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No transparency for the sake of it: How the data subject's capacity, role and context influence the EU Courts' balancing of the right of access to documents against data protection

In the first part this paper describes the rationale and significance of the right of access to documents and to data protection respectively in the EU legal order, and gives an overview of the principles the legislator and the jurisprudence have developed to resolve conflicts between the two. In particular, it highlights the tension with broader principles of EU law and how newly amended legislation may reshape the reconciliation exercise. In the second part, it analyses recent case-law with a particular focus on the nature of the data subject and the capacity he/she finds herself/himself in as well as the context the data stems from. It is argued that these parameters greatly influence the balance struck but that the Courts still have severe reservations about disclosing personal data not intended to be publicised. As a consequence, too strict application of the right to data protection might compromise the intended transparency and accountability of the institutions.

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A. Introduction

There are countless reasons why private organisations or persons request to access documents in the possession of EU bodies, organs and agencies. A lobby organisation may wish to be up-to-date regarding a draft new regulation, an NGO may wish to ascertain that a legislative or delegated act was not unduly influenced by the aforementioned lobby organisation, or an individual may wish to understand why his/her free-lance contract with the Commission was cancelled. On the other hand, persons involved in the EU decision-making process may not want their names and opinions available to anyone, let alone the whole world, after advising or collaborating with EU institutions. Without proper safeguards for anonymity, whistleblowers may not dare to report inappropriate behaviour. In the EU legal order, both sides in these situations can invoke their respective fundamental rights, and there must be rules suited to resolve the inevitable tension in an equitable manner.

When two fundamental rights are at issue, the two must be reconciled and a fair balance must be struck.[1] While this rule appears very straightforward at the outset, achieving a "fair" outcome is a particularly delicate task where fundamental rights come from opposite directions, to some extent logically excluding each other. Such is the case with access to documents and data protection, where the documents requested contain personal data. Both of these fundamental rights are cornerstones of the EU's self-image as a political entity where transparency, accountability and freedom of information are championed, but whose legal order also provides for the most ambitious system of protection of personal data and privacy in the world. Hence, in a situation where, for instance, redacted disclosure or other compromises are not an option, a decision-maker confronted with a request for documents containing personal data must side with either the applicant or the data subject. One of their respective fundamental rights will have to prevail over the other. Schematic solutions would risk running counter to the principle of proportionality. Individual case-by-case assessments are, however, prone to disappoint the parties whose interests were not upheld. It thus comes as no surprise that disputes over refused or granted access to documents (in the latter variant, often in the form of damage claims) have arrived in increasing number before the European Court of Justice (ECJ) and the EU General Court (GC). The principles developed in the course of these proceedings reveal a lot about how the Courts view the role of a critical public in a pluralistic democracy, as well as the

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[1] ECJ, judgment of 22.1.2013 – C-283/11, Sky Österreich / Österreichischer Rundfunk, para. 60.

role of its public servants. The issue will likely retain its dynamic as the pertinent legislation has recently been amended, which may invite further plaintiffs to challenge the established case-law.

B. Access to documents and data protection: two fundamental rights in conflict

I. The right of access to documents

According to a passage introduced with the Amsterdam Treaty, now Art. 1 subs. 2 TEU, decisions in the EU shall be taken "*as openly as possible [...] to the citizens*". The principle of openness was thus made part of EU law, and further developed in Art. 255 TEC which codified an individual right of access to documents held by the European Parliament (EP), Council or Commission. This right was extended to documents in the possession of any Union institution, body, office or agency with the Lisbon Treaty and is now enshrined in Art. 15 TFEU. It is now also a fundamental right recognised in Art. 42 CFR. Accordingly, it must, as Art. 52 para. 2 CFR mandates, be exercised under the conditions and within the limits of the Treaties. These conditions and limits are further specified in Art. 15 para. 3 TFEU,[2] on whose basis (more precisely, its predecessor, Art. 255 TEC) Regulation 1049/2001[3] was adopted. The first two recitals of the Regulation repeat the aim to promote the strengthening of democracy and fundamental rights by ensuring openness and accountability, while Art. 1 lit. a Regulation 1049/2001 includes the principle of a "*widest possible access*". Consequently, the exceptions to the principle of access must be construed restrictively.[4] The right of access to documents was thus introduced into the legal order of the EU as part of a broader commitment to transparency and "*good administration*".[5] It is a precondition for citizens to know, understand and participate in the activity of a public administration.[6] By way of granting access to its documents, the EU hence tries to enable the public to monitor and scrutinise the exercise of its power and thus achieve greater democratic legitimacy.[7]

II. The right to data protection

Data protection is equally a fundamental right in the EU legal order. Art. 16 para. 1 TFEU enshrines it as well as the CFR, which contains two pertinent provisions: Art. 7 on the respect for private and family life and Art. 8 on the protection of personal data. Their exact relationship is subject to controversy, but it is suggested that privacy is not pertinent when the data subject is acting in its public capacity,[8] while data protection, covering a wider context, still is.[9] Thus, the interest protected by Art. 8 CFR can rather be described as the control over one's data[10] or as safeguarding the autonomy of the person.[11] The German Federal Constitutional Court *(Bundesverfassungsgericht)*, for instance, has qualified in its 1983 landmark *Census Judgment* the related concept of informational self-determination as a foundation of a liberal and democratic society: According to this decision, the absence of control over who knows what about one's behaviour severely hampers the free development of one's personality and deters from exercising fundamental rights.[12] The ECJ's case-law on data retention by telecommunication providers (and the subsequent transfer to state authorities) goes in a very similar vein.[13] Parallelly, more modern conceptions of "*data governance*" have arisen under the impression of "*datafication*", the transformation of personal data into a commodity, a business asset.[14] The latter has created new forms of potential information-based harm, beyond the traditional

[2] The explanation to Art. 42 CFR makes clear that, both Art. 52 para. 2 CFR and Art. 15 para. 3 TFEU apply to the fundamental right of access to documents. It follows, that the secondary law enacted on the basis of the latter provision constitutes the applicable standard of review: GC, judgment of 28.3.2017 – T-210/15, Deutsche Telekom / Commission, para. 113.

