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ARTICLE

Easy does it: pressing the right buttons in public access to documents of the EU

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Abstract
This article makes two claims regarding what is relevant in 2022 to the future of Regulation 1049/2001. The first is that an about-turn in the case law of the Court of Justice of the European Union (CJEU) has partly altered the formal scope of the EU policy concerning public access to documents (PAD) from document to information (PAI). This change in scope affects documents included in digital databases or other documents held in digital form but not the *acquis* regarding printed-on-paper documents. Second, we observe an uncomfortable stasis currently affecting both the EU judiciary and the Ombudsman. On the one hand, the judiciary remains imprisoned, without an alternative, within the bounds of insufficient remedial depth, i.e., concerning the action for annulment. Conversely, regarding the Ombudsman's role, classical recommendations have proved insufficient to drive EU access policy. Interestingly, in reaction to suggestions that binding powers be considered for the Ombudsman, even the current head of this institution demurs. Such a proposal carries an inherent serious risk of cognitive dissonance between the EU framework and national frameworks.

Keywords European Union · Transparency · Document · Information · Databases · Injunctive relief · Binding powers

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1 Introduction

Twenty years into its legal existence, it is still not simple to pinpoint what exactly is wrong with Regulation 1049/2001.[1] There is ample consensus that Regulation 1049/2001 has served but exhausted its purpose and urgently needs to be replaced.[2] More difficult to ascertain is what specific mechanisms in Regulation 1049/2001 need replacing and how to go about this in a way that is both appropriate and efficient.

There has been no further overarching legislative contribution to the European Union (EU) policy on public access to documents (PAD) since the adoption of Regulation 1049/2001. True, there are a couple of references in the Charter of Fundamental Rights[3] and there are dispersed self-adopted rules for specific institutions/agencies which have been adopted post-2001. In the meantime, with the legislative framework stalled, an incessant – and on occasion disruptive- amount of case-law continues to develop.

Case-law – both recent and less recent – has touched on the general interpretation of Regulation 1049/2001; on the nature of applicants; on the role of institutions and agencies; on the scope of exceptions and presumptions of harm;[4] on the consequences of legal silence; on the interests and legitimacy of interveners, and most crucially in 2022, case law has re-addressed the nature of documents. On that premise, it seems to me that the leading thought for 2022 within this policy is "pressing the right buttons".

I will consider two distinct issues to anchor my contribution: first, the issue that case-law has partly altered the formal scope of the policy from a document-based approach to an information-based approach. Second, the issue that applicants and the academic community are currently disenchanted by the policy due to a generalised stasis affecting both the EU judiciary and the Ombudsman.

Tension exists between the legislative and judicial approaches concerning what tasks information officers are required to undertake in order to satisfy requests for information. When contained in digital databases, in 2017,[5] the information contained in a document began to be identified as a document unto itself, and thus both terms have since been used interchangeably, subject only to the caveat of extractability by way of pre-programmed search tools. Expressions such as "regular routine search", "sufficient sophistication" of a database, "substantial investment" and "programmes easily available on the market" need urgent clarification by the Court in order for new boundaries to be drawn. The new framework however is not applicable to applications for information dispersed over several printed-on-paper documents.

[1] On the 17-19 November 2021, an ERA seminar brought together a group of agents, experts, judges, lobbyists and professors to engage in a technical discussion concerning the practice of the EU access to documents policy in 2020 and 2021. The closing round table focused on what was to become of Regulation 1049/2001, which is now over twenty years old.

[2] The entire seminar benefitted significantly from another discussion on the same topic albeit from a more specific point of view – the Ombudsman's role in Public Access to Documents- that had taken place only some days prior, in Brussels: https://europa.eu/!PqdP6g_15.11.2021, *Access to EU Documents, What Next?*

[3] Art. 41 and 42 of the Charter of Fundamental Rights; see e.g. *Rossi and Silva*, [4] pp. 25-26 and bibliography cited therein.

[4] For the growth of presumptions: *Costa and Peers* [2], pp. 403-420.

[5] Case C-491/15P *Typke*, EU:C:2017:5 para 37. Hereinafter, *Typke*-CJEU.

