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“ The Paper Chase” - Access to the  
Commission file in the Field of  
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## Summary

In 2001 European Union (EU) implemented the Transparency Regulation<sup>1</sup> (the ‘Regulation’ or the ‘Transparency Regulation’) which sets out the principle of open public access to documents. The purpose of the Regulation is to give fullest possible effect to the right of public access to documents and to lay down general principles and limits on such access in accordance with the provisions of the Treaty of the Functioning of the European Union (TFEU).<sup>2</sup> In accordance with the Regulation all documents of the EU institutions shall be accessible to the public in all areas of EU activities. This wide public access is however not without exceptions as certain public and private interests shall be protected. Moreover, the institutions are entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks.<sup>3</sup>

In the EU Competition law field there are specific procedural rules for access to the file of the European Commission (the ‘Commission’) which are intended to protect the rights of the defence and more precisely an essential ‘*precondition of the effective exercise of the right to be heard*’<sup>4</sup>. These rules allow undertakings to present their views on the conclusions reached by the Commission in its Statement of objections (SO). This means that the undertaking under investigation can request access to the whole file as it is not for the Commission alone to decide which documents are relevant to the undertaking’s rights of defence.<sup>5</sup>

These procedural rules applicable to Competition law are not considered to constitute a *lex specialis* derogating from the general rules set out in the Transparency Regulation. Consequently, the question arises to

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<sup>1</sup> Regulation (EC) No 1049/2001 of the European Parliament, and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

<sup>2</sup> Ibid, para 4.

<sup>3</sup> Ibid, para 11.

<sup>4</sup> T-161/05, *Hoechst GmbH v Commission*, para 160.

<sup>5</sup> Jaime Flattery, *Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a fair Hearing*, The Competition Law Review, December 2010, Vol 7, Issue 1.

what extent the Transparency Regulation can be applied to the sphere of Competition law without calling the system for the protection of competition in question.<sup>6</sup> As either the Regulation or other legal texts do clarify this fully it is and has been the role of the European Court of Justice (ECJ) to decide upon the sphere in this context.

The ECJ and the General Court (GC) have not been fully consistent in their application of the Transparency Regulation within the field of EU Competition Law. The GC has interpreted the provisions of the Regulation more strictly resulting in the widening of access to documents possibly at the expense of the investigation proceedings of the Commission. The ECJ has on the contrary been more willing to accept that those general rules on public access must be interpreted in the light of other special regulations which are applicable in the various fields of EU activities, such as in the area of Competition law.

These issues, besides other related issues, are being scrutinized and analyzed in this thesis.

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<sup>6</sup> Gaëtine Goddin, *Recent Judgments Regarding Transparency and Access to Documents in the Field of Competition Law: Where Does the Court of Justice of the EU strike the Balance?*, Journal of European Competition Law & Practise, 2011, Vol 2, No. 1.

## **Preface**

This thesis marks the end of my study in European Business Law at the Law Faculty of the University of Lund. During this time I have deepened my knowledge in European Union Law which is important for me as a lawyer and an attorney. This becomes even more practical and important due to foreseeable entry of my home country, Iceland, into the European Union.

I am happy to have entered this course and met all the people that I learned to know during the time of the course, both students and teachers.

Most importantly, I would like to thank my husband for his encourage and him and our three children for their unlimited patience during my exams and preparation of this thesis.

Also, I would like to thank my mother for flying from Iceland to Sweden on a regular basis to take care of my children when most needed.

Lastly, I would like to express my thanks to my supervisor, Henrik Norinder, for his good advice and assistance, encourage, positivity and good humour.

*Lund, 20 May 2012*

*Hrund Kristinsdóttir*

## **Abbreviations**

AG	Advocate General
ECJ	European Court of Justice
EU	European Union
FCO	Federal Cartel Office (Germany)
GC	General Court
NCA	National Competition Authority
SO	Statement of Objections
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union

*“This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen”<sup>7</sup>*

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<sup>7</sup> Article 1 of the Treaty of the European Union, [2010] OJ C83/01

# 1. Introduction

## 1.1. Introduction to the topic

An essential part of good governance is transparency and openness. It renders it possible for citizens to scrutinise and evaluate the activities of the public authorities and to call them to account. The freedom of speech and the freedom of information will be more effective to the general public as well as other public and political rights. At EU<sup>8</sup> level, transparency is indispensable for increasing citizens' understanding of EU decision-making and for enhancing their confidence in the EU institutions. Public access to EU institutions' documents strengthens their democratic credentials and helps to close the gap between them and the citizens.<sup>9</sup>

The Maastricht Treaty in 1992 introduced the principle of openness and Declaration no 17 on the Right of Access to Information<sup>10</sup> was attached to the Treaty with the aim of strengthening the democratic nature of the EU institutions and the public's believe and confidence in the administration.

In 1993 the Council adopted a Code of Conduct on Access to Documents<sup>11</sup> and in 1997 the Amsterdam treaty embedded the right of access to information in the EU by providing in Article 255, now Article 15 of the TFEU<sup>12</sup>, the right of access to documents of the European Parliament, European Council and European Commission<sup>13</sup> to all natural and legal

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<sup>8</sup> Formerly in this context the word "European Community" would have been used. Since the entering into force of the Lisbon Treaty there is only the European Union. I will therefore only use "European Union" in this paper even when describing situations as they were before the Treaty of Lisbon, which entered into force on the 1st of December 2009.

<sup>9</sup> Maja Augustyn and Cosimo Monda, Transparency and Access to Documents in the EU: Ten Years from the Adoption of Regulation 1049/2001. Available at: [http://www.eipa.eu/files/repository/eipascope/20110912103927\\_EipascopeSpecialIssue\\_Art2.pdf](http://www.eipa.eu/files/repository/eipascope/20110912103927_EipascopeSpecialIssue_Art2.pdf)

<sup>10</sup> The Maastricht Treaty and Declaration No 17 on the Right of Access to Information attached to the Maastricht Treaty.

<sup>11</sup> Code of conduct concerning public access to Council and Commission documents

<sup>12</sup> Consolidated Version of the Treaty on the Functioning of the European Union, [2010] OJ C83/01

<sup>13</sup> In this paper I will be referring to the European Council, European Parliament and the European Commission as the Council, the Parliament and the Commission.

persons residing or having their registered office in one of the Member States of the EU.<sup>14</sup>

Pursuant to this Article the Council and the Parliament adopted the Transparency Regulation which has the purpose of defining the principles, conditions and limits governing the right of access to documents provided for in the referred Treaty article.<sup>15</sup> The Regulation is supposed to ensure the widest possible access to documents, to establish rules ensuring the easiest possible exercise of this right and promote good administrative practise on access to documents.<sup>16</sup> It is supposed to give fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 15 of the TFEU.<sup>17</sup>

It can be seen from the case law of the ECJ in the last decade that the Court has been shaping the provisions of the Transparency Regulation and in a way allowing ever increasing access to the EU institutions' documents but at the same time it has fine-tuned the interpretation of the exceptions to the right of access provided for in the Regulation.<sup>18</sup>

The general right of *access to documents* set out in the Transparency Regulation cannot be confused with another form of access namely the *access to the Commission file*. The term *access to the file* is used in relation to access to the documents in the file of the Commission in competition cases. Access is then granted to undertakings involved in competition proceedings, in order to allow them to exercise their legitimate right to be heard. The close relationship between the right to be heard and access to the file was reflected in the judgments of the Court of First Instance<sup>19</sup> in *Solvay*<sup>20</sup> and *ICI*<sup>21</sup> where the court stated in the context of Regulation 17/62<sup>22</sup>:

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<sup>14</sup> Article 15 of the Consolidated Version of the Treaty of the Functioning of the European Union, [2010] OJ C83/01

<sup>15</sup> *Supra* note 1, Article 1(a).

<sup>16</sup> *Supra* note 9.

<sup>17</sup> *Supra* note 1, para 5.

<sup>18</sup> *Supra* note 6.

<sup>19</sup> Now the GC.

<sup>20</sup> T-30/91, *Solvay v Commission*.

<sup>21</sup> T-37/91, *ICI v Commission*.

<sup>22</sup> Council Regulation No 17/62 implementing Articles 85 and 86 of the Treaty. This Regulation has now been replaced by Council Regulation (EC) No 1/2003 on the

*“.....the purpose of providing access to the file in competition proceedings is to enable the addressees of statement of objections to examine evidence in the Commission’s file so that they are in a position effectively to express their views on the conclusions reached by the Commission in its statement of objections on the basis of that evidence. Access to the file is thus one of the procedural safeguards intended to protect the rights of defence....”*

This thesis aims to shed some light on the application of the Transparency Regulation in EU competition cases with reference to legal texts, the case law of the ECJ and GC as well as literature in this field.