[3] Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] OJ L 145/43.

[4] Standing case-law, e.g. ECJ, judgment of 17.10.2013 – C-280/11 P, Council / Access Info Europe, para. 30.

[5] Art. 41 CFR on good administration also grants in its para. 2 lit. b a right to access to one's file.

[6] *Courday*, in: Auby/Dutheil de la Rochère, Traité de droit administratif européen, 2nd ed. 2014, p. 699 f.

[7] *Diamandouros*, European State Aid Law Quarterly 2008 (EStAL), 654; ECJ, judgment of 16.7.2015 – C-615/13 P, ClientEarth / EFSA, para. 56.

[8] It has to be noted however, that according to Art. 52 para. 3 CFR, fundamental rights which have a counterpart in the ECHR (which Art. 7 CFR – unlike Art. 8 CFR – has with Art. 8 ECHR) must be interpreted in the light of the ECtHR jurisprudence. In *Amann / Switzerland*, the ECtHR did not exclude professional or business activities *a priori* from the concept of private life: ECtHR, judgment of 16.2.2000 – application 27798/95, Amann / Switzerland, para. 65. But see for public defenders' professional activity in public proceedings: ECtHR, judgment of 8.11.2016 – application 18030/11, Magyar Helsinki Bizottság / Hungary, para. 194.

[9] *Kranenborg*, Common Market Law Review 45 (2008) (CMLRev), 1079 (1093); *Wrigley/Wyatt*, European Law Review 44 (2019) (ELR), 789 (795). Cf. also *González-Fuster*, The emergence of personal data protection as a fundamental right of the EU, 2014, pp. 199-200 with further discussion on the difference between privacy and data protection.

[10] *Lock*, in: Kellerbauer/Klamert/Tonkin, The EU Treaties and the Charter of Fundamental Rights, 2019, Art. 8 CFR para. 4.

[11] *Kranenborg*, CMLRev 45 (2008), 1079 (1095).

[12] BVerfGE 65, 1 (43) = NJW 1984, 419 (422) = openJur 2012, 616, para. 94.

[13] ECJ, judgment of 8.4.2014 – joined cases C-293/12 and C-594/12, Digital Rights Ireland / Minister for Communications, paras. 26-28, 37; ECJ, judgment of 21.12.2016 – joined cases C-203/15 and C-698/15, Tele2 Sverige / Post- och telestyrelsen, paras. 98-101; ECJ, judgment of 6.10.2020 – joined cases C-511/18, C-512/18 and C-520/18, La Quadrature du Net / Premier ministre, paras. 114, 117-118.

[14] See for a comprehensive discussion *Viljoen*, Democratic Data: A Relational Theory for Data Governance, 11.11.2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3727562, lastly accessed on 15.12.2020; Recitals 6 and 7 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR), [2016] OJ L 119/1, also take account of new data-driven business models.

ideas of dignity or autonomy.[15] A more modern notion of the interest in data protection therefore describes its essence in the light of the rampant digitalisation as a right to have a set of rules regarding data processing, not as a purely restrictive right.[16]

Regulation 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data was adopted on the basis of Art. 16 para. 2 TFEU[17] in order to address these new challenges. According to its Art. 2 para. 1, Regulation 2018/1725 is applicable to all processing of personal data by Union institutions and bodies. "*Personal data*" and "*processing*" are defined respectively in Art. 3 paras. 1 and 3 Regulation 2018/1725. As the definitions encompass the handling of any data, whether private or public, which might be able to identify a natural person by reasonable means,[18] it has a broad scope of application.[19]

III. Conflicts between access to documents and data protection

1. General principles governing the reconciliation of conflicting fundamental rights

Before diving into an analysis of the conflicts between these two specific fundamental rights, the general principles governing the collision between any EU fundamental rights shall be outlined. Art. 52 para. 1 s. 2 CFR i.a. lists the "*need to protect the rights and freedoms of others*" as a possible ground for limitations of fundamental rights. With the exception of the rights contained in Title I of the CFR, there is no hierarchical relation between fundamental rights.[20] In the case of one citizen's fundamental rights restricting another citizen's fundamental rights, the interests involved must thus be weighed having regard to all the circumstances of the case in order to reconcile the interests and strike a fair balance.[21] Additionally, any limitation must respect the essence of the fundamental right in question according to Art. 52 para. 1 s. 1 CFR. Consequently, where there are serious infringements of the fundamental rights in question, the requirement of a fair balance is not met.[22] This is, in essence, a consequence and manifestation of the principle of proportionality,[23] from which it follows that there can be no simplistic pre-determined solutions for the balancing and reconciliation but due regard to the particularities of each specific case.[24]

2. Reconciliation in case of access to documents and data protection

a) Threshold theory

Whilst access to documents implies publicity, data protection implies secrecy. Conflicts between the two are inevitable.[25] As both fundamental rights are established in primary law, none can claim supremacy over the other.[26] Accordingly, the two fundamental rights have to be reconciled based on the general principles established in the previous paragraph when documents that contain personal data are requested. Art. 4 para. 1 Regulation 1049/2001 gives further guidance[27] on how to strike the balance: it lists grounds on which – unlike para. 2 – the access to the requested document must be refused, without any discretion on the side of the Union institution involved.[28] Art. 4 para. 1 lit. b Regulation 1049/2001 reads as follows:

"*The institutions shall refuse access to a document where disclosure would undermine the protection of [...] privacy and the integrity of the individual, in particular in accordance with the Community legislation regarding the protection of personal data.*"

[15] *Viljoen*, Democratic Data: A Relational Theory for Data Governance, 11.11.2020, p. 5, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3727562, lastly accessed on 15.12.2020.

