Transparency Today

Openness in the European Union

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## Abbreviations

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<th>Abbreviation</th>
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<tr>
<td>CIREA</td>
<td>Centre for Information, Discussion and Exchange on Asylum</td>
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<td>CFI</td>
<td>Court of First Instance</td>
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<td>EC</td>
<td>European Community</td>
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<td>ECB</td>
<td>European Central Bank</td>
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<td>EC Treaty</td>
<td>Treaty establishing the European Community</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>ECJ</td>
<td>European Court of Justice (the Court)</td>
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<td>EEC</td>
<td>European Economic Community</td>
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<td>EU</td>
<td>European Union</td>
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<td>MS</td>
<td>Member State</td>
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<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<td>OJ</td>
<td>Official Journal</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>TOA</td>
<td>Treaty of Amsterdam</td>
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<td>The Charter</td>
<td>Charter of Fundamental Rights of the European Union</td>
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<td>TOM</td>
<td>Treaty of Maastricht</td>
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Abstract

In the beginning, it was the international aspect of European law that attracted me and made me continue to pursue my studies within the field. So when the time came to decide the subject of my paper, I knew I wished to write about something in connection with European law. After listing through some possible subjects I came upon the subject of Transparency. This subject holds within itself many of the important issues I find so interesting in international law.

By explaining the position of transparency today, I wished to answer the question of how transparency could develop into a general principle without being mentioned explicitly in the legislation. I was also set on trying to see what the future of transparency might look like. The first chapter revealed that the legislation on transparency had increased with the different treaties, and expanded from internal Rules of Procedures’ made by the three main institutions, into articles on the right of access to documents. These then became applicable to other institutions. Finally, by the Treaty of Lisbon, the Fundamental Right of Access to Documents was given the same legal status as the Treaties, increasing the right’s importance.

In the third chapter the case law showed that the Courts and the Ombudsman early worked for increased transparency in the Union. They also set out guidelines in the cases, showing which documents were included in the access to documents and many other things that helped define the scope of the right. After reading the cases an analysis was made. Here I argued for that the European Union had evolved into a ‘being’ that needed transparency in order to function properly democratically. Transparency was also needed to maintain the trust the Member States and Citizens put in the Union. Because of this constant development and the need for transparency, it was my opinion that transparency could exist as an unwritten general principle.

The Court, although it did establish much of the case-law, was found to lack transparency when it came to its judicial role, and the Council was acting reluctant to give up some of its secrecy. It was found that openness and transparency was not something fixed, but an evolving concept. If it was encoded into a single written principle, it could hamper the institutions’ adaptation to the developing case-law. In the end I concluded that with will and trust, transparency could continue to grow in the future.
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1. Introduction

1.1 Background

Transparency touches on the notion of trust between the Citizens and the institutions of the European Union, which is the trust of maintaining a democratic administration. This would be extremely hard without transparency, as Citizens and media would not be able access the documents and papers of the institutions, and thus not be able to control the institutions’ work. Without insight the Citizen cannot have an opinion, and without public opinion, much of democracy is lost.

The subject is also interesting because of Sweden’s and other countries’ involvement in the process of bringing further transparency into the European Union, i.e. seeing how the Member States (MS) can influence the laws and purposes of the Union. Transparency is an international subject that is closely connected with democracy and trust, which makes it relevant for Europe today as well as in the future.

1.2 Main focus

The main focus of this paper will be to explain how transparency came to be a general principle of European law. The three institutions of the European Union will be in the centre, i.e. the Parliament, Council and Commission. The paper will also take up relevant case-law from the two Courts: the Court of First Instance (CFI) and the Court of Justice (ECJ, the Court). Finally it will elaborate on the European Ombudsman’s work to further transparency.

1.3 Delimitations

This paper will not venture deeply into the European Central Bank (ECB) and its lack of transparency, nor much into the other minor institutions, as it would require more space and time. Much of the material in this paper concerns the access to documents; this is because this is the subject that has been most frequently discussed.

1.4 Purpose

This paper is written to help explain the position of transparency today. This is important because of the constant development of the subject and the influence of the new Lisbon treaty.
1.5 Problem

The two questions this paper will try to answer is: How could transparency develop into a general principle without being mentioned explicitly as one in the legislation? And how does the future of transparency within the European Union look?

1.6 Method

At first this paper will go back and explore the beginnings of transparency in the European Union. The reasons to why transparency appeared in the law will be investigated as well as how the subject was developed through the Treaties. But the openness was not only developed through the Treaties, it was also an important issue for the European Ombudsman as well as for the two Courts. Therefore the most important standpoints and decisions of the Ombudsman and the Courts on this issue will be presented.

Secondly, this paper will try to answer the questions asked by analysing the facts. Questions like: what made the transparency important? Did the efforts for increased transparency pay off? And; how can it be further improved?

Finally, this paper will look into the future and on the Treaty of Lisbon, trying to see where transparency has been placed in this new Treaty, and how it will affect the importance of transparency in the future.

1.7 Disposition

Chapter 1 will serve as an introduction to this essay, explaining the ‘whys’ and ‘hows’ of this paper. Chapter 2 will explain the evolution of transparency from its beginnings in 1992 trough the different Treaties and end on the most recent Treaty of Lisbon. Chapter 3 will include the views of the Courts, as selected cases, and of the Ombudsman, as Decisions and Reports. Chapter 4 will make an analysis of chapter 2 and 3. Finally there will be a conclusion of the paper, bringing up the most important points made.
2. The Evolution of Transparency

2.1 The Maastricht Treaty (1993)

The Treaty of Maastricht (TOM), also called the Treaty on European Union (TEU), was the treaty that changed the European Economic Community (EEC) into the European Union (EU). It did so by adding new common policies, i.e. the second and third pillars\(^1\), a European Citizenship and the monetary union. It was also stated in the Treaty’s preamble that it was desired to ‘enhance further the democratic and efficient functioning of the institutions’.

