



INSIGHT

THE GENERAL COURT'S JUDGMENTS IN THE CASES *ACCESS INFO EUROPE V. COMMISSION* (T-851/16 AND T-852/16): A TRANSPARENCY PARADOX?

CATERINA MOLINARI*

ABSTRACT: On 7 February 2018, the General Court issued two twin judgments (T-851/16 and T-852/16) concerning requests for access to documents based on regulation 1049/2001. The two judgments added another piece to the expanding puzzle of case-law concerning access to documents held by institutions of the European Union. They developed a detailed analysis of the scope and nature of several of the exceptions to the principle of the broadest possible access to documents. The Court built largely on precedent. However, some aspects of its reasoning raise concerns on the scope of transparency in the negotiation of international deals, as well as on the rationale of non-disclosure in the name of protection of court proceedings and legal advice.

KEYWORDS: access to documents – transparency – international negotiations – court proceedings – legal advice – overriding public interest.

I. INTRODUCTION

On 7 February 2018, the General Court (the Court) issued two twin judgments¹ concerning requests for access to documents based on regulation 1049/2001² (the Transparency Regulation).

The two judgments added another piece to the expanding puzzle of case-law concerning access to documents held by institutions of the European Union (EU or Union). They developed a detailed analysis of the scope and nature of several of the exceptions to the principle of the broadest possible access to documents.

* PhD researcher and teaching assistant, KU Leuven, Institute for European Law, caterina.molinari@kuleuven.be.

¹ General Court, judgment of 7 February 2018, case T-851/16, *Access Info Europe v. Commission*, judgment of 7 February 2018, case T-852/16, *Access Info Europe v. Commission*.

² Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

The reasoning of the Court built largely on previous case-law, while, at times, accepting novel justifications for non-disclosure. For the first time, the judgments also revealed the Court's position concerning the role of transparency in the preparation by EU institutions of political arrangements with third countries. In this respect, the Court's reasoning is likely to affect the broad range of international deals negotiated between the EU and third countries in an informal manner (i.e. not following the procedure provided by Art. 218 TFEU for the negotiation of international agreements). This type of informal arrangements is increasingly preferred to formal international agreements in certain sensitive areas, such as return and readmission of irregular migrants.³

II. BACKGROUND

In March 2016, the joint press services of the European Council and the Council issued two press releases on the implementation of the EU-Turkey joint action plan to respond to the crisis caused by the war in Syria.

The first press release, dated 7 March 2016, announced that progress had been made in the implementation of the action plan.⁴ The second press release, dated 18 March 2016 and titled "EU-Turkey Statement", reported the content of an agreement reached to reduce migratory pressure at the EU borders while addressing the needs of Syrian asylum seekers.⁵

The NGO Access Info Europe, relying on Art. 6 of the Transparency Regulation, requested access to all documents containing legal advice or assessing the legality under EU and international law of the courses of action announced by the two press releases. The Commission's Legal Service and Directorate-General (DG) Home identified several relevant documents, but refused access to most of them, issuing two final decisions on 19 September 2016.

Access Info Europe (the Applicant) challenged the two decisions before the General Court, giving rise to the twin cases examined in the present *Insight*.

³ J.P. CASSARINO, *Informalizing the EU Readmission Policy*, in A. RIPOLL SERVENT, F. TRAUER (eds), *Routledge Handbook of Justice and Home Affairs Research*, London: Routledge, 2018, p. 83 *et seq.*; P. SLOMINSKI, F. TRAUER, *How do Member States Return Unwanted Migrants? The Strategic (non-) use of Europe during the Migration Crisis*, in *Journal of Common Market Studies*, 2018, p. 101.

⁴ Statement of the EU Heads of State or Government of 7 March 2016, in European Council Press Release 807/16 of 8 March 2016.

⁵ EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016.

III. COURT'S REASONING

III.1. TRANSPARENCY AND DEMOCRACY

Before going into the merits of the several pleas raised by the Applicant, the Court developed some general considerations on the Transparency Regulation, that hinted to a broad understanding of the principle of transparency, firmly anchored in the democratic values upon which the Union is founded.

