The European Patent Reform – Council allows access to withheld documents

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Office translation of the original German language document, the article reflects the personal opinion of the author.

The matter attracted some attention during the final phase of the legislative proceedings on the "unitary patent package": The extensively redacted Council document 15856/11 on the compatibility of the Draft Agreement for the creation of the Unified Patent Court with CJEU opinion 1/09 and the rejection of access requests because this could *"ultimately delay or put into question the entry into force of the envisaged international agreement"*. Upon the fifth (!) request full access was recently granted. Also two further, initially strongly censored Council documents from the same context were now released. A review of these documents shows: The contents were suppressed in violation of EU Regulation No 1049/2001 and the respective CJEU case law as well as the EU citizen's fundamental right of access to documents (Art. 42 of the EU Charter of Fundamental Rights).

I. The access to Council documents on the "unitary patent package" under Regulation No 1049/2001

The legal requirements for public access to documents under EU Regulation No 1049/2001 (afterwards "R"), the proceedings and the processing of document 15856/11 by the Council were discussed in a previous paper [1] of 26/11/2013, its knowledge is assumed. The present article describes the efforts towards full access to this document and to further Council documents which, originally, were made accessible in significantly redacted form only.

II. Council document 15856/11

The latest status reported was that, in November 2013, the Council had disclosed document 15856/11 (title: "Draft agreement on the European Union Patent Jurisdiction (doc.13751/11) - compatibility of the draft agreement with the Opinion 1/09")[2] with the exception of a large footnote.

1. Access request of 03/09/2013

This extended access was achieved by an unknown applicant from Belgium, whose request had not been published when my article of 26/11/2013 was completed.

a) Access request

The access request filed by this applicant on 03/09/2013 had been rejected in a decision of 02/10/2013, for the "protection of legal advice" (Art. 4 (2) second ind. R).[3]

b) Confirmatory application

In his confirmatory application[4] of 07/10/2013, the applicant found clear words for this:[5]

> *"I am dismayed to see that transparency seems to be becoming, in practice, not a principle but an exception, and am not at all surprised by the current low level of trust in and enthusiasm for Europe among its citizens, since their leaders take decisions affecting their lives without informing them beforehand, thus presenting them with a fait accompli.*
>
> *Moreover, by acting in this manner, that is to say by arrogating to yourselves the right to refuse, on unfounded grounds, to disclose a text of interest to citizens, you are draining Regulation No 1049/2001 of its substance."*

Surprisingly, this managed to convince the Council which now widely released the document with its decision[6] of 08/11/2013. This was explained as follows:[7]

> *"The Council has considered the risks which disclosure of the opinion would entail to the protection of legal advice pursuant to Article 4(2) of the Regulation and to the impact of the legal advice in question on the related cases which are currently still subject to litigation before the Court of the European Union* [referring to Spain's nullity actions C-146/13 und C-147/13 pending at that time]. *It has come to the conclusion that, on balance and at the present point in time access can now be granted to the entirety of the opinion with the exception of footnote 23 to paragraph 30."*

However, the content of footnote 23 was still perceived as so *"sensitive and wide in its application"* that it had to remain undisclosed for "the protection of legal advice".[8] The Council stated:[9]

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[1] *Stjerna*, The European Patent Reform – Law-making in camera", accessible at www.stjerna.de/intransparency-lproceedings/?lang=en.

[2] The blackened version is accessible at www.stjerna.de/access-documents/?lang=en.

[3] Council document 14520/13, p. 5; accessible at bit.ly/3eC9O0F.

[4] Council document 14520/13 (fn. 3), p. 7.

[5] Council document 14520/13 (fn. 3), p. 8.

[6] Council document 14523/13, p. 3 ff., accessible at bit.ly/3faCmgV.

[7] Council document 14523/13 (fn. 6), p. 4, para. 7.

[8] Council document 14523/13 (fn. 6), p. 5, para. 10.

[9] Council document 14523/13 (fn. 6), p. 4, para. 8.

