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OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 21 December 2016 (1)

Case C-213/15 P

Commission

v

Patrick Breyer

(Appeal – Access to documents of Union institutions – Article 15(3) TFEU – Regulation (EC) No 1049/2001 – Scope of application – Documents in possession of the Commission – Written pleadings submitted by a Member State in the course of proceedings before the Court – Closed proceedings – Access by third parties – Modalities –Openness of the Court in carrying out judicial tasks)

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I – **Introduction**

1. Mr Patrick Breyer ('the Respondent') asked the Commission ('the Appellant') for access to written pleadings that a Member State submitted in the course of infringement proceedings before the Court. Once the proceedings had ended, the Respondent requested the Appellant to grant him access to those pleadings under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents ('the Regulation'). (2) The Commission refused. Mr Breyer brought an action before the General Court. The General Court annulled the decision of the Commission, holding that the Commission should grant access to the requested pleadings.

2. By the present appeal, the Commission challenges the judgment of the General Court. The case before the Court has several layers. The first one concerns the specific issue raised by the present appeal: do the pleadings of Member States, which are in the Commission's possession, fall within the scope of application of the Regulation? Can they be disclosed once the proceedings in which they were submitted have been closed?

3. Following the Court's approach in *Sweden and Others* v *API and Commission* ('*API'*), (3) I cannot but suggest that both of these questions be answered in the affirmative. Nonetheless this also opens up the deeper layers of the actual problem, both practical and normative. Practically speaking, should it indeed be incumbent on one of the parties or interveners to a case to disclose the pleadings of another party, if so requested? Should it not be the role of the Court? More broadly, on the normative level, what degree of openness ought to apply to the Court when it is carrying out its judicial tasks?

II – **Legal framework**

A – *Primary law*

1. Treaty on the Functioning of the European Union

4. Pursuant to Article 15(1) TFEU, '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'.

5. Article 15(3) TFEU provides that:

'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 it in the second paragraph.

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.

…'

2. Charter of Fundamental Rights of the European Union ('the Charter')

6. Article 11(1) of the Charter provides that: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers.'

7. Under Article 42 of the Charter, entitled 'Right of access to documents', '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 documents of the institutions, bodies, offices and agencies of the Union, whatever their medium'.

B – *Secondary law*

1. Regulation No 1049/2001

8. Regulation No 1049/2001 governs the access of the public to the documents of the European Parliament, the Council, and the Commission.

9. According to recital 2, the Regulation aims to enable 'citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system'. Recital 4 states that its 'purpose is to give the fullest possible effect to the right of public access to documents'.

10. Under recital 10, 'to bring about greater openness in the work of the institutions, access to documents should be granted by the European Parliament, the Council and the Commission not only to documents drawn up by the institutions, but also to documents received by them. In this context, it is recalled that Declaration No 35 attached to the Final Act of the Treaty of Amsterdam provides that a Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement'.

11. By virtue of recital 11, 'in principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities'.

12. Article 2(3) of the Regulation provides that the 'Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union'.

13. For the purpose of the Regulation, the notion of 'document' is defined in Article 3(a) as 'any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility'.

14. Article 4 of the Regulation lays down a number of exceptions to access to documents and practicalities thereof. Under Article 4(2) in particular, 'the institutions shall refuse access to a document where disclosure would undermine the protection of … court proceedings and legal advice … unless there is an overriding public interest in disclosure'.

15. Article 4(4) provides that 'as regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception … is applicable, unless it is clear that the document shall or shall not be disclosed', while Article 4(5) states that a 'Member State may request the institution not to disclose a document originating from that Member State without its prior agreement'.

16. Article 4(7) sets temporal limits on the use of the exceptions: ‘The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.’

2. Decision concerning public access to documents held by the Court in the exercise of its administrative functions (4)

17. Article 1(1) of the Decision states that it ‘shall apply to all documents held by the Court of Justice of the European Union, that is to say, documents drawn up or received by it and in its possession, as part of the exercise of its administrative functions’.

18. Pursuant to Article 3(3), ‘access to a document drawn up by the Court of Justice of the European Union for internal use or received by it, which relates to a matter on which the decision has not been taken by it, shall be refused if disclosure of the document would seriously undermine the decision-making process of the Court of Justice of the European Union. Access to a document containing opinions for internal use as part of deliberations and preliminary consultations with the Court of Justice of the European Union shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the decision-making process of the Court of Justice of the European Union’.

III – **Facts and legal proceedings**

19. By letter of 30 March 2011, the Respondent requested the Commission to grant him access to a number of documents pursuant to Regulation No 1049/2001. The requested documents concerned infringement proceedings brought in 2007 by the Commission against the Federal Republic of Germany and the Republic of Austria with regard to the transposition of Directive (EC) No 2006/24 on data retention. (5)

20. The Commission first rejected the request and then decided, upon confirmatory application, to grant access, but only to some of the requested documents. The Commission notably refused to grant access to written pleadings (6) lodged by the Republic of Austria in *Commission* v *Austria*, (7) on the grounds that those pleadings did not fall within the scope of Regulation No 1049/2001.

21. The Commission stated that written pleadings were a Court document, and that the Court is only subject to the rules on access to documents when exercising its administrative tasks. Furthermore, the Statute of the Court did not provide for the communication of copies of written pleadings to third parties. The Commission further stated that the Court did not address, in *API*, (8) the question whether the institutions should grant access to the written pleadings of another party. In any event, such an interpretation would run counter to the fact that Article 15 TFEU precludes an interpretation of Regulation No 1049/2001 as encompassing Member States’ pleadings.

IV – **The judgment under appeal and the proceedings before the Court**

22. On 30 April 2012, Mr Breyer filed an application before the General Court for partial annulment of the Commission's decision in so far as access to the written pleadings at issue was refused. He claimed that the Commission infringed Article 2(3) of the Regulation. The Republic of Finland and the Kingdom of Sweden intervened in support of his application.

23. The Commission argued that Member States' written pleadings do not constitute 'documents' held by an institution within the meaning of Article 2(3) of the Regulation, read in conjunction with Article 3(a) of that Regulation. It also argued that they should be regarded as documents of the Court which are, by their very nature, excluded from the right of access to documents under Regulation No 1049/2001.

24. In the judgment of 27 February 2015, *Breyer* v *Commission* ('judgment under appeal'), (9) the General Court relied on the judgment of the Court of Justice in *API*. It held, first, that written pleadings drawn up by a third party, which are in the Commission's possession, must be classified as documents held by that institution. They were acquired by the Commission in the exercise of its powers and in the course of its litigation-related activities, and this fell within the meaning of Article 2(3) of the Regulation, read in conjunction with Article 3(a) thereof. (10)

25. Second, the General Court examined the effect of the fourth subparagraph of Article 15(3) TFEU on the scope of application of the Regulation. It took the view that 'it is clear from the case-law relating to the exception concerning the protection of court proceedings under the second indent of Article 4(2) of Regulation No 1049/2001 that the Commission's written submissions fall within the scope of that Regulation, even though … they are a part of the judicial activities of the European Union Courts and that under the fourth subparagraph of Article 15(3) TFEU such activities are excluded from the right of access to documents'. (11) According to the General Court, it followed that, 'by analogy, written submissions which are, like the written submissions at issue, produced by a Member State in infringement proceedings must be regarded as not being excluded, any more than those of the Commission, from the right of access to documents established in respect of the judicial activities of the Court of Justice by the fourth subparagraph of Article 15(3) TFEU'. (12)

26. On that basis, the General Court concluded that 'the written submissions at issue [did] not constitute documents of the Court of Justice which, having regard to the provisions of the fourth subparagraph of Article 15(3) TFEU, would be excluded from the scope of the right of access to documents and thus from the scope of Regulation No 1049/2001'. (13) Therefore, 'the Commission infringed Article 2(3) of that Regulation' by 'considering, in the decision of 3 April 2012, that the written submissions at issue did not fall within the scope of Regulation No 1049/2001'. (14)

27. The General Court thus decided to annul the Commission's decision in so far as it refused access to Austria's written submissions.

28. By the present appeal, the Commission, supported by the Kingdom of Spain and the French Republic, maintains in a single ground of appeal that the General Court has misinterpreted Article 15(3) TFEU. It argues that the provision should have been understood, given the specific nature of judicial activity, as excluding Member States' pleadings from the scope of application of the Regulation.