The Court repeatedly stressed the link between access to documents and democracy, identifying citizens' oversight on decision-making as the essential factor legitimizing the work of institutional actors.⁶

In the Court's reasoning, it is precisely the link between transparency and democracy that justifies the basic principle of the Transparency Regulation, namely the widest possible access to documents held by EU institutions. As a consequence, the limitations to this principle, envisaged by Art. 4 of the Transparency Regulation, are of an exceptional nature and have to be interpreted strictly. The institutions relying on such exceptions must show a reasonably foreseeable risk that "disclosure [...] could specifically and actually undermine the interest protected by an exception provided for in Article 4".⁷ Such an interest can be of a private or public nature. The interests invoked by the Commission and analysed by the Court in the cases at stake were three: public interest as regards international relations;⁸ protection of court proceedings;⁹ and protection of legal advice.¹⁰

III.2. PUBLIC INTEREST AS REGARDS INTERNATIONAL RELATIONS

Art. 4, para. 1, of the Transparency Regulation obliges EU institutions to refuse disclosure of documents when it would undermine public interest as regards, *inter alia*, public security and international relations. The exceptional fields identified in Art. 4, para. 1, are formulated in a general manner, so as to leave the institutions a wide margin of discretion when deciding whether or not documents fall within their scope. The broad discretion left to the institutions implies that, when Art. 4, para. 1, of the Transparency Regulation is in-

⁶ *Access Info Europe v. Commission*, case T-851/16, cit., paras 33-37; and *Access Info Europe v. Commission*, case T-852/16, cit., paras 33-37.

⁷ *Access Info Europe v. Commission*, case T-851/16, cit., para. 37; and *Access Info Europe v. Commission*, case T-852/16, cit., para. 37, both citing Court of Justice, judgment of 17 October 2013, case C-280/11 P, *Council v. Access Info Europe*, para. 31 and judgment of 3 July 2014, case C-320/12 P, *Council v. in't Veld*, para. 52.

⁸ Art. 4, para. 1, of Regulation 1049/2001.

⁹ *Ibid.*

¹⁰ *Ibid.*

voked to justify non-disclosure of a document, judicial scrutiny is confined to corrective interventions in case of “manifest errors of assessment or [...] misuse of powers”.¹¹

With this in mind, the Court examined each document that the Commission refused to disclose, to verify whether or not the latter made a manifest error of assessment.

The Commission’s decision was upheld with respect to the entirety of the documents bearing some relationship to the dialogue with Turkey, as disclosing them would have undermined the Union’s position in the ongoing negotiations. Only for documents of a purely internal character, such as legal advice on the implementation of Directive 2013/32/EU¹² in certain EU Member States,¹³ the Court reached the conclusion that a manifest error of assessment had been made by the Commission.

III.3. PROTECTION OF COURT PROCEEDINGS AND LEGAL ADVICE

Art. 4, para. 2, of the Transparency Regulation requires the institutions to refuse access to documents “when [their] disclosure would undermine the protection of [*inter alia*] court proceedings and legal advice [...] unless there is an overriding public interest in disclosure”.

In other words, the exceptions envisaged by Art. 4, para. 2, of the Transparency Regulation are not as absolute as those envisaged by Art. 4, para. 1. Besides having to establish if disclosure would undermine the protected interest, the institutions are also required to verify whether an overriding public interest in disclosure exists. If so, disclosure must be granted even when the interests protected by the provision, such as court proceedings and legal advice, are undermined.

The real impact of the overriding public interest clause, that we can define as an exception to the exceptions, will be examined in detail below.

a) Court proceedings.

As mentioned, one of the grounds based on which the Commission denied access to the documents requested by the Applicant was the protection of Court proceedings.

In this respect, the Applicant noticed that the documents at issue had not been drafted in connection with Court proceedings. In addition, it argued that the Commission could not invoke the principle of equality of arms to justify denial of access to documents, as it was not a party to the proceedings related to the EU-Turkey statements pending before the Court when the final denial decisions were taken.¹⁴

¹¹ *Access Info Europe v. Commission*, case T-851/2016, cit., para. 40; and *Access Info Europe v. Commission*, case T-851/2016, cit., para. 40, both citing Court of Justice, judgment of 1 February 2007, case C-255/05 P, *Sison v. Council*, para. 64 and General Court, judgment of 12 September 2013, case T-331/11, *Besselink v. Council*, para. 34.