## **1.2. Purpose**

For this Thesis I have decided to look into the general rules on access to documents within the EU institutions based on the Transparency Regulation and put it into a Competition law perspective. The aim is to establish to what extent the general rules on access apply in competition cases and to investigate how the ECJ applies these rules in this area.

I find the discussion on whether procedural rules applicable to Competition law do constitute a *lex specialist* derogating from the general rules on public access to documents of the EU institutions according to the Transparency Regulation interesting. Since the rules themselves do not give any clear guidance on how to delineate between those two regimes it is the role of the ECJ to assess to which extent the Transparency Regulation can be applied in Competition law without calling the system for the protection of competition into question.<sup>23</sup>

The purpose is to shed some light on these abovementioned issues with reviewing legal texts, EU case law and some literature that has been written on the subject and I have come across during my writing.

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implementation of the rules on competition laid down in Articles 81 (now 101 of the TFEU) and Articles 82 (now 102 of the TFEU).

<sup>23</sup> *Supra* note 18.

### **1.3. Delimitations**

This paper is written with the audience of legal professionals in mind who are assumed to possess knowledge of basic EU Law and EU Competition Law principles.

It is intended to give overview over the EU legislation on access to documents and access to the file in EU Competition law and access to the file in relation to other areas of EU law, such as data protection or environmental issues, will therefore not be the subject of discussion in this thesis.

Due to the limitation of this study this paper will first and foremost focus on the general principle of the Transparency Regulation and the exceptions to it. Other provisions of the Regulation will therefore not be the subject of discussion unless it is otherwise necessary for the context as a whole. Another limitation is that it only covers a part of the exceptions made in the Regulation as those are the most relevant for the subject of discussion.<sup>24</sup>

Those chapters that are dedicated to discussion on Competition law matters are limited to access to the Commission file within the area and general principles of Competition law will not be covered.

Scholars, lawyers and others have during the past years been discussing the scope of the general access to documents within the EU institutions from a Competition law perspective and the Transparency Regulation has become an increasingly popular tool for seeking access to Commission materials and a number of appeals against Commission decisions denying access based on the Regulation are pending before the EU courts. The aim will therefore be to try to shed some light on how the ECJ delineates between those two regimes.

Finally, it is worth mentioning that the question whether too much transparency will risk that less will be put on paper and more correspondence and opinions will be in an oral form which could lead to the

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<sup>24</sup> See chapter 2.3.1.

opposite effect, in that important things will simply not be put on paper and therefore reduce transparency, is currently a hot topic. I find these reflections interesting and my original thought was to link those reflections to the main subject of the thesis but due to time and space it was not possible.

#### **1.4. Method and materials**

In writing and preparing this paper I used conventional legal research and reasoning based on European legal texts and case law of the ECJ and the GC. The legal texts I refer to are mostly secondary legislation as for example the Transparency Regulation and other Regulations applicable in the EU Competition law field. Furthermore I make reference to Commission Notices applicable within the area of Competition law. As the referred Regulations are based on primary law I do also refer to the TEU, TFEU and the Charter of Fundamental Rights.

As this subject is dynamic and under constant changes and discussion I mostly used literature that is relatively new or has been written during the last couple of years or so. I came across some books and articles at the library but mostly I searched for literature on the internet and found many interesting articles written by different scholars, lawyers and people working within the EU that came of good use and did give me a clear insight into this controversial issue.

## **2. The Transparency Regulation – Regulation 1049/2001**

### **2.1. Introduction**

As mentioned earlier the purpose of the Transparency Regulation is to give the fullest possible effect to the right of the public to access to documents. In the preamble of the Regulation is stated that in principle all documents of the EU institutions shall be accessible to the public. However, certain public and private interests should be protected by way of exceptions. Moreover the EU institutions are also supposed to be able to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks.<sup>25</sup>

### **2.2. Scope and application – general principle**

The beneficiaries of the Regulation are all citizens of the Union and any natural and legal person residing or having its registered office in a Member State of the Union<sup>26</sup> and therefore grants those parties right to access all documents in the possession of the EU institutions in all areas of EU activities.

As with regards to definition of the term *document* the Regulation defines it:

*“..as any content whatever its medium (written on paper or stored in electronic form or as a sound, visual, audio-visual recording) concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere or responsibility.”<sup>27</sup>*

The Regulation applies to all documents that are held by an institution, both documents that are drawn up within the relevant institution or received by it and in its possession. The right to access therefore applies to all documents and moreover within all areas of the EU as mentioned

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<sup>25</sup> *Supra* note 1, para 11.

<sup>26</sup> *Ibid*, Article 2.

<sup>27</sup> *Ibid* 1, Article 3(a).

earlier. Consequently, there is no area of activity or institution within the EU that can escape the rules set out in the Regulation.<sup>28</sup>

## 2.3. Exceptions

### 2.3.1. General

In spite of the right to access to documents within the EU institutions being extremely wide in general it can in certain circumstances be limited according to specific exceptions set out in the Regulation.

The Regulation provides for two types of exceptions to the general rule of open access to documents. Some exceptions are absolute<sup>29</sup> and prevent all access to the relevant document while others are relative<sup>30</sup> in a sense that, before refusing public access balance between what the exception aims to preserve and any overriding public interest in the content of the document being disclosed must be found.<sup>31</sup>

In respect of the relative exceptions the Regulation provides that access to documents shall be refused where disclosure would undermine certain interests. This applies unless there is an overriding public interest in disclosing.

Those interests protected for in the Regulation are:

- *“Commercial interests of a natural or legal person, including intellectual property rights.*
- *Court proceedings and legal advice*
- *The purpose of inspections, investigations and audits”.*<sup>32</sup>

Furthermore institutions may refuse access to internal and preparatory documents if disclosure will seriously undermine its decision-making process unless there is an overriding public interest in disclosure.<sup>33</sup>

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<sup>28</sup> Ibid, Article 2.

<sup>29</sup> Ibid, Article 4(1). Those exceptions will not be covered in this thesis.

<sup>30</sup> Ibid, Article 4(2).

<sup>31</sup> *Supra* note 18.

<sup>32</sup> *Supra* note 1, Article 4(2).

<sup>33</sup> Ibid, Article 4(3).

The GC has made it clear in its judgments that the fact that a document concerns an interest that is protected by one of the exceptions cannot itself justify the application of the exception. Namely, before invoking an exception the institutions must assess whether access to the document in question would specifically and actually undermine the protected interests.<sup>34</sup> As the Courts have often stated the risk must be reasonably foreseeable and not purely hypothetical.<sup>35</sup> There is a requirement of assessment of each document. As the GC stated in VKI:

*“...concrete examination must, moreover, be carried out, in respect of each document referred to in the request for access...”*<sup>36</sup>

### **2.3.2. Protection of legal advice – article 4(2)**

In *Turco* the ECJ made it clear that legal opinions in legislative procedures shall be made public even if the relevant case has not been closed.<sup>37</sup> Since *Turco* the ECJ has emphasized the difference between legal advice given in the framework of a legislative process and that given in an administrative procedure. Also the Court has stated that the former should be given greater openness by reason of the desired involvement of citizens in the democratic legislative process.<sup>38</sup>

In *MyTravel* case which concerned access to documents in a merger case the ECJ made a distinction between the protection of legal advice required in a legislative on one hand and an administrative procedure on the other. In that respect the Court held that access to documents in

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<sup>34</sup> See for example T-111/07, *Agrofert Holding a.s. v European Commission*, para 58, T-2/03, *Verein für Konsumenteninformation (VKI)*, and *Supra* note 18.

<sup>35</sup> Case T-237/05, *Éditions Jacob v Commission*, para 41.

<sup>36</sup> T-2/03, *Verein für Konsumenteninformation (VKI)*, para 70.

<sup>37</sup> Joined cases C-39/05 P and C-52/05 P, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, para 66-68.

