European Environmental Law Observatory

News

Issue of July 2015

This issue of the European Environmental Law Observatory is now available online http://www.clientearth.org/aarhus-centre-news/news/

The observatory covers information about the application of the Aarhus Convention on access to information, participation in decision-making and access to justice in environmental matters; provides updates on judgments of the Court of Justice and the General Court, decisions of the European Ombudsman as well as other official decisions from EU institutions; and highlights questions raised in recent doctrinal contributions, hand-picked by the Observatory's staff from a selection of major legal journals. The Observatory staff is composed of Anaïs Berthier (coordinator), Ludwig Krämer, Anne Friel and Giuseppe Nastasi. Other staff from ClientEarth contribute on an ad hoc basis.

This issue covers materials published between May 1, 2015 to July 1, 2015.

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Section A: Aarhus Convention

A.1 Recommendation of the European Ombudsman in the inquiries into complaints 803/2012/TN and 369/2013/TN against the European Commission (Transparency)

In 2010, Greenpeace, the complainant, sent the Commission information on an allegedly irregular shipment of live bluefin tuna from Tunisia to a tuna farm in Malta, which prompted the Commission to start investigating the matter. A month later the complainant requested public access to the documents relating to the Commission's investigation. The Commission refused to grant access arguing that public access to the documents would undermine the protection of the purpose of investigations pursuant to Article 4(2) of Regulation 1049/2001. The complainant challenged this refusal before the Ombudsman.

In 2012 the complainant asked to have access to the documents drawn up and received since their first request. At the time of the first request, the Commission had asked Malta to open an administrative inquiry based on Article 102(2) of the Fisheries Control Regulation. At the time of the second request, Malta was in the process of implementing an action plan drawn up by the Commission under Article 102(4) of the same regulation.

The Ombudsman first noted that the Commission had acknowledged and apologised for the excessive delays incurred in dealing with the request and therefore considered that this aspect of the case was resolved. This unfortunately will not encourage the Commission to comply with the time limits prescribed by the regulation.

However, the Ombudsman stated that Article 113 of the Fisheries Control Regulation "*assumes rather than excludes the application of Regulation 1049/2001 to requests addressed to the Commission*" to access data obtained under the Fisheries Control Regulation. She further stated that in order to ascertain whether the Commission had applied Regulation 1049/2001 correctly, she first had to determine whether the documents related to infringement proceedings, given that the case-law of the EU courts restricts access within these proceedings (Case T-111/11, *ClientEarth*; Joined Cases C-514/11 P and C-605/11P, *LPN*; Case T-36/04, *API*). She concluded that Article 113(6) of the Fisheries Control Regulation indicated that "*opening infringement proceedings is a possible subsequent, but clearly separate, measure*." The procedures provided under the regulation are therefore different from infringement proceedings. Moreover, she noted that the procedure under the regulation is more detailed and places less importance on mutual trust and political willingness to find a solution than infringement proceedings. Finally, the Ombudsman noted that the Fisheries Regulation gives the Commission investigatory powers that are similar to those of state authorities. Commission officials are expressly empowered to carry out inspections on the ground in the Member States contrary to infringement proceedings. The Ombudsman therefore concluded that the case-law of the EU courts relating to the application of the third indent of Article 4(2) of Regulation 1049/2001 to documents relating to infringement proceedings was not relevant to the documents in the present case. This conclusion is significantly important since the Ombudsman concluded that Member States are not automatically entitled to expect the Commission to observe confidentiality and there is no presumption of confidentiality applicable to the requested documents falling under the scope of Article 102 of the Fisheries Control Regulation.

The Ombudsman further stated that Article 4(2) third indent of Regulation 1049/2001 interpreted in the light of Article 4(4)(c) of the Aarhus Convention cannot be relied upon to refuse access to

the information at issue. The Convention provides that information may be refused if disclosure would adversely affect the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. Yet, the procedure undertaken under the Fisheries Regulation was neither a criminal nor a disciplinary one. She specified however that even if the procedure was an investigation for the purpose of Regulation 1049/2001 she would have come to the same conclusion. Although investigations were ongoing, at the stages of both requests, she did not consider that disclosure would have undermined the process. The ombudsman adopted a recommendation: the Commission should grant access to the requested documents, in particular the action plan, or provide valid reasons for not doing so.