> *"Footnote 23 to paragraph 30 is very sensitive and wide in its application as it addresses a general and contentious legal issue regarding the relationships between international agreements and the European Union legal order. This issue is of a horizontal scope and will be of relevance for future dossiers and also deals with an issue where there is a real risk of future litigation. The disclosure of this part of the legal advice would undermine the protection of legal advice by disclosing the internal position of the Legal Service on a sensitive and contentious issue and entail a foreseeable risk both that the Council would not seek frank and comprehensive advice on such matters and that the Legal Service would not be able to defend effectively the position of the Council before the Courts."*

Astonishingly, although the CJEU has repeatedly declared these "reasons" – the Council's alleged caution in relying on its Legal Service and the alleged limitations for potential court proceedings – to be unsuitable in this generic form to justify an access denial.[10]

The CJEU's "Turco" case law, pursuant to which Regulation 1049/2001 *per se* demands public access to opinions prepared by the Council's Legal Service in relation to legislative proceedings,[11] was declared *"not applicable to the case under discussion"*, as before[12]. The Council stated:[13]

> *"With respect to the exception relating to the protection of legal advice, the Council has carefully weighed the interests at stake. While the Council would underline that the Turco case-law applies only to legislative procedure, which is not applicable to the case under discussion, it has in any event thoroughly taken into account the interest of transparency and openness, and has therefore disclosed the opinion in its entirety with the exception of one footnote. Nevertheless, the Council is convinced that, as for the specific footnote as indicated above, which has a particularly sensitive and broad scope, the public interest invoked by the applicant does not establish an overriding public interest in disclosure under Article 4(2), last sentence, of Regulation No 1049/2001."*

c) Dissenting Council delegations

As in the case of the preceding confirmatory application[14] of 31/01/2012 and the Council's negative decision[15] of 09/03/2012 – at that time Denmark, Estonia, Slovenia, Finland, Sweden and the UK – also in this case, some Member States rejected the Council's majority decision as too restrictive.[16] Presently, Estonia, Lithuania, Slovenia, Finland, Sweden and Sweden voted for full public access also to footnote 23. Surprisingly, this was also advocated for by Germany. After in March 2012, it had rejected any access to redacted passages of document 15856/11, i. e. also those now released, together with the Council majority, it now pleaded for a full release of the document:[17]

> *"The footnote 23 is referring to the ERTA case, which is already public. Furthermore, the footnote is only naming potential future cases. This does not disclose the internal position of the Legal Service. Thus, disclosure of the footnote would not undermine the protection of legal advice. Full access to the document should be granted."*

This will be discussed further below.

2. Access request of 22/10/2013

Unaware of the access request of 03/09/2013, I again requested access to document 15856/11 on 22/10/2013.

a) Access request

With decision[18] of 13/11/2013 access was granted, but fn. 23 was withheld for the "protection of legal advice":[19]

> *"Footnote 23 to paragraph 30 advices* [sic] *on matters dealing with issues which are relevant to a wide range of current and future dossiers. Moreover those issues are contentious and likely to be subject to litigation before the courts. The footnote is therefore particularly sensitive. Its disclosure would therefore undermine the protection of legal advice under Article 4(2), second indent, of the Regulation. It would make known to the public an internal opinion of the Legal Service, intended for the members of the Council. The possibility that the legal advice in question be disclosed to the public may lead the Council to display caution when requesting similar written opinions from its Legal Service. Moreover, disclosure of the legal advice could also affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts. Lastly, the Legal Service could come under external pressure which could affect the way in which legal advice is drafted and hence prejudice the possibility of the Legal Service to express its views free from external influences."*

Said alleged danger of the Legal Service coming under external pressure, like the Council's alleged caution in relying on its Legal Service and limitations in court proceedings, has also been rejected by the CJEU in the past.[20]

