ECLI:EU:T:2023:15

JUDGMENT OF THE GENERAL COURT (Tenth Chamber, Extended Composition)

25 January 2023 (*)

(Access to documents – Regulation (EC) No 1049/2001 – Documents concerning an ongoing legislative procedure – Council working groups – Documents concerning a legislative proposal to amend Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings – Partial refusal to grant access – Action for annulment – Interest in bringing proceedings – Admissibility – First subparagraph of Article 4(3) of Regulation No 1049/2001 – Exception relating to the protection of the decision-making process)

In Case T-163/21,

**Emilio De Capitani,** residing in Brussels (Belgium), represented by O. Brouwer, lawyer, and S. Gallagher, Solicitor,

applicant,

supported by

**Kingdom of Belgium,** represented by C. Pochet, L. Van den Broeck and M. Jacobs, acting as Agents,

by

**Kingdom of the Netherlands,** represented by M. Bulterman, M.H.S. Gijzen and J. Langer, acting as Agents,

by

**Republic of Finland,** represented by M. Pere, acting as Agent,

and by

**Kingdom of Sweden,** represented by C. Meyer-Seitz and R. Shahsavan Eriksson, acting as Agents,

interveners,

v

**Council of the European Union,** represented by J. Bauerschmidt and K. Pavlaki, acting as Agents,

defendant,

THE GENERAL COURT (Tenth Chamber, Extended Composition),

composed, at the time of the deliberations, of A. Kornezov (Rapporteur), President, E. Buttigieg, K. Kowalik-Bańczyk, G. Hesse and D. Petrlík, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure,

further to the hearing on 22 September 2022,

gives the following

**Judgment**

1 By his action under Article 263 TFEU, the applicant, Mr Emilio De Capitani, seeks the annulment of Decision SGS 21/000067 of the Council of the European Union of 14 January 2021, by which the Council refused him access to certain documents, coded 'WK', exchanged within the Council working groups in the context of legislative procedure 2016/0107 (COD), concerning the amendment of 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) ('the contested decision').

**Background to the dispute**

2 On 15 October 2020, the applicant submitted, pursuant to 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), a request for access to certain documents exchanged within the Council's 'Company Law' working group relating to legislative procedure 2016/0107 (COD), which was ongoing at the time the request was made.

3 On 10 November 2020, the Council granted that request in part, releasing seven documents to the applicant and refusing access in full to seven other documents, namely those with reference numbers WK 6662/18, WK 14969/17 REV 1, WK 14969/17 INIT, WK 5230/17, WK 12197/17, WK 12197/17 REV1 and WK 10931/17 ('the documents at issue'), on the ground, in essence, that their disclosure would seriously undermine the Council's decision-making process within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001.

4 On 25 November 2020, the applicant submitted a confirmatory application to the Council in which he repeated his request for access to the documents at issue.

5 On 14 January 2021, the Council adopted the contested decision, by which it confirmed its refusal to grant access to the documents at issue on the basis of the first subparagraph of Article 4(3) of Regulation No 1049/2001.

**Forms of order sought**

6 The applicant claims that the Court should:

– annul the contested decision;

– order the Council to pay the costs.

7 The Council contends that the Court should:

– dismiss the action as inadmissible or, in the alternative, as unfounded;

– order the applicant to pay the costs.

8 The interveners, the Kingdom of Belgium, the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden state that they support the forms of order sought by the applicant.

**Law**

***The applicant's continuing interest in bringing proceedings***

9 Without formally raising, by separate document, a plea that there is no need to adjudicate, the Council contends that the applicant's interest in bringing proceedings had, in the course of the proceedings, ceased to exist since, by letter of 14 June 2021, the Council released to him all the documents at issue. Therefore, the action is no longer capable, through its outcome, of procuring any advantage for the applicant and has thus become devoid of purpose.

10 The applicant, supported in that regard by the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden, disputes that his interest in bringing proceedings ceased to exist in the course of the proceedings. First, he claims that he did not have access to the documents at issue in good time, that is to say, at a stage which would have enabled him to exercise fully and effectively his rights as a European citizen in a democratic society as regards the legislative procedure in question. Second, he takes the view that he retains an interest in bringing proceedings in order to ensure that the unlawful act committed by the Council does not recur in the future.

11 In that regard, it should be borne in mind that the applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible. That purpose must continue to exist, like the interest in bringing proceedings, until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be liable, if successful, to procure an advantage for the party bringing it (see judgment of 21 January 2021, *Leino-Sandberg* v *Parliament*, C-761/18 P, EU:C:2021:52, paragraph 32 and the case-law cited).

