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Choosing Exposure: A Study in reputation of Member States in Access to EU documents'
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**Choosing Exposure-
A Study in reputation of Member States in Access to EU documents'Rules**

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PRELIMINARY VERSION DO NOT CITE QUOTE WITHOUT THE AUTHOR'S PERMISSION

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1. Introduction

This paper consists in an attempt to use standard assumptions of Reputational theory to analyse the **behaviour of European (EU) Member States in relation to an apparently unattractive sector of EU Litigation**: Access to the internal documents of the European Institutions. This area of law is governed by Treaty Article Art 255 EC by Regulation (EC) n° 1049/2001 *of the European parliament and of the Council, of 30 may 2001, regarding public access to European parliament, Council and Commission documents*, OJ L 145, 31-05-2001. p 43, and the interventions of Member States are governed by Art 56 of the Bylaws of the Court of Justice.

I would like to note that this very “narrow” analysis, is in fact Part II of a previous paper on access to EU documents in General, called analysis of Empirical data collected relating to the 1994-2005 time-frame. That first paper, concentrated on the applicants (poor) incentives to litigate and on the (excessive) length of judicial proceedings as well as on the (disappointing) substance of the remedies that the ECJ is able to grant.

This second paper shifts its attention onto the role of the Member States.

2. The background of Access to EU Documents: No role for the Member State?

Let me start by stating that the legislation on access to EU institutions documents is directed to natural or legal persons originating from or having their registered legal office on EU territory.

We are in the field of direct relations between citizens and or undertakings *vis a vis* EU institutions, where **Europeans (citizens or undertakings) act as applicants** whereby they request access to documents produced or held by the **institutions**, whom inevitably **play the role of defendants**. The applicants will usually have received a decision refusing access to the documents requested “negative decision”, and consequently will challenge it before the CFI (Court of First Instance).

Under *Action for Annulment proceedings*, governed by Treaty article 230 EC, the CFI may do one of two things: a) it may confirm the European Institution’s (Often the Commission or the Council) decision, ruling in favour of the defendant, and the applicant’s only solution will be to appeal the case to the higher court of the Union, the ECJ; b) on the other hand the CFI may annul the institutions decision, ruling in favour of the applicant, in which case the applicant must wait for a new decision from the institution. More often than not the institution will deliver yet another negative decision which will in turn be challenged in court (again at CFI level). As we have discussed in the first Paper this may go on for several years.

And the Member States? What role is reserved for them?

In theory, Member States were, from the start, insulated from access to EU internal documents litigation for the simple reason that the documents sought were supranational documents.

The Member States were merely awarded standing to intervene (by submitting observations-of principle) before the CFI and ECJ in support of either applicant or defendant. Yet would they have reasons to do so?

We collected data on the exposure rate that Member States preferred when considering to avail themselves or not of the opportunity to intervene in litigation brought before the Courts, and looked specifically at the data for information concerning which party they lend support to. Who do they back? The institutions or the Citizens? In points 3-5 we will briefly summarise the reasons why Member States might choose to intervene:

2.1

The first Table indicates which cases have triggered the submission of observations from Member States, supporting either applicant or defendant, or have generated the support of one of the EU institutions or bodies.

In the First and second columns we have written out the reference n^o and the parties to the case. All cases beginning with a (T) mean that they have been discussed in first instance. All cases beginning with a (C) mean that the discussion has moved on into second instance.

In the third and fourth columns we have mapped out which MS intervene and in favour of whom, applicant or defendant. It is very easy to see that SWE, DK and FIN or also NL always intervene in favour of the applicant, and that FR, UK SP and IT or PT place themselves consistently in favour of the institutions.

The fifth column states the n^o of interventions (remember T is in first instance and C is in 2nd instance).

The sixth column states the TOTAL n^o of interventions (adding 1st and 2nd instance).

Wherever the letter **G** (it means Grand appeal) appears it indicates that one of the interveners (Member State), appealed the case to 2nd instance in a way independent from the choices made by the main party at 1st instance. This has occurred 4 times (See IFAW, TURCO, API and MYTRAVEL, below) and every time it has been done by Sweden.