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[10] Cf. e. g. CJEU, Sweden and Turco v Council, C-39/05, para. 65 and 67, accessible at bit.ly/2SOWP3v; Sweden and MyTravel Group plc v Commission, C-506/08 P, para. 115, accessible at bit.ly/3tHn3Bt.
[11] CJEU, C-39/05 (fn. 10), para. 68; confirmed in Council v Access Info Europe, C-280/11 P, para. 32 f., accessible at bit.ly/3eG5ZYn.
[12] Council document 5926/12, p. 6, para. 14, accessible at bit.ly/3hlWQ9e.
[13] Council document 14523/13 (fn. 6), p. 5, para. 9.
[14] Council document 5923/12, p. 6 ff., accessible at bit.ly/3o9KLFr.
[15] Council document 5926/12 (fn. 12), p. 3 ff.
[16] Council document 14523/13 (fn. 6), p. 1.
[17] Council document 14523/13 (fn. 6), p. 1.
[18] Council document 17244/13, accessible at bit.ly/3f7knba.
[19] Council document 17244/13 (fn. 18), p. 3.
[20] Cf. e. g. CJEU, C-39/05 (Fn. 10), para. 65 and 67; C-506/08 P (fn. 10), para. 115.

The Council further held that there was no public interest overriding the "protection of legal advice", the explanations insofar again being limited to mere allegations.[21]

b) Confirmatory application

I filed a confirmatory application[22] against this decision on 02/12/2013, demanding access also to footnote 23. This request was mainly based on the following two arguments: On the one hand, once again the completely insufficient substantiation of the invoked exception for an access denial disregarding the standards set out by the CJEU, which requires a detailed explanation why a publication of the document would effectively and specifically undermine the interest protected in the exception relied on and why this risk was reasonably foreseeable and not merely hypothetical.[23] On the other hand, again, the obligation to disclose documents relating to legislative activity pursuant to the "Turco" case law of the CJEU.[24]

With decision[25] of 28/01/2014 the Council rejected the confirmatory application.

First, the "Turco" case law was, once again, declared inapplicable, as document 15856/11 would not relate to legislative activities of the Council:[26]

> *"The Council would also underline that, contrary to what you contend, the requested document does not relate to matters where the Council is acting in its legislative capacity. Thus, the document contains an opinion of the Council Legal Service on the compatibility of the said draft agreement with opinion 1/09 of the Court of Justice of the European Union. Such agreement is not a legislative act. In that respect the Council considers that the nature of the document must be assessed on the basis of its content and subject-matter. The document does not contain an assessment of any other aspects of the unitary patent than the draft agreement and it is therefore clear that it is not a document falling under the obligation of wider access applicable to documents drawn up in relation to the institution's legislative activities."*

The respective argument[27] asserted in the confirmatory application, namely that the Agreement would, as a part of the "patent package", at least have a direct connection to a legislative procedure which the CJEU considered sufficient for an access right,[28] was ignored. After having identically reproduced the generic explanations on the content of footnote 23 from the decision of 08/11/2013 the Council concluded:[29]

> *"There is consequently a concrete risk that disclosure of footnote 23 would effectively and specifically undermine the protection of legal advice."*

Said *"effective and specific undermining"* mirrors the mentioned CJEU case law requiring such as a basic condition for an access denial, however, further demanding a detailed explanation why it is considered to be present. The Council was apparently aware of this, alleging that a detailed substantiation would disclose the footnote's content and thus thwart the "protection of legal advice", so that it could not be given:[30]

> *"In relation to the reasoning provided, the Council underlines that it is not in a position to give more detailed reasons without revealing the content of the footnote itself which would deprive the invoked exception of its very purpose. Thus, particularly in the case of refusal of access pertaining to a very limited part of a document the difficulty of providing detailed reasoning without disclosing its content must be taken into account."*

They also confirmed that there was no overriding public interest in a disclosure since, on the one hand, the CJEU "Turco" case law was not applicable, and, on the other, the content of said footnote was *"particularly sensitive and broad* [in] *scope"*. Moreover, it would cover only a very tiny part of the otherwise publicly accessible document.[31] After all this, footnote 23 had to remain secret.

c) Dissenting Council delegations

Very insightful, also in this case, was the group of Member States dissenting from the Council majority and demanding full access to the document. This it time, this group was constituted by Estonia, Lithuania, Finland and Sweden.[32] Germany, which in the negotiations about the decision on the preceding confirmatory application roughly three months earlier had likewise demanded to make footnote 23 accessible since *"disclosure of the footnote would not undermine the protection of legal advice"*,[33] now supported the majority vote for an access denial, despite unchanged facts. The same applied to Slovenia.