Annexed to the TEU was Declaration 17\(^2\) on the right of access to information. This declaration can be seen as a starting point for openness and transparency on the political agenda of what now is the EU, before which ‘the principle of confidentiality had reigned’\(^3\). It came to be after a compromise between two countries that wished for increased freedom of information (Denmark and Netherlands, Sweden only joined the EU in 1995), and the countries that did not wish for increased freedom. This declaration also got greater importance after the negative reactions to the TEU, as it worked to supply greater confidence for the Unions and the institutions’ work\(^4\) by making ‘the idea less elitist’\(^5\). In it the Conference said that it considered transparency to be strengthening the ‘democratic nature of the institutions and the public’s confidence in the administration’\(^6\). Advocate General Tesauro commented on the link between democracy and the public’s right of access when he commented the Netherlands v Council\(^7\) case. He wrote: ‘openness of the public authorities’ action is closely linked with the democratic nature of the institutions’ because it ‘tends to secure better

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1 The second pillar was the Title V of the TEU, concerning the Common Foreign and Security Policy. The third pillar was the Title VI of the TEU, concerning Freedom, Security and Justice.
5 Broberg, p. 196.
6 Declaration No 17, p. 1.
7 See 3.1.1 C-58/94 Netherlands v Council, [1996], ECR I-2169, below.
knowledge on the part of Citizens of the acts and measures adopted by those who have “government functions”\(^8\).

In 1992 decisions were made to increase the openness of the Council\(^9\). There was an increase in information about the work of the Council and there were open debates on such things as major issues or on major new legislative proposals. Yet it was far from complete openness as the Council had to be unanimous about having the debates open to the public and the negotiations on legislation were to remain confidential. The public access aspect was that the Council debates would be shown on television in the Council press area.\(^10\)

After the Copenhagen European Council in June 1993, the conference wished for the Commission to submit a report, in which the Commission would write what measures could be taken to improve public access to the information that was being held by the institutions. This finally resulted in that the Council and Commission adopted a Code of Conduct\(^11\) (the Code). The Code had six points which described the ‘basic principles on EU policy on access to documents’\(^12\). They were about: the document containing data; rules on processing applications; refusal of access; exceptions to access; implementation and review.\(^13\) The Council implemented the Code by a Decision that altered the Code’s text\(^14\). It was approved by the Commission unamended.

Although the Code of Conduct was a step forward in transparency, there were still a lot of legislative acts that were not yet within the scope of the principle. The Council had amended its Rules of Procedure to expand the openness\(^15\), yet it included paragraphs on ‘professional secrecy’\(^16\) and stated that ‘meetings of the Council shall not be public’\(^17\). Only the policy debates on the work programme of the Presidency were public; other debates had to have a

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\(^9\) The three main institutions are: The Parliament, the Commission and The Council, Where the Council is seen as being the most important political and decisive institution.


\(^11\) Code of Conduct concerning public access to council and commission documents (93/730/EC), [1993], OJ 340/41.

\(^12\) Peers, p. 10.

\(^13\) Code of Conduct (93/730/EC).


\(^17\) Council Decision (93/662/EC), Article 5.1.
unanimous vote to be public, just as in 1992. It had to disclose votes when the Council was acting as a legislator unless the Council decided otherwise by a majority vote. If the subject was about the second or third pillar issues, the vote had to be unanimous. As Peers puts it: “secrecy and confidentiality were still the rule, with openness and transparency the exception”.

On the side, the Ombudsman began an inquiry into the lack of rules on the access of documents by fifteen other institutions of the Community. This inquiry stemmed not from a received complaint but from the Ombudsman’s own initiative. He concluded that it was ‘maladministration’ if the institutions failed to adopt rules on public access to documents. Those institutions that had not adopted rules were therefore given draft recommendations (‘friendly’ solutions to the problem) which resulted in that fourteen institutions adopted these rules by the end of 1997. The only exception was the Court of Justice.

As seen above, the beginnings of transparency were quite modest, many were still unconvinced that transparency and openness were essential, perhaps most so the Council. Yet there were signs that transparency was a serious issue. The Ombudsman’s office was established by the TOM (arts. 21 and 195) and with it came new possibilities for individuals to claim their rights before the Union. The Courts also dealt with the first cases concerning transparency, showing that this was no temporary solution to resolve the negative reactions to the Treaty.

2.2 The Amsterdam Treaty (1997)

The Treaty of Amsterdam (TOA) helped improve the transparency in many ways. First, the right of access was enshrined into article 1 of the Treaty of the European Union. It said that decisions should be taken ‘as openly as possible and as closely as possible to the Citizen’.

In addition to the new article 1, a new provision was inserted into the EC Treaty; Article 255 EC. 255.1 states that ‘any Citizen of the Union shall have a right of access to European Parliament, Council and Commission documents’. 255.2 says that the general principles and limits shall be determined according to article 251 procedure, and 255.3 states that ‘each

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19 Council Decision (93/662/EC), Articles 5.1 and 7.5.
21 See 3.2 below.
The institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents’. 23

The 251 procedure directs the Council, Commission and Parliament to agree on new rules on ‘general principles and limits on grounds of public or private interest governing this right of access to documents’ (as stated in article 255) within two years from the TOA’s entry into force. 24 The TOA entered into force on 1 May 1999, which meant that the rules should be finished by 1 May 2001. These rules became the new Regulation 1049/2001. The work on the Regulation was aided by the Swedish and Finnish presidencies, during the second term of 1999 and the first term of 2001, as they acted with more transparency than usual and helped bring this Regulation forth. This Regulations replaced the earlier decisions made by the Council and Commission.