TABLE 1: Record of Cases that have Generated support

III

Record of Cases that have Generated support (This is the only table updated to 2009, all others stop at 2007)

		Nationality Of Applicant	In Support for Applicant	In Support for Defendant	Victorious (Applicant or Defendant) ;	TOTAL n° of interventions
C-58/94	NL v Council	NL	EP	Commission FR	D 3	
T-194/94	Carvel I v Council	UK	DK, NL, EP		A 3	
T-105/95	WWF v Commission	UK	SWE	FR, UK	A 3	
T-264/04	WWF v Council	BE		Commission	D 1	
T-174/95	Svenska v Council	SWE	SWE, DK, NL	FR, UK	A 5	
T-50/96	Interporc I v Commission	GER	UK		A 1	
T-83/96	Wan der Wal I v Commission	BE	NL		D 1	
T-188/97	Rothmans v Commission	NL	SWE		A 1	
The Bavarian Lager Co						
T-309/97	Bavarian L I v Commission	UK		UK	D 1	
T-194/04	Bavarian L II v Commission	UK	FIN, EDPS		A 3	
C-28/08P	Commission v Bavarian Lager II		SWE DK FIN	UK Council	? 5	8
Heidi Hautala						
T-14/98	Hautala I v Council	FIN	FIN, SWE	FR	A 3	
C-353/99P	Hautala II v Council	FIN	UK, DK	SP	A 3	6
Internationaler Tier-Schuts Fonds						
T-	IFAW v	GER	NL, SWE,	UK	D	

168/02	Commission		DK		4	
C-64/05P	(Swe) IFAW II v Commission	SWE	FIN	SP	A 2 +G	G+6
T-237/02	TGI v Commission	GER	SWE, FIN		A 2	
T-2/03	VKI v Commission	AUS		Banks		
Maurizio Turco						
T-84/03	Turco v Council	IT	FIN, DK, SWE	UK Commission	D 5	
C-39/05 P	(Swe) Turco v Council	SWE			A G	
C-52/05 P	Turco v Council	IT	NL		A 1	
T-139/03	N. Agricast v Commission	IT		UK	(dismiss) 1	
T-151/03	N. Agricast v Commission	IT		UK	D 1	
Association de la Presse Internationale						
T-36/04	API v Commission	BE			D 0	
C-514/07	(Swe) API v Commission	SWE	DK, FIN		G +2	
C-528/07	API v Commission	BE	SWE, DK, FIN	UK	4	
C-532/07	Commission v API		SWE, DK, FIN	UK	1	
MyTravel						
T-403/05	MyTravel v Commission				D 0	
C-506/08P	(SWE) MyTravel v Commission				G	
C-434/04	Crésson v Commission	FR	FR		D 1	
T-444/05	NLG v Commission	IT		IT Council	A 2	

T-111/07	Agrofert v Commission	IT	SWE, FIN	PK Orlen	3	
C-139/07P	TGI v Commission	GER	SWE, FIN		2	
T-29/08	LPN v Commission	PT	SWE, FIN, DK		? 3	

We can briefly introduce a comment on content of these.

2.2

The next step was to map out the nationality of the CITIZENS or Undertakings that have resorted to the rules on access to documents, (irrespective of the fact that the particular case they lodged with the CFI or ECJ received support at all).

Chart 1: Who is asking for Documents: Citizens from which Country?