3. Access request of 09/03/2015

I started a new attempt to be granted full access to document 15856/11 on 09/03/2015.

a) Access request

Even roughly one and a half years after the latest request, access to footnote 23 was still being denied. The decision[34] of 23/04/2015 was widely identical to the preceding one of 13/11/2013.

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[21] Council document 17244/13 (fn. 18), p. 4.
[22] Council document 17244/13 (fn. 18), p. 6 ff.
[23] E. g. CJEU, C-280/11 P (above fn. 11), para. 31; C-506/08 P (fn. 10), para. 76; C-39/05 (fn. 10), para. 49.
[24] Above fn. 11.
[25] Council document 17246/13, accessible at bit.ly/3hjXnbw.
[26] Council document 17246/13 (fn. 25), p. 4, para. 8.
[27] Council document 17244/13 (fn. 18), p. 10, para. 15.
[28] CJEU, C-39/05 (fn. 10), para. 68.
[29] Council document 17246/13 (fn. 25), p. 5, para. 11.
[30] Council document 17246/13 (fn. 25), p. 5, para. 12.
[31] Council document 17246/13 (fn. 25), p. 6, para. 14 f.
[32] Council document 17246/13 (fn. 25), p. 1.
[33] Council document 14523/13 (fn. 6), p. 1 and above no. II.1.c), p. 2.
[34] Council document 9039/15, p. 3, accessible at bit.ly/3eCXgX0.

b) Confirmatory application

I again filed a confirmatory application on 14/05/2015. Meanwhile, a new CJEU judgment[35] had clarified that the standard of assessment for a denial of access to a document as defined in the "Turco" decision also applies if it does not relate to a legislative procedure.[36]

This invalidated the Council's core argument, the alleged inapplicability of the "Turco" case law.

With decision[37] of 19/06/2015, access to footnote 23 was granted unanimously and document 15856/11[38] thus made fully accessible. However, this did not happen without emphasizing that this outcome was strictly bound to the facts of the present case:[39]

> *"Taking into account the current state of play in the matter concerned, it has come to the conclusion that on balance the public's interest in disclosure outweighs the existing concerns in relation to the protection of legal advice, and that therefore full public access to document 15856/11 should now be granted.*
>
> *The Council notes, however, that the present positive decision is based on the facts of the concrete confirmatory application concerned, and under no circumstances it can constitute a precedent for the future, since each application shall be assessed and judged on its own merit, pursuant to the established practice of the Council."*

As the *"established practice of the Council"* appears to be the only relevant standard for the assessment of access requests which, as described, pays only insufficient regard to the CJEU case law, it is to be feared for the future that the Council will continue not to feel bound by the requirements of Regulation 1049/2001 and the EU citizens' fundamental right of document access.

4. The content of footnote 23

What now is the explosive content of footnote 23 which the Council said to be "*sensitive and wide in its application"* and led it to deny access for more than three years?