Regulation 1049/2001 concerned the principles, conditions and boundaries to the right to documents. It concerned not only received and sent documents, but also those documents drawn up in the institutions’ ongoing activities. All the institutions are also told to have an electronic registry containing these documents, and should respond to inquiries concerning access within fifteen days. 25 Yet the Regulation did little to reduce the number of secret documents the Council could hold during the legislative procedure. It also did not lighten the secrecy of the infringement procedures by the Commission. Peers wrote in 2002:

‘While it is possible that the case law interpreting the new regulation will ultimately chip away at these practices, the Regulation obliges advocates of greater openness and transparency to fight for such an interpretation through the Ombudsman and the Courts, rather than entrenching those changes at the outset.’ 26

During the time of the TOA the transparency definitely got a boost, giving a right of access to Citizens. The new regulation helped to define the three institutions’ obligations on the openness subject, as well as when documents were to remain secret. This document did perhaps not ‘help’ institutions as much as it ‘helped’ those Citizens that wished to gain access, as there were now more specific rules on openness and transparency. This meant that there

24 EC Treaty, article 251.
25 For an extensive list of changes see Peers p. 25-28.
26 Peers, p. 28.
was a legal ground to stand on for those who had been denied or otherwise refused by the institutions from gaining access to documents etc., when complaining to the Court or Ombudsman.

2.3 The Nice Treaty (2000)

The Nice Treaty brought with itself an important addition; the Charter of Fundamental Rights of the European Union (the Charter). It was by that time non-binding, yet it was an important addition to the EU’s legislation. Before the Charter there had been, and still is, the European Convention on Human Rights (ECHR), which had been drafted by the Council of Europe. The ECHR had also brought with itself the European Court of Human Rights into being (ECtHR). Now, with the Charter, the European Union had a Charter of its own.

The Charter was inspired by the ECJ’s work on rights. It is in its 42 article that the Right of Access to Documents is enshrined. It says; ‘Any Citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.’

Takis Tridimas writes in his essay that ‘respect for human rights is viewed… as the most important yardstick in assessing a polity’s democratic credentials’ and that ‘the observance of human rights by the Union institutions and by the Member States is part of the renewed calls for accountability, transparency and legitimacy.’

So the Nice Treaty helped the European Union gain a more democratic position by confirming Human Rights within the EU. And in the Charter the transparency is viewed as a Human Right. Yet as the Charter was not binding, article 42 was only an argument for openness that could be used together with something else to sway a Court’s or Ombudsman’s ruling on for example access in your favour. On its own it was not very strong.

2.4 The Lisbon Treaty (2009)

The Lisbon Treaty entered into force on 1st of December 2009. There were many changes and amendments made. One of them is that the EC was now completely replaced by the EU. This

means that the EC Treaty became the Treaty on the Functioning of the European Union (TFEU) and the TEU remained the same. This makes the EU a single legal personality. There is also a full-time President of the Council, a High Representative of the Union for Foreign Affairs and Security Policy, a Citizens’ right of initiative and one of the most important changes for this paper; that the Treaty of Lisbon will confer the same legal values to the Charter as to the Treaties.29

There are other provisions concerning transparency in the new Treaty. The new Title II (on provisions on democratic principles) holds under itself article 11. It says that the institutions shall ‘give Citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action’30, that the institutions shall ‘maintain an open, transparent and regular dialogue with representative associations and civil society’31 and that the Commission shall consult with concerned parties to ensure that the actions are coherent and transparent32. The Council meetings shall also be public, ‘when it deliberates and votes on a draft legislative33 act’, with no exceptions provided for34. This is different to the Council’s Rules of Procedure and the ‘co-decision’ which had been used during the previous Treaties.

Another important change that probes the issue of openness and transparency is the change of article 255 EC to the new article 15 TFEU. It says that: ‘institutions, bodies, offices and agencies shall conduct their work as openly as possible’35 that the Parliament shall meet in public and the Council as well (but only as stated in article 16 TEU)36, it also says that any Citizen of the EU may have access to documents. This concerns not only the three ‘main’ institutions of the Council, Commission and Parliament, but all. The only exception to this is the two banks and the Court of Justice where only the documents concerning ‘administrative tasks’ shall be available.37

31 Consolidated version of the Treaty on European Union (TEU), [2010], article 11 (2).
32 Consolidated version of the TEU, [2010], article 11 (3).
34 Consolidated version of the TEU, [2010], article 16 (8).
35 Consolidated version of the Treaty on the Functioning of the European Union (TFEU), [2010], article 15 (1).
36 Consolidated version of the TFEU, [2010], article 15 (2).
37 Consolidated version of the TFEU, [2010], article 15 (3).
It is now all institutions that need to ‘elaborate in its own Rules of Procedure specific provisions regarding access to its documents’, which is a step towards greater transparency within the Union, especially when compared to the fact that before, only the Council, Commission and Parliament had an obligation to do this. On the other hand, many of the institutions already had provisions on transparency in their Rules of Procedure. (Remember the Ombudsman’s initiative.)

Another article concerning openness is article 298, which states in its first paragraph that: ‘in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration’. All in all the Lisbon Treaty is yet another step forwards towards a more open EU. It gives more supportive legislation for those seeking access to documents and involves all the institutions, which shows how the legislation is ‘spreading’ out from the most important central institutions to the lesser ones as time goes by, increasing in importance on the way.

3. The Courts and the Ombudsman

3.1 Case law from the Courts

The Courts have dealt with cases of transparency for a long time, although they had their own internal problems with deciding what documents to make public. Professor Lenaerts writes that ‘through judicial review the Community Courts have systematically enhanced the transparency, accountability, and democratic nature of the decision making process in the EU’. They have established that documents concerning second and third pillar matters shall be available for access. Going to the Courts is a way for individuals to assert themselves against the institutions. The very action of going to the Court can make an institution change

38 Ibid.
39 See 2.1 above.
40 See Special report 616/PUBAC/F/IJH, below at 3.2.1.
42 Case T-14/98 Hautala v Council, [1999], ECR II-2489 and C-353/99 Council v Hautala, [2001], ECR I-9565, see 3.1.4 below.
43 Case T-174/95 Svenska Journalistförbundet v Council, [1998], ECR II-2289. The Court ruled that the 1993 rules applied to ‘third pillar’ (justice and home affairs) documents. It also ruled again that an applicant did not have to show an interest to apply for documents. Finally, it suggested that the ‘public security’ exception cannot cover documents that only relate to negotiations on legislative texts.
its attitude. A good example is the British American Tobacco case\textsuperscript{44} where the company wished to obtain minutes and documents of a cancer experts’ committee that supposedly were held by the Commission. The Commission had denied having them until the case came to Court, when it after some time began releasing some of the documents.