Regarding the institutional stasis, on the one hand we highlight how the paucity of existing judicial remedies continues to inflict damage on applicants' expectations and suggest that the inclusion of injunctive relief in the powers of the Court of Justice of the European Union should be given some thought. Lastly, albeit acknowledging that recommendations are insufficient to drive EU access policy, we conclude that the proposal that the Ombudsman be accorded binding powers carries an inherent serious risk of cognitive dissonance between the EU framework and national frameworks.

2 The formal scope of Regulation 1049/2001 concerns documents and not information

2.1 A Policy written for the "Material Paper World"[6]

As was true of the 1993 Code of Conduct,[7] Regulation 1049/2001 concerns public access to *documents*. This is a formal boundary – born of legislative choice- that for many years excluded development into an EU policy of access to information.

In 2017, regarding this EU policy (albeit with the appropriate disclaimers) we qualified the quest for documents as generally interchangeable with the quest for information.[8] We did that -having the material paper world in mind- because, in that world, requests for documents are made simply because documents contain information. This acknowledged, within that world such a situation (the interchangeability between document and information) does not withstand all tests. When focusing more narrowly on the text of the 1993 Code of Conduct and on as much of that structure that carried over into Regulation 1049/2001, the document/information distinction is glaring.[9]

From a comparative point of view, during the 2021 ERA seminar, regarding this distinction in the national laws of the EU, the difference between two contrasting approaches – the Scandinavian approach and the Anglo-Saxon approach – was highlighted.[10] The former approach was born of the Swedish Freedom of Press Act 1766 that focused on access to documents. Therein, PAD is, however, limited to definitive documents, thus excluding drafts. In contrast, the Anglo-Saxon approach is based on a Freedom of Information Act. Europe, thus, is acquainted with a panoply of options where some systems construe PAD policies around *documents* whilst others favour unclad *information* at the centre of transparency.[11]

[6] This wonderful expression is taken from AG Bobek's Opinion in C-491/15 *Typke*, EU:C:2016:711 para. 46.

[7] Code of Conduct signed on 6.12.1993 by the Commission and the Council of Ministers on public access to Council and Commission Documents [1993] OJ L 340, 41.

[8] *Rossi and Silva* [5], p. 2.

[9] *Rossi and Silva* [5], Ch 4.

[10] During the 2021 seminar Norbert Lorenz's contribution, among other topics, touched upon this point. https://www.era.int/upload/dokumente/23985.pdf.

[11] See in general, The Laws of Transparency in Action [4].

Table 1 Sequence of case law regarding digital Databases

		Action Lodged	Ruling Delivered
Dufour v ECB T-436/09	ECLI:EU:T:2011:634	29 October 2009	26 October 2011
Typke v Commission T-214/13	ECLI:EU:T:2015:448	15 April 2013	2 July 2015
Typke Opinion AG Bobek	ECLI:EU:C:2016:711		21 September 2016
Typke v Commission C-491/15P	ECLI:EU:C:2017:5	18 September 2015	11 January 2017
Izuzuqyiza & Semsrott v Frontex T-31/18	ECLI:EU:T:2019:815	20 January 2018	27th Nov 2019
Kedrion v EMA T-520/20	ECLI:EU:T:2022:20	11 September 2020	26 January 2022

The EU policy's identity as one drafted by the legislator for documents, is well-anchored in both EU law and case law. For the printed-on paper[12] version of documents that are produced or held by the EU institutions, it is established – and accepted – that applicants are not enabled to ask EU institutions *solely* for information. If information x is sought, applicants are required to identify the document(s) (containing information x). Success depends, first, on the off-chance that documents containing information x pre-exist the application.