12 In the present case, it is not disputed that the documents at issue were disclosed by the Council to the applicant on 14 June 2021, that is to say, after the present action was brought. However, the contested decision has not been formally withdrawn by the Council, with the result that the legal proceedings have retained their purpose (see, to that effect, judgments of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 45, and of 21 January 2021, *Leino-Sandberg* v *Parliament*, C-761/18 P, EU:C:2021:52, paragraph 33 and the case-law cited).

13 Therefore, it is necessary to examine, in accordance with the case-law of the Court of Justice referred to in paragraph 11 above, whether the applicant could continue to invoke, notwithstanding that disclosure, an interest in bringing proceedings, which requires the determination of whether the applicant has obtained, by that disclosure, full satisfaction having regard to the objectives he pursued by his request for access to the documents in question, which involves determining whether that disclosure took place in good time (see, to that effect, judgments of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 47 and the case-law cited, and of 21 January 2021, *Leino-Sandberg* v *Parliament*, C-761/18 P, EU:C:2021:52, paragraph 34).

14 In that regard, as in essence the applicant and the Republic of Finland submit, the applicant, by his initial request of 15 October 2020 and by his confirmatory application of 25 November 2020, sought to obtain access to the documents at issue in order to ascertain the positions expressed by the Member States within the Council, the Council acting in its capacity as co-legislator, and to be able, if necessary, to inform the public of those positions and generate a debate in that regard before that institution established its position in the legislative procedure in question.

15 In the present case, disclosure of the documents at issue did not take place until after the Council had adopted, on 3 March 2021, its negotiating position in that procedure and after the agreement reached on 1 June 2021, in the context of inter-institutional trilogues.

16 The disclosure of the documents at issue did not take place in good time in the light of the objectives of informing the public and generating debate which the applicant pursued by his application for access to those documents, within the meaning of the case-law referred to in paragraph 13 above (see, to that effect and by analogy, judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 59, and of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 33). At the time of that disclosure, the Council's position had been adopted and an interinstitutional agreement had been reached within the framework of the trilogues. Although, it is true that, at that time, the legislative procedure had not yet been formally concluded, the fact remains that, more often than not, agreements reached in trilogues are subsequently adopted by the co-legislators without substantial amendment (see, to that effect, judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 72).

17 Therefore, by disclosure of the documents at issue, the applicant did not obtain full satisfaction in the light of the objectives pursued by his application for access to those documents.

18 Accordingly, the Council's argument that the applicant's interest in bringing proceedings has ceased to exist in the course of the proceedings must be rejected.

***Substance***

19 The applicant submits, in support of his action, two main pleas in law, alleging, first, infringement of the first subparagraph of Article 4(3) of Regulation No 1049/2001 and failure to state reasons concerning whether disclosure of the documents at issue would seriously undermine the decision-making process and, second, failure to comply with that provision and failure to state reasons concerning the absence of an overriding public interest justifying disclosure of those documents. He also raises, in the alternative, a third plea, alleging infringement of Article 4(6) of Regulation No 1049/2001 and failure to state reasons.

20 The first plea consists, in essence, of two parts, concerning, first, the applicability of the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001 to legislative documents and, second, the application of that exception in the present case.

*The applicability of the first subparagraph of Article 4(3) of Regulation No 1049/2001 to legislative documents*

21 The applicant claims that, by refusing access to the documents at issue, which are, in essence, legislative documents, on the basis of the first subparagraph of Article 4(3) of Regulation No 1049/2001, the Council disregarded the new constitutional dimension concerning access to documents drawn up in the context of legislative procedures established by the FEU Treaty and the Charter of Fundamental Rights of the European Union ('the Charter'). Thus, unlike the previous Article 207(3) EC, which allowed the Council to determine the cases in which it was to be regarded as acting in its legislative capacity in order to allow better access to documents in those cases, while preserving the effectiveness of its decision-making process, the FEU Treaty and the Charter no longer refer to any exception relating to the protection of the decision-making process in the context of legislative procedures. There are therefore legal tensions between the first subparagraph of Article 4(3) of Regulation No 1049/2001, which was adopted on the basis of earlier interpretations of the principle of transparency stemming from the EC Treaty, and Article 15(2) TFEU and Article 42 of the Charter. Therefore, the Council is required to comply directly with its obligations under the FEU Treaty and the Charter, which confer on it no discretion allowing it to refuse access to documents drawn up in the context of a legislative procedure.