Yet the Courts has not yet clearly expressed that there is a general principle of transparency, although they might have, this depends on the interpretation. Caroline Naômé explains this lack of a ‘definite statement’ as deliberate. She writes that a strict rule could disrupt the work of the institutions, and as the Court know of this, they push for the right of public access instead of a general principle. She also writes that ‘a decision organizing the right of access to documents interpreted in a broad manner and in a teleological way can have the same effects as the recognition of a fundamental right’\textsuperscript{45}. She says that case-law is not merely the application of a rule; it is also a construction of the rule.\textsuperscript{46} Lenaerts comments on transparency as a fundamental right by saying that ‘recognizing such a right …would further enhance transparency’ and ‘bring jurisprudence closer in line with the Member States’ own aspirations in Declaration 17’\textsuperscript{47}. Lenaerts actually said, already in 2004, that he considered that such a general principle existed.\textsuperscript{48}


The Netherlands challenged the Council’s rules of procedure. In its view, the issue was of constitutional importance, and the relevant rules should not have been agreed by means on an inter-institutional Code, amendment of the Council’s rules of procedure and an internal Council act. The Court said that the Code was a non-binding measure, and could thus not be challenged, and the other two Council Decisions were valid\textsuperscript{49}.

The Netherlands challenged measures adopted by the Council and claimed they went beyond the confines of its internal organization and that they were intended to have legal effects outside the internal organization. The Parliament said that by basing access of Council papers

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\textsuperscript{44} Case T-311/00 British American Tobacco (Investments) Ltd v Commission, [2002], ECR II-2781.
\textsuperscript{46} Caroline Naôme, p. 184.
\textsuperscript{47} Lenaerts and Corthaut, p. 46.
\textsuperscript{49} See footnotes 13-14.
\end{flushleft}
on the Council’s power to organize its internal operation the Council arrogated to itself the power to determine what legislation proceedings are accessible to the public, and that this was a misuse of article 151(3) of the EC Treaty. They continued by saying that the principle of openness was an essential requirement of democracy, that the requirement for openness constitutes a general principle common to the constitutional traditions of the Member States and, finally, that access to documents was a fundamental human right recognized by various international instruments.

The Council said that after an intervention by the Parliament in support of the Netherlands, that the intervention should be declared inadmissible, it was not. The Court, after listing the legislation articles decided that; the application against the Code of Conduct, as it was not intended to have legislative effects, was dismissed. The 93/731 Decision had been made by the Council in order to conform to the principle of openness and transparency, and was thus valid. And as there were no general rules it was up to the institutions to take measures by virtue of their power of internal organization and in the interests of good administration.

In this case, the Netherland failed to get the Court to state the existence of a general principle of transparency. But on the other hand this is also an important case, because the Court did not deny the existence either. As this is an early case, it is possible that the Court wished the subject of transparency to expand before stating anything definitely.


This case concerned the minutes of the Council and Commission. Although these minutes are legally irrelevant, they still influence the application of legislation in practice. The applicants claimed that the Council had expressed a ‘blanket refusal’ on the documents concerning deliberation, and that such a refusal infringed on article 4(2) of the 93/731 Decision. They also claimed that no balancing of interest had taken place before the decision of rejection. The CFI agreed that: ‘the Council must, when exercising its discretion under Article 4(2), genuinely balance the interest of Citizens in gaining access to its documents against any interest of its own in maintaining the confidentiality of its deliberations’.

50 See case C-292/89 The Queen mot Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen, [1991], ECR I-745.
By observing two letters that had been received by the applicants, the CFI arrived at the conclusion that the ‘Council considered that it did not have the option of disclosing the documents requested’. This meant that the Council had misinterpreted the provisions. It also showed that it most likely had not weighed the interests of the parties against each other. As a result of the case, the Council agreed to adopt a new Code of Conduct in which it agreed to release such minutes to the public on a regular basis, thus increasing its own transparency.


Following Netherlands v Council the CFI ruled that the two Council Decisions intended to give a right of access to documents, and that any exceptions to the right needed to be applied narrowly. The CFI stresses the distinction between ‘mandatory’ and ‘discretionary’ exceptions. In this case the Commission denied the WWF access to certain preparatory documents drawn up during an infringement proceeding against a Member State. The CFI said that while the Commission could rely on the exception to deny WWF these documents, the Commission had failed to explain sufficiently why the documents fell within the exception. Although the Commission simply needed to take up the WWF request again and give better reasons for their refusal, this case also confirmed that good reasons are needed to deny access.

3.1.4 Case C- 353/99 P Council of the European Union v Heidi Hautala [2001] ECR I-9565

Hautala was a member of the European Parliament and wished to have access to a report from the Working Group on Conventional Arms Exports. She was refused access on grounds of that it contained ‘highly sensitive information disclosure of which would undermine the public interest, as regards public security’. Hautala did a confirmatory application. By a simple majority vote, the documents were yet again denied to her.

She put forward three pleas to the CFI, but the CFI only ruled on her first, concerning infringement of article 4(1) of Decision 93/731. It stated: ‘Article 4(1) of Decision 93/731 must be interpreted in the light of the principle of the right to information and the principle of
proportionality. It follows that the Council is obliged to examine whether partial access should be granted to the information not covered by the exceptions’. The Council (with which the report lay) considered that the principle of access to documents to only concern the document, not the information in them. Because of this, it did not examine whether it could make such an examination.

