Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

17 December 2020*

(Appeal – Access to European Central Bank (ECB) documents – Decision 2004/258/EC – Article 4(3) – Exceptions – Document received by the ECB – Opinion from an external service provider – Internal use as part of deliberations and preliminary consultations – Refusal to grant access)

In Case C-342/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 30 April 2019,

Fabio De Masi, residing in Hamburg (Germany),

Yanis Varoufakis, residing in Athens (Greece),

represented by A. Fischer-Lescano, Universitätsprofessor,

appellants,

the other party to the proceedings being:

European Central Bank (ECB), represented by F. von Lindeiner and A. Korb, acting as Agents, and by H.-G. Kamann, Rechtsanwalt,

defendant at first instance,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, L. Bay Larsen (Rapporteur), C. Toader, M. Safjan and N. Jääskinen, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 9 July 2020,

gives the following

* Language of the case: German.

Judgment

1 By their appeal, Mr Fabio De Masi and Mr Yanis Varoufakis seek to have set aside the judgment of the General Court of the European Union of 12 March 2019, *De Masi and Varoufakis* v *ECB* (T-798/17, EU:T:2019:154) ('the judgment under appeal'), by which the General Court dismissed their action seeking the annulment of the decision of the European Central Bank of 16 October 2017 ('the decision at issue') refusing them access to the document of 23 April 2015, drafted by an external service provider at the ECB's request, entitled 'Responses to questions concerning the interpretation of Article 14.4 of Protocol No 4 on the Statutes of the European System of Central Banks and of the European Central Bank' ('the document at issue').

Legal context

Decision 2004/258

2 Recitals 3 and 4 of Decision 2004/258/EC of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (OJ 2004 L 80, p. 42), as amended by the Decision (EU) of the European Central Bank of 21 January 2015 (OJ 2015 L 84, p. 64), ('Decision 2004/258') state as follows:

'(3) Wider access should be granted to ECB documents, while at the same time protecting the independence of the ECB and of the national central banks (NCBs) foreseen by Article 108 of the Treaty and Article 7 of the Statute, and the confidentiality of certain matters specific to the performance of the ECB's tasks. In order to safeguard the effectiveness of its decision-making process, including its internal consultations and preparations, the proceedings of the meetings of the ECB's decision-making bodies are confidential, unless the relevant body decides to make the outcome of its deliberations public.

(4) However, certain public and private interests should be protected by way of exceptions. …'

3 As set out in Article 3(a) of that decision, for the purpose of that decision, 'document' and 'ECB document' are to mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) drawn up or held by the ECB and relating to its policies, activities or decisions, as well as documents originating from the European Monetary Institute (EMI) and from the Committee of Governors of the central banks of the Member States of the European Economic Community.

4 Under the heading 'Exceptions', Article 4(2), (3) and (5) of that decision provides:

'2. The ECB shall refuse access to a document where disclosure would undermine the protection of:

…

– … legal advice,

– …

unless there is an overriding public interest in disclosure.

3. Access to a document drafted or received by the ECB for internal use as part of deliberations and preliminary consultations within the ECB, or for exchanges of views between the ECB and NCBs, NCAs or NDAs, shall be refused even after the decision has been taken, unless there is an overriding public interest in disclosure.

…

5. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.'

5 As set out in Article 7(2) of that decision:

'In the event of total or partial refusal, the applicant may, within 20 working days of receiving the ECB's reply, make a confirmatory application asking the ECB's Executive Board to reconsider its position. Furthermore, failure by the ECB to reply within the prescribed 20 working days' time limit for handling the initial application shall entitle the applicant to make a confirmatory application.'

Regulation (EC) No 1049/2001

6 Recitals 1 and 4 of 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), are worded as follows:

'(1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the 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.

…

(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.'

7 Under the heading 'Exceptions', Article 4(2) and (3) of that regulation provides:

'2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

– … legal advice,

– …

unless there is an overriding public interest in disclosure.

3. 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, shall 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.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.'

Background to the dispute and the decision at issue

8 The background to the dispute was set out by the General Court in paragraphs 1 to 6 of the judgment under appeal and may, for the purposes of the present proceedings, be summarised as follows.