22 In the reply, the applicant states that the first subparagraph of Article 4(3) of Regulation No 1049/2001 is no longer applicable to the legislative debates and ancillary documents. It adds that other exceptions, such as those provided for in Article 4(1) and (2) of Regulation No 1049/2001, remain, by contrast, relevant as regards access to legislative documents and that Article 15(3) TFEU must be understood as referring to those types of exceptions.

23 The Council replies that the applicant is confusing two different dimensions of legislative transparency, namely, first, that relating to the meetings of the European Parliament and of the Council in which their respective members deliberate on draft legislative acts and, second, that concerning access to the documents which relate to legislative procedures. Article 15(2) TFEU refers to that first dimension and is therefore not relevant in the present case. That provision should be understood as referring to the Council in its composition comprising representatives at ministerial level, authorised to commit the government of the Member State which they represent and to exercise voting rights, in accordance with Article 16(2) TEU. By contrast, the second dimension of legislative transparency, namely that referred to in Article 15(3) TFEU, does not provide for an unconditional right of access to documents, including legislative documents.

24 In the rejoinder, the Council submits that the applicant's argument that Article 4(3) of Regulation No 1049/2001 can no longer apply to documents drawn up in the context of a legislative procedure after the entry into force of the FEU Treaty and the Charter constitutes a 'new plea of illegality' raised for the first time in the reply and, therefore, a new plea, which must be declared inadmissible. It also asks, in the event that the 'new plea in law' is to be regarded as admissible, that a measure of organisation of procedure be adopted pursuant to Article 88(1) of the Rules of Procedure of the General Court in order to invite the European Parliament and the European Commission to express a view on the alleged unlawfulness of that provision.

25 When questioned on that point in the context of a measure of organisation of procedure, the applicant challenges the plea of inadmissibility raised by the Council, claiming, in essence, that the

application already set out clearly the argument that, since the entry into force of the FEU Treaty and the Charter, there is legal tension between the first subparagraph of Article 4(3) of Regulation No 1049/2001 and primary law, in particular Article 15(2) TFEU, and that, therefore, the Council had to comply with its obligations under primary law by making the legislative documents available to the public.

– *The plea of inadmissibility raised by the Council*

26 According to settled case-law concerning Article 84(1) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or fact which have come to light in the course of the procedure. However, a plea which constitutes an amplification of a plea made previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible. To be regarded as an amplification of a plea or a head of claim previously advanced, a new line of argumentation must, in relation to the pleas or heads of claim initially set out in the application, present a sufficiently close connection in order to be considered as forming part of the normal evolution of debate in proceedings before the Court (see judgment of 5 October 2020, *HeidelbergCement and Schwenk Zement* v *Commission*, T-380/17, EU:T:2020:471, paragraph 87 (not published) and the case-law cited).

27 In the present case, it must be noted that, in the application, the applicant clearly submitted that Article 15(2) TFEU and Article 42 of the Charter must be interpreted as meaning that they do not confer on the Council 'any discretion' to refuse access to documents drawn up in the context of a legislative procedure, that that institution was required to comply 'directly' with its obligations under the Treaties and that, therefore, that institution had, in the present case, given an excessively broad interpretation of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001. He also claimed that there was 'legal tension' between the latter provision and the FEU Treaty and the Charter.

28 In the reply, the applicant merely develops that part of his argument further, in response to the arguments put forward by the Council in the defence. He submits, inter alia, that Article 4(3) of Regulation No 1049/2001 'can no longer apply' to legislative documents, since Article 15(2) TFEU 'directly' imposes an obligation of transparency on the EU legislature as regards the legislative process.

29 It follows that, in the reply, the applicant merely amplified, at most, a plea in law set out in the application, which must be allowed by the EU judicature.

30 Moreover, contrary to the Council's contention, the applicant does not raise any plea of illegality in respect of the first subparagraph of Article 4(3) of Regulation No 1049/2001, as he confirmed moreover at the hearing. By his line of argument, the applicant does not consider that the first subparagraph of Article 4(3) of Regulation No 1049/2001 is unlawful as such, because it is contrary to the FEU Treaty and to the Charter, but that that provision must be interpreted in the light of the FEU Treaty and the Charter as meaning that it does not apply to legislative documents, while remaining fully applicable to other types of document.

