workplace, which require to be protected by her employer. The Strasbourg Court held that telephone taps carried out on Alison Halford's office and home telephones by her employer, to gather material to assist in their defence against sex discrimination proceedings brought by her, were an unlawful violation of her Article 8 ECHR rights. Similarly, in *Copland v United Kingdom*,⁵⁰ the Strasbourg Court held that monitoring by an employer of an employee's telephone, e-mail and Internet usage while at work and without her knowledge constituted a violation of her right to respect for private life and correspondence. It was irrelevant that the data were not disclosed to anybody, or used against the employee in disciplinary proceedings.

⁴⁸ *S and Marper v United Kingdom* (2009) 48 EHRR 50.

⁴⁹ *Alison Halford v United Kingdom* (1997) 25 EHRR 523.

⁵⁰ *Copland v United Kingdom* (2007) 45 EHRR 37.

4.10 In *Barbelescu v. Romania*⁵¹ the European Court of Human Rights considered the case of an individual from Bucharest who was employed as an engineer in charge of sales by a private company. His employment lasted from 1 August 2004 until 6 August 2007. During his employment, he was asked to create a Yahoo Messenger account to respond to clients' enquiries. On 13 July 2007 the applicant was informed by the employer that his Yahoo Messenger communications had been monitored between 5 and 13 July 2007 and that they had discovered he was using the Messenger for personal purposes. The applicant was presented with a 45-page document containing transcripts of his messages. The employer terminated the applicant's employment for breach of internal regulations. The applicant unsuccessfully challenged the termination before the Bucharest Courts, claiming they had violated his right to correspondence as protected by the Romanian Constitution and Criminal Code. The employee then filed a complaint to the European Court of Human Rights claiming, under article 8 ECHR, that the decision to terminate his contract, and dismissal of his domestic case by the national courts, had breached his right to respect for his private life and correspondence. The Strasbourg court held that the complaint under Article 8 ECHR was admissible and noted that, without a warning of potential monitoring, an applicant has a reasonable expectation to privacy. In this case however the employer did have internal regulations strictly prohibiting the use of such communications for personal use. The case, therefore, revolved around whether the applicant could have a reasonable expectation of privacy in light of the general prohibition of such communications by his employer. By six votes to one the court held that there was no violation with the court holding that the employer's monitoring was legitimate due to employer's belief that the Messenger service accessed would contain professional messages. Additionally, the Court noted that the use of the applicant's Messenger transcripts had only been to establish the fact of disciplinary breach and that the private content of the transcripts was not given weight, mentioned or been a decisive element in the domestic courts' findings. The Court found that it is not unreasonable for employers to want to verify employees are completing professional tasks during work hours and that, in the applicant's case, the fact the employer only monitored the Messenger service, and no other documents on the applicant's computer, resulted in the employer's monitoring being proportionate.

⁵¹ *Bărbulescu v Romania* [2016] ECHR 61496/08 (Fourth Section, 12 January 2016)

4.11 However, this Charter provision also reflects the terms of the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data. And in its conjoined judgments in *Bouchacourt v France*,⁵² *Gardel v France*⁵³ and *MB v France*,⁵⁴ the European Court of Human Rights referred to and relied upon the terms of Article 5 of this 1981 Convention – and also upon Principles contained in Council of Ministers Recommendation R (87) 15 regulating the use of personal data in the police sector – in determining the Convention compatibility (with the right to respect for private life required under Article 8 ECHR) of requirements imposed on convicted sex offenders under French law to notify their personal details to the police.

⁵² *Bouchacourt v France* [2009] ECHR 5335/06 (Fifth Section, 17 December 2009) at para 61.

⁵³ *Gardel v France* [2009] ECHR 16428/05 (Fifth Section, 17 December 2009) at para 61.

⁵⁴ *MB v France* [2009] ECHR 22115/06 (Fifth Section, 17 December 2009) at para 61.

5. EU SECONDARY LEGISLATION ON ACCESS TO DOCUMENTS AND ACCESS TO INFORMATION

ACCESS TO EU DOCUMENTS

5.1 The EU access-to-documents regime applies only to the EU's own institutions, bodies, offices and agencies. Strictly, it is not a freedom of information regime. Instead, as the General Court has stated:

[T]he concept of a document must be distinguished from that of information. The public's right of access to the documents of the institutions covers only documents and not information in the wider meaning of the word and does not imply a duty on the part of the institutions to reply to any request for information from an individual.⁵⁵

5.2 In any event, the protection and promotion of freedom of information by and within the Member States remains a matter for Member States to regulate. European Union law does not yet extend to giving a right of access to documents held – in their own right rather than as agents for the EU – by public authorities of the Member States, though Recital 15 of Regulation (EC) No 1049/2001,⁵⁶ which is the central provision of the EU freedom of information regime, states:

Even though it is neither the object nor the effect of this Regulation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions.

5.3 Regulation (EC) No 1049/2001 aims at facilitating the 'fullest possible public access' to EU documents⁵⁷ (particularly in cases where the EU institutions are acting in a legislative capacity), while – at the same time – seeking to preserve the 'effectiveness' of the institutions' decision-making process, by preserving the secrecy of the institutions'

⁵⁵ Case T-264/04 *WWF European Policy Programme v Council* [2007] ECR II-911 at para 76.

⁵⁶ [2001] OJ L145/43.

⁵⁷ See, eg, Case C-266/05 P *Sison v Council* [2007] ECR I-1233, para 61; Case C-64/05 P *Sweden v Commission* [2007] ECR I-11389, para 53; and Case C-139/07 P *Commission v Technische Glaswerke Ilmenau*, 29 June, [2010] ECR I-nyr at para 51.

internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks (Article 4(3)).⁵⁸

5.4 Somewhat tendentiously, it is claimed that the right of public access to documents of the EU institutions is related to the 'democratic nature' of those institutions.⁵⁹

5.5 Although the Regulation sets time-limits within which to respond to document access requests, failure on the part of the EU to comply with the time-limits laid down in that provision does not lead automatically to the annulment of the decision adopted after the deadline, as this would merely cause the administrative procedure for access to documents to be reopened. Instead, compensation for any loss resulting from the lateness of the institutional response may be sought through an action for damages.⁶⁰

5.6 Article 4 of the EU Regulation also sets out a series of possible permissible reasons for refusing access to (or selectively redacting) requested documentation. As a derogation from the general principle of public access to documents held by the EU, these exceptions must be interpreted narrowly and applied strictly. They include where disclosure would undermine the protection of the public interest as regards public security,⁶¹ defence and military matters, international relations, and/or the financial, monetary or economic

⁵⁸ For discussion of this provision, see Case T-121/05 *Borax Europe Ltd v Commission* [2009] II-27* (Summ Pub) (Order of 11 March 2009) at paras 68 and 70:

'[W]hile the Community legislature has provided for a specific exception to the right of public access to the documents of the Community institutions as regards legal advice, it has not done the same for other advice, in particular scientific advice, such as that expressed in the recordings at issue. ... It follows that scientific opinions obtained by an institution for the purpose of the preparation of legislation must, as a rule, be disclosed, even if they might give rise to controversy or deter those who expressed them from making their contribution to the decision-making process of that institution.'

⁵⁹ See, eg, Joined Cases C-39/05 P & C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, para 34.

⁶⁰ Joined Cases T-355/04 & T-446/04 *Co-Frutta Soc Coop v Commission*, 19 January, [2010] ECR II-nyr at para 71.

⁶¹ Case C-266/05 P *Sison v Council* [2007] ECR I-1233.

policy of the EU or of a Member State⁶² (Article 4(1)(a)). Refusal may also be made on the basis of harm to the privacy and the integrity of the individual, having particular regard to the EU's data protection legislation (Article 4(1)(b)). Further, unless there is an overriding public interest in disclosure, the EU institutions are also required under Article 4(2) of the EU Regulation to refuse access to a document where its disclosure would undermine the protection of:

- a) commercial interests of a natural or legal person,⁶³ including intellectual property⁶⁴;
- b) court proceedings⁶⁵ and legal advice⁶⁶; and

⁶² See Joined Cases T-3/00 & T-337/04 *Pitsiorlas v Council* [2007] ECR II-4779.