[16] *Dalla Corte*, in: Hallinan et al., Data Protection and Privacy – Data Protection and Democracy, 2020, pp. 27 (48-49).

[17] [2018] OJ L 295/39. Regulation 2018/1725 repealed Regulation (EC) No. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, [2001] OJ L 8/1, which covered the same subject.

[18] Cf. Recital 26 Regulation GDPR. The GDPR's notion of „*personal data*" and „*processing*" is defined in its Art. 4 nos 1 and 2 in the same terms as Regulation 2018/1725.

[19] Cf. Article 29 Data Protection Working Party, Opinion 4/2007 on the concept of personal data, 01248/07/EN, https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2007/wp136_en.pdf, lastly accessed on 15.12.2020, with many examples.

[20] *Lenaerts*, EuR 2010, 3 (10). This includes rights and freedoms set forth in other EU primary law instruments.

[21] See e.g. ECJ, judgment of 12.6.2003 – C-112/00, Schmidberger / Austria, para. 81; ECJ, judgment of 6.11.2003 – C-101/01, Lindqvist, para. 86; ECJ, judgment of 22.1.2013 – C-283/11, Sky Österreich / Österreichischer Rundfunk, para. 60.

[22] ECJ, judgment of 16.7.2015 – C-580/13, Coty / Stadtsparkasse Magdeburg, para. 35.

[23] ECJ, judgment of 19.12.2019 – C-752/18, Deutsche Umwelthilfe / Freistaat Bayern, para. 50.

[23] An excellent example for this exercise is ECJ, judgment of 12.6.2003 – C-112/00, Schmidberger / Austria, paras. 82-87, where the ECJ carefully differentiates the public demonstrations in that case from those that gave rise to the precedent *Angry Farmers* case (ECJ, judgment of 9.12.1997 – C-265/95, Commission / France) by emphasising details such as the limited location and time of the protests, the protesters' motivation, their cooperation with the authorities etc.

[25] *Kranenborg*, CMLRev 45 (2008), 1079; cf. also GC, judgment of 12.12.2019 – T-692/18, Montanari / EEAS, para. 23 where the GC acknowledges the inevitable tension.

[26] Kranenborg, CMLRev 45 (2008), 1079 (1090). Recital 4 GDPR clarifies that "data protection is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights". Cf. also for the relationship between the two secondary law instruments, Regulations 45/2001 and 1049/2001: ECJ, judgment of 29.6.2010 – C-28/08 P, Commission / Bavarian Lager, para. 56.

[27] As follows from Art. 52 para. 2 CFR, Art. 15 para. 3 TFEU, Regulation 1049/2001 constitutes the sole standard of review for the right of access to documents: see the jurisprudence cited in n. 2.

[28] *Hofmann/Rowe/Türk,* Administrative Law and Policy of the European Union, 2011, p. 473.

The exact meaning of this paragraph had been disputed for a long time. On the one hand, the "*threshold theory*"[29] argued that a certain privacy threshold had to be met, i.e. that private life had to be affected, in order to refuse access on the basis of Art. 4 para. 1 lit. b Regulation 1049/2001. This used to be the point of view of the European Data Protection Supervisor (EDPS)[30] and of the GC in *Bavarian Lager*.[31]

b) The ECJ's interpretation: renvoi theory

On the other hand, the "*renvoi theory*"[32] construed Art. 4 para. 1 lit. b Regulation 1049/2001 as a renvoi to the entirety of EU data protection law, which had to be applied regardless of the nature or sensitivity of the data in question, as long as it constituted personal data that would fall into the material scope of the pertinent legislation.[33] Supported by the Commission, this was the reading the ECJ eventually upheld in the appeals judgment of *Bavarian Lager*.[34] In *ClientEarth* the ECJ confirmed that the fact that the personal data in question does not relate to someone's private life is irrelevant for the applicability of Art. 4 para. 1 lit. b.[35]

It follows that the pertinent test to be applied in case of a request for documents containing (any) personal data is that of Art. 8 lit. b Regulation 45/2001[36], which had the following wording:

"*[P]ersonal data shall only be transferred [...] if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced.*"

The ECJ interpreted it as follows: firstly, the applicant must demonstrate the necessity of the data transfer. The GC identified this step in a later judgment with the well-known proportionality test, i.e. a demonstration that the data transfer is "*the most appropriate of the possible measures for attaining the applicant's objective, and that it is proportionate to that objective*".[37] Secondly, on the basis of the established necessity, the institution in question must balance the interest invoked against the interests of the data subject.[38] The GC later concretised this stipulation and ruled out any transfer of data where the "*slightest reason to assume that the data subjects' legitimate interests would be prejudiced*" was found.[39] It added, though, that Art. 8 lit. b Regulation 45/2001, when applicable, does not include a presumption favouring these legitimate interests when balanced against the applicant's interests.[40]

c) Assessment

The above-outlined findings are quite striking. Given that Art. 6 para. 1 Regulation 1049/2001 explicitly provides that the applicant is not obliged to state reasons, the ECJ overrides this stipulation in order to allow for a weighing of interests. *Prima facie*, the absence of this obligation is logical due to the general (as opposed to individual) nature of the interest in openness and transparency the right of access is embedded in. The ECJ breaks with this logic when it holds, as follows from *Bavarian Lager*, that the general interest of transparency usually does not suffice.[41] An applicant will have to underpin it, at least, with more specified objectives[42] – here, the nature of the data and the data subject play pivotal roles.[43] For these reasons, this jurisprudence has been criticised, especially with regard to the absolute nature of the exception of Art. 4 para. 1 Regulation 1049/2001, which may lead to an overly strict application of the norm.[44] The institution remains under a duty, however, to grant partial access if only a fraction of the requested documents may prejudice the data subject's interests.[45]

