Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

17 October 2013 *

(Appeal — Right of access to documents of the institutions — Regulation (EC) No 1049/2001 — Article 4(3), first subparagraph — Protection of the institutions' decision-making process — Note from the Council General Secretariat on the proposals submitted in the course of the legislative process for the revision of Regulation No 1049/2001 — Partial access — Refusal of access to information relating to the identity of Member States which put forward proposals)

In Case C-280/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 31 May 2011,

Council of the European Union, represented by B. Driessen and C. Fekete, acting as Agents,

appellant,

supported by

Czech Republic, represented by M. Smolek and D. Hadroušek, acting as Agents,

Kingdom of Spain, represented by S. Centeno Huerta, acting as Agent,

French Republic, represented by G. de Bergues and N. Rouam, acting as Agents,

interveners in the appeal,

the other parties to the proceedings being:

Access Info Europe, established in Madrid (Spain), represented by O. Brouwer and J. Blockx, advocaten,

applicant at first instance,

supported by:

European Parliament, represented by A. Caiola and M. Dean, acting as Agents, with an address for service in Luxembourg,

intervener in the appeal,

Hellenic Republic, represented by E.-M. Mamouna and K. Boskovits, acting as Agents,

* Language of the case: English.

United Kingdom of Great Britain and Northern Ireland,

interveners at first instance,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the First Chamber, A. Borg Barthet, E. Levits and M. Berger, Judges,

Advocate General: P. Cruz Villalón,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 21 February 2013,

after hearing the Opinion of the Advocate General at the sitting on 16 May 2013

gives the following

Judgment

1 By its appeal, the Council of the European Union seeks to have set aside the judgment of 22 March 2011 in Case T-233/09 *Access Info Europe* v *Council* [2011] ECR II-1073 ('the judgment under appeal') by which the General Court of the European Union annulled the Council's decision of 26 February 2009 ('the decision at issue') refusing to let Access Info Europe ('Access Info') have access to certain information contained in a note of 26 November 2008 from the Secretariat General of the Council to the Working Party on Information, set up by the Council, concerning the proposal for a new regulation regarding public access to European Parliament, Council and Commission documents ('the requested document').

Legal context

2 Recital 6 in the preamble to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) is worded as follows:

'Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.'

3 Under Article 1 of that regulation:

'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 … documents … in such a way as to ensure the widest possible access to documents.

…'

4 The first subparagraph of Article 4(3) of Regulation No 1049/2001 provides:

‘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’.

Background to the dispute

5 By e-mail of 3 December 2008, Access Info applied to the Council for access to the requested document. That document contained the proposals for amendments, or for re-drafting, tabled by a number of Member States at the meeting of the Working Party on Information, referred to in paragraph 1 above, on 25 November 2008.

6 By the decision at issue, the Council granted partial access to the requested document. In particular, the Council sent Access Info a version of that document which did not make it possible to identify the Member States which had put those proposals forward.

7 The Council justified its refusal to disclose the identities of those Member States on the basis of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001, on the ground that disclosure of those identities would have seriously undermined its decision-making process and there was no overriding public interest in such disclosure. Indeed, bearing in mind the preliminary nature of the discussions under way at that time, disclosure of the identities of the Member States concerned would have reduced the delegations’ room for manœuvre during the negotiations, which are a feature of the legislative procedure in the Council, and would therefore have impaired its ability to reach an agreement.

8 On 26 November 2008 – that is to say, the very day on which the requested document was created – an unedited version of the requested document was made available to the public on the internet site of the organisation Statewatch, without authorisation (‘the unauthorised disclosure’).

The judgment under appeal

9 By application lodged at the Registry of the General Court on 12 June 2009, Access Info brought an action for annulment of the decision at issue, which was upheld by the judgment under appeal.

10 The General Court first set out the basic principles relating to access to documents. In particular, in paragraphs 55 to 58 of that judgment, it stated that the right of access to documents of the institutions is connected with the democratic nature of those institutions and that, since the purpose of Regulation No 1049/2001 is, in accordance with Article 1 thereof, to ensure the widest possible right of access, the exceptions to disclosure must be interpreted and applied strictly. The General Court observed that those principles are clearly of particular relevance where the Council is acting in its legislative capacity, as in that case.