9 By letter of 24 April 2017, Mr De Masi and Mr Varoufakis applied to the ECB, on the basis of Decision 2004/258, for access to any external legal advice the ECB had sought in order to review its decisions of 4 February and 28 June 2015 regarding the provision of emergency liquidity assistance to Greek banks by the Greek Central Bank.

10 By letter of 31 May 2017, the ECB informed the appellants that it had not sought legal advice for those decisions. It also informed them of the existence of the document at issue.

11 By letter of 7 July 2017, the appellants asked the ECB for access to that document.

12 By letter of 3 August 2017, the ECB refused to grant access to that document on the basis of (i) the exception relating to the protection of legal advice, provided for in the second indent of Article 4(2) of Decision 2004/258, and (ii) the exception relating to the protection of documents intended for internal use, provided for in the first subparagraph of Article 4(3) of that decision.

13 By letter of 30 August 2017, the appellants submitted a confirmatory application for access to the document at issue, under Article 7(2) of that decision.

14 By letter of 16 October 2017, the ECB confirmed its decision of 3 August 2017 refusing access to the document at issue on the basis of the same exceptions as those referred to in that decision.

The procedure before the General Court and the judgment under appeal

15 By application lodged at the Registry of the General Court on 8 December 2017, Mr De Masi and Mr Varoufakis brought an action for annulment of the decision at issue.

16 In support of that action, the appellants raised, in essence, two pleas in law, alleging infringement of the second indent of Article 4(2) of Decision 2004/258 and infringement of the first subparagraph of Article 4(3) of that decision, respectively.

17 By the judgment under appeal, the General Court dismissed the action brought by the appellants as unfounded. After examining the second plea in law, it held, in paragraph 74 of that judgment, that the ECB was fully entitled to base its refusal to grant access to the document at issue on the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258. As a result, it took the view that it was not necessary to examine the first plea in law, concerning the exception to the right of access provided for in the second indent of Article 4(2) of that decision.

18 As regards the first part of the second plea in law, alleging an incorrect application of the exception relating to the protection of documents intended for internal use, the General Court held that it was not necessary to prove that the decision-making process could be seriously undermined under the first subparagraph of Article 4(3) of that decision. In that regard, in paragraph 30 of the judgment under appeal, it stated that a refusal based on that provision requires only that it be established, first,

that that document is for internal use as part of deliberations and preliminary consultations within the ECB, or for exchanges of views between the ECB and the national authorities concerned, and, second, that there is no overriding public interest in disclosure of that document.

19 It found that the ECB was fully entitled to take the view that the document at issue was a document for internal use within the meaning of the first subparagraph of Article 4(3) of that decision, in so far as the ECB considered that that document was intended to provide information and support to the deliberations of the Governing Council within the scope of the competences conferred on it by Article 14(4) of Protocol No 4 on the Statute of the European System of Central Banks (ESCB) and of the ECB.

20 The General Court thus rejected, in paragraphs 44 to 47 of the judgment under appeal, the argument of Mr De Masi and Mr Varoufakis that the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258 was not applicable to the document at issue because that document was a legal opinion which fell within the scope of the exception relating to the protection of legal advice, provided for in the second indent of Article 4(2) of that decision.

21 The General Court also rejected, in paragraphs 48 to 52 of the judgment under appeal, the appellants' argument that the conditions laid down in the first subparagraph of Article 4(3) of that decision were not satisfied since the document at issue, first, is not an internal document and, second, does not relate to a specific procedure.

22 Furthermore, the General Court analysed and rejected, in paragraphs 53 to 58 of the judgment under appeal, the plea alleging infringement of the obligation to state reasons.

23 In paragraphs 62 to 73 of the judgment under appeal, the General Court rejected the second part of the second plea, alleging that there is an overriding public interest in the disclosure of the document at issue.

Procedure before the Court and forms of order sought

24 By their appeal, the appellants claim that the Court should:

– set aside the judgment under appeal in its entirety;

– uphold the form of order sought by it at first instance, and

– order the ECB to pay the costs.

25 The ECB contends that the Court should:

– dismiss the appeal; and

– order the appellants to pay the costs.