¹² Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

¹³ *Access Info Europe v. Commission*, case T-851/2016, cit., para. 56.

¹⁴ *Ibid.*, paras 62-63; and *Access Info Europe v. Commission*, case T-852/2016, cit., paras 56-57.

In response to the first argument raised by the applicant, the Court recognized that the documents were not drafted in connection to court proceedings. However, it relied on previous case-law to affirm that the Court proceedings exception covers also documents not drafted in relation to a specific case, if their disclosure can compromise the equality of arms in the context of pending proceedings.¹⁵ In response to the second argument, the Court simply stated that disclosure of the documents at stake “would [have] affect[ed] the Commission’s position as an intervener”¹⁶ in pending proceedings related to the EU-Turkey negotiations. Thus, it dismissed the Applicant’s line of arguments.

b) Legal advice.

Drawing on Recital 6 of the Transparency Regulation, in *Sweden and Turco v. Council*,¹⁷ the Court of Justice established that legal advice given to the institutions in context of a legislative procedure should, in principle, always be disclosed.¹⁸ It also identified the rationale of the legal advice exception with the need for EU institution to be able to receive “frank, objective, and comprehensive legal advice”.¹⁹ The Applicant relied on this precedent when arguing (i) that at least some of the undisclosed documents were connected to the legislative process of amending decision 2015/1601²⁰ and regulation 539/2001;²¹ and (ii) that the Commission did not clarify how disclosure would have affected its interest in receiving frank, objective and comprehensive legal advice.

Predictably, the Court did not follow the Applicant’s first argument, as the documents at issue were not drafted specifically in connection with a legislative procedure and, as a consequence, they were not subject to the wider transparency obligation imposed on the institutions in their legislative capacity.²² As to the Applicant’s second argument, the Court simply dismissed it, stating that the documents contained interdepartmental legal consultations aimed at preparing the negotiations with Turkey.²³

c) Overriding public interest in disclosure.

¹⁵ *Access Info Europe v. Commission*, case T-851/2016, cit., paras 71-78; and *Access Info Europe v. Commission*, case T-852/2016, cit., paras 65-72. See also General Court, judgment of 15 September 2016, case T-796/14, *Philip Morris v. Commission*, para. 88.

¹⁶ *Access Info Europe v. Commission*, case T-851/2016, cit., para. 77.

¹⁷ Court of Justice, judgment of 1 July 2008, joined cases C-39/05 P and C-52/05 P, *Sweden and Turco v. Council*.

¹⁸ *Ibid.*, para. 68.

¹⁹ *Ibid.*, para. 42.

²⁰ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

²¹ Council Regulation (EC) 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

²² *Access Info Europe v. Commission*, case T-851/2016, cit., paras 89-92; *Access Info Europe v. Commission*, case T-852/2016, cit., paras 83-86.

²³ *Access Info Europe v. Commission*, case T-851/2016, cit., paras 92-94; and *Access Info Europe v. Commission*, case T-852/2016, cit., paras 86-88.

The exceptions enshrined in Art. 4, para. 2, of the Transparency Regulation are subject to the overriding public interest clause, according to which disclosure must in any event be granted when an overriding public interest so requires.

In the cases at stake, the Applicant argued that, with respect to the EU-Turkey negotiations, democratic accountability constituted a pressing public interest consideration, capable of prevailing over the interest in protecting court proceeding and legal advice.²⁴ In this regard, it should be noticed that Art. 4, para. 2, of the Transparency Regulation does not specify who should balance the interests protected by the exceptions with general public interest considerations. However, settled case law has, on the one hand, stated that this balancing exercise must be carried out by the institution involved²⁵ and, on the other hand, that it is for the Applicant to establish that an overriding public interest is specifically present in relation to the disclosure of the documents at issue.²⁶ In the cases at hand, the Court found that “the applicant ha[d] failed to establish how the principle of transparency was especially pressing”.²⁷

IV. COMMENTS

IV.1. PUBLIC INTEREST AS REGARDS INTERNATIONAL RELATIONS

When analysing the exceptions provided for by Art. 4, para. 1, of the Transparency Regulation, the Court’s scrutiny is limited to verifying whether a manifest error of assessment has been made (see *supra*, section III.2). In this context, the Court’s upholding of the Commission’s non-disclosure decision for most documents is not *per se* surprising. Nonetheless, certain aspects of the Court’s reasoning on this exception deserve attention.

a) Transparency and informal deals.

