THE RIGHT TO INFORMATION: A FUNDAMENTAL RIGHT?

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I. WHAT IS TRANSPARENCY AND WHY DO WE NEED IT?

I am asked to talk about the fundamental right to information. Let me start by placing that right in the broader perspective of transparency. The issue of transparency has, during the last decade, been high on the European Union's political agenda. Triggering events were the difficulties surrounding the ratification of the Maastricht Treaty, which brought a lack of public support for the European integration project to the fore. Although transparency is often conflated with the right of access to official documents, transparency is a much broader notion covering a wide set of differing claims. Transparency embraces not only 'openness in government' but also includes concepts such a simplicity and comprehensibility. As a general matter, transparency is born out of a desire to enhance democracy. Democracy is, however, a notoriously vague concept; accordingly, arguments on why transparency is needed and what it entails, widely differ.

1. Openness in government

Why do we want openness in government? There are, I believe, three fundamental reasons.

First, transparency in government *facilitates control of the actions and inactions of public authorities.* It is based on the premise that power corrupts. This is the most traditional understanding of why we need transparency. Two aspects can be further distinguished here, depending on the perspective one takes. From an individual point of view, control requires access to information on one's own position *vis-à-vis* the government in order to be able to defend oneself against potential abuses. The Court of Justice has, for instance, recognised a right of access to the file in the field of competition law and has held that such access is an essential corollary to the right of defence.

From the perspective of the citizen or the public, control is essentially about preventing abuses by those we have chosen to govern us. No agreement exists on how such control can best be assured. The desire to keep governmental abuse and corruption at bay made Sweden adopt in the late 18th century a system of extensive individual rights of access to public documents. The British, on the other hand, have traditionally relied on the concept of ministerial responsibility *vis-à-vis* the parliament in order to prevent abuses and secure public trust.

A second rationale behind openness is a desire to *increase the rationality, deliberateness and effectiveness of the decision-making process* and thus, public confidence in it. The argument is that accountable governors, *i.e.*, governors that can be required to explain their actions to the public, reach better and more rational decisions in a more efficient manner. Openness in government is a two-edged sword however. While political studies have indicated that governing 'in the sunshine' brings about the benefits thus mentioned, too much stress on accountability might also lead to attitudes of legalism and risk aversion (which favours the maintenance of the *status quo*).

In the current debate on transparency in the EU, openness and effectiveness are often portrayed as opposites however. Thus, effectiveness is often invoked as a reason not to open Council meetings to the public. Let me seize this occasion to say something about the issue of **legislative transparency in the Council**. In my opinion, access to documents is not the most pressing need the European Union

encounters in terms of transparency. A truly disturbing fact is the secrecy of the meetings of the Council. According to the Council's Rules of Procedure (the matter is not regulated in the Treaties themselves!), Council meetings are not public, except for the six-monthly policy debates on the presidency's forthcoming work programme and other specific debates if the Council so decides by a unanimous vote. The Council now occasionally holds public debates (which it announces via Internet and which are broadcast by audio-visual means), but openness remains the exception rather than the rule. The Council must, of course, give access to its documents in line with access rules (that will soon be established at the legislative level). Article 207, paragraph 3 EC states in this respect that

> 'the Council shall define the cases in which it is to be regarded as acting in its legislative capacity, with a view of allowing greater access to documents in those cases, while at the same time preserving the effectiveness of its decision-making process. In any event, when the Council acts in its legislative capacity, the results of votes and explanations of vote as well as statements in the minutes shall be made public.'