The appeal

26 In support of their appeal, the appellants raise four grounds, alleging, first, infringement of Article 10(3) TEU, of Article 15(1) and Article 298(1) TFEU and of Article 42 of the Charter of Fundamental Rights of the European Union ('the Charter'), in conjunction with Article 52(1) of the Charter, second, failure to fulfil the obligation to state reasons, third, infringement of Article 4(2) and (3) of Decision 2004/258 and, fourth, infringement of Article 4(3) of that decision.

The first ground of appeal

Arguments of the parties

27 By their first ground of appeal, the appellants claim that the General Court failed to apply the principle of transparency laid down in Article 10(3) TEU, Article 15(1) and Article 298(1) TFEU and Article 42 of the Charter, in conjunction with Article 52(1) of the Charter, in the light of which the exceptions provided for by Decision 2004/258 should have been interpreted.

28 This ground of appeal is divided into two parts.

29 By the first part, the appellants criticise the General Court for having held, in paragraph 29 of the judgment under appeal, that the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258 does not require it to be established that the decision-making process could be seriously undermined. In that regard, the appellants claim that the General Court wrongly relied on the wording of that provision, and criticise it for having adopted an interpretation of that wording which is not consistent with Article 10(3) TEU, Article 15(1) and Article 298(1) TFEU and Article 42 of the Charter, in conjunction with Article 52(1) of the Charter. They assert that those provisions lay down the objective of broad transparency and a right to access to documents which the General Court failed to apply.

30 According to the appellants, since primary law sets the threshold for limiting the principle of transparency, the ECB cannot lower that threshold by failing to take into account the requirement that the decision-making process could be seriously undermined, even if such a requirement is not mentioned in the first subparagraph of Article 4(3) of that decision.

31 The ECB contends that the first part of the first ground of appeal must be rejected as inadmissible. In the alternative, it maintains that that part of the first ground of appeal is unfounded.

32 By the second part of the first ground of appeal, the appellants criticise the General Court for having, in paragraph 54 of the judgment under appeal, conferred on the ECB a broad discretion and thus reduced the scope of its judicial review, in breach of primary law, with the result that the assessment carried out in paragraph 43 et seq. of that judgment was flawed. They take the view that, on account of the dimension of the principle of transparency, access to documents is not a matter for assessment. Article 52 of the Charter requires that any restrictions on that principle be proportionate and that the conditions for applying such restrictions be amenable to full judicial review.

33 The ECB contends that this part is inadmissible and, in any event, unfounded.

Findings of the Court

34 As regards the first part of the first ground of appeal, it should be borne in mind that, under the second sentence of Article 170(1) of the Rules of Procedure of the Court of Justice, the subject matter of the proceedings before the General Court may not be changed in the appeal. In addition, as is apparent from the settled case-law of the Court, to allow a party to put forward for the first time before the Court a ground for complaint which it did not raise before the General Court would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court. In an appeal, the Court's jurisdiction is thus confined to examining the assessment by the General Court of the pleas and arguments discussed before it (see, inter alia, order of 15 January 2020, *BS* v *Parliament*, C-642/19 P, not published, EU:C:2020:32, paragraph 24).

35 The interpretation of the abovementioned provisions of primary law, as proposed by the appellants, may be usefully invoked only to support a plea of the illegality of the first subparagraph of Article 4(3) of Decision 2004/258. It follows from the wording of that provision that the ECB sought to refuse access to its documents where the conditions laid down in that provision are satisfied.

36 In that regard, it must be noted that that same provision makes no reference to a condition such as that relied on by the appellants. Consequently, to consider that refusal of access to ECB documents on the basis of the first subparagraph of Article 4(3) of Decision 2004/258 is subject to a condition other than that which is laid down therein constitutes a contra legem interpretation of that provision.

37 In those circumstances, and since the appellants did not expressly claim before the General Court that, for that reason, the first subparagraph of Article 4(3) of Decision 2004/258 undermined the principle of transparency, as laid down by the provisions of the FEU Treaty and the Charter that they rely on, it must be held that such a plea of illegality was not raised at first instance and cannot, subsequently, be relied upon for the first time in the appeal.