29. In response, Mr Breyer, supported by the Republic of Finland and the Kingdom of Sweden, essentially argues that Article 15(3) TFEU only excludes documents that the Court creates in its judicial activity, but not judicial documents. Therefore, the General Court did not err in law in holding that the Regulation was applicable.

30. Written observations were submitted by the Commission, Mr Breyer and the four abovementioned interveners, namely Spain, France, Finland and Sweden, who all presented oral argument at the hearing that took place on 26 September 2016.

V – **Assessment**

31. This Opinion is structured as follows: first, I propose that the judgment under appeal should be upheld as a natural consequence of both the Regulation as well as the Court's ruling in *API*. These were in no way altered by the adoption of the new, post-Lisbon Article 15(3) TFEU (Part A). Despite the fact that the proposed outcome is the logical and necessary continuation of the Court's ruling in *API*, it cannot be denied that it leads to some rather questionable practical consequences (Part B).

32. Secondly, I suggest therefore, that the present appeal be taken by the Court as a welcome opportunity to revisit its own institutional arrangements on access to some of the documents relating to its judicial activity. In this context, I first address the principle of (judicial) openness, both from its normative and comparative angles (Part C). Next, I provide a concise outline of the potential realisation of the principle of openness at the Court in terms of access to some of its judicial documents (Part D). Finally, I conclude by considering the costs of the present appeal (Part E).

A – *The judgment under appeal*

33. In a nutshell, the question at the heart of the present appeal is the following: Does the Regulation oblige the Commission to grant a third party access to the pleadings submitted by a Member State in a case that has already been closed? I am of the opinion that if the Court wishes to remain within the confines of its present case-law, and in particular to be in line with its decision in *API*, the answer is bound to be 'yes'.

34. In *API*, the Court examined whether the scope of application *ratione materiae* of the Regulation covered the Commission's pleadings in proceedings that were pending before the Court. On the one hand, the Court acknowledged that judicial activities as such were excluded from the scope of the right of access to documents. (15) On the other hand, the Court distinguished between pending cases and closed cases, on the basis of the

exception relating to the protection of court proceedings stated in Article 4(2) of the Regulation.

35. Drawing on that distinction, the Court stated that the disclosure of the Commission's pleadings in *pending* proceedings could be presumed to undermine the protection of those proceedings. A different situation was at hand, however, in cases that have already been *closed*, namely where the proceedings in question had been concluded by a decision of the Court. In the latter situation, grounds for presuming that disclosure of the pleadings would undermine the judicial activities of the Court no longer existed as those activities had already come to an end. (16)

36. It is crucial to note that in *API*, the Court did not rule out, as a matter of principle, access to the Commission's pleadings in pending cases (and certainly not in closed ones). It only established a general presumption of a risk to the protection of court proceedings in pending cases. (17) That means that the Commission does not need to carry out a concrete assessment of each document that has been requested in order to refuse access. The effect of the presumption is to shift the burden of proof.

37. That presumption, however, bears no impact on the definition of accessible documents within the meaning of the Regulation. Quite to the contrary: *API* effectively meant that, in pending as well as in closed cases, pleadings of the Commission that had been put before the Court, when requested from the Commission, fell within the scope of application of the Regulation and the definition of a 'document' contained therein.

38. Turning to the present case, I fail to see any reason why the same logic should not apply to pleadings of Member States in the Commission's possession. That conclusion clearly derives from the wording and the logic of the Regulation (1). It is not in any way altered by the newly introduced Article 15(3) TFEU (2).

1. The scope of application of the Regulation

39. As its title suggests, the Regulation is applicable '*ratione institutionis'* to the documents of the European Parliament, the Council and the Commission. The applicability '*ratione institutionis'* only denotes, in practical terms, the institution to which a request for access to a document may be made. What documents can actually be requested from the institution in question is a different issue, relating to the *ratione materiae* applicability of the Regulation.

40. As regards its scope *ratione materiae*, the Regulation has retained a very broad definition of the notion of 'document' laid down in Article 3(a), read in conjunction with Article 2(3): it is 'any content whatever its medium … concerning a matter relating to the policies, activities and decisions falling with the institution's sphere of responsibility'.

41. It follows from the unambiguous wording of Article 2(3) of the Regulation that the documents that can be accessed are by no means only those *authored* by the European Parliament, the Council or the Commission. Article 2(3) encompasses documents 'held

by an institution' in the sense of 'received by it and in its possession, in all areas of activity of the European Union'. (18) Thus, the identity of the author of the document shall not circumscribe the scope of accessible documents under the Regulation.

42. The fact that the requested document was not authored by an institution is therefore irrelevant for the definition of a 'document' under the Regulation. The so-called 'authorship rule' has clearly been abolished by the Regulation. (19) The only decisive element is that one of the three institutions covered by that secondary law instrument has possession of the files.

43. The fact that access might also be requested for documents that clearly have not been authored by an institution is further confirmed by a systemic reading of the Regulation. Article 4(4) and (5) of the Regulation foresees mechanisms for third party and the Member States' involvement in disclosure of documents not originating from the European Parliament, the Council, or the Commission. The legislator thus evidently foresaw that the Regulation should be applicable to third-party documents.

44. The only other condition of the Article 3(a) definition of a 'document' is that it relates to 'the policies, activities and decisions falling within the institution's sphere of responsibility'.

45. In the present case, the documents requested from the Commission are written pleadings lodged by a Member State that are in the Commission's possession, the Commission being the other party to the proceedings. There is no doubt that the Commission's initiation and pursuit of infringement proceedings is an activity falling within its scope of responsibility. (20) Therefore, all documents pertaining to those proceedings that are in the Commission's possession must logically be covered by the Regulation. That is the case, in particular, of the written pleadings filed by any party or intervener.

46. There is, therefore, no doubt that the pleadings of Member States that are in the Commission's possession are documents within the meaning of Article 3(a), read in conjunction with Article 2(3), of the Regulation.

47. On the other hand, it is also clear that the disclosure in an individual case may be refused on the basis of one of the exceptions laid down in Article 4 of the Regulation. The existence of such an exception in a concrete case has no bearing on the definition of 'document' itself. The qualification as a document and the actual granting of access are two clearly distinct issues. (21) Thus, pursuant to Article 4(2), second indent, of the Regulation in particular, an institution that holds a document may refuse access where disclosure would undermine the protection of court proceedings, unless there is an overriding public interest in disclosure.

48. For these reasons, I cannot subscribe to the proposition presented at the hearing by the Spanish Government. It essentially stated that the potential disclosure of Member States' pleadings is not subject to the provisions of the Regulation, but rather remains

subject to the rules of the individual Member States. That would mean, for example, that an individual wishing to access the pleadings of the Republic of Austria should request those from the Austrian Government under Austrian law.

49. The problem with such a proposition is twofold. First, it disregards the wording of the Regulation, as discussed in the previous points of this section (points 40 to 43), which clearly covers such documents. Second, Member States' pleadings are, although authored by Member States, EU documents by nature: they are drafted for proceedings before the Court, and they enter into the possession of the other EU institutions because of the latter's participation in those proceedings. They were not drafted for the exclusive and internal use of the Member State, to be kept within the Member State. The access to a portion of documents evidently falling under the Regulation cannot be made subject to 28 differentiated national regimes.

50. Finally, as outlined above in point 35 of this Opinion, in *API*, the Court drew a line between pending cases and closed cases with regard to the protection of court proceedings. In pending cases, the disclosure of pleadings may be presumed to undermine the protection of those proceedings. In closed ones, there is no longer any ground for presuming that disclosure of the pleadings would undermine the judicial activity of the Court.

51. The present case is a closed case, with no apparent connection to any further pending cases. Unless the contrary is established, it can be assumed that the disclosure of the pleadings shall no longer undermine the protection of court proceedings. It is up to the institution holding the requested document, in this case the Commission, to provide concrete reasons for refusal to disclose based on an exception laid down in Article 4(2). In the absence thereof, Member States' pleadings that are in the Commission's possession are to be disclosed under the Regulation.

2. The impact of Article 15(3) TFEU on the interpretation of the scope of the Regulation No 1049/2001

52. The thrust of the Commission's single ground of appeal relates to the interpretation of a provision introduced in the Treaty of Lisbon: Article 15(3) TFEU, in particular its fourth subparagraph.