11 Next, in paragraphs 59 and 60 of the judgment under appeal, the General Court stated that the mere fact that a document concerns an interest protected by an exception to disclosure is not sufficient to justify the application of that exception: such application may be justified only if access to that document could specifically and effectively undermine the protected interest. Moreover, the risk of the protected interest being undermined must not be purely hypothetical and must be reasonably foreseeable. It is up to the institution concerned to weigh the specific interest which must be

protected through non-disclosure of part of the requested document – in the circumstances, the identity of the Member States which put forward the proposals – against the general interest in the entire document being made accessible.

12 Applying those principles, the General Court went on in paragraphs 68 to 80 of the judgment under appeal to examine the main reason put forward by the Council as justification for only partly disclosing the requested document, that is to say, the alleged reduction in the delegations' room for manœuvre within the Council as a result of the fact that disclosure of the identities of the Member States which put forward proposals would give rise to so much public pressure on those States that it would no longer be possible for a delegation from those States to submit a proposal tending towards the restriction of openness.

13 First, in paragraphs 69 to 74 of the judgment under appeal, the General Court found that it is specifically the principle of democratic legitimacy which requires those responsible for the proposals contained in the requested document to be publicly accountable for their actions, especially where that document is part of the legislative procedure. The General Court also found that the disclosure of the identities of those who put forward a proposal would not prevent the delegations from subsequently departing from that proposal. It explained that a proposal is designed to be discussed, whether it be anonymous or not, not to remain unchanged following that discussion if the identity of its author is known. Public opinion is perfectly capable of understanding that aspect of proposals made in the legislative process. Moreover, according to the General Court, it cannot be presumed that all sections of public opinion are opposed to limiting the principle of transparency. Lastly, the General Court found that even the unauthorised disclosure had not had adverse effects on the Council's decision-making process.

14 Secondly, in paragraphs 75 and 76 of the judgment under appeal, the General Court rejected the Council's argument that it was necessary to take into consideration the preliminary nature of the discussions in order to assess the risk, in terms of undermining the decision-making process, associated with the reduction of the Member States' room for manœuvre. According to the General Court, the preliminary nature of the discussions does not, in itself, justify application of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001, as that provision does not make a distinction according to the state of progress of the discussions.

15 Thirdly, in paragraphs 77 and 78 of the judgment, the General Court rejected the argument that it was necessary to take into consideration the particularly sensitive nature of the proposals made by the Member State delegations. In that regard, the General Court stated that proposals for amendments are part of the normal legislative process. As a result, they are not 'particularly sensitive' to the point that a fundamental interest of the European Union or of the Member States would be jeopardised if the identity of those who made the proposals were to be disclosed, especially since it was not the content of the proposals made by the Member States that was at issue, but solely the identification of the delegations who had tabled them. Furthermore, the General Court found that it is in the very nature of democratic debate that a proposal for amendment of a draft regulation can be subject to both positive and negative comments on the part of the public and the media.

16 Fourthly, in paragraph 79 of the judgment under appeal, the General Court rejected the argument that the unusual lengthiness of the procedure for approving the new regulation on access to documents was attributable to the difficulties which the unauthorised disclosure had created for the negotiations. According to the General Court, the true position was that there were other political and legal reasons which could account for the length of the legislative process.

17 Lastly, in paragraphs 82 and 83 of the judgment under appeal, the General Court rejected the Council's argument blaming the unauthorised disclosure for the subsequent loss of detail, in particular as regards the identification of delegations, from the reports of the meetings of the Council's working parties. In that connection, the General Court stated that this change could also be explained by the fact that

Access Info had brought an action contesting the decision at issue. In any event, the absence of any causal link between disclosure to the public of the names of the delegations and the serious undermining of the decision-making process was confirmed, according to the General Court, by a document which post-dated the unauthorised disclosure and which did not simply refer, without mentioning names, to the proposals to amend the legislative text, but specified the identity of the delegations, at least in the original version of that document.

18 On the basis of the above considerations, inter alia, the General Court upheld the action and annulled the decision at issue.

The procedure before the Court of Justice and the forms of order sought by the parties

19 By order of 17 October 2011, the Czech Republic and the Kingdom of Spain were granted leave to intervene in support of the form of order sought by the Council, and the European Parliament was granted leave to intervene in support of the form of order sought by Access Info. By order of 2 February 2012, the French Republic was granted leave to intervene in support of the form of order sought by the Council.

20 The Council, the Czech Republic, the Hellenic Republic, the Kingdom of Spain and the French Republic claim that the Court should:

— set aside the judgment under appeal;

— give final judgment in the matters that are the subject of this appeal; and

— order Access Info to pay the costs both of the appeal proceedings and of the proceedings at first instance.

