Access to documents containing confidential business information – The application of Regulation (EC) 1049/2001 in cartel cases and the need for reform

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I. Introduction

One of the aims of the Lisbon Treaty was to make the European Union more transparent and closer to the peoples united within. Article 15 of the Treaty on the Functioning of the European Union (TFEU)[1] summarises in some detail the main aspects of the transparency principle by providing for the EU institutions to work as openly as possible, for the European Parliament and the Council to have their debates opened to the public and for the Union citizens to have a right of

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1 Consolidated version of the TFEU at OJ C 83 of 30/3/2010, p. 47.

access to the documents of the Union institutions.[2] The transparency principle is also expressly laid down in Articles 41(2) and 42 of the EU-Charter on Fundamental Rights,[3] which now also provide for every Union citizen a directly enforceable right to have access to documents held by the European Parliament, Council and Commission or other EU institutions.

The right of access to documents was previously contained in Article 255 EC and was added by the Amsterdam Treaty.[4] In 2001 the "Transparency Regulation" (Regulation (EC) 1049/2001[5]) came into force and provided for a directly enforceable right to access to documents to "any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State."[6] Although the idea of unified European provisions on transparency and access to documents was not new, the Member States felt the need to further stress the need for transparency in the Lisbon Treaty.

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2 Art. 15 (ex Art. 255 TEC) reads:
"1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.
2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.
3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure. Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph. The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks. The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph."

3 The Charter became legally binding with the entry into force of the Lisbon Treaty on 1 December 2009. OJ C 364 of 18/12/2000, p. 19. Art. 42 reads: "Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents."

4 Openness in the European institutions goes back to the adoption as an annex to the Maastricht Treaty, a declaration calling for more transparency in the decision making process ("Declaration No. 17 on the Right of Access to Information"), see *Maes*, The "New" Regulation on Access to Documents, in: Deckmyn (ed.), Increasing Transparency in the European Union?, 2002, p. 199.

5 OJ L 145 of 31/5/2001, p. 43.

6 For details on the genesis of Regulation (EC) 1049/2001 see *Heliskoski/Leino*, Darkness at the break of noon: The case law on Regulation No. 1049/2001 on access to documents, CMLR 43 (2006), p. 740 et seq.

Prior to the adoption of the Transparency Regulation, the onus was mainly on the Union's courts to establish and develop the core principles on the right of access to documents which was seen as a cornerstone of a Community reigned by the rule of law.[7]

II. Access to documents under Regulation (EC) 1049/2001[8]

1. Scope of the Regulation

Article 15(3) TFEU provides for literally everyone whose residence is within the EU to have access to information in the documents held by Union institutions and bodies, offices and agencies. Explicitly, there is no need to be a Union citizen in order to have a right of access; it is rather granted on the sole regional criterion of residence within the Union.

According to subparagraph 2 of Article 15(3) TFEU the general principles governing the access to documents and the exceptions to the right are to be determined by means of regulations by the European Parliament and the Council. The relevant regulation enacted upon this power is the aforementioned Regulation (EC) 1049/2001 on public access to documents, which governs the main rights and exceptions.[9] The "Transparency Regulation" puts the principle of openness on a stronger legal basis and enlarges the scope of the rules on access.[10]

With regard to the beneficiaries of the right to access, the Regulation provides for an even wider scope of the entitlement as Article 2(2) states that Union institutions may also grant access to documents to companies and individuals residing outside the EU. As all Union institutions have provided for this personal extension of the right to access within their implementation rules,[11] the rights granted under Regulation (EC) 1049/2001 can be considered as even more extensive than those provided for in Article 15(3) TFEU.

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7 *Boysen*, Transparenz im europäischen Verwaltungsverbund, Das Recht auf Zugang zu Dokumenten der Gemeinschaftsorgane und Mitgliedstaaten in der Rechtsprechung der europäischen Gerichte, Die Verwaltung 2009, p. 216.

8 For a general overview over the Regulation see i.a. *Heitsch*, Die Verordnung über den Zugang zu Dokumenten der Gemeinschaftsorgane im Lichte des Transparenzprinzips, 2003; *Riemann*, Die Transparenz in der Europäischen Union, 2004.

9 *Wegener*, in: Calliess/Ruffert (eds.), EUV/AEUV, 4th ed. 2011, Art. 15 TFEU, para. 10.