[29] *EDPS*, Public access to documents containing personal data after the *Bavarian Lager* ruling, pp. 3-4, https://edps.europa.eu/sites/edp/files/publication/11-03-24_bavarian_lager_en.pdf, lastly accessed on 15.12.2020.
[30] GC, judgment of 8.11.2007 – T-194/04, Bavarian Lager / Commission, para. 67.
[31] GC, judgment of 8.11.2007 – T-194/04, Bavarian Lager / Commission, paras. 117-120.
[32] *EDPS*, Public access to documents containing personal data after the *Bavarian Lager* ruling, pp. 3-4, https://edps.europa.eu/sites/edp/files/publication/11-03-24_bavarian_lager_en.pdf, lastly accessed on 15.12.2020.
[33] *EDPS*, Public access to documents containing personal data after the *Bavarian Lager* ruling, pp. 3-4, https://edps.europa.eu/sites/edp/files/publication/11-03-24_bavarian_lager_en.pdf, lastly accessed on 15.12.2020.
[34] ECJ, judgment of 29.6.2010 – C-28/08 P, Commission / Bavarian Lager, paras. 59-63.
[35] ECJ, judgment of 16.7.2015 – C-615/13 P, ClientEarth / EFSA, para. 32.
[36] Regulation 45/2001 has been replaced by Regulation 2018/1075, its ramifications will be discussed in section B.III.2.d.
[37] GC, judgment of 15.7.2015 – T-115/13, Dennekamp / EP, para. 59.
[38] ECJ, judgment of 29.6.2010 – C-28/08 P, Commission / Bavarian Lager, para. 78.
[39] GC, judgment of 15.7.2015 – T-115/13, Dennekamp / EP, para. 117; similarly: GC, judgment of 12.12.2019 –- T-692/18, Montanari / EEAS, para. 32.
[40] GC, judgment of 15.7.2015 - T-115/13, Dennekamp / EP, para. 127.
[41] Cf. also ECJ, judgment of 2.10.2014 – C-127/13 P, Strack / Commission, para. 108, where it rejects the argument that access to documents was always in the public interest.
[42] *Praun*, European Data Protection Law 3 (2019) (EDPL), 448 (450).
[43] *EDPS*, Public access to documents containing personal data after the *Bavarian Lager* ruling, p. 7, https://edps.europa.eu/sites/edp/files/publication/11-03-24_bavarian_lager_en.pdf, lastly accessed on 15.12.2020.
[44] *Hofstötter*, in: von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7th ed. 2015, Art. 15 AEUV, para. 49. The European Ombudsman commented on the Commission's refusal to disclose the data requested in *Bavarian Lager* (later ruled legal by the ECJ) as an example of data protection rules being "*diverted from their proper purpose*": European Ombudsman, Correspondence of 25 September 2002, https://www.ombudsman.europa.eu/en/correspondence/en/3538, lastly accessed on 15.12.2020.
[45] Art. 4 para. 6 Regulation 1049/2001; ECJ, judgment of 6.12.2001 – C-353/99, Council / Hautala, para. 27.

d) Regulation 2018/1725: a fresh start?

With effect from 11 December 2018 on, Regulation 45/2001 was replaced by Regulation 2018/1725. The *sedes materiae* corresponding to Art. 8 lit. b Regulation 45/2001 is now Art. 9 para. 1 lit. b and para. 3 Regulation 2018/1725:

"*[P]ersonal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if [...] the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests.*"

[…]

"*3. Union institutions and bodies shall reconcile the right to the protection of personal data with the right of access to documents in accordance with Union law.*"

The wording of the new disposition seems to codify certain aspects of the *Bavarian Lager* jurisprudence.[46] The applicant still needs to bring forward the necessity of the data transfer, but, importantly, now specified as a "*specific purpose in the public interest*". This seems to confirm *Bavarian Lager's* message that general, unspecified interests may not be invoked, but also seemingly rules out the possibility that any request of documents for private purposes may be "*necessary*". Recital 28 of Regulation 2018/1725 mentions, however, that a specific purpose may relate to the transparency of the institutions. Interestingly, the article speaks about establishing proportionality *after* having demonstrably weighed the interests at stake. This is a reversal of the order in which the two-limb test was hitherto applied by the Courts. Furthermore, the wording does not seem to rule out cases where the data subject's interest might be prejudiced, but where a transfer of data would still be proportionate. Para. 3 then explicitly mandates the reconciliation of the fundamental rights to access to documents and data protection, where conflicts may arise between the two. These findings may hint at a departure from the strict approach with regard to prejudice taken by the GC in *Dennekamp*,[47] but could signify a narrower approach as regards the necessity test. This reading is further supported by the fact that these changes were added late in the legislative process: the Commission's first proposal lacked a para. 3 and the wording of para. 1 lit. b was left largely unchanged compared to Art. 8 lit. b Regulation 45/2001, safe for a reference to the principle of proportionality and the data subject's "*rights and freedoms*", additionally to his/her interests.[48]

C. The significance of the nature, context and role of the data and the data subject

As described in the previous section, the test hitherto applied by the Courts requires first to show the necessity of the transfer of data beyond a mere general interest in transparency behind the disclosure of documents and then, to weigh up this specified interest against the essentially individual interest in protecting one's personal data from transfer or publication. First, this requires a delimitation of which interests should be deemed making the transfer "*necessary*". Subsequently, the weight attached to the individual interest in data protection must be inferred depending on the context the data in question stems from and the nature and role of the data subject.

