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No. 2321 **LETTER FROM THE PARLIAMENTARY COUNSEL**

To the Speaker of the House of Representatives of the States General

Amsterdam, 6 March 2017

1 INTRODUCTION AND CONCLUSIONS

1.1 Context of this parliamentary opinion

1.1.1 The House of Representatives of the Netherlands has asked De Brauw[1] to prepare a legal analysis of the compatibility of European treaties, legislation and case law in the field of transparency (hereinafter: «European transparency law») of the instruments and practices that govern access to Council documents, in particular the Guidelines for handling of documents internal to the Council («Guidelines»)[2] and the Rules of Procedure for the Council («Rules of Procedure»).[3]

1.1.2 This request for a parliamentary opinion should be seen in light of the four proposals put forward by Mr Omtzigt in his position paper of November 2016[4] to enhance the transparency of the Dutch government towards the House of Representatives with regard to the decision-making in the European Union («EU»), in particular within the Council of Ministers of the EU («Council»).

1.2 Research questions

1.2.1 In accordance with the request approved by the Presidium of the House of Representatives,[5] this opinion examines the following six research questions:

- Are the Guidelines fully compatible with European transparency law?
- Are the Rules of Procedure fully compatible with European transparency law?
- What is the legal basis for the «citation ban» that applies to members of the House of Representatives with regard to Council documents marked as «LIMITE»? How does this «citation ban» relate to European transparency law and to Article 68 of the Dutch Constitution?
- Can an active disclosure obligation on the part of the Council be inferred from European transparency law, in the sense that the Council is in principle obliged to actively make documents public, not only in response to a disclosure request?

[1] Letter from the Speaker of the House of Representatives of 01.02.17.

[2] Guidelines for handling of documents internal to the Council, Council document of 09.06.11, no. 11336/11.

[3] Council Decision of 01.12.09 on the adoption of the rules of procedure, OJEU L 325/25 of 11.12.09.

[4] Pieter Omtzigt, «*Vier voorstellen voor meer transparantie van de regering richting het parlement over besluitvorming in de Europese Unie*», November 2016 (Parliamentary document 22 112, no. 2250).

[5] Parliamentary document 22 112, no. 2291.

- Are the formal European legal transparency frameworks applicable to the decision-making within informal Council forums, such as the Euro Group, the Euro summits, the Trilogue meetings or the EU-27?
- If it is established that parts of the Guidelines, the Rules of Procedure or the «citation ban» are incompatible with European transparency law, what procedural possibilities are open to members of the House of Representatives for bringing these incompatibilities before a judicial body?

1.2.2 This opinion starts by giving a brief outline of the European legal framework within which these research questions should be seen (**Chapter 2**). This is followed by an analysis of the above questions in turn (**Chapters 3 to 8**). The main conclusions are then set out in Section 1.3. Appended to this opinion are an English translation of the main conclusions of this opinion (**Appendix 1**)[6], the relevant treaty provisions and legislation (**Appendix 2**)[7] and the full texts of the Guidelines (**Appendix 3**)[8] and the Rules of Procedure (**Appendix 4**)[9]

1.3 Summary of the main conclusions

1.3.1 In this opinion, a legal analysis was made of whether the instruments and practices that govern access to Council documents, in particular the Guidelines and the Rules of Procedure, are compatible with European transparency law.

1.3.2 The main conclusions of this opinion can be summarised as follows:

X. In our opinion, the principal rule of the Guidelines, requiring all internal Council documents to be marked as "LIMITE"[10] is incompatible with European transparency law, in particular with the case law of the Court of Justice of the EU regarding Regulation 1049/2001.[11]

XI. In our opinion, the grounds that limit the disclosure of Council documents, set out in Article 11, clauses 4 and 6 of Annex II of the Rules of Procedure, are incompatible with European transparency law.

XII. The "citation ban" seeks to ensure that the principal rule of the Guidelines, mentioned under I., is adhered to. As this principal rule is at odds with European transparency law, the "citation ban" hinders access to Council documents more than can be justified from a European law perspective. However, considering that the Guidelines constitute a Council decision which the Netherlands, as an EU Member State, has consented to, the Dutch government does not, in our opinion, have the freedom to unilaterally revoke the "citation ban" without prior consultation with the Council.

XIII. European transparency law does not at this moment offer an explicit basis for an active disclosure obligation of the Council with regard to all types of documents. Nevertheless, we believe that Regulation 1049/2001 does offer some support for the proposition that the Council has an active disclosure obligation with regard to legislative documents.

XIV. Unless informal forums such as the Eurogroup, the Euro summits, trilogue meetings or the EU-27 have voluntarily declared that European transparency law applies to their activities, these forums are, in our opinion, not bound to European transparency law. Questions whether the applicability of European transparency law to these forums is desirable or whether it is possible to bring these forums within the scope of European transparency law fall outside the scope of this opinion. We believe that a further examination of these questions might be of value. The procedural possibilities for members of the House of Representatives to seek legal redress for the incompatibilities found in this opinion are limited. It is impossible, both for members of the House of Representatives and for the Dutch government, to institute direct annulment proceedings against the

[6] Accessible via www.tweedekamer.nl.
[7] Accessible via www.tweedekamer.nl.
[8] Accessible via www.tweedekamer.nl.
[9] Accessible via www.tweedekamer.nl.
[10] See points 4 and 20 of the Guidelines.
[11] Regulation 1049/2001 of the European Parliament and the Council of 30.05.01 regarding public access to European Parliament, Council and Commission documents, OJEU, 31.05.01, L 145/43.

Guidelines or the Rules of Procedure, quite apart from the fact that the time limit for bringing such proceedings has long expired. We do, however, see the following possibilities for members of the House of Representatives to further the disclosure of Council documents, and of legislative documents in particular:

i. (Individual) members of the House of Representatives can (regularly) request the disclosure of Council documents based on Regulation 1049/2001 and can institute legal proceedings before the Court of Justice of the EU against a possible rejection decision;
ii. The House of Representatives can call upon the Dutch government to confirm that the categorical disclosure prohibition for all internal Council documents is incompatible with European transparency law and to insist that the Council amends the Guidelines and the Rules of Procedure in order to remove their – increasingly discernible – incompatibilities with European transparency law;
iii. The House of Representatives can call upon the Dutch government to enter into consultations with the Council in order to amend the "citation ban" in light of the Guidelines' incompatibility with European transparency law;
iv. The House of Representatives can call upon the Dutch government to – if appropriate in consultation with the Council – cease applying the "citation ban" in specific cases where internal Council documents clearly do not fall under one of the non-disclosure exceptions of Regulation 1049/2001;
v. Members of the House of Representatives can raise these issues with their colleagues in the European Parliament. Considering that the European Parliament plays an important role in the European legislative process and is jointly responsible for this legislative process' compliance with the requirements of European transparency law, the European Parliament could confront the Council with what can be regarded as a systematic violation of European transparency law;
vi. Members of the House of Representatives can raise the issue of the incompatibility of the Guidelines and the Rules of Procedure with European transparency law with the European Ombudsman.

2. OVERVIEW OF EUROPEAN TRANSPARENCY LAW

2.1 Relevant treaty provisions

2.1.1 Since the entry into force of the Treaty of Lisbon, transparency has been firmly anchored in the European treaties. In accordance with this Treaty, the principle of public access, that forms the basis of the principle of transparency, has been incorporated into Article 1 of the Treaty on European Union («**TEU**»), which requires that measures at European level should be taken «as openly as possible» and «as closely as possible to the citizen», in order to create «an ever closer union among the peoples of Europe».

2.1.2 The principle of transparency itself is enshrined in Article 15 of the Treaty on the Functioning of the EU («**TFEU**»). Paragraph 1 of this article confirms the importance of the principle of transparency in order to «promote good governance and ensure the participation of civil society». Of particular importance for this opinion is Article 15(3) TFEU. According to this paragraph, access to documents of the Union's institutions, bodies, offices and agencies is a right that every Union has[12] . This right of access to documents should be seen together with the right of access to documents laid down in Article 42 of the Charter of Fundamental Rights of the European Union. Moreover, Article 15(3) TFEU contains an obligation for «each institution», therefore including the Council, to ensure «that its proceedings are transparent» by establishing its own Rules of Procedure «in accordance with» the EU transparency regulations transparency.