Regarding information contained only on printed-on-paper versions of documents, institutions are not required to draw up *new* documents by combining information sourced from disperse files to present the applicant with rearranged content. In this context, when an original document containing information x does exist, and cumulatively the applicant has identified the document, and still no exception is applicable, the applicant should either be sent the document or be invited to consult it *in loco*.[13]

2.2 Part of the EU Public Access Policy "goes digital"

The ability to rely on the classical document/information distinction was rattled when, in 2009, a first case concerning access to a (digital) database arose. To structure seminal case law on this point, the existing case law *acquis* constructed for printed-on-paper documents was adapted by the General Court (GC) and the Court of Justice (the Court) to fit requests for information without a fixed material basis. This process shook the EU access tree and, over the next twelve years, six rulings fell out (Table 1: Sequence of case law regarding digital Databases): *Dufour* (2011), *Typke* (2015, *Typke* GC) (2016, *Typke* Op) (2017, *Typke* CJEU), *Frontex* (2019) and *Kedrion* (2022).[14]

Each of these rulings became a building block in the disruptive path that the EU judiciary chose to take.

[12] Here we mean "content whatever its medium", but there must be a medium.

[13] *Rossi and Silva* [5], Ch.5.

[14] Six important landmarks: Case T-436/09 *Dufour*, EU:T:2011:634 (hereinafter DUFOUR); Case T-214/13 *Typke* EU:T:2015:448 (hereinafter *Typke*-GC); Case C-491/15P AG Bobek Opinion *Typke* EU:C:2016:711 (hereinafter, *Typke Op*); Case C-491/15P *Typke* EU:C:2017:5 (hereinafter *Typke-CJEU*); Case T-31/18 *Izusquiza and Semsrott* EU:T:2019:815 (hereinafter *Frontex*).

The rulings involved applicants litigating against the European Central Bank (ECB), the European Commission (the Commission), the European Union Border and Coast Guard Agency (Frontex) and the European Medicines Agency (EMA). The ripples of the case law that emerged in consequence spread wide and superimposed upon one another since there were multiple points of origin. In addition, since the case law progressed first through two of the most important institutions (the ECB and the Commission), it was thus more easily replicable at the level of the agencies.

The above-mentioned rulings focused on information included in databases. *Dufour*, running between 2009 and 2011, was certainly a case concerning a digital database. The same is true of the later *Typke* proceedings that were conducted between 2013 and 2017. In the *Frontex* case that ran between 2018 and 2019, it was the institution that paved the way for the court to treat requests for information contained in databases in a way that contrasts with the treatment of information kept outside a database. The institution moved first, admitting of its own volition, not to have worked from an original document. The information had accordingly been extracted from documents in a database and rearranged in another format/layout to comply with measures of inquiry ordered by the court. This allowed the EU judiciary (both the General Court and Court) to structure the seminal case law for databases for a decade: 2009-2019. In addition, the courts acknowledged and benchmarked differences in institutional easiness of manipulation between information dispersed over several printed-on-paper files and information held in digital form. The latter (say the courts) is easily manageable *via* search tools that are not available for the material paper world.

The easiness *acquis* is the most plausible explanation for the outcome of the *Kedrion* proceedings that ran from 2020 to 2022. It was held irrelevant, in this case-law, that the contested documents were not part of a digital database. If was sufficient, at that point, for the General Court, that the contested documents (nether contained in a database nor a database themselves) were digital: it was a document held as a PDF. The next conclusion drawn was that, since digital, it fitted the judicial definition of documents the information in which was easy to manipulate if the proper tools were available. Lastly in the cascade of argument, if the appropriate tools were not available, they were (said the court) easy to procure. Consequently, as had previously been held true for databases, manipulation of digital documents not included in databases does not amount to "excessive workload".

The expressions "tools that make documents easy to manipulate", "programmes easily available on the market" "programmes easy to procure", translate the concepts that bridge the digital and the physical worlds and that impinge dramatically on the lengths that information officers must go to in order to properly discharge the burden of responding to applicants. Below is a more detailed explanation of the sequence of case law that disrupted the pre-1999 *acquis*.

2.2.1 Dufour 2009-2011

The *Dufour* proceedings began when a doctoral student of sociology lodged an action for annulment against a decision of the Executive Board of the ECB, in which the

latter refused to grant the applicant access to the databases used as a basis for preparing ECB reports on staff recruitment and mobility. The ECB responded by claiming that the databases to which the applicant sought access were not documents within the meaning of Decision 2004/258.[15] The institution also argued that the copy-paste (electronic) operations deemed necessary to satisfy the applicants' request amounted to creating a *new* document.