⁶³ Joined Cases T-355/04 & T-446/04 *Co-Frutta*, above n 43, the General Court noted at para 133 in relation to this exception:

"The aim behind the application for access to the documents [in this case] is that of verifying the existence of fraudulent practices on the part of the applicant's competitors. The applicant thus pursues, amongst other objectives, the protection of its commercial interests. However, it is not possible to categorise the applicant's commercial interests as being an "overriding public interest" which prevails over the protection of the commercial interests of traditional operators, the objective underlying the refusal of access to a part of the documents requested. In addition, the pursuit of the public interest in identifying cases of fraud in order to ensure the smooth operation of the banana market is not a matter for the operators, but for the competent Community and national public authorities, where appropriate following an application made by an operator."

⁶⁴ Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-271.

⁶⁵ In Joined Cases C-514, C-528 & C-532/07P *Sweden and Association de la Presse Internationale asbl (API)* ECLI:EU:C:2010:541 [2011] 2 AC 359 the Grand Chamber CJEU ruled – more than a little paradoxically – that the disclosure of pleadings lodged in pending court proceedings is presumed to undermine the protection of those proceedings – because of the fact that the pleadings constitute the basis on which the Court carries out its judicial activities – and so a general rule can be applied to refuse access to court pleadings in open proceedings.

However, in closed proceedings held *in camera* no such general presumption can be applied, and so access to the pleadings in proceedings held behind closed doors can be refused by the Commission only after it undertakes a specific examination of the document to which access is requested and explains how disclosure of that document could specifically and effectively undermine the court proceedings in question.

⁶⁶ In Case C-477/10 P *Agrofert Holding as v Commission*, [2012] 5 CMLR, 9, CJEU, on appeal from the General Court the ECJ confirmed that it was insufficient for the Commission to refuse access to the legal advice in question merely by claiming a general need to maintain its confidentiality in order to be able to obtain full and frank legal advice. To rely upon this exemption effectively, the Commission would instead have to show how disclosure of the legal advice in question would, on

c) the purpose of inspections, investigations⁶⁷ and audits.⁶⁸

5.7 In order to justify refusal of access to a document the disclosure of which has been requested, it is not sufficient, in principle, for that document to be covered by an activity mentioned in Article 4(2). If an EU institution or body subject to the provisions of Regulation (EC) No 1049/2001 decides to refuse access to a requested document, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the Article 4 exceptions.⁶⁹ However, the Grand Chamber has also ruled that the EU institution may, in refusing a specific document access request, base its decisions on general presumptions which apply to certain categories of document, as considerations of a generally similar kind are likely to apply to applications for disclosure which relate to documents of the same nature.⁷⁰

5.8 In Case C-127/13P *Strack v European Commission* EU:C:2014:455 EU:C:2014:2250 [2015] 1 WLR 2649 the CJEU held that the failure by an institution of the European Union to respond to a confirmatory application for access to documents within the time limit laid down amounted to a decision to refuse access and that that implied decision constituted the starting point for the period within which the applicant could bring an action for annulment. The court also held that Regulation No 1049/2001 did not allow for the derogation from the time limits laid down in articles 7 and 8, which could not be varied by the parties, and which were determinative in relation to the conduct of the procedure for access to documents. Accordingly if no express decision had been made by the expiry

the facts of the particular case, constitute a genuine and reasonably foreseeable specific risk (rather than some purely hypothetical threat) to its legitimate interests.

⁶⁷ In Case T-111/07 *Agrofert Holding as v Commission*, 7 July, [2010] ECR II-nyr it was held (at para 97) that this proviso 'must be interpreted as applying only if disclosure of the documents in question may endanger the completion of inspections, investigations or audits'.

⁶⁸ In Joined Cases C-514, C-528 & C-532/07P *Sweden and Association de la Presse Internationale asbl (API)* ECLI:EU:C:2010:541 [2011] 2 AC 359 the Grand Chamber upheld the decision of the General Court on appeal to the effect that documents relating to investigations carried out by the Commission in the context of infringement proceedings under Art 258 TFEU are no longer covered by this last exception (undermining 'the purpose of inspections, investigations and audits') after the Court of Justice has delivered its judgment closing those proceedings.

⁶⁹ See, e.g., Joined cases C-514/11P & C-605/11 P *LPN and Finland v Commission* EU:C:2013:738, paragraph 44, and Case C-612/13 P *ClientEarth v Commission*, , EU:C:2015:486, paragraph 68.

⁷⁰ Joined Cases C-514, C-528 & C-532/07P *Sweden and Association de la Presse Internationale asbl (API)* ECLI:EU:C:2010:541 [2011] 2 AC 359, at para 74.

of the time limit for processing a confirmatory application laid down in article 8 of Regulation No 1049/2001, an implied refusal would be deemed to exist which could be the subject of an action for annulment. Further, any refusal of access to a requested document could be subject to challenge by way of an action for annulment, whatever the reason relied on to refuse access, including that the requested document did not exist or was not in the possession of the institution concerned

5.9 In principle, the right of access also applies to EU documents relating to the Common Foreign and Security Policy and to police and judicial cooperation in criminal matters. In principle too, the EU freedom of information regime is not limited only to documents drawn up by the EU institutions, but may also apply to documents received by them, although allowing for a Member State to request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement. But Member States do not have any general and unconditional right of veto on the disclosure of a document held by a Community institution simply because it originates from that Member State.⁷¹

5.10 The EU regulation sets up a two-stage administrative procedure in relation to dealing with access to documents requests, with the additional possibility of court proceedings being taken by a disappointed applicant before the CJEU or a complaint being made to the European Ombudsman. The object of Articles 7 and 8 of that regulation, by providing for a two-stage procedure, to achieve, first, the swift and straightforward processing of applications for access to documents of the institutions concerned and, second, as a priority, an amicable settlement of disputes that may arise. For cases in which such a dispute cannot be resolved by the parties, the abovementioned Article 8(1) provides two remedies, namely, the institution of court proceedings or the lodging of a complaint with the Ombudsman. One may note in this regard the provision of Article 43 CFR which states that

any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European

⁷¹ Case C-64/05 P *Sweden v Commission* [2007] ECR I-11389, para 58, on appeal from Case T-168/02 *IFAW Internationaler Tierschutz-Fonds v Commission* [2004] ECR II-4135.

Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role.

5.11 The two stage procedure under Regulation gives institution concerned the chance to re-examine its position before taking a definitive refusal decision which could be the subject of an action before the EU courts. It is claimed that this procedure “makes it possible for initial applications to be dealt with more promptly and, consequently, more often than not to meet the applicant's expectations, while also enabling the institution to adopt a detailed position before definitively refusing access to the documents sought by the applicant, in particular where the applicant repeats the request for disclosure of those documents, notwithstanding a reasoned refusal by that institution”: Case C-362/08P, *Internationaler Hilfsfonds v Commission*, EU:C:2010:40 (ECJ, 26 January 2010, paragraph 53-4).

5.12 Since the response to an initial application within the meaning of Article 7(1) of Regulation No 1049/2001 is only the first position in principle, in principle it is not actionable, since it does not produce legal effects. The situation is different, in particular, where the response to the initial application is vitiated by a defect in that it failed to inform the applicant of its right to make a confirmatory application: Case T-437/05 *Brink's Security Luxembourg v Commission* EU:T:2009:318, paragraphs 74 and 75. An initial position will also be actionable (in the sense of being something which can be challenged before the CJEU) where an EU institution adopts a definitive position with a response to an initial application: Case C-362/08 P *Internationaler Hilfsfonds v Commission*, EU:C:2010:40, paragraphs 58 to 62, and Case C-127/13 P *Strack v Commission*, EU:C:2014:2250, paragraph 36).