Anaïs Berthier

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Section B: Judgments of the Court of Justice and the General Court

Court of Justice of the EU

B.1 Case C-461/13, Judgment of the Court of 1 July 2015, Bund für Umwelt und Naturschutz Deutschland eV v Germany,

(Reference for a preliminary ruling — Environment — EU action in the field of water policy — Directive 2000/60/EC — Article 4(1) — Environmental objectives relating to surface waters — Deterioration of the status of a body of surface water — Project for the development of a navigable waterway — Obligation of the Member States not to authorise a project that may cause a deterioration of the status of a body of surface water — Decisive criteria for determining whether there is a deterioration of the status of a body of water)

The Water Framework Directive (Directive 2000/60/EC, WFD) establishes a framework for the protection of inland surface waters, groundwater, transitional waters and coastal waters with the ultimate goal of achieving a good status for all EU surface waters by 2015. The CJEU in its preliminary ruling clarifies the Member States' obligations to prevent deterioration of all bodies of surface waters and examines the criteria for determining whether there is a deterioration of the status of a body of water.

The proceedings at national level concerned a planning permit for three independent projects concerning the deepening of the river Weser (North Germany), a navigable waterway classified as a heavily modified water body within the meaning of Article 2(9) of the Directive. All three projects would cause direct effects through initial and regular dredging of the river bed and in addition hydrological and morphological consequences for the sections of river concerned. The competent national authority concluded that these adverse effects would not result in a change in quality status class and therefore not constitute a 'deterioration of the status of the body of water concerned'. The planning permit was challenged by German nature conservation organisation Bund für Umwelt und Naturschutz Deutschland eV (BUND) which argued that there

had been a failure to comply with provisions for the protection of water originating in the Directive.

The CJEU was asked for a preliminary ruling on the question: whether the Directive is applicable to the authorisation procedure for individual projects or whether it simply sets out mere management-planning objectives (questions 1 and 4), and which criteria should be used to determine the 'deterioration of the status' of a body of water (questions 2 and 3).

First, the Court examined the Member States' obligations under Article 4(1)(a)(i)-(iii) of the Directive in relation to individual projects. The CJEU highlighted that Article 4(1) imposes two intrinsically linked objectives, namely to implement the necessary measures to prevent deterioration of the status of all bodies of surface water ('obligation to prevent') and to protect, enhance and restore all those bodies of water with the aim of achieving good status ('obligation to enhance'). Both objectives serve the ultimate goal of the Directive to achieve ‘good status’ of all EU surface waters by 2015. Taking into account the wording of Article 4(1) ('shall implement'/'in making operational'), drafting history and structure of the Directive including the derogation clause in Article 4(7), the Court concluded that the 'obligation to prevent' and the 'obligation to enhance' do not amount solely to basic obligations, but also apply to individual projects. Consequently, Article 4(1)(a)(i)-(iii) of the Directive requires a Member State to refuse authorisation for an individual project that may cause a deterioration of the status of a body of surface water or jeopardises the attainment of a good surface water status, unless a derogation applies.

The Court then turned to the concept of 'deterioration of the status' of a water body, which is not defined in the Directive. It first highlights that Article 4(1)(a)(i) imposes the 'obligation to prevent' in a general manner without mentioning any change of status class as set out in Annex V. The Court was concerned to avoid an outcome that would deter Member States from preventing deterioration of the status of a body of surface water also within a status class. This would result in a weakening of the protection of waters falling within the highest class and would ultimately put at risk the Directive's overall aim. Consequently, 'deterioration of the status' was held to mean situations where the status of at least one of the quality elements (contained in Annex V) falls by one class, even if there is no change of class as a whole. However, if the quality element concerned is already in the lowest class, any deterioration of that element constitutes a ‘deterioration of the status’ of a body of surface water.

Birgit Hollaus

B.2 Case C-5/14, Judgment of the Court of 4 June 2015, Kernkraftwerke Lippe-Ems GmbH v Hauptzollamt Osnabrück

(Reference for a preliminary ruling - Article 267 TFEU - Interlocutory procedure for review of constitutionality - Examination of whether a national law complies with both EU law and with the Constitution of the Member State concerned - Discretion enjoyed by a national court to refer questions to the Court of Justice for a preliminary ruling - National legislation levying a duty on the use of nuclear fuel - Directives 2003/96/EC and 2008/118/EC - Article 107 TFEU - Articles 93 EA, 191 EA and 192 EA)

Does a Member State violate EU law if it imposes a duty on nuclear fuel? This is the central question of this case, answered negatively by the European Court of Justice (ECJ).