In the case *Sophie in ‘t Veld v Council*, the Court held that a document revealing simple disagreement within the institutions on the correct legal basis for international negotiations could not be considered in and of itself as having the potential to under-

²⁴ *Access Info Europe v. Commission*, case T-851/2016, cit., para 97; and *Access Info Europe v. Commission*, case T-852/2016, cit., para. 91.

²⁵ *Access Info Europe v. Commission*, case T-851/2016, cit., para. 102; and *Access Info Europe v. Commission*, case T-852/2016, cit., para. 96, both citing *Council v. Access Info Europe*, cit., para. 32, citing *Sweden and Turco v. Council*, cit., para. 45.

²⁶ *Access Info Europe v. Commission*, case T-851/2016, cit., para. 103; and *Access Info Europe v. Commission*, case T-852/2016, cit., para. 97, both citing Court of Justice, judgment of 14 November 2013, joined cases C-514/11 P and C-605/11 P, *LPN and Finland v. Commission*, para. 94; judgment of 16 July 2015, case C-612/13 P, *ClientEarth v. Commission*, para. 90; and General Court, judgment of 23 January 2017, case T-727/15, *Justice & Environment v. Commission*, para. 49.

²⁷ *Access Info Europe v. Commission*, case T-851/2016, cit., para. 112; and *Access Info Europe v. Commission*, case T-852/2016, cit., para. 105.

mine the Union's public interest in international relations.²⁸ Relying on this judgment, the Applicant contended that at least some of the documents included in its access request necessarily dealt with the EU competence to conclude agreements with Turkey, and that such documents needed to be disclosed. To fully understand this argument, we need to remember that the Applicant's access request concerned documents containing legal advice or assessing the legality under EU and international law of the agreements reached with Turkey.

In the judgments analysed, the Court concluded that the undisclosed documents did not deal with issues of competences.²⁹ If we are to believe the Court, which had access to the full text of the undisclosed documents and was, therefore, best placed to assess their content, we are bound to ask ourselves the following question: how is it possible to discuss the legality of an international deal without discussing the issue of the legal basis and competence to conclude it?

The answer may well be linked to the political nature of the EU-Turkey statements of 7 and 18 March 2016. Had the same commitments taken the forms of international agreements governed by Art. 216 *et seq.* TFEU, the institutions would have been obliged to specify their legal basis.³⁰ The choice of issuing political statements, rather than concluding international agreements, rendered this obligation inapplicable. In this context, it should be noted that the same choice also erased the obligation to obtain the European Parliament's consent, which would have been necessary if an international agreement in the area of readmission and return of migrants had been concluded by the Union.³¹ In other words, issuing a political statement instead of concluding an international agreement entails a double loss of democratic accountability, as the negotiating institutions are (i) not obliged to obtain the consent of the European Parliament to agree on the statement; and (ii) free to avoid discussing and disclosing the legal basis of such statement. This double avoidance of accountability creates a transparency paradox in those fields of international relations characterized by a strong preference for

²⁸ General Court, judgment of 4 May 2012, case T-529/09, *Sophie in't Veld v. Council*, para. 50, confirmed on appeal by Court of Justice, judgment of 3 July 2014, case C-350/12 P, *Council v. Sophie in't Veld*, paras 44-45.

²⁹ *Access Info Europe v. Commission*, case T-851/2016, cit., paras 55, 110 and 111; *Access Info Europe v. Commission*, case T-852/2016, cit., paras. 55 and 104.

³⁰ Court of Justice, judgment of 6 November 2008, case C-155/07, *Parliament v. Council*; judgment of 10 January 2006, case C-94/03, *Commission v. Council*.