Article 207, paragraph 3 EC leaves the Council with (too) much discretion, however. First, the Council itself can decide when it acts in a legislative capacity. In its Rules of Procedures, the Council has established that this is the case when the Council adopts rules which are legally binding in or for the Member States, by means of regulations, directives, framework decisions or decisions, on the basis of the relevant provisions of the Treaties. Excluded are, however, discussions leading to the adoption of internal measures, administrative or budgetary acts, acts concerning inter-institutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions. Further, only the results of votes, explanations and statements in the minutes (if any) must rendered public. There is no equivalent of the European Parliament's *Official Journal* debates series, however, and access to further information (position papers and other preparatory documents) is frequently refused on the basis that it would run counter to the 'confidentiality of the Council's proceedings.' Moreover, the wording of Article 207, paragraph 3 appears only to confirm the common assumption that making the public know what really happens in the Council undercuts the efficiency of the decision-making process. This is, in any event, the view of the Council as it was transmitted --without critique-- by the Court of First Instance in *Carvel*:

> '(T)he Council points out that it works through a process of negotiation and compromise, in the course of which its members freely express their national preoccupations and positions. It is essential that those positions remain confidential, particularly if the members are forced to move away from them in order that agreement may be reached, sometimes to the extent of abandoning their national instructions on a particular point. This process of compromise and negotiation is vital to the adoption of Community legislation, and would be jeopardised if delegations were constantly mindful of the fact that the positions they were taking, as recorded in Council minutes, could at any time be made public through the granting of access to those documents, whether or not the Council had authorised such access.'[1]

I am not convinced by this argumentation. Also national legislatures work 'through a process of negotiation and compromise'; the times that national parliaments could be seen as representatives of one nation with one general will are indeed long gone. Neither do I accept the oft-heard argument that secrecy is necessary to foster a spirit of solidarity and mutual understanding that, in turn, facilitates innovative decision-making by consensus. It might very well be that the absence of public awareness of what their institutions did, allowed the new-born Communities to evolve into the innovative, *sui generis* system it has become today. Yet the Council has, I believe, never been the most innovative of institutions; moreover, the days of small, 'club-like' Council meetings geared towards consensus (as well as the days of visionary politicians?) are long gone. As has been pointed out, a Council of soon over twenty members (each with their staff) is no longer a Council but an Assembly.

The Council assumes wide legislative functions; it decides on broad normative matters affecting the European citizens directly in their daily lives. A democracy cannot tolerate that laws are passed behind closed doors. Secrecy of Council meetings is, in my opinion, the source of many 'democracy deficits.' It weakens the position of the European Parliament, even in the co-decision procedure -- for how can the Parliament successfully debate with a partner whose interests and concerns it does not fully perceive? -- and even worse, it curtails the controlling powers of the national parliaments. The Protocol on the role of national parliaments in the European Union annexed by the Treaty of Amsterdam gives the national parliaments the right to

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1 Case T-194/94, *John Carvel and Guardian Newspapers v. Council*, [1995] E.C.R. II-2765, para. 52.

receive in time legislative proposals drawn up by the Commission, but it does not give them a greater access by one *iota* to what happens in the Council than other citizens have. Further, a lack of openness might explain the alleged lack of interest and involvement in European affairs of Council members (recently denounced, among others, by the *European Voice*). One knows that most Council decisions are reached at lower levels, in various committees and working groups. Since they do not speak for the public at Council meetings, national ministers can, so to speak, 'afford' to give poor attention to their files. Their natural tendency to concentrate on national debates, which take place in the limelight.

One often counters the argument for more openness by adducing that open Council meetings do not have a real content since ministers only read out prepared speeches. That risk does of course exist, yet it is innate in all efforts towards more openness. Where governors are required to render their documents public, the tendency is also to have the documents carefully drawn up or reviewed by civil servants (even outside lawyers) who are expected to provide a rational and acceptable explanation for governmental behaviour. Complete openness might not be attainable (nor desirable), yet that does not mean that secrecy is a better option.

A third --in my opinion most important-- rationale links openness more explicitly with citizenship as active participation in political affairs. It considers transparency *an essential condition for the process of will-formation that is crucial in a democratic society*. This rationale leans on theories of deliberative democracy. In this view, openness in government cannot be limited to forms of parliamentary control but must include a wide range of mechanisms enabling participation of citizens in the policy process by means of an effective access to the process and voice within it. Openness is to allow an effective participation of citizens in EU governance, which in turn is to draw the citizen closer to the European Union. Although this rationale for openness is gaining ground, it also remains a contested one. Thus, it has been observed that the US freedom of information act has more often than not been used by commercial interests seeking to gain competitive advantages, which is hardly related to the participation of citizens in government.

