Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

11 January 2017 *

(Appeal — Access to documents of the institutions — Regulation (EC) No 1049/2001 — Article 3 — Notion of document — Article 2(3) — Documents held by an institution — Characterisation of information contained in a database — Obligation to create a document which does not already exist — None — Existing documents capable of being extracted from a database)

In Case C-491/15 P

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 18 September 2015,

**Rainer Typke**, residing in Hasbergen (Germany), represented by C. Cortese, avvocato,

appellant,

the other party to the proceedings being:

**European Commission**, represented by F. Clotuche-Duvieusart and B. Eggers, acting as Agents,

defendant at first instance,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.-C. Bonichot (Rapporteur), A. Arabadjiev, C.G. Fernlund and S. Rodin, Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 21 September 2016,

gives the following

## Judgment

1 By his appeal, Mr Rainer Typke seeks to have set aside the judgment of the General Court of the European Union of 2 July 2015, *Typke* v *Commission* (T-214/13, EU:T:2015:448) ('the judgment under appeal') in so far as that court by that judgment dismissed his action seeking annulment of the

Commission decision of 5 February 2013 rejecting his first application for access to documents relating to the preselection tests for the open competition EPSO/AD/230-231/12 ('the decision at issue').

## Legal context

2 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) provides as follows, in Article 1, point (a), thereof:

'The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as "the institutions") documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents'.

3 Article 2 of that regulation, entitled 'Beneficiaries and scope', provides as follows:

'1. 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, subject to the principles, conditions and limits defined in this Regulation.

...

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.

4. Without prejudice to Articles 4 and 9, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register. ...

...'

4 Article 3(a) of that regulation is worded as follows:

'For the purposes of this Regulation:

(a) "document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility'.

5 Article 4(6) of Regulation No 1049/2001 provides as follows:

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

6 Article 10(1) of that regulation provides as follows:

'The applicant shall have access to documents either by consulting them on the spot or by receiving a copy, including, where available, an electronic copy, according to the applicant's preference. ...'

## Background to the dispute and the decision at issue

7 Mr Typke applied to the European Personnel Selection Office ('EPSO') on the basis of Regulation No 1049/2001 for access to a 'table' containing a series of anonymised data on the preselection tests in open competitions in which he had participated (procedure GESTDEM 2012/3258).

8 The 'table' applied for should, he claimed, have contained information relating to the candidates for certain EPSO competitions, to the questions which they had been asked, the answers required and those actually given and the languages used. Certain information, such as the identity of the candidates or the content of the questions and answers, was to be replaced by separate identifiers which would allow that information to be compared without disclosing its actual content.

9 By decision of 9 August 2012, EPSO refused that initial application, inter alia on the ground that the 'table' applied for by the appellant did not exist.

10 On 21 August 2012, the appellant filed a confirmatory application for access with the Commission, under Article 7(2) of Regulation No 1049/2001. On that occasion, he stated that his application was not intended to require EPSO to create a new document by merging information from existing documents, but to give him access to a series of documents held by EPSO in electronic form, from which any information covered by one of the exceptions to the right of access provided for in Article 4 of that regulation had been excluded.

11 By the decision at issue, the Commission refused that confirmatory application on the ground, inter alia, that the application was in fact intended to procure access to a document that did not exist.

12 In addition, on 28 December 2012 the appellant submitted to EPSO a second application for access to documents (procedure GESTDEM 2013/0068), followed, on 30 January 2013, by a confirmatory application. In the absence of any express decision from the Commission after the expiry of the time limit set, the appellant concluded that there had been an implied refusal of the application in question.

## The action before the General Court and the judgment under appeal

13 By application lodged at the Registry of the General Court on 15 April 2013, Mr Typke brought an action seeking the annulment, first, of the decision at issue, adopted in the course of the procedure GESTDEM 2012/3258, and, secondly, of the implied refusal of access to the documents to which his second application related, adopted in the course of the procedure GESTDEM 2013/0068.

14 By the judgment under appeal, the General Court found that the implied refusal had been replaced by an express decision of 27 May 2013 and that, therefore, there was no longer any need to adjudicate on the action in so far as it was directed against that implied decision. Since the appellant's request seeking to extend his action to the express decision of 27 May 2013 was submitted after the expiry of the time limit for bringing an action for annulment against that decision, the General Court dismissed that claim for annulment as inadmissible.