10 *Maes*, (fn. 4), p. 199.

11 *Wegener*, (fn. 9), Art. 15 TFEU, para. 12.

According to Article 2(3), the Regulation applies to both documents produced by the EU institutions and those obtained by them in any context. It even includes documents classified as "confidential" or "secret".[12] Article 2(4) provides that the only requirement to be met for the access to a document to be granted is a written application, unless the documents are directly made available electronically or through a register.

When the Regulation entered into force it was widely praised by both Union institutions and learned scholars and after years of its application it may be stated that it has made a considerable contribution to the increased use of the right of access to documents.[13]

2. Exceptions to the right of access to documents

With regard to the beneficiaries and the documents within the scope of the Regulation, it appears evident that not to everyone an unlimited right of access to any document held by Union bodies can be granted. Thus, there must be boundaries to that right in order to make it operable in practice. Whereas as a general principle, no category of documents is *per se* excluded from access,[14] the Regulation sets out a number of exceptions. The exceptions under Article 4 of the Regulation are formulated in a rather general manner in order to be applicable to the great variety of cases that can possibly arise with regard to a request of access to documents.[15] The exact scope of the exceptions varies from case to case and no

12 *Maes*, (fn. 4), p. 200.

13 In this sense also *Heliskoski/Leino*, (fn. 6), p. 736 et seq.

14 *Maes*, (fn. 4), p. 200.

15 Art. 4 Regulation (EC) 1049/2001 reads as follows:
"1. The institutions shall refuse access to a document where disclosure would undermine the protection of:
(a) the public interest as regards:
- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the Community or a Member State;
(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.
2. The institutions shall refuse access to a document where disclosure would undermine the protection of:
- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,
unless there is an overriding public interest in disclosure.
3. Access to a document, drawn up by an institution for internal use or received by an institu-

strict method can be applied as to whether documents may be accessed or not. Whereas when the conditions for the exceptions under Article 4(1) are met, according to jurisprudence the respective institution has no discretion as to whether to disclose the documents or not,[16] the mandatory refusal can be overcome within the scope of the exceptions set out under Article 4(2) and (3) when the applicant can demonstrate an overriding public interest in the disclosure. Despite the fact that applicants do not need to give explicit reasons when requesting access to documents, the existence of a public interest in disclosure forms the basis for every request. This is why a solely individual interest in disclosure cannot suffice and may be a valid reason to deny access to documents for the respective Union institution.[17]

When taking a closer look at the exceptions set out under Article 4 of the Regulation, one finds them to concern both Union issues as well as private issues which might be referred to in the context of a refusal of access to documents. As the purpose of the regulation is to give the "fullest possible effect to the right of public access to documents",[18] however, the limitations are interpreted and applied restrictively in the EU courts' jurisprudence.[19]

From a private individual's or a company's point of view, the exceptions under subparagraph 1(b) and 2, first indent of Article 4 are of particular interest. They provide for the access to be refused when privacy and integrity of the individual or commercial interests are at stake.

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tion, 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 disclosure.
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."

16 EGC, case T-2/03, *Verein für Konsumentenforschung*, ECR 2005, II-1121, para. 72; EGC, case T-124/96, *Interporc*, ECR 1998, II-231, para. 52; EGC, case T-123/99, *JT's Corporation*, ECR 2000, II-3269, para. 64.

17 According to Art. 6(1) of the Regulation the applicant need not give reasons for his application; for the need for a public interest see i.a. ECJ, case C-266/05 P, *Sison*, ECR 2007, I-1233, paras. 52 and 71.

18 Recital (4) of Regulation (EC) 1049/2001.

19 *Boysen*, (fn. 7), p. 226; EGC, case T-211/00, *Kuijer*, ECR 2002, II-485, para. 55; EGC, case T-110/03, *Sison*, ECR 2005, II-1429, para. 45; ECJ, case C-266/05 P, *Sison*, ECR 2007, I-1233, para. 61; EGC, case T-36/04, *API*, ECR 2007, II-3201, para. 51.