In the European Union legal circles, one finds today all three aforementioned reasons for openness. Thus, the second recital to the Commission's proposal for a regulation regarding public access to European Parliament, Council and Commission documents dd. January 26, 2000 (hereafter 'the proposed Transparency Regulation') states that

> 'openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable vis-à-vis the citizen in a democratic system.'

Similarly, a recent resolution of the European Parliament holds that openness

> 'will help to clarify EU policy choices, encourage wide and more balanced input into the policy process, reduce the scope for corruption and abuses of power, and generally help to promote wider public acceptance by European citizens of EU decisions.'[2]

2. Clarity/ comprehensibility

In my view, one of the main reasons for the lack of public support for the European Union is its sheer complexity and, at times, lack of consistency. It is far from clear in the European Union who does what and how decisions are taken. There is, in the European legal order, no real hierarchy of norms, neither does the so-called legal basis --the treaty provision that sets out what can be decided, by whom and how-- sufficiently take account of the scope and character of the norms to be adopted (constitutional, legislative, executive). The problem starts with the so-called European 'constitution' itself, that is, an amalgam of rules mainly flowing from the texts of the European treaties. The European treaties contain more than only constitutional norms. On the other hand, not all norms of a constitutional nature are set out in the Treaties themselves; one can find them in secondary legislation but also in instruments with an unclear legal status (such as inter-institutional agreements) or worse, in instruments that do not result of democratic decision-making processes or that lack publicity.

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[2] European Parliament resolution dd. January 12, 1999, on openness within the European Union, A4-0476/98.

Comitology is an (in)famous example. Article 202, third indent EC entitles the Council, acting unanimously, to establish the principles and rules governing the exercise of implementing powers by the Commission (or, in exceptional cases, by itself). Albeit a matter of first-rate constitutional importance, the legal frame governing executive action is thus being established with little or no parliamentary control (no involvement of the European Parliament, no ratification by the national parliaments). One could add the fact that the new Comitology Decision[3] is accompanied by five declarations, only three of which are published (separately from the Decision itself, in the C-series of the Official Journal). Further, the new Comitology Decision does not provide an exhaustive regulation, but leaves it to the Council to decide, on a case-by-case basis, whether it can reserve implementing powers to itself, and to the Commission to establish standard rules of procedure governing the functioning of the comitology committees. One wonders whether such 'sub-delegations' are compatible with Article 202, third indent EC which requires all principles and rules to be established in advance by way of a Council decision. In particular, issues such as the participation of experts and interest parties in comitology decision-making are not regulated in the Comitology Decision and are thus 'left' to be set out in standard rules of procedure, although these issues can hardly be viewed as matters of internal organisation only.

II. THE RIGHT TO INFORMATION: A FUNDAMENTAL RIGHT?

For some time, European academic opinion has been divided over the question whether or not transparency and in particular access to public documents constitutes a fundamental right. Despite repeated invitations (among others of the European Parliament) the European Courts have hitherto avoided pronouncing on the exact place of transparency in the constitutional order of the Union. The debate on the alleged fundamental status of transparency is fraught with confusion. The confusion starts at the level of terminology: if we admit that there is something fundamental about access to information, should access be considered a human right, a citizen right or rather a fundamental constitutional principle? And more importantly, what consequences does the recognition that access to information is 'fundamental' entail?

[3] Council Decision 99/468/EC, [1999] O.J. L 184/23, *corrigendum* in [1999] OJ L 269/45.