<sup>38</sup> Gaëtane Goddin, *The MyTravel Judgment on Transparency: No Space to Think*, *Journal of European Competition Law & Practice*, 2012, Vol. 3, No. 2.

administrative activities of the Commission do not require as extensive access as when it comes to legislative activities.<sup>39</sup>

The background of the case is that the European Commission declared a concentration between a British company, which subsequently became MyTravel Group plc., and its competitor, to be incompatible with the internal European market. Following the judgment the Commission created a working group to assess whether the case should be appealed or not. MyTravel later requested access to the group's report and documents relating to its preparation which was rejected by the Commission. MyTravel appealed the case before the GC which confirmed the Commission's decision on rejection and partly dismissed the case. The ECJ on the contrary took another view and annulled the decision of the Commission.<sup>40</sup>

Regarding the legal advice the ECJ rejected all arguments based on the need for the protection of legal advice in the administrative procedure at issue. The Court took the view of its arguments in *Turco* and ruled that the widest possible access should be given to legal advice in administrative process that has been finalized. It seems that the triggering element was the distinction between on-going procedures and closed procedures has led the Court to that decision and grant a wide access to documents relating to finalized procedures as in the case of legislative processes in general.<sup>41</sup>

Goddin, in her article *The MyTravel Judgment on Transparency: No space to think?*, addresses the issue of whether there is a reason behind allowing access to legal advice in an administrative procedure in the same way as access documents relating to preparation of legal texts. In her opinion, which I find easy to agree with, there can hardly be reason to look at this issue with the same eyes as in the administrative process the result

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<sup>39</sup> Case C-506/08, *Kingdom of Sweden v European Commission and MyTravel group plc*, para 86-87.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Supra* note 38.

will only be binding on the parties concerned while the legislative process will probably affect the general public in the end.<sup>42</sup>

AG Maduro in *Turco* addresses this issue as well as the GC in *MyTravel*.<sup>43</sup> Maduro points out that the granting of broad access to legal advice after the closure of an administrative procedure can entail a risk that is not just purely hypothetical but could affect the interplay between EU institutions and their respective legal services or lead to self-censorship and/or oral instead of written deliberations or with other words it could lead in the end to less openness and transparency.<sup>44</sup>

The case law has also confirmed that it is the Commission's role to prove that disclosure of documents will specifically and effectively undermine the protection of the interests at stake. This can be seen in *Agrofert* where the GC ruled that refusal to grant access was unlawful and stated:

*“.... the refusal to grant access, including partial access, to the legal advice requested must be annulled as being wrong in law, on the ground that the Commission has not shown that disclosure of all of the documents in question would specifically and effectively undermine the protection of legal advice, without it being necessary to examine whether there may be an overriding public interest in that regard.”*<sup>45</sup>

### **2.3.3. Commercial interests – article 4(2)**

In accordance with the first indent of Article 4(2) of the Transparency Regulation, the institutions are to refuse access to a document where disclosure would undermine the protection of commercial interests of a

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<sup>42</sup> Ibid.

<sup>43</sup> T-403/05, *MyTravel v Commission*, para 73.

<sup>44</sup> Opinion of Advocate General Maduro in Joined cases C-39/05 and C-52/05, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, delivered on 29 November 2007, para. 43.

<sup>45</sup> T-111/07, *Agrofert Holding a.s. v European Commission*, para 132.

natural or legal person, unless there is an overriding public interest in disclosure.<sup>46</sup>

The ECJ has in several cases dealt with the issue and it seems that the court is not making it easy for the commission to rely this exception and interprets it extremely narrowly.

In *Agrofert Holding, Agrofert*, a minority shareholder in Unipetrol, requested the Commission, on the basis of the Regulation, to grant it access to all unpublished documents concerning the notification and pre-notification procedure in respect of the acquisition of Unipetrol by PKN Orlen.<sup>47</sup> By a decision of 2 August 2006 the Commission refused to grant that request on the ground that the request was general in nature and that the exceptions laid down in article 4(2) and (3) of the Regulation were applicable. The General Court, however, ruled that in merger control cases the commission should disclose non-confidential versions of the parties' submissions or at least provide their detailed description.<sup>48</sup>

Advocate General Villalón in its opinion in *Agrofert* strongly advocates that the protection of commercial interests should be interpreted in the light of the Merger Regulation<sup>49</sup> and supports the general presumption that disclosure of documents supplied by an undertaking to the Commission in the course of merger procedure is capable of adversely affecting the undertaking's commercial interests.<sup>50</sup>

As G. Goddin points out the same could apply in antitrust/cartel cases on the basis of Article 28 of Regulation 1/2003.<sup>51</sup> As *Agrofert* is still pending before the ECJ it remains to be seen whether the court will take the same view as AG Villalón regarding the protection of commercial interests.

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<sup>46</sup> *Supra* note 1, Article 4(2).

<sup>47</sup> *Supra* note 45.

<sup>48</sup> *Ibid.*

<sup>49</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

<sup>50</sup> Opinion of Advocate General Villalón in C-477/10, *Commission v Agrofert Holding*, delivered on 8 December 2011, para 67.

<sup>51</sup> *Supra* note 38 and Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

G. Goddin is of the opinion that some balance must be found between the protection of commercial interests and access to documents.<sup>52</sup>

#### **2.3.4. Protection of the purpose of inspections, investigations and audits – article 4(2)**

According to the Transparency Regulation the EU institutions shall refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits.<sup>53</sup> This exception has frequently been used by the Commission in its arguing that access to certain documents should be refused but the GC has not in its recent judgments been willing to accept those arguments.

In *Éditions Jacob*, which concerned access to documents in a merger investigation file, the GC accepted that documents that were submitted at the pre-notification stage of a merger proceeding form a part of the investigation file so that this exception could in principle be adopted in principle. It was however rejected by the GC that the fact that a document cannot in itself justify application of the exception and it should be subject to concrete and individual assessment.<sup>54</sup> Then the GC considered that after the adoption of a merger decision, the documents that are part of the investigative file would no longer fall within the scope of the investigation exception.<sup>55</sup> It remains to be seen whether the ECJ will take the same view as the GC in this respect.

In *Agrofert* the GC stated the following:

*“Although there are indeed grounds for accepting that the need to preserve the confidentiality of certain information or documents justifies the Commission’s refusing access to them on the basis of the third indent of Article 4(2) of Regulation No 1049/2001, it is clear that, in the present case,*

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<sup>52</sup> *Supra* note 38.

<sup>53</sup> *Supra* note 1, Article 4(2).

<sup>54</sup> T-237/05 *Editions Jacob v Commission*.

<sup>55</sup> *Ibid* and *supra* note 18.

*the Commission has ruled in abstracto on the harm which disclosure of all the documents requested might cause to its investigative activities.*<sup>56</sup>

This seems to indicate that the Commission can refuse access to documents on the grounds that it is to protect investigation but the arguing of the Commission on the harm which disclosure might cause to its investigative activities may not be made in abstracto as well as they must be reasonably foreseeable and not purely hypothetical.<sup>57</sup>

### **2.3.5. Decision-making process - "Space to think" - article 4(3)**

The Transparency Regulation contains a specific exception which aims to protect the European Institutions decision process.<sup>58</sup>

Those exceptions are stipulated in Article 4(3) first and second subparagraphs and two constitute two matters.<sup>59</sup> First, access to documents used for internal use of the Commission which relates to a matter *where a decision has not been taken* and second, access to documents relating to matter *where a decision has been taken*.

- First subparagraph of Article 4(3) access to documents states as follows:

*“Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter **where the decision has not been taken** by the institution, shall be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosing.*<sup>60</sup>

When reading this part of article 4 it is clear that two things have to be assessed. First whether there is a risk that disclosure will undermine the

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<sup>56</sup> *Supra* note 45, para 103.

<sup>57</sup> *Supra* note 18.

<sup>58</sup> *Supra* note 1, Article 4(3).

<sup>59</sup> *Supra* note 1, Article 4(3).

<sup>60</sup> *Ibid*, first sub paragraph.

Commission's decision-making process and if that is the case whether it should be overlooked due to an overriding public interest in disclosing.<sup>61</sup>

- Second subparagraph of the same Article states as follows:

*“Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.”*<sup>62</sup>

Unlike the first subparagraph this second intent of the Article applies to documents relating to matter where a decision has already been taken. Here, as in the first intent of the Article, it has to be assessed whether disclosure risks undermining the decision-making process, even though it has ended, and if so whether there is an overriding public interest in disclosing.

The important issue with the second subparagraph is that it only applies to documents that are a part of deliberations and preliminary consultations within the institution concerned. This is clear from the wording of the Article and has even been confirmed by the ECJ in MyTravel.<sup>63</sup>

The Court has been demanding in relation to proving that disclosure of internal documents that are part of a finalized administrative decision-making process might specifically and effectively harm the relevant institutions decision-making capacity.<sup>64</sup> In MyTravel the ECJ was not willing to accept that there might be a risk that the Commission's services would refrain from expressing totally frank and critical opinions if they knew that these would be disclosed. Thus, according to the ECJ, it should be tough to prove that documents that are a part of finalized administrative processes should not be disclosed.<sup>65</sup>

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<sup>61</sup> *Supra* note 38.

<sup>62</sup> *Supra* note 1, Article 4(3), second sub paragraph.

<sup>63</sup> *Supra* note 39, para 78.

<sup>64</sup> Tinne Heremans, "Optimal" versus "Maximal" Public Access to Documents; a Brief Note on EU Case Law, European Policy Brief, EGMONT Royal Institute for International Relations, 2011. Available at: <http://www.egmontinstitute.be/papers/11/eur/EPB4.pdf>

<sup>65</sup> *Supra* note 39 and *supra* note 64.