III. Access to documents containing business information

1. Documents obtained in cartel proceedings

With regard to confidential business data, the issue of disclosure is of particular delicacy, where information is obtained in connection with cartel proceedings. There are various possibilities for the respective authorities to get hold of the information, e.g. documents can be handed over voluntarily by one of the cartel members under the leniency programme[20] or documents can be obtained by the Commission in the course of its investigations.[21] Various documents containing internal information of the companies involved will be obtained and investigated throughout cartel proceedings and thus be kept in the file of the investigating EU institutions (in cartel investigations this is the Directorate General for Competition of the European Commission). The mere fact that an EU institution possesses the documents makes them subject to disclosure under Regulation (EC) 1049/2001, regardless of their origin and no matter if they were handed over voluntarily or not. As there is no general exception to the right to access with regard to (confidential) information obtained in the context of a cartel proceeding, disclosure can only be refused along with the general exceptions under Article 4 of the Regulation. This is why *inter alia* the question arises if and possibly to what extent documents should be protected from disclosure which were handed over voluntarily in order to disclose the existence of a cartel and get back to legality.

Companies seem particularly vulnerable where business data is concerned. From their point of view a disclosure would be detrimental to their interests and should thus be refused. At the same time "victims" of the cartel may have a legitimate interest in disclosure in order to examine their chances of obtaining damages with regard to the burden of proof in a civil procedure before a national court.[22]

Hence, the question arises if there are legitimate interests for disclosure to be granted and whether a public interest in the disclosure can be established?

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20 Leniency allows the Commission to offer full immunity or a reduction in the fines that would otherwise have been imposed on a cartel member in exchange for disclosure of information on the cartel and cooperation with the investigation. For details see 2006 Commission notice on immunity from fines and reduction of fines in cartel cases, OJ C 298 of 8/12/2006, p. 17 et seq.

21 Art. 20 Nr. 2 (b) Regulation (EC) 1/2003 gives the Commission the right to "take or obtain in any form copies of or extracts from such books or records" when exercising its powers of inspection. Thus, the Commission may not confiscate whole original documents. For details see *van der Hout*, in: Mäsch (ed.), Praxiskommentar zum deutschen und europäischen Kartellrecht, 2010, Art. 20 Regulation 1/2003, para. 24 et seq.

22 The establishment and quantification of harm suffered by a cartel has proven to be a major obstacle when it comes to claim damages under national civil law as the burden of proof lies with the claimant. See for details *van der Hout*, The Commission's White Paper on Damages Actions for Breach of the EC Antitrust Rules in the Light of the ECJ's Manfredi Judgment, LexisNexis Expert Commentary, July 2008.

The issue is even more precarious, where the information concerned was submitted voluntarily by a company as a "whistle-blower" in the framework of the leniency programme in order to end participation in a cartel or disclose its previous involvement. As a reward for "blowing the whistle", the company may be fully or partially spared from cartel fines. If, however, the information provided was disclosed to third parties, consequences similarly detrimental to a cartel fine could arise. In particular, the information could, if disclosed to companies who suffered damage from the cartel actions and now wish to sue the participants, lead to damages claims against the whistle-blower before national courts. Such possible consequences will certainly put into question whether or not a leniency application should be filed at all. There are, however, no statutes limiting the possibility of disclosure of documents submitted in connection with leniency proceedings that apply in all EU Member States.[23]

Within the scope of Regulation (EC) 1049/2001 the respective documents do not classify as "sensitive" documents under Article 9(1)[24] and can thus not be subject to the greater scrutiny emerging from that provision when assessing their disclosure. They are, however, documents originating from third parties under Article 4(4) of the Regulation and thus the companies have the right to be consulted with regard to the question of disclosure and can state their disapproval. It is, however, only the Commission that decides on the applicability of any exception and on the disclosure of the documents at issue. The author, in this case the respective company, will only be informed about the intended release of the document and can take legal action against it but to what outcome remains questionable.[25]

2. The ECJ's approach in "Pfleiderer"

In a recent ruling concerning the disclosure of documents on national level the ECJ stated that European Competition Law, especially Regulation (EC) 1/2003, does not prohibit that access be granted to documents obtained under the leniency programme of the Commission.[26] Thus, there is a risk that whistle-blowers will be even more reluctant to come forward, despite the possible immunity from fines.[27] The ECJ put it to the national courts to rule on the circumstances for access and