³¹ Arts 218, para. 6, let. a), sub-let. v), and 79, para. 2, let. c), TFEU. See, *inter alia*: G. FERNÁNDEZ ARRIBAS, *The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem*, in *European Papers*, Vol. 1, 2016, No 3, www.europeanpapers.eu, p. 1097 *et seq.*; N. IDRIZ, *The EU-Turkey Statement or the 'Refugee Deal': The Extra-legal Deal of Extraordinary Times?*, in D. SIEGEL and V. NAGY (eds), *The Migration Crisis?: Criminalization, Security and Survival*, The Hague: Eleven International Publishing, p. 61 *et seq.*; S. CARRERA, L. DEN HERTOG, M. STEFAN, *It Wasn't me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal*, in CEPS Policy Insights, no. 15, 2017. Both contributions reflect on the implications of the EU-Turkey informal deal in light of three General Court orders of 28 February 2017: case T-192/16, *NF v. European Council*; case T-193/16, *NG v. European Council*; and case T-257/16, *NM v. European Council*.

political arrangements, such as the area of return and readmission of migrants. The less transparent the institutions are during the negotiating process (using informal negotiating procedures not governed by the TFEU), the less will they be required to discuss and, then, disclose when confronted to an access to documents request.

b) Public interest in whose international relations?

The public interest referred to in Art. 4, para. 1, of the Transparency Regulation does not seem to be limited to the Union's international relations. Rather, it encompasses Member States' external action as well. This conclusion is suggested by the text of Art. 4, para. 4, of the Transparency Regulation, that deals with the disclosure of Member States' and other third parties' documents held by EU institutions. According to this provision, before disclosing a national document, the requested EU institution should consult the concerned Member State with a view to assessing the applicability of the exceptions envisaged, *inter alia*, in Art. 4, para. 1. The requirement to consult the concerned Member State implies that this article – at least when an access request concerns national documents – also protects the public interest in Member States' international relations.

In light of the above, we might wonder whose international relations would have been compromised by the disclosure of documents related to the EU-Turkey negotiations, especially if we consider the outcome of the three cases dealing with the validity of the EU-Turkey Statement. In the orders deciding those cases,³² the Court declined jurisdiction, arguing that the EU-Turkey Statement had been concluded by the Member States, rather than by the Union itself.³³ The two judgments analysed in the present *In-sight* could have referred to these precedents, and treated the negotiation of the Statement as pertaining to the Member States', rather than the Union's, international relations. They did not do so. The Court never engaged with its previous rulings and solely referred to the Union's interest in its own international relations as a legitimate ground for the Commission to refuse disclosure.³⁴

IV.2. PROTECTION OF COURT PROCEEDINGS

The Court concluded its analysis of the exception related to the protection of Court proceedings by stating that disclosure of the documents held by the Commission would have compromised the equality of arms in the pending cases brought by three asylum seekers to challenge the legality of the EU-Turkey Statement.³⁵ However, at the time of the denial decisions, the Commission had simply requested to intervene the pending

³² *NF v. European Council*, cit.; *NG v. European Council*, cit.; *NM v. European Council*, cit.

³³ On the implications of the General Court's conclusion concerning the paternity of the EU-Turkey Statement see E. CANNIZZARO, *Denialism as the Supreme Expression of Realism – A Quick Comment on NF v. European Council*, in *European Papers*, Vol. 2, 2017, No 1, www.europeanpapers.eu, p. 251 *et seq.*

³⁴ *Access Info Europe v. Commission*, case T-851/2016, cit., paras 41-42 and 43; *Access Info Europe v. Commission*, case T-852/2016, cit., paras 41-42 and 45.

³⁵ *NF v. European Council*, cit.; *NG v. European Council*, cit.; *NM v. European Council*, cit.

proceedings. It was not (and was never going to become) a party to those proceedings. In this context, the Court completely failed to explain why and to what extent the principle of equality of arms – consistently recognized as applying *inter partes*³⁶ – could be automatically extended with its full implications to potential interveners. This seems to be a broad, rather than a narrow, reading of the exception discussed, although exceptions are to be interpreted restrictively, as the Court itself recognized.³⁷

IV.3. PROTECTION OF LEGAL ADVICE

In the context of the legal advice exception, the Court was very quick in dismissing the Applicant's arguments and affirming the need to protect legal advice related to international negotiations. This may come as a surprise as, in the past, the Court had ruled that disclosure cannot automatically be denied, relying on the need to receive frank objective and comprehensive legal advice, every time international relations are involved.³⁸ When the specific exception related to international relations cannot be invoked, a real assessment of whether protection of legal advice is granted must be carried out, especially when the outcome of the negotiation is likely to affect internal legislative activity.³⁹ At the same time, the Court's sensitivity to the argument that secrecy favours mutual trust in diplomatic negotiations, independently on the effect of such negotiations on internal legislation, is not new.⁴⁰