53. The Commission essentially argues that the Regulation should be interpreted in the light of Article 15(3), fourth subparagraph, TFEU, read in conjunction with the first subparagraph. According to the Commission, Article 15(3) has limited the scope of application *ratione materiae* of the Regulation not only by excluding the Court's documents but, more broadly, documents of a judicial nature altogether. As a result, access to Member States' pleadings that are in the Commission's possession should be excluded.

54. The Commission, supported by the Spanish and French Governments, nonetheless makes a distinction between different types of judicial documents. The Commission

maintains that it would allow access to pleadings authored by an institution covered by the Regulation (namely the European Parliament, the Council, and the Commission) because those pleadings have a dual nature: they are judicial documents, but they are also documents of an institution. The Commission further explained that distinction at the hearing by stating that it is for the purposes of democratic control of the activities of the institutions that it would give access to its own pleadings or to those of another institution covered by the Regulation, after having consulted the relevant institution.

55. Mr Breyer, the Finnish and Swedish Governments maintain that Article 15(3) TFEU should have no bearing on the interpretation of the Regulation. They consider that Article 15(3), fourth subparagraph, TFEU only covers the judicial activity of the Court. It cannot be interpreted as relating to judicial documents in general. They also oppose the distinction made by the Commission on the basis of the 'double nature theory'.

56. I cannot subscribe to the interpretation of Article 15(3) TFEU proposed by the Commission. It appears to be based on a somewhat selective reading of that provision.

57. Article 15(3), first subparagraph, TFEU lays down a general right of access to documents of the Union's institutions. This general provision is further qualified in the fourth subparagraph of the same article with the following statement: '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.'

58. Thus, that provision indeed limits the right of access to documents to one segment of the activity of the Court: the exercise of its administrative tasks. When interpreting that provision, there might be some terminological hesitations. (22) There might also be the issue of boundaries in individual cases: is a specific task carried out by the Court judicial or administrative? Is a task always only administrative, or only judicial?

59. There is, however, no doubt that on the natural reading of that provision, the exclusion contained in Article 15(3), fourth subparagraph, TFEU is primarily an *institutional* one, within which there is a second, *functional* one. That provision contains a two-layered definition: *the Court of Justice* (an institution) shall be subject only when exercising its *administrative tasks* (a type of activity).

60. In practical terms, that provision of the Treaty simply states that no application for access to information may be addressed to the Court as an institution, if the content of the request relates to the exercise of its judicial tasks. By contrast, such requests may be addressed to the Court as an institution if they concern the exercise of its administrative tasks. (23)

61. But it is equally evident that the applicability of the functional element of the definition is clearly limited by the default institutional definition. In other words, the functional element shall come into play only to the extent that an application is made to the Court as an institution. Nothing in the Treaty suggests that the definition was

supposed to be extended outside its institutional dimension, thus creating a new, *de facto* exception to access.

62. That is however, in essence, the proposition made by the Commission in the present case. In the Commission's argument, Article 15(3) TFEU ought to be understood as protecting judicial activity as such. However, if uprooted from its primary institutional dimension, such exclusion would be in fact extremely far reaching: any document relating to the judicial activity of the Court could be excluded from access, irrespective of its author or whose possession it is in. Consequently, any document emanating from or in the possession of any institution that touches upon the judicial activity of the Court would persistently, if not permanently, fall outside the scope of application of the Regulation.

63. Why such an approach cannot be embraced is also discernible from the argumentative contradictions encountered in the overall argument of the Commission. Taken to its extreme, the interpretation of Article 15(3), fourth subparagraph, TFEU advanced by the Commission would mean preventing the Commission itself from disclosing its own pleadings or, for instance, the pleadings of the Council or the European Parliament. Such pleadings also relate to judicial tasks of the Court, which, if the Commission's argument were to be adopted, are henceforth excluded by virtue of Article 15(3), fourth subparagraph, TFEU.

64. For these reasons, the literal as well as systemic reading of Article 15(3), fourth subparagraph, TFEU runs counter to the interpretation advanced by the Commission in the present case.

65. Furthermore, the overall aim of the Treaty of Lisbon, invoked several times in the course of this appeal, also appears to run counter to the Commission's interpretation. If read in the context of other post-Lisbon provisions of the Treaties, such as Article 1 TEU and Article 298 TFEU, as well as Articles 11 and 42 of the Charter, all of which refer to openness and transparency, the overall purpose of Article 15(3), fourth subparagraph, TFEU, appears to be *not to exclude* something, but rather to expressly *include* something else: to make the Court clearly subject to the principle of access to information when exercising its administrative tasks.

66. Thus, in my understanding, neither the textual, systemic, nor contextual readings of Article 15(3) TFEU indicate that that provision could be interpreted as providing a restriction to the extant scope of access to documents in the Regulation, including access to pleadings in the Commission's possession.

67. In the light of the foregoing considerations, I suggest that the appeal should be dismissed.

B – *Operational and practical problems with the API solution*

68. In my view, the proposed solution to the present case that has just been outlined is the only conceivable one in the present legal context, provided that the Court wishes to

remain within the confines of *API*, while respecting the broad reading of the Regulation – which is also further boosted by the institutional openness induced by the Treaty of Lisbon in general.

69. There is, however, no denying that some of the practical consequences of the solution that I shall refer to as 'the *API* approach' may be seen as problematic in terms of their operation. Before outlining three of them, I wish to stress that those practical difficulties ought to be taken into account when contemplating future workable solutions to the issue of access to some of the judicial documents of the Court. They should not, however, be used to restrict the existing scope of access to documents.

70. First, the *API* approach, potentially extended by the present case, creates an asymmetry between the parties. It will be the Commission, or potentially another EU institution, that may be called upon to disclose the pleadings of another party or intervener to a procedure. A party, which ought to be on an equal footing with other parties to the same case, thus suddenly becomes the *de facto* judge deciding (of course indirectly) on the interests of the other parties with regard to disclosure of its pleadings. Without wishing to imply that there would be ill will or any sense of abuse from the party that has that advantage, such a position is inherently problematic.

71. Secondly, there is a danger of gaps in term of access. On the basis of *API*, access to third-party documents, such as pleadings, appears to be conditional upon whether the Commission – or another institution covered by the Regulation – was party to the proceedings before the Court. If that is not the case, the Regulation will be *de facto* inapplicable. In some cases therefore, the pleadings to which access could be granted in general, certainly once the case is closed, will not be accessible, because the respective institutions simply did not participate in the proceedings.

72. Thirdly, the *API* approach obliges the Commission – but also possibly the European Parliament or the Council when they are parties to the proceedings before the Court – to evaluate an application for access to documents. While doing so, the institution in question is obliged to run a series of assessments, and amongst other things ponder on whether or not any of the exceptions in Article 4 of the Regulation apply, or whether the case connects to any other cases, and thus the (temporal) exception of connectedness, as introduced by *API,* should apply. Without wishing to doubt in any way the high level of expertise of the institutions covered by the Regulation, the truth is that a party or intervener is unlikely to have all the necessary information relating to the individual case file, or to other potentially related pending cases.

73. All these reflections lead to an obvious, but important and necessary conclusion: the decision on access to judicial documents ought to be primarily made by the Court, not by a party or an intervener. For a number of practical purposes, but also normative ones, it is the master of the judicial file who should primarily decide on the access to documents in that file. (24)

74. All in all, a generous reading of the Regulation which offers a broad definition of a 'document', and the abandonment of the authorship rule, leads to the necessary conclusion outlined above in Section A. Nonetheless, as explored in this section, the subliminal feeling of a critical observer, if stated frankly, remains that an institution, *in casu* the Commission, effectively becomes obliged to carry out a job that ought properly to be done by the Court itself.

75. In the following Section (C) therefore, I shall outline broader reasons as to why the Court should take this task upon itself. I shall then, in Section D, offer a concise outline of how to practically achieve that task.

C – *The principle of openness and courts*

76. The Court is not required to provide access to documents with the exception of when it exercises its administrative tasks. That does not mean, however, that the Court is not subject to the overall principle of openness (1). Equally, some elements of (judicial) openness also pertain to the right of freedom of information, provided for by the Charter (2). More broadly, courts can no longer escape, as a matter of principle, openness as a value in their daily judicial activities (3), as also clearly witnessed by comparative inspiration (4).