ACCESS TO ENVIRONMENTAL INFORMATION AND THE AARHUS CONVENTION

5.13 EU law - in the form of the United Nations Economic Commission for Europe Aarhus Convention on Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (“Aarhus”) which was ratified by the UK and separately by the EU in February 2005 - makes specific legislative provision in relation to national rules on access to justice and standing to challenge in the sphere of environmental law. The Aarhus Convention now forms an integral part of the legal

order of the European Union: Case C-240/09 *Lesoochránárske zoskupenie VLK v Slovakia* [2011] ECR I-1255 at § 58. The Aarhus Convention relating to access to documentation in environmental matters provides, so far as relevant, as follows:

“Article 1 Objective

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee *the rights of access to information, public participation in decision-making*, and access to justice in environmental matters in accordance with the provisions of this Convention

Article 4 - Access to Environmental Information

1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:

(a) Without an interest having to be stated;

(b) In the form requested unless:

(i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or

(ii) The information is already publicly available in another form.

2. The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

3. A request for environmental information may be refused if:

...

(c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

4. A request for environmental information may be refused if the disclosure would adversely affect:

(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;

...

(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;

(e) Intellectual property rights;

(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;

(g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material;...

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.

...

6. Each Party shall ensure that, if information exempted from disclosure under paragraphs 3 (c) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.

Aarhus access to EU environmental information

5.14 The Aarhus obligations of the EU institutions to provide for public access to environmental information are set out in Regulation (EC) No 1367/2006.⁷² In addition to making provision for requests for environmental information to be made of the EU institutions by any natural or legal person, the Regulation also make specific provision for the rights of NGOs to request internal review of any response to such a request and, if dissatisfied therewith, to raise an action before the Court of Justice of the European Union. In order to benefit from these provisions the NGO has to show that:

- a) it is an independent non profit-making legal person in accordance with a Member State's national law or practice;
- b) it has the primary stated objective of promoting environmental protection in the context of environmental law;
- c) it has existed for more than two years and is actively pursuing the objective of environmental protection in the context of environmental law; and
- d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities.

⁷² [2006] OJ L264/13.

5.15 In Case C-673/13 *Commission v Stichting Greenpeace Nederland and PAN Europe* (ECJ, 23 November 2016) the court confirmed that the objective of the Aarhus regulation 1367/2006 is to ensure access to information concerning factors, such as emissions affecting or likely to affect elements of the environment, in particular air, water and soil. That is not the case as regards purely hypothetical emissions. But that concept cannot be limited to information concerning emissions actually released into the environment, at least in relation to products which are intended for general environmental release, for example as plant protection products. Consequently, the information which is covered by the Aarhus regulation include information on foreseeable emissions into the environment from the plant protection product or active substance in question, under normal or realistic conditions of use of that product or substance, namely the conditions under which the authorisation to place that product or substance on the market was granted and which prevail in the area where that product or substance is intended to be used

5.16 In Case C-442/14 *Bayer CropScience and Stichting De Bijenstichting* (ECJ, 23 November 2016) the court took a similarly broad view of the extent of the obligations under the Aarhus regulations, rejecting the finding of the General Court and the submissions of the Member States and the Commission that a restrictive approach should be taken, by for example reading the reference to emission affecting the environment as referring only to emissions emanating from industrial installations or processes.

5.17 Access to general environmental information and monitoring is also a matter which falls within the remit of the European Environmental Agency, which was set up by an EU Regulation⁷³ to create an information network, provide a report on the state of the environment every three years, and otherwise collate, record and assess environmental data.

Aarhus access to environmental information from Member States

5.18 The Public Access to Environmental Information Directive 2003/4/EC was expressly adopted so as to ensure consistency between the requirements of EU law and

⁷³ Council Regulation 1210/90 [1990] OJ L120/1.

the Aarhus principles, in order to allow the EU to ratify the Aarhus Convention. The Directive obliges public authorities to make practical and effective arrangements with a view to making available and disseminating environmental information to the general public to the widest extent possible – using, in particular, information and communication technologies. 'Environmental information' is given the broadest of definitions; and the 'public authorities' covered by the Directive include not only all national and local government bodies (whether or not they have specific responsibilities for the environment), but also persons or bodies performing public administrative functions under national law in relation to the environment, and other persons or bodies acting under their control and having public responsibilities or functions. The (non-) performance of these duties of disclosure and dissemination on request to the public has to be made judicially reviewable before the national courts at the instance of any persons whose request for environmental information has been refused (Article 6). Although Article 4 of the Directive sets out a list of reasons which might justify a refusal of a request for environmental information – including the generality of the request or its manifest unreasonableness, claims to confidentiality, asserted adverse effect on international relations, public security, national defence or the course of justice, or, except where the request relates to information on emissions into the environment, claims to confidentiality or the protection of the environment to which such information relates (such as the location of rare species) – the Article goes on to provide that these grounds of refusal

shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure ... weighed against the interest served by the refusal.

5.19 The importance of access to information as a mechanism of ensuring that the Member State authorities duly abides by the law in environmental cases was underlined by the CJEU in *Solvay v. Walloon Region*, where the Luxembourg Court observed:

“[T]hird parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority was aware, in accordance with the rules laid down by national law, that an adequate prior evaluation had been carried out in accordance with the requirements of Directive 85/337.

58 Moreover, interested parties, as well as the other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with that obligation of the competent authority as to an evaluation.

59 In that regard, effective judicial review, which must be able to extend to the lawfulness of the reasons for the decision being challenged, presupposes in general that the court before which the matter is brought may require the competent authority to communicate those reasons. However, where it is more particularly a question of securing the effective protection of a right conferred by EU law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its decision is based, either in the decision itself or in a subsequent communication made at their request.⁷⁴

60 That subsequent communication may take the form not only of an express statement of the reasons but also of the making available of relevant information.”⁷⁵

5.20 In *Flachglas Torgau GmbH* the Grand Chamber CJEU confirmed that “public authorities should not be able to determine unilaterally the circumstances in which the confidentiality referred to in article 4(2) of Directive 2003/4 can be invoked”.⁷⁶

5.21 In *Fish Legal* the Grand Chamber CJEU reiterated that the Aarhus Convention (and consequently Directive 2003/4) seeks, among other things, “to achieve the widest possible systematic availability and dissemination to the public” of environmental information. Accordingly the Court ruled privatised water companies fall within the ambit of the environmental freedom of information regime “in respect of all the environmental information which they hold” if they can be said to be vested as a matter of national law with “special powers beyond those which result from the normal rules applicable in relations between persons governed by private law” and hence fall within the ambit of Article 2(2)(b). The CJEU records (at para 54) that “the water companies concerned have certain powers under the applicable national law, such as the power of compulsory purchase, the power to make byelaws relating to waterways and land in their ownership, the power to discharge water in certain circumstances, including into private watercourses, the right to impose temporary hosepipe bans and the power to

⁷⁴ See Case 222/86 *Heylens* [1987] ECR 4097 at [15], *Mellor* [2009] ECR I-3799 at [59]

⁷⁵ Case C-182/10 *Solvay and others v. Région Wallonne* [2012] 2 CMLR 19 (ECJ, (16 February 2012))

⁷⁶ Case C-204/09 *Flachglas Torgau GmbH v Federal Republic of Germany* [2013] QB 212 (CJEU Grand Chamber) at para 63

decide, in relation to certain customers and subject to strict conditions, to cut off the supply of water.” Separately if the system of national regulation is such that a privatised water company could not be said to have power to “determine in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it” then the company will fall within the ambit of Article 2(2)(c) and has an obligation of public disclosure but only in respect of the environmental information which it holds “in the context of the supply of those public services”. Companies are not required to provide environmental information if it is not disputed that the information does not relate to the provision of those public services but if this is disputed or is uncertain then the information in question must be provided. In relation to the Article 2(2)(c) control test, the CJEU observed as follows:

“69. The manner in which such a public authority may exert decisive influence pursuant to the powers which it has been allotted by the national legislature is irrelevant in this regard. It may take the form of, inter alia, a power to issue directions to the entities concerned, whether or not by exercising rights as a shareholder, the power to suspend, annul after the event or require prior authorisation for decisions taken by those entities, the power to appoint or remove from office the members of their management bodies or the majority of them, or the power wholly or partly to deny the entities financing to an extent that jeopardises their existence.

