



Background

The CJEU decision

ETC Comment

General Court clarifies conditions of access to documents prepared in the Council's working groups

Access to documents – Documents concerning an ongoing legislative procedure – Council working groups

On January 25, 2023, the General Court of the European Union (General Court or the Court) gave its decision in the case [T-163/21](#) (De Capitani v Council). The case concerns access to documents prepared by the Council of the EU within its working groups related to the EU Public Country-by-Country Reporting (CbC) Directive file¹.

The General Court held that the Council should have granted access to the documents prepared in its working groups throughout the discussions on the EU Public CbCR file.

Background

The EU Public CbCR Directive stemmed from the European Commissions (EC)' efforts to increase tax transparency and fight tax avoidance and requires multinational groups operating in the EU and that exceed certain size thresholds to publish certain information on their tax affairs. The proposal was published by the EC in April 2016 and was subject to lengthy negotiations among Member States, as well as between the Council of the EU and the European Parliament. In the Council, the proposal was initially debated at working group level and a common position was adopted in March 2021. Subsequently, following interinstitutional negotiations between the Council and the Parliament, mediated by the European Commission (so called "trilogue"), in June 2021 a provisional political agreement was reached on a compromise text.

On October 15, 2020, the plaintiff requested access to certain documents exchanged within the Council's working group in relation to the EU Public CbCR file. The legislative process was still in progress at EU level at the time the request was made. On November 10, 2020, the request was partly refused by the Council on the grounds that disclosing certain documents would seriously undermine the Council's decision-making

¹ Legislative procedure 2016/0107 (COD) concerning Directive (EU) 2021/2101 of the European Parliament and of the Council of November 24, 2021, amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches

process, within the meaning of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents.

Regulation 1049/2001 prescribes that EU institutions are entitled to refuse access to certain documents if their disclosure would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure. Following a second request submitted by the plaintiff for access to the documents at issue, the Council adopted a decision reconfirming its refusal (the Decision). On January 14, 2021, the applicant sought the annulment of the Decision before the General Court.

The Council did release to the plaintiff the disputed documents on June 14, 2021, after political agreement on the compromise text for the EU Public CbCR Directive was reached.

The General Court's decision

The General Court confirmed that documents drawn up within the Council's working groups are governed by the principle of publicity and transparency of the legislative procedure, deriving from the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the EU (the Charter). The Court rejected the plaintiff's plea that following the entry into force of the TFEU and of the Charter, the exception related to the protection of the decision-making process is no longer applicable to legislative documents.

The Court recalled its case-law based on which the principles of publicity and transparency are inherent in the legislative procedures of the European Union. Nevertheless, in the Court's view, this does not imply that EU primary law provides an unconditional right of access to legislative documents. The Court then observed that the disclosure exception under Regulation 1049/2001 remains applicable following the entry into force of the TFEU and the Charter. The Court concluded that, whilst access to documents must be as wide as possible (as established by settled case-law), EU institutions are allowed to refuse access on the ground that such disclosure would seriously undermine their decision-making process, within the meaning of Regulation 1049/2001.

The General Court continued by analyzing whether the Council demonstrated that disclosing the documents at issue falls under this exception. The Court noted that – under settled case-law, EU institutions must explain how access to such documents could specifically, effectively and in a non-hypothetical manner seriously undermine the legislative process concerned.

The Court rejected the Council's first claim according to which tax transparency of multinational groups represented a highly sensitive topic from a political perspective. In this respect, the Court noted that the documents at issue contain proposals and amendments to legislative texts that form part of the normal legislative process. In this context, the Court emphasized that the fact that 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". Moreover, on December 16, 2015, the Parliament adopted a resolution recommending the Commission to bring transparency, coordination and convergence to corporate tax policies in the EU². The Court noted that these documents reflect the great importance of tax transparency of multinational groups for EU citizens. The court also recalled its case-law based on which access to information forming the basis of EU legislative action is a precondition for the effective exercise by EU citizens of their democratic rights.