15 As regards the claims directed against the decision at issue, the General Court found that the application for access did not relate to access, even partial, to one or more existing documents held by EPSO, but, on the contrary, sought that the Commission create new documents which cannot simply be extracted from a database by means of a normal or routine search using an existing search tool. On those grounds, the General Court dismissed the action.

## Forms of order sought

16 By his appeal, Mr Typke claims that the Court should:

— set aside the judgment under appeal in so far as, by that judgment, the General Court dismissed his action brought against the decision at issue;

— set aside the judgment under appeal in so far as it ordered him to pay the costs;

— annul the decision at issue and

— order the Commission to pay the costs he has incurred at first and at second instance.

17 The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

## The request to reopen the oral procedure

18 Following the delivery of the Opinion of the Advocate General on 21 September 2016, Mr Typke, by a document lodged at the Court Registry on 7 November 2016, applied for the oral part of the procedure to be reopened. In support of that application, he submits, in essence, that the Advocate General raised an argument relating to the interpretation of the notion of 'existing document' for the purposes of Regulation No 1049/2001 which was not debated by the parties before the Court.

19 It should be pointed out that the Court may, at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure under Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union (judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 40).

20 That is not the situation here. Mr Typke set out during the written part of the procedure his arguments in relation to the interpretation of Regulation No 1049/2001 and the notion of 'existing document'. Accordingly, the Court takes the view, after hearing the Advocate General, that it has sufficient information to be able to adjudicate and that the present case does not need to be decided on the basis of arguments that have not been discussed.

21 In the light of the foregoing, the Court considers that there is no need to reopen the oral part of the procedure.

## The appeal

### *The first ground of appeal*

#### – Arguments of the parties

22 By his first ground of appeal, the appellant alleges that the General Court committed several errors of law inasmuch as it held that granting access to the information for which he had applied was tantamount to the creation of a new document.

23 In the first place, the appellant submits that, contrary to what is stated in paragraphs 54 and 58 of the judgment under appeal, it is apparent from paragraphs 110, 112, 116 and 118 of the judgment of 26 October 2011, *Dufour* v *ECB* (T-436/09, EU:T:2011:634) that a normalised relational database, such as that containing the information requested by the appellant, should be construed as a single document. Consequently, the General Court erred in making a distinction between the information contained in a database and the documents which can be extracted from that database.

24 It follows from paragraphs 93, 94, 108 and 109 of that judgment that the notion of document for the purposes of Regulation No 1049/2001 also includes any individual file and each occurrence of its content in a database. Likewise, every combination of data extracted from various files would be a document since any search is possible in a normalised database.

25 In the second place, in paragraphs 68 to 70 of the judgment under appeal, the General Court incorrectly interpreted the notion of 'existing document' for the purposes of Regulation No 1049/2001. It is apparent from paragraph 150 of the judgment of 26 October 2011, *Dufour* v *ECB* (T-436/09, EU:T:2011:634), that any application for access to information contained in a database is deemed to concern an 'existing document' for the purposes of Article 2(3) of Regulation No 1049/2001, provided that the search called for can be carried out using the 'search tools available' for that database.

26 In the case of a normalised relational database, the search tools available are management systems which react to Structured Query Language ('SQL') queries. Those are search queries that a user may formulate in the way he chooses. Consequently, the General Court was incorrect to find that the formulation of an SQL query which is not already used for the management of a database is tantamount to the programming of a new search tool which is therefore not 'available' within the meaning of the judgment of 26 October 2011, *Dufour* v *ECB* (T-436/09, EU:T:2011:634).

27 In doing so, the General Court incorrectly concluded that normal or routine searches within the meaning of paragraph 153 of that judgment are those made using preprogrammed SQL queries.

28 Lastly, in the third place, the interpretation given by the General Court to the notion of 'existing document' would be liable to render Regulation No 1049/2001 ineffective. Thus, access would be excluded to all information for which a preprogrammed SQL query does not exist. The institutions might therefore be tempted to conceal electronic documents, in particular by dividing them into several parts which could not be found by preprogrammed SQL queries. Furthermore, since the institutions would be prevented from using new SQL queries, it would be difficult to conceal by automised means data covered by one or several of the exceptions provided for in Article 4 of that regulation, such as personal data.

