



ОБЩ СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ  
TRIBUNAL GENERAL DE LA UNIÓN EUROPEA  
TRIBUNÁL EVROPSKÉ UNIE  
DEN EUROPÆISKE UNIONS RET  
GERICHT DER EUROPÄISCHEN UNION  
EUROOPA LIIDU ÜLDKOHUS  
ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ  
GENERAL COURT OF THE EUROPEAN UNION  
TRIBUNAL DE L'UNION EUROPÉENNE  
CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH  
OPĆI SUD EUROPSKE UNIJE  
TRIBUNALE DELL'UNIONE EUROPEA

EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA  
EUROPOS SĄJUNGOS BENDRASIS TEISMAS  
AZ EURÓPAI UNIÓ TÖRVÉNYSZÉKE  
IL-QORTI ĠENERALI TAL-UNJONI EWROPEA  
GERECHT VAN DE EUROPESE UNIE  
SĄD UNII EUROPEJSKIEJ  
TRIBUNAL GERAL DA UNIÃO EUROPEIA  
TRIBUNALUL UNIUNII EUROPENE  
VŠEOBECNÝ SÚD EURÓPSKEJ ÚNIE  
SPLOŠNO SODIŠČE EVROPSKE UNIJE  
EUROOPAN UNIONIN YLEINEN TUOMIOISTUIN  
EUROPEISKA UNIONENS TRIBUNAL

## REPORT FOR THE HEARING \*

(Access to documents – Regulation (EC) No 1049/2001 – Working documents from the General Secretariat of the Council concerning two ongoing legislative proposals at the time of the request – Refusal to grant access – Implicit or continued explicit decision not to publish in the Council's register the documents to which access has been granted – Action for annulment – Admissibility – Exception relating to protection of the decision-making process)

In Case T-590/23,

**Emilio De Capitani**, residing in Brussels (Belgium), represented by O. Brouwer, T. van Helfteren and N. Piga, lawyers,

applicant,

supported by

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

by

**Republic of Finland**, represented by H. Leppo and M. Pere, acting as Agents,

and by

**Kingdom of Sweden**, represented by C. Meyer-Seitz, acting as Agent,

interveners,

v

**Council of the European Union**, represented by J. Rurarz, X. Chamodraka and L. Atzeni, acting as Agents,

\* Language of the case: English.

defendant,

supported by

**French Republic**, represented by B. Fodda, B. Travard, S. Royon and B. Herbaut,  
acting as Agents,

intervener,

- 1 By his action based on Article 263 TFEU, the applicant, Emilio De Capitani, seeks the annulment, first, of Decision SGS 23/002579 of the Council of the European Union of 14 July 2023 in so far as it refused access, on the basis of the exception relating to the protection of the decision-making process, to two documents drawn up by the Secretary-General of the Council in the context of two legislative procedures pending at the time of the application [2016/0132 (COD) and 2020/0279 (COD)] ('the contested decision') and, second, of the implicit or continued explicit decision not to directly publish in the Council's own register legislative documents to which access has been granted following a request 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).

### **Background to the dispute**

- 2 On 6 March 2023, the applicant submitted, on the basis of Regulation (EC) No 1049/2001, an application for access to, inter alia, certain Council working documents bearing the code 'WK' ('WK documents'). In particular, the applicant sought access to 33 WK documents listed in its application (the 'initial application').
- 3 By three separate communications, dated 27 March, 20 April and 24 April 2023, the General Secretariat of the Council replied to the applicant's request by providing full access to 27 documents and partial access to 3 WK documents. However, the Council completely refused access to documents WK 1505/2023 and WK 1513/2023 ('the documents at issue') and to document WK 768/2023 on the ground, in essence, that their disclosure would seriously undermine its decision-making process.
- 4 On 14 May 2023, the applicant made a confirmatory application under Article 7(2) of Regulation No 1049/2001, seeking access only to the documents at issue (the 'confirmatory application').
- 5 On 14 July 2023, the Council adopted the contested decision, by which it confirmed the 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 in so far as it refuses access to the documents at issue;
  - annul the implicit or continued explicit decision not to directly publish in the Council's register legislative documents to which access has been granted following a request for access under Regulation No 1049/2001, in accordance with Article 2 and Article 12 of that Regulation and the principle of legislative transparency laid down in Article 15(2) TFEU;
  - order the Council to pay the costs.
- 7 The Council, supported by the French Republic, contends that the Court should:
  - dismiss the second form of order sought as inadmissible;
  - dismiss the action as unfounded as regards the remainder or in its entirety, in the event of the second form of order sought being deemed to be admissible;
  - order the applicant to pay the costs.
- 8 The Kingdom of Belgium and the Republic of Finland, claim that the Court should:
  - annul the contested decision in so far as it refuses access to the documents at issue;
  - order the Council to pay the costs.
- 9 The Kingdom of Sweden states, in essence, that it supports the applicant's first form of order sought.