1. Openness at the Court of Justice

77. The Court as an institution is not subject to the obligation to provide access to documents when it exercises its judicial tasks. That does not mean, however, that the Court is not subject to the overall principle of openness, (25) enshrined in a number of provisions of the Treaties. (26)

78. First, Article 15(3) TFEU (as discussed above, in points 52 to 66 of this Opinion), makes the Court subject to the obligation to provide access to documents only when the Court is exercising its administrative tasks. However, Article 15(1) TFEU, introduced by the Treaty of Lisbon, clearly extended the scope of application of the principle of openness to all the Union institutions. It states that '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'. Article 13(1) TEU lists the Court of Justice of the European Union as one of the Union's institutions. Thus, the Court of Justice is subject to the principle of openness.

79. Second, other provisions of the Treaties in their post-Lisbon wording further underline the principle of openness. The preamble to the TEU sets out the broadly defined objectives assigned to the EU by the High Contracting Parties. It notably puts emphasis on the overall need 'to enhance further the democratic and efficient functioning of the institutions' without distinguishing between the institutions. Further, Article 1, second subparagraph, TEU lays down that 'the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which *decisions are taken as openly as possible and as closely as possible to the citizen'*. (27)

80. Third, as also confirmed by the Court, ‘the principle of transparency … enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system’. (28)

81. In sum, the general duty of openness is applicable to *all* the institutions of the Union, without distinction. The Treaties contain clear requirements under which the Court itself, as any other institution, is subject to the principle of openness.

2. Freedom to receive information

82. The Court’s duty to ensure a reasonable degree of openness in the exercise of its judicial tasks could also be inferred from the fundamental rights provisions enshrined in the Charter. In my view, the pertinent provision in this regard is not Article 42 of the Charter (right of access to documents), but rather Article 11 (freedom of expression and information).

83. Article 42 of the Charter, placed under Title V, ‘Citizens’ Rights’, lays down a general right of access to documents of the institutions of the Union. Thus, read in isolation, Article 42 of the Charter could be construed as subjecting *all institutions* of the Union, including the Court of Justice, to the obligation incumbent on them to fulfil the right of access to documents.

84. However, Article 15(3), fourth subparagraph, TFEU subjects the Court to the obligation only when the Court is exercising its administrative tasks. It stems from Article 52(2) of the Charter that ‘rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties’. In this respect, the explanations relating to the Charter provide guidance in the interpretation of Article 42. They state that the right of access to documents is exercised under the conditions and within the limits set out in Article 15(3) TFEU.

85. Thus, Article 42 of the Charter remains applicable to the Court only when it is exercising its administrative tasks. It is not applicable to the Court when it is exercising its judicial tasks.

86. However, the fact that the specific right is not applicable does not preclude the applicability of other, more general rights contained in the Charter. In the present case, the freedom of information is also covered by Article 11 of the Charter. The latter provision states that the right to freedom of expression shall include freedom *to receive* and impart information and ideas. That right is broader than that of access to documents. In other words, the right of access to documents is a logical subset, or one of the emanations, of the right to receive information. Everyone is entitled to receive information in order to be able to harness their freedom of expression. (29)

87. Article 11 of the Charter corresponds to Article 10 of the European Convention on Human Rights ('the Convention'). The latter provision tends to be increasingly construed by the European Court of Human Rights (ECtHR) as a broad guarantee of freedom to receive information, bordering on the recognition of a right of access to information. (30)

88. As far as the specific question of access to court documents is concerned, the ECtHR stated in *Társaság a Szabadságjogokért v. Hungary* (31) that Hungary violated Article 10 of the Convention by refusing access to a non-governmental organisation (NGO) to a complaint pending before the Constitutional Court concerning the constitutionality of amendments to the national Criminal Code. The ECtHR held that it was an unnecessary interference with freedom to receive information. (32) It is perhaps worth highlighting that the ECtHR reached that conclusion in relation to a *pending* case before the Constitutional Court, in which access to the pleadings (the original application for review) was requested prior to the decision of the Constitutional Court.

89. Article 52(3) of the Charter states that the meaning and scope of Charter rights shall be the same as those laid down by the Convention. The EU law standard should not therefore fall below the standard set by the ECtHR. It remains to be seen where precisely the ECtHR will strike the balance in future cases relating to the same subject matter. (33) It is, however, already quite clear that the starting point in terms of judicial openness and access to pleadings submitted by a party to a court is in greater favour of openness and access.

90. To sum up: the Court is subject to the principle of openness, which is also applicable to its judicial activities. Freedom to receive information, guaranteed under Article 11(1) of the Charter, and as interpreted through Article 52(3) of the Charter and Article 10 of the Convention by the ECtHR, also clearly hints at a greater degree of openness.

91. However, the vocabulary of duties, obligations, and a list of provisions on the basis of which the Court of Justice is arguably *obliged* to do something is not the best way of approaching the issue. It would be more apt to put the question differently: what might a court at the beginning of the 21st century *want* to do by itself, in order to reasonably engage with its wider audience?

92. The following two parts of this section seek such inspiration at two levels: one relating to values (3), and the other relating to comparative inspiration (4). What do the courts do in terms of openness and why?

3. The values underlying judicial openness

93. Openness is no new concern when it comes to justice. Even as far back as the late 18th century, Jeremy Bentham stressed that publicity was the 'very soul of justice'. (34) He stated that 'Without publicity, no good is permanent. Under the auspices of publicity, no evil can continue' and that 'The efficacy of this great instrument extends to everything – legislation, administration, judicature.' (35) Thus, publicity of hearings and publication

of judgments may be seen as an expression of openness, (36) strongly intertwined with the element of public control of and over the judiciary.

94. With judicial evolution over the passing of time, further openness became necessary. Today, courts play a key role in democratic societies. With power comes responsibility. This is all the more so for a supranational court, such as the Court of Justice, on account of its being arguably more 'distant' (37) and differing from the more traditional types of authority that national courts are said to possess.

95. In constitutional democracies, the level of legitimacy ought to match the level of power and responsibilities in order for the decisions taken to be socially acceptable. Of course there are different sources of legitimacy. It is possible to distinguish, for example, between institutional and argumentative legitimacy. (38) It is equally possible to distinguish between input and output legitimacy. (39) Whatever taxonomic label will eventually be put on the notion, the question remains the same: how does an institution gain legitimacy, and where from?

96. When conceiving of the *means* to enhance courts' legitimacy in constitutional democracies, openness appears to be the natural candidate**.** Openness strengthens the overall legitimacy of courts. On the one hand, it enhances their democratic credentials by rendering courts somewhat more responsive to the citizens (a). On the other hand, it improves the quality of justice by creating incentives to improve judicial work and output (b).

a) Democratic adjudication (40)

97. When it comes to courts of law, popular legitimacy cannot be channelled through the same traditional means that are in force with the government or the parliament. It must be tailored to the specific and unique role of independent courts.

98. Thus, it is notably through openness that courts become more accountable to the citizens. The openness of courts fosters their democratic nature by enabling the citizens to monitor the exercise of judicial power, by guaranteeing their participation through public debate and, finally, by furthering understanding of the judicial pronouncements. In this way, judicial openness ultimately fuels input legitimacy.

99. First, openness ensures some democratic control over courts. As Lord Chief Justice Hewart famously said, 'justice should not only be done, but it should manifestly and undoubtedly be *seen* to be done'. (41) One way of enabling such democratic control is through access to pleadings. Pleadings are essential for understanding a ruling, its content and the dialectic that led to the ruling. Courts appear more trustworthy, reliable and efficient when they disclose at least some of the documents that they rely on in order to issue a judgment. The public may see that a court thoroughly examined and pondered the different arguments made by the parties. It helps the public to understand the logic underpinning a judicial pronouncement and why one argument may have prevailed over another.

100. Second, the openness of courts encourages public debate. It fosters the participation of the citizens in the building, through discussion and exchange of ideas, of a public opinion in Europe. (42) Debate may notably be triggered by NGOs, associations, journalists, social watchdogs, researchers or whistle-blowers who contribute to raising citizens' awareness on specific issues of public interest. (43) Thus, more openness is likely to increase public confidence in the judiciary. (44)

101. It should be clearly stressed that the ability to express criticism is integral to a meaningful debate. Potential criticism should not be seen as undermining courts as institutions. Moreover, the fear of criticism is certainly not a good reason for withholding information. Criticism is, by contrast, a key feature of democratic societies where freedom of expression and the pluralism of opinions are valued.