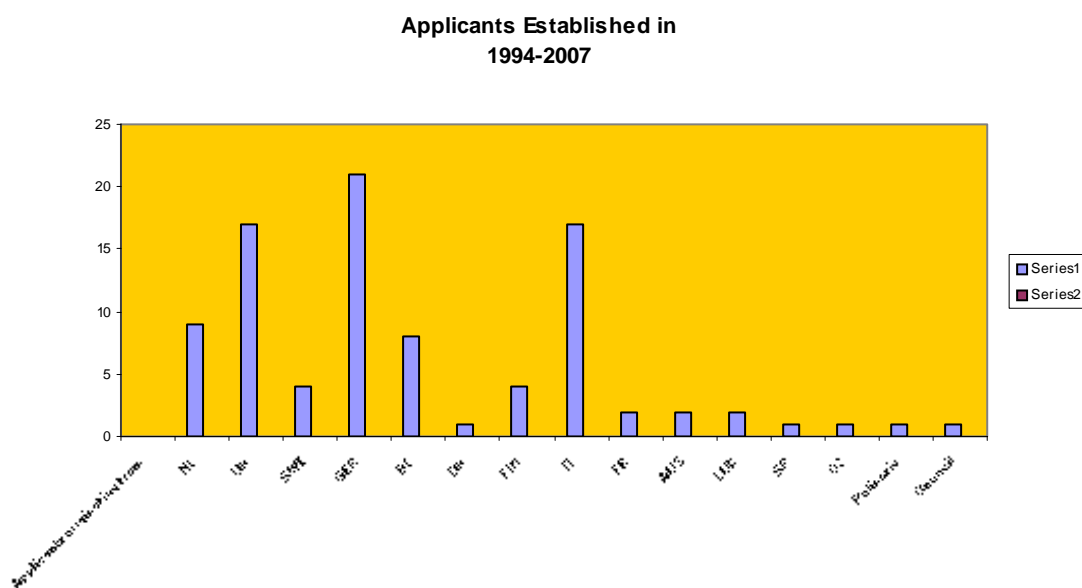


Table 2

Nationality of Applicant

Nationality	Nº	Case Reference
NL	9	(1) C-54/94 NL v Council; (2) T-188/97 Rothmans v Commission; (3) T-188/98 Kuijter I v Council; (4) T-29/99 Denkavit v Commission; (5) T-211/00 Kuijter II v Council; (6) T-110, 150,405/03 Sison v Council; (7) T-319/04 Port Support v Commission
UK	17	(1) T-194/94 Carvel I v Council; (2) T-105/95 WWF v Commission; (3) T-309/97 Bavarian Lager I v Commission (4) T-78/99 Elder & Elder v Commission (5) T-123/99 JT's v Commission; (6) T-178/99 Elder & Elder v Commission (7) T-36/00 Elder & Elder v Commission (8) T-111/00 BAT I v Commission (9) T-68/02 Masdar v Commission (10) T-159/02 Masdar v Commission (11) T-170/03 BAT II v Commission (12) T-194/04 Bavarian Lager II (13) T-42/05 Williams v Commission (14) T-121/05 Borax v Commission (15) T-166/05 Borax v Commission (16) T-233/05 Nomura v Commission (17) T-403/05 MyTravel v Commission
SWE	4	(1) T-174/95 Svenska v Council; (2) C-39/05 P (Turco) Govmt v Council (3) C-64/05P (IFAW II) Govmt v Commission (4) C-514/07 P (API) Govmt v Commission
GER	21	(1) T-50/96 Interporc I v Commission; (2) T-124/96 Interporc II v Commission; (3) T-156/97 Achim v Commission; (4) T-92/98 Interporc III v Commission; (5) C-417/08P Interporc v Commission (6) C-41/00P Interporc v Commission; (7) T-168/02 IFAW v Commission; (8) T-237/02 TGI v Commission; (11) T-284/04 UPS v Commission (12) T-5/05 VIC v Commission (13) T-141/05 I Hilfsfonds (14) T-290/05 Weber v Commission; (15) T-236/06 Landtag SH v Commission (16) T-251/06 Meyer-Falk v Commission (17) C-406/06 Landtag SH v Commission (18) T-68/07 Landtag SH v Commission (19) C-107/07 Weber v Commission (20) C-139/07P TGI II v Commission (21) T-392/07 Strack v Commission (22) T-399/07 Basell v Commission
BE	8	(1) T-83/96 Van der Wal v Commission; (2) C-174/, 189/98P Van der Wal v Commission; (3) T-36/04 API v Commission; (4) T-237/04 Ultradent ¹ v Commission (5) T-264/04 WWF v Council; (6) T-203/06 Eurostrategies I v Commission; (7) C-122/07P Eurostrategies II v Commission
DK	1	(1) T-610/96 Carlsen v Council;
FIN	4	(1) T-14/98 Hautala I v Council; (2) T-209/99 Mattila I v Council; (3) C-353/99P Hautala II v Council; (4) C-353/01P Mattila II v Council
IT	17	(1) T-191/99 Petrie v Commission; (2) T-47/01 Co-frutta v Commission;

¹ Applicant also USA based.