### **Arguments of the parties**

#### ***Admissibility of the second form of order sought***

- 10 The Council, supported by the French Republic, considers that the second form of order sought is inadmissible.
- 11 The Council submits that that form of order sought does not constitute an action for annulment of an act under Article 263 TFEU, but rather a request for a declaratory judgment or, in essence, an action for failure to act on the basis of Article 265 TFEU. However, the applicant does not have standing to bring an action for failure to act.



- 12 Assuming that the second form of order sought is to be regarded as having been brought on the basis of Article 263 TFEU, the Council and the French Republic submit that the issue of publication of the WK documents in the public register is not dealt with in the contested decision, either explicitly or implicitly. That decision concerns only the refusal of access to the documents at issue and does not relate to the WK documents to which the applicant was granted access in response to the initial application. The applicant did not indicate any other act that would concern the alleged decision of the Council not to directly publish those documents, or any other documents, in its register. It thus follows that a challengeable act is missing.
- 13 In any case, the Council and the French Republic point out that, in order to seek the annulment of a decision under the fourth paragraph of Article 263 TFEU, the applicant must demonstrate that he is directly concerned by the non-publication of the relevant documents in the public register. Furthermore, in accordance with the case-law, the applicant must have a personal interest in the annulment of the contested measure and an action cannot be brought in the general interest of third parties or of legality.
- 14 The Council points out that Regulation No 1049/2001 does not directly link the obligations under Articles 11 and 12 thereof with the right of access to documents under Article 2(1) of that Regulation. Therefore, in accordance with the case-law, compliance with the duty to register documents cannot be enforced by means of an application for access to documents. The applicant cannot therefore claim an interest in having any document published in the register, since such publication is governed by provisions which are not related to specific applications for access.
- 15 Moreover, the Council points out that the applicant has obtained full satisfaction in the present case, since the documents which he claims should have been included in the register were made available to him following the initial application. Once he had received those documents, the applicant lost any interest in having them included in the register and thus any direct concern in the second form of order sought.
- 16 The French Republic adds that, in order to justify his interest in bringing proceedings, the applicant cannot effectively argue that the documents should have been published so as not to discriminate against other EU citizens and institutions such as the Parliament.
- 17 In his reply, the applicant responds that he is not in any way seeking a declaratory judgment, nor addressing a failure to act within the meaning of Article 265 TFEU, since the Council's implicit and systematic decision to not disclose documents in the register is an intentional act and not a mere omission.
- 18 The applicant argues that, by refusing to publish the WK documents requested in the case at hand in its register, the Council has directly evidenced its systematic approach to adopt an implicit and/or continued explicit decision of non-



publication, in breach of Articles 2 and 12 of Regulation No 1049/2001 and of Article 15(2) TFEU.

- 19 According to the applicant, that implicit and/or continued explicit decision is inherently covered by the contested decision. The applicant states that the Council did grant access to certain documents referred to in the initial application. That is not, however, making those documents available to the public, as required by Regulation No 1049/2001 and Article 15(2) TFEU. The applicant has not obtained full satisfaction, since the contested decision is, from a legal perspective, partial and/or incomplete and infringes his rights to legislative transparency and democracy.
- 20 The applicant is of the opinion that a person requesting access to documents is entitled to publication and accessibility on the register based on Articles 11 and 12 of Regulation No 1049/2001 and, therefore, by virtue of a decision that grants access to documents. According to the applicant, requiring that person to challenge a supposed 'non-publication act' would mean that such a person has to demonstrate that he or she is directly and individually concerned. That would clearly be disproportionate and significantly impede upon the public's right of access to documents electronically on the register and the applicant's right to effective judicial review in relation to non-publication.
- 21 Finally, in his comments on the French Republic's statement in intervention, the applicant submits that the fact that he actually received certain documents should not deprive him of the right to challenge the Council's partial decision not to publish those documents in its public register.
- 22 On that basis, the applicant claims that the second form of order sought is admissible.