[12] In accordance with Article15 paragraph 3 TFEU, this right of access also applies to any natural or legal person residing in or having its registered office in a Member State.

2.1.3 The counterpart of the transparency principle is the obligation of professional secrecy, laid down in Article 339 TFEU. This article, which forms the basic proviso for the Guidelines, prohibits members of the European institutions and European officials from disclosing «information of the kind covered by the obligation of professional secrecy».

2.2 Regulation (EC) No 1049/2001

2.2.1 Regulation (EC) No 1049/2001 constitutes a further elaboration of Article 15 TFEU and contains the general principles and limitations of the right of access to EU documents. Although in principle this regulation applies only to (documents of) the Council, the European Commission and the European Parliament,[13] by now almost all EU institutions, agencies and bodies have declared this Regulation to apply (at least in part) to their documents by means of internal decisions.[14]

2.2.2 The starting point of Regulation (EC) No 1049/2001 is ensuring «the widest possible access to documents».[15] This openness «enables citizens to participate more closely in the decision-making process» and «guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system».[16]

2.2.3 This wide right of access to documents can however be restricted by means of the exceptions included in Article 4 of Regulation (EC) No 1049/2001. These exceptions are intended to safeguard the public interest as regards public security, defence and military matters, international relations, the financial, monetary or economic policy of the EU or a Member State,[17] the privacy and integrity of the individual, in particular in light of the protection of personal data,[18] the protection of commercial interests of a natural or legal person, including intellectual property, the protection of court proceedings and legal advice and the protection of the purpose of inspections, investigations and audits.[19]

2.2.4 The most relevant exception for this parliamentary opinion is the so-called «space to think»-clause[20] of Article 4(3) of Regulation (EC) No 1049/2001, which relates to the protection of the decision-making process. This exception states:
«3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.» (underscoring and marking added)

2.2.5 The application of the above-mentioned exceptions should occur in accordance with Article 4(6) of Regulation (EC) No 1049/2001. This paragraph stipulates that access may only be refused to those parts of documents that are fall under the exceptions of Article 4 of Regulation (EC) No 1049/2001. Therefore, the parts of the documents that do not fall under the exceptions of Article 4, should be disclosed. .

2.2.6 Article 9 of Regulation (EC) No 1049/2001 contains a special procedure for the treatment of applications for access to so-called «sensitive» documents, that is to say documents which «protect essential interests» of the EU or its Member States in the areas of public security, defence and military matters

[13] Article 1, sub a) Regulation (EC) No 1049/2001, read in conjunction with the explanatory notes of Regulation (EC) No 1049/2001, COM/2000/0030def., point 4.

[14] For an overview, see for example the document of 15.11.13 from the General Secretariat of the Council, no. 16331/13, which can be consulted online at http://data.consilium.europa.eu/doc/document/ST-16331–2013-INIT/en/pdf.

[15] Article 1 Regulation (EC) No 1049/2001. See also the 1st and 4th preambles of Regulation (EC) No 1049/2001.

[16] 2nd preamble of Regulation (EC) No 1049/2001.

[17] Article 4 paragraph 1, sub a) Regulation (EC) No 1049/2001.

[18] Article 4 paragraph 1, sub b) Regulation (EC) No 1049/2001.

[19] Article 4 paragraph 2 Regulation (EC) No 1049/2001.

[20] See for example Abazi and Hillebrandt, «The legal limits to confidential negotiations: Recent case law developments in Council transparency: *Access Info Europe* and *In 't Veld*», *CMLR* 52, 825–846, 2015, p. 826.

(the exceptions of Article 4(1) of Regulation (EC) No 1049/2001), and which are classified as «TOP SECRET», «SECRET» or «CONFIDENTIEL».[21]

2.2.7 Finally, Regulation (EC) No 1049/2001 attaches special value to legislative documents, that is to say «documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States».[22] For this type of documents, Regulation (EC) No 1049/2001 stipulates: *«Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity [...] while at the same time preserving the effectiveness of the institutions' decision-making process.»*[23]

2.2.8 According to Article 12 of Regulation (EC) No 1049/2001, legislative documents should, moreover, as far as possible be made directly accessible in electronic form or through a register.[24] This direct access should be distinguished from access by means of a written application, which is also provided for in Regulation (EC) No 1049/2001.[25]

2.3 Relevant European transparency case law

2.3.1 The Court of Justice of the EU has made a valuable contribution to the development of European transparency law by giving guidelines for interpreting the right of access to EU documents and the exceptions of Article 4 of Regulation (EC) No 1049/2001.

Starting point: the fullest possible right of access to EU documents

2.3.2 According to the CJEU, the starting point should be that the public has the fullest possible right of access to documents of the EU institutions.[26] In the context of the Council, this means that «public access to the entire content of Council documents constitutes the principle, or general rule»[27] This interpretation by the CJEU is in line with the central principle of Regulation (EC) No 1049/2001 mentioned in Section 2.2.2.

2.3.3 The above means that institutions are obliged to grant public access to their documents, unless one of the exceptions of Article 4 of Regulation (EC) No 1049/2001 applies. According to the CJEU, this principal rule also applies to legal advice[28] and with respect to the disclosure of individual positions of Member States in a preliminary legislative document.[29]

Strict assessment of limitations to the right of access

2.3.4 According to the CJEU, limitations to the broad right of access to EU documents should be interpreted restrictively and should be based on legal exceptions provided for in Article 4 of Regulation (EC) No 1049/2001.[30]

2.3.5 In particular, when restricting access to documents, an institution must explain how disclosure of documents forms a concrete and actual, reasonably foreseeable and not merely hypothetical undermining of an interest protected by Article 4 of Regulation (EC) No 1049/2001.[31] Moreover, when refusing access to documents, an institution should perform a balancing test, in which the interest of non-disclosure should be weighed against the general interest

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[21] Council Decision of 23.09.13 concerning the security regulations for the protection of classified EU information, OJEU L-274/1 of 15.10.13.

[22] Article 12 paragraph 2 Regulation (EC) No 1049/2001.

[23] 6th preamble of Regulation (EC) No 1049/2001.

[24] Article 12 paragraph 2 Regulation (EC) No 1049/2001.

[25] Article 12 paragraph 4 in conjunction with Article 10 of Regulation (EC) No 1049/2001.

[26] CJEU, C-350/12P, *Council / In 't Veld*, ruling of 03.07.14, ECLI:EU:C:2014:2039, par. 48; CJEU C-280/11P, *Council/ Access Info Europe*, ruling of 17.10.13, ECLI:EU:C:2013:671, par. 28; CJEU C-506/08P, *Sweden / MyTravel and Commission*, ruling of 21.07.11, ECLI:EU:C:2011:496, par. 73; CJEU, joined cases C-514/07P, C-528/07P and C-532/07P, *Sweden and others / API and* Commission, ruling of 21.09.10, ECLI:EU:C:2010:541, par. 69; CJEU, joined cases C-39/05P and C-52/05P, *Sweden and Turco* / Council, ruling of 01.07.08, ECLI:EU:C:2008:374, par. 33.

[27] CJEU, *Access Info Europe*, see footnote 26 above, par. 35.

[28] CJEU, *Turco*, see footnote 26 above, par. 68.

[29] CJEU, *Access Info Europe*, see footnote 26 above, par. 35. In the relevant case, the Council refused to disclose the individual positions of Member States in a preliminary legislative document, because the disclosure would seriously damage the decision-making within the Council. According to the Council, disclosure restricted the Member States' room for manoeuvre, now that – as a consequence of negative pressure from public opinion and the media – after disclosure, Member States would no longer be able to deviate from the position they had taken in the first instance. The General Court and the Court of Justice of the EU did not follow the Council in this reasoning.