The operator of a nuclear plant in Germany resisted the imposition of a duty on nuclear fuel due under German law. It proposed two main arguments in support of its claim. Firstly, the operator contended that EU Directives 2003/96 and 2008/118 only authorise the taxation of electricity as an end product -- not of the energy sources consumed for producing that electricity. Secondly, it submitted that the German tax constituted unlawful State aid benefiting other low-CO2 electricity generators, which were not subject to the tax.

The ECJ rejected the first claim, essentially holding that neither Directive 2003/96 nor Directive 2008/118 apply to the case. As regards Directive 2003/96, it covers 'energy products' included in the list set out in that Directive, which does not include nuclear fuel. The specifc exemption, under Directive 2003/96 (Article 14(1)(a)), of energy sources used for producing electricity does not therefore apply to nuclear fuel. What is more, contrary to the operator's contention, the provision cannot be regarded as establishing a general principle that may be applied by analogy to nuclear fuel used to generate electricity. As regards Directive 2008/118, this Directive governs, among other things, indirect taxes on the consumption of excise goods, notably electricity. The ECJ considered that the German tax is not levied in proportion to generated electricity, but to the amount of nuclear fuel used. The two criteria are not equivalent, as the output of electricity varies in relation to the nature and properties of the fuel, as well as the characteristics of the reactor. Furthermore, the nuclear fuel could be used to sustain a reaction that does not actually generate any electricity. The ECJ therefore concluded that the German tax was not an indirect tax on the consumption of electricity, and that Directive 2008/118 does not apply.

As to the second claim, the ECJ examined whether the German tax could be regarded as being selective. This would have been the case if a particular legal regime (national taxation of energy sources) favoured certain undertakings or goods (other low-CO2 electricity generators) in comparison with others (nuclear power generators) which are in a comparable situation. The ECJ held that this was not the case. Following, albeit less explicitly, the Advocate General's opinion, it did not consider that taxes on combustion of fossil fuels, nuclear reaction and renewable energy could be regarded as an individual legal regime, given the significant differences between these technologies. The ECJ referred to the explanatory memorandum to the proposal that culminated in the German measure, which explained that its purpose was to raise revenue to contribute, inter alia, to the rehabilitation of a storage site for radioactive waste. Based on these premises, the Court concluded that nuclear power generation is not in a situation comparable to other electricity generation techniques, and that therefore there was no selective State aid.

Apart from clarifying the scope of application of EU Directives on energy taxation, this judgment recognises that Member States are free to charge duties on the use of nuclear fuel, as doing so does not violate EU law.

Giuseppe Nastasi

B.2 Case C‑399/13P, Judgment of 4 June 2015, Stichting Corporate Europe Observatory v European Commission,

(Appeals — Regulation (EC) No 1049/2001 — Access to the documents of the European institutions — Documents relating to the trade negotiations between the European Union and the Republic of India — Full access — Refusal)

Corporate Europe Observatory (CEO), an NGO dedicated to raising general knowledge about the political and economic influence of transnational companies, appealed a General Court ruling which confirmed the validity of the Commission's decision to withhold certain documents related to trade negotiations between the EU and India.

During the negotiations, an advisory committee was created to identify barriers to market access in India. Representatives of trade associations and companies participated in the work of the committee and of working groups established on the basis of sector-specific expertise. The documents requested by CEO related to the communications between the Commission and these industry representatives, as well as minutes of the advisory committee and working groups in which they participated.