### ***Substance***

- 23 In support of the action, the applicant relies on four pleas in law.

*First plea in law, alleging an error of law in the interpretation and application of the first subparagraph of Article 4(3) of Regulation No 1049/2001, in that, in particular, the interpretation and application of that exception in the contested decision infringes the obligation of legislative transparency set out in Article 15(2) TFEU*

- 24 The first plea in law consists, in essence, of three parts: the first concerns the interpretation of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001 in the light of Article 15(2) TFEU and Article 16(8) TEU; the second concerns the refusal to grant access to the documents at issue pursuant to that exception; and the third concerns the Council's alleged practice, claimed to be reflected in the contested decision, of not

making the WK documents public, whether proactively in its register or upon request, in breach of Article 15(2) TFEU.

*Interpretation of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001 in the light of Article 15(2) TFEU and Article 16(8) TEU*

- 25 The applicant points out that Article 15(2) TFEU and Article 16(8) TEU have strengthened the right of EU citizens to be informed and to participate in the democratic life of the Union in that those provisions require the co-legislators to sit in public when deliberating and voting on a draft legislative act.
- 26 The applicant submits that Article 15(2) TFEU created a new regime of legislative transparency which overrides the exception relating to the protection of the decision-making process provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001, prior to the Treaty of Lisbon. A legal tension now exists between those two provisions. However, according to the applicant, primary law takes precedence over secondary law such as a provision in a regulation, much less a provision in internal Rules of Procedure, and mandates access to legislative documents because of the normative choice made in the Treaty of Lisbon for legislative transparency (Article 15(2) TFEU) and the democratic right of participation in the decision-making process of the EU (Article 10 TEU).
- 27 Accordingly, although the EU judicature has recognised that the principle of openness is not absolute, that does not allow the Council to invoke the decision-making process exception contained in the first subparagraph of Article 4(3) of Regulation No 1049/2001 in respect of legislative documents.
- 28 In its reply, the applicant adds that Article 15(3) TFEU on access to documents does not mention ‘legislative transparency’ of the Council, but, in keeping with the predominantly administrative subject of the right of access to documents, only of transparency in the proceedings. The applicant submits that transparency in the proceedings does not equate to legislative transparency, and the reference to ‘its documents’ does not relate to the legislative documents that belong to the joint legislative function of the Parliament and the Council, but rather to the internal Council documents unrelated to the legislative procedure.
- 29 The Council, supported by the French Republic, submits that the applicant’s line of argument according to which Article 15(2) TFEU takes precedence over the first subparagraph of Article 4(3) of Regulation No 1049/2001 has already been considered and rejected in Case T-163/21 *De Capitani v Council* (EU:T:2023:15).
- 30 For the sake of completeness, the Council reiterates its position in the case considered in the judgment of 25 January 2023, *De Capitani v Council* (T-163/21, EU:T:2023:15) and concludes that the applicant’s arguments should be rejected.



*The refusal to grant access to the documents at issue under the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001*

- 31 The applicant, supported by the Kingdom of Belgium, the Republic of Finland and the Kingdom of Sweden, considers that access to the documents at issue cannot be refused on the ground of protection of the Council's decision-making process.
- 32 First, the types of arguments invoked in the contested decision to refuse access to the documents at issue have already been rejected by the EU judicature.
- 33 Second, the Council does not, as required by the case-law, demonstrate why disclosure of the documents at issue would result in a specific, actual and reasonably foreseeable risk that access to those documents would seriously undermine its decision-making process.
- 34 The applicant submits that disclosure of the documents at issue would enable European citizens to understand the intent of the Council with regard to a highly pressing issue, that of migration, identified as one of the key priorities of the Commission and therefore highly impactful on the 2024 European elections. In addition, according to the applicant, the stalemate called by the Parliament due to the Council's failure to adopt a position on the amended proposal for the Eurodac Regulation as well as other legislative proposals related to migration, is the perfect illustration of how the absence of legislative transparency hinders the democratic process.
- 35 In its reply, the applicant adds that the documents at issue are not devoid of immediate political commitment, as the Council asserted before the General Court.
- 36 Lastly, the applicant points out that the arguments put forward by the French Republic before the General Court concerning the content and sensitivity of the documents at issue and the legislative procedures in question are considerably more detailed than the contested decision, which did not carefully assess the confirmatory application. In any event, the applicant considers that the arguments put forward by the French Republic did not justify the refusal of access to the documents at issue.
- 37 The Kingdom of Belgium adds that transparency in legislative matters has been strengthened in the Council through a new approach set out in a note, bearing the reference ST 9493/20, sent by the Presidency and the General Secretariat of the Council to the members of the Committee of Permanent Representatives (Coreper) on 9 July 2020, and entitled 'Strengthening legislative transparency' ('Note ST 9493'). The Kingdom of Belgium states that, after adopting that new approach, the Council took the decision, set out in Article 11(5) and (6) of its Decision of 1 December 2009 adopting its Rules of Procedure (OJ 2009 L 325, p. 36, the 'Council's Rules of Procedure'), to make new categories of documents connected to legislative procedures public from the outset. The Kingdom of Belgium therefore considers that relying on an exception to the right of access to