[30] See for example CJEU, *Access Info Europe*, see footnote 26 above, par. 30; CJEU, *Turco*, see footnote 26 above, par. 36; CJEU, C-266/05P, *Sison /* Council, ruling of 01.02.07, ECLI:EU:C:2007:75, par. 63.

[31] See for example CJEU, Access Info Europe, see footnote 26 above, par. 31; CJEU, Turco, see footnote 26 above, par. 43.

that documents are made accessible, taking in to account the benefits of increased openness, including closer participation of citizens in the decision-making process, greater legitimacy and more efficiency and responsibility of citizens towards the democratic system.[32]

2.3.6 Finally, when receiving requests for disclosure, institutions should assess per individual document whether it falls under one of the exceptions of Article 4 of Regulation (EC) No 1049/2001[33] and a refusal of disclosure should be extensively substantiated in such a way that it is clear that the requested document does indeed fall under one of the exceptions of Article 4 of Regulation (EC) No 1049/2001 and that the need to protect this exception is real.[34] As explained above, within the framework of this individual assessment, institutions are obliged under Article 4(6) of Regulation (EC) No 1049/2001, to verify whether individual documents fall fully or only in part under one of the exceptions of Article 4 of Regulation (EC) No 1049/2001.

Particularly strict assessment for legislative documents

2.3.7 According to the CJEU, the general interest mentioned above that documents be made accessible, is particularly relevant when institutions, and in particular the Council, act in a legislative capacity. In this context, transparency serves to strengthen democracy, by allowing citizens to control *all* information that underlies legislative acts.[35]

2.3.8 The case of *Access Info Europe* is particularly relevant in this regard. In this case, when refusing access to documents, the Council sought to invoke the exceptions of Article 4(3) of Regulation (EC) No 1049/2001 by referring to the «sensitivity» of the documents in question.[36]

2.3.9 However, the CJEU was of the opinion that documents that are part of the normal legislative process, including various proposals for amendment or re-drafting made by the Member States, could not be regarded as «sensitive» «by reference to any criterion whatsoever».[37] Therefore, institutions cannot refuse access to documents on the basis of Article 4(3) of Regulation (EC) No 1049/2001 by relying on the «sensitivity» of such documents. By this means, it would appear that the Court has raised the threshold for institutions to deny access to legislative documents.

2.3.10 In this regard, the *De Capitani* case, which is currently pending before the General Court of the EU («GCEU»)is relevant.[38] Apparently, the question in this case is whether access to preliminary legislative documents, including documents drawn up in Trilogue meetings, can be denied at all on the basis of Article 4(3) of Regulation (EC) No 1049/2001. It is recommended that the developments around this case be followed, as these could be relevant for any further steps in response to this opinion.[39]

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[32] See for example CJEU, *Access Info Europe*, see footnote 26 above, par. 32; CJEU, *Turco*, see footnote 26 above, par. 45.

[33] See for example CJEU, *Turco*, see footnote 26 above, par. 35.

[34] GCEU, T-796/14, *Philip Morris / Commission*, ruling of 15.09.16, ECLI:EU:T:2016:483, par. 31; GCEU, T-331/11, *Besselink / Council*, ruling of 12.09.13, ECLI:EU:T:2013:419, par. 99.

[35] See for example CJEU, *Access Info Europe*, see footnote 26 above, par. 33; CJEU, *Turco*, see footnote 26 above, par. 46.

[36] The use of the term «sensitive» in this case is particularly confusing. As has already been explained above, Article 9 of Regulation (EC) No 1049/2001 contains a special procedure for dealing with «sensitive» documents. These are documents that fall under the exceptions of Article 4, paragraph 1 of Regulation (EC) No 1049/2001 (and which also bear an extra qualification, namely «sensitive»). However, in *Access Info Europe* the Council invokes the «sensitivity» of the documents in question to rely on the exception of Article 4, paragraph 3 of Regulation (EC) No 1049/2001, and not to rely on the special procedure in Article 9 or on an exception of Article 4, paragraph 1. We therefore assume that the reference by the CJEU and the Council to «sensitive» documents does not relate to documents that fall under Article 9 of Regulation (EC) No 1049/2001, but concerns the interpretation of the exceptions in Article 4, paragraph 3 of Regulation (EC) No 1049/2001.

[37] CJEU, Access Info Europe, see footnote 26 above, par. 63: «In any event, even if the General Court were wrong in finding that the criterion for establishing the particularly sensitive nature of a document is that of the risk that disclosure of the document would jeopardise a fundamental interest of the European Union or of the Member States, it must be noted that, in paragraph 77 of the judgment under appeal, it was not by reference to that criterion that, in the circumstances of the case, the General Court ruled out the possibility that the requested document was particularly sensitive. Its conclusion was based, rather, on the finding that the various proposals for amendment or re-drafting made by the four Member State delegations which are described in the requested document are part of the normal legislative process, from which it follows that the requested documents could not be regarded as sensitive – not solely by reference to the criterion concerning the involvement of a fundamental interest of the European Union or of the Member States, but by reference to any criterion whatsoever.»

[38] GCEU, T-540/15, *De Capitani / Parliament*, pending. The means and leading arguments of the applicant in this procedure can be consulted at:
http://curia.europa.eu/juris/document/document.jsf?text=&docid=172426&pageIndex=0&doclang=NL&mode=lst&dir=&occ=first&part=1&cid=504038.

[39] Based on information we received from the registry of the CJEU, the court's decision on this case is not expected before 2018.

Extent of judicial scrutiny of refusal decisions

2.3.11 Finally, it should be noted that the judicial scrutiny of refusal decisions, that is to say, decisions in which institutions refuse access to documents following a disclosure request, is limited.

2.3.12 This is because institutions have a wide margin for discretion when determining whether disclosing a certain document would damage a public interest protected by Regulation (EC) No 1049/2001. The review by the CJEU must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers[40]

2.3.13 In practice, the limited judicial control described above has until now not prevented the CJEU from very critically assessing refusal decisions by the institutions and from, where necessary, declaring refusal decisions as incompatible with European transparency law and annulling them.[41]

3 COMPATIBILITY OF THE GUIDELINES WITH EUROPEAN TRANSPARENCY LAW

3.1 Overview of the Guidelines

3.1.1 The Guidelines set out how the Council should handle its internal documents. In this context, «Internal Council Documents» are defined as:
«unclassified Council documents whose distribution is internal to the Council, its members, the Commission and the EEAS and, depending on the policy area, certain other bodies and institutions.»[42]

3.1.2 The principal rule of the Guidelines is that all internal Council documents should bear the marking «LIMITE».[43]

3.1.3 The background to this principal rule is as follows:
«The untimely public disclosure of such documents could adversely affect the Council's decision-making process.»[44] (underscoring added)

3.1.4 Qualifying all internal Council documents as «LIMITE» has important consequences for the way in which these documents should be handled. First of all, the Guidelines state that documents marked «LIMITE» are deemed to be covered by the obligation of professional secrecy in accordance with Article 339 TFEU and that they should be handled in accordance with Regulation (EC) No 1049/2001.[45]

3.1.5 Regarding the distribution of «LIMITE» documents (that is to say the persons to whom such documents may be sent), the Guidelines state that «LIMITE» documents may only be distributed to «any official of a national administration of a Member State» or to «nationals of a Member State who are duly authorised to access such documents by virtue of their functions».[46] «LIMITE» documents may not be distributed to the media or the general public without prior authorisation.[47]

3.1.6 Regarding public access to «LIMITE» documents, point 20 of the Guidelines states that:
«LIMITE documents must not be made public unless a decision to that effect has been taken by duly authorised Council officials, by the national administration of a Member State (see paragraph 21), or, where relevant, by the Council, in accordance with Regulation (EC) No. 1049/2001 and the Council's rules of procedure.» (underscoring added)

3.1.7 Moreover, point 21 of the Guidelines states that where personnel in the national administration of a Member State do decide to make certain «LIMITE» documents public, in principle they must first consult the General Secretariat of the Council before taking such a decision:
«Personnel in any EU institution or body other than the Council may not themselves decide to make "LIMITE" documents public without first con-

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[40] CJEU, *In 't Veld*, see footnote 26 above, par. 63.