70 The mere fact that the entity in question is, like the water companies concerned, a commercial company subject to a specific system of regulation for the sector in question cannot exclude ‘control’ within the meaning of Article 2(2)(c) of Directive 2003/4 ...

71 If the system concerned involves a particularly precise legal framework which lays down a set of rules determining the way in which such companies must perform the public functions related to environmental management with which they are entrusted, and which, as the case may be, includes administrative supervision intended to ensure that those rules are in fact complied with, where appropriate by means of the issuing of orders or the imposition of fines, it may follow that those entities do not have genuine autonomy vis-à-vis the State, even if the latter is no longer in a position, following privatisation of the sector in question, to determine their day-to-day management.”⁷⁷

⁷⁷ Case C-279/12 *Fish Legal and another v Information Commissioner and others* EU:C:2013:853

6. OPEN JUSTICE AND ACCESS TO COURT DOCUMENTS

No right of access to CJEU court pleadings

6.1 In an Order of 3 April 2000 in Case C-376/98 *Germany v European Parliament* the CJEU stated that the parties in action before the CJEU are, in principle, free to disclose their own written submissions (which would include any documents appended thereto). The Court observed as follows:

2. ... In these proceedings, the Council and Parliament, the defendants, requested, in a letter of 30 June 1999 and in their rejoinders respectively, that the documents produced by the German Government as Annexes 2, 4 and 5 to its reply be removed from the case-file.

3. Annexes 2, 4 and 5 to the reply are three applications by which three companies instituted proceedings against the Parliament and Council before the Court of First Instance seeking annulment of the directive.

4 ... The Council submits that production of those applications infringes the principle of the confidentiality of legal proceedings.

....
5. The Parliament likewise takes the view that production of those applications by the German Government in support of its arguments on the facts, regarding the economic repercussions of the directive, and, in the case of Annex 5, to support the legal arguments set out in its application infringes the principle that the case-files in legal proceedings are confidential ...

....
8 In its observations of 31 August 1999 on the Council's request, the German Government first of all argues that all of the companies that have brought actions before the Court of First Instance sent to it copies of their applications for purposes of information and accepted that those applications be annexed to the German Government's reply. It submits that the confidential nature of an application depends exclusively on the decision of the applicant and that there is no general principle of confidentiality of judicial proceedings, with the consequence that there can be no infringement of any such principle. ...

9. The arguments put forward by the Council and the Parliament must be rejected.

10 So far as infringement of the principle of confidentiality is concerned, there is no rule or provision under which parties to proceedings are authorised to or prevented from disclosing their own written submissions to third parties. Apart from exceptional cases where disclosure of a document might adversely affect the proper administration of justice, which is not the case here, the principle is that parties are free to disclose their own written submissions.”⁷⁸

⁷⁸ Case C-376/98 *Germany v European Parliament* [2000] ECR I-2249

6.2 In his Opinion in *Sweden and Association de la Presse Internationale asbl (API) v Commission* A-G Maduro stated that the CJEU should take the opportunity of expressly departing from and over-ruling this Order. He observed:

“14 While litigation is ongoing, it should be for the court, not the commission, to decide whether the public should have access to the documents in a particular case....During the course of litigation, the court is master of the case. Only the court is in a position to weigh the competing interests and to determine whether the release of documents would cause irreparable harm to either party or undermine the fairness of the judicial process. If the decision to release documents is left to the parties, they may be too cautious in releasing documents where they fear damage to their own interests and too ready to release documents that might cause harm to their adversaries.

...

15. I believe that the best conclusion in the present case would be to find that all documents submitted by parties in pending cases fall outside the scope of Regulation No 1049/2001. Once submitted to the court, they become elements of the judicial process, the administration of which lies within the exclusive competence of the court. This does not mean that the court itself is not subject to constraints when deciding whether to allow access. On the contrary, it may be under a duty to assess requests for access in the light of the principles of fairness and transparency, taking carefully into account all the interests at stake. Put differently, justice should be administered in a fair and transparent way, and it is for the court to ensure that this requirement is satisfied in all cases.

16 My position is in tension with the order of the court in Germany v European Parliament (Case C-376/98) [2000] ECR I-2247. If it were true that, as the court stated in that order, the parties are, in principle, free to disclose their own written submissions (ibid, para 10) the court would be unable to control access to the documents in the case file.

Furthermore, if, as that order indicates, a party’s voluntary release of its own submissions is not to be viewed as undermining the integrity of the judicial process, there would be no basis for the commission’s blanket refusal to release submissions in pending cases. Whether documents are released willingly or because it is required by regulation, the potential for the release to generate public pressure affecting the integrity of judicial proceedings or disadvantaging one of the parties would be the same.

*Actually, the order in *Federal Republic of Germany v European Parliament* is slightly contradictory in the following sense: while recognising that the parties are, in principle, free to disclose their written submissions, the court also notes that in exceptional circumstances disclosure might adversely affect the proper administration of justice. What follows, logically, is that the question of disclosure in those exceptional cases where the proper administration of justice is at stake cannot be left to the parties but should be decided by the court. But who is going to assess whether a specific case is sufficiently exceptional to merit the court’s attention? The answer is obvious: only the court itself can make such an assessment. It is equally obvious that the court’s intervention is meaningful only if it takes place before any disclosure by one of the parties. If a party releases a document which should have*

remained secret and, as a result, the integrity of the judicial process is threatened, no later action by the court can remedy the damage.

....

18 Thus, the time has come for the court to reconsider its statement in *Federal Republic of Germany v European Parliament* and to make clear that the court, not the parties, must control access to documents in pending cases.

Although the court 'has always shown itself to be circumspect with regard to reversing an interpretation of the law given in earlier judgments' in order to protect the important values of stability, uniformity, cohesion and legal certainty ⁷⁹ it has been willing to reconsider its past decisions in exceptional circumstances. This seems to me to be one of those situations in which reconsideration is justified. When the order was made, its full effect on the issue of access to judicial documents was not clear."⁸⁰

6.3 In its decision in *Sweden and Association de la Presse Internationale asbl (API) v Commission* the CJEU did not expressly follow the approach of the A-G Maduro, nor did it overrule the Order in the earlier *Germany v. Parliament* case, noting instead as follows:

"80. [I]t is quite clear from the wording of article 255EC that the court is not subject to the obligations of transparency laid down in that provision.

81 The purpose of that exclusion emerges even more clearly from article 15FEU, which replaced article 255EC and which, while extending the scope of the principle of transparency, specifies in the fourth subparagraph of paragraph 3 thereof that the Court of Justice is to be subject to paragraph 3 only when exercising its administrative tasks.

82 It follows that the fact that the Court of Justice is not among the institutions which, in accordance with article 255EC, are subject to those obligations is justified precisely because of the nature of the judicial responsibilities which it is called upon to discharge under article 220EC.

...

84 Thus, it follows both from article 255EC and from Regulation No 1049/2001 that the limitations placed on the application of the principle of transparency in relation to judicial activities pursue the same objective: that is to say, they seek to ensure that exercise of the right of access to the documents of the institutions does not undermine the protection of court proceedings.

85 In that regard, it should be noted that the protection of court proceedings implies, in particular, that compliance with the principles of equality of arms and the sound administration of justice must be ensured.

....

86. [I]f the content of the commission's pleadings were to be open to public debate, there would be a danger that the criticism levelled against them,

⁷⁹ See my opinion in Joined Cases C-94/04 and C-202/04 *Cipolla v Fazari*[2006] ECR I-11421, point 28

⁸⁰ Joined Cases C-514, C-528 & C-532/07P *Sweden and Association de la Presse Internationale asbl (API) v Commission* [2010] ECR I-8533

whatever its actual legal significance, might influence the position defended by the commission before the EU courts.