21 Access Info and the European Parliament contend that the Court should dismiss the appeal and order the Council to pay the costs.

The appeal

22 The Council relies, essentially, on three grounds of appeal.

The first ground of appeal

Arguments of the parties

23 By its first ground of appeal, the Council, supported in this regard by the Kingdom of Spain, submits that the General Court disregarded the balanced approach laid down both in primary law (Article 207(3) EC and Article 255 EC, applicable *ratione temporis*) and secondary law (recital 6 to Regulation No 1049/2001 and the first subparagraph of Article 4(3) thereof) between, on the one hand, the wider right of access to documents relating to the legislative activity of the institutions and, on the other, the need to preserve the effectiveness of the decision-making process. In particular, the General Court – inter alia in paragraph 69 of the judgment under appeal – construed the first subparagraph of Article 4(3) in such a way as to attribute undue and excessive weight to the transparency of the decision-making process, without taking any account of the needs associated with the effectiveness of that process.

24 More specifically, the Council – supported by the Czech Republic, the Hellenic Republic and the Kingdom of Spain – argues that its legislative process is very fluid and requires a high level of flexibility on the part of Member States so that they can modify their initial position, thus maximising the chances of reaching an agreement. In order to ensure a 'negotiating space' and thereby preserve the effectiveness of the legislative process, it is necessary to ensure that Member States have maximum room for manœuvre in the discussions and that they do so from the earliest stages of the procedure. That room for manœuvre would be reduced if the identity of the delegations were disclosed too early in the procedure, in that it would have the effect of triggering pressure from public opinion, which would deprive the delegations themselves of the flexibility needed to ensure the effectiveness of the Council's decision-making process.

25 In that connection, the Czech Republic and the Kingdom of Spain add that, in the present case, it was not necessary to name the delegations in order to attain the objective pursued by Regulation No 1049/2001. Full access to the content of the requested document would be sufficient to ensure a democratic debate on the issues which that document concerns. Moreover, the only consequence of disclosing the identity of the delegations would have been to enable pressure to be exerted, not on the Council, but on the Member States.

26 Access Info contends that, by its first ground of appeal, the Council criticises only three paragraphs of the judgment under appeal, namely, paragraphs 57 and 58, in which the General Court merely set out the relevant case-law, and paragraph 69, in which – according to Access Info, supported in that regard by the European Parliament – the General Court specifically weighed the requirements of transparency against the need to protect the decision-making process, and concluded that disclosure of the identities of the Member States concerned did not appear liable, in the case before it, to undermine the Council's decision-making process.

Findings of the Court

27 In order to rule on this ground of appeal, it should be noted that, in accordance with recital 1 to Regulation No 1049/2001, that regulation reflects the intention expressed in the second paragraph of Article 1 TEU of marking 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. As is stated in recital 2 to that regulation, the public right of access to documents of the institutions is related to the democratic nature of those institutions (Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraph 34; Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others* v *API and Commission* [2010] ECR I-8533, paragraph 68; and Case C-506/08 P *Sweden* v *MyTravel and Commission* [2011] ECR I-6237, paragraph 72).

28 To that end, Regulation No 1049/2001 is designed – as is stated in recital 4 and reflected in Article 1 – to confer on the public as wide a right of access as possible to documents of the institutions (*Sweden and Turco* v *Council*, paragraph 33; *Sweden and Others* v *API and Commission*, paragraph 69; and *Sweden* v *MyTravel and Commission*, paragraph 73).

29 However, that right is none the less subject to certain limitations based on grounds of public or private interest. More specifically, and in reflection of recital 11, Article 4 of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision (see Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 62; *Sweden and Others* v *API and Commission*, paragraphs 70 and 71; and *Sweden* v *MyTravel and Commission*, paragraph 74).

30 Nevertheless, as such exceptions derogate from the principle of the widest possible public access to documents, they must be interpreted and applied strictly (*Sison* v *Council*, paragraph 63; *Sweden and Turco* v *Council*, paragraph 36; *Sweden and Others* v *API and Commission*, paragraph 73; and *Sweden* v *MyTravel and Commission*, paragraph 75).

31 Thus, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, first explain how disclosure of that document could specifically and actually undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon which it is relying. Moreover, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical (*Sweden* v *MyTravel and Commission*, paragraph 76 and the case-law cited).

32 Moreover, if the institution applies one of the exceptions provided for in Article 4 of Regulation 1049/2001, it is for that institution to weigh the particular interest to be protected through non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible, having regard to the advantages of increased openness, as described in recital 2 to Regulation No 1049/2001, in that it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (*Sweden and Turco* v *Council*, paragraph 45).