[41] See for example CJEU *Access Info Europe*, see footnote 26 above; CJEU, *Turco*, see footnote 26 above.

[42] Council Legal Service document of 31.05.13, no. 10384/13, «Handling of documents Internal to the Council», point 2.

[43] Point 4 of the Guidelines. See also point 2 of the Council Legal Service document of 31.05.13, no. 10384/13, see footnote 42 above.

[44] Point 1 of the Guidelines.

[45] Point 5 of the Guidelines.

[46] Point 14 of the Guidelines.

[47] Point 17 of the Guidelines.

sulting the GSC. Personnel in the national administration of a Member State will consult the GSC before taking such a decision unless it is clear that the document can be made public, in line with Article 5 of Regulation (EC) No 1049/2001»[48]

3.1.8 We note that point 21 of the Guidelines only refers to personnel of national administrations, which cannot be taken to mean members of national parliaments, but does include civil servants employed by these parliaments, such as, in the Netherlands, the Secretary General of the House of Representatives.

3.1.9 Although in principle the Guidelines only apply internally to the Council and the other EU institutions, they also affect the national administrations of the Member States. The basis for this is to be found in the Treaty principle of sincere cooperation set out in Article 4(3) TEU. Against this background, point 2 of the Guidelines states:
«These specific requirements are applicable for the functioning of the Council and, as a consequence, are to be respected by Member States to the extent that they are members of the Council, in line with the principle of loyal cooperation which governs relations between the EU institutions and the Member States.»

3.1.10 As will be explained in more detail in Chapter 5 of this opinion, the aforementioned points 20 and 21 of the Guidelines form the basis for the«citation ban» to which members of the House of Representatives are bound. Moreover, these two points of the Guidelines oblige the Member States to ensure that all persons to whom they grant access to internal Council documents respect the public access rules of the Guidelines.[49]

3.2 Compatibility of the Guidelines with European transparency law

3.2.1 First and foremost, it must be stated that the Guidelines are in principle intended as an internal act of the Council, which is not subject to appeal at the CJEU under Article 263 TFEU. Due to the fact that the Guidelines do not have binding effects on third parties, the Court of Justice of the EU does not take these into consideration when reviewing Council decisions on disclosure requests based on Regulation (EC) No 1049/2001. For example, in the *Access Info Europe* case, the General Court ignored the reliance by the Council on the Guidelines, thereby implicitly indicating that the partial refusal of access to a Council document could not be justified on the basis of principles in the Guidelines.[50] In appeal,[51] the advocate-general of the CJEU made the following comment about the Guidelines:[52]
«However, the restriction [of access to Council documents, addition by De Brauw] cannot go as far as the 'guidelines' followed by the Council in its application of Regulation No 1049/2001, which are referred to in paragraphs 16 to 25 of the Council's appeal. Under these guidelines, the Council will not, as a matter of principle, disclose the names of the delegations concerned in any document on which the institution has not yet taken a decision. For reasons which I will go on to explain, I take the view that to apply this rule indiscriminately, without regard to the nature of the proceedings of which the document forms part is inconsistent with the meaning and objectives of Regulation No 1049/2001.»

3.2.2 The advocate-general equally did not assess the issue directly against the Guidelines, and in its ruling, in which the appeal of the Council was dismissed, the CJEU made no reference at all to the Guidelines.[53]

3.2.3 For the sake of completeness, we note that if it were to be accepted that (points 20 and 21 of) the Guidelines are intended to have legal effects vis-à-vis third parties – read: the Member States –and thus not just apply internally, the two-month time limit for lodging an appeal as mentioned in Article 263 TFEU has passed. This means that the Netherlands as a Member State can no longer challenge the validity of the Guidelines in law.

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[48] Point 21 of the Guidelines.
[49] Point 7 of the extra Council Resolution 2013, explaining points 20 and 21 of the Guidelines
[50] GEU, T-233/09 *Access Info Europe*, ruling of 22.03.11, ECLI:EU:T:2011:105, par. 43.
[51] Right of appeal is the term used in the TFEU for an appeal against a decision given by the General Court.
[52] Conclusion of the advocate-general Cruz Villalón of 16.05.13 in case C-280/11P *Access Info Europe*, ECLI:EU:C:2013:325, recital 56.
[53] CJEU, *Access Info Europe*, see footnote 26 above, par. 27 ff.

3.2.4 However, the above does not affect the fact that the principal rule of the Guidelines – namely that *all* internal Council documents are in principle not to be made public – is in our opinion incompatible with Regulation (EC) No 1049/2001. We explain this as follows.

3.2.5 The European Treaties, Regulation (EC) No 1049/2001 and European transparency case law all show that the right of access to documents should be interpreted broadly. Full access to documents should be the starting point and exceptions to this principal rule should be interpreted strictly.[54] Moreover, Member States are obliged, on the basis of transparency case law, to assess per individual document whether it falls under one of the grounds for exception in Article 4 of Regulation (EC) No 1049/2001.[55]

3.2.6 Given the above, it is our opinion that the principal rule of the Guidelines, that all internal Council documents are automatically – that is to say without being subject to an individual assessment– marked as «LIMITE», is contrary to the European legal transparency principle. After all, the principal rule of the Guidelines is «non-disclosure, unless» while Regulation (EC) No 1049/2001 dictates the principle «disclosure, unless».

3.2.7 Moreover, the principal rule of the Guidelines is based on a premise that is incompatible with Regulation (EC) No 1049/2001. As has been stated above, the principal rule of the Guidelines assumes that «the untimely public disclosure of such [LIMITE] documents could adversely affect the Council's decision-making process.»[56]

3.2.8 This observation is at odds with Article 4(3) of Regulation (EC) No 1049/2001, as this article sets out a far stricter criterion for refusing public disclosure of these documents. According to this article, there must be a «serious undermining» of the Council's decision-making process, and not merely a possibility («could») that the decision-making process of the Council be «adversely» affected.

3.2.9 Moreover, the case law of the CJEU shows that this «serious undermining» must also be interpreted very strictly, in that institutions must prove that there is a *concrete* and *actual* serious undermining of the decision-making in the Council which is *reasonably foreseeable* and *not merely hypothetical*. Also, according to the case law of the CJEU, this «serious undermining» must be weighed up against the general interest that a certain document should be made public.[57] The Guidelines do not make mention of such a consideration. We have not been able to ascertain that this balancing test takes place in practice.

3.2.10 Bearing in mind that the Guidelines themselves prescribe that the handling of internal Council documents should take place in compliance with Regulation (EC) No 1049/2001,[58] in our opinion, the principal rule of the Guidelines, according to which all internal Council documents should be marked as «LIMITE» and therefore in principle may not be made public, is incompatible with European transparency law, in particular with the case law of the Court of Justice of the EU concerning Regulation (EC) No 1049/2001.

3.2.11 This conflict between the Guidelines and European transparency law is in our opinion particularly poignant for legislative documents. In *Access Info Europe*, in our opinion the CJEU accepted an particularly high threshold for refusing access to such documents on the basis of Article 4(3) of Regulation (EC) No 1049/2001.[59] This higher threshold seems difficult to reconcile with the principal rule of the Guidelines which categorically refuses access to all internal Council documents (including legislative documents). The outcome of the aforementioned pending the *De Capitani* case,[60] may be of importance for this issue.

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[54] See for example CJEU, *Access Info Europe*, see footnote 26 above, par. 28–30; CJEU, *Turco*, see footnote 26 above, par. 33-36.

[55] See for example CJEU, *Turco*, see footnote 26 above, par. 35.

[56] Point 1 of the Guidelines.

[57] See for example CJEU, *Access Info Europe*, see footnote 26 above, par. 31-32; CJEU, *Turco*, see footnote 26 above, par. 43-45.

[58] Point 5 of the Guidelines.

[59] CJEU, *Access Info Europe*, see footnote 26 above, par. 63.