In the case of documents relating to on-going administrative processes, the situation is not quite clear as to what extent the exception for the protection of the decision-making process can be relied upon.<sup>66</sup> Advocate General Kokott has addressed the importance of even greater protection in on-going administrative processes and stated in her opinion in *MyTravel*:

*“It must nevertheless be acknowledged that on-going administrative procedures merit greater protection. Where a decision has not yet been taken, there is an increased risk that access to internal documents relating to the procedure in question will have detrimental effects. Such information can be used by interested parties to exert influence selectively, which may in particular adversely affect the quality of the final decision”.*<sup>67</sup>

Furthermore she states:

*“....administrative procedures, especially in the area of the control of concentrations, are subject to strict time-limits, compliance with which would be jeopardised if the Commission was required to deal with reactions to its internal communications in the course of the procedure. Consequently, it must be ensured, as in court proceedings, that administrative procedures also take place in an atmosphere of total serenity. It is necessary to avoid exposing administrative activities to external pressure, albeit only in the perception of the public, which would disturb the serenity of the proceedings.”*<sup>68</sup>

Thus, it is the opinion of Advocate General Kokott that documents in on-going administrative processes should not be disclosed as it would risk undermining the decision-making process and in her opinion this especially applies in competition cases. This approach seems very sensible and is balancing in its nature. It secures the right to access to the extent that it is no longer possible without disturbing the serenity of the investigations proceedings in question.

Even though the ECJ was not as clear as Advocate Kokott in its position towards the administrative procedures it drew a clear distinction between on-going administrative procedures on one hand side and finalized

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<sup>66</sup> *Supra* note 64.

<sup>67</sup> Opinion of Advocate General Kokott in C-506/08, *Kingdom of Sweden v European Commission and MyTravel group plc.*, para 65-66.

<sup>68</sup> *Ibid.*

administrative procedures on the other in MyTravel. Namely the Court stresses that, at the time of MyTravel's request, the Commission's decision had not only been adopted but also annulled by the GC against which the time-limit for lodging an appeal had, moreover, already expired<sup>69</sup>.

G. Goddin points out that this could be a sign of the ECJ to apply more protective approach towards documents in *on-going* merger cases and arguably in antitrust/cartel procedures. In her opinion the Court has the opportunity to confirm this on appeal of the GC judgment in *Éditions Jacob*<sup>70</sup> concerning a request for access to document in an on-going merger case.<sup>71</sup>

As to when administrative procedure shall considered closed it seems to be different views amongst lawyers.

The GC in the *Editions Jacobs* ruled that a procedure has ended when the Commission has adopted its decision.<sup>72</sup>

On the contrary, in Advocate General Kokott's opinion a merger case cannot be considered to have finalized until it can no longer be judicially challenged. She supports her opinion by referring to that the right of access to documents in procedures for the control of concentrations is a corollary of the rights of defence and when a decision can no longer be judicially challenged, the rights of defence in that relation to that decision are no longer relevant.<sup>73</sup> The ECJ seems to agree with AG Kokott as in TGI the Court considered that while a case pending an appeal against a state aid decision before the GC that the procedure was ongoing.<sup>74</sup> In MyTravel the ECJ even stated that the request in question not only had been made after

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<sup>69</sup> *Supra* note 39, para 77.

<sup>70</sup> *Supra* note 54, para 97.

<sup>71</sup> *Supra* note 38.

<sup>72</sup> *Supra* note 54, para 71.

<sup>73</sup> *Supra* note 67, para 65-69.

<sup>74</sup> Case T-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH (TGI)*.

that the decision had been taken but it had also been annulled by judgment of the GC against which the time-limit for lodging an appeal had expired.<sup>75</sup>

And finally it is noteworthy that the ECJ has in its recent case law ruled that there should be complete openness of legislative processes even if those are still on-going.<sup>76</sup>

## 2.4. Chapter conclusion

Due to the complexity of the exceptions discussed above and the multiplicity of the case law within the area I will now try to bring together the main results of chapter 2.

It is clear that the Transparency Regulation applies within the field of EU Competition law as it leaves no activities of the EU out of its scope. The question is however to what extent the Regulation is applicable you can say that it is a common view that the answer seems to rest on the interpretation of the exceptions of the Regulation.<sup>77</sup>

In respect of the protection of **legal advice**, given by the legal services of the institutions, it is clear from EU case law that a distinction is drawn between legal advice given in administrative procedure on one hand and legislative on the other. It also confirms that greater protection should be given to legal advice in administrative procedures. Namely, legal advice in legislative procedures both ongoing and finalized shall be granted access without limitations. In respect of administrative procedures however the Court seems to be of the opinion that legal advice in finalized administrative procedures should be given access to while in those still ongoing refusal to grant access is acceptable if the Commission proves that disclosure would specifically and effectively undermine the legal advice and other interests protected.

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<sup>75</sup> *Supra* note 39, para 77.

<sup>76</sup> *Supra* note 64.

<sup>77</sup> See for example *supra* note 18.

The Commission can refuse access to documents on the grounds that disclosure would undermine the **investigation** but it has to prove that the risk is reasonably foreseeable and not purely hypothetical.

As with regards to the protection of **commercial interests** the situation is not clear at all. The GC has in its recent judgments not made it easy for the Commission to rely on this exception. But hopefully will ECJ rule precisely on the scope in *Éditions Jacob and Agrofert*, which are pending before the Court.

In respect of the protection of the **decision-making process** the line seems to be that documents in an ongoing administrative procedures should not be disclosed and especially in competition cases.<sup>78</sup> On the contrary when a procedure is finalized documents should be disclosed unless the Commission can prove that disclosure would specifically and effectively undermine the already finalized decision-making process.

The difference between access to documents in legislative processes on the one hand side and the administrative on the other is simply that greater access should be given to the former in general.

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<sup>78</sup> *Supra* note 70.

### 3. Access to the file under EU competition rules

#### 3.1. General

Access to the Commission's file is enshrined in the relevant legislation, case law and the Charter of Fundamental Rights.<sup>79</sup>

In the EU Competition law field there are specific procedural rules for access to the file of the Commission which are intended to protect the rights of the defence and more precisely an essential "*precondition of the effective exercise of the right to be heard*"<sup>80</sup>. The rules allow undertakings to present their views on the conclusions reached by the Commission in its SO. This means that the undertaking in question can request access to the whole file as it is not for the Commission alone to decide which documents are relevant to the investigated undertaking's rights of defence.<sup>81</sup>

It is settled case law that access to the file is closely bound up with the principle for the rights of defence which is one of the procedural guarantees intended to protect the right to be heard.<sup>82</sup> Early viewpoint was that access to the file did not exist, in view of the administrative nature of Commission proceedings. The competition procedure has however evolved roughly the last years in three stages: firstly, the right of a person under investigation to gain access to information held against him as a part of investigation process was granted. Secondly, the contents of the file that can be transmitted to a person under investigation were defined. Thirdly, these rights have been codified in EU Regulations.<sup>83</sup>

According to these rules there are is no general right to obtain access to documents in the same way as according to the Transparency Regulation

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<sup>79</sup> Charter of Fundamental Rights (2000/C 364/1), article 41.

<sup>80</sup> Case T-161/05, *Hoechst GmbH v Commission* [2009] ECR II-3555, para 160.

<sup>81</sup> Jaime Flattery, *Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a fair Hearing*, The Competition Law Review, December 2010, Vol 7, Issue 1.

<sup>82</sup> Simone White, *Rights of Defence in Administrative Investigations: Access to the File in EC Investigations*, Review of European Administrative Law, 2009, Vol. 2., No. I.

<sup>83</sup> *Ibid.*

and the scope is relatively narrower. As has been mentioned earlier the rationale for the general rules on access to documents is ensuring that the work of the EU institutions are transparent while the rationale for the special procedural rules in Competition cases is to protect the rights of defence and the equality of arms.<sup>84</sup>

Importantly, access to the file may therefore not be confused with the right of access to documents under the Transparency Regulation and in VKI<sup>85</sup> the ECJ clearly delineated between access to file, which creates a privileged right of access for interested parties, and access by third parties. Third parties can exercise their right of access through the Transparency Regulation without having to show a particular interest as the Transparency Regulation defines access widely.

### **3.2. EU Regulations on access to the file in the field of Competition law**

As stated above access to the Commission file is one of the procedural guarantees intended to apply the principle of equality of arms and to protect the rights of the defence. Access to the file is provided for in the following legal texts in the Competition law field:

- Article 27(1) and (2) of the Council Regulation No 1/2003<sup>86</sup>. Article 27 (2) states as follows:

*"The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities*

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<sup>84</sup> *Supra* note 18.