102. Third, judicial openness presents a heuristic value. (45) It allows a better understanding of the outcome of a case. Anyone can discover, if not why, at least *how* a court came to a certain decision if access is in principle given to the pleadings of the parties, the latter constituting the starting point of judicial reasoning. Equally, the pleadings may shed light on certain unclear pronouncements and unveil the systemic patterns of a court's reasoning. As a consequence, court rulings may become more predictable.

b) Quality of the justice

103. Openness also improves both the output and the input of judicial work, namely the quality of rulings but also that of party pleadings. It is likely to generate conditions for a race to the top in legal work since public supervision and possible critiques could be an efficient incentive for the courts, but also all the other participants to the proceedings, to improve the quality of their professional work. It may also serve the interests of future litigants because it may unveil strategies or argumentation patterns. As a result, the quality of the work of the different legal actors involved as much as the overall observance of the rule of law is likely to increase.

104. In sum, on the normative level, openness is bound to enhance the overall institutional legitimacy of courts. There is no reason to believe that the same general proposition does not apply to the Court of Justice. How then, more specifically, can such broader normative propositions be put into operation? In this regard, comparative inspiration from other national and international systems might be of interest.

4. Comparative inspiration

105. The practice regarding access to judicial documents in the Member States of the Union is extremely varied. (46) Specific rules on access to judicial documents have been adopted only in a minority of Member States, such as Sweden and Finland. In other States, access to judicial documents is subject to general rules on access to public documents. In yet others, access to judicial documents would be provided for by the relevant provisions of the national codes of procedure (civil, administrative, criminal)

that govern access to the judicial file by third parties as a part of the applicable rules of procedure.

106. Most of the Member States appear to have opted for some type of individual request system. Access often seems to be, though not always, conditional upon proving a legitimate interest. Depending on the nature of the case, documents can be made available when the case is still pending or after the judgment is given. In some sensitive cases, they can only be disclosed after the appropriate period of confidentiality has expired.

107. Beyond Europe, a number of jurisdictions, including the United States of America and Canada, appear to be rather open with regard to third party access to judicial documents, in particular to pleadings. (47)

108. Looking to international jurisdictions, and taking the ECtHR as the first example, Article 40(2) of the Convention states that 'documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise'. Rule 33(1) of the ECtHR's Rules of Court further provides that 'all documents deposited with the Registry by the parties or by any third party in connection with an application … shall be accessible to the public in accordance with arrangements determined by the Registrar, unless the President of the Chamber … decides otherwise, either of his or her own motion or at the request of a party or any other person concerned'. On this basis, documents relating to proceedings that have ended are made available on individual request while documents in pending cases can be consulted on the ECtHR's premises. However, there is also an exhaustive list of restrictions to public access to the case file. (48)

109. At the European Free Trade Association (EFTA) Court those persons that have an interest in the case may consult the register, which notably contains pleadings, at the Registry. Third parties may obtain copies or extracts on payment of a fee. (49) On top of this, the report for the hearing, which features the factual and legal background together with a summary of the pleas and arguments, is available online as soon as it is drafted, thus also for pending cases.

110. Pleadings lodged before the International Court of Justice can be made accessible to the public, after ascertaining the views of the parties, on or after the opening of the oral proceedings. (50)

111. The International Tribunal of the Law of the Sea, for its part, makes pleadings of the parties to a case public on the opening of the oral proceedings - or earlier, though not until the views of the parties have been ascertained. (51)

112. Finally, within the Court of Justice of the European Union itself, specifically the General Court, the issue of access to judicial documents was initially governed by Article 5(8) of the Instructions to the Registrar of the General Court. Third parties could, after the parties to the case had been heard, obtain access to the case file on the express

authorisation of the President or, if the case was still pending, by the President of the formation. That issue is now regulated by Article 38(2) of the new Rules of Procedure of the General Court, (52) which has taken over the rule that used to apply before the Civil Service Tribunal. (53) It provides that 'no third party, private or public, may have access to the file in a case without the express authorisation of the President of the General Court, once the parties have been heard. That authorisation may be granted, in whole or in part, only upon written request accompanied by a detailed explanation of the third party's legitimate interest in having access to the file'.

113. What lessons, if any at all, can be drawn from such a varied overview of (and by definition selective) comparative samples? Four points shall be offered in lieu of a conclusion to this section.

114. First, judicial openness is all around. (54) If there is any common denominator to the considerably varied practice at the national and international levels, it is that the courts as institutions have been becoming more, not less, open in the last decade or two.

115. Second, whatever the individual or procedural arrangements in the system in question, potential disclosure of party pleadings tends to be administered by the courts themselves. Arguably, there are not many systems in which no access to pleadings would be provided at all.

116. Third, a comparison might be of relevance not only at the level of normative solutions, but also at the level of social impact and consequence of certain legislation or a solution. Seen from this perspective, it would not appear, in those systems that opted for greater openness and access to judicial documents, that the often conjured negative consequences, such as the information being exploited or misused by third parties, or parties' agents or a member of the court being pressurised or influenced in any way, would have materialised in any tangible way. It might well be, of course, that such incidents have just not been reported. However, at the present stage, the comparative information available does not confirm the coming into existence of any of the frequently advanced dangers as to why greater openness at courts is not possible.

117. The fourth and final point is that of course it is true that normative choices and solutions adopted in one system are not *eo ipso* transferable into another system. Comparative argument remains an inspiration. The fact that others do things in a certain way does not mean that one must do the same. On the other hand, seeing the robust trend pointing in a clear direction, buttressed by strong normative arguments as to why reasonable openness of courts is a good thing, a very convincing explanation would be needed for suggesting that the Court of Justice is and ought to be different in this regard.

D – *Revisiting access to (external) judicial documents of the Court*

118. Against this background, it is fair to acknowledge that the present state of openness at the Court as far as its judicial activity (55) is concerned is not optimal. An interested

third party has no access to the judicial file. Access to some written pleadings might be possible in cases that have been closed, if the conditions of *API* are met.

119. Broader context and evolution of judicial practice also matters in this regard. Although there have been some positive developments with regard to access to (older) judicial documents of the Court, (56) the fact remains that as far as the overall access to further information about the ongoing judicial business of the Court is concerned, avenues of information were being closed rather than new ones being opened. Until the mid-1990s, an interested third party could have obtained more information about the case and the arguments of the parties through a report for the hearing published in the European Court Reports alongside the decision of the Court and the Opinion of an Advocate General. This is no longer possible as publication of the reports for the hearing was discontinued. Since 2012, with the entry into force of the new Rules of Procedure, reports for the hearing ceased to be generated altogether. Added to this is the increasing conciseness of both the judgments of the Court and the Opinions of Advocates General with respect to the restatement of the arguments advanced by the parties or interveners, for the obvious and understandable reasons of translation costs.

120. In sum, somewhat paradoxically in an age of universal internet information overload, the interested outside world is in fact receiving less and less information about the decision-making of the Court. The time is ripe to turn the tide. Against the outline above, providing greater access to some judicial documents of the Court should more properly be seen as re-establishing the balance in terms of understanding the judicial procedure before the Court: some avenues of information have, for operational reasons, been closed down. Others, such as broader access to written pleadings submitted to the Court, should therefore open up.

121. Before outlining a few suggestions in this regard, three preliminary points should be made at the outset.

122. First, all the suggestions made in this section are based on the principle of openness under Article 15(1) TFEU. It should be clearly reiterated that the Court, when exercising its judicial tasks, is *not* subject to the obligation to enable the right of access to documents. What follows is rather an expression of what a judicial institution that is responsive and reasonably engages with the broader world ought to wish to do of its own accord.

123. The approach of the European Central Bank (ECB) may be illustrative in this regard. The ECB is in a similar position to that of the Court. By virtue of Article 15(3), fourth subparagraph, TFEU, the ECB is subject to the right of access to documents only when exercising its administrative tasks. (57) That fact, however, did not prevent the ECB from voluntarily providing wider access to its documents, some time ago, on the basis of the broad concept of openness laid down in Article 1, second paragraph, TEU. (58)

124. Second, and following on from the previous point, nor is the Court covered by Regulation No 1049/2001. However, even if not applicable, the principles and the case-

law under the Regulation might provide some guidance in devising the appropriate legislative solution, as was in fact also the case with the Court's Decision of 11 December 2012.