documents must be supported by even more robust reasoning where the document concerned has been issued in the context of a legislative procedure.

- 38 The Republic of Finland also points out that transparency is firmly rooted in the Treaties, referring to the provisions already relied on by the applicant and to Article 298(1) TFEU and Article 42 of the Charter of Fundamental Rights of the European Union. The Republic of Finland considers that the reasoning set out in the contested decision is too general and abstract and could easily be applied to a great many other pieces of draft legislation. With regard to Note ST 9493, the Republic of Finland states that it specifically concerns the proactive publication of legislative documents. That note was in no way intended to limit or otherwise affect public access to documents based on requests for access to documents, which is covered by comprehensive and well-established case-law.
- 39 The Kingdom of Sweden also refers to Article 42 of the Charter of Fundamental Rights and emphasises that the fact that the decision-making process surrounding the adoption of a legislative act is sensitive, as in the present case, is not sufficient to apply the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001. What matters is the content of a requested document.
- 40 The Council, supported by the French Republic, submits that, as established in the contested decision, disclosure of the documents at issue could, in a reasonably foreseeable and not merely hypothetical manner, seriously undermine the Council's decision-making process, which distinguishes the present case from that examined in the judgment of 25 January 2023 in Case T-163/21 *De Capitani v Council* (EU:T:2023:15).
- 41 The Council considers that there is a fundamental difference between, on the one hand, the exchanges at working party level and, on the other, the political position endorsed either at Coreper or Council level, allowing the launch of trilogues, which is always reflected in a public document. In that regard, the Council points out that a General Approach is always issued ab initio, in accordance with Article 11(5) of Annex II to its Rules of Procedure, and that the Council's initial negotiating mandate, when endorsed at Coreper level, is also published, as provided for in point 1(e) of the Annex to Note ST 9493/20.
- 42 The Council explains that the documents at issue consist of comments of officials and experts from Member State delegations intervening at a technical level, without political endorsement, which do not necessarily reflect the formal, crystallised position of the Member States in question on the legislative files and which were produced before the Council could formulate a very first political position. It is precisely the intent of 'the Council' with regard to a highly pressing issue which, according to the applicant, disclosure of the documents at issue would enable European citizens to understand.
- 43 The Council fully recognises that, in accordance with the case-law, the preliminary nature of the discussions does not suffice, in itself, to justify the



application of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001. However, in the Council's view, the actual assessment of a document may lead to the conclusion that the disclosure of such preliminary exchanges, given their specific content and the particular context of the decision-making process to which they pertain, would risk undermining the effectiveness of its decision-making process.

- 44 In the present case, the Council notes that the preliminary exchanges reflected in the documents at issue revealed difficulties that needed to be addressed before the Council could reach its initial position allowing the launch of trilogues. The Council points out that, as the Kingdom of Sweden acknowledged before the General Court, the documents at issue were drawn up in the context of acts that were difficult to negotiate. Accordingly, in the Council's view, the refusal to disclose was not based on general considerations, but on the specific and detailed examination of the content of the disputed documents, carried out in consultation with the Member States who made the comments contained therein. That is also shown by the fact that the Council has given access to several other documents concerning discussions at working party level, which were also referred to in the initial application.
- 45 The Council states that the publication of certain very early, preliminary comments made at technical level presents a reasonably foreseeable risk of impacting the mutual trust between the technical experts of the Member States and might render very difficult the position of the Member States in the legislative procedures concerned, since such preliminary comments could have set out concerns, suggestions or positions which were later changed by the Member States themselves, as a result of technical or political discussions or which are not in line with the final position of the Council. In its rejoinder, the latter explains that the brevity of the explanation provided in the contested decision is justified, in particular, by the need not to disclose the very information which the exception seeks to protect.
- 46 The French Republic states that the documents at issue contained elements of general positions on the Pact on Migration and Asylum proposed by the Commission on 23 September 2020. The proposal, which was of major political importance for the Union, comprised five closely related legislative acts. According to the French Republic, disclosure of the documents at issue could also weaken the Council's position in the negotiations concerning the other legislative acts.
- 47 The French Republic submits that the documents at issue were drawn up at a particularly sensitive stage in the negotiation of the legislative acts, that reaching an agreement within the Council and, a fortiori, between the Parliament and the Council required particularly delicate compromises and that disclosure of the documents at issue would certainly have threatened the achievement of a compromise in the trilogues. The French Republic emphasises that the requested documents list both the 'red lines' of certain Member States and the points on