<sup>85</sup> Case T-2/2003 *Verein für Konsumenteninformation v Commission* .

<sup>86</sup> *Council Regulation (EC) No 1/2003* of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

*of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the competition authorities of the Member states or between the latter, including documents drawn up pursuant to Articles 11 and 14. Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement"*

- Article 15(1) of the Commission Regulation No 773/2004<sup>87</sup> –The Antitrust Implementing Regulation.

*"If so requested, the Commission shall grant access to the file to the parties to whom it has addressed a statement of objections. Access shall be granted after the notification of the statement of objections.*

- Article 18(1) and (3) of the Council Regulation No 139/2004<sup>88</sup> - The Merger Regulation.

*" The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets."*

- Article 17(1) of Commission Regulation No 802/2004<sup>89</sup> - The Merger Implementing Regulation.

*"If so requested, the Commission shall grant access to the file to the parties to whom it has addressed a statement of objections, for the purpose of enabling them to exercise their rights of defence. Access shall be granted after the notification of the statement of objections."*

Accordingly the right to defence based on the right to be heard shall be fully respected in EU Competition law cases.

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<sup>87</sup> Commission Regulation (EC) No 773/2004 of 7 April 2004 on relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty

<sup>88</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings

<sup>89</sup> Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

As the scope of these Regulation provisions is further detailed in the Commission's Notice on the access to its file it will enjoy further discussion in next chapter.<sup>90</sup>

### **3.3. Commission's notice on access to the file**

#### **3.3.1. General**

The Commission Notice (the "Notice") on the rules for access to the Commission file<sup>91</sup> provides the framework for the exercise of the right to access to the file set out in the EU Competition Regulations mentioned and referred to above in Chapter 3.2.

It is clear from the Notice that the specific right to access according to the EU Competition Regulations are distinct from the general right to access under the Transparency Regulation.<sup>92</sup>

Before taking its decisions in antitrust, cartel or merger cases the Commission shall give the persons, undertakings or associations of undertakings, the opportunity of making known their views on the objections against them and they shall moreover be entitled to have access to the Commission's file in order for their rights of defence in the proceedings to be fully respected.<sup>93</sup>

#### **3.3.2. Who is entitled to the access to the file?**

The scope of the right to access to the file is clearly stated in the Notice itself as the right only being reserved to the persons, undertaking or

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<sup>90</sup> Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 (now 101) and 82 (now 102) of the EC Treaty (now the TFEU), Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid, para 1.

<sup>93</sup> Ibid, para 2.

associations of undertakings to which the Commission addresses its SO, or the addressees of the SO upon request.<sup>94</sup>

As the right to access to the file only applies to those parties that are under investigation the situation of complainants and other involved parties is different of the addressees. In the EU Competition Regulations the term *access to documents*, is used in respect of those parties instead of the terms *access to the file*. This is clear from the Notices as it specifically states that these two situations are distinct irrespective of the wording in the Competition regulations.<sup>95</sup>

Complainants however have the right to access to documents on which the Commission has based its provisional assessment on rejecting a complaint. That kind of access is provided for on a single occasion, following the issuance of the letter informing the complainant of the Commission's intention to reject its complaint.<sup>96</sup> It is also clear that complainants have no access to business secrets or other confidential information which the Commission has collected during its investigation.<sup>97</sup>

In respect of other related parties which have been informed of the objections in merger proceedings<sup>98</sup> they shall also be granted access to the file in so far as necessary for the purposes of preparing their comments.<sup>99</sup> Other related parties are considered to be other than the notifying parties such as the seller and the undertaking which is the target of the concentration in question.

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<sup>94</sup> Ibid, para 7.

<sup>95</sup> Ibid, para 29. Article 8(1) of the Implementing Regulation speaks about "*access to documents*" to complainants and Article 17(2) of the Merger Implementing Regulation speaks about "access to file" to other involved parties

<sup>96</sup> Ibid, para 31.

<sup>97</sup> Ibid.

<sup>98</sup> *Supra* note 87, Article 17(2).

<sup>99</sup> *Supra* Note 80, para 33.

### **3.3.3. To which documents is access granted?**

Access is given to the whole file except internal documents, correspondence with other public authorities, confidential information and business secrets.<sup>100</sup>

According to the Notice the Commission file consists of all documents which have been obtained, produced and/or assembled by the Commission Directorate General for Competition, during the investigation.<sup>101</sup>

The Notice defines accessible documents on one hand side and non-accessible document on the other and I will discuss shortly each type in the following chapters.

#### **3.3.3.1. Accessible documents**

The parties that request access must be able to acquaint themselves with the information in the Commission's file so that, on the basis of this information, they can effectively express their views on the preliminary conclusion reached by the Commission in its objections. Due to that purpose there shall be granted access to all documents in the file with the exception of internal documents, business secrets of other undertakings or other confidential information.<sup>102</sup> It is therefore not the role of the Commission alone to decide which documents in the file may be useful for the purposes of defence. In *Solway* the Court stated:

*“.....it cannot be for the commission alone to decide which documents are of use for the defence. Where, as in the present case, difficult and complex economic appraisals are to be made, the Commission must give the advisers of the undertaking concerned the opportunity to examine documents which may be relevant so that their probative value for the defence can be assessed.”*<sup>103</sup>

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<sup>100</sup> *Supra* note 80, para 10.

<sup>101</sup> *Ibid*, para 8.

<sup>102</sup> *Ibid*, para 10.

<sup>103</sup> Case T-30/91, *Solway v Commission*, para 81.

### 3.3.3.2. Non-accessible documents

Non-accessible documents are internal documents such as drafts, opinions, memos and notes from the Commission departments or other public authorities. Also, correspondence between the Commission and other public authorities are considered as internal documents. The most important issue regarding those documents is that they can neither be incriminating nor exculpatory and they do not constitute part of the evidence on which the Commission can rely in its assessment of a case. Thus, these internal documents do not have evidential value and restriction of access does therefore not prejudice the proper exercise of the parties 'right of defence. In certain exceptional circumstances access is granted to documents originating from MS, the EFTA Surveillance Authority or EFTA States, after deletion of any business secrets or other confidential information. The key issue there is whether the documents in question are relevant to the parties defence with regard to the exercise of the competence by the Commission.<sup>104</sup> As mentioned earlier that examination would not be for the Commission alone.<sup>105</sup>

Another angle of the non-accessible documents is the confidential information and business secrets to which access may be partially or totally restricted.<sup>106</sup> The general rule is that access will be granted, where possible, to non-confidential versions of the original information but when confidentiality cannot be assured in other way than summarising the relevant information, access will only be granted to the summary.<sup>107</sup>

Business secrets of undertakings and documents containing information about an undertaking's business activity shall be kept non-accessible unless it is certain that access would not seriously harm the same undertaking. Technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply

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<sup>104</sup> *Supra* note 80, para 12-16.

<sup>105</sup> See *supra* note 103.

<sup>106</sup> *Supra* note 80, para 17.

<sup>107</sup> *Ibid.*

sources, market shares, marketing plans and sales strategy are examples of information that would be considered as business secrets.<sup>108</sup>

The Notice defines ‘other confidential information’ as information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking. As mentioned in the Notice this could for instance apply to information provided by third parties about undertakings which are able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers.<sup>109</sup> In this respect the Notice furthermore states as follows:

*“The Court of First Instance and the Court of Justice have acknowledged that it is legitimate to refuse to reveal to such undertakings access to certain letters received from their customers, since their disclosure might easily expose the authors to the risk of retaliatory measures. Therefore the notion of other confidential information may include information that would enable the parties to identify complainants or other third parties where those have a justified wish to remain anonymous.”*<sup>110</sup>

### **3.4. Antitrust and cartels**

In antitrust and cartel cases the right of access is guaranteed in the Antitrust Implementing Regulation.<sup>111</sup> In accordance with the Notice the right to access in antitrust and cartel cases is reserved to the person, undertakings and associations of undertakings to which the Commission addresses its SO and other parties do not have the same procedural right. These rules are rather straightforward and in line with the general rules that are provided for in the Notice.

An important part of the discussion relating to cartels is access to documents and access to the file in cartel damage claims which will be discussed in the following chapters.

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<sup>108</sup> Ibid, para 18.

<sup>109</sup> Ibid, para 19.

<sup>110</sup> Ibid, para 19.

<sup>111</sup> Supra note 87, Article 15(1).