38 It is true that an argument which was not raised at first instance does not constitute a new plea that is inadmissible at the appeal stage if it is simply an amplification of an argument already developed in the context of a plea set out in the application before the General Court (judgment of 16 November 2017, *Ludwig-Bölkow-Systemtechnik* v *Commission*, C-250/16 P, EU:C:2017:871, paragraph 29). However, it is clear that that is not the case here.

39 In that regard, although the appellants cited those provisions of primary law in their application at first instance, they did not, in that application, expressly raise those provisions in support of an argument seeking to establish that the first subparagraph of Article 4(3) of Decision 2004/258 does not comply with the terms of those provisions.

40 It follows that, since the appellants' argument at first instance did not suggest that the first subparagraph of Article 4(3) of Decision 2004/258 is incompatible with those provisions of primary law and the compatibility of that former provision is being called into question for the first time before the Court, this part of the first ground of appeal cannot be considered to be an amplification of the pleas set out in the application initiating proceedings.

41 Consequently, the first part of the first ground of appeal must be rejected as inadmissible.

42 As regards the second part of that ground of appeal, it should be noted that the discretion that the General Court recognised the ECB as having, in paragraph 54 of the judgment under appeal, and the restricted scope of the review exercised by the General Court concerned only the matter of whether an overriding public interest could be affected by the disclosure of the document at issue. Those considerations therefore could not have resulted in the General Court having carried out a flawed assessment in paragraphs 43 to 52 of that judgment, which do not concern the risk of harm to the public interest but rather concern the grounds which may justify refusal to grant access to an ECB document and the nature of the document at issue. Therefore, the arguments put forward by the appellants on this point cannot succeed.

43 As regards paragraphs 53 to 58 of the judgment under appeal, it must be noted that, in those paragraphs, the General Court analysed the appellant's plea alleging failure to fulfil the obligation to state reasons regarding the possible harm to the decision-making process. Since, in respect of the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258, it is not a requirement to establish that the decision-making process could be seriously undermined, as the General Court held in paragraph 29 of the judgment under appeal, the considerations concerning the nature and intensity of the EU courts' review of whether there is a threat to the public interest were in any event irrelevant to the success or otherwise of that plea.

44 Consequently, the arguments raised by the appellants in the second part of the first ground of appeal must be rejected.

45 Having regard to the foregoing, the first ground of appeal must be rejected in its entirety as being in part inadmissible and in part unfounded.

The second ground of appeal

Arguments of the parties

46 By their second ground of appeal, the appellants criticise the General Court for having disregarded, in paragraphs 53 to 57 of the judgment under appeal, the requirements to state reasons established by the Court in relation to Regulation No 1049/2001. In particular, they criticise the General Court for having accepted that the ECB could rely on 'hypothetical effects' to justify refusing access to its documents. They claim that general and abstract risks are not sufficient to justify such refusal. The ECB thus did not explain how access to the document requested could restrict the ECB's 'space to think' and specifically and effectively undermine the interest protected by the exception provided for in Article 4 of Decision 2004/258 that it relies on.

47 The ECB claims that that ground of appeal should be rejected as inadmissible or, in the alternative, as unfounded.

Findings of the Court

48 It should be borne in mind, from the outset, that Regulation No 1049/2001 is not applicable to the document at issue, access to which is governed by Decision 2004/258.

49 In respect of the alleged infringement of the requirements as regards stating reasons for acts of the institutions established by the Court in relation to that regulation, pleaded by the appellants, it must be noted that, while the second subparagraph of Article 4(3) of that regulation requires it to be established that disclosure of the document would seriously undermine the institution's decision-making process, that is not a requirement in connection with the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258. It follows that the General Court was under no obligation to assess whether the ECB had provided explanations as to how granting access to the document at issue could lead to its decision-making process being seriously undermined.

50 Refusal to grant access to a document on the basis of the first subparagraph of Article 4(3) of Decision 2004/258 requires only that it be established, first, that that document is, inter alia, for internal use as part of deliberations and preliminary consultations within the ECB, and, secondly, that there is no overriding public interest in disclosure of that document.