Footnote 23 is based on the following statement in para. 30 of document 15856/11:

> *"In the Council Legal Service's view, this alternative* [for the creation of a Unified Patent Court] *way could be the conclusion of an international agreement amongst EU Member States alone establishing a court common to them[23]."*

Footnote 23 states:

> *"It could be argued at the outset that, following the ERTA case (case 22/70, 1971, ECR 263), the validity of such an agreement is questionable, since it will concern a - by exercise - exclusive competence of the Union, ie civil jurisdiction (see Regulation 44/2001 – Brussels and the Lugano Convention, as well as Regulation 593/2008 -Rome I-, Regulation 864/2007 -Rome II- and Directive 2004/48/EC on the enforcement of intellectual property rights). The answer to this argument could be that the Union's exclusive competence applies only to agreements with third states and not between Member States alone (see wording of Article 216 TFEU). It could then be considered that agreements between Member States may affect provisions of the Union law in so far as they are compatible with them. In this respect, see also paragraphs 2 to 3 of the present opinion."*

Reading this causes surprise, because said aspect – the implications of the so-called ERTA or AETR case law of the CJEU – neither seems to be unknown nor very controversial. This had also been noted by the German delegation in its dissenting vote on the confirmatory application decision of 08/11/2013.[40] Apart from that, this has been discussed even before document 15856/11, dating of 21/10/2011, for instance in the fully publicly accessible Council document 12704/11 of 11/07/2011, titled "Creating a unified patent litigation system - Note from the Luxembourg delegation". In it, it is set out:[41]

> *"In the Commission's non-paper (Annex II to 10630/11 PI 54) and under the new draft international agreement (11533/11 PI 68), it is proposed that an international patent court be set up by an agreement concluded between the Member States themselves. The European Union would not be party to it.*
>
> *However, this international agreement would require the EU acquis to be adjusted (in particular, the 'Brussels I' Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) and is likely to affect it.*
>
> *In keeping with the 'AETR' case law and Article 3(2) of the TFEU, the EU has exclusive competence to conclude an international agreement insofar as its conclusion may affect common rules or alter their scope.*
>
> *Would exclusive competence to conclude this agreement not lie with the EU?"*

The AETR case law and its relevance for the "unitary patent package" was also repeatedly discussed in the academic literature.[42]

Apart from this, it was later found that footnote 23 had been cited[43] completely already in the book, published in

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[35] CJEU, Council v Sophie in ´t Veld, C-350/12 P, accessible at bit.ly/3blEaCt.
[36] Ibid., para. 96, 104 ff.
[37] Council document 9041/15, accessible at bit.ly/3y8D5ro.
[38] Accessible at bit.ly/33C1B6j;, a markup version showing the originally blackened passages is accessible at www.stjerna.de/access-documents/?lang=en.
[39] Council document 9041/15 (fn. 37), p. 3, para. 5 f.
[40] See above fn. 33.
[41] Council document 12704/11, p. 3 f., accessible at bit.ly/3eCMj7M.
[42] For Germany cf. *Gaster*, EuZW 2011, 394 (398); *Jaeger*, IIC 2012, 286 (289); *id*., EuZW 2013, 15 (20).

October 2013, "The Unified Court on Patents: The New Oxymoron of European Law" by *Franklin Dehousse*, at that time judge at the European Court, and was therefore public anyhow. At this time at the very latest, full access to document 15856/11 should have been granted.

III. Access to further suppressed Council documents on the "unitary patent package"

Although document 15856/11 was in the center of the efforts to gain access due to the highly controversial statements in the initial decisions of access denial, further Council documents were censored much more heavily.

1. Council document 17580/11

A good example is document 17580/11[44] of 01/12/2011, a note on the Draft Agreement on the creation of the Unified Patent Court and the open issues to be discussed by the Competitiveness Council. Of its ten pages, originally eight and a half were blackened.

Upon an access request filed on 08/10/2015, the document[45] was released.

In its first part, it contains a list of aspects still needing clarification as to the creation of the Unified Patent Court, e. g. in relation to the seat of the Central Division, the language of procedure or the number of ratifications required for the Agreement's entry into force. Part 2 refers to the renewal fees and their distribution among the Member States. As an annex, a "Draft declaration of the contracting Member States concerning the preparation for the coming into operation of the Unified Patent Court" is enclosed.

It is hard to see for what reason the originally censored content of this document was considered confidential.