### 3.4.1. Leniency statements

A leniency statement or a leniency application is a confession by an undertaking of having participated in an alleged cartel. The reason for the company to make such an application before the Commission is that it may result in immunity or reduction of fines. However, by submitting a leniency application will at present normally not protect the leniency applicant from the civil law consequences of its participation in an infringement of Article 101 TFEU.<sup>112</sup>

According to the Commissions Notice on immunity from fines and reduction of fines in cartel cases<sup>113</sup> (hereinafter referred to as the "Leniency Notice") access is limited, only granted to the addressees of the SO on certain conditions. The parties are for instance prohibited to make a copy of the leniency statements and they can only use the information for the purpose of judicial or administrative proceedings for the applications of the EU competition rules<sup>114</sup>. Likewise other parties such as complainants will not be granted access to these statements.<sup>115</sup>

The use of such information for a different purpose during the preceding may be regarded as lack of cooperation within the meaning the Leniency Notice. Moreover, if any such use is made after the Commission has already adopted a prohibition decision in the relevant proceedings, the Commission may, in any legal proceedings before the EU Courts, ask the Court to increase the fine in respect of the responsible undertaking. Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.<sup>116</sup>

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<sup>112</sup> Caroline Cauffman, *Access To Leniency related Documents after Pfleiderer*, Maastricht European Private Law Institute, working paper No 2012/3. Available at: <http://www.ssrn.com>

<sup>113</sup> Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ 2006 C298/11.

<sup>114</sup> *Supra* note 18.

<sup>115</sup> *Supra* note 113.

<sup>116</sup> *Ibid*, para 33.

According to the Leniency Notice and the Commission Notice on Settlement procedures<sup>117</sup> it is clear that the Commission considers that public disclosure of documents and written or recorded statements received in the context of these notices would generally be expected to undermine certain public and private interests in particular the protection of the purpose of carrying out inspections and investigations, even after a decision has been taken.<sup>118</sup> Namely, the Immunity Notice states the following:

*“The Commission considers that this specific protection of a corporate statement is not justified as from the moment when the applicant discloses to third parties the content thereof.”*<sup>119</sup>

The right to access is not automatic in these cartel cases, nor absolute. It is normally given on one occasion and upon request. Usually it is given following the notification of the SO to the parties; and no access is granted to the other parties replies to the Commission’s SO.<sup>120</sup>

### **3.4.2. Disclosure of leniency documents on the grounds of the Transparency Regulation**

The question is whether parties who allege to have suffered loss as a result of anticompetitive agreement should be granted access to the leniency documents. This is a very delicate issue as disclosure might discourage cartel participants from applying for leniency in the first place which would significantly hamper the discovery and punishment of cartels.<sup>121</sup>

It is clear from the Leniency Notice that the Commission recognises the application of the Transparency Regulation but at the same time states the following:

*“...normally public disclosure of documents and written or recorded statements received in the context of this notice would undermine certain*

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<sup>117</sup> Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation 1/2003 in cartel cases, OJ 2008 C167/01.

<sup>118</sup> *Supra* note 18.

<sup>119</sup> *Supra* note 113, para 33.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Supra* note 112.

*public or private interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of Regulation (EC) No 1049/2001, even after the decision has been taken.*”<sup>122</sup>

The most recent case in this area is the decision of 14 June 2011 of the ECJ or the Pfleiderer case<sup>123</sup> where the Court ruled on a reference for a preliminary ruling as to whether EU Competition law prohibits parties adversely affected by a cartel, for the purpose of bringing civil-law claims, to be given access to leniency applications or to information and documents voluntarily submitted in that connection by leniency applicants.<sup>124</sup> The ECJ decided that the interpretation of the EU Competition law would not preclude and stated:

*“..a person who has been adversely affected by an infringement of European Union Competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement.”*<sup>125</sup>

At the same time the Court ruled that it is up to the national courts to decide under which conditions to grant or refuse access under national law, by balancing interests protected by EU law in a case-by-case analysis. According to the Court the interests in question do include on one hand side the right to claim damages and the principle that national procedures do not make it excessively difficult or practically impossible<sup>126</sup>. But what the Court also had in mind was that the effectiveness of the leniency programs as a successful tool for eliminating cartels is also protected by EU law, as well as the interest to protect the information voluntarily provided by leniency applicants.<sup>127</sup>

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<sup>122</sup> *Supra* note 113, para 40.

<sup>123</sup> Case C-60/09, Pfleiderer, a preliminary ruling reference from the Bundeskartellamt in Bonn, Germany, 14 June 2011, [2011] ECR – not yet published

<sup>124</sup> *Supra* note 112.

<sup>125</sup> *Supra* note 123, para 32.

<sup>126</sup> Case C-432/05, *Unibet (London) Ltd. and Unibet (International) Ltd. v Justitiekanslern*, reference for a preliminary ruling from the Högsta domstolen, 13 March 2007, [2007] ECR I - 02271

<sup>127</sup> Case C-60/09, Pfleiderer, a preliminary ruling reference from the Bundeskartellamt in Bonn, Germany. See also: Silke Heinz, *No access to file to leniency applications for third parties in Germany – national follow-on judgment in Pfleiderer*, 2 March 2012, Kluwer Competition Law Blog. Available at: <http://kluwercompetitionlawblog.com/2012/03/02/no-access-to-file-to-leniency-applications-for-third-parties-in-germany-national-follow-on-judgment-in-pfleiderer/>

Thus, the Court played the ball back to the referring court to decide upon the case in question.<sup>128</sup> The referring district court in Bonn now balanced the different interests in the actual case and decided to grant access to a non-confidential version of the file with the exception of internal documents of the German Competition Authority records and the exception of the statements and evidence provided by the leniency applicants. The district court took the view that if access would be granted to the leniency applications in the case it would compromise the functioning of the leniency program for the future. The court also stated that it would also harm the possibility of civil damage actions. As the court allowed access to the non-confidential part of the file it held that only gaining that access would not render it practically impossible for the applicant of the case, *Pfleiderer*, to prepare and bring civil actions.<sup>129</sup>

Thus, by its judgment, the District Court of Bonn took a robust stance in favour of protecting leniency-related documents. It is believed to be unlikely that in future cases leniency-related documents will be disclosed to third parties seeking damages. This has been supported by the fact that the German legislature is currently considering amending the German cartel law by a provision explicitly denying access to leniency applications and evidence submitted in support of such applications. The new provision is expected to enter into force on January 1 2013.<sup>130</sup>

It remains to be seen what impact of the *Pfleiderer* case will have on leniency applications submitted to the European Commission under the EU leniency programme. The question is also whether other Member State courts will take the same view. Also interesting to see is whether the ECJ endorse the same position regarding the protection of leniency applications

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<sup>128</sup> Silke Heinz, *No access to file to leniency applications for third parties in Germany – national follow-on judgment in Pfleiderer*, 2 March 2012, Kluwer Competition Law Blog. Available at: <http://kluwercompetitionlawblog.com/2012/03/02/no-access-to-file-to-leniency-applications-for-third-parties-in-germany-national-follow-on-judgment-in-pfleiderer/>

<sup>129</sup> *Supra* note 127.

<sup>130</sup> Tim Reher and Christoff Soltau, *Leniency trumps private enforcement: access to leniency application denied*, CMS Hasche Sigle, 1 March 2012. Available at: <http://www.lexology.com/library/detail.aspx?g=f47202b7-1226-41a0-954e-2072dd8edec7>

that the Commission is provided for through the European Competition Network.<sup>131</sup>

It can easily be argued that the ECJ has with the ruling in the Pfleiderer case opened for the possibility that different views will be taken in the Member State regarding access to the leniency documents. It remains to be seen whether that is a desirable solution or not.

### 3.4. Mergers

Article 18(3) of the Merger Regulation states:

*“Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.”*<sup>132</sup>

Thus, notifying parties are granted automatic access to the file upon their request pursuant to Article 17(1) of the Implementing Regulation in order to be able to exercise their right of defence by expressing their views on the objections raised by the Commission.<sup>133</sup> The parties’ right to access can be granted upon request at every stage of the procedure from the notification of the SO to the consultation of the Advisory Committee.<sup>134</sup>

The wording of Article 18(3) that access to the file shall be open ‘*at least to the parties directly involved*’ strongly suggests that third parties do not have access to the file.<sup>135</sup> The Notice also sets out that the right to unrestricted access applies to persons or undertakings under investigation but third parties are not entirely excluded from accessing the file. They are only excluded from being granted an unrestricted access to the file.<sup>136</sup> Notifying parties are therefore given access to the file on request at every

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<sup>131</sup> European Competition Network (ECN) is a forum of cooperation between the European Commission and the National Competition Authorities in all the Member States.

<sup>132</sup> *Supra* note 88, Article 18(3).

<sup>133</sup> Mihalis Kekelekis, *The EC Merger Control Regulation: Rights of Defence, A Critical Analysis of DG COMP Practise and Community Courts’ Jurisprudence*, Kluwer Law International, Netherlands 2006

<sup>134</sup> *Supra* note, 88 Article 18(3).