31 As to the remainder, it must be stated that, in accordance with Article 82 of the Rules of Procedure, a copy of the application and of the defence was sent to the Parliament and the Commission to enable them to assess whether the inapplicability of one of their acts was invoked under Article 277 TFEU. Since the applicant's line of argument was already clearly set out in the application, it must be held that the Parliament and the Commission decided not to intervene in the

present case in full knowledge of the facts. Therefore, there is no need to grant the Council's request for the adoption of a measure of organisation of procedure in that regard.

32 Accordingly, the plea of inadmissibility and the Council's request for the adoption of a measure of organisation of procedure must be rejected.

– *Substance*

33 Under the first subparagraph of Article 4(3) of Regulation No 1049/2001, access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, is to be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

34 As noted in paragraphs 21 and 22 above, the applicant submits, in essence, that the first subparagraph of Article 4(3) of Regulation No 1049/2001 cannot be applied in order to refuse access to documents exchanged within the Council's working groups in the context of a legislative procedure following the entry into force of the FEU Treaty and the Charter.

35 In that regard, it should be noted that the Council does not dispute the legislative nature of the documents at issue.

36 In that context, it must be pointed out that primary EU law establishes a close relationship that, in principle, exists between legislative procedures and the principles of openness and transparency (judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 77).

37 It is precisely openness in the legislative process that contributes to conferring greater legitimacy on the institutions in the eyes of Union citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole (see, to that effect, judgment of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 59).

38 The principles of publicity and transparency are therefore inherent in the legislative procedures of the European Union (judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 81).

39 However, that does not mean that EU primary law provides for an unconditional right of access to legislative documents.

40 In that regard, it must be borne in mind that Article 42 of the Charter states that 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.

41 The Explanations relating to the Charter, published in the *Official Journal of the European Union* of 14 December 2007 (OJ 2007 C 303, p. 17), to which due regard must be given by the Courts of the European Union when interpreting the Charter (see fifth recital of the preamble to the Charter), state as follows:

‘The right guaranteed in [Article 42] has been taken over from Article 255 of the EC Treaty, on the basis of which Regulation … No 1049/2001 has subsequently been adopted. The European Convention has extended this right to documents of institutions, bodies and agencies generally, regardless of their form (see Article 15(3) of the Treaty on the Functioning of the European Union). In accordance with Article 52(2) of the Charter, the right of access to documents is exercised under the conditions and within the limits for which provision is made in Article 15(3) of the [FEU] Treaty’.

42 It follows that the right of access to documents, enshrined in Article 42 of the Charter, is exercised ‘under the conditions and within the limits for which provision is made in Article 15(3)’, TFEU.

43 That interpretation is, moreover, consistent with Article 52(2) of the Charter, according to which rights recognised by the Charter for which provision is made in the Treaties are to be exercised under the conditions and within the limits defined by those Treaties.

44 Under the first subparagraph of Article 15(3) TFEU, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union’s institutions, bodies, offices and agencies, whatever their medium, ‘subject to the principles and the conditions to be defined in accordance with this paragraph’. The second subparagraph of that paragraph states that, ‘general principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure’.

45 The fifth subparagraph of Article 15(3) TFEU states that the Parliament and the Council are to ensure publication of the documents relating to the legislative procedures ‘under the terms laid down by the regulations referred to in the second subparagraph’ of that paragraph. Although it thus highlights the principle that legislative documents must be published, that provision does not provide that those documents must be made public in all cases and without exception, as evidenced by the reference to the ‘terms’ which the regulations may lay down for that purpose.

46 It follows that the right of access to documents of the institutions, including legislative documents, of Union citizens and any person residing or having its registered office in the territory of the European Union, is exercised in accordance with the general principles, limits and terms determined by means of regulations. Article 15(3) TFEU does not exclude legislative documents from its scope.

47 Consequently, the provisions of the FEU Treaty and of the Charter governing the right of access to documents of the institutions, bodies, offices and agencies of the Union provide that the exercise of that right may be subject to limits and conditions laid down by regulations, including as regards access to legislative documents.

48 That conclusion is not called into question by the arguments put forward by the applicant.

49 First, the applicant’s argument that Regulation No 1049/2001 has, in a sense, become obsolete because it was adopted on the basis of the EC Treaty and therefore does not take account of the amendments made by the FEU Treaty and by the Charter cannot succeed. As noted in paragraph 41 above, the explanations relating to the Charter state that the right guaranteed in Article 42 ‘has been taken over from Article 255 of the EC Treaty, on the basis of which [that regulation] has subsequently been adopted’. That clarification thus refers to the continuity which

exists in this area between the EC Treaty and the FEU Treaty and to the continuing relevance of that regulation following the entry into force of the FEU Treaty and the Charter. If the authors of the Charter had wished to govern the right of access to documents in a way that was substantially different from the regime in force under the EC Treaty, they would have indicated this in the explanations relating to that treaty.