		<ul style="list-style-type: none"> (3) T-76/02 Messina v Commission; (4) T-84/03 Turco v Council (5) T-139/03 Nuova Agricast v Commission (6) T-187/03 Sciappacerola² v Commission (7) T-287/03 Simsa v Commission; (8) T-295/03 Poli Sud v Commission; (9) T-296/03 Proteco v Commission (10) T-297/03 T. Achille v Commission; (11) T-298/03 Bieffe v Commission; (12) T-299/03 Nuova FUD v Commission; (13) T-161/04 Valero Jordana v Commission (14) C-52/05 P Turco v Council (15) T-409/05 A.S. TER v Commission (16) T-444/05 NLG v Commission (17) T-417/07 Lodato v Commission
FR	2	<ul style="list-style-type: none"> (1) C-432/04 Crésson³ v Commission (2) T-237/05 Ed. Jacob v Commission
AUS	2	<ul style="list-style-type: none"> (1) T-2/02 V.F.K v Commission; (2) T-198/03 Bank Austria v Commission (3) C-345/06 UVLN (234^o)
LUX	2	<ul style="list-style-type: none"> (1) T-391/03 Franchet I v Commission; (2) T-70/04 Franchet II v Commission
SP	1	<ul style="list-style-type: none"> (1) T-144/05 Muñiz v Commission
CZ	1	<ul style="list-style-type: none"> (1) T-111/07 Agrofert v Commission
Polinesia	1	<ul style="list-style-type: none"> (9) (1) T-106/99 Meyer v Commission
GRE	5	<ul style="list-style-type: none"> (1) T-3/00 Pitsiorlas v Council & ECB (2) C-193/01 P Pitsiorlas v Council & ECB (3) T-337/04 Pitsiorlas v Commission (4) T-380/04 Terezakis v Commission (5) T-374/07 Pachitis v Commission

When we elaborated the table we must note that we adopted the criteria of nationality taken as the place of establishment of an applicant.

² Established in BE

³ Technically not “pure” access to D

2.3 Positive and Negative Biases.

The first thought that occurred to me was that Member States might feel compelled to participate, for reasons of a positive (or even negative) national bias. Submitting observations could be seen as an instrument of fostering their own citizen's positions vis-à-vis the CFI or ECJ, and a straightforward choice of foreign policy administration.

I ran a verification mapping out all Member States that consistently aided applicants, and went into further detail by checking for a subset, from among the first for incidents where applicant-friendly Member States would support an applicant that shared their same nationality.

II Record Of Support For Applicant /Defendant

		Support for Applicant		Support for Defendant	
	Participation of Citizens	A When the applicant is a national citizen	B When the applicant is not a national citizen	C When the applicant is a national citizen	D When the applicant is Not a national citizen
NL	9		5 ⁴		
UK	17		2 ⁵	2 ⁶	5 ⁷
SWE	4	1 ⁸	12 ⁹		
GER	21				
BE	8				
DK	1		5 ¹⁰		
FIN	4	2 ¹¹	6 ¹²		
IT	17			1 ¹³	

⁴ T-194/94; T-174/05; T-83/96; T-168/02; C-52/05 P

⁵ T-50/96; C-353/99 P

⁶ T-105/95 WWF; T-309/97

⁷ T-174/95; T-168/02; T-84/03, T-139/03, T-151/03

⁸ T-174/95

⁹ T-105/95; T-188/97; T-14/98; T-168/02; T-237/02; T-84/03; C-39/05 P (G); C-52/05 P; C-64/05P (G); T-111/07; C-139/07P; C-514/07 P (G)