23 ECJ, case C-360/09, *Pfleiderer*, not yet published, para. 20.

24 For documents covered by Art. 9(1) see *Maes*, (fn. 4), p. 203.

25 Ibid., p. 204.

26 ECJ, case C-360/09, *Pfleiderer*, not yet published, para. 27.

27 *Crofts*, Almunia stresses defence of whistleblower programmes post Pfleiderer, MLex of 16/9/2011, 09:46 GMT; ECJ, case C-360/09, *Pfleiderer*, not yet published, para. 27; this risk had already been contemplated by the Commission in their leniency notice, Commission Notice on Immunity from fines and reduction of fines in cartel cases, (2006/C 298/11), I.(6).

those for refusal of the respective information on a case-by-case basis[28] instead of ruling a general prohibition of the disclosure in order to protect the key witnesses.

As a result the general rules governing the access to documents also apply to those obtained in cartel proceedings and access can only be refused on grounds of a detailed scrutiny of each and every document requested.[29] This case-by-case analysis, be it by the Commission or any respective EU institution holding the information sought, or the national courts with regard to national authorities in possession of the requested information under the ECJ's ruling in *Pfleiderer*, will hardly be seen as a sufficient safeguard by those considering blowing the whistle.

However, the Commission's practice of disclosing documents obtained in cartel investigations to third parties, so far remains rather restrictive and the overall goal of "protecting" the efficiency of its leniency programme seems to be dominant. The Commission is further pursuing this restrictive approach despite the pledge given in its White Paper back in 2008 to "improve victims' access to relevant evidence" and by this to further strengthen "private enforcement" of Competition Law.[30]

IV. Impact of the "Pfleiderer" case on EU competition law

As the *Pfleiderer* judgement itself only concerned information obtained and held by national competition authorities, the European Commission was quick to state that documents of whistle-blowers' origin within its possession would not be affected by the judgement.[31] Indeed, the ECJ ruled that the interest of preserving the effectiveness of leniency programmes and that of facilitating private antitrust damages actions needed to be balanced by the national courts on a case-by-case basis. However, it does not provide national courts with practical guidelines, but instead merely refers to the general principles of equivalence and effectiveness.

So far the Commission has proved to be clearly committed to protecting the documents submitted by whistle-blowers from disclosure to potential claimants.[32] The

28 ECJ, case C-360/09, *Pfleiderer*, not yet published, para. 31.

29 EGC, case T-2/03, *Verein für Konsumenteninformation*, ECR 2005, II-1121, para. 67 et seq.

30 White Paper on Damages Actions for Breach of the EC antitrust rules, COM (2008) 165 of 2/4/2008. For details see *van der Hout*, (fn. 22).

31 *Rego*, Whistleblower statements still safe in EC's hands following Pfleiderer ruling, EU official says, MLex of 13/7/2011, 16:01 GMT.

32 *Crofts*, EC mulls legislative option for solving leniency, damages disclosure dilemma, MLex of 16/9/2001, 11:52 GMT.

Pfleiderer judgement, however, gave rise to a certain degree of uncertainty in this respect. During the hearing in *Pfleiderer* the Commission said it would only intervene if the co-operation among competition authorities was at risk and would otherwise leave it to the national courts to decide on the disclosure (an approach the Commission now seems to criticise[33]).

It is arguable, that potential whistle-blowers consider the possible limited protection of information handed over to the Commission, despite the Commission's general considerations[34] to keep such information safe. One may not resent them a certain level of suspiciousness which might result in keeping them from participating in leniency programmes altogether. The Commission has already stated that new legislation, at best European "hard law" binding on national authorities and courts, needs to be enacted as soon as possible to protect the leniency programme.[35]

There is, however, no new legislation in sight as previous suggestions for a redraft got stuck between the participating institutions, in particular between the Commission and the Parliament.[36] Hence, the question arises, which documents the Commission or any other EU institution have to disclose under the applicable law as it stands now, and what changes the new legislation should introduce.

The Commission is the EU institution which is most frequently asked to disclose documents and whose decisions are then challenged in court. This is why the following explanations refer to cases which concerned the Commission's decisions. The findings in general, however, apply to any other EU institution within the scope of Regulation (EC) 1049/2001.[37]

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33 *Crofts*, ECJ considers disclosure risk for European whistle-blower programmes, MLex of 14/9/2010, 17:01 GMT.