33 Moreover, the Court has also held that those considerations are clearly of particular relevance where the Council is acting in its legislative capacity, a fact reflected in recital 6 to Regulation No 1049/2001, which states that wider access must be granted to documents in precisely such cases. Openness in that respect contributes to strengthening democracy by enabling citizens to scrutinise all the information which has formed the basis for a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights (*Sweden and Turco* v *Council*, paragraph 46).

34 It is on the basis of those principles that the Court of Justice must examine the first ground of appeal, by which the Council claims, in essence, that the General Court did not take any account of the needs associated with the protection of its decision-making process.

35 It should be noted that, in paragraph 69 of the judgment under appeal, the General Court specifically stated that, in accordance with the case-law referred to in paragraph 30 above, public access to the entire content of Council documents constitutes the principle, or general rule, and that that principle is subject to exceptions which must be interpreted and applied strictly.

36 Contrary to the assertions made by the Council, the General Court did take account of the needs associated with the effectiveness of the decision-making process: in paragraphs 69 to 83 of the judgment under appeal, it carried out a detailed examination of the arguments adduced by the Council to justify the application, in the circumstances, of the exception concerning the protection of the Council's decision-making process.

37 Thus, far from disregarding the balance between the principle of transparency and the preservation of the effectiveness of the Council's decision-making process, the General Court, in accordance with the principles set out in paragraphs 31 to 33 above, examined the substance of all the arguments put forward by the Council to justify the application, in the circumstances, of the exception referred to in the first subparagraph of Article 4(3) of Regulation 1049/2001.

38 It was not until after it had examined those arguments and found that none of them could prove that disclosure of the information relating to the identity of the Member States in question would have given rise to a genuine risk of seriously undermining the interest protected by the exception in

question that the General Court concluded, in paragraph 84 of the judgment under appeal, that the Council had infringed the first subparagraph of Article 4(3) of Regulation 1049/2001 by precluding, through the decision at issue, the disclosure of that information.

39 Moreover, to the extent that the Council's criticism could be seen as an attempt to put in question the General Court's assessment of those arguments, it must be stated that the Council does not, in support of this ground of appeal, put forward anything to refute the General Court's conclusion that the Council's arguments at first instance were not sufficiently substantiated to establish that disclosure of the information concerning the identity of the Member States in question would have given rise to a genuine risk of seriously undermining the Council's decision-making process.

40 Lastly, as regards the argument of the Czech Republic and the Kingdom of Spain that disclosure of the identity of the delegations was not necessary to attain the objective of Regulation No 1049/2001, suffice it to state that, as was pointed out in paragraph 28 above, the aim of Regulation No 1049/2001, as stated in Article 1 thereof, is to confer on the public as wide a right of access as possible to documents of the institutions. It is in the light of that principle that the General Court rightly stated in paragraph 69 of the judgment under appeal that Regulation No 1049/2001 aims to ensure public access to the entire content of Council documents, including, in this case, the identity of those who put forward the proposals, and full access to those documents may be limited only on the basis of the exceptions to that right laid down in that regulation, which must, for their part, be based on a genuine risk that the interest which they protect might be undermined. As the General Court ruled out the existence of such a risk in the circumstances of the case, partial access to the requested document cannot be regarded as sufficient for the purposes of attaining the objective pursued by Regulation No 1049/2001.

41 In those circumstances, the first ground of appeal must be rejected as unfounded.

The third ground of appeal

Arguments of the parties

42 By its third ground of appeal, which it is appropriate to examine in second place and which comprises three parts, the Council alleges that the General Court committed several errors in law, which led it to conclude that the Council had not established 'to the requisite legal and factual standard' the risk that its decision-making process might be seriously undermined.

43 By the first part of its third ground of appeal, the Council, supported by the Hellenic Republic and the Kingdom of Spain, criticises the General Court for having required, in paragraphs 73 and 74 of the judgment under appeal, proof that the interest protected by the exception had actually been seriously undermined. According to the Council, for it to be possible to rely on the exception under the first subparagraph of Article 4(3) of Regulation 1049/2001, there need only be a risk of harm and, accordingly, an institution which receives a request for access to documents need only establish the likelihood of harm to its decision-making process as a result of the disclosure of that document.