50 Second, the applicant submits that the second subparagraph of Article 15(3) TFEU must be interpreted as meaning that the 'limits' to the right of access to documents referred to in that provision are intended to apply to other types of exception, such as those provided for in Article 4(1) and (2) of Regulation No 1049/2001, but not for the purposes of protecting the decision-making process within the meaning of the first subparagraph of Article 4(3) of that regulation.

51 However, the second subparagraph of Article 15(3) TFEU refers to 'limits on grounds of public or private interest governing [the] right of access to documents', without any further clarification or distinction being made as to the nature of those limits. Therefore, 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 legislative documents may be refused on the ground that their disclosure would seriously undermine the decision-making process of the institution in question, within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001.

52 Third, the applicant relies, in support of his argument, on Article 15(2) TFEU. Under that provision, 'the European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.'

53 It follows from the word 'meet' that Article 15(2) TFEU lays down the principle of publication of legislative debates during the sessions of the Parliament and the Council. However, that provision does not concern the right of access to documents or the limits and conditions for the exercise of that right, which are governed by Article 15(3) TFEU and Article 42 of the Charter.

54 The legislative context of the right of access to documents supports the conclusion set out in paragraph 47 above.

55 It should be recalled that, under Article 1 TEU, that treaty 'marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen'. Article 10(3) TEU provides that every citizen is to have the right to participate in the democratic life of the Union and that decisions are to be taken as openly and as closely as possible to the citizen. Similarly, Article 15(1) TFEU states that 'in order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible'.

56 All of those provisions confirm that the principle of openness, although of fundamental importance to the EU legal order, is not absolute.

57 Lastly, the EU judicature has already had occasion to state that it remains open to the EU institutions to refuse, on the basis of the first subparagraph of Article 4(3) of Regulation No 1049/2001, to grant access to certain documents of a legislative nature in duly justified cases (judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 112).

58 Similarly, in its judgment of 17 October 2013, *Council* v *Access Info Europe* (C-280/11 P, EU:C:2013:671, paragraphs 36 to 40 and 62), the Court of Justice held, in essence, that the first subparagraph of Article 4(3) of Regulation No 1049/2001 was intended to apply to legislative documents and that, when applying that provision, the General Court had to take account of the balance between the principle of transparency and the preservation of the effectiveness of the Council's decision-making process.

59 As regards the applicant's argument that the case-law relating to the first subparagraph of Article 4(3) of Regulation No 1049/2001 was based on the EC Treaty and was therefore rendered redundant by the FEU Treaty, suffice it to note that the judgment referred to in paragraph 57 above was delivered in relation to a decision taken well after the entry into force of the FEU Treaty.

60 Lastly, although the applicant also refers to Article 41 of the Charter, that provision is irrelevant to the outcome of the present dispute, since it concerns the right of every person to have access 'to his or her file'. However, it is common ground that the documents at issue do not specifically concern the applicant.

61 To conclude, while it is true that access to legislative documents must be as wide as possible, the fact remains that the provisions of the Treaties and of the Charter relied on by the applicant cannot be interpreted as precluding, as a matter of principle, access to such documents from being refused on the ground that their disclosure would seriously undermine the institution in question's decision-making process, within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001.

62 In the light of the foregoing, the first part of the first plea must be rejected as unfounded.

*The application to the present case of the first subparagraph of Article 4(3) of Regulation No 1049/2001*

63 The applicant, supported by all the interveners, submits, in essence, that the Council has not demonstrated that disclosure of the documents at issue would specifically and actually undermine its decision-making process and that the risk of such undermining was reasonably foreseeable and not purely hypothetical.

64 The Council disputes the applicant's arguments, reproducing, in essence, the reasons given in the contested decision.

65 In that regard, it should be recalled that, in accordance with recital 1 of Regulation No 1049/2001, that regulation reflects the wish to create a Union in which decisions are taken as openly as possible and as closely as possible to the citizen. As is stated in recital 2 of that regulation, the right of public access to the documents of the institutions is connected with the democratic nature of those institutions.

66 To that end, the purpose of Regulation No 1049/2001, as indicated in recital 4 and Article 1 thereof, is to give the public a right of access that is as wide as possible (see judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 58 and the case-law cited).