The applicant argued that the entire database was a document and furthermore that granting his application would put the institution to almost no trouble at all.[16] The General Court defined database,[17] agreeing with the applicant, and went on to state that if sufficiently sophisticated,[18] a database's search tools could easily provide an applicant not only with the entire dataset, but possibly with the same dataset arranged in a variety of ways.

The moment §153 of the Dufour ruling was written and published, the EU[19] policy on public access to documents changed dramatically. It went digital. The General Court ruled that if data is stored electronically and the request for access is compatible with the database's classification scheme and can be extracted by way of a "normal or routine search" it may be the subject of an application for access. Agents in institutions were left to press the right buttons.[20] Since then, agents not only have to test databases' classification schemes, but, additionally, must establish what a "normal or routine (electronic) search" is.

2.2.2 Typke 2013-2017

Less than two years later, on 15 April 2013, very different proceedings began. They were initiated by a member of staff of the Commission, Rainer Typke, who had taken part in tests for admission to a different grade.

The applicant asked that the Commission (draw up and) grant him "access to a table containing a series of anonymised data on the tests in question, which had been taken by approximately 45 000 candidates". The *Typke* General Court proceedings would signal – building on *Dufour* – that a great divide had been wedged into the EU policy on public access to documents.

On the one hand, the General Court would not stray from the principle that applications pertaining to the material paper world remain attached to the *acquis* that distinguishes documents and information.[21] Conversely, the General Court went on to make a bold, new statement: applications for data stored digitally -because of their

[15] Decision 2004/258/EC of the ECB of 4.3.2004 (OJ 2004 L 80, p. 42).

[16] *Dufour* para.57..

[17] *Dufour* para. 87.

[18] *Dufour* para. 117.

[19] This expression *EUropeans* means EU citizens, residents or persons otherwise administered by the EU.

[20] *Dufour* para. 183.

[21] This *acquis* implies that: (i) the rule that the institutions are not required to create new (paper) documents and finally to (ii) the solutions found in the past for the so-called cumbersome applications.

immaterial basis- cause the EU policy on public access to documents to take on a new breadth.

The General Court's interpretation was unexpected since the table Mr. Typke asked for was complex.[22] And it required anonymisation of each participant. Moreover, the applicant clearly irritated the Commission's Secretary General who stated that Regulation No 1049/2001 was not intended to oblige the Commission to perform IT (information technology) operations in order to extract information stored in various databases.[23]

The applicant-institution conversation quickly escalated from this into technical jargon including terms as "strict mark-up syntax; item banks, structured query language (SQL queries) and new identifiers". New language to make progress on the only topic that matters today: what degree of sophistication do databases' pre-programmed search tools allow? It is a fascinating new analysis and a far cry from the traditional disputes about how many pages long a document is, the time a document would take to photocopy, if the applicant is able to travel to the institution's headquarters, if someone is available to supervise *in loco* consultation etc…

The General Court then left it to the Commission to decide whether a "routine search" was, or not, feasible in that specific case. However, a word of warning transpired since the General Court also added that had the applicant *Typke* requested access to the "entire" database, the outcome might have taken a different turn.

The *Typke* case went on to appeal, and very early on, Advocate General Bobek, in his Opinion, trumpeted again that the digital era required the enforcers of Regulation 1049/2001 to adapt. This was the fourth time the matter had been discussed by the EU courts. It had been discussed first in *Dufour*, secondly during the first instance phase of the *Typke* proceedings, thirdly in AG Bobek's Opinion delivered within the *Typke* appeal proceedings, and finally it was to be addressed once again by a judgment that would bring the *Typke* appeal to a close. After three hints that an about-turn might take place, it was without surprise that the public read in the judgment that that the