[60] GCEU, *De Capitani*, see footnote 38 above.

4 COMPATIBILITY OF THE RULES OF PROCEDURE WITH EUROPEAN TRANSPARENCY LAW

4.1 Overview of Rules of Procedure

4.1.1 In addition to procedural rules related to the organisation and course of the Council meetings, the Rules of Procedure of the Council contain several provisions on access to documents. First of all, the Rules of Procedure stipulate that several categories of documents, including the agendas of the Council meetings, should be publically accessible and that these should be sent simultaneously to the Council, the European Commission and the national parliaments.[61]

4.1.2 Article 10 of the Rules of Procedure specifically relates to public access to Council documents. This article refers to Annex II of the Rules of Procedure for the specific provisions related to access to Council documents,. Hence it is this annex that is of particular relevance to this opinion.

4.1.3 Article 1 of Annex II of the Rules of Procedure states first and foremost that any natural or legal person shall have access to Council documents subject to the principles, conditions and limits laid down in Regulation (EC) No 1049/2001. Hence this article recognises that the Rules of Procedure should be in line with Regulation (EC) No 1049/2001.

4.1.4 Article 11 of Annex II contains a list of Council documents which, under certain conditions, should be accessible to the public. In particular, in Article 11(4) and (6) it is stipulated that:
«4. Provided that they are clearly not covered by any of the exceptions laid down in Article 4 of Regulation (EC) No 1049/2001, the General Secretariat may also make the following documents available to the public as soon as they have been circulated: [...]
(b) other documents, such as information notes, reports, progress reports and reports on the state of discussions in the Council or one of its preparatory bodies which do not reflect individual positions of delegations, excluding Legal Service opinions and contributions
6. After adoption of one of the acts [...] or final adoption of the act concerned, the General Secretariat shall make available to the public any documents relating to this act which were drawn up before one of such acts and which are not covered by any of the exceptions laid down in Article 4(1), (2) and (3), second subparagraph, of Regulation (EC) No 1049/2001, such as information notes, reports, progress reports and reports on the state of discussions in the Council or in one of its preparatory bodies (outcomes of proceedings), excluding Legal Service opinions and contributions.
At the request of a Member State, documents which are covered by the first subparagraph and reflect the individual position of that Member State's delegation in the Council shall not be made available to the public.» (underscoring added)

4.2 Compatibility of the Rules of Procedure with European Transparency Law

4.2.1 For the Rules of Procedure, the same applies *mutatis mutandis* as was mentioned before in paragraph 3.2.1 relating to the Guidelines: this is an internal document of the Council which is not subject to appeal at the CJEU on the basis of Article 263 TFEU. Due to the fact that the Rules of Procedure do not have binding effects on third parties, the Court of Justice of the EU does not take these into consideration when reviewing Council decisions on disclosure requests based on Regulation (EC) No 1049/2001. Although in *Access Info Europe*, the Council invoked its own Rules of Procedure as part of its justification for a partial denial of access to a Council document, again the General Court and the CJEU completely disregarded this argument.

4.2.2 In our opinion, the Rules of Procedure are equally at odds with the spirit and aim of Regulation (EC) No 1049/2001. In particular, our observation that the Rules of Procedure, and in particular Article 11 of Annex II of these Rules of Procedure, are incompatible with Regulation (EC) No 1049/2001 and European transparency law is founded on the following arguments.

[61] See Article 3 of the Rules of Procedure See also Articles 7–9 and 13 of the Rules of Procedure.

Article 11(4) of Annex II

4.2.3 The starting principle of Article 11(4) of Annex II of the Rules of Procedure that «informative notes, reports, progress reports and reports on the state of discussions in the Council or one of its preparatory bodies which do not reflect individual positions of delegations, excluding Legal Service opinions and contributions» «may» only be made accessible if they «clearly» do not fall under one of the exceptions of Regulation (EC) No 1049/2001, is in our opinion in conflict with European transparency law on multiple points.

4.2.4 First of all, as stated before, the starting point of the *Access Info Europe* case is that access to documents which contain individual positions of delegations may in principle not be refused,[62] whilst Article 11(4) of Annex II of the Rules of Procedure stipulates that documents may only be made available to the public if they do not contain individual positions of delegations.

4.2.5 Secondly, the provision in Article 11(4) of Annex II of the Rules of Procedure that documents may only be made available to the public as long as they contain no Legal Service opinions and contributions, seems to be incompatible with the *Turco* case, which established that legal opinions should in principle be publically accessible unless they fall under one of the exceptions of Article 4 of Regulation (EC) No 1049/2001.[63]

4.2.6 Finally, we consider the strict condition in Article 11(4) of Annex II of the Rules of Procedure that a document «may» only be made available to the public if it «clearly» does not fall under one of the exceptions of Regulation (EC) No 1049/2001 to be incompatible with Regulation (EC) No 1049/2001, which contains no such condition in Article 4(3). Indeed, on the basis of Article 4(3) of Regulation (EC) No 1049/2001, access to documents «shall» only be refused «if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.»

Article 11(6) of Annex II

4.2.7 As already explained above, under Article 11(6) of Annex II of the Rules of Procedure, at the request of a Member State, documents which are covered by the first subparagraph of Article 11(6) and reflect the individual position of that Member State's delegation in the Council shall not be made available to the public. We consider it plausible that Article 11(6) is incompatible with European transparency laws for two reasons.

4.2.8 Firstly, neither Regulation (EC) No 1049/2001, nor the European Treaties, nor European transparency case law allow for a Member State to submit a request to the Council that a Council document be made non-disclosable because it contains the individual position of this Member State. In fact, with this provision, Article 11(6) of Annex II of the Rules of Procedure introduces a new exception in European transparency law, which is not based on and therefore incompatible with Regulation (EC) No 1049/2001. Moreover, such a request would be incompatible with the *Access Info Europe* case, which provided that that access to documents which contain the individual positions of delegations may in principle not be refused.[64]

4.2.9 Secondly, Article 11(6) of Annex II of the Rules of Procedure, which stipulates that entire documents may be made unavailable to the public at the request of Member States, seems to be in conflict with Article 4(6) of Regulation (EC) No 1049/2001. After all, this article provides that only access to those parts of documents that fall under the exceptions of Article 4 of Regulation (EC) No 1049/2001 can be refused, and not *de facto* the access to entire documents.

4.2.10 Based on the above, in our opinion, the grounds for limiting the disclosure of Council documents set out in paragraphs 4 and 6 of Article 11 of Annex II of the Rules of Procedure are incompatible with European transparency law.

[62] CJEU, *Access Info Europe*, see footnote 26 above, par. 35.
[63] CJEU, *Turco*, see footnote 26 above, par. 68.
[64] CJEU, *Access Info Europe*, see footnote 26 above, par. 35.

5 ASSESSMENT OF THE LAWFULNESS OF THE«CITATION BAN» FOR «LIMITE»-DOCUMENTS

5.1 Provision of information to the States General

5.1.1 In the Dutch government system, Ministers and State Secretaries are responsible for their department. This also applies with regard to «European questions» which affect their department. This ministerial responsibility is derived from Article 42(2) of the Dutch Constitution. Based on this article, Ministers and State Secretaries are bound to give unsolicited account to parliament. They have an *active* duty to inform the States General.[65]

5.1.2 The duty to provide information at request as laid down in Article 68 of the Constitution is also a consequence of the ministerial responsibility.[66] This *passive* duty to provide information implies that Ministers and State Secretaries are obliged to provide the information requested by one or more members of the House of Representatives, provided this does not conflict with the interests of the State.[67]

5.1.3 The active and passive duty to provide information together form one of the foundations of Dutch representative democracy. Only by being well informed, parliament can properly perform its parliamentary scrutiny of the government.[68] Thus, for the system to function properly, it is vital that parliament receives solicited and unsolicited information.

5.1.4 The starting point is that the information from a government member should be provided to parliament *publicly.*[69] This follows from Article 66(1) of the Dutch Constitution, which stipulates that the sittings of the States General shall be held in public. However, as can be seen from Article 66(2) and (3) of the Dutch Constitution, this requirement of public access is not absolute. If the public provision of information by a government member is considered irresponsible, then a way must be found to inform the States General which as far as possible does justice to the interest of informing parliament.[70] One such way is the confidential provision of information.