67 That right is nonetheless subject to certain limitations based on grounds of public or private interest. More specifically, and in accordance with recital 11 of Regulation No 1049/2001, Article 4 of the regulation lays down a series of exceptions authorising the institutions to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by

that provision (see judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 59 and the case-law cited).

68 Since such exceptions derogate from the principle that the public should have the widest possible access to the documents, they must be interpreted and applied strictly (see judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 61 and the case-law cited).

69 Where an EU institution, body, office or agency to which a request for access to a document has been made decides to refuse to grant that request on the basis of one of the exceptions laid down in Article 4 of Regulation No 1049/2001, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by that exception, and the risk of that undermining must be reasonably foreseeable and not purely hypothetical (judgments of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 51, and of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraphs 63 to 65).

70 According to the case-law, the decision-making process is 'seriously' undermined, within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001 where, inter alia, the disclosure of the documents in question has a substantial impact on the decision-making process. The assessment of that serious nature depends on all of the circumstances of the case including, inter alia, the negative effects on the decision-making process relied on by the institution as regards disclosure of the documents in question (judgments of 18 December 2008, *Muñiz* v *Commission*, T-144/05, not published, EU:T:2008:596, paragraph 75; of 7 June 2011, *Toland* v *Parliament*, T-471/08, EU:T:2011:252, paragraph 71; and of 9 September 2014, *MasterCard and Others* v *Commission*, T-516/11, not published, EU:T:2014:759, paragraph 62).

71 In the present case, the documents at issue are documents exchanged within the Council's 'Company Law' working group. In particular, documents WK 5230/17, of 8 May 2017, WK 10931/17, of 6 October 2017, WK 12197/17, of 27 October 2017 and WK 12197/17 REV1, of 18 July 2018, contain specific textual comments and amendments proposed by the delegations of the Member States concerning the legislative proposal in question as a whole, in the form of summary tables. Documents WK 14969/17, of 19 December 2017, and WK 14969/17 REV 1, of 8 January 2018, contain notes of the Presidency of the Council addressed to the working group in question, in which the Presidency noted, inter alia, cross-referencing errors in the legislative proposal, proposed amendments designed to clarify the wording of a provision and put forward a point which had yet to be discussed, namely that of finding a more appropriate drafting for certain provisions in order to avoid the risk of circumvention of the application of the directive for certain undertakings. Document WK 6662/18, of 1 June 2018, contains an invitation from the Presidency to a meeting of the working group aimed at continuing work on the legislative proposal in question, which states that delegations are invited to comment inter alia on the proposals contained in the previous documents.

72 In the contested decision, the Council justified its refusal of access to the documents at issue on a number of grounds.

73 First, in paragraph 9 of the contested decision, the Council stated that the subject of the tax transparency of multinational undertakings was 'highly sensitive' from a political point of view.

74 In that regard, it is apparent from the full version of the documents at issue, now disclosed, that they contain proposals and amendments to legislative texts which form part of the normal legislative process. However, the Council does not identify, either in the contested decision or

before the Court, any concrete and specific aspect of those documents of a particularly sensitive nature.

75 Moreover, it should be noted, as the Council itself points out in the contested decision, that, in its conclusions of 18 December 2014, the European Council considered that there was ‘an urgent need to advance efforts in the fight against tax avoidance and aggressive tax planning, both at the global and EU levels’ and that the Parliament had adopted a resolution on 16 December 2015 with recommendations to the Commission on bringing transparency, coordination and convergence to corporate tax policies in the European Union (2015/2010 (INL)). Those documents show the great importance for European citizens of the subject of the tax transparency of multinational undertakings, which militates in favour of the widest possible access to the relevant legislative documents, and not in favour of restricted access. Access to all the information forming the basis for EU legislative action is a precondition for the effective exercise by Union citizens of their democratic rights as recognised, in particular, in Article 10(3) TEU (see, to that effect, judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 92).

76 Accordingly, whilst relating to a matter of some importance, possibly characterised by both political and legal difficulty, there is nothing in the contested decision to suggest that the content of the documents at issue is particularly sensitive to the point of jeopardising a fundamental interest of the European Union or of the Member States if disclosed (see, to that effect, judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 97 and the case-law cited). Moreover, before the Court, the Council also does not specify the specific aspects of the content of those documents which are particularly sensitive.

77 Second, in paragraph 21 of the contested decision, the Council submits that the legislative proposal at issue was the subject of ongoing discussions and that the documents at issue were not exhaustive and did not necessarily reflect the definitive positions of the Member States.