After an application to the Court (as the first part had been in the CFI), the Court came to the conclusion that: ‘the interpretation put forward by the Council … would have the effect of frustrating, without the slightest justification, the public’s right of access to the items of information contained in a document which are not covered by one of the exceptions listed in Article 4(1) of Decision 93/731. The effectiveness of that right would thereby be substantially reduced’. The Court, although it did not find it ‘necessary’ to consider the CFI’s arguments on the existence of a principle of right to information, concurred with the CFI that the Council ‘is obliged to examine whether partial access should be granted to the information not covered by the exceptions’.

3.1.5 Case T-211/00 Kuijer v Council [2002] ECR II-485

The Kuijer case concerned Aldo Kuijer’s wishes to gain access to the Centre for Information, Discussion and Exchange on Asylum’s (CIREA) reports. The Council did not give him access to all documents, nor the list of contact persons he had required. The Council claimed that if they released the reports, the information therein could damage EU’s relations to the countries assessed in the reports.

Kuijer put forward three pleas, the third one being that ‘he alleges infringement of a fundamental principle of Community law, according to which European Citizens must be given the widest and most complete access possible to the documents of the Union’. The CFI however saw it appropriate to only consider his two other pleas. The CFI also noticed that the Council had assessed the consequences of disclosure, as decided in the Hautala case.

Although the court dismissed the third plea, it stated in the first paragraph of its findings that: ‘the principle of transparency is intended to secure a more significant role for Citizens in the decision-making process and to ensure that the administration acts with greater propriety, efficiency and responsibility vis-à-vis the Citizens in a democratic system. It helps to

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53 The principle of Proportionality is enshrined in article 5 TEU.
strengthen the principle of democracy and respect for fundamental rights’, after which it referred to the *Bavarian Lager Case*\(^{55}\).

Finally the CFI concluded that even if documents contain negative statements about the political situation or human rights, it is not reason enough not to disclose them. It is the specific content of each report that, after being weighed and measured, can be concluded as to pose a danger to public interest.

### 3.1.6 Joined cases C-174/98 P and C-189/98 P Kingdom of the Netherlands and *Gerard van der Wal v Commission* [2000] ECR I-1

van der Wal wished to gain access to letters held by the Commission. These letters were correspondence between national courts and the Commission. He was refused on grounds of public interest. He received the explanation that ‘once the replies have been sent, they form an integral part of the proceedings and are in the hands of the court which raised the quest’, i.e. in the national court, and that ‘the decision whether to publish that information and/or make it available to third parties is a matter primarily for the national court to which the reply is sent’. The complainant had sent a confirmatory application after his initial refusal. He was refused again, with the added arguments of ‘sound administration of justice’ and that a disclosure ‘could undermine the relationship and the necessary cooperation between the Commission and national courts’, especially when the court proceedings in the national court were not yet complete.

The Court cited the CFI’s ruling where it had read article 6 of the ECHR\(^{56}\) (this was before the Nice Treaty), where the CFI had said that the exception to the general principle of openness based on protection of public interest is designed to ensure respect for that fundamental right. In this case it was the procedural autonomy of the national court. The Court said that they could not deduce the same thing as the CFI had done. They came to the conclusion that it is often that in more general documents the Commission expresses opinions independent of the court proceedings. Such documents should be individually assessed and then decided if released. Any documents containing ‘legal and economic analyses’ by the

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\(^{55}\) Case T-309/97 *Bavarian Lager v Commission*, [1999], ECR II-3217, the CFI annulled a Commission decision refusing the applicant access to a document concerning a meeting held in connection with proceedings for failure to fulfil Treaty obligations, relating to the United Kingdom provisions on the sale of beers from other Member States in public houses in the United Kingdom.

\(^{56}\) The Right to a Fair Trial.
Commission should on the other hand be released by the national courts because of the ‘public interest’. Still the Court remarked that the Commission must apply such exceptions strictly, to gain the greatest amount of openness as possible. van der Wal got his documents in the end.

### 3.2 Complaints, Decisions and Reports from the European Ombudsman

The European Ombudsman was “established” by the TOM. This office was linked with the Citizenship, as it was introduced at the same time. The Ombudsman’s main task is to inquire into possible maladministration.\(^\text{57}\) The right to a good administration, as well as the right to refer cases to the Ombudsman are enshrined in the Charter in articles 41 and 43, wrapping round the right of access to documents in article 42\(^\text{58}\).

In contrast to the Courts, the Ombudsman cannot give binding orders. Nor does his findings become enforceable ‘arguments’ for the complainant. The tools he can use are the ‘friendly solution’, the draft recommendation\(^\text{59}\) and the final solution: the Special Report to the Parliament. Ian Harden writes that the Ombudsman is useful in two ways: the approach is costless for the complainant, more flexible and quicker, and that the conditions of complaint are more liberal.\(^\text{60}\)

The Ombudsman found no maladministration concerning the seven classified documents that the applicant sought, but he commented that the ‘fair solution’ he found that the Council was not entitled to apply a ‘fair solution’ under Article 3 (2) of Decision 93/731.

#### 3.2.1 Special report from the European Ombudsman to the European Parliament (616/PUBAC/F/IJH) following the own-initiative inquiry into public access to documents

This special report concerned the 15 institutions that the Ombudsman had sent draft recommendations to after his work in 1996.\(^\text{61}\) The rules are that after the Ombudsman informs the institutions about the decisions and draft recommendations made, the institutions are to

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\(^\text{59}\) To which the institution/body must respond to within three months with a detailed opinion.

\(^\text{60}\) Harden, p. 124.

\(^\text{61}\) See 2.1 the Maastricht Treaty above.
send detailed opinions back to the Ombudsman. This special report concerned these detailed opinions and was actually the first special report ever to the European Parliament.

In it the Ombudsman (Jacob Söderman) makes clear that his draft recommendations concerned the existence of rules on transparency, not the substance of them, because in the present style of Community law it would be inappropriate to make recommendations on substance. He also concluded that most institutions had based their rules on the Commission’s and Council’s rules.