5.1.5 Given the aforementioned interests of parliamentary scrutiny, the possibility for a Minister or State Secretary to withhold information in its entirety from parliament is small. Refusal can only be an option if this is necessary in the interests of the State. The interpretation of what is meant by «interests of the State» is at the discretion of the responsible government member.

5.1.6 The option for a government member to provide information to parliament in confidence is not one that should be used lightly, as the provision of confidential information frustrates the opportunities for public democratic scrutiny of the public administration. Providing information in confidence presupposes that, even if this is not explicitly stated, the interests of public disclosure do not weigh up against protecting the interests of the State.[71]

5.1.7 It is ultimately up to the Senate or the House of Representatives to determine whether they accept the invocation of the ground for exemption for the non-provision, or the confidential provision of information by a government member. By means of the unwritten confidence rule, either of the two Houses can discharge a Minister or State Secretary if they do not agree with the way they have been informed.

5.2 Legal basis for citation ban

5.2.1 On the basis of the so-called «citation ban», it is forbidden for members of the House of Representatives to share «LIMITE» Council documents with their

[65] It should be noted that in a memorandum on the scope of Article 68 of the Dutch Constitution, the government took the position that the active duty to provide information is bound up with the unwritten rule of confidence (see Parliamentary document 28 362, no. 2, p. 3.

[66] Parliamentary document 14 225, no. 3, p. 3.

[67] For that matter, the constitutional legislature has also accepted the limit of the so-called «natural obstacles». These include such situations where information is not provided because the details requested are not immediately available. A government member is not expected to perform the impossible: if a Minister or State Secretary does not have certain information, that is the end of it. See: Proceedings II 1979/80, p. 1962.

[68] Parliamentary document 14 225, no. 12, p. 1-2.

[69] Parliamentary document 19 014 (R 1284), no. 5, p. 3.

[70] Parliamentary document 28 362, no. 2, p. 3.

[71] Parliamentary document 28 362, no. 2, p. 6.

party assistants,[72] with the general public or with the media. Moreover, it is forbidden for members of the House of Representatives to cite from these documents in public debates. For this reason, members of the House of Representatives have indicated that the «citation ban» hinders them from efficiently exercising democratic control of the activities of the Dutch government in the Council.[73]

5.2.2 As stated before in Chapter 3, the «citation ban» is based on the categorical disclosure prohibition of Point 20 of the Guidelines, read together with the obligation of sincere cooperation of Article 4(3) TEU.

5.2.3 Point 20 of the Guidelines was implemented into the Dutch political practice by means of a political agreement dated 18 January 2013.[74] This political agreement states the following:
«The Cabinet has decided to offer both of your Houses the opportunity to directly access internal EU Council documents marked Limité via the so-called EU extranet database. As you will understand, this must take place under the caveat that the Netherlands – and thus also your Houses – adhere to the Guidelines agreed among the EU Member States in the Council[75] about the handling of such documents. [...]
The most important provision in these guidelines is that these documents or parts of them may not be made public without the prior authorisation of the Council or of persons authorised to do so by Council decision. <u>This means that both of your Houses and all members thereof should handle these documents as internal documents that may not be made public or shared with the media and from which they may not cite in public debates with members of the Cabinet.</u>» (underscoring added)

5.2.4 As shown by the letter of 18 January 2013, the government *actively* provides information to parliament about EU Council documents marked «LIMITE». Direct access to these «LIMITE» documents is given to the Dutch Senate and House of Representatives via the so-called EU extranet database.

5.2.5 However, the government has subjected this direct access to the conditions that (i) the documents may not be made public, (ii) the documents must be treated as internal documents, and (iii) it is forbidden to cite from these documents. Therefore, *de facto*, this is a case of *confidential* provision of information to parliament.

5.3 Compatibility of the «citation ban» with European transparency law

5.3.1 In Chapter 3 of this opinion we observed that (Point 20 of) the Guidelines is at odds with European transparency law, and in particular with the case law of the Court of Justice of the EU concerning Regulation (EC) No 1049/2001.

5.3.2 In this context, it is important to stress that the European Treaties, European transparency law and European transparency case law do not distinguish between members of the national parliament and EU citizens regarding the right of access to documents. For example, both Article 15(3) TFEU and Article 42 of the EU Charter state that the right of access to Union documents is given to «any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State.» Moreover, according to European transparency case law, access «of the public» to documents of the institutions should be interpreted as widely as possible and in principle «the public» should be given full access to all documents of the institutions.[76]

5.3.3 Based on the above, members of national parliaments should have access to EU documents under the same circumstances as EU-citizens. Point 20 of the Guidelines and the «citation ban» are completely contrary to this premise. Although the «citation ban» cannot be directly tested against European transparency law – this is enforceable against acts of Union institutions –

[72] Although the Minister of Foreign Affairs, in his letter of 23.12.16, promised members of the House of Representatives that from now on they would be given the opportunity to consult experts when examining «LIMITE» documents from the Council, we assume that party assistants cannot automatically be seen as such experts. See Parliamentary document 22 112, no. 2274, p. 1-3.

[73] We refer to our exploratory discussion with Mr Omzigt of 07.12.16, as well as the position paper by Mr Omtzigt of November 2016, see footnote 4 above.

[74] Parliamentary document 22 112 no. 1548, p. 1-2.

[75] Formally there is no question of guidelines agreed among the Member States, but a decision of the Council as an institution of the EU.

[76] CJEU, *Access Info Europe*, see footnote 26 above, par. 35.

this does not detract from the fact that the «citation ban» obstructs access to Council documents more than can be justified from a European law perspective.

5.3.4 It is important to be aware of the consequences should the «citation ban» be lifted. If the «citation ban» were lifted, in principle the general public would be given access to all the Council's «LIMITE» documents. This is because members of the House of Representatives would be able to make all «LIMITE» documents public, or quote from these documents in public debates. This unrestricted access to «LIMITE» documents would not only be at odds with the categorical duty of confidentiality mentioned in the Guidelines (which in itself is not problematic given its incompatibility with Regulation (EC) No 1049/2001and European transparency case law), but it has particular consequences for «LIMITE» documents which in whole or in part fall under the grounds for refusal of Article 4 of Regulation (EC) No 1049/2001.

5.3.5 As the principal rule of the Guidelines is that all internal Council documents be marked with the code «LIMITE», at present both documents which *do* fall under the exceptions of Article 4 as well as documents which *do not* are marked as «LIMITE». If the general public would be given access to *all* «LIMITE» documents, this would mean they would also have access to (parts of) documents to which an exception of Article 4 of Regulation (EC) No 1049/2001 applies.

5.3.6 This would then lead to the Council being forced, in line with European transparency case law, [77] to always make an individual assessment of its internal documents to establish whether access to these documents can be refused on the basis of Article 4 of Regulation (EC) No 1049/2001 before marking them as «LIMITE» and handling them as such.

5.3.7 On the basis of the above, we conclude that in the current state of Union law, the «citation ban» obstructs access to Council documents more than can be justified from a European law perspective.

5.3.8 However we also note that as a Member State in the Council, the Netherlands has consented to the text of the Guidelines, including to Points 20 and 21, as well as to the reference to the principle of sincere cooperation in Point 2 of the Guidelines. Against this background it is our opinion that the Dutch government cannot revoke the «citation ban» unilaterally and without consulting the Council beforehand.

5.3.9 We would like to add that, if it were assumed that (Points 20 and 21 of) the Guidelines are intended to have legal effects on third parties, the time limit mentioned in Article 263 TFEU has long since expired, as a consequence of which the Netherlands no longer has the option to legally contest the legal validity of the Guidelines.

5.3.10 If it should be decided to undertake political steps to bring the Guidelines in line with European transparency law (see Chapter 8), the «citation ban» could be reconsidered in that context.