¹⁰ T-194/94; T-174/95; C-353/99P; T-168/02; T-84/03

¹¹ T-14/98; C-353/99P

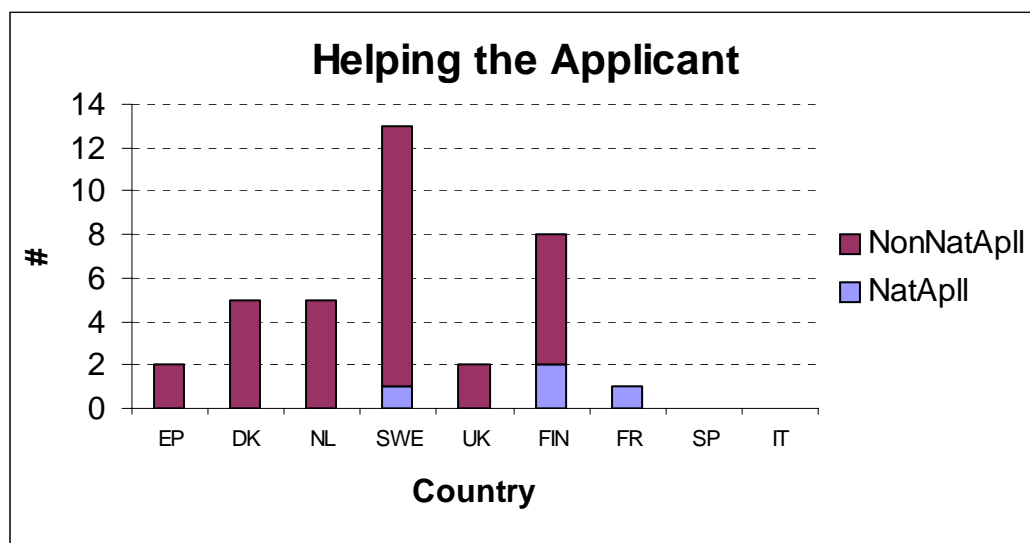
¹² T-237/02; T-84/03; T-194/04; C-64/05P; T-111/07 C-139/07

¹³ C-444/05P

FR	2	1 ¹⁴			4 ¹⁵
AUS	2				
LUX	2				
SP	1				2 ¹⁶
CZ	1				
Polinesia	1				
Council	1				1 T-444/05
Commiss	3				2 C-58/94; T- 264/04;
EDPS		1 T-194/04			
EP			2 C-58/94; T- 194/94		

The Bordeaux bar ascertains the Member State's friendliness to applicants, and the Blue shading reports incidence of friendliness towards a special target: national applicants.

Chart 2: Which Countries Support Citizens who ask for Documents?



Given the data, it's difficult to make definitive statements. Sweden certainly seems applicant-friendly but not overtly influenced by a positive national bias, and although the bias is more evident about Finland, generally the same assessment could be made of this second State. France appears 100% biased in favour of its citizens yet the sample consists of one single case, so this

¹⁴ C-432/04

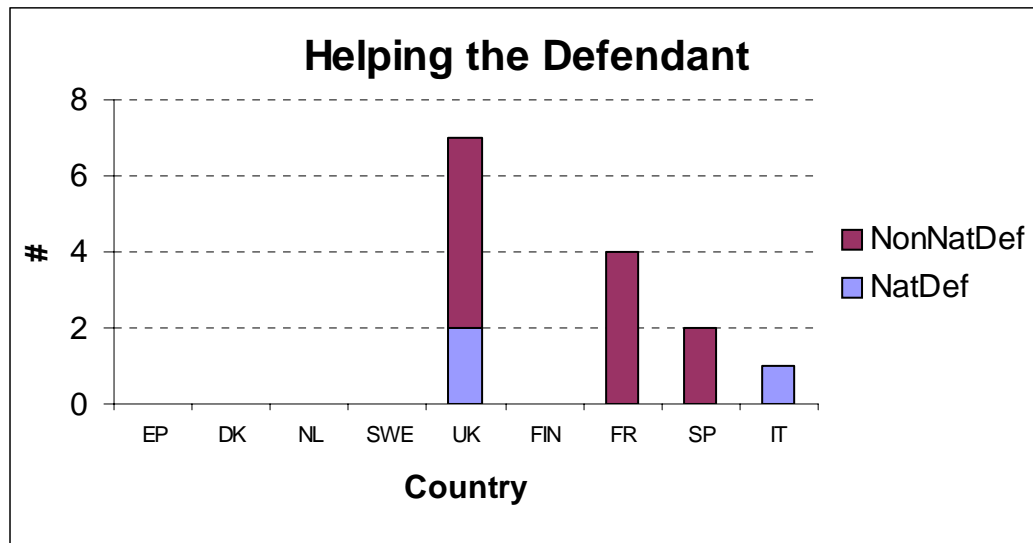
¹⁵ C-58/94; T-105/95; T-174/95; T-14/98

¹⁶ C-353/99P; C-64/05P

reading should be given with caution. Overall, the theory of the positive national bias is not strongly supported by evidence.