The Treaties, embodying the principles of openness and transparency, warrant and even desire a public that is enabled to constantly scrutinise the actions of public decision-makers in order to verify the absence of partiality and bias.[49] Hence, the idea that the interest in data protection is to safeguard the individual's autonomy by protecting him/her from scrutiny by the government or peers does not really fit in this context. Likewise, individual requests for personal data are not comparable to large-scale data collection and processing by tech giants in the context of *datafication*. Still, the underlying idea of an interest in preventing uncontrolled and potentially harmful data processing and transferring, i.e. a rule-based processing, can be universally applied.

Thus, it follows that a situation in which a public figure is acting in a public capacity, openness should generally be favoured[50] while – as provides Recital 6 of Regulation 1049/2001 – documents that are part of the legislative process should be granted wider access. The focus of the necessity and balancing test should be on making sure that the data transfer may not harm the data subject and that the recipient also complies with data protection rules.[51]

The following analysis will deal – if not otherwise stated – with case-law on Regulation 45/2001. Some preliminary uncontroversial observations should be mentioned: Art. 4 para. 1 lit. b of Regulation 1049/2001 is not pertinent if it is only the data subject's own personal data which is

[46] Some authors therefore expect little change in the case-law: *Praun*, EDPL 3 (2019), 448 (450); *Wrigley/Wyatt*, ELR 44 (2019), 789 (802).
[47] GC, judgment of 15.7.2015 – T-115/13, Dennekamp / EP, para. 117.
[48] Commission, COM/2017/08 final - 2017/02 (COD).
[49] Cf. *Wrigley/Wyatt,* ELR 44 (2019), 789 (790); *Diamandouros*, EStAL 4 (2008), 654 with further elaboration.
[50] *EDPS*, Public access to documents containing personal data after the *Bavarian Lager* ruling, p. 7, https://edps.europa.eu/sites/edp/files/ public cation/11-03-24_bavarian_lager_en.pdf, lastly accessed on 15.12.2020; Opinion of AG Cruz Villalón, 14.4.2015 - C-615/13 P, ClientEarth / EFSA, para. 56.
[51] In essence: *Wrigley/Wyatt,* ELR 44 (2019), 789 (794).

included in the documents requested.[52] Moreover, the data subject's death does not mean that his heir cannot claim damages for a purportedly illegal transfer of personal data of the deceased person to an applicant.[53]

I. The necessity test

1. Public interests invoked by the applicant

Several recent judgments deal with the criterion of necessity in the public interest and how it may be influenced by the identity or capacity of the data subject. In *Psara*, the GC had to rule on a refusal by the EP to disclose the records of several Members of the EP (MEPs) allowances spending. The applicants justified the necessity of the data transfer as follows: "*on the one hand, to enable the public to verify the appropriateness of the expenses incurred by MEPs in the exercise of their mandate and, on the other, to guarantee the public right to information and transparency*". The GC rejected the justification due to its "*excessively broad and general wording*".[54] It held that the mere vague reference to "*many instances of fraud in recent years*", while only one specific case was mentioned,[55] did not suffice to demonstrate that the existing mechanisms of review were insufficient and the data transfer therefore necessary.[56]

On the other hand, the ECJ ruled in *ClientEarth* on the disclosure of personal data from remunerated experts working for the European Food Safety Authority (EFSA). It accepted the necessity because the applicants substantiated their argument with a study linking some of the experts to lobby work and held that in such a circumstance, the impartiality of the experts could only be ascertained by full disclosure.[57] The GC also held in *Dennekamp* that the disclosure of names of MEPs participating in an additional pension's scheme was necessary because of suspicions of their voting behaviour being influenced by their financial interests. It particularly noted that the voting behaviour of elected representatives can in no other way be held to account than by public debate.[58]

These judgments differ in several regards: first, the specific interest was a suspicion of fraud in *Psara*, and a suspicion of conflict of interest in *Dennekamp* and *ClientEarth*. The judges seemed to accept them in both cases as potentially justifying necessity. Secondly, the degree of substantiation varied. In *Psara*, no specific suspicious link to the data subjects in question was drawn, while in *ClientEarth*, it was. Thirdly, in *Psara* and *Dennekamp*, the data subjects were MEPs, while in *ClientEarth*, they were remunerated experts.

The Courts thus attach significance to the framework the data subjects works in: are there control instances, other than the public, capable of effectively monitoring misbehaviour? Without being presented any specific contrary evidence, the GC apparently had sufficient trust in the EP administration to do so in case of allowance spending.[59] In *ClientEarth*, however, the ECJ was presented with evidence for lobby links, while EFSA would still be cooperating with the experts in question. Apparently, this convinced the Courts to deem EFSA's internal review mechanisms as not sufficient and consequently allow the public to review the matter.[60] In *Dennekamp*, the Court ruled again on the appearance of a conflict of interests, namely the fact that MEPs were voting on their own financial interests. This situation, together with the total absence of any internal review mechanism (naturally, as MEPs enjoy a free mandate[61]) convinced the GC of the necessity of disclosure – even without proof of an actual unduly influenced decision-making.[62] In conclusion, it seems that the less reliable alternative mechanisms of review other than publication there are, the less evidence the Courts expect.