78 In that regard, it should be borne in mind that the preliminary nature of the discussions relating to the legislative proposal in question does not justify, as such, the application of the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001. That provision makes no distinction according to the state of progress of the discussions. It envisages in general the documents relating to a question where a ‘decision has not been taken’ by the institution concerned, by contrast with the second subparagraph of Article 4(3), which envisages the situation where a decision has been taken by the institution concerned. In the present case, the preliminary nature of the ongoing discussions and the fact that no agreement or compromise has been reached within the Council on those proposals do not therefore establish that the decision-making process has been seriously undermined (see, to that effect, judgments of 22 March 2011, *Access Info Europe* v *Council*, T-233/09, EU:T:2011:105, paragraphs 75 and 76, and of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 100).

79 Similarly, according to the case-law, a proposal is, by its nature, intended to be discussed and is not liable to remain unchanged following such discussion. Public opinion is perfectly capable of understanding that the author of a proposal is likely to amend its content subsequently. For precisely the same reasons, an applicant for access to legislative documents in the context of an ongoing procedure will be fully aware of the preliminary character of the information contained therein and of the fact that it is intended to be amended throughout the discussions in the course of the preparatory work of the Council working group until agreement on the whole text is reached (see, to that effect, judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 102 and the case-law cited). This is particularly evident from the objective pursued in the present case by the request for access, in that the applicant sought to know 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 (see paragraph 14 above).

80 Third, the Council noted, in paragraph 22 of the contested decision, that the elements set out in the documents at issue were the result of 'difficult negotiations' between the Member States and reflected the difficulties which it still had to resolve before reaching an agreement.

81 However, in the contested decision, the Council does not specify which concrete and specific 'elements' of the documents at issue would have been sources of difficulties such that their disclosure could have seriously undermined its decision-making process. Moreover, the reason that some of the proposed amendments reflected in the documents at issue had yet to be discussed before an agreement was reached is too general and capable of applying to any document of a legislative nature drawn up or exchanged within the framework of a Council working group.

82 Fourth, in paragraph 23 of the contested decision, the Council stated that the documents at issue contained free and frank discussions between Member States, the disclosure of which at that stage of the 'negotiations' would damage the mutual confidence which governs the work of Council working groups.

83 However, the Council has not produced any tangible evidence to show that, as regards the legislative procedure at issue, access to the documents at issue would have harmed the Member States' cooperation in good faith. The risk invoked thus appears to be hypothetical. Moreover, since 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 the sincere cooperation which the Member States and the institutions are required to exercise among themselves pursuant to Article 4(3) TEU (see, by analogy, judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraphs 103 and 104).

84 Although, by the ground relied on in paragraph 23 of the contested decision, the Council alluded to a risk of public pressure, as it submits in the defence, it should be recalled that, in a system based on the principle of democratic legitimacy, co-legislators must be answerable for their actions to the public. 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 (judgment of 22 March 2011, *Access Info Europe* v *Council*, T-233/09, EU:T:2011:105, paragraph 69). Furthermore, Article 10(3) TEU states that every citizen is to have the right to participate in the democratic life of the Union and that decisions are to be taken as openly and as closely as possible to the citizen. Thus, the expression of public opinion with regard to a particular legislative proposal forms an integral part of the exercise of Union citizens' democratic rights (judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 98).

85 Although it has been recognised in the case-law that the risk of external pressure can constitute a legitimate ground for restricting access to documents related to the decision-making process, the reality of such external pressure must, however, be established with certainty, and evidence must be adduced to show that there is a reasonably foreseeable risk that the decision to be taken would be substantially affected owing to that external pressure. There is no tangible evidence in the case file establishing, in the event of disclosure of the documents at issue, the reality of such external pressure. Therefore, nothing in the case file before the Court suggests that, as regards the legislative procedure in question, the Council could reasonably expect there to be a reaction beyond

what could be expected from the public by any member of a legislative body who proposes an amendment to draft legislation (see, to that effect, judgments of 22 March 2011, *Access Info Europe* v *Council*, T-233/09, EU:T:2011:105, paragraph 74, and of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 99).

86 Fifth, in paragraphs 23 and 24 of the contested decision, the Council explained that disclosure of the documents at issue would seriously undermine the effectiveness of its decision-making process and would reduce the chances of reaching an agreement.

87 However, the ground relied on in paragraphs 23 and 24 of the contested decision is still too general, in that the Council does not explain how access to the documents at issue would specifically, effectively and in a non-hypothetical manner seriously undermine the possibility of reaching an agreement on the legislative proposal in question.