29 The Commission contends that the first ground of appeal should be rejected.

– Findings of the Court

30 Admittedly, an electronic database may enable the extraction of any information contained therein. However, the possibility that a document may be created from such a database does not lead to the conclusion that the document concerned must be regarded as an existing document for the purposes of Regulation No 1049/2001.

31 The Court has already held that the right of access to documents of the institutions applies only to existing documents in the possession of the institution concerned and that Regulation No 1049/2001 may not be relied upon to oblige an institution to create a document which does not exist (see, to that effect, judgment of 2 October 2014, *Strack* v *Commission*, C-127/13 P, EU:C:2014:2250, paragraphs 38 and 46). It follows that, as the General Court correctly held in paragraph 55 of the judgment under

appeal, an application for access that would require the Commission to create a new document, even if that document were based on information already appearing in existing documents held by it, falls outside the framework of Regulation No 1049/2001.

32 The General Court was therefore correct in examining, inter alia in paragraphs 56 to 59 of the judgment under appeal, the issue of to what extent the extraction of information contained in an electronic database allows an existing document to be generated rather than being tantamount to the creation of a new document.

33 It must nevertheless be observed that, so far as documents of a static nature are concerned, in particular in paper form or in the form of a straightforward electronic file, it is sufficient to ascertain that the medium and its content exist in order to determine whether a document exists.

34 On the other hand, the dynamic nature of electronic databases is scarcely compatible with that approach since a document which may be generated very easily from information already contained in a database is not necessarily an existing document within the strict sense of the term, as the Advocate General observed in point 46 of his Opinion.

35 Consequently, so far as electronic databases are concerned, the distinction between an existing document and a new document must be made on the basis of a criterion adapted to the technical specificities of those databases and in line with the objective of Regulation No 1049/2001, whose purpose, as is apparent from recital 4 and Article 1(a) thereof, is 'to ensure the widest possible access to documents'.

36 It is not disputed that the information contained in databases, depending on the structure and the restrictions imposed by the programming of such databases, may be regrouped, linked and presented in different ways using programming languages. However, the programming and IT management of such databases are not included among the operations carried out in the context of general use by final users. Those users access information contained in a database by using preprogrammed search tools. Those tools enable them to perform standardised operations easily in order to display the information which they usually need. A substantial investment on their part is, in general, not required in that context.

37 In those circumstances, all information which can be extracted from an electronic database by general use through preprogrammed search tools, even if that information has not previously been displayed in that form or ever been the subject matter of a search by the staff of the institutions, must be regarded as an existing document.

38 It follows that the institutions, to satisfy the requirements of Regulation No 1049/2001, may be led to establish a document from information contained in a database by using existing search tools.

39 On the other hand, as the Advocate General observed in point 47 of his Opinion, any information whose extraction from a database calls for a substantial investment must be regarded as a new document and not as an existing document.

40 Accordingly, any information which would, in order to be obtained, require an alteration either to the organisation of an electronic database or to the search tools currently available for the extraction of information must be considered to be a new document.

41 Far from, as the appellant claims, rendering Regulation No 1049/2001 ineffective, such an interpretation of the notion of 'existing document' corresponds to the purpose of that regulation, namely to ensure that the public has the widest possible access to the documents of the institutions. Applicants for access to the information contained in a database will enjoy, in principle, access to the same information as that to which the staff of the institutions have access.

42 The appellant is also incorrect in claiming that such an interpretation of the notion of 'existing document' would deprive the institutions of the possibility of concealing, using new SQL queries, the data covered by one or more of the exceptions provided for in Article 4 of Regulation No 1049/2001 in order to grant partial access to a document.

43 He fails to have regard, in this connection, to the fact that the criteria showing whether an application for access relates to an existing document, on one hand, must be distinguished from the technical means of communicating such a document, on the other. In so far as a document applied for exists, the institutions may use any technical means in order to conceal, where necessary, certain data.

44 In addition, as regards the appellant's claim that the institutions could conceal electronic documents, it must be stated that the abstract possibility that a document may be deleted or destroyed applies equally to both documents in a physical format and those generated by extraction from a database.

45 It is necessary to examine, on the basis of all the above considerations, the appellant's claim that the General Court, in paragraphs 68 to 70 of the judgment under appeal, committed errors in the legal characterisation of the document to which the application for access in the procedure GESTDEM 2012/3258 related.