The General Court had upheld the Commission's decision to withhold certain of these documents and redact others on the basis that their disclosure would undermine the protection of international relations (Article 4(1)(a), third indent of Regulation 1049/2001 on access to documents). The majority of CEO's arguments in the appeal were rejected as inadmissible because they were based on the General Court's misinterpretation of facts, rather than law. The only argument that was accepted as admissible was based on Article 9 of Regulation 1049/2001. Article 9(1)(a) states that sensitive documents are those classified as "TOP SECRET", "SECRET" or "CONFIDENTIAL" according to the rules of the institution in question, and which protect essential interests of the EU in the areas covered by Article 4(1)(a). CEO argued that in failing to classify the documents with one of the specific designations mentioned in Article 9(1), the Commission implicitly waived the confidentiality of those documents. The Court rejected the argument. It stated that it does not follow from either Article 4 or Article 9 of Regulation 1049/2001 that the fact that a document has not previously been classified pursuant to Article 9(1) prevents an institution from refusing access to that document. Accordingly, the mere fact that a document is not marked as secret cannot prevent the exceptions provided for in Article 4(1)(a) from applying.

Anne Friel

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Section C: European Ombudsman decisions

C.1 Decision to open own initiative inquiry on transparency in trilogues 26/05/2015: OI/8/2015/FOR

The European Ombudsman has opened an investigation into the transparency of "trilogues" with a view to boosting transparent law-making in the EU. Trilogues are informal negotiations between the European Parliament (EP), the Council and the Commission aimed at reaching early agreements on new EU legislation.

The Ombudsman has sent one letter to each of the three institutions expressing her concerns about the lack of transparency of these meetings and asking them to reply to a series of questions.

This initiative is very welcome since the practice of having trilogue meetings is highly undemocratic and allegedly not compatible with the EU Treaty. Article 294 TFEU provides that the EP shall adopt a position on a legislative proposal of the Commission in a formal decision (first reading). This Parliament position is available on the internet and published in the EU Official Journal. In this way, each European citizen has the possibility to learn how his or her elected representatives reacted to the Commission's proposal. When the position of the Parliament is prepared in Parliamentary committees before being adopted in plenary, the members of the European Parliament have the possibility to introduce amendments and discuss with the other MEPs. The Commission proposal is thus subject of detailed discussion within the different Parliamentary committees involved, and among the different political groups and members of Parliament.

This way of adopting the EP's positions gives the public the possibility to discuss the Commission's position, to learn about the opinions of the different Parliamentary committees and to approach the members of Parliament, directly or via public and media discussions, in order to try to influence Parliament's position. This public discussion of legislative proposals is the essence of democratic decision-making. However, it has become common practice for the trilogues to take place before the vote in plenary in order to ensure the adoption of the directive/regulation at first reading. It therefore highjacks the discussion that is supposed to take place in the EP plenary between MEPs and replaces it with a discussion behind closed doors between the Commission, the EP and the Council. This means that before the Parliament has even adopted its first reading position officially, the Council, the Commission and the EP have already agreed on a final draft. Only a few members of the European Parliament take part in trilogue discussions and it is often their assistants who do the negotiating with the Commission and Council on their behalf. This system cannot replace the participation of the public and of all members of the Parliament in discussing Commission legislative proposals.

Not only is this practice undemocratic, it is completely opaque. The public does not have access to any information pertaining to these discussions; the whole process takes place behind closed doors in breach of the obligation of the EU institutions to act openly and transparently. The Ombudsman is expecting the institutions' reply by 30 September 2015.

Anaïs Berthier

C.2 Decision of the European Ombudsman closing the inquiry into complaint 2186/2012/FOR against the European Chemicals Agency

The complainant, an animal welfare organisation, made a request for documents to the European Chemicals Agency (ECHA) regarding certain preparatory documents for a decision on the acceptability of animal testing under the REACH evaluation programme. The request was made after the decision making process had ended.

ECHA's Member States Committee (MSC) is responsible for checking the compliance of companies with the data requirements of the Registration program under the REACH Regulation 1907/2006. Registration is a necessary requirement for placing a substance on the market in the EU. In this case, the compliance check included an evaluation of the animal testing undertaken by the companies concerned.
ECHA refused access to the documents because their release might mislead the public, and that, on the basis of the second paragraph of Article 4(3) of Regulation 1049/2001, disclosure would seriously undermine the decision making process. ECHA maintained that disclosure would hinder scientific debate within ECHA and put undue pressure on the members of the committee responsible for the decision. According to ECHA, if access was granted the decision would not be a scientific one, but rather a political one. Finally ECHA deemed there to be no overriding public interest in disclosure since a) stakeholders can take part in non-confidential discussions at the MSC and the complainant has availed itself of that opportunity, b) MSC minutes are subsequently published, and c) the complainant was given access to the final decisions and cover letters.