<sup>135</sup> *Supra* note 133.

<sup>136</sup> *Ibid.*

stage of the procedure from the publication of the SO to consultation of the Advisory Committee.<sup>137</sup>

According to the Merger Regulation the right to access does not apply to confidential information or business secrets. Moreover it does not extend to the correspondence between the Commission and the competition authorities in the Member States or the internal documents of the both the Commission and the relevant national authorities.<sup>138</sup>

### 3.5. Statement of contents

The Commission maintains an inventory of all of the documents in the file which is normally in an excel spread sheet. This inventory which is called the *file index* or the *statement of contents* is organized by document number and indicates the category into which each document falls, for example leniency submission, reply to requests for information, correspondence, etc. Indicated are also the parties, from where the document was obtained, it is accessible, inaccessible or internal, the date of arrival to the Commission, the date of registration within the Commission, registration number, and the number of pages.<sup>139</sup>

In December 2011 the GC ruled that the Commission should disclose the statement of contents of its cartel files upon request.<sup>140</sup> A company, CDC HP<sup>141</sup>, which had purchased the right to make follow-on damages claims from a group of hydrogen peroxide purchasers, asked the Commission, pursuant to the Transparency Regulation, to provide the statement of contents in the Hydrogen Peroxide Cartel case for use by CDC

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<sup>137</sup> *Supra* note 38.

<sup>138</sup> *Supra* note 88.

<sup>139</sup> Sidley Austin LLP, January 9, 2012. Available at: <http://marketing.sidley.com/files/Uploads/Documents/2012%2001%2009%20-%20Antitrust%20Update.pdf>

<sup>140</sup> Case T-437/08, *CDC Hydrogene Peroxide Cartel Damage Claims (CDC Hydrogene Peroxide) v European Commission*.

<sup>141</sup> Cartel Damages Claims – CDC – The European Brand for Private Antitrust Enforcement. More information available here: <http://www.carteldamageclaims.com/index.shtml>

in a private damages action in Germany against the cartelists.<sup>142</sup> The Commission refused to grant access on the grounds that refusal to grant access was necessary to preserve the attractiveness of its leniency programme for future cases.

CDC brought an action before the GC which, by its judgment of 15 December 2011, annulled the decision of the Commission. In its ruling the court referred to the purpose of the Transparency Regulation and stated:

*“.....purpose of Regulation No 1049/2001 is to give the public the fullest possible right of access to documents held by the institutions.”<sup>143</sup> Furthermore it stated: “Since they derogate from the principle of the widest possible public access to documents, the exceptions laid down in Article 4 of Regulation No 1049/2001 must be interpreted and applied strictly”.<sup>144</sup>*

The Commission invoked the commercial interest exception of the Transparency Regulation<sup>145</sup> as a reason to refuse CDC access to the statement of contents. The GC ruled that the Commission had been wrong in doing that and had failed to establish that access to the index was likely specifically and effectively to undermine the commercial interest of a cartel. Then the Court stated:

*“...the interest of a company which took part in a cartel in avoiding damage actions cannot be regarded as a commercial interest, in any event, does not constitute an interest deserving the protection, having regard, in particular, to the fact that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition.”<sup>146</sup>*

The Court also stipulated the importance of private damage actions for an effective enforcement of EU antitrust rules and states:

*“It must be recalled that the leniency and co-operation programmes whose effectiveness the Commission is seeking to protect are not the only means of ensuring compliance with EU Competition law. Actions for*

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<sup>142</sup> *Supra* note 140.

<sup>143</sup> *Ibid*, para 32.

<sup>144</sup> *Ibid*, para 36.

<sup>145</sup> *Supra* note 1, Article 4(2).

<sup>146</sup> *Supra* note 140, para 49.

*damages before the national courts can make a significant contribution to the maintenance of effective competition in the EU.”<sup>147</sup>*

The Court in this case therefore seems to have valued the rights of cartel victims to access the Commission’s statements of contents more highly than the interests of the Commission to obtain full cooperation from the alleged cartelists. Noteworthy is though that in this case was it a question on relatively limited nature of the information contained in the statement of contents which might have had some influence on the Court’s result.<sup>148</sup>

The Court rejected the Commission’s argument as to that some of the information listed in the statement of contents were submitted in leniency applications or provided voluntarily to cooperate and disclosure of inventory and that disclosing of such information could result in companies reducing their cooperation to an absolute minimum and becoming reluctant to provide information that the Commission considers essential in combating cartels.<sup>149</sup>

Thus, the result is that the issue to be considered is whether disclosure of the statement of contents could prejudice the commercial interests of the company’s party to the investigation. The conclusion to be drawn is therefore that if the statement of contents had contained business secrets or other normally confidential information relating inter alia to the business relations of the companies concerned, the prices of their products, their cost structures, or their market shares, disclosure of such information in the statement of contents could be regarded as jeopardizing the protection of the companies’ commercial interests and should therefore not be granted access to. However, the statement of contents in the relevant case was found not to have contained any such commercially sensitive information.<sup>150</sup>

It remains to be seen whether this case will be appealed and it would be interesting to see whether the ECJ would endorse this position of the GC.

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<sup>147</sup> *Supra* note 140, para 77.

<sup>148</sup> *Supra* note 139.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

## **4. Conclusion**

### **4.1. Introduction**

This paper has now partly covered the general rules on public access to documents and some of the provisions of the Transparency Regulation as well as special rules on access to the file within the EU Competition law. To conclude, the last chapter will reflect on some of the issues discussed earlier with the aim of coming to conclusion as well as discussing the interplay between those two regimes and speculating about the future rulings of the ECJ.

### **4.2. Inconsistency between the GC and the ECJ**

When studying the recent case law of the European Courts regarding access to documents in competition cases it seems that the GC has given very strict interpretation of the exceptions enshrined in the Transparency Regulation while the ECJ has in its recent judgments been more open to taking the characteristics of Competition law into account. The Courts have therefore not been consistent in their rulings.

This can for instance be seen in the TGI case<sup>151</sup> which concerned state aid where the Court recognised the existence of a general presumption according to which disclosure of documents on the administrative file would, in principle, undermine the protection of the purposes of inspections and investigations. According to the Court this presumption results from the nature and the general scheme of these procedures, which are initiated in respect of the Member State responsible for granting the aid.<sup>152</sup> Previously the Court of First Instance<sup>153</sup> had annulled the Commission's decision on refusing access to documents on the grounds that the Commission had not

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<sup>151</sup> T-139/07, *Commission v Technische Glaswerke Ilmenau GmbH*, para 55.

<sup>152</sup> *Ibid*, para 55.

<sup>153</sup> Now the GC.

examined in a concrete, individual manner the each and every document covered by the request for access.<sup>154</sup>

### 4.3. "Lex specialis derogat generali" - considerations

After MyTravel it will be interesting to see whether the ECJ will use the same reasoning in the *Éditions Jacob* and by that guarantee a 'space to think' atmosphere that is guaranteeing a space for the Commission to proceed its competition investigations without being compelled to disclose investigation documents. The Court in fact could rely on AG Kokott's argument that is in line with the previously mentioned TGI case that *lex specialis derogat generali* and decide that the Transparency Regulation should be interpreted consistently with the Merger Regulation. Like AG Kokott in MyTravel<sup>155</sup> argues it would undermine the merger case investigation if interested parties could obtain access to document on the basis of the Transparency Regulation that they could not obtain under the merger rules.

Thus, the ECJ has shown willingness to accept that specialized legislation or rules organizing access to documents in specific domain should prevail over the more general rules. As discussed earlier, if specialized rules do not grant access to the documents at hand, there will be a rebuttable general presumption against disclosure. It has been pointed out that this approach is not in line with the Court's traditionally strict stance on the requirement of a concrete case-by-case analysis.<sup>156</sup>

Moreover, the recent case law of the ECJ indicates that documents in a competition investigation file are protected from concrete and individual examination under certain circumstances, for example where an investigation is still ongoing. It can also be seen from the recent case law of the ECJ that the provisions of the Transparency Regulation shall be

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<sup>154</sup> T-237/02, *Technische Glaswerke Ilmenau GmbH v Commission*.

<sup>155</sup> *Supra* note 67.

<sup>156</sup> *Supra* note 64.

interpreted in the light of other EU rules as not depriving those of their practical effectiveness.

#### **4.4. A clear distinction between finalized and ongoing procedures?**

The GC in *MyTravel* indicated that one could rely on the exception for protection of the decision-making process even after the decision has been taken.<sup>157</sup> The ECJ in the same case for the first time draws a clear distinction precisely by reference to whether a procedure has been closed or not.<sup>158</sup> The Court stated:

*“MyTravel made its request for access to the documents concerning..... that is to say at a time when that decision.....had not only already been adopted but had also been annulled by the judgment of the General Court in *Airtours v Commission*, against which the time-limit for lodging an appeal had, moreover, already expired.”*<sup>159</sup>

In TGI however the request for documents was made while the case was still pending before the GC.