51 Accordingly, the General Court did not infringe requirements as regards stating reasons for acts of the institutions of the European Union when, in paragraph 55 of the judgment under appeal, it undertook a review of the reasoning of the decision at issue, finding that that decision stated that the document at issue was intended for internal use as part of deliberations and preliminary consultations of the Governing Council, that disclosure of that document would undermine the possibility of an effective, informal and confidential discussion between the members of the decision-making bodies and, as a consequence, would restrict the ECB's 'space to think', and that, in addition, disclosure of the document at issue, in so far as it would be removed from its context, would risk undermining the independence of the members of the Governing Council.

52 The General Court was also fully entitled to hold, in paragraph 57 of the judgment under appeal, that the obligation to state reasons did not preclude the ECB from basing its reasoning on considerations which take account of hypothetical effects which disclosure of the document at issue might have on that institution's space to think.

53 Consequently, the second ground of appeal must be rejected as unfounded.

The third ground of appeal

Arguments of the parties

54 By their third ground of appeal, which is divided into two parts and refers in essence to paragraphs 43 to 50 of the judgment under appeal, the appellants complain that the General Court, first, misconstrued the scope of the first subparagraph of Article 4(3) of Decision 2004/258, concerning documents intended for internal use, and the scope of the second indent of Article 4(2) of that decision, concerning legal advice, and, second, misinterpreted that first provision by finding that the conditions for its application were satisfied in the present case.

55 More specifically, in the first part of this third ground of appeal, the appellants claim that, in the light of its wording, the second indent of Article 4(2) of Decision 2004/258 concerns 'legal advice', while the first subparagraph of Article 4(3) of that decision concerns only documents containing non-legal opinions. The appellants criticise the General Court for not having addressed the question as to whether or not the document at issue constituted legal advice within the meaning of that first provision.

56 They claim, in that regard, that, since the document at issue is an abstract and scientific response to a point of law and not legal advice, the document at issue cannot be classified as legal advice within the meaning of the second indent of Article 4(2) of Decision 2004/258.

57 As a result, in contrast to what the General Court ruled in paragraph 43 of the contested decision, the first subparagraph of Article 4(3) of Decision 2004/258 should not have been applied on account of the blocking effect of the second indent of Article 4(2) of that decision, which is a *lex specialis* with regard to the first provision, since the second indent of Article 4(2) of Decision 2004/258 exhaustively governs the exceptions to the principle of transparency applicable to that type of document.

58 In the second part of this ground of appeal, the appellants challenge the interpretation of the first subparagraph of Article 4(3) of Decision 2004/258 made by the General Court. In that regard, they reiterate that, like the second subparagraph of Article 4(3) of Regulation No 1049/2001, the first subparagraph of Article 4(3) of Decision 2004/258 seeks to protect the integrity of the ECB's internal decision-making process. The document the disclosure of which was requested does not come within the scope of the latter provision since it is not intended for internal use in relation to a specific decision-making process, but rather constitutes an external analysis seeking to define 'the external framework' of the ECB's competencies.

59 The ECB contests those arguments and claims that this ground of appeal should be rejected in its entirety.

Findings of the Court

60 As regards the first part, it is necessary, from the outset, to note that the wording of the second indent of Article 4(2) of Decision 2004/258 contains no indications which might confer on it the character of *lex specialis* in relation to the first subparagraph of Article 4(3) of that decision.

61 As is apparent from the first subparagraph of Article 4(3) of that decision, the exception provided for therein refers to documents drafted or received by the ECB for internal use as part of deliberations and preliminary consultations within the ECB, or for exchanges of views between the ECB and the national authorities.

62 Moreover, it should be noted that nothing in the wording of Article 4 of Decision 2004/248 precludes the same part of a document from being covered by 'any of the exceptions' referred to therein. It follows that it cannot reasonably be argued that the same document cannot be covered by more than one of the provisions of Article 4 of Decision 2004/258 relating to refusal to grant access to documents provided for in that decision.

63 The General Court was therefore fully entitled to rule, in paragraphs 44 to 47 of the judgment under appeal, that the ECB, when assessing a request for access to documents which it holds, may take into account more than one ground for refusal – in the present case both that set out in the second indent of Article 4(2) of Decision 2004/258 and that set out in the first subparagraph of Article 4(3) of that decision.

