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THE PRINCIPLE OF TRANSPARENCY IN THE ACTIVITY OF THE INSTITUTIONS OF THE EUROPEAN UNION

The jurisprudence of the Court of Justice of the European Union

Abstract

The paper will analyze the principle of transparency within the European Union. In the context of the EU law, the principle of transparency affects not only the protection and guarantee of the rights of citizens in relation to its institutions, but it is a valuable tool to ensure that Member States comply obligations they have taken within the EU. Access to documents constitutes the most developed legal and jurisprudential dimension of the principle of transparency within the EU and will therefore be the focus of treatment on this principle.

Despite the reluctance for the formulation of a general principle of transparency, the jurisprudence of the Community Courts (with the Treaty of Lisbon the Court of Justice of the European Union) had an important role in developing the content of the right of access to documents of the institutions. For this purpose different decisions of the Court of Justice of the European Union are taken under study. In order to achieve the objective of the paper and to prove the above mentioned results, historical, analytical and comparative methods are used.

Keywords: Principle, Transparency, Access, Case law

1. Introduction

The principle of transparency is considered as one of the main principles of democratic polities, in contrast with the authoritarian states in which secrecy is

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the rule and transparency is the exclusion.\textsuperscript{2}

The principle includes, \textit{inter alia}, the right of access to documents available to the administration and the right to access data, relating to citizens themselves or with their interests.\textsuperscript{3} The right of access to documentation is important for informing citizens about the activity of the bodies of the government as well as the recognition of their objectives. Moreover, access to data related to citizens themselves helps them in formulating reasoned allegations to object a measure taken against them and to check its correctness and the uses to which it is put.\textsuperscript{4}

In the context of the EU, transparency serves not only to preserve the preceding values as between citizens and the EU, but also functions as a valuable method of ensuring that Member States adhere to their EU obligations.\textsuperscript{5} Access to documents constitutes the most developed legal and jurisprudential dimension of the principle of transparency within the EU and will therefore be at the center of the treatment of this principle.

\section*{2. The principle of transparency in the Treaties of the European Union}

The early years of the European Economic Community were weak in terms of democracy, accountability, and accessibility to public scrutiny. Meetings of the Council of Ministers (Council) were secretive and minutes were not published.\textsuperscript{6} The Commission was perceived as an overly bureaucratic body, and community procedures as complicated and obscure.\textsuperscript{7}

The transparency principle was devoted a lot of attention in the 90s. This was noted clearly at the Intergovernmental Conference on the Amsterdam Treaty. In this conference was discussed about the need for an “open administration” for the Union and increasing the transparency of the activities of its institutions, with a view to expanding public access.\textsuperscript{8}

In 1993, the Council and the Commission adopted a joint act called the

\begin{itemize}
  \item \textsuperscript{3} E. Dobjani (2004) “E drejta administrative 1”, pg. 57.
  \item \textsuperscript{4} P. Craig (2006 )“EU Administrative Law”, pg. 350.
  \item \textsuperscript{5} Ibid, pg. 351.
  \item \textsuperscript{6} P. Craig (2006 )“EU Administrative Law”, pg. 350.
  \item \textsuperscript{8} Lodge, (1994) “Transparency and Democratic Legitimacy”, pg. 32.
\end{itemize}
The Code of Conduct. 9 The code had the nature of an interinstitutional agreement and does not specify rights for persons. However, within its framework, further measures that would have legal effects could be taken. 10

It was only with the Treaty of Amsterdam that the right of access to documents was recognized as a right deriving from the Treaty.

The Amsterdam Treaty in Art. 1 of Title 1 of the TEU stated, as one of the general principles of the European Union that “This 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”. The words in italic were added at Amsterdam. They herald a greater emphasis on openness. 11

The immediate development came in an amendment to the EC Treaty and Article 255 which provided for the introduction of a regulation of access to documents covering the Council, Commission and Parliament. It is restricted to those institutions. The regulation was adopted on 30 May 2001 after completing the procedure in Article 251 – the co-decision procedure. Each institution must also establish specific provisions regarding access to its own documents in its rules of procedure. The regulation was something of a victory for the supporters of transparency. 12

Article 255 of TEC 13 stated that:

1. 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 European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.

Analyzing the content of this article we can conclude that it defines: the

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10 Case58/94 (ECJ), “Netherlands vs Council”, 1996
12 Ibid
13 Art.15 of TFEU
subject entitled the right of access, its object, the conditions and ways of exercising the right as well as the limitations that could be imposed.

The subjects entitled to this right are three: the citizens of the Union, any natural person residing within its territory and any legal person having its registered office in a Member State. On the other hand, the subjects obligated to make available the information, under Article 255 of the ECT they are the European Parliament, the Council and the Commission. The Treaty on the Functioning of the European Union, which amends this Article with its Article 15\textsuperscript{14}, provides that the right of access shall extend to documents of the Union bodies, offices and agencies.