125. Third, in terms of access, two categories of *judicial* documents (59) of the Court ought to be distinguished: 'internal judicial documents' and 'external judicial documents'.

126. *Internal* judicial documents are those drafted within the Court and for the Court, such as draft opinions and judgments, preliminary reports, notes for a decision on procedure, or notes for deliberation. Those documents pertain to the quintessential process of judging. Unless the nature of the judicial function was to change considerably, those documents cannot be concerned by openness. (60)

127. *External* judicial documents of the Court are either those drafted by the Court for the purpose of the Court's judicial communication with external bodies (parties, interveners, or the national courts) or those submitted by third parties to the Court in judicial proceedings, such as pleadings submitted by the parties, but also the requests for a preliminary ruling submitted by national courts. They may, in principle (unless any of the exceptions preventing disclosure in the individual case applies), be accessible to foster openness at the Court.

128. All that follows in this section relates exclusively to *external* judicial documents of the Court. As to the practical modalities of access, I am of the opinion that the Court should grant physical (1) and remote (2) access to external judicial documents upon request. Ideally, it could also provide access to certain documents of its own motion (3).

1. Third-party physical access to individual documents in the file

129. Third-party access to the judicial file, or rather the appropriate segment of it containing external judicial documents, ought to be made possible at the premises of the Court upon request in both closed as well as pending cases. (61)

130. Differentiated regimes of access to the file might be called for with regard to ongoing and closed cases. There is a difference in the balance of interests. The right balance needs to be struck between two competing aims: openness on the one hand and protection of court proceedings on the other. Before the judgment is issued (or, at any rate, until the oral hearing or until the end of the written stage of procedure in cases without oral hearing), the legal discussion should be concentrated within the Court and take place in the courtroom, not in the media. In addition, although the danger of influence or threats to parties or their representatives should not be exaggerated, it cannot be completely excluded either.

131. There is, however, no reason why there would be the need for any *prima facie* presumption, as in *API*, that disclosure of judicial documents in pending cases would automatically go against the requirement of protection of court proceedings. A case-by-

case assessment is called for, also in view of the institutional dimension of the proposition discussed here: if it is the Court itself deciding on the potential disclosure, there is perhaps less need for any presumptions formulated to guide administrative discretion.

132. Therefore, access to external judicial documents in *pending* cases could also be allowed, albeit in a restricted manner compared to closed cases. In pending cases, a third party that shows a legitimate interest in consulting a document should have a right of access to it, upon individual application, on the premises of the Court. The decision on access should be made by the President of the Chamber, who is arguably best placed to weigh the competing interests present with the particular details of the individual case. The parties to the ongoing proceedings should be consulted.

133. In *closed* cases, when there is no connection to any pending cases, an overall lighter access regime ought to apply. A legitimate interest shall no longer be required. Indeed, in terms of balancing, the overall public interest in openness can be presumed to prevail and the access will be granted, unless there is any legitimate reason that could prevent such access, such as protection of personal data, protection of minors or of business secrets. For the same reasons, but also for a number of practical reasons, for closed cases there should no longer be the need to consult the parties.

2. Third-party remote access to individual documents in the file

134. Requests for remote access to individual external judicial documents contained in a judicial file should also be possible in order to facilitate individual access. Such type of access is in particular likely to be of relevance with regard to standard types of documents, which are reasonably expected to be present in a file, such as pleadings submitted in a case by a party or an intervener.

135. Enabling some type of remote access is in the best interest of both: the interested third party as well as, in fact, the institution itself. Equality and social considerations plead for remote access in the case of the former: not everybody can afford to travel to Luxembourg in person to inspect the file at the premises of the Court. As the Court has stated in different contexts on a number of occasions, substance and the ability to genuinely exercise certain a right must be safeguarded, not just the mere formal existence of a right or remedy. (62)

136. In any event, the conditions for remote access should in substance be the same as those suggested for physical access to files at the premises of the Court, outlined above in points 130 to 133. However, the interested person must be naturally more specific in terms of the precise documents he or she would like to obtain. Equally, reasonable caps might be imposed on the amount of copies, as well as appropriate fees for those copies.

3. Online access to selected judicial documents

137. Finally, as a supplement to the individual request but also as its extension, a more proactive stance to the publication of selected external judicial documents could be envisaged for closed cases (or at least a portion of them). In such cases, the most significant types of external judicial documents – such as the request for a preliminary ruling, the pleadings of the parties and, if applicable, the national court's final decision – could be put on the Court's website, as a matter of routine. They would create, together with the decision of the Court and, if delivered, Opinion of the Advocate General, an online 'E-file' of a case.

138. The suggestion made is in fact by no means as revolutionary as it might appear at first sight: all three types of documents tend to be already, in one way or another, in the public domain. The text of the questions referred by national courts in their requests for a preliminary ruling are already published in the *Official Journal of the European Union*. Besides, in most Member States' legal systems, those requests are normal judicial decisions (orders) that are likely to be accessible anyway, in the respective online databases of national courts. (63) That also holds true for the final decision of the national court which would be, in most jurisdictions, accessible online as well. For their part, written pleadings of the Commission in closed cases may already be obtained by virtue of *API* and, if the Court follows the approach advocated in the first part of this Opinion (Section A), the Commission would be obliged also to disclose the written observations submitted by other parties.

139. Thus, all that information is already somehow in the public domain. It is just difficult to locate and to access, scattered across a number of databases in numerous Member States and Union institutions. Such a proactive stance would certainly foster the discourse and awareness of European Union law which is naturally in the interest of the Court itself. It would, in fact, also save the time and resources of the institution, as well as those of the individual: no special requests for access would have to be made, and nobody would have to process them.

140. Three final remarks relating to all three modalities of access are outlined in this section: first, in my view, openness with regard to external judicial documents means inspection of the file or remote access to the documents *in the version received* by the Court from an individual party, including the language in which the document was originally received.

141. Second, should the Court embrace any of the suggestions made in this section, their gradual implementation should allow the parties concerned to adapt their course of action, should they wish to. In particular, clear instructions to the parties in advance would indicate that a third party might seek access to the judicial file. If that materialises, it could be open to the author of the document (pleadings) to suggest to the Court what part of their submissions ought not to be disclosed.

142. Third, of course the suggestions made in this section would require a number of other technical adaptations. However, the technical and operational issues cannot be

allowed to cloud the original value, deeply reflecting the vision of what type of court the Court wishes to be. There is no reform without change.

4. A Coda

143. Finally, for the sake of completeness: how would the suggestions made in this section relate to the Court's ruling in *API*, potentially filled out by the Court's judgment in the present case?

144. As I acknowledged above (Section B), the *API* approach, brought to its outer, but logical and necessary, conclusions by the present case, is not ideal. However, until and unless the Court itself provides for access to some of its judicial documents, that approach and the possibility it gives ought to stand. Once, however, the Court devises rules on access to its judicial documents, those rules should take precedence, as *lex specialis*, over the jurisprudential approach embraced by *API* and potentially extended by the present case.

145. Once any such system is established, any requests for disclosure of judicial documents should primarily be addressed to the Court. In practical terms, if the Court is approached before another EU institution, its decision as to whether to grant access binds the Commission, and any other Union institutions. That means those latter institutions could not disclose the requested documents, even if in possession of them, if the Court refused to provide access. If requests for third-party documents were addressed first to the Commission or another institution covered by the Regulation, it is my humble suggestion that they should be redirected to the Court. Nevertheless, that should not, in principle, prevent self-disclosure of an institution's own documents, that is, its own pleadings. The parties would remain free to disclose their own pleadings, in line with previous case-law. (64)

E – *Costs*

146. At the hearing, the Commission asked the Court to order Mr Breyer, on the basis of Article 138(3) of the Rules of Procedure, to bear his own costs, even in the case of the dismissal of the appeal.

147. Mr Breyer asked the Court to order the Commission to bear the costs of the appeal. He further invited the Court to generally clarify the issue of whether a party may use the documents obtained only to defend his or her own private interests or may also freely publish them online and comment on them.