1. Before the Treaty of Amsterdam

The debate arose in the pre-Amsterdam era, that is, at a time the European treaties did not contain any requirements of openness or access to documents (in fact, before the Amsterdam amendments, even the principle of democracy could not be found in the provisions of the European treaties).[4] The sole references to openness could be found in a declaration annexed to the Maastricht Treaty[5] and in a number of conclusions of European Council meetings inviting the institutions (and in particular the Council and the Commission) to adopt measures to grant the citizen the fullest possible access to information. In line with the foregoing, the Council and the Commission adopted on December 6, 1992 the so-called 'Code of Conduct', which sets out the conditions and principles that would have to underlie to rules on access to documents to be adopted by each institution. The Council and the Commission implemented the inter-institutional agreement by way of decisions based on their respective powers to take measures of internal organisation.

In *The Netherlands v. Council,* the Dutch government sought the annulment of Council Decision 93/731 on public access to Council documents (and the aforementioned Code of Conduct) on the grounds that the wrong legal basis had been chosen.[6] With the support of the European Parliament (that intervened in the case) it argued that the right of access to public documents was a fundamental right, and that therefore determining the procedures, conditions and limits for public access could not be left to the discretion of each institution. The Council should rather have followed the normal legislative process, in which also the European Parliament is involved. While Advocate-General Tesauro in his opinion labelled the right of access to information 'increasingly clearly a fundamental civil right,' the Court of Justice only noted a 'trend, which discloses a progressive affirmation of the individual's right

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4 Only in the preambles.

5 Declaration 17: 'The Conference considers that openness of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to information available to the institutions.'

6 Case C-58/94, *The Netherlands v. Council*, [1996] E.C.R. I-2186

of access to documents held by public authorities.' It further held that the Council was entitled to regulate access to documents by virtue of its powers of internal organisation.

Although the judgement has been criticised, I do not think that the Court of Justice sought, in this decision, to deny the fundamental nature of the right to information. Later judgements confirm this. While they never clearly defined the status of access rights in the European legal order, the European Courts have consistently worked on the basis of a 'presumption of openness' when interpreting and applying the Code of Conduct and the Council's and Commission's implementing decisions. Thus for instance, the Court of First Instance observed in *WWF UK* that 'the grounds for refusing a request for access to documents, set out in the Code of Conduct as exceptions, should be construed in a manner which will not render it impossible to attain the objective of transparency expressed in the response of the Commission to the calls of the European Council.' It imposed a fairly narrow interpretation of the exceptions set out in the Code of Conduct, and in particular prescribed a balancing test if institutions wished to invoke the exception of the confidentiality of their proceedings. In *Hautala*, the Court of First Instance explicitly referred to the 'principle of the right of information' as a standard for interpretation of the relevant access decision. Further, while initial annulments of decisions refusing access were based on procedural grounds only (namely on a breach of the institution's duty to give reasons), *Hautala* made clear that judicial scrutiny can also encompass substantial elements such as a review of 'whether there has been a manifest error of assessment of the facts or a misuse of power.' Finally, the European Courts have not hesitated to clarify matters that the access regulations did not address and on these occasions have invariably broadened the scope of access rights. Thus, it was held that access to documents also concern documents of comitology committees (*Rothmans*), that partial access to documents must be granted where possible (*Hautala, Interporc II*) and that access rights also concern documents related to non-community activities (*Svenska*). All these cases suggest that the Courts did not simply apply the existing rules on access to documents, but also helped to shape them in line with a fundamental principle of openness.

Yet why did the Court of Justice not require in *The Netherlands v. Council* a legislative act if it deemed the matter of a fundamental importance? The reason is to be found in the fact that at that time, no legal basis existed which would have entitled the Community legislator to adopt rules on access to documents of the EU institutions.

2. Impact of the Treaty of Amsterdam

Since the Treaty of Amsterdam, the debate on the status of access rights in the European Union legal order and the way they should be regulated has lost much of its relevance. Article 1 TEU states that decisions in the Union are taken 'as openly as possible.' It fully affirms, therefore, that openness in government is a fundamental principle of European Union law. It firmly belongs to the Union's constitutional *acquis* and is to be respected by all institutions as well as the Member States (the latter flows from a conjunctive reading of the Articles 1, 6 and 7 TEU). Constitutional principles should be distinguished from (fundamental) rights. Rights are particular entitlements that individuals can enforce in courts. Principles are often too vague to create a justiciable entitlement as such but have an important interpretative value and may, in exceptional cases, operate as an independent source of rights. Likewise, openness in the European Union is not a 'right' in itself (that is, to the extent the term right is used in a technical, non-political sense). It is a principle that may and should be used by the European Courts as an interpretative device.

