Evaluating Rights through Conflict ,
Measuring the right of Access to Documents against the rights of Privacy
Italy and the European Union Compared

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Abstract

Evaluating Rights through Conflict ,
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This is a work in Progress paper, and we feel we would benefit from discussion at an early stage

Anna Simonati and I are attempting to attribute a value to the right of access to the internal documents of EU Institutions, going beyond a simple analysis of the instrinsic structure of that right as such.

We are analysing case-law of the European Court of Justice that solves **conflicts in which the right of access competes with the right to privacy**. We then compare our results with standard practice in the Italian Courts to check for deviations of Supranational European Standars from traditional national standards.

I - The first part of the paper is descriptive:

1. Our paper first defines Access and its relationship with the principle of transparency both under European Law and under Italian law. We analyse statute and case-law for both legal systems, and subsequently contrast national vs european results.

2. We then proceed to do the same for the Right of Privacy, checking for its anchors and potential competitors (rights) in both the national and European settings.

3. We have also opted to map out procedures governing and standard expectations of Litigation for both Access and Privacy in the national and European settings.

II - In the second part of the Paper we take 3 cases solved at EU level to discussion.

4. As a starting point we describe the growing importance and popularity of Access to Documents litigation in the EU setting. We describe its main charcateristics ansd assumptions.

5. We then take the second Episode of the Bavarian Lager Litgation and we describe i detail the reasons for which the Court of First Instance ruled Access prevalent over Privacy, including a detailed analysis of the definition of Privacy offered by the CFI, and especially focus on the refusal of the court to protect individual parties names from disclosure, when individuals are acting in a professional capacity. Therefore, in the Bavarian lager Judgement, Access is judged to be prevalent over Privacy.

6. We proceed to contrast this understanding with 2 recent episodes MyTravel and Williams, both September 2008 rulings in which the court surprisingly considers Access to be Non-prevalent over Privacy necessarily accorded to EU officials names and opinions when acting in their Professional capacity.

7. The Court has gone on to state that one of the reasons that Access is non prevalent is that Institutions should not have to disclose whether they have taken decisions on an objective basis, for reasons of Policy or for reasons of lack of resources.

8. We are contrasting this very extreme position with standard practice in Italy.

9. A global appreciation of balance or unbalance thus created in both systems is then discussed from a technical point of view.

10. Conclusions go in the direction that it is shortsighted to run analysis on the strength of rights based solely on intrinsic characteristics and even case-law, without testing this apparisal in a context of conflict with competing positions of the legal system.

I-1. Access and its relationship with the principle of transparency both under European Law and under Italian law. We analyse statute and case-law for both legal systems.

It is well known that in the Italian legal system (especially after the 2005 reform enacted through art. 1, c.1, legge 7 agosto 1990, n.241) the right of access to administrative documents is considered to be an expression of the principles of publicity and transparency. Both of these principles have double anchoring (national and supranational) as legitimate foundation for this right given that L 241 makes an explicit reference to Community law, where transparency of the activity of the Institutions is a undoubtedly a cornerstone.

Literature defending that both concepts (transparency and access) are, in substance, coincident is considered to be outdated. Rather it is a commonly shared opinion that the principle of transparency embodies a general rule of correctness of the exercise of power, under which public management must be "*discernible…in its many developments and readable in its final products*"(ABBAMONTE 1989). This is not necessarily incompatible with the concealment of the content of certain acts when conflicting and prevalent interests concur with requirements of publicity.

Regarding Community law the public's right of access to internal documents drawn up or received by the institutions is governed by Treaty article 255 EC and two European regulations. Regulation 1049/2001 and a more recent regulation so-called "Aarhus", Regulation 1376/2007, concerning environment-related documents. Furthermore the core of this legal framework accommodates *circa* fifty rulings originating both from the Court of First Instance (CFI) and the European Court of Justice (ECJ), issued between 1995 and today.

It goes without question – in a Community setting – that access to documents consist in a minor part of a more ample transparency policy. Nevertheless today access to documents is "*en vogue*", thus tending to superseed in visibility other statements of the strong political instrument that transparency is. Access to documents litigation is ongoing before the community courts under art 230 CE with the purpose of seeing annulled Decisions of the European institutions addressed to private parties. More often than not it is these private parties themselves that play an active role in the disclosure of information –concerning cases under discussion-about interests at stake. Furthermore albeit being observable via both Official Journal of the European Union and European Court Reports, most acts engaged in by the Community courts are available on the internet.