In any event, it should be critically noted that the Courts risk applying some sort of circular logic when they require from an applicant to bring forward evidence-backed specific grounds in the general interest (such as suspicions of fraud or impartiality) in order to obtain access to documents where these grounds might only be apparent from the content of these exact documents.[63]

2. Private interests invoked by the applicant

When private interests are brought forward to justify a transfer of data under Regulation 1049/2001, not only the data subject, but rather the applicant and his/her role and position come into focus. As discussed above in section B.III.2.d, the addition of a "*public interest*" in Art. 9 para. 1 lit. b Regulation 2018/1725 calls into question the suitability of private interests *a priori*.

The case-law on Regulation 45/2001, however, did not establish such limitation. In *VG*, the GC assessed a request made by a former Team Europe member whose contract had been cancelled by the Commission after an attendant

[52] GC, judgment of 22.5.2012 – T-300/10, Internationaler Hilfsfonds / Commission, para. 107.
[53] GC, judgment of 27.11.2018 – joined cases T-314/16 and T-435/16, VG / Commission, para. 36.
[54] GC, judgment of 25.9.2018 – joined cases T-639/15 to T-666/15 and T-94/16, Psara / EP, paras. 74-75.
[55] GC, judgment of 25.9.2018 – joined cases T-639/15 to T-666/15 and T-94/16, Psara / EP, paras. 84-85.
[56] GC, judgment of 25.9.2018 – joined cases T-639/15 to T-666/15 and T-94/16, Psara / EP, paras. 77, 86.
[57] ECJ, judgment of 16.7.2015 – C-615/13 P, ClientEarth / EFSA, paras. 57-58.
[58] GC, judgment of 15.7.2015 – T-115/13, Dennekamp / EP, paras. 88, 94.
[59] GC, judgment of 25.9.2018 – joined cases T-639/15 to T-666/15 and T-94/16, Psara / EP, para. 77.
[60] The ECJ took note of a "*general climate of suspicion of EFSA*": ECJ, judgment of 16.7.2015 – C-615/13 P, ClientEarth / EFSA, para. 53.
[61] Arts. 2 and 3 of Decision 2005/684/EC (MEP Statute).
[62] GC, judgment of 15.7.2015 – T-115/13, Dennekamp / EP, para. 110.
[63] In the same vein: *Wrigley/Wyatt,* ELR 44 (2019), 789 (798).

of a conference, X, had complained about the applicant's conduct towards women.[64] The applicant requested, i.a., access to the testimonies, which the Commission denied on the basis of Art. 4 para. 1 lit. b Regulation 1049/2001. The GC held that for the purposes of that article, the nature of the specific interest invoked by the applicant, even whether the purported interest was his real interest, is irrelevant.[65] Therefore, the GC accepted the necessity on the basis of the applicant's wish to understand the Commission's decision and to "*restore his honour*".[66]

The GC took a different position in *Basaglia*, the first judgment on Regulation 2018/1725. Here, the applicant had requested documents related to the auditing of the financial management of certain research projects in possession of the European Anti-Fraud Office (OLAF) in order to defend himself against fraud allegations in criminal proceedings in Italy. The GC made clear that such personal interests do not privilege the applicant:[67] Moreover, the GC rejected the notion of a public interest encompassing the establishment of the truth in the context of criminal proceedings in order to prevent unjust criminal convictions, and ruled that the applicant's personal situation shall not guide the Commission's assessment whether to grant access to documents or not.[68] The GC went on to rule that the necessity test developed by the ECJ in *Bavarian Lager* must be understood as the necessity of invoking an interest of a public nature (referencing Art. 9 para. 1 lit. b Regulation 2018/1725).[69] Consequently, it upheld the Commission's decision to refuse access as the purely private interest invoked by applicant was insufficient to that end. However, the GC noted that the Italian Court may still request the litigious documents on the basis of the principle of mutual cooperation.[70]

The GC left open whether it believed that this should have been *Bavarian Lager*'s correct reading all long, or whether the public interest requirement was an innovation brought about by newly adopted Regulation 2018/1725. In any event, these findings clash significantly with those in *VG* – all the more in view of the applicant's quite existential interest in avoiding a criminal conviction. One may justify this exclusion with the argument that that the interest in openness of the institutions aims at accountability and strengthening of democracy, yet is not intended to serve private interests. However, it still adds to the difficulties many applicants already had faced when requesting documents. The line between public and private interest may be blurred at times, thus further facilitating an unwilling institution to block access requests. Lastly, the GC did not mention the principle of proportionality. It is again unclear if this was a consequence of the test order warranted by the new wording of Art. 9 para. 1 lit. b Regulation 2018/1725 (proportionality *after* weighing the interests), or due to the *a priori* unsuited nature of the applicant's private interest.

II. The balancing exercise

In the cases above, where necessity was established, the Courts proceeded to the second limb of the test, the balancing of the interests. A particular emphasis in this context is put on whether the interests of the data subjects may be at risk of being prejudiced. *Basaglia* is the only judgment so far based on Regulation 2018/1725, and the GC rejected the necessity in that case. For this reason, the following analysis pertains case-law based on Regulation 45/2001 and it is yet to be seen whether the new legislation will lead to a re-evaluation.