2. Council document 18239/11

Initially also large parts of document 18239/11 [46] of 06/12/2011, a compromise proposal of the Polish Council Presidency titled "Draft Agreement on the creation of a Unified Patent Court - Presidency compromise text", were being withheld. Apart from headlines, all five pages of the document were blackened.

a) Access request of 12/12/2011

In December 2011, an unknown applicant requested access to the document.[47] With decision[48] of 01/02/2012, the application was rejected based on the "protection of the Council's decision-making process" (Art. 4(3) R). Said protection was stated to cover the whole document, so that also partial access pursuant to Art. 4(6) R was excluded.

Still on the same day, the applicant filed a confirmatory application[49].

The Council rejected it with decision[50] of 29/02/2012, additionally invoking the "protection of international relations" (Art. 4(1) lit. a third indent R).[51]

The decision contains some statements which give an idea about why the Council usually seems to be eager to avoid giving reasons for its decisions. First, it was emphasized – without mentioning the "Turco" case law, but presumably in relation to it – that the Agreement on a Unified Patent Court was concluded by the Member States alone:[52]

> *"It has to be recalled that the negotiations for an Agreement on a Unified Patent Court are taking place between 25 Member States ('contracting Member States') outside the legal and institutional framework established by the EU Treaties, where the envisaged judicial organisation will be created by means of an ordinary international treaty. If some of the preparatory work has been done in the Council's premises, making use of the Council's decision-making structures, this solution was chosen for reasons of convenience, in view of the close link between the envisaged Agreement and the draft Regulations implementing enhanced cooperation in the area of the creation of unitary patent protection, currently pending before the EU legislator."*

In the next paragraph already, the Council, however, admitted that its role in this was far from passive:[53]

> *"The requested document contains a Presidency compromise text which was drawn up by the Presidency for the representatives of the contracting Member States in the Competitiveness Council of 5 December 2011. This document contains compromise proposals on the outstanding issues in the draft Agreement, with a view to securing a political agreement on the patent "package", i.e. the draft Agreement and the two draft Regulations referred to above."*

Also the reasons given why the public had to be excluded from access for the "protection of international relations" were not convincing:[54]

> *"Given the fact that negotiations on this complex and sensitive file are in a critical stage where there is - for the first time since the beginning of discussions on a single Community patent and on an integrated jurisdictional system for patents - a reasonable chance of an agreement, disclosure to the public of the requested document risks negatively affecting the climate of confidence in the ongoing negotiations and hamper a con-*

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[43] Ibid., p. 13, fn. 28.
[44] The blackened version is available at www.stjerna.de/access-documents/?lang=en.
[45] Accessible at bit.ly/3blZLdY, a markup version showing the originally blackened passages is accessible at www.stjerna.de/access-documents/?lang=en.
[46] The blackened version is available at www.stjerna.de/access-documents/?lang=en.
[47] Council document 6048/12, p. 2, accessible at bit.ly/3bjRjMk.
[48] Council document 6048/12 (fn. 47), p. 3.
[49] Council document 6048/12 (fn. 47), p. 5.
[50] Council document 6051/12, accessible at bit.ly/3o9MQkJ.
[51] Council document 6051/12 (fn. 50), p. 6, para. 12.
[52] Council document 6051/12 (fn. 50), p. 5, para. 10.
[53] Council document 6051/12 (fn. 50), p. 5, para. 11.
[54] Council document 6051/12 (fn. 50), p. 6, para. 12.

structive cooperation, which is essential at this crucial stage of the process."

It can be doubted that maintaining a "climate of confidence" and a "constructive cooperation" the continued existence of which seems to hinge on excluding the public, are aspects outweighing the general access right.