Besides the issue of coherence with precedents of the solution reached, the nature of the Court's motivation deserves attention. In fact, the Court justified its approach by affirming that "[t]he interdepartmental consultations [...] would have been affected, if the drafters of those consultations, drafted in haste [...] had had to anticipate that such emails would be made available to the public".⁴¹ The Court further underlined that the relevant "consultations were sought at short notice [...] in an area of certain high political sensitivity

³⁶ See for example Court of Justice, judgment of 28 June 2018, case C-564/16 P, *EUIPO v. Puma*, para. 37; judgment of 30 June 2016, case C-205/15, *Direcția Generală Regională a Finanțelor Publice Brașov v. Vasile Toma*, para. 47; judgment of 28 July 2016, case C-543/14, *Ordre des barreaux francophones et germanophone and Others v. Conseil des ministres*, para. 40.

³⁷ *Access Info Europe v. Commission*, case T-851/2016, cit., para. 36; *Access Info Europe v. Commission*, case T-852/2016, cit., para. 36.

³⁸ *Sophie in't Veld v. Council*, cit., paras 70-79, confirmed on appeal by *Council v. Sophie in't Veld*, cit., paras 98-99.

³⁹ *Sophie in 't Veld v. Council*, cit., para. 89.

⁴⁰ See, for example, General Court, judgment of 19 March 2013, case T-301/10, *Sophie in't Veld v. Commission*, paras 178-181. See also D. CURTIN, *Official Secrets and the Negotiation of International Agreements: is the EU Executive Unbound?*, in *Common Market Law Review*, 2013, p. 453, according to whom an interpretation of the Transparency Regulation that values the protection of the "negotiating environment" very highly might "pre-empt open democratic and inclusive public debate on the adoption of what constitutes in substantive terms 'legislative' type international agreements".

⁴¹ *Access Info Europe v. Commission*, case T-852/2016, cit., para. 88.

and in a context of urgency” and that “the expeditiousness of those legal consultations, given in a situation of urgency – as evidenced by inter alia the late hours at which the emails at issue were sometimes sent [...] – would have been affected [...] if the drafters of those consultations, drafted in haste in order to lay the groundwork for meetings [...], had had to anticipate that such emails would be made available to the public”.⁴²

By developing these arguments, the Court added a new component, namely expeditiousness, to the core interests protected by the exception of legal advice, broadening its scope instead of giving the narrow interpretation required by its nature of exception.

Moreover, the Court conveyed the impression that expeditiousness might justify a lower quality of the legal advice, as this seems the only possible reason why the legal advice may be expected to change depending on the number and nature of its potential readers.

Finally, by referring to the political sensitivity of the issue at stake, the Court contradicted previous case law, according to which the particular sensitivity of ongoing international negotiations cannot in itself suffice to invoke the legal advice exception, once reliance on the specific exception dedicated to international relations has failed.⁴³

IV.4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

According to Art. 4, para. 2, of the Transparency Regulation, disclosure of documents must be granted even when the protection of court proceedings and legal advice would be undermined, if an overriding public interest so requires (see *supra*, section III.3). In the absence of indications to the contrary in the Transparency Regulation itself, consistent case-law has imposed the burden to demonstrate the existence of a specific public interest in disclosure on the applicant. As noticed in the literature, this has placed “the burden of identifying the [overriding public interest] on the shoulders of a player that has neither seen the contested documents and cannot argue private interests before the Court”.⁴⁴ Establishing what makes the public interest in transparency particularly pressing with respect to specific documents without having access to their content is a daunting task. Thus, the burden of proof placed on the applicant has the practical effect of obliterating the overriding public interest clause from the text of the Transparency Regulation.⁴⁵ In light of its case-law on the burden of proof in situations character-

⁴² *Access Info Europe v. Commission*, case T-851/2016, cit., paras 92-94.