Further, Article 255 EC grants any citizen of the Union and any natural or legal person residing or having its registered office in a Member State a right of access to European Parliament, Council and Commission documents, subject to the principles and conditions to be defined by way of a legislative instrument adopted by the Council and the Parliament in co-decision. Given its place in the European treaties (in the EC Treaty, under the heading 'provisions common to several institutions') and its cautious wording (in particular paragraph 3, which leaves the institutions a degree of discretion when taking up access rules in their internal rules of

procedure)[7], authors have doubted whether the right of access is a fundamental one. My feeling is that it is:

- Article 255 EC gives further shape to the principle of openness set out in Article 1 TEU. It also belongs to the principles of democracy 'common to the Member States' which the European Union is to respect (Article 6, paragraph 1 TEU);
- The right of access also derives its fundamental character from the fact that it contributes to the democratic nature of Union governance. Following *Roquette*, rights and procedures set out in the European treaties that have a bearing on democracy (such as the right for the European Parliament to be consulted and, *mutatis mutandis*, the right of access to public documents) must, by their very nature, be considered essential;
- Access to documents is likely to be included in the Human Rights Charter that is currently being prepared.

3. A *human* right to information?

I do not want to be misunderstood here. In my opinion, the right of access to governmental information is a fundamental right in the European legal order, but I am not sure whether it is a fundamental *human* right (*i.e.,* a right for all humans, where ever in the world). As to date, the question whether the freedom of expression set out in Article 10 ECHR includes a right of access to public documents remains a hotly debated one. Whilst many plead in favour of the recognition of such a right, there are reasons to be reluctant on the matter. In particular, the drafters of the ECHR would have actively resisted attempts by the Swedes to link public access to the right of expression. Further, the *Leander* case, in which the Human Rights Court held that the refusal of the Swedish (!) authorities to grant access to the applicant's secret service file did not run counter to Article 10 ECHR, is frequently cited as an indication that

[7] See also Article 207, paragraph 3 EC (*supra*)!

access to the public documents is not a human right (although I am not convinced of the precedent value of *Leander* in this respect).[8]

Further, international law instruments do not, in my knowledge, recognise a specific a right of access to documents detained by the government. Having said that, a general entitlement to openness in government may well be inherent in what is now being promoted as the 'right to democracy.' In a resolution entitled 'promotion of the right to democracy,' the United Nations Human Rights Commission has affirmed, among others, that the rights of democratic governance include, *inter alia*, 'the right to freedom to seek, receive and impart information through any media' (this might, but not necessarily does, include a right of access to public documents) and '(t)ransparent and accountable government institutions.' The evolutions within the European Union might well stimulate further development towards the recognition of a human right of access to documents.

4. Consequences of the fundamental nature of the right of access to documents

Does the discussion on the 'fundamental' nature of openness and in particular the right of access matter? It does, for several reasons. It paves the way for a broad, 'principled' reading of Article 255 EC. The fact that Article 255 EC limits access rights to three named institutions (Council, Commission, Parliament) should not be read to mean that other institutions, agencies and organs can operate under a veil of secrecy. To be sure, the legal instrument to be adopted on the basis of Article 255 EC will also embrace the organs and committees established to assist the three named institutions in their tasks (such as comitology committees and working committees of the Council). Yet it will not cover, for instance, the European Central Bank or so-called independent agencies. All these bodies are subject, however, to the general, horizontal principle of openness enshrined in Article 1 TEU (as well as to the democracy principle referred to in Article 6 TEU). Each body must have its own 'code' of rules and procedures on access, that must conform to the general principles of openness as clarified by the Court of Justice and, arguably, as set forth in the

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8 European Court of Human Rights, March 26, 1987, Series A, n° 116; see also *Gaskin*, July 7, 1989, Series A, n° 160.