Proceedings before national courts.

In national literature, the opinion that access to documents is a right "unto itself"[1](FIGORILLI 1994 and SANTORO 1992), has been corroborated by case-law and is currently prevalent over opposing theories that consider the right of access either to consist only in a "second tier" legal position – a legitimate interest- or even to amount to a mere legal expectation to participate in legal proceedings.

Access to documents is governed within administrative proceedings under the exclusive jurisdiction of the administrative courts in which "*the judge, having verified the existence of valid grounds, orders discovery of the documents requested*." Deadlines for lodging actions are quite stringent, and parties are allowed to come before the court personally without the aid of a lawyer.

[1] Un vero e próprio diritto soggettivo.

Concerning **Community law** it is more than a decade that the qualification of access to documents as a right goes unchallenged. Nonetheless it is a subjective position to this day deprived of truly consequential remedies (such as injunctions). With the passage of time (and the development of case-law) what seems to grow is the degree of detail[2] required -by the courts- of the institutions in the justification of decisions that deny access to documents requested. The introduction of a further requirement *vis à vis* the institutions, that is that they should alternatively always consider "*partial*" access to a document when entire access is not feasible, initially by way of jurisprudence[3] and later through legislative[4] instruments has also contributed to make their justification burden heavier.

Active legitimacy to access (that is: who may request a document) is construed in extremely generous terms. In fact no explanation is necessary as to the reasons behind or the purpose of the request is necessary, and it is indeed the very act of requesting that *per se* establishes the applicant's interest. (It is assumed that you hold an interest <u>just because you asked</u> and it is not necessary to explain why you hold an interest). Passive legitimacy (that is which Institution's documents you may ask for) covers documents of the European parliament, the Council and the Commission, and today embraces not only documents drawn up directly by the institutions but also documents received[5] by them. Concerning third-party documents received and held by the institutions, albeit the author *may be* heard by the institution circa the document's disclosure to the public, a recent ruling of the European Court of Justice (ECJ) – *Sweden /Commission, C-64/05 P*[6]*, of* - has established that *no veto power* over final disclosure remains with the original author. The consultation of the original author amounts thus to a mere opinion-seeking burden cast upon the institution, not always mandatory and furthermore non-binding.

Access is however not an absolute or unlimited right, in fact nine exceptions have been fitted into Regulation 1049/2001 (see below)[7]. These are however applied and interpreted in a restrictive manner by the Community courts.

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[2] See *Verein fur Konsumenten* decision of the CFI, case T-2/03 of 14.04.2005

[3] See *Hautala /Council* decision of the CFI, case T-14/98 of 19/07/1999, at Par 87 and the Appeal C-353/99P *Council/Hautal*a in which the Council was not successful.

[4] Regulation 1049/2001

[5] In the past, third –party documents were governed by a so-called "author's rule" by which the institution would refer the applicant to the author, who would then engage in direct negotiations with the applicant concerning the disclosure of the document requested.

[6] This ruling was given by the ECJ in the sequence of Sweden having appealed a first instance decision of the CFI in the IFAW *Internationaler Tierschutz-Fionds Gmbh/Commission* case , T-168/02.

[7] *Article 4*

Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:
(a) the public interest as regards:
— public security,
— defence and military matters,
— international relations,
— the financial, monetary or economic policy of the Community or a Member State;
(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data (Regulation 45/2001)..
2. The institutions shall refuse access to a document where disclosure would undermine the protection of:
— commercial interests of a natural or legal person, including intellectual property,
— court proceedings and legal advice,

The Exceptions are divided into 3 paragraphs: (the ones in bold are the relevant exceptions for the discussion on case-law in part II.

Par 1	Par 2	Par 3
5 exceptions are listed	3 exceptions are listed	1 exception is listed
Public Interest (**art 4,1 a**)	:(**art 4,2,1**) Commercial interests and intellectual property	(**art 4,3**) documents drawn up or received for **internal use** where disclosure could undermine the ***institution's decision-making process***.
security,	**(art 4,2,2**) ***Court proceedings and legal advice***	
defence,	***(art 4,2,3) Purpose of inspections***	
international relations		
financial policy		
Private Interests (**art 4,1 b**)		
Privacy of Individuals		

Proceedings before the Community courts.
Administrative proceedings have been established into two distinct and separate phases with a ulterior possibility to resort to the community courts or to the Ombudsman to settle the dispute. The first phase of such proceedings consists in an initial application for access to specified documents held by an institution. Processing of initial applications has quite stringent timings given that the institution only has 15 days[8] in which to reply, and this deadline is partnered with a negative

— the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.
3. Access to a document, drawn up by an institution **for internal use** or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine **the institution's decision-making process**, unless there is an overriding public interest in disclosure.
Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision
has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.
4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.
5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.
6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.
7. 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.