148. In the judgment under appeal, the General Court gave satisfaction to Mr Breyer on the merits. However, it ordered him to pay half of his own costs incurred by the Commission on account of the fact that he published on his website, while the judicial proceedings were still ongoing, the defence, the reply, Sweden's statement in intervention and an exchange of letters between the Commission and the applicant on the subject of the publication of those documents. The publication of the documents would have offered

internet users the possibility to make comments and given rise to a number of comments which were critical of the Commission. (65)

149. It ought to be stressed that the General Court's decision on costs is not the subject of the present appeal. That issue is not formally raised as a separate ground of appeal by the Commission. It was also not subject to a cross-appeal by Mr Breyer.

150. Instead, in the present appeal, the Commission invited the Court to rule on the costs of the appeal in a similar way to the General Court. Indirectly therefore, the Court is asked to endorse the approach of the General Court, by essentially replicating it on the appellate level.

151. I would not recommend the Court to do so. My proposition to the Court as far as a decision on costs of the present appeal is concerned is to follow the normal rule of Article 138(1) of the Rules of Procedure and to order the Commission, as the unsuccessful party, to pay the full costs of the Respondent, for two reasons.

152. First, even if one were to endorse the approach of the General Court in relation to costs in a similar situation, the Respondent was already ordered to bear half of his own costs by the General Court. In this respect, I fail to see why he should be sentenced a second time for apparently the same alleged wrongdoing at the appellate level as well.

153. Second, I must admit that I also have general reservations as to the approach chosen by the General Court. For its decision on costs in the present case, the General Court relied on its previous decision in *Svenska.* (66) The present case, however, appears to me to be rather different, both factually as well as procedurally.

154. As to the facts, in *Svenska,* it was stated that the applicant published edited – that is, altered – versions of the relevant judicial documents online, with the telephone and telefax numbers of the Agents of the Council, expressly inviting the public to send their comments and thus bring pressure upon the Council, to provoke the public criticism of the Agents. (67) For that, the applicant received only two thirds of its costs from the Council, although it was wholly successful in the case. In the present case, it would appear that Mr Breyer contented himself with publishing the integral version of the received documents online, without altering them, and only after having anonymised all of the personal data. And for that, which might be arguably seen as much less interference, the defendant was reimbursed only half of his costs.

155. There also appears to be a procedural difference. In *Svenska*, the issue of publication of judicial documents on the internet was treated as a preliminary issue by the Court of First Instance, on which the parties were invited to submit observations, with the incident being discussed and incidence of the publication on the proceedings assessed. (68) In the present case, it is not entirely evident how specifically (the factually rather different) disclosure would have impaired the Commission's right of defence and constitute a misuse of the pleadings. (69)

156. For all these reasons, I would suggest that the Court follow the general rule applicable to allocation of costs of appeals: the unsuccessful party shall be ordered to bear the costs. A (potentially) far-reaching decision of the Court on whether and how a party to the proceedings might publish online the pleadings of another party or intervener ought to be reserved for a proper and full consideration in a different case, where that issue would be properly heard and discussed.

VI – **Conclusion**

157. In the light of the aforementioned considerations, I propose that the Court should:

– dismiss the appeal;

– order the Commission to bear its own costs and those incurred by Mr Patrick Breyer;

– order the Kingdom of Spain, the French Republic, the Republic of Finland and the Kingdom of Sweden to bear their own costs.

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1 – Original language: English.

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2 – Regulation of the European Parliament and of the Council of 30 May 2001 (OJ 2001 L 145, p. 43).

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3 – Judgment of 21 September 2010, *Sweden and Others* v *API and Commission* and *API* v *Commission* and *Commission* v *API* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541).

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4 – Decision of the Court of Justice of the European Union of 11 December 2012 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (OJ 2013 C 38, p. 2).

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5 – Directive of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54).

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6 – Throughout this Opinion, I shall employ the term (written) ‘pleadings’ as a generic term referring to any written submissions made by a party or an intervener in a procedure before the Court, thus encompassing both the notion of (written) ‘observations’ and (written) ‘submissions’.

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7 – Judgment of 29 July 2010, C-189/09, EU:C:2010:455.

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8 – Judgment of 21 September 2010, *Sweden and Others* v *API and Commission* and *API* v *Commission* and *Commission* v *API* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541).

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9 – T-188/12, EU:T:2015:124.

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10 – Paragraphs 47 to 48 of the judgment under appeal.

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11 – Paragraph 74 of the judgment under appeal.

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12 – Paragraph 80 of the judgment under appeal.

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13 – Paragraph 112 of the judgment under appeal.

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14 – Paragraph 113 of the judgment under appeal.

15 – See judgment of 21 September 2010, *Sweden and Others* v *API and Commission* and *API* v *Commission* and *Commission* v *API* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 79 et seq.).

16 – See judgment of 21 September 2010, *Sweden and Others* v *API and Commission* and *API* v *Commission* and *Commission* v *API* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraphs 130 to 131).

17 – See judgment of 21 September 2010, *Sweden and Others* v *API and Commission* and *API* v *Commission* and *Commission* v *API* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 92 et seq.).

18 – See judgments of 18 December 2007, *Sweden* v *Commission* (C-64/05 P, EU:C:2007:802, paragraph 55), and of 21 July 2011, *Sweden* v *MyTravel and Commission* (C-506/08 P, EU:C:2011:496, paragraph 88). See also recital 10 of the Regulation.

19 – See judgment of 18 December 2007, *Sweden* v *Commission* (C-64/05 P, EU:C:2007:802, paragraph 56).

20 – It might be added that the same is true also for other types of proceedings before the Court where the Commission is involved, notably the preliminary ruling procedure. Also in the latter type of proceedings, if the Commission decides to intervene pursuant to Article 23 of the Statute of the Court of Justice, it naturally acts within its sphere of responsibility in the sense of Article 3(a) of the Regulation.

21 – See my Opinion in *Typke* v *Commission* (C-491/15 P, EU:C:2016:711, paragraph 35 and the case-law cited).

22 – It is perhaps worth noting that Article 15(3), fourth subparagraph, TFEU refers to 'administrative tasks'. However, neither that provision, nor in fact the Regulation in its exception in Article 4(2), actually employ the term 'judicial activity'. On the other hand, assuming that the Court can act only when exercising its 'administrative tasks' or, *a contrario*, 'judicial tasks' (and that *tertium non datur)*, then, for all practical purposes, the exercise of 'judicial tasks' might be equated with 'judicial activity' and the exercise of 'administrative tasks' with 'administrative activity'.

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23 – Implemented by the Court in its Decision of 11 December 2012).

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24 – Thereby joining in general the suggestion already made with regard to access to judicial documents in ongoing cases in the Opinion of Advocate General Poiares Maduro in *Sweden* v *API* and *API* v *Commission* and *Commission* v *API* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2009:592, paragraph 14).

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25 – In relation to the Court and to judicial institutions in general, I shall employ the term 'openness' and not 'transparency'. Judicial work, unless its character is to change considerably, can never be transparent. It might seek to become, however, reasonably open in the sense of being accessible, both intellectually as well as physically, for the citizens.

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26 – See, for example, Alemanno, A., Stefan, O., 'Openness at the Court of Justice of the European Union: Toppling a Taboo', *Common Market Law Review,* Vol. 51, Kluwer Law International, 2014, pp. 97 to 139. More generally, on openness and transparency in the context of the European Union, see Prechal, S., De Leeuw, M.E., 'Transparency: A General Principle of EU Law?', in Bernitz, U. et alia (eds), *General Principles of EC Law in a Process of Development*, Kluwer Law International, London, 2008, pp. 201 to 242; Dyrberg, P., 'Accountability and Legitimacy: What is the Contribution of Transparency?', in Arnull, A., Wincott, D. (eds), *Accountability and Legitimacy in the European Union*, Oxford University Press, Oxford, 2002, pp. 81 to 96; Rideau, J. (dir), *La transparence dans l'Union européenne – Mythe ou principe juridique?*, L.G.D.J, Paris, 1999; Curtin, D., *Executive Power of the European Union. Law, Practices, and the Living Constitution*, Oxford University Press, Oxford, 2009, pp. 204 to 245; Coudray, L., 'La transparence et l'accès aux documents', in Auby, J.-B., Dutheil de la Rochère, J. (dir), *Traité de droit administratif européen*, 2nd edition, Bruylant, Brussel, 2014, pp. 699 to 712.