Sequentially, I then ran a verification for negative biases. Mapping out which Member States appeared Defendant-friendly, and checking for a subset, within these, for Member States who would “turn on their own” citizens, by backing their adversaries in Court.

Chart 3



I find Chart 3 much more revealing. It shows that four Member States are Defendant-friendly, UK, FR, SP and IT. Of the four UK is the most Defendant-friendly Member State, and it does “turn on its own”. Spain also has not, to date, backed the adversary of a Spanish citizen in court, yet Italy once and the UK twice have done so. France, being Defendant-Friendly, does not “turn on its own citizens” either.

A negative bias *vis à vis* your own citizens is more difficult to explain than a positive one. In this field it is especially singular: why would a Member State in litigation occurring between its own citizen and an institution, back the institution? Only because there is a reason, a selfish, rational reason.

2.4 From discretionary participation on the grounds of Principle to coerced participation on the grounds of Negative bias-

Selfish and rational reasons bring us to the core of contests: the content of litigation. Could it be that the “fight” is not between the citizen and the institution? Could it be that the Member State is somehow involved? Involved enough so as to stand up in a European court and by siding with the institutional adversary publicly shun the plea of a national citizen? I have concluded that since the entry into force of Regulation 1049/01 very often what is being requested of the EU institutions, in access to EU documents litigation is that

they release, information that they hold, but that primarily does not concern the EU institution, rather it concerns Member States.

Lack of control over documents it has transmitted to Brussels will “push the Member State” to move (through the submission of negative observations) for non-disclosure of a document, in all cases that documents contain national information, and this is especially likely to occur when national citizens or citizens/undertakings, established on national territory request information from EU institutions. Negative national biases will be encouraged.

Here I would like to discuss the Concepts of “Author” versus “Guardian” of Documents, and to call attention to the fact that should the current interpretation of Regulation 1049/99 be asserted by the ECJ in an upcoming judgement ¹⁷, negative biases of Member States versus their own citizens will increase in this field.

3. Authority as author: the Period between 1994-December 2001

Until December 2001, access to documents was governed by an interinstitutional Code of Conduct and since the Treaty of Amsterdam by article 255^a TCE. The Code of Conduct contained a so-called “Author’s rule”: Only documents produced directly by the institutions were covered by the Code, documents produced by third parties (author) yet held by the institution were explicitly excluded from the Code’s reach. As a consequence during this period documents transmitted by the Member States to the institutions were expressly protected from release to the public by the institutions’ unilateral initiative. Since requests go directly to the institution, the Member State would under the ¹⁸ author’s rule, at the most release documents of its own production that had been transmitted to the institution.

According to this rule any request of access to a document that although held by the institutions, did not originate from the institutions, would be refused and the applicant would be invited to address the author directly.

4. Authority as Guardian? the Period between 1994-December 2001

A curious problem that arose concerned documents held by the Member States but originating from the institutions. It was generally believed that (albeit written nowhere) Member States would behave under a reciprocity rule: Whenever a request for documents held by the State but produced by the institutions was filed under national law it was “expected” that the Member State would show reciprocal loyalty, by re-directing the applicant to the institution.

We will anticipate that an extremely complicated discussion arose when, in case T-174/95 one of the Member States ¹⁹ released EU produced documents in its

¹⁷ Made clear in the Opinion of Advocate-General Poiras Maduro rendered in *Case C-64/05 P, Sweden v Commission*

¹⁸ until - 03/12/2001, date of entry into force of Regulation 1049/99-

¹⁹ (not surprisingly SWEDEN)

possession when those same documents had been refused the applicant by the Council. This opened up a fierce debate on loyalty, forum shopping and competing jurisdictions despite the fact that later the CFI came to rule in favour of the applicant to whom the documents had been denied.