[8] An ulterior extension of 15 days may be negotiated -once- with the applicant in specific situations.

silence mechanism that enables[9] an applicant left answerless -once the deadline has expired- to formulate a confirmatory application asking the institution to reconsider its position. Regulation 1049/2001 is silent regarding the significance to be attributed to a "*late*"[10] answer.

In its confirmatory response to the applicant, the institution may confirm its initial reply, for the same reasons offered in the initial reply or it may offer new and distinct reasons (among the exceptions listed in art 4 Regulation 1049/2001) or it may alter the sense of the reply altogether, for example, by granting access to documents previously denied the applicant. A further dilemma confronts the applicant when the institution denies access or does not reply at this stage: the applicant must choose whether to lodge an action before the community courts or to address a complaint to the Ombudsman.

At the Community courts access to documents is protected through "*action for annulment*" proceedings under art 230EC with the purpose of "*annulling*" that is, removing from the legal system, decisions of the institutions made in breach of Regulation 1049/2001. Yet if the decision under challenge does come to be thus "*removed*", the (Community) judge has not been further bestowed with the power to "*order the institution to exhibit the document to the applicant*" - as in national proceedings-. In short the Community courts do not have the power to address injunctions to the institutions. Within this - somewhat bizarre - framework the practical outcome of the action is that the institution - whose decision was annulled - is obliged, at the most, to address a new decision to the applicant. Moreover the institution has at its disposal d*a capo* any of the nine exceptions contained in Art 4 of Regulation 1049/2001. Which might mean – and has indeed meant[11] - that at the most, and despite having defeated the institution in court, the applicant will receive a new, negative, decision, this time based on another exception.

Coming to another interesting point of this discussion, is the fact that in the access to documents litigation record, the role of Member States is observable. These may – and do - try to influence the interpretation given to the provisions of Regulation 1049/2001 by the Community courts by submitting observations both before the CFI and the ECJ, in the role of interveners[12] in support of either party (applicant or institution) involved. Empirical data[13] have shown a clearly pro-access positioning of Sweden, Finland, Denmark and the Netherlands. It should also be noted that, since 2005, Sweden has consistently engaged in situations of bringing before the ECJ - through appeal proceedings - challenges to decisions taken by the institutions and validated by the CFI in actions for annulment litigated without success, in first instance, by third parties[14]. Conversely France, Italy, Spain and on occasion the UK

[9] It is not yet clear if the applicant ***must*** formulate a confirmatory application or whether it is possible to lodge judicial proceedings immediately after the 15 day deadline has expired.

[10] On this point it is very interesting to consider the motivation offered for the lodging of case T-446/04 *Co-frutta soc.coop.a.r.l/ Commission* on Nov 9, 2004; whereby the applicant held that –once the deadline for rely had expired- the Commission could no longer offer an (explicit) decision, which in fact was challenged, given that the negative silence mechanism had already at a prior moment given rise to an implicit decision of rejection of a confirmatory application.

[11] See the *Interporc* and *Van der Wal* cases

[12] Art 56 of the Internal Rules of the ECJ

[13] See ROSSI, L., *Choosing Exposure – a study in reputation of Member States of the EU regarding 'access to document' rules*. http://repositories.cdlib.org/bple/alacde

[14] See for instance case C-39/05 P in which Sweden appealed the decision of the CFI rendered in the T-84/03 proceedings initiated by *Maurizio Turco/ Council*, albeit Mr. Turco himself having lodged an appeal listed as C-52/05 P; through case C-64/05 P Sweden also appealed the decision rendered by the

have positioned themselves at a more conservative stance on this subject. They have often taken up an adversarial role versus applicants to documents, thus coming close to the national concept of "*counter-interested parties*[15]" to access.