44 For their part, Access Info and the European Parliament contend that, far from requiring the Council to provide proof of an actual adverse effect on the decision-making process, the General Court merely examined, in paragraphs 73 and 74, the argument raised by the Council itself that the Council's decision-making process had been genuinely and specifically undermined as a result of the unauthorised disclosure.

45 By the second part of its third ground of appeal, the Council, with the backing of the Hellenic Republic, argues that, in paragraph 76 of the judgment under appeal, the General Court did not take due account of the importance of the state of progress of discussions when assessing the risk posed to

the decision-making process by disclosure of the identities of the delegations. According to the Council, if the public were recognised as having the right to scrutinise all the preparatory documents throughout the entire decision-making process, delegations would be dissuaded from expressing their points of view during the initial stages of the procedure. Indeed, given the 'peculiarities' of the Council's *modus operandi*, those opinions – especially when they relate to technical matters – are often exploratory in nature and do not necessarily reflect the precise and definitive position of the Member State from which those delegations come, which means that they are liable to evolve during the procedure. The effect of recognising a public right of scrutiny at that preliminary stage of the procedure would be that delegations would refrain from expressing their points of view until they had been assigned a negotiation position by their respective governments, and this would make the legislative process more rigid.

46 In response to those arguments, Access Info contends, first of all, that the Council did not explain the precise nature of the 'peculiarities' that purportedly distinguish its decision-making process. Secondly, it was not until the appeal that the Council raised the argument based on the allegation that the ability of the Member States' delegations to modify their point of view during the procedure would be undermined. In any event, as the General Court found in paragraph 76 of the judgment under appeal, there is no reference in the first subparagraph of Article 4(3) of Regulation No 1049/2001 to the stage of the negotiations as a criterion to be taken into account in order to justify application of the exception to the right of access. Admittedly, that factor could be a relevant consideration when assessing the risk that the interest protected by that provision might be adversely affected. However, identifying the delegations which put forward proposals at an early stage in the discussions would not prevent those delegations from being able to change their position at a later stage. Lastly, Access Info states that it is precisely at the point when the procedure is initiated that maximum transparency is vital: by the time that discussions have already been held and compromise positions reached, transparency and public debate are no longer of any use at all.

47 By the third part of its third ground of appeal, the Council submits in essence that, contrary to the requirements laid down in paragraph 69 of *Sweden and Turco* v *Council*, the General Court did not take due account, in paragraphs 72 and 79 to 83 of the judgment under appeal, of the sensitive nature of the requested document when assessing the risk that full disclosure of that document would cause serious harm to the decision-making process. According to the Council, the sensitive nature of that document stems from the fact that the proposals in question concerned the provision to be made in the new regulation on access to documents regarding exceptions from the principle of transparency. Moreover, the sensitivity of those issues is confirmed by the fact that the European Union Courts have recently ruled on the interpretation of the exceptions and by the level of debate, and the pressure from public opinion, generated by those issues.

48 In support of that part of the ground of appeal, the Council puts forward a number of arguments. First of all, it claims that *Sweden and Turco* v *Council* allows it to rely on the exception under the first subparagraph of Article 4(3) of Regulation No 1049/2001 where the requested document is of a particularly sensitive nature. In paragraph 78 of the judgment under appeal, however, the General Court construed that provision as being applicable only where a fundamental interest of the European Union or of the Members States is involved. There is nothing in the wording of that provision or in other parts of the regulation to support that interpretation; nor is it borne out by *Sweden and Turco* v *Council*. Moreover, that interpretation, together with the high standard of proof required by the General Court to establish that level of harm, makes it almost impossible to rely on that provision.

49 Next, in order to emphasise once more the sensitive nature of the issues in question, the Council claims that the General Court erred in finding, in paragraph 79 of the judgment under appeal, that the unusual lengthiness of the legislative procedure in question could be accounted for by political and legal factors connected with the entry into force of the Lisbon Treaty, the European Parliament elections and the renewal of the Commission. Referring to certain changes in the drafting rules for documents from its working parties with effect from the second half of 2008 – that is to say, after the

unauthorised disclosure – the Council states that in actual fact that delay was attributable, at least in part, to the decline in the candour and completeness of the discussions that followed the unauthorised disclosure, which diminished the effectiveness of the decision-making process within the Council.