64 Moreover, it is irrelevant, for the purpose of applying the exception referred to in the first subparagraph of Article 4(3) of Decision 2004/258, that the document at issue may also be classified as 'legal advice' within the meaning of the second indent of Article 4(2) of that decision. The legislature of the European Union did not make the possibility of relying on the exception set out in the first subparagraph of Article 4(3) of Decision 2004/258 conditional on the documents referred to therein not being 'legal advice', within the meaning of the second indent of Article 4(2) of that decision.

65 In those circumstances, the first part of the third ground of appeal must be rejected as unfounded.

66 As regards the second part of the third ground of appeal, it must be noted that, in accordance with the first subparagraph of Article 4(3) of Decision 2004/258, access to a document drafted or received by the ECB for internal use as part of deliberations and preliminary consultations within the ECB, or for exchanges of views between the ECB and the national authorities, are to be refused even after the decision has been taken, unless there is an overriding public interest in disclosure of that document.

67 As regards, first, the condition regarding internal use of the documents, it should be borne in mind that the document at issue was requested from an external service provider in order to enrich the internal considerations of the ECB's decision-making bodies and support their deliberations and discussions.

68 It must be noted that the first subparagraph of Article 4(3) of Decision 2004/258 is drafted with the effect of protecting internal preparatory documents, even if the document at issue was drafted by an external service provider, since that provision refers expressly to a document 'received' by the ECB.

69 In addition, as the General Court correctly stated in paragraph 49 of the judgment under appeal, it is stated in the decision at issue not that the document at issue is an internal document but that it is intended for internal use.

70 The General Court was therefore fully entitled to hold, in paragraph 41 of the judgment under appeal, that the ECB had validly been able to consider that the document at issue was a document intended for internal use, within the meaning of the first subparagraph of Article 4(3) of Decision 2004/258.

71 Second, the wording of the first subparagraph of Article 4(3) of Decision 2004/258 cannot be read as reserving the protection contained in it only to documents linked to a specific decision-making process. That provision requires only that a document be used 'as part of deliberations and preliminary consultations within the ECB'. As the ECB maintains, while its deliberations and preliminary consultations may concern a specific procedure, they can also have a broader purpose and

concern general matters. In support of this, by also referring to documents intended for exchanges of views between the ECB and the national authorities, that provision has the effect of covering, in a broad manner, documents linked to the ECB's internal processes.

72 Such an interpretation of the first subparagraph of Article 4(3) of Decision 2004/258 cannot be called into question by the Court's findings in the judgment of 13 July 2017, *Saint-Gobain Glass Deutschland* v *Commission* (C-60/15 P, EU:C:2017:540), on which the appellants rely.

73 In that judgment, the Court, in essence, held that it was possible to refuse access to a document on the basis of the first subparagraph of Article 4(3) of Regulation No 1049/2001 only in so far as the decision-making process relates to taking a decision.

74 However, unlike that regulation, and contrary to what the appellants maintain in that regard, the purpose of the protection provided for in the first subparagraph of Article 4(3) of Decision 2004/258 is not the same as that provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001. Indeed, that provision of Decision 2004/258 refers to deliberations and preliminary consultations within the ECB, whereas such a reference does not appear in the first subparagraph of Article 4(3) of Regulation No 1049/2001.

75 Moreover, while Article 4(3) of that regulation makes refusal to grant access to a document conditional upon that document '[relating] to a matter where the decision has not been taken' by the institution, the first subparagraph of Article 4(3) of Decision 2004/258 does not contain such a precision. On the contrary, in the context of Decision 2004/258, the ECB thus sought to confer protection on its documents even in the case of an integrated decision-making process, given that, under that provision, access to the document is to be refused 'even after' the decision has been taken.

76 In addition, it must be borne in mind that the ECB, by Decision 2004/258, chose to confer a right of access to its documents subject to the conditions and limits defined by that decision. That decision thus aims to preserve that right of access while taking into account the specific nature of that institution which, in accordance with Article 130 TFEU, must be able effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by the Treaty and the Statute of the ESCB.