87 In addition, such a situation could well upset the vital balance between the parties to a dispute before those courts, the state of balance which is at the basis of the principle of equality of arms, since only the institution concerned by an application for access to its documents, and not all the parties to the proceedings, would be bound by the obligation of disclosure.

...
92 As regards, secondly, the sound administration of justice, the exclusion of judicial activities from the scope of the right of access to documents, without any distinction being drawn between the various procedural stages, is justified in the light of the need to ensure that, throughout the court proceedings, the exchange of argument by the parties and the deliberations of the court in the case before it take place in an atmosphere of total serenity.

93 Disclosure of the pleadings in question would have the effect of exposing judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings.

....
95 Such disclosure would flout the special nature of that category of documents and would be tantamount to making a significant part of the court proceedings subject to the principle of transparency. As a consequence, the effectiveness of the exclusion of the Court of Justice from the institutions to which the principle of transparency applies, in accordance with article 255 EC, would be largely frustrated.

96 In addition, such a presumption is also justified in the light of the Statute of the Court of Justice of the European Union and the Rules of Procedure of the EU courts ⁸¹

97 Although the Statute of the Court of Justice provides that the hearing in court is to be public (article 31), it restricts those entitled to receive communication of procedural documents to the parties and to the institutions whose decisions are in dispute: article 20, second paragraph.

98 Similarly, the Rules of Procedure of the EU courts provide for procedural documents to be served only on the parties to the proceedings. In particular, article 39 of the Rules of Procedure of the Court of Justice, article 45 of the Rules of Procedure of the General Court and article 37(1) of the Rules of Procedure of the Civil Service Tribunal provide that the application is to be served only on the defendant.

99 It is clear, therefore, that neither the Statute of the Court of Justice nor the above Rules of Procedure provide for any third-party right of access to pleadings submitted to the court in court proceedings.” ⁸²

⁸¹ See, by analogy, Case C-139/07P *Commission of the European Communities v Technische Glaswerke Ilmenau GmbH (Kingdom of Denmark intervening)*[2011] 1 CMLR 79, para 55.

⁸² *Joined Cases C-514, C-528 & C-532/07P Sweden and Association de la Presse Internationale asbl (API) v Commission* [2010] ECR I-8533

6.4 Trying to reconcile the order in 2000 with the observations in of the Grand Chamber in its 2010 decision one could say that in the *Sweden* case the court simply established that third parties have no general right of access to the pleadings upon which the CJEU is proceeding in pending cases. Nor is the CJEU bound by the general principle of transparency. The Order of 2000 makes it plain however that it is open to a party to proceedings before the CJEU to make its own pleadings public should it choose to do so.

6.5 In its decision in *Sweden and Association de la Presse Internationale asbl (API) v Commission*, the Grand Chamber CJEU seemed to set little store by the idea of compliance with the principle of transparency in decision making – at least in the context of CJEU proceedings – as being in itself of overriding public interest, and summarily dismissed 'mere claims' made by API to the effect that the public's right to be informed about important issues of EU law – such as those concerning competition, and about issues which are of great political interest raised by infringement proceedings against Member States – should 'prevail over the protection of the court proceedings'. Instead, in the Grand Chamber's view,

*it is only where the particular circumstances of the case substantiate a finding that the principle of transparency is especially pressing that that principle can constitute an overriding public interest capable of prevailing over the need for protection of the disputed documents and, accordingly, capable of justifying their disclosure.*⁸³

6.6 The decision of the Grand Chamber CJEU in *Sweden and Association de la presse internationale asbl (API) v Commission* that there is no public right of access to written pleadings before the CJEU is difficult to justify, particularly against the apparent lack of transparency in the Court's actual reasoning in so many cases given the requirement for composite unanimous non-dissenting judgments which too often conceal more than they reveal in Delphic prose.

The principle of open justice in UK law

⁸³ *Ibid*, at para 156.

6.7 The decision and approach of the CJEU is particularly difficult to justify within the context of the United Kingdom where it has been a constant theme of the courts that rights of open justice require that the public should be able to scrutinise both written and oral evidence and argument upon which the court has been invited to arrive at its decision. The achievement of that purpose requires that a member of the public who is an observer should be afforded access to the same written submissions and witness statements, given to the judge and referred to in open court. What this means is that there is a strong presumption in favour all court papers lodged with the court (including parties arguments and the court pleadings) to be released and made available to the public and to the press on request. Thus in *GIO Personal Investment Services Ltd v Liverpool and London Steamship P&I Association Ltd* [1999] 1 WLR 984 Potter LJ noted at 996E-G

“If, as in the instant case, an opening speech is dispensed with in favour of a written opening (or a skeleton argument treated as such) which is not read out, or even summarised, in open court before the calling of the evidence, it seems to me impossible to avoid the conclusion that an important part of the judicial process, namely the instruction of the judge in the issues of the case, has in fact taken place in the privacy of his room and not in open court. In such a case, I have no doubt that, on application from a member of the press or public in the course of the trial, it is within the inherent jurisdiction of the court to require that there be made available to such applicant a copy of the written opening or skeleton argument submitted to the judge.

6.8 In *SmithKline Beecham Biologicals SA v. Connaught Laboratories* [2000] FSR 1 Lord Bingham CJ observed at the close of his judgment (at page 15-16):

"Since the date when Lord Scarman expressed doubt in Home Office v. Harman [1983] AC 280 as to whether expedition would always be consistent with open justice, the practices of counsel preparing skeleton arguments, chronologies and reading guides, and of judges pre-reading documents (including witness statements) out of court, have become much more common. These means of saving time in court are now not merely permitted, but are positively required, by practice directions. The result is that a case may be heard in such a way that even an intelligent and well-informed member of the public, present throughout every hearing in open court, would be unable to obtain a full understanding of the documentary evidence and the arguments on which the case was to be decided.

In such circumstances, there may be some degree of unreality in the proposition that the material documents in the case have (in practice as well as in theory) passed into the public domain. That is a matter which gives rise to concern. In some cases (especially cases of obvious and genuine public interest) the judge

may in the interests of open justice permit or even require a fuller oral opening, and fuller reading of crucial documents, than would be necessary if economy and efficiency were the only considerations. In all cases the judge's judgment (delivered orally in open court, or handed down in open court in written form with copies available for the press and public) should provide a coherent summary of the issues, the evidence and the reasons for the decision.

...

Public access to documents referred to in open court (but not in fact read aloud and comprehensibly in open court) may be necessary, with suitable safeguards, to avoid too wide a gap between what has in theory, and what has in practice, passed into the public domain.

6.9 In *Lilly Icos Ltd v Pfizer Ltd (2)* [2002] 1 WLR 2253 the Court of Appeal set out (at paragraphs 25(i)) the general principle of open justice:-

*“25 i) The court should start from the principle that very good reasons are required for departing from the normal rule of publicity. That is the normal rule because, as Lord Diplock put it in *Home Office v Harman* [1983] AC 280 at p303C, citing both *Jeremy Bentham* and *Lord Shaw of Dunfermline* in *Scott v Scott**

“Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.”

The already very strong English jurisprudence to this effect has only been reinforced by the addition to it of this country's obligations under articles 6 and 10 of the European Convention.

6.10 In *R v Howell* [2003] EWCA Crim 486 Judge LJ said, at para 197:

“Subject to questions arising in connection with written submissions on [public interest immunity] applications, or any other express justification for non-disclosure on the basis that the written submissions would not properly have been deployed in open court, we have concluded that the principle of open justice leads inexorably to the conclusion that written skeleton arguments, or those parts of the skeleton arguments adopted by counsel and treated by the court as forming part of his oral submissions, should be disclosed if and when a request to do so is received.”