50 Lastly, according to the Council, the impasse over the legislative dossier was also attributable, at least in part, to the fact that, precisely because of the unauthorised disclosure, Member States found it very difficult to move out of their initial negotiation positions. In particular, the delegations from those States which wanted to propose amendments that could be perceived by the public as restricting the right of public access were unwilling to do so. The Council claims that the General Court was wrong not to acknowledge the adverse effects on the Council's decision-making process produced by the unauthorised disclosure. First, the General Court erred in finding, in paragraph 72 of the judgment under appeal, that such an argument was unfounded because one of the proposals in question, made after the unauthorised disclosure, restricted the right of public access, whereas, contrary to the statements made by the General Court, that proposal had not been tabled by a delegation from a Member State, but originated with the Commission itself. Secondly, in paragraphs 82 and 83 of the judgment under appeal, the General Court was wrong to reject evidence provided by the Council to explain the decline in the level of detail in the reports for the legislative file, and in relation to the identification of the delegations in the working parties by name. Whereas the General Court found an explanation for this in the fact that proceedings had been brought before it, the Council maintains that, given the sensitive nature of the issues in question, that change was attributable precisely to the unauthorised disclosure. The Council illustrates the reduction in the level of detail with a reference to a report established in July 2009 from the working party in question, in which the identity of the delegations was no longer mentioned but, instead, use was made of expressions like 'a certain number of delegations' and 'other delegations'.

51 Access Info contends first of all that the General Court referred to a situation in which 'a fundamental interest of the European Union or of the Members States' is involved only as an example of a situation in which an issue might be regarded as 'particularly sensitive'. It did not state, however, that only such situations may be regarded as sensitive. Secondly, in contrast with the document at issue in *Sweden and Turco* v *Council*, the requested document contained, not legal opinions, but merely proposals for amendments to draft legislation. Lastly, Access Info adds that the Council failed to provide a detailed statement of reasons for its refusal, even though this is required by *Sweden and Turco* v *Council*.

52 As to the remainder, Access Info contends that the third part of the Council's third ground of appeal must be ruled inadmissible in that it calls into question the General Court's findings as to the sensitive nature of the requested document, as well as those relating to the reasons for the unusual lengthiness of the legislative procedure in question. In any event, Access Info – supported in substance by the European Parliament – argues, first, that the Council's position regarding the sensitive nature of the issues covered by the requested document is based on the fact that those issues give rise to public debate and that they are covered by the case-law of the European Union Courts. Access Info maintains, however, that the Council has failed to substantiate those assertions. Moreover, according to Access Info, the vast majority of legislative procedures concern issues that could give rise to lobbying from interest groups or to debate in the media. Yet that is precisely what transparency and democracy involve, and it does not demonstrate the sensitive nature of an issue, justifying the confidential treatment of a document such as the document requested. Furthermore, if the issues examined were so very sensitive, it would have warranted the redaction, not just of the names of the Member States, but also of the content of the proposals. Secondly, Access Info disputes the Council's submission that the unusual delay in the legislative process in question was caused by the unauthorised disclosure. In fact, that delay could also be explained by the lack of any political agreement between the Council and the European Parliament over the revision of the regulation. Thirdly, Access Info contests the assertion that the unauthorised disclosure led to changes in the detail provided in the working party's reports.

Findings of the Court

53 As regards the first part of the Council's third ground of appeal, it must be stated that this is based on a misreading of the judgment under appeal.

54 In paragraph 59 of the judgment, the General Court rightly stated that application of the exceptions to the right of access is justified only if there is a risk that one of the protected interests might be undermined; and that risk must be reasonably foreseeable and must not be purely hypothetical.

55 In order to determine whether such a risk existed in the circumstances of the case, the General Court first of all found, in paragraphs 70 to 72 of the judgment under appeal, that the Council had not demonstrated the accuracy of the premiss on which it based its arguments, that is to say, the assumption that the public pressure generated by disclosure of the identity of the delegations would be so great that it would no longer be possible for those delegations to submit a proposal tending towards the restriction of openness. Since that was not demonstrated, the General Court rightly found that disclosure of the identity of the delegations which wished to put forward such proposals was not likely to undermine the Council's decision-making process.

56 The General Court then examined, in paragraphs 73 and 74 of the judgment under appeal, the argument – summarised in paragraph 50 of that judgment, which is not criticised by the Council – that the unauthorised disclosure 'had a negative effect on the sincerity and exhaustiveness of the discussions within the Council Working Party, preventing the delegations from contemplating different solutions and amendments so as to reach agreement on the most controversial questions'.

57 In paragraphs 73 and 74, the General Court confined itself to responding to that plea and concluded that, contrary to the submissions made by the Council, the unauthorised disclosure was not, in the circumstances of the case, such as to undermine the Council's decision-making process.