He concluded with an analysis in which he wrote that ‘compared to some national administrations… the rules are quite limited’. Finally he welcomed the fact that ‘Community institutions and bodies have responded in a positive and cooperative spirit at all stages’ and that ‘steps taken represent a significant step forward in improving the transparency of Community administration’.

Upon reading this special report, it is clear that the Ombudsman both has the power to institute changes, as he managed to improve transparency within fourteen institutions and even by a small amount in the ECJ, but also that he is restrained by the legislation. In the report he often writes that it is outside his jurisdiction to make recommendations in certain areas. Still, he is an important control-mechanism without which it would be much less transparency and democratic control in the European institutions.

3.2.2 Complaint 1087/10.12.96/STATEWATCH/UK/IJH against the Council

During 1996, the complainant wished in accordance to Council Decision 93/731 on public access to Council documents to gain access to a large amount of documents. (97 different reports and 6 other documents.) The General Secretariat provided the complainant with 16 of the most recent documents and denied access to seven others, this was considered to be a ‘fair solution’. In October the complainant once again tried to get access to all the documents. The Council answered by saying that it had applied article 4(2) of Decision 93/731 and balanced his interest against the Council’s interest in keeping the documents confidential. In doing this it found that the Council’s interest outweighed the complainant’s. This is where the complainant turned to the Ombudsman.

62 See footnote 7.
During the inquiry the Council questioned the Ombudsman’s competence, as they claimed that the matter was within the third pillar, and that as the Ombudsman’s competence does not extend to actions taken by the Council in relation to cooperation in the third pillar. The Ombudsman answered that it was a matter of access to documents, that the request had been made under 93/731, which in turn had been made by article 151 of the EC Treaty.

He went on by recapitulating the *Netherlands v Council* case, where it had been shown that the Decision in relation to third parties was a matter of Community Law (i.e. not third pillar). He also took up the *Carvel* case which also included access to third pillar documents. The Ombudsman put it like this: ‘Court of First Instance would have had no jurisdiction to deal with this aspect of the *Carvel* case if access to third pillar documents was itself a third pillar matter’\(^63\).

### 3.2.3. Special Report from the European Ombudsman to the European Parliament concerning lack of cooperation by the European Commission in complaint 676/2008/RT

This Special report concerned a non-governmental organisation (NGO), which wished to have access to documents held by the Directorate General in March 2007. These documents contained the Commission’s approach to carbon dioxide emissions of cars, as the documents came from a meeting with car manufacturers. The NGO gained partial access. They then did a confirmatory application. Out of eighteen letters the NGO gained access to fifteen, but to three they were refused access according to 4(2)\(^64\) of Regulation 1049/2001. The NGO wished for the Commission to grant them access to the requested letters in their entirety.

In his analysis, the Ombudsman first explained the arguments: the NGO claimed that the Commission had failed to give a detailed explanation on why the commercial interests were relevant and that it had not taken into account the overriding public interest in disclosure. The Commission argued that they could not provide further details without revealing the content of the letters and that they indeed had carried out the public interest test, and arrived at the conclusion that Porsche’s (the three letters were from Porsche) commercial interest weighed more heavily than the public interest.

\(^{63}\) Decision of the European Ombudsman on complaint 1087/10.12.96/STATEWATCH/UK/IJH against the Council, p. 4.

\(^{64}\) Disclosure would undermine the protection of the company’s commercial interests.
After inspecting the three letters, the Ombudsman arrived to the conclusion that it was wrong of the Commission to refuse access to these letters and that this constituted maladministration. The Ombudsman wrote a draft recommendation to the Commission which said that the institution should release the letters or at least consider to partially disclosing them. He also asked for a detailed opinion from the Commission.

At first, the Commission did not reply. It asked for extensions for over six months, finally it said that it could not give a reply until it had finished consulting with the third party (Porsche), according to article 5 paragraph 6 of the 1049/2001 Regulation. In September 2009 the Commission stated that it had decided to give partial access to the letters, but that the decision would be suspended for ten days to give Porsche the chance to challenge the decision. It then became known that the letter would be sent to Porsche after transliteration in the beginning of November. 9 November the Ombudsman asked for a copy of the letter sent to the company. 4 December he was informed that the letter would be sent shortly.

The Ombudsman assessed the situation, noting that the Commission had not provided its opinion within the three month deadline. His view was that the Commissions explanations were unconvincing. He then took up the principle of sincere cooperation (article 4 paragraph 3 TEU) and the duty to cooperate in good faith (article 13 paragraph 2 TEU). He concluded, with great regret, that the Commission ‘infringed its obligation to cooperate with him sincerely and in good faith’.

He finished his Special Report with writing that ‘the Commission’s attitude is detrimental not only to inter-institutional dialogue, but also to the public image of the EU’ and that the Commission’s uncooperative attitude ‘risks eroding Citizen’s trust in the Commission and undermining the capacity of the European Ombudsman and the European Parliament to supervise the Commission’. All this, was according to the Ombudsman, ‘counter the principle of law, on which the Union is, inter alia, founded’.

This special report is interesting in many ways. If compare to Special Report 616/PUBAC/F/IJH (3.2.1 above) it is clear that there is a different tone. Most usually the

65 The Commission shall inform the author of the intention to disclose the document, and to draw attention to the remedies available to him to oppose this disclosure.
66 Special report 676/2008/RT, pt. 38.
67 From article 2 TEU; ‘The Union is founded on… the rule of law’.
68 Special report 676/2008/RT, pt. 39.
Ombudsman is careful with what he says, just as he does in the above report when he comments that it would be inappropriate of him to comment on certain matters. In this one, on the other hand he shows a more proactive side. It is also a good example of why the European Ombudsman is an important institution when it comes to the principle of transparency. Without him, the NGO would only be able to turn to the Courts for assistance, which is good, but sometimes not enough (not considering the long time it takes for a process to be completed in the Courts).