34 See Commission Notice on Immunity from fines and reduction of fines in cartel cases, 2006/C 298/11, V.(40), where the Commission considers that normally public disclosure of the respective documents would undermine certain private or public interest within the scope of Art. 4 of Regulation (EC) 1049/2001, OJ C 298 of 8/12/2006, p. 17.

35 *Crofts*, (fn. 32).

36 Competition Commissioner *Almunia* announced in a speech (Public enforcement and private damages actions in antitrust, 11/598) before the ECON committee of the European Parliament that on 22/9/2011 that "the relations between public enforcement of competition law and private damages actions" should be furthered and future regulation should be based on a "balanced proposal" which "preserve the effectiveness of public enforcement".

37 According to Art. 2(3) of Regulation (EC) 1049/2001 it is applicable to EU institutions.

V. The Commission's duty to disclose documents under the Transparency Regulation according to the case-law

When considering the scope of the EU institutions' duty to disclose documents, one must not only take into consideration the provisions in law but one should also closely examine the pertinent case-law. The Union Courts' judgements, particularly those of the Court of First Instance, on the matter are numerous and new rulings[38] are given regularly. They do not all concern the disclosure of documents obtained in cartel proceedings, but they nevertheless provide important guidance on the disclosure of documents. Whereas the Regulation (EC) 1049/2001 itself does not provide for any detailed guidance on how to apply the exceptions set out therein, the case law does so with greater precision.

The main aspects to be deduced from the relevant case law are the Commission's obligation to take each and every document requested under detailed scrutiny[39] and to explain exactly why each exception applies if the access is to be limited or refused.[40] The Commission has to balance the interests protected by the exception under Article 4 of Regulation (EC) 1049/2001 against the interest in disclosure with special regard to the aims set out in the second indent of the Regulation itself,[41] namely, that transparency strengthens democracy and enlarges the administration's legitimacy by enabling citizens to participate more closely in the decision-making process. Exactly this balancing does, however, require a detailed reasoning,[42] should the disclosure be refused and thus bears major problems. In this context it does not suffice that a document concerns any interest protected by the exceptions of the Regulation but the interest must actually be violated by access to the document and the danger of a prejudicing effect on the interest must be reasonably foreseeable and must not be merely hypothetical in nature.[43] Depending on the exception, the Commission invokes different lines of reasoning when motivating the full or partial refusal of disclosure. The exceptions refer to different aspects that are considered to be worth protecting and range from risks

38 E.g. in EGC, case T-471/08, *Toland*, not yet published; ECJ, case C-506/08 P, *MyTravel*, not yet published.

39 This principle already stems from the "pre-Regulation" case law, see *Heliskoski/Leino*, (fn. 6), p. 746.

40 See e.g. EGC, case T-110/03, *Sison*, ECR 2005, II-1429, para. 60.

41 ECJ, case C-39/05 P, *Turco*, ECR 2008, I-4723, para. 45.

42 With respect to the duty to reason see the following judgments: EGC, case T-174/95, *Svenska Journalistförbundet*, ECR 1998, II-2289; EGC, case T-124/96, *Interporc*, ECR 1998, II-231; EGC, case T-123/99, *JT's Cooperation*, ECR 2000, II-3269; EGC, case T-211/00, *Kuijter*, ECR 2002, II-485; EGC, case T-2/03, *Verein für Konsumentenforschung*, ECR 2005, II-1121; ECJ, case C-174/98 and C-189/99 P, *Netherlands and Van der Wal*, ECR 2000, I-1.

43 EGC, case T-471/08, *Toland*, not yet published, para. 29.

to the institutions' decision-making process via court proceedings to individual commercial interests and general public interests.[44]

A general problem that not only the Commission faces when giving reasons for the refusal to disclose documents is that in many cases, too detailed a reasoning would imply a disclosure of the main content of the document.[45] Hence, the reasons can often only be formulated in a very vague manner which might lead to claims for annulment of the decision on the grounds of insufficient reasoning.[46]

But regardless of the exact reasons for the refusal, whenever an EU institution does not disclose the documents requested there is an inherent risk that a court case may be brought. The Commission has been sued repeatedly over the refusal of access to documents in connection with cartel proceedings.[47] The applications in all cases have been based on a claimed misinterpretation of the exceptions provided for in Article 4 of Regulation (EC) 1049/2001 or the disproportionality of the balance struck between the interest in disclosure and that in protection of the information. *Basell Polyolefine*,[48] dating from 2007, was the first case expected to give rise to a court ruling but – unfortunately in this context – it ended without a judgement because the documents initially requested were no longer needed. None of the other cases have yet been ruled on, leaving no precedent in this regard so far.