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

59 As regards the second part of the third ground of appeal, according to which the General Court did not take due account of the importance of the state of progress of discussions when assessing the risk posed by full disclosure of the positions of the delegations, in terms of seriously undermining the Council's decision-making process, it must be stated that that part is also based on a misreading of the judgment under appeal.

60 In paragraph 76 of the judgment under appeal, the General Court stated that the preliminary nature of the discussions does not, in itself, justify application of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001. Accordingly, having ruled out the possibility that the Council's other arguments could establish a risk of its decision-making process being undermined, the General Court rightly found that the mere fact that the request for disclosure was made at a very early stage in the legislative process was not sufficient to allow the application of that exception.

61 Consequently, the second part is unfounded.

62 Lastly, as regards the third part of the Council's third ground of appeal, it must be stated first that, when the General Court found, in paragraph 78 of the judgment under appeal, that the matters covered by the requested document were not particularly sensitive, it did not refer to *Sweden and Turco* v *Council*; and rightly so, given that paragraph 69 of that judgment, on which this part of the ground of appeal is based, concerns only specific documents, namely, legal opinions. In the present case, not only was the requested document created as part of the legislative process, but it does not belong to any category of documents in respect of which Regulation No 1049/2001 recognises an interest that specifically merits being protected, such as the category for legal opinions.

63 In any event, even if the General Court were wrong in finding that the criterion for establishing the particularly sensitive nature of a document is that of the risk that disclosure of the document would jeopardise a fundamental interest of the European Union or of the Member States, it must be noted that, in paragraph 77 of the judgment under appeal, it was not by reference to that criterion that, in the circumstances of the case, the General Court ruled out the possibility that the requested document was particularly sensitive. Its conclusion was based, rather, on the finding that the various proposals for amendment or re-drafting made by the four Member State delegations which are described in the requested document are part of the normal legislative process, from which it follows that the requested documents could not be regarded as sensitive – not solely by reference to the criterion concerning the involvement of a fundamental interest of the European Union or of the Member States, but by reference to any criterion whatsoever.

64 Consequently, the Council was wrong to allege that the General Court disregarded the particularly sensitive nature of the requested document.

65 Secondly, as concerns the other arguments relied on by the Council in support of the third part of its third ground of appeal, it should be recalled that, according to settled case-law of the Court of Justice, it is clear from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that the General Court has exclusive jurisdiction to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and to assess those facts. When the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them. The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Save where the clear sense of the evidence has been distorted, that assessment does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see, inter alia, Case C-510/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-1843, paragraph 105, and the Order of 10 November 2011 in Case C-626/10 P *Agapiou Joséphidès* v *Commission and EACEA* [2011] ECR I-169, paragraph 107).

66 By its argument that the General Court was wrong to hold that the unusual lengthiness of the legislative procedure in question could be accounted for by political and legal factors connected with the entry into force of the Lisbon Treaty, the European Parliament elections and the renewal of the Commission, the Council, without pleading any distortion of the evidence, seeks to challenge the General Court's finding that the unusual lengthiness of the legislative procedure was attributable, not to the difficulties brought about by disclosure of the information relating to the identity of those who had made the proposals, but to those factors of a legal and political nature – as the Council itself also maintains, as can be seen from paragraph 46 of the judgment under appeal.

67 Similarly, as regards the alleged effects of the unauthorised disclosure on the Council's decision-making process, the Council, without clearly pleading any distortion of the evidence, is simply attempting to challenge assessments made at first instance. First, it challenges the assessment made by the General Court, in paragraph 72 of the judgment under appeal, of an item of evidence – that is to say, the public version of a document containing written proposals relating to the legislative procedure in question, drawn up by the delegations, namely, Document No 9716/09 of 11 May 2009 – in concluding that, contrary to the assertions made by the Council at first instance, that disclosure had not forced the delegations to avoid submitting proposals tending towards the restriction of openness. Secondly, the Council challenges the General Court's assessment, in paragraphs 82 and 83 of the judgment under appeal, of another item of evidence – namely, Document 10859/1/09 REV 1 – from which the General Court inferred that there had been a change in Council practice after the unauthorised disclosure, in that the information relating to the identity of the Member States which made comments or suggestions about the Commission's proposal was no longer included, and that that change could be explained by the fact that Access Info had brought an action contesting the lawfulness of the decision at issue.

68 Consequently, since those arguments are inadmissible, the third ground of appeal must be rejected as being in part inadmissible and in part unfounded.