4. Analysis

It is obvious that transparency was introduced as administrative principle into the Treaty of Maastricht as a way to be able to continue with the work of integration. It is highly doubtful that the following treaties would have been as successful or even come to be if it had not been for the work on increasing transparency in the Maastricht Treaty. What the lack of it would have done for the European Union is of course not clear, but is my guess that it could not have become as vibrant as it is today, as much of the work would have remained in secret, which would have muted much of the different opinions.

The evolution of transparency is also a good way to see how the Community developed, from being mostly about cooperative trade in the Coal and Steel Community, into being a forum for integration and democracy as it is today. The security and privacy which surrounds most private enterprises was the rhythm of the early community. And it would have worked if the Community had remained a simple forum for trade and such related operations. Instead it widened the field of its operations into numerous other spheres such as monetary policies, agriculture, defence policies and the introduction of Citizenship for those within the Union.

Yet, as the power of the Community (and later Union) increased, the transparency of its proceedings and workings did not. This is where some of the Member States began to question why there was such a lack of transparency (most notable are the Dutch and the Danish). The countries that were used to open governance became concerned that many of the important decisions were made behind locked doors. Such decisions included the legislative process, which is important because the decisions made there affect many or all Member States.
If the members of the Community/Union could not get insight into those important processes, into the institutions that made the laws that affected them, what was left of the Democracy that was a cornerstone of the Community? It was this ‘democratic deficit’ that almost stopped the Treaty of Maastricht and made possible Declaration 17, which was annexed to the treaty.

Declaration 17 shows the Member States’ power to influence the new legislation and Treaty, perhaps this does not come as such a big surprise as the staff working in the institutions comes from the Member States. Yet it is important to point this out. It also shows, in my opinion that the whole concept of the Community rests on trust. Trust for the institutions and the Community comes from the understanding of the work performed within. Who, what, and why something is done, and what consequences will come out of an action are all measures of understanding. Such an understanding of the work and reasons is not possible without insight. Although many aspects of the institutions’ work was (and is) secret, it was understood that insight was necessary to be able to continue on the plotted course for the Community.

New legislation in the field also opens up new routes on complaint. Both the Courts and the Ombudsman were able to widen and deepen the subject of transparency by listening to the complaints of the Citizens and NGO’s (but also others, like Member States) that wished to have access to documents, which was the aspect of transparency which was the most contested and ‘used’ of all the various kinds of openness.

The Treaty of Amsterdam was a step in the right direction for accountability and democracy in the Union. Not only was the principle of openness represented in the first article of the TEU, it was also enshrined in article 255 as access to documents. An important thing to notice with article 255 was that it only concerned the three main institutions, leaving the others out. This increased presence of transparency in the Amsterdam Treaty was most likely a result of the initial deficit of it in the Maastricht Treaty. By including transparency in a more direct and eye-catching way the treaty-makers ensured that the new treaty would be more easily ratified than the previous one.

The Ombudsman quite quickly took the opinion that openness and transparency was for the better of the Union, which he showed by his own initiative inquiry into the openness of all institutions, not only the three main ones. This work was not only a statement of opinion though, many of the institutions actually adopted rules on access to documents, years before there was any concrete laws that asked them to do so. This proves that the Ombudsman can push for important subjects, even though powerful institutions such as the Council may be
reserved against them, and succeed in implementing changes. (Remember that the Council questioned the Ombudsman’s authority.\(^69\))

By the Nice Treaty the Union had rightfully come to the conclusion that Human Rights needed to be written down on paper, not merely stated by the Courts. Many cases in the Courts had been about Human Rights yet there had not been any Charter! But the Charter was, when introduced, non-binding, which meant that Citizens could not rely solely on it in court, especially when discussing issues on transparency. This is most likely because it did not just concern the Citizens’ rights but also the institutions and the third parties that were on the opposite sides in many of the openness cases.

The Charter was changed with the Lisbon treaty to have the same legal status as the Treaties. It is a big step for article 42 to jump from the non-binding status it had before to having the same value as the Treaties. The practical advantages of this is that the Right of access to documents, first of all, has been elevated in status, which means that it will be harder to disregard or dismiss it for the Courts and institutions. Secondly it does speak for that there is such a thing as a principle of transparency, if there is not already. The more case law is built up around the subject and the more accepted this principle gets, the more believable it will be that it is a general principle of law.

The two Courts’ roles in establishing the scope of openness have been important ones. Many times they have assessed the question of access to documents, and many times they have granted access. They have established in the Hautala and Svenska Journalistförbundet cases that documents from the old second and third pillars were included into the right of access, even though they might have concerned sensitive issues. Yet it is not so that any document may be given out to the public.

The conflicts over what to keep secret and what do disclose have been brought up to the Courts many times. In Carvel the CFI said that it was not right to do ‘blanket refusals’ on documents, the institutions needed to do balancing tests for the documents and from those decide if the document could be released. In this case, the CFI also showed that even the Council can misinterpret the law! In the WWF case it was also established that exceptions needed to be applied narrowly. All this sums up to that it is imperative that the institution which has been tasked with assessing the possibility of releasing a document needs to

\(^{69}\) See 3.2.2 above.
carefully measure each document before denying any access. Even if a document is classified, the paper should be released if the secret parts can be deleted/darkened from the document. This shows that the Courts are in favour of as much openness as possible within the institutions of the Union.

Yet there is much discussion whether they actually have stated that there is a general principle of transparency. Lenaerts said that there was such a thing already in 2004. Some claim that the Court stated the existence of it already in the Netherlands v Council case. Yet it is my opinion that if there is an argument over if they have stated it, it means that they did not state it clearly enough. This does not mean that it does not exist, only that it would gain even more strength if the Courts made a ‘doubtless’ statement of its existence.