I-2 The right of Privacy as a limitation to the right of access

In the Italian system Privacy [16] is yet to be defined by statute, albeit it's acknowledgement at constitutional level. At normative level, within the rules on access to documents (L 241/90), privacy is listed as a viable limitation to the exercise of access. Nonetheless L 241/90 makes clear that access must be granted (over privacy) if the knowledge of the documents is instrumental to the defence of private[17] legal interests. In the case that the documents requested include data from which inferences on the sexual life or state of health of individuals may be made, access is allowed within the limits of what is considered strictly indispensible. Moreover access to documents containing such data occurs only in cases in which the relevant legal situation that serves as justification for disclosure is, at least, of the same rank as the right of privacy of the individual mentioned in the data, or consists in a right of personality or other fundamental or inviolable right.
The legislator expressly qualifies as "*counter-interested parties to access*": *all identified or easily identifiable subjects, on the basis of the nature of the document requested, that by reason of the exercise of access, would have their right to privacy jeopardised.*
Counter-interested parties (CIPS) also play a relevant role during national administrative proceedings. Public entities, to which specific requests for access are addressed to, have the burden of notifying such a request to CIPS, who, in turn, have ten days to express an opinion on the matter. Furthermore, the very possibility that CIPS may exist, prevents access to document requests from being validly made orally.
On this topic it may be interesting to note – by way of similarity with Community law – that L 241/90 altered the grounds on which CIPS may intervene. While, originally, the regulatory measures[18] implementing the law of 1990 established that the exclusion[19] of access could be enforced in order to protect "*reasons/needs*[20] *of privacy of the administration*", since 2006 the new regulatory framework[21] anchors the admissibility of the exclusion of access to all cases in which it is necessary to protect, more generally "*specific reasons/needs of the administration*". On the basis of the 1992 provision - no longer in force- some of the literature argued in favour of the theoretical possibility of acknowledging a right to privacy *ex parte* the public administration itself.

CFI in the *IFAW/ Commission* case listed as T-84/03; subsequently it lodged an appeal C-514/07 P versus the ruling rendered in the *API/Commission* case listed as_____ and has done the same in through case _____that has taken into appeal the decision rendered by the CFI in the Mytravel case listed as

[15] Contro-interessato all'accesso

[16] Diritto alla Riservatezza

[17] Under Community law, invoking the necessity of Access in order to defend private, even legal, interests, is of no avail

[18] DPR 352/92

[19] differimento

[20] esigenze

[21] DPR 184/06

As regards Community law, and specifically as an exception to the right of access, Privacy is relevant on a double basis. In the first place privacy is relevant **as a right of *self-protection of the personal sphere* acknowledged to individuals**. Thus they hold a counter-right that is in direct opposition to access rights of applicants who requests documents. Secondly, privacy is relevant when taken to **represent an area of *functional sanctuary* of institutions**. It has actually been named[22] as an indispensible "*space to think*" of the public administration that should be worthy of being screened away from the public.
Among the exceptions to access listed in art 4 of Regulation 1049/2001 we find both these profiles. As to privacy concerning **individuals a**rt 4, 1 b) states that institutions refuse access to documents where disclosure would undermine "*privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data (today Regulation 45/2001).*" On the other hand, and specifically regarding **the institutions interests**, point 11 of the Preamble to Regulation 1049/2001 states that "*institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks*." This idea is then further developed in art 4,3 of Regulation 1049/2001.

The European framework on the privacy standards accorded to **individuals** may be inferred from the combined application of Treaty article 236 EC and Regulation 45/2001 (a legislative instrument that is contemporary of Regulation 1049/2001). Regulation 45/2001 rather than focusing on the *disclosure* of data, as is with Regulation 1049/2001 that is ultimately an *operational* Regulation, aims to impede the causation of harm to individuals as a consequence of abusive *processing* of personal data. As such it appears as a *preventive* Regulation.
Regulation 45/2001 clearly identifies three purposes[23]: establishing rights for data subjects, obligations for those who process personal data, and an independent supervisory body responsible for monitoring the application of the processing of personal data rules within the European institutions. The Regulation goes on to state – using the same terms chosen by national law - that the principles laid down should apply to "any information concerning an *identified or identifiable person*" [24]. Coordination with Regulation 1049/2001 is quickly made explicit[25] whereby "*Access to documents, including conditions for access to documents containing personal data, is governed by the rules adopted on the basis of art 255 EC*" that is to say: on the basis of Regulation 1049/2001.
Personal data must be processed fairly and lawfully, collected for specified explicit and legitimate purposes, be adequate, relevant and not excessive, be accurate and kept up to date and finally kept in a form which permits the identification of data subjects for no longer than is necessary for the purposes for which the data were collected[26]. Processing is lawful only in five alternative cases[27], and from amongst these when the data subject has unambiguously given consent. Special categories of data described at art 10 of Regulation 45/2001 amongst which for example trade-union membership or data