46 It is apparent from paragraph 67 of the judgment under appeal that the database at issue allows the extraction of information using SQL queries and that the appellant did not before the General Court dispute that access to the combination of data to which his application referred presupposes a certain amount of computer programming work, namely the development of new SQL queries.

47 Having regard to the considerations in paragraphs 31 to 40 of the present judgment, the General Court did not err when it held, in paragraph 68 of the judgment under appeal, that the operations which the programming of new SQL queries would involve were not comparable to a normal or routine search in the database concerned, carried out using the search tools available to the Commission in respect of that database and that, therefore, the information requested would have required the creation of a new document.

48 For the same reasons, the General Court did not err in holding, in paragraphs 69 and 70 of the judgment under appeal, that, in the present case, the search tools available to the Commission for the database at issue are the preprogrammed SQL queries.

49 Having regard to what has been held in the preceding paragraphs, the appellant's argument that, in paragraphs 54 and 58 of the judgment under appeal, the General Court incorrectly made a distinction between, on one hand, the information contained in a database and, on the other hand, the documents which can be extracted from that database must be rejected as ineffective.

50 In the light of all of the foregoing, the first ground of appeal must be rejected.

*The second ground of appeal*

– Arguments of the parties

51 By his second ground of appeal, the appellant submits that the General Court's finding in paragraph 80 of the judgment under appeal that his application did not relate to existing documents is based on several erroneous premisses.

52 First, he claims that in paragraphs 61, 67 and 73 of the judgment under appeal the General Court distorted the facts. According to the appellant, his application did refer to existing documents in so far as it related to access to a set of documents, in electronic form, enabling him to reconstruct a

table. He did not on the other hand require the creation of that table and therefore his application did not prescribe any selection of data. It was only to facilitate the treatment of that application that the appellant proposed the use of SQL queries.

53 In any event, the communication of the individual sheets of results sent by EPSO to the candidates who had sat the tests would have enabled the appellant to construct the table in question.

54 Secondly, the appellant submits that in paragraphs 58, 66 and 68 of the judgment under appeal the General Court incorrectly held that his application for access related to information structured according to a classification not supported in the database concerned.

55 He submits that, contrary to what the General Court found in paragraphs 62 and 63 of the judgment under appeal, the database concerned is structured over more than 500 normalised tables and would support any query, including that requested by the appellant, without any complex operation. Furthermore, each field in the tables in a normalised database is associated with a unique identifier. Consequently, every parameter in the appellant's application could be represented by such an identifier without it being necessary to disclose the contents of the field concerned.

56 Thirdly, the appellant claims in the last place that, in paragraphs 66 and 67 of the judgment under appeal, the General Court distorted the evidence. It wrongly based its findings on a presumption of legality attaching to the Commission's statement that the documents applied for did not exist. The appellant contested that statement, which is contradicted by the very nature of the database concerned. In addition, it is clear from the application for access that such an application may be complied with by allowing the appellant access to the relevant existing documents.

57 The Commission contends that the second ground of appeal should be rejected.

– Findings of the Court

58 It follows from the Court's settled case-law that the General Court's assessment of the facts of the case before it does not constitute a point of law falling within the scope of the Court's power of review, unless the General Court's findings are vitiated by a substantive error or distortion which is manifest from the documents in the file.

59 The appellant's arguments alleging an incorrect analysis by the General Court of, respectively, the scope of his application for access to the documents, the availability of the information required, the quality and the organisation of the information available, the capacity of the existing search tools capable of meeting his application and the scope of the operations which the Commission would have had to perform in order to respond positively to his application seek to call in question the factual assessments made by the General Court, without showing any distortion of the documents in the file. Those arguments are therefore inadmissible.

60 Consequently, the second ground of appeal must be rejected.

61 It follows from all the foregoing that the appeal must be dismissed in its entirety.

**Costs**

62 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs.

63 Under Article 138(1) of those Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

64 Since the Commission has applied for costs and Mr Typke has been unsuccessful, the latter must be ordered to pay the costs.

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

**1. 1. Dismisses the appeal;**

**2. 2. Orders Mr Rainer Typke to pay the costs.**

Silva de Lapuerta Bonichot Arabadjiev

Fernlund Rodin

Delivered in open court in Luxembourg on 11 January 2017.

A. Calot Escobar
Registrar

R. Silva de Lapuerta
President of the First Chamber