6.11 In *R (Mohammed) v Secretary of State for Foreign & Commonwealth Affairs* [2011] QB 218 Lord Judge CJ said:-

“38. Justice must be done between the parties. The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law. For that reason, every judge sitting in judgment is on trial. So it should be, and any exceptions to the principle must be closely limited. In reality very few citizens can scrutinise the

judicial process: that scrutiny is performed by the media, whether newspapers or television, acting on behalf of the body of citizens. Without the commitment of an independent media the operation of the principle of open justice would be irretrievably diminished.

39. There is however a distinct aspect of the principle which goes beyond proper scrutiny of the processes of the courts and the judiciary. The principle has a wider resonance, which reflects the distinctive contribution made by the open administration of justice to what President Roosevelt described in 1941 as the "...first freedom, freedom of speech and expression". In litigation, particularly litigation between the executive and any of its manifestations and the citizen, the principle of open justice represents an element of democratic accountability, and the vigorous manifestation of the principle of freedom of expression. Ultimately it supports the rule of law itself. Where the court is satisfied that the executive has misconducted itself, or acted so as to facilitate misconduct by others, all these strands, democratic accountability, freedom of expression, and the rule of law are closely engaged.

40. Expressed in this way, the principle of open justice encompasses the entitlement of the media to impart and the public to receive information in accordance with article 10 of the European Convention of Human Rights. Each element of the media must be free to decide for itself what to report."

6.12 All of these principles were recently summed up and affirmed in the judgment of Lord Reed in *A v. BBC Scotland* [2014] UKSC 25, 2014 SC (UKSC) 151 where he states makes clear:

"The general principle of open justice

[23] It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy. As Toulson LJ explained in R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court [2013] Q.B., p.630, para.1, society depends on the courts to act as guardians of the rule of law. Sed quis custodiet ipsos custodes? Who is to guard the guardians? In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny.

...

[25] The principle that courts should sit in public as important implications for the publishing of reports of court proceedings. In Sloan v B, 1991 S.C., p.442; 1991 S.L.T., p.550, Lord President Hope, delivering the opinion of the court, explained that it is by an application of the same principle that it has long been recognised that proceedings in open court may be reported in the press and by other methods of broadcasting in the media.

"The principle on which this rule is founded seems to be that, as Courts of Justice are open to the public, anything that takes place before a Judge or

Judges is thereby necessarily and legitimately made public, and, being once made legitimately public property, may be republished”⁸⁴

[26] The connection between the principle of open justice and the reporting of court proceedings is not however merely functional. Since the rationale of the principle is that justice should be open to public scrutiny, and the media are the conduit through which most members of the public receive information about court proceedings, it follows that the principle of open justice is inextricably linked to the freedom of the media to report on court proceedings.

Exceptions to the principle of open justice

[27] Since the principle of open justice is a constitutional principle to be found in the common law, it follows that it is for the courts to determine its ambit and its requirements, subject to any statutory provision. The courts therefore have an inherent jurisdiction to determine how the principle should be applied.”

...

[31] More recently still, the importance of the common law principle of open justice was emphasised by nine justices of this court in Bank Mellat v HM Treasury. Lord Neuberger, giving the judgment of the majority, described the principle as fundamental to the dispensation of justice in a modern, democratic society (para 2). He added that it had long been accepted that, in rare cases, a court had an inherent power to receive evidence and argument in a hearing from which the public and the press were excluded, but said that such a course might only be taken (i) if it was strictly necessary to have a private hearing in order to achieve justice between the parties and (ii) if the degree of privacy was kept to an absolute minimum.

...

[32] It has also been recognised in the English case law, consistently with Lord Neuberger’s requirement of the degree of privacy being kept to a minimum, that where the interests of justice require some qualification of the principle of open justice, it may not be necessary to exclude the public or the press from the hearing: it may suffice that particular information is withheld. ...

....

41. ... Whether a departure from the principle of open justice was justified in any particular case would depend on the facts of that case. As Lord Toulson observed in Kennedy v Charity Commissioner (para 113), the court has to carry out a balancing exercise which will be fact specific. Central to the court’s evaluation will be the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and, conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others.

⁸⁴ *Richardson v Wilson* (1879) 7 R., p.241 per Lord President Inglis

6.13 Somewhat shockingly, one of the cases in which the UK courts felt it necessary to conceal the identities of litigants was *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 7 [2017] 2 WLR 583 the recent challenge to the attempt by the UK Government to trigger the process for the withdrawal of the United Kingdom from the EU without prior Parliamentary legislative authorization. In the light of threats made against the individual in whose name the challenge had been brought the UK Supreme Court made an order forbidding the publication of the names or any other means of identifying those claims whose identities were not already public. They also permitted the lead claimant Gina Miller to attend court accompanied by two personal bodyguards

7. EU SECONDARY LEGISLATION ON DATA PROTECTION

Data protection and the EU institutions

7.1 Regulation (EC) No 45/2001⁸⁵ was made by the EU legislature under reference to Article 286 EC (what is now Article 16(2) TFEU, the provisions of which are outlined in para 16.10 above). Those protected under the Regulation are identified or identifiable individuals whose personal data are processed by EU institutions or bodies in any context whatsoever. The Regulation's provisions do not apply to wholly anonymised data; but the Regulation is not limited, for example, simply to those who are employed by the EU.

7.2 'Personal data' for the purposes of the Regulation comprise any information held on an individual; the Regulation does not apply to information held on a company or other legal person.⁸⁶ Particularly sensitive personal data are those which may disclose details of an individual's racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, health or sex life. The lawful processing of such information has either to be expressly consented to or otherwise shown to be specifically necessary for a legitimate purpose (Article 10(2), which may include for the purposes of preventative medicine, medical diagnosis, the provision of care or treatment, or the management of health-care services; and any such processing will be subject to the rules on medical confidentiality (Article 10(3)).

7.3 Article 10(4) provides that data concerning an individual's offences, criminal convictions, or security measures or authorisations may lawfully be processed only if specifically properly authorised, whether under the Treaty or EU secondary legislation, or by the European Data Protection Supervisor. The European Data Protection Supervisor is the independent EU supervisory authority who may grant exemptions, guarantees, authorisations and impose conditions relating to data processing operations, to ensure compliance with the requirements of the regulations within the EU. Data subjects may also complain to the European Data Protection Supervisor under Article 32(2), of alleged breach of the requirements of data protection in relation to them. The Regulation also

⁸⁵ [2001] OJ L8/1.

⁸⁶ See Case T-198/03 *Bank Austria Creditanstalt v Commission* [2006] ECR II-1429 at para 95.

requires that in each EU institution or body, one or more Data Protection Officers should ensure that the provisions of the Regulation are applied and should advise data controllers on fulfilling their obligations under it.

7.4 The Regulation has the dual aim of ensuring individuals' fundamental right to protection of their private data, while facilitating – for purposes connected with the exercise of their respective legal competence – the free flow of personal data between Member States and the EU, and within the EU itself. To this end the Regulation seeks to ensure consistency in the relevant rules and procedures applicable in different EU legal contexts, for example in judicial cooperation in criminal affairs or cooperation between police and customs authorities. Thus the substantive provisions of Article 4 of the EU Regulation effectively mirror the general principles already set out in Article 5 of the Council of Europe Data Protection Convention 1981 (see also para 16.21 above), by requiring in effect that personal data used by the EU institutions should be:

- a) obtained and processed fairly and lawfully;
- b) stored for specified and legitimate purposes and not used in a way incompatible with those purposes;
- c) adequate, relevant and not excessive in relation to the purposes for which they are stored;
- d) accurate and, where necessary, kept up to date; and
- e) preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.

7.5 The Regulation also provides:

- a) a right of access by the data subject to the information held on him (Article 13);
- b) a right to obtain rectification of any errors therein (Article 14);

- c) a right to block *ad interim* the use of data the accuracy, continued need for, or lawful retention of which is disputed (Article 15);
- d) a circumscribed right for the data subject to object to the particular use of his data (Article 18); and
- e) the right to have unlawfully or improperly held data erased from the record (Article 16).

