



PRESS RELEASE No 15/23

Luxembourg, 25 January 2023

Judgment of the General Court in Case T-163/21 | De Capitani v Council

The Council must grant access to documents drawn up within its working groups relating to the legislative procedure concerning the amendment of the directive on the annual financial statements

The General Court finds that none of the grounds relied on by the Council supports the conclusion that disclosure of the documents at issue would seriously undermine, in a concrete, actual and non-hypothetical manner, the legislative process concerned

The applicant, Mr Emilio De Capitani, had submitted a request for access ¹ to certain documents exchanged within the Council's 'Company Law' working group relating to the legislative procedure concerning the amendment of Directive 2013/34 on the annual financial statements. ² The Council had refused access to certain documents on the ground that their disclosure would seriously undermine the Council's decision-making process within the meaning of Regulation No 1049/2001. ³ Following the applicant's confirmatory application concerning access to the undisclosed documents, the Council adopted the contested decision, ⁴ by which it confirmed its refusal to grant access.

The Council working groups are internal bodies of that institution which prepare the work of the Committee of Permanent Representatives (Coreper) and, subsequently, the ministerial formation with competence of the Council.

The General Court, hearing an action for annulment which it upholds, addresses the question of access to documents relating to legislative procedures from the novel perspective of the relationship between, on the one hand, the principles of publicity and transparency of the legislative procedure, deriving from the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union ⁵ and, on the other hand, the exception to the disclosure of documents taken from the protection of the decision-making process of an institution, laid down by secondary legislation. ⁶ In addition, the Court examines for the first time the conditions for access to documents drawn up by the Council's working groups in the context of a legislative procedure.

Findings of the Court

First, the Court rejects the applicant's argument that the exception relating to the protection of the decision-making process provided for in Regulation No 1049/2001, interpreted in the light of the FEU Treaty and the Charter, does not apply to legislative documents.

¹ Under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

² Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ 2013 L 182, p. 19).

³ First subparagraph of Article 4(3) of Regulation No 1049/2001.

⁴ Decision SGS 21/000067 of the Council of the European Union of 14 January 2021.

⁵ Article 15 TFEU and Article 42 of the Charter of Fundamental Rights of the European Union ('the Charter').

⁶ Within the meaning of Article 4(3) of Regulation No 1049/2001.

The Court notes that as the principle of openness is of fundamental importance in the European Union legal order, the principles of publicity and transparency are inherent in the legislative procedures of the European Union.⁷ Access to legislative documents must therefore be as wide as possible. However, that does not mean that EU primary law provides for an unconditional right of access to legislative documents. In accordance with the FEU Treaty,⁸ the right of access to documents of the EU institutions is exercised in accordance with the general principles, limits and conditions laid down by means of regulations. The provisions of the FEU Treaty governing the right of access to documents of the institutions do not exclude legislative documents from its scope.

The Court observes that that conclusion is supported by the legislative context of the right of access to documents. It is apparent from primary law that the principle of openness is not absolute.⁹ Furthermore, the Court notes that, in accordance with Regulation No 1049/2001, the EU institutions may refuse access to certain documents of a legislative nature in duly justified cases.

Contrary to the applicant's submissions, the Court finds, first of all, that the continuity of the right of access to documents exists between the Treaty establishing the European Community and the FEU Treaty and concludes that the exception to the obligation to disclose a requested document relating to the protection of the decision-making process of the institution concerned, provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001, remained applicable following the entry into force of the FEU Treaty and the Charter. Next, it considers that there is nothing to support the conclusion that the provisions of the FEU Treaty and of the Charter exclude, as a matter of principle, the possibility that access to documents drawn up by the Council's working groups in the context of a legislative procedure may be refused on the ground that their disclosure would seriously undermine the Council's decision-making process. Lastly, it states that although the provisions of the FEU Treaty according to which the Council is to meet in public when considering and voting on a draft legislative act¹⁰ lay down the principle of publication of legislative debates during Council sessions, they do not concern the right of access to documents or the limits and conditions for the exercise of that right.

Secondly, the Court finds that none of the grounds relied on by the Council in the contested decision supports the conclusion that disclosure of the documents at issue would specifically, effectively and in a non-hypothetical manner seriously undermine the legislative process concerned.

First of all, as regards the ground based on the allegedly sensitive content of the documents at issue, the Court finds that they in fact contain specific textual comments and amendments which form part of the normal legislative process. Although those documents relate to subjects of some importance, possibly characterised by both political and legal difficulty, and may contain elements resulting from 'difficult negotiations' which might reflect the difficulties which it still had to resolve before reaching an agreement, the Council does not identify any concrete and specific aspect of those documents which is particularly sensitive in the sense that a fundamental interest of the European Union or of the Member States would have been called into question in the event of disclosure. Nor does it explain how access to the documents at issue would specifically, effectively and in a non-hypothetical manner seriously undermine the possibilities of reaching an agreement on the legislative proposal in question.

Next, as regards the preliminary nature of the discussions, within the Council working group, relating to the legislative proposal in question, the Court notes that it does not justify, as such, the application of the exception based on the protection of the decision-making process. That exception makes no distinction according to the state of progress of the discussions, but envisages in general the documents relating to a question where a 'decision has not been taken' by the institution concerned. Since a proposal is, by its nature, intended to be discussed, an applicant for access to legislative documents in the context of an ongoing procedure is fully aware that the information contained therein is intended to be amended throughout the discussions in the course of the preparatory work of the working group until agreement on the whole text is reached. That was the objective pursued by the request for access made by the applicant, who sought to ascertain the positions expressed by the Member States within the Council specifically in order to generate a debate in that regard before that institution established its position in the legislative procedure in question.

⁷ Judgment of 22 March 2018, *De Capitani v Parliament*, [T-540/15](#), (see also [CP 35/18](#)).

⁸ Article 15(3) TFEU.

⁹ Article 1 and Article 10(3) TEU and Article 15(1) TFEU.

¹⁰ Article 15(2) TFEU.

Furthermore, the Court finds that the Council has produced no tangible evidence to show that access to the documents at issue would have harmed the Member States' cooperation in good faith. It notes that, since the Member States express, in the context of Council working groups, their respective positions on a given legislative proposal, and accept that their position could evolve, the fact that those elements are then disclosed, on request, is not in itself capable of undermining sincere cooperation.¹¹ In a system based on the principle of democratic legitimacy, co-legislators must be answerable for their actions to the public and if citizens are to be able to exercise their democratic rights they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information. In the present case, there is nothing to suggest that the Council could reasonably expect a risk of external pressure and a reaction beyond what could be expected from the public by any member of a legislative body who proposes an amendment to draft legislation.

Lastly, access to documents drawn up by the Council working groups cannot be limited because of their allegedly 'technical' nature. Whether or not a document is 'technical' is not a relevant criterion for the purposes of the application of the exception based on protection of the decision-making process. The members of Council working groups are given a mandate from the Member States that they represent and, at the time of deliberation on a given legislative proposal, they express the position of their Member State within the Council, when the Council acts in its capacity as co-legislator. The fact that the working groups are not authorised to adopt the Council's definitive position does not mean that their work does not form part of the normal legislative process, or that the documents drawn up are 'technical' in nature.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

Unofficial document for media use, not binding on the General Court.

The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355

Stay Connected!



¹¹ Article 4(3) TEU.