5.4 Relationship between the duty to provide information and the «citation ban»

5.4.1 As has been explained before, the Dutch government provides parliament *de facto* with information on Council documents marked «LIMITE» on a confidential basis. Therefore, it cannot be said that information is withheld from the Senate and the House of Representatives. To justify the provision of information on a confidential basis, the government relies on the agreements between the Member States in the Council about handling «LIMITE» documents, as included in the Guidelines.

5.4.2 In principle the agreements made on the handling of information –in this case the confidential handling of the «LIMITE» documents – constitute a *compelling factor* in the consideration on whether to present this information to parliament.[78]

5.4.3 The government has linked the agreements on the confidential handling of «LIMITE» documents to the interest of the State. As far as parliament, as opposed to the government, is of the opinion that certain information from the «LIMITE» documents (or «LIMITE» documents in general) should be provided to parliament *publicly*, the Minister or State Secretary responsible can be requested to do this. In that case it would be logical for there to be a dis-

[77] See for example CJEU, *Turco*, see footnote 26 above, par. 35.
[78] cf. Parliamentary document 28 362, no. 2, p. 11.

cussion between the government member and the House on the expediency of making the «LIMITE» documents public.[79]

5.4.4 If in a specific case a Member of the House feels that applying the «citation ban» to a «LIMITE» document is unjustified in the light of European transparency case law, he or she could bring this up in a debate with the government member and request the government member (i) to confirm that he or she agrees that no justification for the non-disclosure can be found in the European transparency case law of the Court of Justice of the EU, and (ii) on the basis of Point 21 of the Guidelines, to discuss with the Council whether the application of the «citation ban» can be waived in this specific case. If the government member does not cooperate in this regard, the House can attach political consequences to this.

5.4.5 The government member in question can ultimately refuse to make «LIMITE» documents public if he or she feels this is necessary in the interest of the State. As has already been explained, the interpretation of the term «interest of the State» is at the discretion of the Minister or State Secretary responsible. If the Senate or the House of Representatives does not accept the ground for refusal put forward by the government, they can use the unwritten confidence rule to discharge the government member in question.

6 EXISTENCE OF AN ACTIVE DISCLOSURE OBLIGATION FOR COUNCIL OF MINISTERS

6.1.1 Below we examine whether, on the basis of European transparency law, the Council is subject to an active disclosure obligation in line with the Dutch model,[80] in the sense that the Council should in principle be bound to actively make documents public on its own initiative and not only upon request.

6.1.2 First of all, it should be noted that an active disclosure obligation as described above does not explicitly arise from European transparency case law or from the European Treaties. Regulation (EC) No 1049/2001 explicitly provides for the possibility that documents be made public «after a written application» and thus not directly by the Council acting on its own initiative. Under Article 2(4) of Regulation (EC) No 1049/2001, EU documents can be made public in the following three ways:
«Without prejudice to Articles 4 and 9, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register.» (underscoring added)

6.1.3 On the basis of the above, it seems that in the current state of European transparency law, it would go too far to conclude that the Council is subject to an active disclosure obligation for all types of documents.

6.1.4 Specifically for legislative documents, Article 2(4) of Regulation (EC) No 1049/2001 states that «in particular», these should be «made directly accessible in accordance with Article 12». Article 12 of Regulation (EC) No 1049/2001 bears the subtitle states «Direct access in electronic form or through a register» and stipulates:
«1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.
2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.» (underscoring added)

6.1.5 Where Article 2 of Regulation (EC) No 1049/2001 thus explicitly provides for the possibility that documents are made public «following a written application», this is not included in Article 12 of Regulation (EC) No 1049/2001. Although the explanatory memorandum of Regulation (EC) No 1049/2001 does not mention anything about the absence of a written application, the above could imply that the Council does have an active disclosure obligation as far as legislative documents are concerned.[81] In our opinion such an active disclosure obligation would also be in line with the wider right of access that,

[79] cf. Parliamentary document 28 362, no. 2, p. 5.

[80] See Article 8 paragraph 1 of the Government Information (Public Access) Act, Bulletin of Acts and Decrees 1992, 185.

[81] As noted above, under Article 12 paragraph 2 of Regulation (EC) No 1049/200, the term «legislative documents» concerns «documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States.» Thus in the sense of Regulation (EC) No 1049/2001, «legislative documents» concern more than just finally adopted legal statutes.

on the basis of Regulation (EC) No 1049/2001[82] as well as European transparency case law,[83] applies to legislative documents.

6.1.6 We therefore conclude that European transparency law in its current state does not offer an explicit basis for an active disclosure obligation of the Council concerning all types of documents. However, we are of the opinion that Regulation (EC) No 1049/2001 does offer some grounds to argue that the Council has an active disclosure obligation with regard to legislative documents.

7 APPLICATION OF EUROPEAN TRANSPARENCY LAW TO INFORMAL FORUMS

7.1.1 Before elaborating on the procedural possibilities for members of the House of Representatives challenge the incompatibilities noted above before a judicial authority, we will briefly explore whether European transparency law applies to informal forums such as the Euro Group, the Euro summits, the Trilogue meetings or the EU-27.

7.1.2 As already explained in Chapter 2 of this opinion, the scope of European transparency law is relatively limited with respect to the bodies to which it applies. Thus, in principle Regulation (EC) No 1049/2001 only applies to the Council, the European Commission and the European Parliament.[84] This was confirmed by the CJEU in the ruling *Sweden-API-Commission*.[85] Moreover, Article 15 TFEU only refers to the «institutions, bodies, offices and agencies» of the EU. Informal forums such as the Euro Group, the Euro summits, the Trilogue meetings or the EU-27, fall outside these categories.[86]

7.1.3 Unless these informal forums have voluntarily stated that European transparency law applies to their activities,[87] in our opinion these bodies are therefore not bound by European transparency law.

7.1.4 It should be noted that the outcome of the pending *De Capitani* case[88] may be of importance for this issue. We also refer to the recent ruling of the General Court in *Herbert Smith Freehills*, where it was ruled that the exchanges of positions between the Legal Services of the Council, the European Commission and the European Parliament that occur to achieve a compromise within the context of a Trilogue meeting, fall within the scope of Regulation (EC) No 1049/2001 and thus of European transparency law.[89] This means that in assessing whether European transparency law applies to informal forums, not only the forum within which the documents are circulating needs to be considered, but also the institution from which the documents in question originate.

7.1.5 It falls beyond the scope of this opinion to explore further the desirability of applying European transparency law to these informal forums and the possibilities of subjecting these informal forums to European transparency law. We believe that a further investigation of this may be worthwhile.

8 PROCEDURAL POSSIBILITIES FOR MEMBERS OF THE HOUSE OF REPRESENTATIVES WITH REGARD TO IDENTIFIED INCOMPATIBILITIES WITH EUROPEAN TRANSPARENCY LAW IN THE GUIDELINES AND RULES OF PROCEDURE

8.1.1 Below we investigate the procedural possibilities for members of the House of Representatives to challenge the incompatibilities identified in Chapters 3 to 6 before a judicial authority.

8.1.2 In Chapters 3 and 4 we observed that essential elements of the Guidelines and the Rules of Procedure are incompatible with European transparency law and in particular with Regulation (EC) No 1049/2001 and European transparency case law.

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[82] See the 6th preamble of Regulation (EC) No 1049/2001.

[83] See for example CJEU, *Access Info Europe*, see footnote 26 above, par. 33; CJEU, *Turco*, see footnote 26 above, par. 46.

[84] Article 1, sub a) Regulation (EC) No 1049/2001, read in conjunction with the explanatory notes of Regulation (EC) No 1049/2001, COM/2000/0030def., point 4.

[85] Sweden-API-Commission, par. 91.

[86] See for example: https://europa.eu/european-union/about-eu/institutions-bodies_nl.

[87] As already noted above in Chapter 2, by now almost all EU institutions, bodies, offices and agencies have already declared through internal decisions that Regulation (EC) No 1049/2001 applies (at least in part) to their documents.

[88] GCEU, *De Capitani*, see above footnote 38.