7.6 Article 32(1) of the Regulation confirms that the CJEU has jurisdiction to hear all disputes which relate to its provisions, including claims for damages; and under Article 32(4), any person who has suffered damage because of an unlawful processing operation or any action incompatible with this Regulation shall have the right to have the damage made good in accordance with Article 340 TFEU (formerly Article 288 EC). Lastly, Recital 36 to the Regulation notes that the Regulation 'does not aim to limit Member States' room for manoeuvre in drawing up their national laws on data protection under Article 32 of Directive 95/46/EC'.

7.7 The Court of Justice has held that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary.⁸⁷ It has also held that no automatic priority can be conferred on the objective of transparency over the right to protection of personal data, even if important economic interests are at stake.⁸⁸ The Grand

⁸⁷ See Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* [2008] ECR I-9831, para 56.

⁸⁸ See Case C-28/08 P *Commission v Bavarian Lager*, 29 June, [2010] ECR I-nyr, paras 75–79. For commentary on this decision see European Data Protection Supervisor (“EDPS”) Paper “Public access to documents containing personal data after the *Bavarian Lager* ruling” at http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/BackgroundP/11-03-24_Bavarian_Lager_EN.pdf He observes at page 6:

‘In case of a public access request for a document containing personal data, such as in the *Bavarian Lager* case, the rules on data protection are entirely applicable, with Article 8(b) having crucial importance. It follows from the judgment that the Commission, under Article 8(b) of the data protection regulation, should in principle have weighed up the various interests of the parties concerned. However, since *Bavarian Lager* had not provided any express and legitimate justification, this balance of interests could not be made by the Commission. The Court was therefore not in a position to evaluate the outcome of such a balancing test. As a consequence, the judgment itself provides no guidance as to the way in which to strike a fair balance between the different interests at stake. The Court furthermore considered that the Commission rightly verified whether the data subjects *had* given their consent to the disclosure of their personal data and in the absence of express consent rightly required *Bavarian Lager* to establish the necessity of the transfer. The

Chamber of the CJEU has held a measure disclosing personal data of and on an individual (as distinct from a legal corporation, since 'the seriousness of the breach of the right to protection of personal data manifests itself in different ways for, on the one hand, legal persons and, on the other, natural persons'⁸⁹) may yet be determined to be proportionate and hence lawful where there is a specific decision which expressly considers and seeks to balance that individual's claim to privacy and confidentiality against such general considerations as the principle of transparency of public acts or the open and proper expenditure of public funds.⁹⁰

Data protection and the Member States

7.8 Data Protection Directive 95/46/EC was also passed by the EU legislature under what is now Article 16(2) TFEU. The Data Protection Directive creates provisions which parallel – for Member States when acting within the sphere of EU law – the provisions of Regulation (EC) No 45/2001 which apply to activities of the EU institutions. The Directive has the same dual aim as the Data Protection Regulation, i.e. of protecting the fundamental rights and freedoms of natural persons – and in particular their right to privacy in the processing of personal data – while allowing for the continued free flow and processing of personal data EU-wide.

7.9 Article 3(2) provides that the Directive's provisions do not apply to Member States' data-processing activities in the field of public security, defence and State security (including the economic well-being of the State when the processing operation relates to State security matters), or to the activities of the State in areas of criminal law.⁹¹ And even where

EDPS takes the view that, with regard to the analysis under Article 8(b), these considerations should not be read as obliging the institutions to request the consent of the data subject in every case in which public disclosure of personal data is asked for. The data protection rules provide that the legitimate interests of the data subject may be sufficiently safeguarded if he or she is afforded the right *to object* to the disclosure as provided for in Article 18 of the data protection regulation.'

⁸⁹ See Joined Cases C-92/09 & C-93/09 *Volker und Markus Schecke GbR v Land Hessen* [2010] ECR I-11063 at para 87.

⁹⁰ Joined Cases C-465/00, C-138/01 & C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989.

⁹¹ In Case C-524/06 *Heinz Huber v Germany* [2008] ECR I-9705, the Grand Chamber ruled that the putting in place by a Member State, for the purpose of fighting crime, of a system for processing personal data specific to EU citizens who are not nationals of that Member State was contrary to

a data-processing activity falls within the ambit of the Directive, Article 13(1) allows for restrictions to be imposed by Member States on the subject's rights of access and information in so far as they are necessary to safeguard, for example, national security,⁹² defence or public safety, criminal investigations and prosecutions,⁹³ and action in respect of breaches of ethics in regulated professions.

7.10 Otherwise the Data Protection Directive seeks to ensure that there is a common level of protection of the rights and freedoms of individuals with regard to the processing of personal data which is equivalent in all Member States. The Directive does not seek minimal base level harmonisation of Member States' laws but is, instead, aimed at harmonisation which is generally complete, so as to allow for free movement of data throughout the EU which is consistent with respect for the protection of private life. The Directive therefore allows relatively limited scope for variation in the implementation of its provisions within the Member State. In *C-468/10 Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) v Administración del Estado* [2011] ECR I-12181 the CJEU confirmed the provisions of the DPD have to be read and applied in a manner which is compatible with the relevant rights contained in the CFR, and/or with other general principles of EU law such as the principle of proportionality. As the Court of Justice observed in *Criminal Proceedings against Bodil Lindqvist*, in relation to the Data Protection Directive 95/46/EC:

the nationality discrimination provisions of the Treaty, and that the storage and processing of personal data containing individualised personal information in this Central Register of Foreign Nationals for statistical purposes could not, on any basis, be considered to be 'necessary' within the terms of Directive 95/46/EC.

⁹² In Joined Cases C-317/04 & C-318/04 *European Parliament and the European Data Protection Supervisor (EDPS) v Council and Commission* [2006] ECR I-4721, the Grand Chamber annulled an Agreement between the EU and the USA for the transfer of personal data contained in the Passenger Name Record of air passengers from European air carriers to the US Department of Homeland Security, on the basis of there being in the Agreement inadequate protection of personal data on such transfer to the US authorities.

⁹³ See also the Electronic Data Retention Directive 2006/24/EC [2006] OJ L105/54, which, with a view to detecting, preventing and safeguarding common security, requires the Member States to retain for a certain time data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks. See Case C-301/06 *Ireland v Council* [2009] ECR I-593, an unsuccessful challenge to the legal basis for the measure, for a discussion of the background to this Directive.

[I]t is for the authorities and courts of the Member States not only to interpret their national law in a manner consistent with [the] Directive ... but also to make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law, such as inter alia the principle of proportionality.

... [T]he provisions of Directive 95/46/EC do not, in themselves, bring about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are applicable within the European Union and are enshrined inter alia in Article 10 of the ECHR. It is for the national authorities and courts responsible for applying the national legislation implementing Directive 95/46/EC to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order.⁹⁴

7.11 Article 1 of Directive 95/46/EC identifies the objective of the Data Protection Directive as being 'to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data'. It is therefore primarily a privacy protection measure, rather than a general 'freedom of information measure', although the principle of public access to official documents is to be taken into account by Member States when implementing the principles set out in the Directive (see Recital 72). The purpose of the right of access to information held on an individual is primarily in order to verify in particular the accuracy of the data and the lawfulness of the data processing (Recital 41); and even then the interests or the rights and freedoms of the data subject are not overriding.⁹⁵

7.12 Article 2(a) of Directive 95/46/EC defines 'personal data' as meaning 'any information relating to an identified or identifiable natural person'. Again, as with the EU Data Protection Regulation, its provisions do not apply to anonymous (or properly anonymised) data (see Recital 26). Article 3(1) of Directive 95/46 states that the provisions of the Directive

shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal

⁹⁴ Case C-101/01 *Criminal Proceedings against Bodil Lindqvist* [2003] ECR I-12971 at paras 87 and 90.

⁹⁵ See Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 80, where the Court of Justice observed that the right to the protection of personal data is not an absolute right but must be considered in relation to its function in society.

data which form part of a filing system or are intended to form part of a filing system.