Furthermore, the Court dismissed the Council's claim that the Public CbCR Directive file 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. The Court argued that the exception prescribed by Regulation

² European Parliament resolution on "Bringing transparency, coordination and convergence to corporate tax policies in the Union" - [2015/2010\(INL\)](#)

1049/2001 does not distinguish according to the state of progress of the discussions. In this context, the Court noted that a proposal is, by its nature, intended to be discussed and is not liable to remain unchanged following such discussions. In the Court's view, public opinion is "perfectly capable" of understanding that the author of a proposal is likely to amend its content subsequently.

Moreover, the Court observed that the Council did not specify which concrete and specific elements of the documents could trigger the risk of undermining its decision-making process. The Court also noted that the Council did not produce any tangible evidence demonstrating that such access would negatively influence the cooperation in good faith among Member States. The Court also rejected the Council's claim that disclosure would have led to a risk of public pressure. In this respect, the General Court observed that – in a system based on the principle of democratic legitimacy, co-legislators must be answerable for their actions to the public. Although the risk of external pressure has been recognized in settled case-law as a legitimate reason for restricting access to documents, the Court's view was that in the case under dispute there was nothing to suggest that the Council could reasonably expect external pressure and a reaction beyond what any member of a legislative body who proposes an amendment to draft legislation could reasonably expect from the public.

Finally, the Court noted that the technical nature of the documents is not a relevant criterion for the purposes of the application of the exception based on protection of the decision-making process. The Court continued by analyzing that the actual content of the documents in question demonstrates that they contain normative proposals for various legislative texts and thus are part of the normal legislative process.

Based on the above, the Court concluded that none of the grounds relied on by the Council in the Decision supports the conclusion that disclosure of the relevant documents would specifically, effectively, and non-hypothetically seriously undermine the legislative process, as defined under Regulation 1049/2001. As a result, the General Court annulled the Council's Decision.

ETC Comment

Access to legislative documents prepared by the EU institutions in the course of the legislative process has been a point of contention in the EU for some time. This is not the first time a Council decision not to disclose certain documents is criticized and challenged, with several complaints having been brought before the General Court or the EU Ombudsman.

The need for transparency in the EU legislative process is also supported by several Member States. As an example, in the context of a [complaint](#) against the refusal to provide full public access to documents related to trilogue negotiations on motor vehicle emissions, Sweden and the Netherlands signed a [joint statement](#) noting their disagreement with the Council's position. Their statement mentioned settled case-law on the topic and highlighted the restrictive interpretation the Court gave to the exception based on the protection of the decision-making process.

As mentioned in the Court's [press release](#), the novelty of the present case is represented by the first-time examination of the conditions for access to documents drawn up by the Council's working groups in the context of a legislative procedure. It is worth noting that the plaintiff was supported in his efforts to challenge the Council's refusal to disclose documents by four Member States (Belgium, Finland, the Netherlands, and Sweden).

In its decision, the General Court did not dispute the plaintiff's objective of understanding the positions expressed by the Member States within the Council, with the purpose of informing the public and of generating a debate *before* that institution established its negotiating position. Instead, the Court noted that by disclosing the information *after* the Council's position had been adopted and an interinstitutional agreement had been reached, the plaintiff was deprived of the possibility to achieve his objective. Moreover, the Court dismissed the Council's plea that public pressure would compromise its decision-making process and highlighted the

importance of EU citizens having access to detailed information throughout the process (including the proposal stage).

It will be interesting to see whether this ruling will trigger a change in the Council's position and generate more transparency in respect of other initiatives currently pending before this institution. Typically, the only institution that obtains input from stakeholders formally, through public consultations, is the European Commission. However, this step is related to the EC's proposals, which can change significantly following discussions between Member State in the Council working groups.

The Council can appeal the General Court's decision to the CJEU. It remains to be seen whether the Council exercises this right and, if so, whether the CJEU will confirm the General Court's reasoning.

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