[89] GCEU, T-710/14, *Herbert Smith Freehills LLP* / Council, ruling of 15.09.16, ECLI:EU:T:2016:494, par. 59.

8.1.3 However we also observed that the Guidelines and Rules of Procedure are not (or have not been) subject to appeal before the Court of Justice of the EU because they are internal acts which are not intended to produce legal effects vis-à-vis third parties. If it were assumed that Points 20 and 21 of the Guidelines are in fact intended to produce legal effects vis-à-vis third parties (i.e. the Member States), the time limit for instituting legal proceedings mentioned in Article 263 TFEU has long since expired , as a consequence of which the Netherlands as a Member State no longer has the option to legally contest the legal validity of the Guidelines. For the sake of completeness, we note that in any case members of the House of Representatives do not have the possibility to institute proceedings against the Guidelines and the Rules of Procedure, as they are decisions from an EU-institution which are not addressed to them and cannot be deemed to be of direct and individual concern to them, as is required by Article 263 TFEU.

8.1.4 Because these are internal acts, the Guidelines and the Rules of Procedure are ignored by the Court of Justice of the EU when assessing the legitimacy of Council decisions regarding applications for disclosure of documents based on Regulation (EC) No 1049/2001. In doing so, the Court of Justice of the EU implicitly acknowledges that the Guidelines and the Rules of Procedure have no legal meaning in this context, which is in line with the qualification of both the Guidelines and the Rules of Procedure as internal acts.

8.1.5 On the other hand, we are of the opinion that the Netherlands as a Member State is not free to unilaterally ignore the restrictions on disclosing «LIMITE» documents contained in Point 20 of the Guidelines, as this would seem in conflict with the principle of sincere cooperation in Article 4(3) TEU. In our opinion, this also implies that the Dutch government cannot unilaterally revoke the «citation ban» without consulting the Council beforehand. Nevertheless, this does not change the fact that the «citation ban» imposes an obligation of confidentiality that obstructs access to Council documents more than can be justified from a European law perspective.

8.1.6 None of this prevents members of the House of Representatives from raising the issue of the incompatibility of the Guidelines and the Rules of Procedure with the transparency law. We see the following possibilities for doing this, which could be considered individually or together.

8.1.7 First of all, (individual) members of the House of Representatives are free to (systematically) request the disclosure of Council documents, which they feel should be made public on the basis of Regulation (EC) No 1049/2001. Once these documents have been made public under Regulation (EC) No 1049/2001, the members of the House of Representatives are free to cite from them and to further distribute them. If their request for disclosure is rejected by the Council, members of the House of Representatives may institute legal proceedings before the General Court.[90] We realise that this approach offers no solution in the short term because of the tension between on the one hand, the time limit, in the Dutch parliamentary system, within which members of the House of Representatives need to respond to positions of the government with regard to legislative proposals of the Council, and on the other hand, the time-frame within which the Council deals with disclosure applications under Regulation (EC) No 1049/2001. However, systematically requesting the disclosure of Council documents on the basis of Regulation (EC) No 1049/2001 contributes to keeping the incompatibility of the Guidelines and the Rules of Procedure with European transparency law on the political agenda. We also note that systematically submitting disclosure applications to (the General Secretariat of) the Council could contribute to the General Secretariat developing an administrative practice within the context of applying Regulation (EC) No 1049/2001 that *de facto* limits the categorical restriction of disclosure of «LIMITE» documents without formally changing the Guidelines and the Rules of Procedure.

8.1.8 Secondly, the House of Representatives can ask the government to confirm that the categorical disclosure prohibition for all internal Council documents is incompatible with European transparency law and to (once again) insist that the Council change the Guidelines and the Rules of Procedure. Considering the established case law of the Court of Justice of the EU on the interpretation of Regulation (EC) No 1049/2001, it is beyond reasonable contestation that the Guidelines and the Rules of Procedure are no longer in line with European transparency law. The Council has already had to back down

[90] As has been previously successfully done by EP member In 't Veld.

in a number of appeal proceedings before the Court of Justice of the EU under the regime of Regulation (EC) No 1049/2001, and in particular it has had no success at all in using arguments based on its own Guidelines and the Rules of Procedure. The Dutch government could be requested to insist to the Council that it attaches fitting consequences to this by changing the Guidelines and Rules of Procedure in the light of European transparency case law.

8.1.9 Thirdly, the House of Representatives could can call upon the Dutch government to, with reference to Point 21 of the Guidelines and European transparency case law, enter into consultations with the Council to restrict the application of the «citation ban» to documents of which the disclosure could be reasonable refused on the basis of Article 4 of Regulation (EC) No 1049/2001. Although Point 21 of the Guidelines literally only refers to the consultation of the General Secretariat of the Council by national civil servants «personnel in the national administration of a Member State» in individual cases, this provision could be used to try and find a more generic solution.

• 8.1.10 Fourthly, in specific cases, the House of Representatives can call upon the Dutch government to – if necessary in consultation with the Council – cease applying the «citation ban» for internal Council documents which clearly do not fall under one of the non-disclosure exceptions of Regulation (EC) No 1049/2001.

8.1.11 Fifthly, Members of the House of Representatives can raise these issues with their colleagues in the European Parliament. Considering that the European Parliament is an important party in the European legislative process and is jointly responsible for ensuring the compliance of this legislative process with the requirements of European transparency law, the European Parliament could confront the Council with what could be regarded as a systematic violation of European transparency law.

8.1.12 Finally, members of the House of Representatives can bring the incompatibility of the Guidelines and the Rules of Procedure with European transparency law to the attention of the European Ombudsman. The European Ombudsman recently carried out an investigation on her own initiative into improving the transparency of the Trilogue meetings.[91] She concluded this investigation in May 2016 with a number of concrete recommendations.[92] In the decision, the European Ombudsman emphasised that transparency of the Trilogue meetings is particularly relevant for national parliaments, who should be given the opportunity to exercise democratic control of the positions that their national governments take in the EU legislative process.[93] Members of the House of Representatives could refer to this when approaching the European Ombudsman. We do not recommend submitting a formal complaint to the Ombudsman, as such a complaint should relate to administrative practices which the complainant feels constitute «maladministration». We question in this regard if it is desirable that members of national parliaments consider the practices of the Council to constitute «maladministration».

8.1.13 We naturally remain available for any further explanation regarding this advice.[94]

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[91] See the decision of the European Ombudsman of 12.07.16 in case OI/8/2015/JAS, available at: https://www.ombudsman.europa.eu/cases/decision.faces/en/69206/html.bookmark.

[92] In her decision the European Ombudsman determined that the transparency of the Trilogues is «an essential element of EU law-making legitimacy» and she recommended that the Council, the European Parliament and the European Commission, during or after the negotiations in the context of the Trilogues, should make the following documentation and information publicly available: Trilogue dates, initial positions of the three institutions, general Trilogue agendas, "four-column" documents, final compromise texts, lists of the political decision makers involved and, as far as possible, a list of other documents tabled during the negotiations.

[93] See Point 21 of the decision of the European Ombudsman concerning Trilogues, see footnote 91 above:
«*The EU Treaties also emphasise the special role of national Parliaments in the adoption of EU legislation. During the Ombudsman's public consultation, several national Parliaments expressed concerns about the transparency of Trilogues. National Parliaments must be empowered to exercise democratic scrutiny of the positions their governments take in the course of the EU legislative process. Citizens of Member States can then hold their national Parliaments to account for how they carry out that important role. If this chain of accountability is broken, trust in EU law-making and trust in the EU will suffer. Sufficient transparency regarding Trilogue negotiations is an important element in ensuring that national Parliaments can effectively exercise their role. It also underpins the very necessary democratic connection between what happens in the Member States and what happens in the EU institutions, particularly when it comes to law-making that impacts on every EU citizen*.»

[94] Please note that the English version of this parliamentary opinion is a translation of the Dutch original and has been construed for information purposes only. In the case of any discrepancy between the Dutch and the English versions, the Dutch original version prevails.

Yours sincerely,

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