⁴³ *Sophie in't Veld v. Council*, cit., para. 74, confirmed on appeal by *Council v. Sophie in't Veld*, cit., paras 97-99.

⁴⁴ L. ROSSI, P. VINAGRE E SILVA, *Public Access to Documents in the EU*, Oxford: Hart Publishing, 2017, p. 161.

⁴⁵ See P. LEINO, D. WYATT, *No Public Interest in Whether the EU-Turkey Refugee Deal Respects EU Treaties and International Human Rights?*, in *European Law Blog*, 28 February 2018, www.europeanlawblog.eu, citing *LPN and Finland v. Commission*, cit.; *ClientEarth v. Commission*, cit.; General Court, judgment of 23 January 2017, case T-727/15, *Association Justice and Environment v.*

ized by asymmetry of information between the parties (for example, discrimination cases⁴⁶), the Court may be expected to rethink its approach to the overriding public interest clause in access to documents cases.

V. CONCLUSION

In the two judgments examined, the Court analysed several of the exceptional justifications to deny disclosure of documents, as identified in Art. 4 of the Transparency Regulation.

The Court built largely on precedent, reminding us that transparency and democracy are inextricably linked and that exceptions to the principle of access to documents have to be interpreted strictly. However, the Court's reasoning warrants some reflections.

First, with respect to the exception envisaged by Art. 4, para. 1, of the Transparency Regulation, the Commission avoided disclosure obligations not only because the relevant documents were linked to international negotiations, but also because such international negotiations were to lead to the issuance of a political statement, rather than an international agreement. If the EU, alone or together with its Member States, had been negotiating an international agreement with Turkey, the legal basis of such agreement and the division of competence between the EU and its Member States would have been discussed and the documents containing such discussions, in principle, would have had to be disclosed. In this sense, by negotiating political arrangements, the institutions avoid democratic accountability both through the channel of the European Parliament and through the channel of access to documents.

Secondly, the Court consistently referred to the public interest in the Union's international relations, failing to coherently engage with its previous rulings on the nature of the EU-Turkey Statement as a non-Union deal.

Thirdly, with regard to the exceptions envisaged in Art. 4, para. 2, of the Transparency Regulation, two fallacies can be identified in the Court's reasoning: (i) the Court failed to explain why the principle of equality of arms should apply with no distinction to parties to the dispute as well as interveners; and (ii) it broadened the scope of the protection of legal advice. For the first time, the traditional protection of the institutions' interest in receiving frank, objective and comprehensive legal advice was complemented by the protection of *expeditious* legal advice, that would have allegedly been compromised by disclosure.

Fourthly, concerning the overriding public interest clause, the Court followed settled case law and confirmed the judge-made obliteration of this section of the Transparency Regulation, through the imposition of the burden of proof on applicants unaware of the content of the documents they have requested access to. This state of af-

Commission, judgment of 15 July 2015, case T-115/13, *Dennekamp v. Finland*; Court of Justice, judgment of 11 May 2017, case C-562/14 P, *Sweden v. Spirlea*, and *Besselink v. Council*, cit.

⁴⁶ See, for example, Court of Justice, judgment of 17 October 1989, case 109/88, *Danfoss*; judgment of 27 October 1993, case C-127/92, *Enderby v. Frenchay Health Authority*.

fairs is especially troubling in case of international arrangements negotiated and concluded informally. As the negotiating process of this type of arrangements suffers from a democratic accountability deficit if compared to formal international agreements, it may be argued that the public interest in the democratic control granted by access to document is especially pressing with respect to such arrangements.

Finally, it is worth remembering that, until the early '90s, transparency was treated by EU institutions as an "issue [...] of communication, rather than access".⁴⁷ In this context, the Transparency Regulation was the outcome a fundamental change of perspective concerning the issue of institutional accountability in the Union. Against this background, the Court's contention that the absence of an overriding public interest in disclosure in the cases at stake was reinforced by the fact that "the Commission ha[d] regularly disseminated general information [on the negotiations with Turkey] publicly"⁴⁸ constitutes a worrying step back.

⁴⁷ D. CURTIN, *Official Secrets and the Negotiation of International Agreements*, cit., p. 430.

⁴⁸ *Access Info Europe v. Commission*, case T-851/2016, cit., para. 112.