In *Dennekamp*, the GC made very clear that MEPs cannot expect the same standards as ordinary citizens:

"*It would be entirely inappropriate for an application for the transfer of personal data to be assessed in the same way irrespective of the identity of the data subject. Public figures have chosen to expose themselves to scrutiny by third parties, particularly the media and, through them, by a lesser or greater general public […].*"[71]

The GC then stated that the personal data in question belonged to the public sphere and that any legitimate interest linked to it must enjoy less protection.[72] Additionally, it noted that the fact that the publication might draw public criticism on the MEPs was inherent in their public function.[73] Consequently, it saw no reason why the interests of the MEPs would be prejudiced.[74]

In *ClientEarth*, the ECJ noted first, that EFSA's arguments about feared personal attacks on the experts were not supported by evidence and second, that disclosure would rather enable them to dispel doubts regarding their impartiality.[75]

In *VG*, the GC took into consideration that it was not X's and other concerned data subjects' interest to enter the

[64] GC, judgment of 27.11.2018 – joined cases T-314/16 and T-435/16, VG / Commission, paras. 4-6.
[65] GC, judgment of 27.11.2018 – joined cases T-314/16 and T-435/16, VG / Commission, paras. 55-56.
[66] GC, judgment of 27.11.2018 – joined cases T-314/16 and T-435/16, VG / Commission, paras. 94, 103.
[67] GC, judgment of 23.9.2020 – T-727/19, Basaglia / Commission, para. 27.
[68] GC, judgment of 23.9.2020 – T-727/19, Basaglia / Commission, paras. 28-30.
[69] GC, judgment of 23.9.2020 – T-727/19, Basaglia / Commission, paras. 64-65.
[70] GC, judgment of 23.9.2020 – T-727/19, Basaglia / Commission, paras. 66-67.
[71] GC, judgment of 15.7.2015 – T-115/13, Dennekamp / EP, para. 119.
[72] GC, judgment of 15.7.2015 – T-115/13, Dennekamp / EP, para. 124.
[73] GC, judgment of 15.7.2015 – T-115/13, Dennekamp / EP, para. 129.
[74] GC, judgment of 15.7.2015 – T-115/13, Dennekamp / EP, para. 130.
[75] ECJ, judgment of 16.7.2015 – C-615/13 P, ClientEarth / EFSA, paras. 67-70.

public domain when ruling the Commission's refusal legal.[76] The case concerned two distinct refusal decisions by the Commission. When assessing the second decision, the GC pointed out that any individual had a right to ascertain the lawful processing of his/her data. Interestingly, the GC linked the right of access as a precondition to the applicant's right to rectify the records of the allegations against him, thereby pitting the applicant's own data protection rights against those of X.[77] The mere unwillingness of X to let her personal data be transferred to the applicant out of fear of reprisals by him was, as long as not backed by evidence, not in itself sufficient for tilting the balance in her favour.[78]

A further case of interest, not mentioned so far, is *Agapiou Joséphidès*. Here, the applicant requested documents related to the award of a Jean Monnet centre of excellence to a university. These documents included personal data of academic staff, including CVs.[79] The GC took into consideration that the CVs were different from those accessible on the university's website and thus related to private life.[80] As a disclosure to the applicant would mean that the authority addressed by the request could not oppose wider dissemination, the GC saw a risk of prejudice to the data subjects' interest and ruled the refusal to access legal.[81]

It is thus visible from the case-law that the Courts are willing to refuse access where the data subject's interests are prejudiced. Yet, the notion of prejudice is not absolute. The circumstances in which it is seen as given depend greatly on the capacity in which the data subject is acting and the presented evidence backing the existence of such risk. A person acting in a public capacity – be it elected representative or remunerated expert – will have to accept public criticism and scrutiny of his/her work. This comes very clear in *Dennekamp*, where the GC initially sets a seemingly ultra-strict standard ("*slightest reason that the data subjects' legitimate interests would be prejudiced*")[82], but then goes on to state, in essence, that there is no legitimate interest in obscuring a potential conflict of interest of elected representatives. In situations related to privacy, on the other hand, the Courts attach more weight to the risks related to private life that a disclosure may entail, especially with regard to the handling of the data by the recipient. If the data subject is not in a capacity with an inherent exposition to the public, then the mere fact that the data may be disseminated in an uncontrolled way (which could be translated into "without a set of rules") or may gain publicity suffices to assume potential harm, as shown by *Agapiou Joséphidès* and *VG*.

D. Conclusion

The right of access to documents and the right to data protection have different directions and normative underpinnings, so that the ECJ's interpretation on how to resolve conflicts between the two breaks with the logic Regulation 1049/2001 on access to documents is otherwise informed by. Even though this dogmatic break may be to some degree inevitable, the ECJ's interpretation risks to raise undue obstacles with regard to the effectiveness of the right of access. Newly adopted Art. 9 Regulation 2018/1725 allows, however, to revisit the established line of jurisprudence regarding the second limb of the test, the balancing exercise, and to ease its strictness. Its wording concerning the necessity criterion, on the other hand, points towards a narrower scope of the interests suited to pass the first limb's test.

Conventional notions of the interest in data protection (such as absence of surveillance or *datafication*) have only limited pertinence in the context of public figures as data subjects. While still not accepting the interest in transparency for the sake of it as a sufficient reason for data transfer, the Courts do take into account the need for public debate when conflicts of interests are at stake. Parameters such as the context of the data subjects, their self-chosen exposition to the public and the existence of other, internal, review mechanisms play pivotal roles when assessing document requests. The Courts rather seem to view public scrutiny as a control of last resort. Additionally, the newly drafted wording of Art. 9 para. 1 lit. b Regulation 2018/1725 seems to clear the way for a jurisprudence sacrificing any private interests in accessing data on the altar of data protection – without any need to add the data subject's interests into the equation.

However, in cases where it comes to assessing the potential prejudice to the data subject, the notion of what constitutes said prejudice again differs with respect to the private or public nature of the data and the data subject's capacity in question. In this regard, the Courts' jurisprudence seems to be informed by a more modern "right-to-a-rule"-notion of data protection: mere uncontrolled dissemination or unwanted publication alone may be sufficient to constitute a prejudice.