88 Sixth, in paragraphs 25 and 27 of the contested decision, the Council stated that the legitimate public interest justifying disclosure of the documents at issue did not outweigh the equally legitimate need to protect the decision-making process.

89 By the ground relied on in paragraphs 25 and 27 of the contested decision, the Council appears to confuse, as the applicant submits, two separate stages in the application of the first subparagraph of Article 4(3) of Regulation No 1049/2001. It is only if the institution concerned considers that disclosure of a document would specifically and actually undermine the decision-making process in question that it is then required to ascertain whether an overriding public interest nevertheless justifies disclosure of the document concerned. In other words, it is in that context that it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 of that regulation, from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (see, by analogy, judgment of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P et C-52/05 P, EU:C:2008:374, paragraph 45).

90 Seventh, in paragraph 26 of the contested decision, the Council stated that the refusal to disclose a limited number of documents covered by the applicant's request does not amount to denying citizens the possibility of being informed of the decision-making process in question.

91 In that regard, as the applicant has acknowledged and as has, moreover, the Council, the ground relied on in paragraph 26 of the contested decision is not a relevant criterion for assessing whether the conditions for refusal under the first subparagraph of Article 4(3) of Regulation No 1049/2001 are met. The mere fact that access to certain documents relating to the same legislative procedure has been granted cannot justify the refusal of access to other documents.

92 Eighth, the Council submits, in paragraph 28 of the contested decision, that, 'following its specific assessment of the content and context' of the documents at issue, it concluded that there were objective reasons demonstrating that there was a reasonably foreseeable risk that disclosure of those documents would seriously undermine the decision-making process in question.

93 However, that alleged 'specific assessment of the content and context' of the documents at issue is not apparent from the contested decision, with the result that the risk that the decision-making process would be seriously undermined is not substantiated by any tangible, concrete and specific evidence.

94 Lastly, in its written pleadings before the Court, the Council adds that it is necessary to distinguish between documents drawn up in the context of trilogues which were the subject of the judgment of 22 March 2018, *De Capitani* v *Parliament* (T-540/15, EU:T:2018:167), and the documents at issue. In its view, documents drawn up in the context of trilogues are involved at a stage of the legislative procedure in which it has already adopted its position on a legislative proposal, whereas the documents at issue relate to discussions within working groups between officials of the delegations of the Member States acting at 'technical level'. In the present case, the documents at issue concern preparatory work and have no political implications so long as they are not submitted, as such, to the Committee of Permanent Representatives (Coreper), or subsequently to one of the ministerial formations of the Council.

95 Although, by that argument, the Council seeks to justify less extensive access to documents drawn up by its working groups because of their allegedly 'technical' nature, first of all, it must be pointed out that whether or not a document is 'technical' is not a relevant criterion for the purposes of the application of the first subparagraph of Article 4(3) of Regulation No 1049/2001. Next, and in any event, the actual content of the documents at issue shows that they contain normative proposals for various legislative texts and that they therefore form part of the normal legislative process. The documents at issue are therefore in no way 'technical'. Lastly, 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 those working groups are not authorised to adopt the definitive position of that institution does not mean, however, that their work does not form part of the normal legislative process, which, moreover, the Council does not dispute, or that the documents that they draw up are 'technical' in nature.

96 In the light of all the foregoing considerations, it must be concluded 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, within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001.

97 Accordingly, the second part of the first plea in law must be upheld and, consequently, the contested decision must be annulled, without it being necessary to examine the other pleas and heads of claim put forward in support of the action.

**Costs**

98 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has been unsuccessful, it must be ordered to bear its own costs and to pay those of the applicant, in accordance with the form of order sought by him.

99 In accordance with Article 138(1) of the Rules of Procedure, the Kingdom of Belgium, the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden are to bear their own costs.

On those grounds,

THE GENERAL COURT (Tenth Chamber, Extended Composition)

hereby:

1. **Annuls Decision SGS 21/000067 of the Council of the European Union of 14 January 2021;**

2. **Orders the Council to bear its own costs and to pay those incurred by Mr Emilio De Capitani;**

3. **Orders the Kingdom of Belgium, the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden to bear their own costs.**

Kornezov Buttigieg Kowalik-Bańczyk
Hesse Petrlík

Delivered in open court in Luxembourg on 25 January 2023.

E. Coulon S. Papasavvas
Registrar President

* Language of the case: English.