Also not very persuasive were the Council's remarks on why its decision-making process had to be protected:[55]

> *"In addition, in view of the fact that the negotiating package includes, in addition to the draft Agreement, two draft Regulations for the creation of unitary patent protection and the applicable translation arrangements, where the European Parliament is yet to adopt its position at first reading/opinion, disclosure of the requested document risks having a substantial impact on the outcome of those decision-making processes, and accordingly, would seriously prejudice the Council's decision-making process (Article 4(3), first subparagraph of Regulation 1049/2001). The Council believes that in this context, where the negotiations on the patent package involve particularly sensitive and essential interests, the public interest relating to public participation invoked by the applicant does not establish an overriding public interest in disclosure."*

Why and to what extent the negotiations on the "patent package", from the Council's view, affect *"particularly sensitive and essential interests"* and why they outweigh a public participation was – once again – not explained. The reasons for this would certainly have been enlightening.

b) Access request of 08/10/2015

Upon my access request of 08/10/2015, document 18239/11[56] was finally disclosed in its entirety.

The issues discussed in it are largely the same as in document 17580/11. It mostly deals with little substantiated proposals which do not appear to be too controversial, even from a perspective at the time. An exception might be the fact that Paris was suggested as the (only) seat of the Central Division,[57] for which also Munich and London had signaled their interest. However, this could have been dealt with easily by a partial redaction.

After all, here as well a legitimate interest in such a far-reaching access limitation cannot be identified.

IV. Conclusion

The described cases disclose a very generous interpretation of the access exceptions by the Council and show the limited value attributed by it to Regulation 1049/2001 and the citizens' fundamental right of access to documents. For years, the CJEU is repeating over and over again that the public has to be granted the widest possible access to documents of the so-called "organs" of the EU, i. e. Commission, Parliament and Council (Art. 1 a) R), and that any exceptions to this principle have to be interpreted narrowly.[58] At least in the present context, the Council has repeatedly turned this into the exact opposite.

If the Council persistently claims confidentiality for such vague contents like that in footnote 23 of document 15856/11, which anyhow involves a publicly discussed issue, or the mostly rather generic contents of documents 17580/11 and 18239/11, thus showing that they regard these as so sensitive as to outweigh the citizens' general access right, one would rather not want to imagine the Council's handling of a truly controversial document.

The motivating force behind this approach may be the awareness that applying such legally doubtful rejectionist attitude will in many cases allow the relevance of a document to be diminished by the mere lapse of time. The person claiming access can only file a complaint with the European Court once his confirmatory application has been rejected. Presently, the procedure from filing an access request to the decision on the confirmatory application took around three months on average, a subsequent first instance at a court would currently add around a year. If appeal proceedings ensue, which often seems to be the case in access matters, there would be up to two more years. Against this temporal background, at the time of a positive final instance access decision by a court, in many cases the document in question will already have lost much of its relevance, e. g. because a legislative procedure associated with it will have been concluded by then. Therefore, an apparently legally questionable application of Regulation 1049/2001 as it was described above has its political value, apart from the fact that the responsible persons do not need to fear any sanctions.

Insofar, it is worth recalling the statement, which has meanwhile become almost proverbial for the legislative proceedings on the "unitary patent package", made by the former Chairman of the European Parliament's Legal Affairs Committee and rapporteur on the unitary court system, *Klaus-Heiner Lehne*, who in 2013 dismissed objections raised as regards the insufficient transparency of the proceedings as "nonsense", claiming:[59]

> *"There is no legislative proceeding which is more transparent than that at the European level."*

The contrast between political propaganda and reality could hardly be disclosed in a much clearer form.

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For possibilities to support my work on the European patent reform please visit www.stjerna.de/contact/?lang=en. Many thanks!

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[55] Council document 6051/12 (fn. 50), p. 6, para. 14.
[56] Accessible at bit.ly/3eGnCHr; a markup version showing the originally blackened passages is accessible at www.stjerna.de/access-documents/?lang=en.
[57] Council document 18239/11 (fn. 56), p. 5.
[58] E. g. C-350/12 P (fn. 35), para. 46 and 48; C-280/11 P (fn. 10), para. 28 (w.f.r.) and 30 (w.f.r.).
[59] JUVE Rechtsmarkt, issue 1/2013, p. 89, accessible at bit.ly/2RR2xRy.