However, Article 6(13) of the Rules of Procedure of the MSC, the body responsible for the evaluation of dossiers submitted under the REACH registration procedure, foresees that observers are not provided with access to the meeting documents related to draft decisions on dossier and substance evaluation, except for non-confidential presentations at an open session of a MSC meeting introducing specific cases. Further, as the complainant pointed out, Article 10 of the rules of procedure of the MSC provides that observers cannot disclose to the public any information acquired as a result of their work in the Committee unless otherwise stipulated in EU or national law or already publicly available. Observers have to make a written declaration of confidentiality.

The complainant argued that further disclosure was likely to throw light on the complete assessment made and that ECHA should welcome lobbying by citizens who should be able to participate in the decision making process.

The Ombudsman didn't agree with ECHA's grounds for refusal. It stated that while the documents are technical, she does not consider that they would be likely to mislead any reasonably well-informed, interested person. The Ombudsman did not consider that the complexity of a document is a justification for refusing to grant public access to that document. Also, she noted that if further clarifications are needed, the EU institutions can always provide them to citizens requesting access to complex documents. The Ombudsman further stated that

this argument is not only wrong, but that invoking it carries the risk that the institution will be seen as appearing both overbearing and paternalistic towards the public.

As for the protection of the decision making process, the Ombudsman noted that interested parties will seek to impose pressure on the ECHA decision-making process irrespective of whether or not the documents relating to that process are made public. Furthermore, pressure from stakeholders is entirely legitimate and useful pressure that can improve ECHA's decision-making process. In particular, the Ombudsman underlined that disclosure of draft decisions are vital to the understanding of ECHA's decision-making process, since they reveal the starting point for ECHA's deliberations. Therefore the Ombudsman recommended that ECHA discloses all the requested documents.

ECHA agreed to disclose the documents but with redacted personal data and commercially sensitive information. In conclusion, ECHA agreed that the reasons to refuse access to documents in cases where a procedure had been concluded should be interpreted more restrictively than in cases where the procedure was still on-going. It then maintained that it should still be entitled to invoke the exemption for the protection of the institution's decision-making process but only under exceptional circumstances. The complainant accepted the redacted documents and thus the Ombudsman closed its complaint.

This decision is a further step towards more transparency in ECHA's decision-making process. However, ECHA is likely to continue to maintain secrecy of its decision making process before decisions are taken, thus only the companies concerned will have access to the preparatory document, while the wider public will not be able to participate in matters that affect human health, the environment and animal welfare.

Vito A. Buonsante

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Section D: Other EU institutions' decisions

There are no updates on the other EU institutions' decisions in this edition. You can read about the most recent developments in the May newsletter.

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Section E: Legal journal articles

E.1 Anaïs Berthier, Rulings in joined cases C-401/12P to C-403/12P and joined cases C-404/12P and C-405/12P: The lack of proper implementation of Article 9(3) of the Aarhus Convention, JEEPL LAW 12(2015) 207-213

The article comments joined Cases C-401/12 P to C-403/12 P and joined cases C-404/12 P and C-405/12 P. In the first cases, the NGO applicants had submitted a request to the Commission for internal review, under Article 10 of Regulation 1367/2006 on the application of the Aarhus Convention to EU institutions, of the decision of the Commission to grant the Netherlands an exemption under Directive 2008/50 on ambient air quality. The Commission rejected the NGOs' request as inadmissible on the ground that its decision was not a measure of individual scope and therefore could not be considered an "administrative act" within the meaning of Article 2(1)(g) of Regulation 1367/2006. In joined cases C-404/12 P and C-405/12 P, the decision the NGO applicants sought to annul was Regulation 149/2008 of 29 January 2008, amending Regulation 396/2005 by establishing Annexes II, III and IV setting maximum (pesticides) residue levels for products covered by Annex I. The Commission also rejected this request for the same reason given in joined Cases C-401/12 P to C-403/12 P. In all cases referred to above, the General Court annulled the Commission's decision.