[22] According to that initial application, the table was to contain the following information: – an identifier for each candidate which was not to give any indication of the identity of the candidate but to relate the candidate to the questions which he had to answer;
– an identifier for each question asked, without, however, revealing the content of the question;
– for each question asked, the type of question, namely a verbal reasoning, abstract reasoning, numerical reasoning or situational judgment question;
– the language in which each question was presented to each candidate;
– an indication of any neutralisation of particular questions;
– an identifier for the expected answer which, without revealing the content of the question, was to be the same for each question/answer pair; the applicant specified in this regard that, if the answer options were not presented in the same order to all the candidates, it was to be ensured that the same identifier was used for each expected answer; he also stated that, for situational judgment questions, the entire expected answer was to be indicated, that is to say the best and the worst options;
– the answer given by each candidate to each question, it being understood, however, that the applicant did not seek to ascertain the content of the answers, merely to identify correct and incorrect answers from the candidates; the applicant specified in this regard that a separate identifier was to be used if a candidate had not answered a question, and that the complete answer was to be indicated for situational judgment questions;
– lastly, the time spent by each candidate on answering each question.

[23] *Typke*-GC para.7

Court concurred with the Advocate General's Opinion. The Court masterfully altered the scope of the EU policy on public access to documents by kneading together the words 'information' and 'document'. Subject to the caveat of its extractability by way of pre-programmed search tools, in the digital era the words 'information' and 'document' may be used interchangeably.

The only nod to the prior *acquis* constructed for the material paper world, involved the concept of excessive workload.[24] For the digital world, this was reconceptualised as "substantial investment",[25] and explained to mean "a required alteration either to the organisation of the database or to the search tools." If either step is required to satisfy an applicants' request, then the institution may legitimately refuse to undertake those measures.

2.2.3 Frontex 2018-2019

The *Frontex* case builds on *Typke* and contributes to thickening the growing *acquis* on public access to information contained in digital documents. Interestingly, the applicants in this case had simply asked for "information (x) contained in documents" without identifying specific documents. The information requested was "the name, type and flag of all vessels deployed by Frontex between 1 June and 30 August 2017 in the central Mediterranean under Operation Triton 2017". In a pre–1999 setting such a request might have been stonewalled by the combined interpretation of Regulation 1049/2001's Articles 2(1) and 6(1) – written for the material paper world – that burden the applicant with a higher level of specificity.[26]

It was the institution's inertia regarding cooperative duties with the applicant combined with a self-incriminating institutional statement that kicked the *Frontex* case into the digital arena.[27] The institution declared to have recovered and rearranged the contested information from a digital database not for the purpose of aiding the applicant but, conversely, to satisfy a measure of inquiry ordered by the General Court.[28]

It was but a short throw for the General Court to recover the *Typke*-CJEU para. 36 paradigm established by the Court: "all information that can be extracted (...) through pre-programmed search tools (...) must be regarded as an existing document."[29]

[24] *Clausen* [1], pp. 747-755.

[25] *Typke* Op para. 47: any information whose extraction from a database calls for a substantial investment must be regarded as a new document and not as an existing document.
Accordingly, any information which would, in order to be obtained, require an alteration either to the organisation of an electronic database or to the search tools currently available for the extraction of information must be considered to be a new document.

[26] *Frontex* para. 45.

[27] *Frontex* para.49.

[28] *Frontex* para.50.

[29] *Frontex* para.52.

2.3 Easy does it! 2022 – More bites, less pieces:[30] informatics and public access to documents beyond databases

2.3.1 Kedrion 2020-2022

Finally, a third ruling *Kedrion* (2022) tore even harder at the document/information boundary.[31]

The object of the *Kedrion* ruling was not a database. However, in this case, the new argument that had emerged specifically for databases – "the easiness of electronic manipulation" – was thrown over the entire world of electronic documents whether catalogued in a database or not.

Kedrion is a company that manages the collection and manipulation of blood plasma in five Italian regions that participate in a consortium called "Planet". It asked the European Medicine Agency (EMA) for access to the list of centres for collection and manipulation of blood plasma contained in the plasma master file (PMF) of a pharmaceutical company, Takeda. Among other arguments, the agency held that even a mere list of names and addresses of Takeda's centres would require manipulation of the PMF file by the agency since the order according to which centres appear in the original PMF (as main, secondary, or mobile centres) would reveal management strategy (which was commercially sensitive information).

Again, the question was: in such a context is the EMA compelled to create a *new* document?