[22] By the Institutions
[23] Par 2 and 3 of the Preamble to Regulation 45/2001
[24] Par 8 of the Preamble to Regulation 45/2001
[25] Par 15 of the Preamble to Regulation 45/2001
[26] Art 4 of Regulation 45/2001
[27] Art 5d) of Regulation 45/2001

concerning health or sex life are inaccessible for processing unless exceptional and equally listed circumstances concur.

I-3 Proceedings before national and Community courts concerning the protection of the privacy of individuals

As has been explained, Community rules regarding Privacy (of individuals) are construed as a protection against data *processing*. There are very specific rules concerning the possibility of an individual challenging the processing of data point Regulation 45/2001. However, conflict between access to documents and privacy occurs when the data contained in a document has already been processed. Therefore this type of conflict is governed, by remission, with the rules construed for access to documents in general. In Community law conflict between access and privacy has only been addressed, in a more detailed fashion, by the courts, and their findings will be discussed in part II.
Conversely, in national law there are detailed rules that precisely govern situations in which an applicant to documents and a data subject might find themselves in opposition to one another. They will disagree on the appropriateness of discovery by the (national) public administration of a document, containing sensitive data.
Where, nonetheless, we mention similarities in national and Community procedure, these relate to the relationship between national procedure and the procedure set down by Regulation 1049/2001 on transparency in general.

The first point that seems interesting is that both at national and Community level, silence on the part of the public administration regarding a specific request for access to documents is considered to embody a "*negative, implicit*" decision[28].
Furthermore under national law the possibility of complaining to the national Ombudsman – *Difensore Civico* - (or to the national Commission for access) is only open to the applicant requesting documents and not to the data subject who wishes to keep the documents and the data private. The same rule is *prima facie* in force in Community law.
Regarding court proceedings, those may be instituted by the applicant to whom access has been denied, and, interestingly, also by the data subject who –upon notification of the request - wishes that they be subtracted from public access. Under Community law, the data subject, knowing that a document containing personal data about his/her person has been requested has not been awarded standing to institute court proceedings. However, concerning the possibility of the documents being disclosed by the institution, the data subject might be consulted by the institution (in order to ascertain whether there is, or not, consensus on the subject's side) but it would seem that – ultimately - the final decision would lie with the institution. On the other hand, the data subject could intervene, as an opponent to access, however this would occur under a general provision governing interventions before the Community courts, and only within proceedings already instituted by the applicant.

[28] However and as we have already mentioned, if silence occurs at ***the initial application*** stage, Regulation 1049/2001 states that "failure to reply within the prescribed time-limit "entitles the applicant to make a confirmatory application". The text of Regulation 1049/2001 changes regarding failure to reply in the context of the processing of ***confirmatory applications***, indeed only here is this "considered as a negative reply and entitle the applicant to institute court proceedings and /or make a complaint to the Ombudsman)

Coming back to national law, the identity of the subject that institutes court proceedings has stringent consequences on the practical outcome of the judicial decision awarded. In the case that proceedings are instituted by the applicant, the court decision determines *circa* the correctness of the grounding[29] of the request, and, where so ascertained contains an *order* of discovery of the documents requested. Conversely when court proceedings are instituted by a different party, who complains about the (administrative) decision determining that access should be granted, the principle that determines that powers of courts are typical (i.e. must be clearly listed) prevents the judge from issuing an order of "*non discovery*". Thus it would seem that the administrative judge is limited to ascertaining the inexistence – within that specific context - of the applicant's right to access. However, in the literature "*objections to the objection have been raised*": it may also be argued that regardless of the fact that the public administration (having issued a positive decision granting access) has established a legal entitlement in favour of the applicant, and albeit the fact that - in order to protect the data subject - this entitlement should be repealed, it suffices, for purposes of protection of the data subject to resort to a general power of annulment.