The second ground of appeal

Arguments of the parties

69 By its second ground of appeal, the Council submits essentially that the General Court's reasoning is inconsistent with the case-law of the Court of Justice which allows the institutions to rely on general considerations in order to refuse to disclose certain categories of document. The Council maintains, as does the Hellenic Republic, that the decision at issue set out the general considerations explaining the reasons why the requested document could not be disclosed and the reasons why those considerations were in fact applicable to the requested document. Thus, the Council did not confine its examination to the nature of the document, but based its refusal on detailed explanations relating to the sensitive nature of the issues covered and on the fact that those issues formed part of preliminary discussions engaged in before the legislative procedure proper.

70 Access Info contends first that, as the second ground of appeal does not expressly refer to any particular paragraph in the judgment under appeal, it is inadmissible and ineffective. In any event, according to Access Info, supported on this point by the European Parliament, the Council did not make explicit, either in its appeal or in the decision at issue, which general presumption formed the basis for its refusal of access in the circumstances. Moreover, contrary to the requirements of the relevant case-law, there is no basis in any provision of European Union law or any general principle of law for a general presumption of confidentiality for documents such as the requested document, all the more so since that document originated from a procedure of a legislative nature.

Findings of the Court

71 It should be noted at the outset that, contrary to the assertions made by Access Info, this ground of appeal is admissible, given that, although the Council admittedly does not identify any specific paragraph in the judgment under appeal as containing an error of law, it is clear from the arguments in support of this ground of appeal that the Council takes issue with the General Court for not finding that it was open to the Council to rely on a presumption of confidentiality based on general considerations as justification for refusing access to the requested document.

72 As regards the substance, it should be noted that, according to settled case-law, although, in order to justify refusing access to a document, it is not sufficient, in principle, for the document to fall within an activity or an interest referred to in Article 4 of Regulation No 1049/2001, as the institution concerned must also explain how access to that document could specifically and actually undermine the interest protected by an exception laid down in that provision, it is nevertheless open to that institution to base its decisions in that regard on general presumptions which apply to certain categories of document, as similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature (*Sweden and Turco* v *Council*, paragraph 50; Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-5885, paragraph 54; and Case C-477/10 P *Commission* v *Agrofert Holding* [2012] ECR, paragraph 57).

73 While, in such a case, the institution concerned would not be under an obligation to carry out a specific assessment of the content of each of those documents, it must nevertheless specify on which general considerations it bases the presumption that disclosure of the documents would undermine one of the interests protected by the exceptions under Article 4 of Regulation No 1049/2001 (see, to that effect, *Sweden and Others* v *API and Commission*, paragraph 76).

74 In the present case, even if it were to be taken as established that the Council had argued at first instance that it was entitled to refuse access to a document, such as the requested document, by relying on a presumption based on the considerations summarised in paragraph 43 of the judgment under appeal concerning the need to protect the delegations' room for manœuvre during preliminary discussions on the Commission's legislative proposal, it is clear, first, that, in paragraphs 70 to 79 of the judgment under appeal, the General Court examined those considerations and that, in paragraph 80, it concluded that they were not a sufficient basis for application of the exception under the first subparagraph of Article 4(3) of Regulation No 1049/2001. Secondly, the Council's attempt to challenge that assessment by the third ground of appeal was unsuccessful, that ground having been rejected.

75 Consequently, the Council cannot reasonably argue that it was entitled to refuse access to the requested document by relying on a presumption based on such considerations.

76 In view of the above, the arguments seeking to show that the General Court did not take into account the reasons why the Council had considered that those general considerations were applicable to the requested document are ineffective.

77 It follows that the second ground of appeal must be rejected as unfounded.

78 It follows from all the foregoing considerations that the appeal must be dismissed.

Costs

79 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those Rules, 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. Article 140(1) of those Rules provides that the Member States and institutions which have intervened in the proceedings are to bear their own costs.

80 Since the Council's appeal has been dismissed, it is appropriate, in accordance with the forms of order sought by Access Info, for the Council to be ordered to pay, in addition to its own costs, the costs incurred by Access Info.

81 The Czech Republic, the Hellenic Republic, the Kingdom of Spain, the French Republic and the European Parliament must bear their own costs.

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

1. **Dismisses the appeal;**

2. **Orders the Council of the European Union to pay the costs incurred by Access Info Europe;**

3. **Orders the Czech Republic, the Hellenic Republic, the Kingdom of Spain, the French Republic and the European Parliament to bear their own costs.**

[Signatures]