The EMA objected that the contested list was only held in PDF format (thus the contested document was neither in a database nor a database unto itself) and that to re-transcribe it would have excessively burdened the institution.

The *Kedrion* ruling recalls that differently to the past, specifically since the *Typke*[32] ruling, in general, institutions *may* be required to present information to the applicant in a *rearranged* form.[33] That reasoning is equally applied to documents not catalogued in databases since the General Court states that opportunities arising from informatics (might and do) reach beyond databases.[34]

Still, the General Court pointed out that by resorting to "programmes easily available on the market "it is possible to convert "PDF image plus text"[35] into another format that allows information to be easily rearranged by way of standard procedures. Finally, after the appropriate program is procured, this double manipulation: conversion + rearrangement (said the General Court) could not be considered a substantial investment.

[30] In 2017, when writing *Public Access to Documents in the EU* with *Patrícia Vinagre e Silva*, [4] we had used the Title -*A Policy of Bites and Pieces?* in the Introduction to Ch 4-Documents. It casts light on the concept of documents as a layered construction and, in particular, as straddling electronic forms of stored information. It re-words *Curtin* [3].

[31] *Kedrion* para.47.

[32] Typke-CJEU and *Frontex* para. 53.

[33] *Kedrion* para.41 and 42.

[34] *Kedrion* para.46.

[35] *Kedrion* para.47.

2.3.2 Conclusion: digital documents in the EU Access Policy: from PAD to PAI

Concluding on this point, first, regarding information in databases new buttons must be pressed to perform normal routine searches. Secondly, for documents held merely in electronic format albeit not within a database, programmes easily available on the market are to be bought and utilised by institutions. Correspondingly, in 2022, for digital documents, it is information, not a document that is placed at the centre of the public access debate.

After *Kedrion*, when information is available in a digital version, it is unlikely that the EU judiciary will ever revert to interpreting the formal scope of Regulation 1049/2001 as one still connected to (classical) documents. All digital information held by the EU institutions has irreversibly slid, at the hands of the judiciary, into a new framework of public-access-to-*information*: PAI. Therein, the language of access speaks in bites rather than pieces.

3 An institutional stasis affecting both the Judiciary and the Ombudsman

Turning now to the second issue of our contribution, 2022 is also the time in the history of public access to documents in the EU in which two institutions openly struggle with their formal bounds. The Courts of the EU, already unpopular because proceedings seem to take too long, are (still) unable to offer injunctions to applicants. At the same time, a speculative insinuation has been publicly voiced regarding the Ombudsman: that, within the field of public access to documents, this institution would do a better job if given binding powers.[36]

First, and regarding the EU courts, PAD-related litigation in the EU supranational courts is governed strictly within the bounds of the action for annulment, i.e., Art. 263 of the Treaty on the Functioning of the EU (TFEU). The only other (litigious) alternative is to engage the Ombusdman. Bluntly put, the best outcome of an Art. 263 TFEU action is that after one or two years of litigation, an institution might be told by an EU court that it has erred in denying access to a document and must – as a consequence – take a new decision on the matter.

Insofar as concerns the Ombudsman, just as bluntly put, the best outcome is that after one year, a non-binding recommendation is issued stating that the institution erred in denying access to the document. These narrow bounds have led to an institutional stasis. Institutions have no legal path to overcome their inadequacy to assure what we may call a "EUropean"[37] that if (after a year or two) a first reason for denial is not validated (by the judiciary or by the Ombudsman) an obligation to hand-over the document will arise.

When determined *to gain access* to a document EUropeans will find this institutional panoply unattractive: slow, obstacle-ridden and of low remedial intensity: in sum, ill-equipped to help applicants exercise a right of access to documents at full potential.

[36] Available at https://europa.eu/!PqdP6g_15.11.2021, *Access to EU Documents, What Next?*

[37] EU citizens, natural or legal persons residing or having their registered seat within the EU territory, and/or persons who don't meet these criteria but to whom the institutions choose to extend rights.

3.1 The Judicial stasis

Concerning the Judiciary, there is a triple jeopardy: time, cost and remedial depth.