which other Member States were flexible and that they thus reveal the fragmentation of the Member States' positions within the Council and the most delicate points of the compromise reached in the mandates for negotiations which the Parliament could have used to its advantage in the negotiations. More generally, the disclosure of those elements would run the risk of reducing the ability of certain Member States to express their views.

- 48 Furthermore, according to the French Republic, the documents at issue contain elements of a particularly sensitive nature. Thus, document WK 1513/2023 contains sensitive security elements concerning the limitations and issues associated with the operation of the Eurodac system as it exists.
- 49 Lastly, the French Republic claims that the information contained in the documents at issue might be used in a real and reasonably foreseeable way by actors hostile to European interests to try to prevent the successful conclusion of negotiations on the Pact on Migration and Asylum as a whole, or to undermine the political position of a Member State.

*The Council's alleged practice, claimed to be reflected in the contested decision, of not making WK documents public, whether proactively in its register or upon request*

- 50 The applicant claims that the Council continues, in a recurring manner, to rely on outdated arguments in response to requests for access to documents in order to apply a policy of systematic refusal. That practice amounts to a systemic misuse of the decision-making process exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001 which results in the creation of a general approach of non-accessibility that is entirely incompatible with the principle of legislative transparency enshrined in Article 15(2) TFEU.
- 51 The applicant points out that the Council treats preparatory legislative documents, at working parties and Coreper level, as documents whose distribution should be restricted to certain persons on a 'need-to-know' basis, by classifying them in the 'LIMITED' category and by de facto forcing citizens to specifically request access to them and then to challenge the Council's refusal before the EU judicature. However, according to primary EU law, such documents should be public. In so doing, the Council is structurally circumventing and avoiding its responsibilities under Article 15(2) TFEU to actively disclose legislative documents and also infringes the publication obligations contained in Regulation No 1049/2001, as set out in the fourth plea in law in support of the application.
- 52 According to the applicant, a joint reading of Article 5(1) and Article 6(1) of the Council's Rules of Procedure, combined with a reading of the document entitled 'Comments on the Council's Rules of Procedure', which states that 'legislative work in preparatory bodies is not public', manifestly demonstrates that the Council does not view the work carried out by working groups as being subject to the requirements of Regulation No 1049/2001.



- 53 In his reply, the applicant states that the Council has further entrenched that approach by providing, in Annex II to its Rules of Procedure, for Article 11(4)(b), which confirms the systematic circumvention that he complains of. The applicant also points out that the Parliament's approach to transparency is the opposite of that of the Council.
- 54 In the rejoinder, the Council firmly disputes the existence of a policy on its part or of a systematic practice of misapplication and misuse of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001, as demonstrated, inter alia, by the fact that, in 2023, only 2.6% of applications for access to documents were refused on the basis of that exception.
- 55 The Council argues that it has always adapted its practice to the evolving case-law. In addition, the Council considers that the comparison made by the applicant between its working groups and the Committees of the Parliament is misguided.
- 56 The French Republic adds that the arguments put forward by the applicant concern the illegality, not of the contested decision, but of the Council's practice concerning, first, publication in the register and, second, the Council's alleged systematic misuse of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001. Those arguments are therefore inadmissible.