[76] GC, judgment of 27.11.2018 – joined cases T-314/16 and T-435/16, VG / Commission, para. 77.
[77] GC, judgment of 27.11.2018 – joined cases T-314/16 and T-435/16, VG / Commission, para. 102. The GC does not refer to it, but the right to rectification is now stipulated in Art. 16 GDPR; the right to erasure in Art. 17 GDPR.
[78] GC, judgment of 27.11.2018 – joined cases T-314/16 and T-435/16, VG / Commission, para. 108-109.
[79] GC, judgment of 21.10.2010 – T-439/08, Agapiou Joséphidès / Commission, para. 112.
[80] GC, judgment of 21.10.2010 – T-439/08, Agapiou Joséphidès / Commission, para. 114.
[81] GC, judgment of 21.10.2010 – T-439/08, Agapiou Joséphidès / Commission, para. 116.
[82] GC, judgment of 15.7.2015 – T-115/13, Dennekamp / EP, para. 117.

It is still to be decided how (and whether at all) the Courts will adjust the established principles governing the reconciliation of the right of access to documents with data protection to the newly applicable regulation. The legislator opened up the possibility for the Courts to loosen their protective stance criticised by many authors – something that may seem even more warranted in the light of the legislator's choice (and the according application by the GC) to reject private interests altogether.

Jan Wehrhahn[*]

Medienberichterstattung, Öffentlichkeit und die Hauptverhandlung: Was ist von *Court TV* im Strafprozess zu halten?

Der nachfolgende Beitrag beschäftigt sich mit der Frage, ob Fernsehübertragungen strafrechtlicher Hauptverhandlungen in Deutschland wünschenswert sind oder nicht. Es handelt sich um einen Dauerbrenner, der im deutschsprachigen rechtspolitischen Diskurs bislang nicht mit der Aufmerksamkeit betrachtet worden ist, die er ob seiner Relevanz verdient. Die Untersuchung will einerseits die wichtigsten Argumente für und gegen Fernsehübertragungen aus deutschen Gerichtssälen hervorheben; andererseits führt sie eine kritische Analyse des Diskurses innerhalb der deutschen Jurisprudenz durch. Darum werden die meistvertretenen kritischen Argumente gegen „Court TV" auf ihre Stichhaltigkeit untersucht, bevor ein Fazit zur Ausgangsfrage gezogen wird.

Inhaltsübersicht

A. Einleitung

„*Die Verhandlung vor dem erkennenden Gericht einschließlich der Verkündung der Urteile und Beschlüsse ist öffentlich*" (§ 169 Abs. 1 S. 1 GVG). Man könnte meinen, mit diesem lapidaren Satz sei alles gesagt zum Verhältnis von Öffentlichkeit und Justiz. Tatsächlich befinden sich beide Bereiche in einem hochkomplexen Spannungsfeld, denn der Öffentlichkeitsbegriff selbst ist bis heute nicht zufriedenstellend definiert[1] und unterliegt einer steten dynamischen Entwicklung, die zuletzt durch die umfassende Etablierung von Massenmedien ganz entscheidend geprägt wurde.[2] Öffentlichkeit wird nachfolgend als „*das an der Erörterung von politischen Angelegenheiten und an politischer Entscheidungsfindung beteiligte Publikum*"[3] verstanden. Auch die Justiz hat sich verändert: Ausgehend von der inquisitorischen Geheimjustiz des Mittelalters zählt die öffentlich kontrollierte Gerichtsbarkeit zu einer der fundamentalen Errungenschaften der Aufklärung.[4] Die Rahmenbedingungen zwingen beide Bereiche, ihr Verhältnis zueinander stetig neu zu definieren.

Ein Aspekt dieses Verhältnisses ist das Thema der vorliegenden Arbeit. Sie beschäftigt sich mit der Frage, was von einer visuellen Übertragung der strafrechtlichen Hauptverhandlung für ein Medienpublikum als Bestandteil der Öffentlichkeit zu halten ist und ob dieses Konzept in Deutschland eine Zukunft hat. Diesbezüglich muss zunächst die aktuelle Gesetzeslage in Deutschland zusammengefasst werden. Als Gegenentwurf dazu wird das amerikanische Modell *Court TV* geschildert. Im Hauptteil des Beitrages werden die in der deutschsprachigen rechtspolitischen Diskussion etablierten Argumente gegen *Court TV* kritisch analysiert und bewertet. Diese Art der Auseinandersetzung ermöglicht zum einen die Herausarbeitung der relevanten Aspekte, die über die Beantwortung der Kernfrage entscheiden. Zum anderen lässt sie auch eine Beurteilung des aktuellen Meinungsstandes im deutschen rechtspolitischen Diskurs zu. Abschließend werden die Zukunftsperspektiven visueller Übertragungen strafrechtlicher Hauptverhandlungen in Deutschland thematisiert, bevor ein Fazit gezogen wird.

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[*] Der *Verfasser* studiert im siebten Fachsemester Rechtswissenschaft an der Freien Universität Berlin. Der Beitrag beruht auf einer Studienabschlussarbeit im Schwerpunktbereich Kriminologie. Die Themenstellung erfolgte durch PD Dr. *Christine Morgenstern*.

[1] *Stöber*, in: Öffentlichkeit – Diskurs zu einem Schlüsselbegriff der Organisationskommunikation, 1999, S. 77 (90 f.).

[2] *Hickethier*, Einführung in die Medienwissenschaft, 2. Aufl. 2010, S. 217.

[3] *Schmidt*, Wörterbuch zur Politik, 2. Aufl. 2004, S. 498.

[4] Eingehend *Neuling*, Inquisition durch Information – Medienöffentliche Strafrechtspflege im nichtöffentlichen Ermittlungsverfahren, 2005, S. 59 ff.