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27 – See also Article 10(3) TEU, which falls under Title II ‘Provisions on democratic principles’, and, more broadly, also Article 298(1) TFEU. Emphasis added.

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28 – See judgment of 9 November 2010, *Volker und Markus Schecke and Eifert* (C-92/09 and C-93/09, EU:C:2010:662, paragraph 68 and the case-law cited).

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29 – Furthermore, given specific factual constellations, other rights could also be potentially relevant, such as Article 13, entitled ‘Freedom of arts and the sciences’. It provides that ‘the arts and scientific research shall be free of constraint. Academic freedom shall be respected’.

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30 – See for instance judgments of the ECtHR of 10 July 2006 in *Sdružení Jihočeské Matky v. Czech Republic* (ECLI:CE:ECHR:2006:0710DEC001910103); of 14 April 2009 in *Társaság a Szabadságjogokért v. Hungary* (ECLI:CE:ECHR:2009:0414JUD003737405, § 35); of 3 April 2012 in *Gillberg v. Sweden* (ECLI:CE:ECHR:2012:0403JUD004172306, § § 82-83); and of 17 February 2015 in *Guseva v. Bulgaria* (ECLI:CE:ECHR:2015:0217JUD000698707, § 53).

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31 – See judgment of the ECtHR of 14 April 2009 in *Társaság a Szabadságjogokért v. Hungary* (ECLI:CE:ECHR:2009:0414JUD003737405).

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32 – Stating, in rather sweeping terms, that ‘the present case essentially concerns an interference – by virtue of the censorial power of an information monopoly – with the exercise of the functions of a social watchdog, like the press, rather than a denial of a general right to access to official documents’ - judgment of the ECtHR of 14 April 2009 in *Társaság a Szabadságjogokért v. Hungary* (ECLI:CE:ECHR:2009:0414JUD003737405, § 36).

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33 – See, for illustration, the pending case concerning access to a case file: ECtHR, *Studio Monitor and Zuriashvili v. Georgia,* Application no. 44920/09.

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34 – Bentham, J., 'Draught of a Code for the Organization of the Judicial Establishment in France, in *Works* IV (1790)', *The Works of Jeremy Bentham, 1838-1843*, Bowring, J., (ed), Russell & Russell, New York, 1962, p. 316.

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35 – Bentham, J., 'Essay on Political Tactics, in *Works* II (1791)', *The Works of Jeremy Bentham*, *1838-1843*, Bowring, J., (ed), Russell & Russell, New York, 1962, p. 314.

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36 – See, in general, Dawson, J.P., *The Oracles of Law*, University of Michigan Law School, Ann Arbor, 1968, in particular pp. 50 to 64.

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37 – See Opinion of Advocate General Poiares Maduro in *Sweden* v *API* and *API* v *Commission* and *Commission* v *API* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2009:592, paragraph 26, last line).

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38 – See De S.-O.l'E. Lasser, M., *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford University Press, Oxford, 2009, p. 299 et seq.

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39 – See Scharpf, F., *Regieren in Europa. Effektiv und demokratisch?*, Campus Verlag, Frankfurt/New York, 1999, pp. 16 to 28.

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40 – See Ewing, K.D., 'A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary' *Alberta Law Review,* Vol. 38, 2000, pp. 708 to 733. In the CJEU's context, see de Witte, B., 'Democratic Adjudication in Europe – How Can the European Court of Justice be Responsive to the Citizens?', in Dougan, M., Nic Shuibhne, N., Spaventa, E. (eds), *Empowerment and Disempowerment of the European Citizen*, Hart Publishing, Oxford and Portland, 2012, pp. 129 to 144.

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41 – R v Sussex Justices, *Ex parte* McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233). Emphasis added.

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42 – See Habermas. J., *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*. Suhrkamp, Frankfurt am Main, 1992, p. 435 et seq.

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43 – See, emphasising the link between access to information on the part of social watchdogs and contributing to public debate, judgments of the ECtHR of 25 June 2013 in *Youth Initiative for Human Rights v. Serbia* (ECLI:CE:ECHR:2013:0625JUD004813506, § 24) and of 28 November 2013 in *Österreichische Vereinigung Zur Erhaltung, Stärkung und Schaffung Eines Wirtschaftlich Gesunden Land- und Forstwirtschaftlichen* Grundbesitzes *v. Austria* (ECLI:CE:ECHR:2013:1128JUD003953407, § 33).

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44 – See Opinion of Advocate General Poiares Maduro in *Sweden* v *API* and *API* v *Commission* and *Commission* v *API* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2009:592, paragraph 33).

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45 – See for instance, Sharpston, E., 'Transparency and Clear Legal Language in the European Union: Ambiguous Legislative Texts, Laconic Pronouncements and the Credibility of the Judicial System', *Cambridge Yearbook of European Legal Studies,* Vol. 12, 2010, pp. 409 to 423.

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46 – See, for the outline of selected national systems, *National practices with regard to the accessibility of court documents*, European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, 2013; or *Report on Access to Judicial Information,* Open Society Justice Initiative, March 2009.

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47 – See in this regard, in particular the *Model Policy for Access to Court Records in Canada*, drawn up by the Judges Technology Advisory Committee of the Canadian Judicial Council in September 2005, as well as the *Policy for Access to Supreme Court of Canada Court Records* of 17 March 2015 (online at http://www.scc-csc.ca/case-dossier/rec-doc/pol-eng.aspx).

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48 – Rule 33(2) of the ECtHR's Rules of Court.

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49 – Article 14(5) of EFTA Court's Rules of Procedure.

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50 – Article 53 of the Rules of Court of the International Court of Justice.

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51 – Article 67 of the Rules of the International Tribunal for the Law of the Sea.

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52 – OJ 2015 L 105, p. 1.

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53 – Article 22(2), first subparagraph, of the Rules of Procedure of the Civil Service Tribunal (OJ 2014 L 206, p. 1).

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54 – A sceptic might remark that it used to be love (that was all around). But then apparently something has changed (certainly with regard to public perception of courts).

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55 – Leaving aside, in this section, the access to the Court's documents relating to its administrative activities, provided for by the Decision of the Court of Justice of the European Union of 11 December 2012.

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56 – See Decision of the Court of Justice of the European Union of 10 June 2014 concerning the deposit of the historical archives of the Court of Justice of the European Union at the Historical Archives of the European Union (European University Institute) (OJ 2015 C 406, p. 2).

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57 – Despite the absence at that time of a Treaty provision requiring it to give access to its administrative documents, the ECB already provided for such access in Decision ECB/1998/12 of 3 November 1998 concerning public access to documentation and the archives of the European Central Bank (OJ 1999 L 110, p. 30).

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58 – Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (OJ 2004 L 80, p. 42).

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59 – As opposed to *administrative* documents of the Court.

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60 – Unless some of them are made accessible in the Historical Archives (see above, note 56).

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61 – Thus, in a (modified) way, following the example of the Rules of Procedure of the General Court and the now defunct Civil Service Tribunal (see above, point 112 of this Opinion).

62– See, by a broader analogy with cases relating to effective judicial protection, judgments of 15 September 2016, *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:688, paragraph 44) or of 22 December 2010, *DEB* (C-279/09, EU:C:2010:811, paragraph 28).

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63 – In addition, some national jurisdictions, in particular higher jurisdictions, go even further and 'self-post' on their own websites, with regard to requests for preliminary rulings that they have submitted to the Court: they typically publish their original request for a preliminary ruling, the Court's reply, and their own final national decision.

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64 – See order of 3 April 2000, *Germany* v *Parliament and Council* (C-376/98, EU:C:2000:181, paragraph 10).

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65 – Paragraph 126 of the judgment under appeal, in the light of paragraphs 120 and 122.

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66 – Judgment of 17 June 1998, S*venska Journalistförbundet* v *Council* (T-174/95, EU:T:1998:127).

67 – Judgment of 17 June 1998, *Svenska Journalistförbundet* v *Council* (T-174/95, EU:T:1998:127, paragraph 138).

68 – Judgment of 17 June 1998, *Svenska Journalistförbundet* v *Council* (T-174/95, EU:T:1998:127, paragraphs 22 to 24).

69 – Judgment under appeal, paragraphs 123 and 124, with the Commission's claim as to costs apparently only having been made at the hearing (paragraph 25 of the judgment under appeal).