3.1.1 First, actions for annulment, from lodging to ruling take a long time[38]

Even a very superficial analysis of a small sample of cases regarding access to documents will result in the conclusion that litigating these cases in the EU courts is an (*excessively*) *lengthy process. If we refer to Table 1, which describes six episodes, we observe the following: Dufour took 24 months, Typke* (*from first instance to a final ruling from the CJEU*) *took 44 months, Frontex took 22 months, and, finally, Kedrion took 16 months. The numbers raise a crucial question of incentives: can we really ask EUropeans to wait between two to three years for a validation or cassation of an institutional refusal to disclose a document?*

3.1.2 Secondly, the access litigation imposes significant cost on applicants[39]

Funding may also be a significant deterrent for applicants to engage in litigation. A recent order on expenses[40] *has brought to light that a case may impose costs upwards of 10,000 euros on an applicant. Even though* (*some*) *expense is inherent in litigation, within a policy that seeks to foster institutional transparency vis-à-vis the public at large, this is an often-neglected topic worth looking into*.

3.1.3 Thirdly, even twenty years into Regulation 1049/2001, the public has a right to have illegitimate refusals annulled: no less, and no more

Existing remedies are confined to discussing whether a refusal was legitimate or not, but fall short of admitting that applicants might be handed the documents directly by the EU courts.[41] In addition, the galloping growth of presumptions of harm[42] has flung blanket-bans far and wide over masses of information. As a consequence, when considering pursuing the judicial route, the results of a cost-benefit analysis are heavily swayed against the popularity of Art. 236 TFEU as an efficient tool to *gain* access to documents.

It is not by chance that litigation has mostly been preferred by those with plenty of time on their hands, or who have access to in-house counsel and/or to abundant

[38] One glance at the rate at which proceedings progressed in *Typke* (see table on page 7) makes us wonder why it takes the best part of four years to *definitively* decide whether a member of Staff is entitled to rearranged information or not.

[39] Case T-31/18 DEP *Frontex*, EU: T:2021:173.

[40] Case T-31/18 DEP, *Frontex*, EU:T:2021:173 the initial request was of 23,000 EUR.

[41] *Rossi and Silva* [5], p.8

[42] *Costa and Peers* [2], pp. 403-420.

funds.[43] These points taken together (time, cost and the absence of injunctive relief) have allowed another player's role within the policy area, i.e., the Ombudsman, to compete for applicants' attention.

3.2 Stasis also affects the Ombudsman

Concerning the Ombudsman, here too an institutional stasis arises. However, here it is much more from the lack of remedial intensity and much less due to lengthy procedures. Conversely, lack of expense acts as an incentive to pursue this route as a preferential one to the judicial alternative.

A classical analysis of Ombudsman's powers dictates that -here too- we must be honest about the remedial paucity involved: Ombudsmen (and Ombudswomen), at the most, after stating that an institution is at fault, provide complainants with a non-binding recommendation that the institution involved amend its ways. After all, the judicial alternative (litigation via Art. 263 TFEU) also falls formally short of coercive powers over the institution, i.e., an order to make the contested documents available.

It is not surprising then that two proposals, both bold, were discussed -among other topic s- in 2021 at a debate organised by the Ombudsman on altering institutional design.[44] The first one was that the Ombudsman be granted binding authority in proceedings concerning access to documents, the second one is that an Access Commissioner be added to the EU's institutional Design. Both proposals involve risk.

3.2.1 Binding powers for the Ombudsman? Risk: cognitive dissonance

The first risk – duly acknowledged by the current Ombudsman Emily O'Reilly – is that of too much cognitive dissonance between the EU system and national legal systems: an Ombudsman with binding authority is (for most EUropeans) no longer an Ombudsman.[45] Even a "new legal order"[46] such as that of the EU must mirror basic tenets of its component members' legal systems to avoid the risk of (too much) cognitive dissonance between national law and the supranational EU framework. A new legal order "*ma non troppo*" is a philosophical limitation that the Union must acknowledge if it means to keep a cultural umbilical cord attached to its peoples.