77 Moreover, it must be borne in mind that the legal framework concerning access to ECB documents provided for by the Treaties differs, under the fourth subparagraph of Article 15(3) TFEU, depending on whether or not the ECB is exercising its administrative tasks. While the rules on access to the documents of the institutions subject to that provision must be compliant with Regulation No 1049/2001, a document such as the document at issue, which contains legal advice concerning the interpretation of Article 14.4 of Protocol No 4 on the Statutes of the European System of Central Banks and of the ECB, cannot be considered to be related to the exercise of the ECB's administrative tasks.

78 It follows that the second subparagraph of Article 4(3) of Regulation No 1049/2001 is designed so that access to a document is refused only where it is related to a specific decision, whereas, under the first subparagraph of Article 4(3) of Decision 2004/258, the protection of confidentiality of the ECB's documents is guaranteed even when those documents are not part of the process of adopting a specific decision.

79 It was thus on the basis of an interpretation of the first subparagraph of Article 4(3) of Decision 2004/258 free from error of law that the General Court rejected the appellants' arguments raised at first instance.

80 Therefore, the second part of the third ground of appeal must be rejected as unfounded and, as a result, the third ground of appeal must be rejected in its entirety.

The fourth ground of appeal

Arguments of the parties

81 By their fourth ground of appeal, the appellants criticise the General Court for having failed to have regard, in paragraphs 62 to 72 of the judgment under appeal, to the existence of an overriding public interest justifying disclosure of the document at issue.

82 In that regard, they claim that, even if the conditions for application of the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258 are satisfied, the fact remains that there is an overriding public interest in disclosure of the document at issue.

83 The appellants' submit that considerations related to the review of legality of the ECB's actions support that conclusion. In their view, the finding of a potential defect in a decision of the ECB is in the public interest. In addition, it is clear from recital 1 of Decision 2004/258 that greater transparency enables citizens to participate more closely in decision-making processes. Lastly, they criticise the General Court for having weighed the competing interests without indicating specifically and in a substantiated manner in what way the interests of the ECB would be undermined.

84 Moreover, the appellants take the view that, by holding that it was not necessary to prove that the decision-making process could be seriously undermined, and by thus reducing its judicial review to review of abuse of power, the General Court based its review of the existence of a public interest on an incorrect criterion. Indeed, it was not established that disclosure would undermine or risk undermining either the protection of legal advice or the protection of the internal decision-making process.

85 Therefore, according to the appellants, contrary what the General Court held, it is not sufficient to take abstract and purely hypothetical factors into consideration to justify the risk that a protected interest could be undermined.

86 The ECB argues that this ground of appeal should be rejected as inadmissible or, in the alternative, as unfounded.

Findings of the Court

87 As regards this ground of appeal, it must be stated that the appellants' arguments in relation to the General Court's rejection of the suggestion that there is an overriding public interest in disclosure are the same as those put forward at first instance. Accordingly, by their arguments, the appellants seek, in reality, reconsideration of the application submitted before the General Court, which falls outside the jurisdiction of the Court of Justice (see, inter alia, judgment of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562 paragraphs 62 and 63).

88 As regards the appellants' arguments that it is for the ECB to establish that the decision-making process would be seriously undermined, those arguments are based on an incorrect premiss since, in the context of the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258, that is not a requirement, as was already stated in paragraph 43 above. As is apparent from the present paragraph, the appellants' arguments concerning evidence that the decision-making process would be seriously undermined are ineffective.

89 Accordingly, this ground of appeal should be rejected as being in part inadmissible and in part ineffective.

90 It follows from all the foregoing considerations that none of the grounds put forward by the appellants in support of their appeal can succeed.

91 The appeal must therefore be dismissed in its entirety.

Costs

92 Under Article 138(1) of the Rules of Procedure of the Court of Justice, applicable to appeal proceedings by virtue of Article 184(1) of those rules, 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 ECB has applied for costs and the appellants have been unsuccessful, the appellants must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the appeal;

2. Orders Fabio de Masi and Yanis Varoufakis to pay the costs.

[Signatures]