II- Practical issues on the conflict between access and privacy in European Law.

We will now attempt to discuss some practical issues, discussed in detail in recent court proceedings, in which the European institutions have tried to raise arguments concerning both profiles of Privacy discussed: of Individuals, and Institutions. The purpose was to withhold from public access, in the first place, the names of participants in meetings with the institutions, secondly, the content of opinions expressed both by experts and civil servants during preparatory meetings with a view to brief[30] the Institutions on certain topics.

II-1 The *Bavarian Lager Co, Ltd/Commission* ruling of the CFI, in case T-194/04, delivered on 8 Nov 2008, concerns the privacy of individuals, therefore the interpretation of the exception set out in Art 4,1b) of Regulation 1049/2001.

II-2-The *Mytravel Group plc/Commission* ruling of the CFI, in case T-403/05, delivered on 9 Sept 2008, concerns, the Privacy of Institutions and more specifically the decision-making process, therefore the exception set out in art 4, 3 of Regulation 1049/2001.

This ruling has been appealed by Sweden in proceedings *Sweden/Commission* in case C-506/08 P that are currently before the ECJ.

II-3 The *Rhiannon Williams/Commission* ruling of the CFI, in case T-42/05, delivered on 10 Sept 2008, concerns, the Privacy of Institutions and more specifically the decision-making process, therefore the exception set out in art 4, 3 of Regulation 1049/2001.

II-4 The *Borax Europe Ltd/Commission* ruling of the CFI, in case T-121/05 delivered on 11 March 2009, concerns both the privacy of individuals, therefore the interpretation of the exception set out in Art 4,1b) of Regulation 1049/2001 and the Privacy of Institutions and more specifically the decision-making process, therefore the exception set out in art 4, 3 of Regulation 1049/2001.

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[29] fondatezza

[30] We will not address, in detail, for now, the exceptions set out under arts 4,2,2 and 4,2,3 of regulation 1049/2001 regarding Legal advice and Inspections.

II-1 The Bavarian Lager Ruling – T-194/04 -Individual Privacy

In this case, the Commission refused access to the names of participants in a meeting with the Commission. The institution held that Regulation 45/2001 should be applied and that consensus of the participants to such disclosure should be obtained (several years after the meeting had occurred). The institution was unwilling to release the names of participants who did not consent the institution to do so. However the institution was willing to disclose the names of participants who did not answer the institution's request for authorization.
It also held that even if Regulation 45/2001 concerning individuals would not be applicable, under the exception laid out in art 4,2,3 of Regulation 1049/2001, the protection of the capacity to conduct inspections (institutional privacy) would prevail over access.

In the **findings of the CFI,** having analysed the rule of Regulation 45/2001, specifically art 18, regarding the ability of the data subject to object, at any time, on compelling legitimate grounds relating to his/her particular situation, to the processing of data relating to him or her, except in the cases covered by art 5 b) c) and d) (…). Art 5 b) states that "processing is necessary for compliance with a legal obligation to which the controller (institution) is subject". Given that processing, (here keeping record of who attended a meeting) under Regulation1049/2001, constitutes a legal obligation (of the Commission) within the meaning of art 5 b) of Regulation 45/2001, the interested party, has not been acknowledged, in principle, the right to object.
However given that art 4,1,b of Regulation 1049/2001 (individual privacy protection) sets out an exception to disclosure, the effects of disclosure on the data subjects' personal life must be considered. It should be noted that the exception set out in 4,1,b relates to only to data that may undermine individual's private life and integrity. Therefore the mere presence of the name of an individual, as a participant to a meeting, on behalf of the entity which the person represents, in the exercise of professional obligations, and when personal (versus professional) opinions of this person may not be inferred, is not such as to jeopardize the private sphere.
Interestingly the CFI also stressed the fact that the institution had not sought (during the meeting) to keep secret the participants' names, neither had the participants requested[31] the institution (at the time) to do so.
Furthermore, in infringement proceedings (as was the case) whilst the *complainant* may opt for a secretive handling of personal data, such treatment is not set out for *participants* in inspections. Interestingly the CFI also made clear that neither does Regulation 45/2001 impose that the Commission keep secret the names of persons who communicate to the institutions opinions or information related to the exercise of the Commission's tasks.