5. No authority as Author, the Period Post Regulation 1049/99

Through pressure of the European Parliament and the more “liberal Member States”, Regulation 1049/99 extinguished the “author’s rule”. Member States no longer enjoy a power of “veto”²⁰ over documents transmitted to the Brussels-based administration. Today the EU’s authority covers “documents drawn up and documents received”.

Once transmitted, national documents will no longer be governed by national rules but by Regulation 1049/01.

*An institution may (...) grant access to a document to which the Member State which provided it has refused access, because the Community rules which the MS have agreed to impose on the institutions grant wider access to documents than the national law of the MS concerned*²¹.

6. Authority as Guardian? , The Period Post Regulation 1049/99

What about documents transmitted from the institutions to the Member States? Will access thereon be governed by national rules or by Regulation 1049/01?

It is also written that *“Even though it is neither the object or the effect of this regulation to amend national legislation”²² on access to documents (...) by virtue of the principle of loyal cooperation, Member States should take care not to hamper²³ the proper application of this Regulation”*.

Subject to article 5 (cooperation) *A MS may thus disclose a document to which the community institution has refused access because its national rules on transparency are more generous*²⁴.

Table 3 Member States’ Control over Documents

	Control over documents “Produced” (and subsequently transmitted)	Control over documents “Held”
Under the Author’s rule	YES	A) NO or Possibly not (due to principle of primacy/loyal cooperation) B) Sweden seems to think YES
Under Regulation 1049/99	NO	YES

Given that the ECJ has conformed the Conclusions of the Advocate General in the IFAW case, we will enter a “schizophrenic “era in which both MS and EU

²⁰ Except, security, defence and military matters.

²¹ Opinion of the Advocate General par 47, Case C-64/05 P

²² Exclusion of the primacy rule.

²³ An explicit reference to the T-174/95 episode.

²⁴ Opinion of the Advocate General, Par 47 Case 64/05 P

institutions abandon the existing control²⁵ over self-produced documents held by a third party and enter a period where they only control the release over documents that they did not produce themselves, but that they hold.

²⁵ (the MS surely under the author's rule, the institutions eventually under loyal cooperation principle)

7. National Reputations at Stake

From the data collected we have drawn up a table where the first column represents the **nationality of applicants involved in the litigation** between 1994-2005, and how many times **citizens** originating from that State have litigated.

The Citizens of Germany, followed by citizens from the UK and the Netherlands seem to be the most enthusiastic.

The second column represents **what MS have supported, applicants**, therefore “liberal Member States (B), Sweden, the Netherlands and Denmark and Finland, lead the parade, with the UK and France registering one single episode of support for an applicant. We have tried to find out if there is a correlation between, the support of a Member State, because a citizen of the same MS is litigating, in other words MS with a *bias in favour* of national citizens (A), only Finland and France²⁶ seem to fall into this category.

The third column represents **MS that have supported defendants**, therefore conservative MS or those who favour a power of veto over national documents transmitted to the institutions. France and the UK (A/B) dominate the third column, whilst Italy and Spain²⁷ register a single entry. We have also checked for MS who support institutions for the only reason that one of their own citizens is involved, therefore MS capable of turning against their own, exposing a *negative bias vis à vis* national citizens (A) with the UK (once) and Italy once falling into this category.

As **Global reputations** are concerned NL, SWE, DK and FIN have stayed strictly and consistently on the applicants' side of the table, in stark contrast to the UK and France who have consistently stayed with the institutions, although the UK has ventured once in favour of applicants (no UK citizen was involved) and France sacrificed a consistent reputation to rescue Edith Crésnon in the notorious proceedings C-432/04. Spain and Italy have chosen initial positions as conservatives, in the Italian case versus an Italian citizen.

²⁶ The French case was of a very exceptional nature

²⁷ C-353/99 P

Chart 4: What Prevalent type of Type of Behaviour do Citizens/Countries/Institutions Choose?