Transparency Regulation to be adopted. The European Ombudsman's initiatives in this respect deserve praise.

Further, the fundamental nature of the right of access may also (continue) to influence the Court of Justice's reading of the institutions' transparency rules. As the Court of Justice time and again stresses, its task is to ensure that 'in the interpretation and application of this Treaty *the law* is observed' (Article 220 EC). It is not bound to engage in textual, black-letter interpretation but can interpret European (primary and secondary) law in light of the overarching principles and objectives of the European Union. The Court of Justice may therefore continue the '*in dubio pro* transparency attitude' it has hitherto followed.

Finally (and perhaps most importantly) a 'principled' reading of Article 255 EC also means that the Community legislator (the Council and the Parliament) does not have *carte blanche* when drafting the implementing instrument. The mere fact that we will soon have a European *law* on access to public documents, instead of just internal procedural rules, does not guarantee that more access will be granted. In fact, the Commission proposal is in many ways a disappointment (I do not discuss the proposal, as other speakers will do that). Given the fundamental nature of openness, the Community legislator must, however, take due account of the current *acquis* on transparency as well as, crucially, of the Member State's own constitutional traditions. This brings me to the last matter I briefly wish to discuss with you.

III. INTERACTION BETWEEN NATIONAL AND EU RULES ON ACCESS TO PUBLIC DOCUMENTS

As today, nearly all Member states have specific rules on access to public documents. There is, however, a rather wide divergence. Whereas the national laws of some Member States are more liberal (Sweden is the obvious example), other Member States harbour rather a culture of secrecy. The new transparency regulation will not harmonise the national rules on access to documents (that would fall outside the scope of Article 255 EC, which is limited to documents of three named European Union institutions). As the preamble to the proposed transparency regulation notes, 'it is neither the object nor the effect of this Regulation to amend existing national

legislation on access to documents.' How to deal, however, with divergence? There are two issues here. The first concerns the drafters of the new regulation, the second those that are called to apply it.

1. Taking account of the constitutional traditions 'common' to the Member States

The drafters of the new transparency regulation should take due account of the Member States' legislation on access to documents. As Article 6 TEU recalls, the Union must respect the principles of democracy that are 'common to the Member States' (paragraph 1) as well as fundamental rights 'as they result from the constitutional traditions common to the Member States' (paragraph 2). As regards transparency, however, it might appear difficult to find a truly shared tradition. In the explanatory memorandum to its January 26 proposal, the Commission states that it has given particular consideration to 'good practice in the Nordic countries, which have a long tradition of opening up their documents to the public.' In other words, it has tilted the balance in favour of openness rather than secrecy (or at least it *says* it has done so -- again, I am sceptical on the matter).

Good grounds sustain, I think, such an attitude. The Union is not to simply copy national traditions (if at all a common denominator can be found), but rather to re-invent them, in dialogue with the Member States, in light of the specific Union context. As I have argued elsewhere, what is needed is a 'post-traditional' approach to the Member States' democratic traditions, that is, an approach whereby national traditions are opened up for interrogation and discourse and must explain themselves in light of the ethos and needs of European integration. Such an approach is all the more desirable since the Member States' own democratic understandings are in full transition -- in part as a reflection upon and under the influence of European integration. The definition of what democracy requires is certainly not a one-way street (from the Member States to the Union) but rather a hermeneutic process involving statal and, hopefully, also non-statal actors in the Union.

One notes, further, that national access laws tend to be (with some notable exceptions) of a fairly recent date. In many Member States, a culture of openness, that is, a general awareness that openness contributes to more democracy, is

developing only just now. Legislation on access is currently under preparation (or under amendment) in no less than four Member States (Germany, France, U.K., Greece). Even in the U.K., which long considered access rights unnecessary, one can note a climate change: a bill on access in currently being discussed in the House of Lords. In fact, the 'climate change' might very well be influenced by developments at the European level: if the European Union is to draw inspiration from the Member states' constitutional traditions, it also operates as a source of inspiration. In this way, a constitutional 'common law for Europe' emerges.