The object of this right are all the documents held by institutions, created or received by them, as long as they are in their possession and are related to sectors where the EU has the power to interfere. The notion “document” is given a broad meaning. It includes “any data source” regardless of its form. So it may be about printed documents or in electronic format, audio recordings or video recordings.\textsuperscript{15}

The legislation required by Article 255 of the ECT was adopted in the form of a Regulation in 2001\textsuperscript{16}, following a number of specific decisions. This regulation significantly improved the right to access to documents in some respects, such as mitigating some of the exceptions to this right or requiring the retention of the register of document. It was adopted by the three EU institutions in their internal regulations and applied to EU agencies as well.

In the content of the Charter of Fundamental Rights of the EU\textsuperscript{17}, part of the Lisbon Treaty, the principle of transparency, together with the principle of participation and the obligation of the administration to give reasons for its decisions, constitute elements of good administration and effectiveness of administrative activity.

In Article 41, of the Charter of Fundamental Rights of the EU, it is stated that:

“Every person has the right to have his or her affairs handled impartially,

\textsuperscript{14} “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 institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.”

\textsuperscript{15} Regulation 1049/2001, Art. 3 (a).


\textsuperscript{17} According to Article 6 (1), first subparagraph of the Treaty on European Union, the Charter promulgated in 2007 has the same legal force as the Treaties.
fairly and within a reasonable time by the institutions and bodies of the Union. This right includes: ... the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy.”

3. The principle of transparency in the jurisprudence of the Court of Justice of the EU

The principle of transparency, in general, was supported by the Community Courts even before the reform of the Treaty of Amsterdam. But they have avoided formulating a principle that would establish transparency or the right of access to documents as a general right. 18

According to the cases brought before the Court of First Instance and the Court of Justice, the applicants were primarily non-governmental environmental organizations, 19 media, 20 a member of the European Parliament 21 or a person with a legal interest (in the broadest sense) for the information requested. 22 Citizens have rarely appealed to the Courts a demand to respect their right to access in documents. 23

In the Carvel case, the Court of First Instance stated that in exercising the discretion to make the documents available, the Commission must balance the interests of citizens to get acquainted with documents with confidentiality requirements. It should not express in general terms the refusal of access to a particular set of documents.

In the Netherlands v Council, the Dutch Government argued that the principle of transparency is a fundamental requirement of democracy and the right of access to documents constitutes a fundamental human right recognized internationally. In the reasoning of the decision, the European Court of Justice affirmed the importance of the right of access to documents as well as its connection with the democratization of the activity of the institutions, but rejected the argument that this right could not be treated as a matter of the Council’s internal Regulation.

The decision of the Court of First Instance in the Hautala case, which annulled the Council’s decision to reject the request for partial access to sensitive political documents, was left in force by the European Court of Justice. Further, referring to the principle of proportionality, this court held that: “on the basis of the principle of proportionality, the Council should first consider the partial access to a document, which disclosure could harm international relations and, secondly, the right of access must be limited to the extent necessary to protect the interest that dictates this restriction.” But, it did not see it as necessary to say whether Community law recognized a general principle of the “right to information”.

The right to information may be subject to restrictions. Their request for access to the documents of the institution may be refused if their disclosure could potentially damage legitimate public and private interests. In the category of legitimate public interests are included security, defense, international relations, financial, monetary, economic policies, etc. In the group of legitimate private interests it can be mentioned the private life of persons and their integrity, health status, etc. Trade interests as well as intellectual property are also protected. 24

In the Sison25 case, the Court of First Instance held that access restrictions were to be interpreted strictly and it was for the institution to prove that the required documents were part of the limitation list.

As aforesaid, Council and Commission decisions refusing access to documents have been canceled by Community Courts based on arguments such as refusing to grant partial access or the inadmissibility of the grounds for refusal. But they did not evaluate this rejection as a violation of the general principle of transparency.

However, despite the reluctance to formulate a general principle of transparency, the Courts in their jurisprudence have played an important role in developing the content of the right of access to documents of the institutions.

Based on legal statements and improvements, such as Article 255 of the ECT, Regulation 1049/2001 and Article 42 of the Charter of Fundamental Rights, Judge Lenaerts has outlined extrajudicially that “it is difficult to deny that the principle of transparency has evolved into a general principle of Community law.”26 This statement of Lenaerts is further reinforced by the inclusion of this principle in the text of the Lisbon Treaty as an element of the right to good administration.

25 Case 405/03 (ECJ) “Sison v Council”, 2005
in Article 41 of the EU Charter of Fundamental Rights recognizing as binding the right of every person to view his file, respecting the legitimate interests of maintaining the confidentiality of the information as well as professional and commercial secrecy.
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