The Directive therefore makes a distinction between automatic processing of data held on computer and the manual processing of hard copies. While it is necessary for hard copy data to be part of a relevant structured filing system relating to individuals to be covered by the Data Protection Directive, any data which are in fact stored electronically will fall within the Data Protection Directive regardless of whether they form part of a relevant filing system.

7.13 Like the EU Data Protection Regulation, substantive data protection provisions of Article 6 of Directive 95/46/EC also effectively mirror the general principles already set out in the Council of Europe Data Protection Convention 1981, by requiring that personal data be:

- a) obtained and processed fairly and lawfully;
- b) stored for specified and legitimate purposes, and not used in a way incompatible with those purposes;
- c) adequate, relevant and not excessive in relation to the purposes for which they are stored;
- d) accurate and, where necessary, kept up to date; and
- e) preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.

7.14 Article 9 of the Directive seeks to reconcile two fundamental rights – the protection of privacy and freedom of expression – by requiring Member States to provide for a number of derogations or limitations in relation to the protection of data (and, therefore, in relation to the fundamental right to privacy) for journalistic purposes, or for the purpose of artistic or literary expression, which fall within the scope of the fundamental right to freedom of expression. The Grand Chamber of the CJEU has observed that

in order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary, first, to interpret notions relating to that freedom, such as journalism, broadly. Secondly, and in order to achieve a balance

*between the two fundamental rights, the protection of the fundamental right to privacy requires that the derogations and limitations in relation to the protection of data provided for in the chapters of the directive referred to above must apply only in so far as is strictly necessary.*⁹⁶

7.15 Article 12(a) of the Data Protection Directive requires Member States to ensure a right of access to information on the recipients or categories of recipient of personal data, and on the content of the data disclosed not only in respect of the present but also in respect of the past. The Court of Justice has held that rules which limit the storage of information on the recipients or categories of recipient of personal data (and on the content of the data disclosed) to a period of one year – and correspondingly limit access to that information – do not in principle appear to strike a fair balance in relation to the privacy interests of the data subject.⁹⁷

7.16 Lastly, Article 28 of the Directive requires that properly independent supervisory authorities be set up in each Member State to ensure compliance with the provisions of the Data Protection Directive⁹⁸; and Article 23 gives a data subject the right to seek damages in respect of a breach of the data protection requirements as regards that individual.⁹⁹

⁹⁶ See Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* [2008] ECR I-9831, para 56.

⁹⁷ Case C-553/07 *Rijkeboer* [2009] ECR I-3889.

⁹⁸ See Case C-518/07 *European Commission and European Data Protection Supervisor v Germany*, 9 March, [2010] ECR I-nyr, where the CJEU held that by making the authorities responsible for monitoring the processing of personal data in the different *Länder* subject to State scrutiny, Germany incorrectly transposed the Directive's requirement that those authorities perform their functions 'with complete independence'.

⁹⁹ In Case T-48/05 *Yves Franchet and Daniel Byk v Commission* [2008] ECR II-1585, an action for damages brought against the EU by the former Director-General and the former Director of Eurostat (Statistical Office of the European Communities) under Art 340 TFEU (formerly Art 288 EC). The General Court refused the claim for compensation in so far as based on material damages but made an award for non-material damages, noting (at para 411): '[T]he applicants experienced feelings of injustice and frustration and ... they sustained a slur on their honour and their professional reputation on account of the unlawful conduct of OLAF and of the Commission. Taking account of the particular circumstances of the present case and of the fact that the applicants' reputation was very seriously affected, the Court evaluates the damage, on an equitable basis, at EUR 56 000.' In *Vidal-Hall and others v Google Inc.* [2015] EWCA Civ 311 [2015] 3 WLR 409 the Court of Appeal held that section 13(2) of the Data Protection Act 1998 which expressly provided that an individual who suffered distress by reason of a contravention by a data controller of any of the requirements of the 1998 Act was entitled to compensation only if he also suffered pecuniary or material loss thereby (or if the contravention related to the processing of personal data for special purposes) was incompatible with the terms and objectives of the Data Protection Directive 95/46/EC which the 1998 bore to implement into UK law. The Court of Appeal considered that the reference to "damage" in article 23 of the Directive should be given its natural and wide meaning so as to include both material and non-material damage. Accordingly, in order to ensure victims

7.17 With effect from 25 May 2018 the Data Protection Directive will be repealed and its provisions replaced by the directly applicable General Data Protection Regulation (EU) 2016/679. An examination of its provisions would require a whole other paper, however.

Data protection and cross-border criminal investigations

7.18 The provisions of the Framework Decision 2008/977/JHA¹⁰⁰ on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, seek to ensure a high level of protection of individuals' right to privacy while still guaranteeing a high level of public safety. The Framework Decision seeks to set out clear rules concerning data transmitted or made available, with a view to enhancing mutual trust between the competent authorities while fully respecting individual fundamental rights. It was adopted on the basis that the existing provisions of EU law on data protection, notably the Data Protection Directive 95/46/EC (above), were insufficient, since the Data Protection Directive did not apply to the processing of personal data in the course of an activity which falls outside the scope of EC law (such as the Third Pillar actions of the Member States under the then EU Treaty), and in any case did not apply to processing operations concerning public security, defence, State security or the activities of the State in areas of criminal law.

7.19 The Framework Decision applies only to data gathered or processed by competent authorities for the purpose of the prevention, investigation, detection or prosecution of criminal offences, or the execution of criminal penalties. It provides that 'personal data' may be collected only for specified, explicit and legitimate purposes. Processing must be lawful and adequate, relevant and not excessive. The rules in this Framework Decision regulating and restricting the transmission of personal data by the judiciary, police or

of data breach the effective remedy to which they were entitled under and in terms of Article 47 of the EU Charter of Fundamental Rights (CFR) for breach of the right to respect for private and family life under article 7 CFR and the right to protection of personal data under article 8 CFR, section 13(2) of the 1998 Act should be disapplied. This would mean that victim of data protection breach would be entitled to compensation under section 13(1) of the 1998 Act for any damage suffered as a result of a data controller's contravention of *any* of the 1998 Act's requirements.

¹⁰⁰ [2008] OJ L350/60.

customs to private parties do not apply to the disclosure of data to private parties (such as defence lawyers and victims) in the context of criminal proceedings. Personal data must be rectified if they are inaccurate, and erased or made anonymous when they are no longer required. The Framework Decisions also provides a right to compensation and a right to a judicial remedy. It may be necessary to inform data subjects about the processing of their data, in particular where there has been particularly serious encroachment on their rights as a result of secret data collection measures, in order to ensure that those data subjects can enjoy effective legal protection.

7.20 The Framework Decision allows for the possibility of archiving collated data in a separate data set if the data are no longer required and used for the prevention, investigation, detection or prosecution of criminal offences, or the execution of criminal penalties. Archiving in a separate data set is also permitted if the archived data are stored in a database with other data in such a way that they can no longer be used for the prevention, investigation, detection or prosecution of criminal offences, or the execution of criminal penalties. The appropriateness of the archiving period should depend on the purposes of archiving and the legitimate interests of the data subjects. In the case of archiving for historical purposes, the Framework Decision allows that a very long period may be envisaged.

7.21 Framework decision 2008/977/JHA will be repealed and its provisions replaced with effect from 6 May 2018 by Directive (EU) 2016/680 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. The provisions of this Directive have to be implemented into national law of the Member State by 6 May 2018.

8. CONCLUSION

8.1 The foregoing survey on rights of access to documents and separately to information within the ambit of EU law will, I hope illustrate the complexity of the issues raised by this subject. It is covered by two fundamental principles – transparency and privacy – which pulling entirely opposite directions from one another. It is almost impossible to reconcile these two principle in the abstract. They have always to be considered in the light of the particular factual circumstances in which they have to be applied.

8.2 This means that any general legislation will always be subject to challenge in litigation. This is not then the most ideal situation for ourselves as citizens. For lawyers, alas, there is much fruitful work in all this still to be done.

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24 February 2017