II-2 The *Mytravel* Ruling - T-403/05 "*Space to Think*" for the Institutions

In this second case the Commission refused to grant access to a document containing (professional) opinions for internal use, that reflects the assessment of

[31] See by contrast, the *Adams/Commission* ruling of the CFI delivered on 7 November 1985 in case T-145/83, ECR, 3539, concerning information covered by Professional Privilege, and in any event in cases where the participant requested, from the start, that his/her identity be kept secret.

the Commission's legal service and of Commission employees concerning the opportunity of challenging a judgement rendered in the area of competition law and on the critical assessment of reviewing its inspection procedures in the area of concentrations.
According to the Commission, disclosure of such a report to the public would seriously undermine its decision-making process, since the freedom of the authors of such documents would be threatened if, when drafting them (professional opinions), they had to take into account, the possibility of their opinions being disclosed to the public.
The Commission reinforced this argument on the basis that *critical opinions of Commission officials or experts* falling within the *purely administrative functions* of the institution (as opposed to legislative functions) should be screened from the public in a more consistent manner.

In the **findings of the CFI,** the court makes some surprising statements, ad specifically at par 52, 53 and 54. The court concurs with the Commission that if authors of reports would take the risk of future disclosure into account, they might be led to practise self-censorship and to cease putting forward any views that might involve the addressee of the report (the institution) being exposed to risk. (…) it appears –says the CFI, that "*it is probable that the Member of the Commission responsible, would cease to ask views of his advisers written and potentially critical views. Furthermore merely to hold oral and informal discussions which would not require the drawing up of a document would cause significant damage to the Commission's internal decision-making process*".
The court also rules that "*Institutions must be able freely to assess the views for forward (…) taking into account factors that go beyond the scope of the rules in force (…) this means that it may not be possible to implement a proposal for reasons connected with the political priorities of the Commission or with the availability of resources*."
Space to think was also extended to documents originating from the legal service (covered by art 4,2,2.

It came as no surprise that Sweden instituted appeal proceedings against this ruling. We would also like to highlight that from the little that may be inferred from the summary justifying the appeal, the Swedish position on any professional provider of services' duties in the light of the spectrum of self-censorship seems to be : that it is not because the public has a legal right to monitor activities of the institutions that it is acceptable for any professional to omit the requisite standard of professional conduct .
Furthermore it should result from the justification of each individual decision if it has been taken within the scope of legal rules in force, for reasons of political priority or due to the availability (or not) of resources.

II-3 and II-4 (Both Williams and Borax rulings confirm the CFI''s position as expressed in MyTravel).

Conclusions

Within Italian law, the system of remedies undoubtedly favours the holder of access to document rights over the holder of a right to privacy. The former, in fact, have at their disposal a series of instruments that go beyond t proceedings ex L241/90 , but also include court proceedings, complaints to the national Ombudsman or to the national Commission on access, and, of late have come to include administrative confirmatory applications.
This is even more evident if we consider that full remedies –as injunctions – may only be awarded to the applicant for documents who has been denied access either expressly or under a tacit form.
Conversely existing proceedings to protect the data subject (ex art 25 L 241/90) resemble a 'blunt' weapon. In this case, if access has already been exercised (albeit under the less invasive form of mere 'visioning' of documents), fatally the necessity of privacy of the personal sphere has been irreparably sacrificed.
In this context, the instrument capable of "negotiating" between both conflicting interests with more efficiency is "partial access".

In truth, the European solution does not stray far from what has been established in the national system here examined. However a significant distinction has been made between private and professional life that subtracts from the existing protection of the personal sphere the carrying out of professional duties.
Regarding experts called on to brief the institutions, it seems to be clear that value may be attributed to the desire for secrecy expressed especially if this is done at the moment of and as a condition of acceptance of the task to be performed.
More complex however remains the conflict between access and transparency regarding the functional *space to think*, time and again demanded by the institutions for the sake of "workability" and independence.
The absence of stringent powers of instructions to the institutions by the judges seems to have been counter-weighted by the ever-growing burden of specific justification in order to assure compliance with the requisite standard accepted by the community courts concerning any decision refusing access. Furthermore the generous ability accorded to third parties (whether counter interested or supportive) to intervene in proceedings to the point that interveners may take into appeal level proceedings initiated in first instance by a distinct party has certainly rendered this theme more "lively".
Finally, on this level also, partial access has found a solid role to play both regarding the privacy of Individuals and Institutional thinking space.