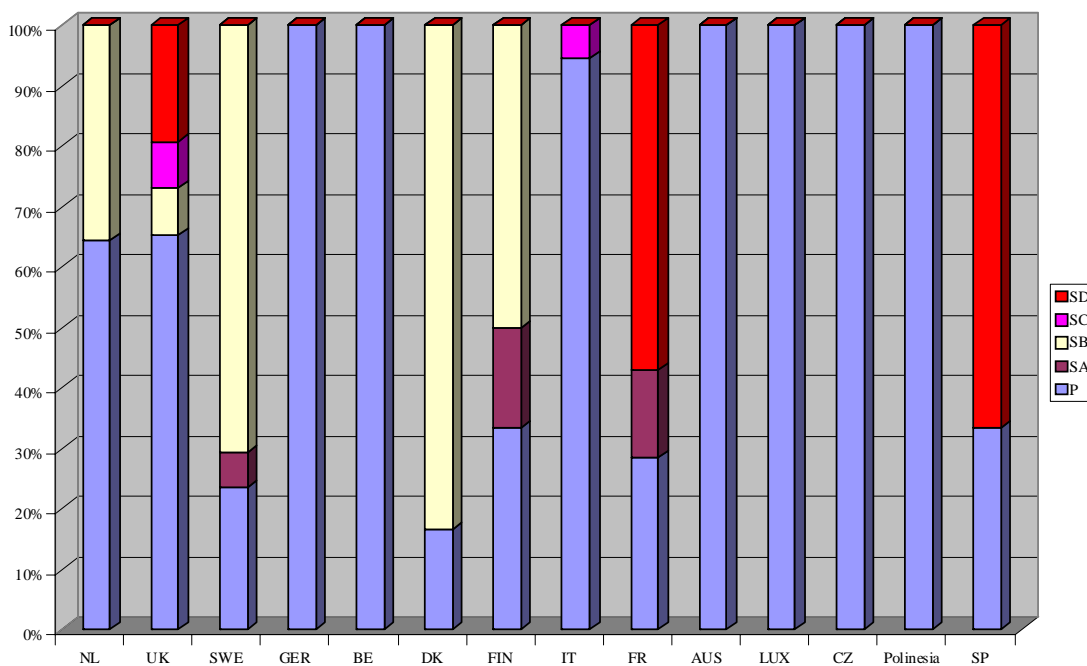
Blue: Activity of Countries' Citizens in requesting Documents

Wine: Country Supports who asks for Documents, if applicant is of the same nationality

Yellow: Country Supports anyone who asks for Documents, although applicant is NOT of the same nationality

Pink: Country opposes an applicant holding the same nationality (IT, UK)

Red: Country normally chooses to oppose applicants



8. On The Marginal Utility of Successive and Repeated Interventions by the Same Member State.

The main topic I would like to discuss in this paper, and the topic on which I am still looking for answers on is the Marginal Utility of Successive interventions by the Same MS.

From the data collected it is apparent that Sweden, Finland and Denmark are always ready to intervene as a matter of principle !-in favour of applicants whose requests for access to documents have been refused by the Institutions in violation of Regulation 1049.

In the light of this “voluntarism “ unsuccessful applicants in the pre-litigation phase, may indulge in high probability expectations that one of the 3 MS referred will come to their aid (through the submission of supportive observations), should they choose to sue the Institution involved.

One question that I ask is how useful are, in fact, observations, and do they, in fact change the final outcome of proceedings.

A second question raises the issue of whether observations submitted by MS could be, at a certain point, detrimental if considered to be the product offered up by a supporter of “compulsive” character? (I think not- but I would like to discuss it further)

Both negative evaluations presupposed in questions 1 & 2 are shunned by the outcome of cases where Sweden has successfully appealed to the ECJ and in an independent manner, unfavourable judgements rendered to private applicants in first instance

A third question finally addresses Reputation-building issues and is the following: how costly or how valuable is an abrupt change of posture of one of the Member States, end especially regarding MS that have built and kept constance in policy regarding the issue of transparency. I’m thinking here of the situation where Sweden, Fin or DK (that have always supported applicants should choose to oppose (for once) an applicant of documents.