But there is a strange paradox on the subject of the Courts. On one hand they seem to be paragons of openness and wish to enhance the democratic nature. Yet they themselves have not adopted any extensive regulations on openness. When the Ombudsman did his own initiative inquiry, they had problems with separating their administrative tasks (where the Ombudsman wished to improve access) from their judicial role (to which the Ombudsman did not have mandate).

Even in the Lisbon Treaty the Courts and Banks have been granted ‘pardon’ by article 15.3 from conducting their work ‘as openly as possible’ when not doing administrative tasks. A reason for this could be that the Courts wish to be seen as ‘united’ in important questions, and if he documents on their internal arguments would be released, the stability of the case-law would decrease, making the judgements less reliable. One possible option for increased openness is that the Courts themselves (and this could be applied to the Banking institutions as well) open up their material self-willingly. This way they would act as role models for other institutions by showing that initiatives can come from within. So, the Court will continue to work behind closed doors for now, yet with the new provisions on openness they will be able to further the cause of transparency.

The institution most reluctant to transparency seems to me to be the Council, although I do understand that much of their work needs to be kept ‘under the lid’ in order for many agreements to work, their attitude towards openness does not strike one as a welcoming one.

70 See 3.1 above.
A most recent example of this comes from the Special Report made by the Ombudsman.\(^{71}\) Not only did the Council stall the proceedings indefinitely, they did all the necessary tests that the Ombudsman required but still did not finish the matter. This shows that there needs not only be good procedural rules on how to consider documents for openness but also the will to make them available, a will that sometimes is lacking when it comes to sensitive subjects that the institutions feel could damage the reputation of either the parties or the Union itself. Here is yet another paradox of the system, as revealing the contents of a document could be detrimental to the reputation of the Union, but keeping it secret could do the same. It could ‘damage the public image of the EU’ as the Ombudsman said. There probably is no easy solution to this problem, but if the institutions cooperate in good faith, as the Ombudsman suggested (remember the Porsche letters\(^{72}\)), and weigh carefully what should be revealed and what should not (minding the principle of proportionality), many issues could be resolved before they reach the critical mass when a Special Report, or something similar, is needed.

The transparency was, as explained above, developed because of a deficit of it in the laws and work of the Union. This was almost twenty years ago and much has changed since then. So, can the transparency keep up with the changes? Can it still hold open a Union that has expanded to such a great behemoth as it is today? More power is being delegated ‘up’ into the Union while the national courts do not have so much to say to the European Courts. So, the rather transparent proceedings in the national courts (especially in the Nordic countries and the Netherlands) are now replaced by the higher European Courts. In these courts, we have seen, there is less transparency that we perhaps might have desired. Is the expansion of the Union swallowing the transparency as it grows larger?

If the transparency is not transferred from the national courts, the most obvious way of dealing with this issue would be to delegate some of the duties (other than minding the law), down to the national courts. This would increase participation of the Member States and perhaps ever ‘rub off’ even more transparency. The other would be to involve them further into the work of the ECJ. By informing the national courts more properly on how European Law works, they might not be as oblivious to the European law. Openness does find its way down to the national courts already, as seen in the *van der Wal* case, and it is left for the national courts to decide whether specific documents are to be disclosed (the public interest

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\(^{71}\) See 3.2.3 above.

\(^{72}\) See 3.2.3 above.
argument). Yet, if more national courts ruled in favour of transparency, it would be good arguments for applicants to the ECJ, as it would strengthen their arguments. Increased understanding on a national level might also incite the growth of transparency by creating a greater acceptance and involvement. As I said before, with understanding comes trust, and this cannot come without insight.

So, how could transparency develop into a general principle without being mentioned explicitly as one in the legislation? First of all it is crucial to determine whether it really exists. It is true that there is no article stating that ‘work in the Union shall be based on the general principle of transparency’, or something similar. But principles develop over time, just as law does; they do not appear instantly but are developed through repetition and acceptance. But principles are also different from law, whereas law is binary, either applicable or not, principles can conflict with each other without being rendered useless. Caroline Naômé follows a similar argument in her essay.\(^73\)

During the years since Declaration 17, many new forms of transparency have risen from the implementation of the law. These are the developments that convince me that there is a general principle of transparency now at work in the Union. It may not be explicitly written down, but still it influences everything from the institutions, to the Courts and the Citizens themselves. Would anyone complain to the ECJ if they did not think their cause had any grounds?

After the Lisbon Treaty it has, according to me, become even clearer that transparency is being more and more accepted as a principle. The Charter gained the same legal status as the treaties and all the institutions are now bound by law to have rules on access. Those who argued that transparency could not be a general principle because it only applied to the Commission, Council and Parliament now have to rethink their arguments.

More can always be done to increase the transparency. The difficulties with the ratification of the constitutional treaty may prove that further transparency is needed. Perhaps, with the Lisbon Treaty, the institutions, Courts and the Ombudsman will be able to develop new laws decisions etc. based on the new, and old, articles and case-law. This is my best speculation on what will happen in the future of transparency.

\(^73\) See 3.1 above.
5. Conclusion

Transparency is an important concept for any ‘community’ that wishes to have democracy as a ground value. The development of this right shows that it is a value taken seriously by the institutions, Member States and Citizens of the European Union. Although the development is not fast, there is always a steady increase of openness in every new Treaty. This gives the institutions time to adapt to new legislation, which can be hard work when they are as big as they are.

The development will continue, as there is no complete transparency yet. Member States and applicants will continue to raise questions in the Courts and complain to the Ombudsman. These in turn will change, rewrite and sometimes confirm the already established right of access to documents. This shows that it is not a static law, but a changing right. Because of this ‘mobility’ it has, according to me, gained enough status to be called a general principle of law. But until the Court pronounces it ‘doubtlessly’, there may be opinions contrary to that of mine.

Yet it is my belief that as long as the legislation and the right continue to develop, there will be less and less opportunities for those that claim the opposite to construct a valid argument against it. The important thing is to establish a trust, and to have the will to change. If these two things are granted, I am certain all else will follow.
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