VI. Need for new, unified legislation

Recapitulating what is outlined above, one may state that the present situation, with mainly case law determining the requirements for access to documents and the refusal of access, is way beyond what could be considered as convenient. On the one hand, it is difficult for the applicants for the disclosure of documents to evaluate in advance what chances they have of their request being accepted. Negative answers may thus be particularly frustrating and incomprehensible and trigger new applications to the General Court. On the other hand, the Commission and other EU institutions are faced with a surge of case law con-

44 See fn. 15 above.

45 EGC, case T-110/03, *Sison*, ECR 2005, II-1429, para. 60.

46 E.g. EGC, case T-84/03, *Turco*, ECR 2004, II-4061, para. 74; Opinion of Advocate General *Maduro* to ECJ, case C-39/05 and 52/05 P, *Sweden and Turco*, ECR 2008, I-4723, para. 36.

47 E.g. EGC, case T-399/07, *Basell Polyolefine*, not published; EGC, case T-437/08, *CDC Hydrogene Peroxide*, not yet published; EGC, case T-380/08, *Netherlands/Commission*, not yet published; EGC, case T-344/08, *EnBW*, not yet published.

48 EGC, case T-399/07, *Basell Polyolefine*, not yet published.

cerning the application of Regulation (EC) 1049/2001 and its exceptions, which does not provide detailed, continuous guidelines on how to deal with applications under the Regulation but only provides a case-by-case assessment. With each refusal to disclose documents the Commission has to be prepared for another claim being brought before the Union's Courts for the annulment of that decision.

But even if the Commission's refusal is annulled by the General Court, the documents requested will not automatically be revealed to the applicant. The only consequence of such a judgement is the annulment of the very decision itself and the Commission thereafter is obliged to decide anew on the same request on the same documents. They may then either disclose the documents or find better and more substantiated reasons to uphold the refusal. In the latter case the applicant may again bring an action for the annulment of the decision before the General Court and theoretically the issue may never be resolved. In practice there are requests for access to documents which are treated in front of the Commission and the EU Courts for more than ten years without a final solution even being near.

The need for unified and more detailed rules on document access therefore appears evident and the recognition of this is nothing new. As early as in 2005 the Commission decided to launch the "European Transparency Initiative" with the intent to increase transparency and in this context review Regulation (EC) 1049/2001.[49] Following the Parliament's request to make a proposal for amendments to the regulation, the Commission published a Green Paper on the issue in April 2007.[50]

According to the European Parliament's resolution[51] that contained the request for the amendments, the Commission considered a range of points when drafting its proposal.[52] Against the background of several years of applying Regulation (EC) 1049/2001, the problems faced in this context and a considerable amount of case law on the issue, the amendments proposed were predominantly to address the existing problems and ambiguities.

Taking into account the present issue, namely the disclosure of confidential business information, particularly where obtained in cartel proceedings, the relevant

49 European Commission, Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, COM (2008) 229 final, p. 2.

50 Green Paper, Public access to Documents held by institutions of the European Community – A review, COM (2007) 185 final.

51 Resolution adopted 4/4/2006, P6_A(2006) 052.

52 European Commission, Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, COM (2008) 229 final, p. 3.

amendments duly considered by the Commission firstly concerned the possibility of more detailed rules on confidentiality and the classification of documents as such. Whereas the Parliament would have approved of respective regulations and its own control over their application the Commission did not include such rules in its proposal, as a mere classification could not *per se* exclude documents from disclosure.[53]

Secondly, with regard to the protection of commercial interests, the Commission again did not propose any amendments.[54] The oppositional opinions on that topic, however, were disclosed during the public consultation of the Green Paper. On the one hand civil society as well as individual citizens took the view that the public interest for disclosure should prevail over the interest to keep commercial information secret in most cases. In this opinion only "real business secrets may be withheld", whereas information concerning any illegitimate behaviour of companies should, in particular, be disclosed.[55] On the other hand, business demanded better protection of confidential business information and was particularly concerned about a possible disclosure with regard to information obtained under EU competition rules. National judges argued along the same lines claiming the current system did not provide sufficient protection for information submitted involuntarily.[56] However, as most public authorities considered the balance struck between the interest in disclosure and that in the protection of confidential business information just right,[57] the Commission came to the conclusion not to propose any amendments in this context.