With the judgment in *MyTravel* the court has therefore given rather clear guidance how to interpret the scope of the decision-making process at least when it comes to procedures that have been finalized. All documents that do not fall under the definition of internal deliberative documents shall be disclosed when a procedure has been finalized. It has therefore clarified that second subparagraph of Article 4(3), which protects decision-making documents that are part of ongoing case, only applies to those internal deliberative documents and no other documents at all.<sup>160</sup>

In an ongoing administrative procedure the situation is not quite as clear but the ECJ touched on this in *MyTravel* as well. Namely the Court seems to be accepting that in some cases it would be ready to apply TGI

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<sup>157</sup> T-403/05, *MyTravel v Commission*.

<sup>158</sup> *Supra* note 39, para 77.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Supra* note 39.

type of general presumption protecting documents in ongoing merger procedures from disclosure.<sup>161</sup> However the Court made it clear that in such situations it should be tough to prove that such documents in a finalized procedure should not be disclosed. For instance the Court was not willing to accept that there might be a risk that the Commission's services would refrain from expressing totally frank and critical opinions if they knew that these would be disclosed.<sup>162</sup>

#### **4.5. Interpretation of the exceptions – a key issue?**

I find it easy to agree with Goddin when she argues that the interpretation of the exceptions to the principle of general public access in Article 4 of the Transparency Regulation is the key issue in assessing whether to grant access or refuse it. She points out that in *Agrofert*<sup>163</sup> and *Éditions Jacob*<sup>164</sup> the GC has given strict interpretation of the exceptions on the rules to access to documents. This is not in accordance with the TGI judgment of the ECJ which, as mentioned earlier, seems more open to recognising the procedural competition rules.<sup>165</sup>

*Éditions Jacob*<sup>166</sup> concerned the Commissions refusal to grant access to certain documents in a merger case and invoked the exceptions of Article 4(2) of the Transparency Regulation, namely the one that allows it to refuse access in order to protect the purpose of inspections, investigations and audits. The GC considered that after the adoption of a merger decision, the documents that are part of the investigative file would no longer fall within the scope of the exception regarding the protection of investigations. It rejected the argument of the Commission that if it was the case that parties and third parties in merger cases would know that information they gave would be disclosed they would be more reluctant in providing that

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<sup>161</sup> *Supra* note 38 and *supra* note 39.

<sup>162</sup> *Supra* note 39.

<sup>163</sup> T-111/07, *Agrofert v Commission*.

<sup>164</sup> T-237/05, *Éditions Jacob v Commission*.

<sup>165</sup> *Supra* note 74.

<sup>166</sup> *Supra* note 164.

information, sometimes referred to as the ‘the chilling effect argument’.<sup>167</sup> According to the GC those arguments were too vague and general and in spite of them not being willing to give the information they would in any event be obliged to do so.<sup>168</sup> Goddin believes that this judgment suggests that the GC might assess the temporal scope of the exception differently in the case of a request for access to documents submitted voluntarily as for instance in leniency submission.<sup>169</sup>

In *Agrofert* the GC appeared more inclined in this ruling than in the *Éditions Jacob* judgment to recognise in principle *the chilling effect argument* and that it might be a valid reason for refusing access as long as it is substantiated by concrete evidence and facts.<sup>170</sup>

In his opinion in *Agrofert AG Villalón*<sup>171</sup> adopted the TGI approach and annulled the Commission decision refusing access to documents contained in the file relating to merger control procedure pursuant to the Merger Regulation. He argues that the protection of commercial interests in Article 4(2) of the Transparency Regulation must be interpreted in the light of the Merger Regulation and support the general presumption that disclosure of the documents supplied by an undertaking to the Commission in the course of a merger procedure is capable of adversely affecting its commercial interests.<sup>172</sup> Villalón discusses the relation of Regulation 1/2003 in competition matters and Regulation 659/1999 on stated aid rules<sup>173</sup>, puts it into TFEU perspective and states:

*“It should not be forgotten that, while the European Union is based on the values set out in Article 2 TFEU, it is also bound by the aims and objectives listed in Article 3 TEU, the most important of which for our purposes here is the establishment of an internal market and the ‘sustainable development of Europe based ... on a highly competitive social market economy ... (Article 3 TEU).”*<sup>174</sup>

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<sup>167</sup> *Supra* note 38.

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid* and *supra* note 163, para 103.

<sup>171</sup> *Supra* note 50.

<sup>172</sup> *Ibid*, para 67.

<sup>173</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty – the State Aid Regulation.

<sup>174</sup> *Supra* note 50, para 65.

In his opinion it is therefore clear that those Regulations serve a common purpose shared by Regulation 1/2003 which shall specifically facilitate the attainment of one of the objectives underpinning the existence of the European Union.<sup>175</sup> It will be interesting to see whether the ECJ will adopt the TGI general presumption approach in line with Villalón and determine the exact scope of the exception relating to the protection of commercial interests in the specific context of merger proceedings.

Both these cases, *Agrofert* and *Éditions Jacob*, are still under an appeal and therefore it remains to be seen whether the ECJ will and adopt the general presumption approach and take the EU Competition law specificities into account in assessing the scope of the exceptions of the Transparency Regulation. Importantly, there are some indications that the Court will indeed endorse this position. Namely in *Bavarian Lager*<sup>176</sup> which concerned the interplay between the Transparency Regulation and the EU data protection rules the Court decided that when a request is made for access to documents on grounds of the Transparency Regulation in the area of data protection the specificities of the Data Protection Regulation<sup>177</sup> must be taken into account. In *API* the ECJ also favoured the general presumption approach and ruled that disclosure of the pleadings lodged by EU institutions in court proceedings would undermine the protection of those proceedings while they were pending.<sup>178</sup> Moreover the European Ombudsman in his E.ON decision from 27 July 2010 adopted the same approach in a case where the complainant requested access to preliminary assessment documents drafted by the Commission in the context of its Competition law investigation against a German energy supplier E.ON. The Ombudsman agreed that disclosing the preliminary assessment before a final agreement was reached and made binding could have endangered the

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<sup>175</sup> *Supra* note 50, para 65.

<sup>176</sup> C-28/08, *Commission v Bavarian Lager*.

<sup>177</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

<sup>178</sup> Joined cases C-514/07, C-528/07 and C-532/07, *API v Commission*.

completion of the Commission's investigation on E.ON.<sup>179</sup> Consequently there are some strong signs on how the ECJ will interpret the exceptions in the Transparency Regulation in the future.

#### **4.6. Final remarks**

The ultimate aim must be to prevent that parties can get access the competition file on grounds of the Transparency Regulation when they would at the same time and under same circumstances not be granted such access according to the rules on access to the file in EU Competition Law.

As has been mentioned above the GC, in its recent case law, has interpreted the exception of the Transparency Regulation very strictly while the ECJ has been more open to take into account and recognise the specificities of the procedural rules of the EU Competition law. IN my view the approach of the EJC seems more attractive as it focuses on the importance on the '*effet utile*' of the EU competition rules as well as aiming for giving the general rules on openness and transparency its fullest possible effect.

In spite of TGI the ECJ has not ruled on the temporal scope of the protection of investigation. It is of great importance within the field of Competition law that the protection of the investigative file be valid after the closure of proceedings.<sup>180</sup> Therefore it will be interesting to see what view the ECJ will take in *Éditions Jacob and Agrofert*. Also, as discussed earlier the Court has not interpreted the exceptions of the Transparency Regulation so clearly that one can without doubt say that the interplay with the special rules of access to the file completely clear.

The Commission has for two times proposed a revision of the Transparency Regulation, in 2008 and 2011 without any result in legislative changes. These proposed revisions have been controversial and a legislative

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<sup>179</sup> Decision of the European Ombudsman 2953/2008/FOR, *E.ON v Commission*, 27 July 2010, para 23.

<sup>180</sup> *Supra* note 38.

reform seems to be extremely difficult to reach.<sup>181</sup> Those proposals of review have not been the subject of discussion in this thesis but for those interested in it, a research of those might be interesting and even a comparison with the recent case law of the ECJ and the problems that have arisen with the application of the Transparency Regulation not only within the field of Competition law but also within other sectors of EU law such as for example environmental and data protection areas.

While the legislator is struggling to find the perfect solution to the problem of how to change the Regulation for the better it is the role of the ECJ to set the limits of the general public access to documents which means that the legislator will later on have to take into account all the rulings made by the court within this area.

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<sup>181</sup> Supra note 9.

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