The article comments on the General Court and on the Court of Justice of the EU's rulings. It criticises the ruling from the Court of Justice and argues that it leaves Article 9(3) of the Aarhus Convention as a dead letter. The General Court found that Regulation 1367/2006 had been adopted to meet the EU's obligations under Article 9(3) of the Aarhus Convention and that in so far as it provides for an internal review procedure only in respect of acts defined as "measures of individual scope", is incompatible with Article 9(3) of the Aarhus Convention. The author welcomes this ruling as it would have required the Commission to review the regulation to bring it into compliance with the Article 9(3). However, the Commission, the Council and the Parliament appealed the ruling. The European Court of Justice overturned the decision, ruling that Article 9(3) of the Aarhus Convention could not be relied upon to assess the legality of Article 10(1) of Regulation 1367/2006 as it was not directly applicable. According to the author, the question of whether limiting administrative and judicial challenges to acts of individual scope is compatible with Article 9(3) of the Convention remains therefore unanswered. She further notes that these rulings raise a question about the way the EU applies the international conventions it ratifies. She claims that refusing to review the legality of EU secondary legislation in the light of provisions of the Aarhus Convention, which is ratified by the EU, seems to be at odds with Article 216(2) of the Treaty on the Functioning of the EU (TFEU) which provides that international conventions are binding upon the EU institutions, and with settled case-law according to which these conventions prevail over EU secondary law. Moreover, contesting that Article 10 of the Regulation was adopted to implement Article 9(3) of the Convention is unreasonable

Moreover, the author contests the fact that Article 9(3) of the Aarhus Convention does not have direct effect. The wording specifically states that it applies to "all acts and omissions" by public authorities which contravene environmental law. The author further alleges that the Court should have relied on the *Biotech* case, in which the Court had ruled that the lack of direct effect of a provision of an international agreement did not prevent the EU courts from examining the validity of EU secondary legislation with that international agreement.

Finally, the article stresses the fact that the Court's case-law lacks coherence in not applying the Slovak bear case to the EU court itself. In this case, it had ruled that although Article 9(3) of the

Convention does not have direct effect, national courts had to interpret national rules in accordance with Article 9(3) to enable environmental NGOs to challenge decisions liable to be contrary to EU environmental law before a court. The Court thus adopted different standards in the implementation of Article 9(3) of the Convention, one for Member States' courts in which access to courts must be granted to the fullest extent possible, and one for itself, barring all access to justice. Yet, the EU is itself a party to the Convention and consequently its institutions, including the Courts, are subject to all the Convention's provisions.

Anaïs Berthier

E.2 Abazi V. and Hillebrandt M., The legal limits to confidential negotiations: Recent case law developments in Council transparency: Access Info Europe and In 't Veld, Common Market Law Review, Vol. 52, Issue 3, pp. 825–845

This article comments two recent cases of the Court of Justice, the Access-Info-Europe (AIE) and Sophie In't Veld (In't Veld) cases, on Regulation 1049/2001 on public access to documents held by EU institutions considered by the authors as pivotal and game changers for openness in the EU. In the AIE case, the Court addressed the question of whether the concealment of Member States' identities in documents pertaining to a legislative procedure is warranted under the exception in Article 4(3), first indent, on the protection of the decision-making. In In't Veld, the document requested contained legal advice regarding international negotiations to which only partial access was granted on the basis of the exceptions in Article 4(1)(a), third indent (the protection of international relations) and 4(2), second indent (the protection of legal advice). Both judgments dismissed the appeals brought by the Council and ruled in favour of transparency.

The authors demonstrate the importance of these two cases. Following the AIE case, all documents pertaining to legislation, regardless of the stages of negotiations, must be open and include the identity of the decision-makers. In the In't Veld case, the Court for the time affirmed that even in a context of international relations, the institutions are obliged to demonstrate how disclosure would specifically and actually undermine a protected interest. The required statement of reasons becomes more substantial than before since the Court deemed "insufficient in law" the statement of reasons that only noted the existence of a risk without establishing how the interests were undermined. The novelty in the Court's ruling is also that it applies the *Turco* test regarding legal advice in a non-legislative context. The test even applies when the exception ground invoked is the protection of international relations under Article 4(1)(a) of the regulation.

The article analyses the rationale for confidentiality within the Council to better understand the Council's refusal to provide access to documents as well as its legal arguments. It focuses on two issues: the Council's self-perceived need for a discretionary space and its considerations regarding the overarching institutional design that might necessitate such discretion. The article then reflects on the purposes of transparency, notably ensuring accountability and public participation in the decision-making process.

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