In the aftermath of the number of claims brought against the Commission over the refusal to disclose certain documents, there were even considerations to completely exclude documents obtained in cartel proceedings from disclosure under revised transparency rules.[58] The Commission hoped to put "documents forming part of the administrative file of an investigation or of proceedings concerning an act of individual scope" under a blanket restriction and thus keep them from access "until the investigation has been closed or the act has become definitive".[59] The European Parliament did, however, vote against these Commission proposals

53 Ibid, p. 3.

54 Ibid, p. 5.

55 Commission Staff Working Paper, Report on the Outcome of the Public Consultation on the Review of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, p. 5, para. 2.5.

56 Ibid.

57 Ibid.

58 *Crofts*, EC's cartel file access plans falter in European Parliament, MLex of 17/2/2009, 16:28 GMT.

59 Ibid.

and thus destroyed the Commission's hope for a settlement of the issue along the lines of its proposal.

The need for new regulations was further addressed in an opinion by the European Parliament's Legal Service on the revision of Regulation (EC) 1049/2001.[60] According to this legal opinion, the entry into force of the Lisbon Treaty modifies both the legal basis and the context of the regulation on the access to documents and the main future objective is to be the facilitation of the citizens' participation in democratic Union life.[61] However, with the entry into force of the Lisbon Treaty on 1 December 2009 the discussions regarding an amendment of the existing transparency rules have come to a halt, one may even say the EU institutions are stuck in a stand-off with the issue.[62] Previous proposals made by the Commission were disapproved of by the European Parliament. The Member States are a long way from a consensual opinion and none of the parties seems willing to make a move. June 2010, the date named for a revised version of the Transparency Regulation,[63] has come and gone unnoticed with no revised regulation presented by the Commission.

Up to today, no amended version of the Regulation has entered into force. The issue certainly is, however, still of great relevance. Additional years of applying the existing provisions of the Regulation have elapsed, more cases have been ruled on and the issue is as pressing as ever. Members of the European Parliament have only recently argued that the Regulation needs to be revised and that a "change of mentality" is needed. Real democracy is said to be going hand in hand with real transparency[64] and the German court's referral to the ECJ in the *Pfleiderer* case stressed the exigency for uniform rules.[65]

60 Legal Opinion SJ-0483/09 of 16/10/2009.

61 Ibid., IV-Conclusions, i, ii.

62 *Crofts*, Reform of file-access laws caught in EU institutional stand-off, MLex of 5/11/2009, 15:32 GMT.

63 Ibid.

64 EP Statement, Right of access to EU documents – more transparency needed, MLex of 13/4/2011, 17:36 GMT.

65 *Rego/Hilgenfeld*, German ECJ referral stresses need for unified document access rules, MLex of 20/11/2009, 14:55 GMT.

VII. Conclusion

How "full transparency" is to be achieved and when an amended version of the Regulation will finally enter into force remains open. Before the European legislator will enact new transparency rules, further cases like those mentioned above where the Commission was sued for disclosure of documents obtained under EU competition law, especially in cartel proceedings, will be decided. These precedents will then factually have to be taken into account when enacting new rules, and it is likely that the issue will not be simplified as more case law comes into existence. Hence, the need for new legislation meeting the necessities lacking under the present rules on transparency is unbroken and continually gaining strength. Especially in the light of the ECJ's ruling in *Pfleiderer* and its possible consequences for disclosure requests to both national and EU institutions and the further handling of the EU leniency programme, new legislation is definitely required.[66] This need is not satisfied by the latest draft report of the European Parliament[67] which is little more than yet another notice of intent and neither contains the long-awaited proposals for compromise. The need to overcome the dispute over an amendment to the Transparency Regulation and to finally clarify duties and exceptions thus remains.

66 *Crofts*, Almunia tells MEPs of need to "regulate" damages actions, access to evidence, MLex of 22/9/2011, 9.56 GMT.

67 Draft Report on public access to documents (Rule 104(7)) for the years 2009-2010, (2010/2294(INI)).