2. In case of conflict: mutual loyalty as a guiding principle

Various situations of conflict are possible.

First, a request might be filed with an EU institution in order to obtain access to documents originating from a Member State which that Member State would not itself release under its national rules. The EU rules could thus be applied in order to circumvent stricter national rules. In order to counter this risk, a declaration was added to the Treaty of Amsterdam allowing 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 approval. Addressing that concern, the Commission proposal provides that documents emanating from third parties will not be granted if the document is covered by one of the exceptions set out in Article 4 of the proposed regulation. In particular, Article 4 holds that

> 'the institutions shall refuse access to documents where disclosure could significantly undermine the protection of (…) confidentiality as requested by a the third party having supplied the document or the information, or as required by the legislation of the Member State.'

The way Article 4 is phrased makes clear that the European institutions have the last word: it is incumbent on them to decide whether disclosure 'could significantly undermine' the national interest. In other words, while they are under an obligation (pursuant to Article 10 EC) to consult the author of the document first, they do not have to follow his or her view but must conduct a 'harm test' in order to discern whether to accord priority to the national interest in confidentiality or to the EU

interest in openness. This finds also support in the 12th recital of the proposed Transparency Regulation:

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

A second situation of conflict mirrors the first but is presumably more complex. It is the situation wherein individuals file a request for access with national authorities in order to get access to documents originating from the European Union which they would not obtain under the EU rules on access. In practice, journalists and others tend to turn to the Nordic countries or the Netherlands in order to obtain information there on European Union affairs they could not obtain elsewhere. In this manner, information that the Union wishes to keep confidential leaks. Profound disagreement exists as to how to handle this conflict situation. One can discern three positions.

A first, most conservative position consists in saying that European law takes precedence over national law and that in case a national authority or court is to decide on requests for documents of European Union institutions (such as Council or Commission documents), it has to set aside its own national laws and abide by the EU rules on access. The Dutch Council of State took that position in the (much criticised) *Metten* case. The legal service of the Council would, reportedly, take the same position.

The opposite, most progressive position defends that European access rules can in no circumstance detract from national rules. It has been argued that the level of access accorded by any and all of the Member States should be considered as 'acquired' and that, since access rights bear on citizenship, the EU rules can only have a supplemental function (in other words, the effect of the EU rules can only be more access, not less).

I cannot agree with either position as (and to the extent) they depart from a strict, automatic hierarchy between national and European law. The first position gives EU law an unconditional precedence, the second inverts the hierarchy and places national law at the absolute top. I rather favour a middle-ground position (reportedly also defended by the legal service of the Commission). In my view, potential conflict between EU and national access laws should be settled by way of mutual concertation, taking account of the duty of loyalty to which the EU institutions and the Member States are mutually bound (Article 10 EC). National authorities should not disclose documents of EU provenance if the EU shows an overriding interest in seeing confidentiality upheld. In practice, that means that Member States have to abstain from disclosing documents of EU provenance if the EU rules on access to documents preclude disclosure (in case of doubt a preliminary question could be raised with the Court of Justice), unless the national interest in disclosure manifestly outweighs the EU interest in confidentiality. As national (constitutional) rights are at stake, the matter is ultimately for the national authorities and, as the case may be, the national courts to decide.

Of course, loyalty has its limits. The European Union cannot expect a Member State that regards access to information as one of its corner constitutional values, to accept a culture of secrecy anytime a matter is decided at the European rather than the national level. This emphasises, once again, the need for a due concertation (and even a voluntary minimum harmonisation) in the field of access to information.

In sum, loyalty rather than a strict hierarchy determines the relationship between national and European access rules. Each instance that receives a request for documents should be free to apply its own rules, taking duly into account the interests of the author of the documents. Like mutual respect, loyalty however only works where at least a minimum agreement exists as to what level of openness is possible and attainable.