*Second plea in law alleging, in the alternative, an error of law in so far as the Council did not find an overriding public interest in disclosure of the documents at issue.*

- 57 The applicant, supported by the Republic of Finland and the Kingdom of Sweden, points out that, in the confirmatory application, he had submitted evidence establishing the existence, in any event, of an overriding public interest justifying disclosure of the documents at issue.
- 58 However, the contested decision failed to strike any balance between the protection of the Council's decision-making process and the existence of an overriding public interest justifying disclosure of the documents at issue. Instead, that decision summarily rejected, without any actual examination, what was put forward by the applicant in that regard. The Council thus confused two separate stages in the application of the first subparagraph of Article 4(3) of Regulation No 1049/2001, namely that of determining the risk of a serious undermining of the decision-making process which permits an exception to transparency and that concerning the existence of an overriding public interest which would justify disclosure of the documents at issue.
- 59 The applicant is of the view that, in the balancing provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001, the legislative transparency prescribed by Article 15(2) should have prevailed as the Council cannot dispose of its obligations under the latter provision. Furthermore, the

applicant considers that there was a specific public interest in having access to the documents at issue in order to try to ensure that the legislative procedure in question, which had reached an impasse, continued and reached a conclusion.

- 60 The Republic of Finland adds that the analysis of the existence of a possible public interest is of particular relevance where the Council is acting in its legislative capacity. Moreover, according to the case-law, the overriding public interest capable of justifying the disclosure of a document should not necessarily be distinct from the principles which underlie Regulation No 1049/2001.
- 61 The Council, supported by the French Republic, replies that the balancing was indeed carried out in the contested decision. For the Council, the interest in increased transparency and openness of the legislative process does not mean that the public interest in an informed debate can and must automatically override the protection of the decision-making process in all cases. In the present case, the arguments put forward by the applicant, whether in the confirmatory application or in his application in the present case, are of a very general nature and are not sufficient for the purpose of establishing that an overriding public interest prevails over the reasons justifying the refusal to disclose the documents at issue. In the rejoinder, the Council adds that the applicant failed to present any evidence substantiating his claim that, at the moment the contested decision was adopted, the legislative process was stalling.

*Third plea in law, alleging, in the further alternative, errors of law and manifest error of assessment resulting in the misapplication of the obligation to provide partial access to the documents at issue, in accordance with Article 4(6) of Regulation No 1049/2001 and failure to state reasons*

- 62 The applicant, supported by the Republic of Finland and the Kingdom of Sweden, submits that the Council fails to explain in the contested decision what ‘inseparable whole’ the documents at issue form part of, in its view, or why that would prevent partial disclosure of the content of those documents.
- 63 Moreover, the applicant points out that the legal test to be applied in accordance with Article 4(6) of Regulation No 1049/2001 is not whether the documents are part of a whole, but rather, for each of the documents, whether every single part is covered by the exception relating to the protection of the decision-making process. However, according to the applicant, it is not apparent from the contested decision that such a diligent and thorough review of the said documents was carried out, the Council having confined itself to making an overall analysis.
- 64 The Council, supported by the French Republic, replies that partial access to the documents at issue could not be granted, since their content must be considered an inseparable whole and that all parts of the documents fell within the exception relating to the protection of the decision-making process. In that regard, the Council points out that the entirety of the two documents consists of preliminary comments of the representatives of the Member States for internal use.



*Fourth plea in law, alleging an error of law and infringement of Articles 2 and 12 of Regulation No 1049/2001 (and the principle of legislative transparency laid down in Article 15(2) TFEU) in that the Council implicitly decided in the contested decision and/or in an explicit and continued manner, not to publish directly in its own register the legislative documents disclosed upon the request of a citizen*

- 65 The applicant submits that the WK documents to which he had access and the documents at issue should have been published in the Council's public register, in accordance with Article 12(2) of Regulation No 1049/2001. In that regard, the applicant points out that publication on the register is an integral part of the legislative transparency of Article 15(2) TFEU and is crucial for the possibility of citizens to exercise their democratic right of participation laid down in Article 10 TEU.
- 66 The Council, supported by the French Republic, considers that that plea is inadmissible, since it is put forward solely in support of the second form of order sought, which is itself inadmissible.
- 67 In any event, according to the Council, that plea is unfounded since, as the EU judicature has already established, Regulation No 1049/2001 does not directly link the obligations under its Articles 11 and 12 with the right of access to documents guaranteed by Article 2(1) thereof. Furthermore, the Council states in the rejoinder that Article 12 of Regulation No 1049/2001 lays down certain standards of administrative practice and does not impose unconditional obligations on the institutions concerned.

M. Sampol Pucurull  
Judge-Rapporteur