Moreover, the EU courts issue binding decisions and even that is not enough to exclude the possibility that an institution is able to invoke one reason after another to ground non-disclosure. In truth, it's not just the binding nature of authority that matters but the injunctive muscle that for now is altogether absent in the EU system.

[43] Frequent applicants are, say, Client Earth, Info-driven NGO's, Big Pharma or Airline companies. (own computation).

[44] Available at -the Ombudsman's role in Public Access to Documents-. https://europa.eu/!PqdP6g_15.11.2021, *Access to EU Documents, What Next?*

[45] Again, see, in general, The Laws of Transparency in Action [4].

[46] Case 26/62 *Van Gend & Loos*, EU:C:1963:1.

3.2.2 An information commissioner? Risk: sludge

The discussion on changes to Regulation 1049/2001 also included the idea of the advent of an Information Commissioner.[47] If taken up, this would bring about a new institutional framework (after the requisite Treaty reform) featuring two courts, an Ombudsman, and an Access Commissioner. It is respectfully submitted that it would possibly add (another!) layer to what is already a "sludge-filled"[48] route to obtaining documents from the EU.

If an Information Commissioner were designed for the EU where would it fit? Would it be a stand-alone institution, and thus would we discard the Ombudsman's past role altogether? Would it amount to a (new) structure within the Ombusdman's structure? Would there be an appeal from Access Commissioner to Ombusdman (thus mimicking the judicial setting that comprises the General Court/Court with the associated risks of lengthy proceedings)?

During the debate, Ombudsman O'Reilly recounted (on the basis of a comparative law analysis) that where an Information Commissioner steps up, an institution that does not wish to follow a recommendation to disclose must then sue the Access Commissioner. Is this where we want to go? Into a place where institutions sue institutions while the applicant waits?

3.3 Disbelief in the judicial route?

Both limbs of the proposal to release the Ombudsman from the present institutional deadlock (i.e., those of binding authority and of an Information Commissioner) give up on the judicial route. Relegating (judicial) litigation to the blessed few with time and funds on their hands and/or to the simply brave. Such a message is twofold and delivers a dismal prognosis. On the one hand, it rests on the belief that the judicial "tempo" cannot be bettered. On the other hand, the message suggests that we should relinquish hope in a different future status for the EU judiciary.[49] Today, formally confined by Art. 263 TFEU, it might yet grow up into a "proper" administrative court with competence to enjoin institutions (albeit confined, in doing so, to the access policy) or ultimately even to substitute itself for the institutions.[50]

In the fight against this institutional stasis, we concur that a balanced solution may well lie in improving existing routes – but not beyond recognition. Under the current remedial frame (limited to annulment by the judiciary, and dispensation of non-binding decisions by the Ombudsman) both the courts and the Ombudsman could still work on the "tempo" of the dispensation of justice. Possibly by way of setting up of, say, a special section/chamber in each, thus creating a public access procedural highway as opposed to the current *status quo* under which access to documents cases

[47] Fashioned after the Irish experience.

[48] "Sludge," understood as friction, reducing access to important licenses, programs, and benefits. Because of the sheer costs of sludge, rational people are effectively denied life-changing goods and services; *Sunstein* [6].

[49] *Costa and Peers* [2], pp. 403-420.

[50] Both possibilities are present in national law.

are discussed alongside a panoply of cases covering different topics and are not earmarked to be readily dealt with and swiftly gotten out of the way.[51]

Specifically, as regards the EU's judicial branch, the time is also right to discuss and consider an about-turn in competence that – as regards the access policy- would transform the General Court and the Court into administrative courts able to dispense the more intense remedies known to national law – namely, injunctions.

4 Conclusion

In sum, several issues must be resolved in 2023. First, further clarification is needed from the courts on the meaning of the expressions "normal or routine searches" and "programmes easily available on the market". Secondly, the width and depth of the EU courts' competence should be revised. Thirdly, the extension or not of the Ombudsman's role in access policy needs to be discussed. And, finally, the recasting of Regulation 1049/2001 can no longer be postponed.

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Declarations

Competing Interests The authors declare no competing interests.

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[51] As the PPU (*Procédure Préjudicielle D'Urgence*).