



INSIGHT

TRANSPARENCY OF LEGISLATIVE PROCEDURES AND ACCESS TO ACTS OF TRILOGUES: CASE T-540/15, *DE CAPITANI V. EUROPEAN PARLIAMENT*

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ABSTRACT: On 22 March 2018, for the first time the General Court ruled on access to documents of trilogues (case T-540/15, *De Capitani v. European Parliament*). These are informal meetings between representatives of the European Parliament, the Council and the Commission, which negotiate to reach an agreement, which must subsequently be approved by those institutions in accordance with their respective internal procedures. The judgment, delivered on the appeal made against a refusal by the European Parliament to grant access to the fourth column of the multicolour table used in an on-going trilogue, confirms that access to documents produced in the legislative procedure can be denied only if the institution requested proves that it is reasonably foreseeable, and not purely hypothetical, that full access to the documents at issue is likely to undermine, specifically and actually, its decision-making process. The General Court considered that the principles of publicity and transparency are to be applied to trilogues, since they constitute a decisive stage in the legislative process, and that exceptions provided for in the regulation regarding public access to European Parliament, Council and Commission documents shall be restrictively interpreted. The judgment represents an important step towards reinforcing transparency of trilogues and democratic legislative process in the EU.

KEYWORDS: legislative procedure – trilogues – access to acts of the EU institutions – transparency – Regulation (EC) 1049/2001 – decision-making process.

I. INTRODUCTION

The ordinary legislative procedure in the European Union should be founded on the principles of participation,¹ openness to public scrutiny,² transparency³ for enhancing democratic legitimacy of secondary legislation⁴ and, in more general terms, of the EU institutions.

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¹ The European Union institutions, as well as the EU consultative bodies, incorporate various interests, which find a “constitutional balance” in the decision-making procedures. K. LENAERTS, A. VERHOEVEN,

Although both transparency and democratic process are notions that are difficult to grasp and define in their complexity, transparency, which requires, *inter-alia*, the access⁵ to documents produced, exchanged, transmitted by the institutions during the legislative procedure, is a prerequisite for democratic control. In fact, access to documents allows citizens to scrutinize all the information which have formed the basis of a legislative act⁶ and to gain knowledge about the issues that are debated, making it possible to check decision makers⁷ and facilitating the stakeholders' informed and active contribution⁸ through the various forms provided for in the EU legislative process. It allows public opinion to follow the ways in which decisions are made, the reasons behind them, what positions the institutions (and their members) take and their motivations.

The EU legislative agenda requires an efficient⁹ decision-making process, which combines promptness, acceptance (which is founded on the perception that the outcome of the process is legitimate) and good performance. In the Agreement on Better Law Making, efficiency is mentioned as one of the principles guiding legislative procedure together with sincere cooperation, transparency and accountability.¹⁰

Institutional Balance as a Guarantee for Democracy in EU Governance, in C. JOERGES, R. DEHOUSSE (eds), *Good Governance In Europe's Integrated Market*, Oxford: Oxford University Press, 2002, p. 47 *et seq.*

² Art. 15, para. 2, TFEU. A. ALEMANNI, *Unpacking the Principle of Openness in EU Law Transparency, Participation and Democracy*, in *HEC Paris Research Paper Law*, no. 1003, 2013, papers.ssrn.com.

³ On transparency see Arts 11 and 15 TEU. As regards transparency in the legislative procedure, see the Interinstitutional Agreement Between the European Parliament, the Council of the European Union and the Commission of 13 April 2016 on Better Law-Making, para. 2.

⁴ Court of Justice, judgment of 1 July 2008, joined cases C-39/05 P and C-52/05 P, *Sweden and Turco v. Council*, para. 59 [GC].

⁵ The principle of access to documents of the institutions is provided for in Art. 42, of the Charter of Fundamental Rights of the European Union, in Art. 15, para. 3, TEU, and in the Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

⁶ Court of Justice, judgment of 15 September 2015, case C-280/11 P, *Council v. Access Info Europe*, para. 33. The Council appealed the General Court judgment of 22 March 2011, case T-233/09, *Access Info Europe v. Council*.

⁷ However, the EU lacks accountability mechanisms where voters can punish or approve of policy makers.

⁸ Interest groups and stakeholders' participation in the decision making process takes place, for example, through public consultations at the stage of the impact assessment made by the Commission when it elaborates its legislative proposal. On the issue of access to impact assessment documents see the case pending before the Court of Justice, C-57/16 P, *Client Earth v. Commission*, on a refusal of the Commission to grant access to two impact assessments. In the previous case the General Court found that the Commission could rely on a general presumption to refuse access to impact assessment documents. See General Court, judgment of 13 November 2015, joined cases T-424/14 and T-425/14, *Client Earth v. Commission*.

⁹ A reference to efficiency can be found in the Preamble of the TEU, subparagraph 7, and in Art. 17, para. 6, let. b), TEU. This principle has inspired majority voting in the Council, which improves decision making in terms of efficiency.

¹⁰ Interinstitutional Agreement on Better Law-Making, cit., para. 32.

The three institutions involved in the ordinary legislative procedure have developed a practice of informal meetings of their representatives, called trilogues.¹¹ The informality of the meetings and the participation of a restricted number of people who exchange information on the political positions and preferences of the institutions they represent, accelerate the negotiating process, avoiding the shuttling back and forth between the Council and the European Parliament, often making it possible to end the legislative procedure at the first or second reading.¹² The agreement, which is often the outcome of a package-deal¹³ method of negotiation that is reached in trilogue, becomes the text of the act that is adopted by the two legislative chambers of the EU, which, as a general rule, rubber stamp it without further discussions.¹⁴ Trilogues,¹⁵ which undoubtedly increase the efficiency (at least in terms of speed) of the EU legislative process, are problematic from different standpoints, but, in particular, they are characterised by a lack of transparency concerning, in particular, the access to acts produced by the institutions and used in the meetings. Informality also means that, in some cases, no acts are produced at all.

As previously mentioned, since transparency in the legislative process is a prerequisite for democratic legislation and since trilogues determine the content of the final act, the opaqueness of trilogues and the non-accessibility of the documents used in these meetings may seriously affect the democratic process and the accountability of the EU legislature. The most important document of trilogues is the multicolumn table. The first, second and third columns reproduce, respectively, the Commission's proposal, and the Council and EP's initial position. The fourth column, which is completed as the negotiations advance, contains the compromise texts and the preliminary positions of the Presidency of Council.¹⁶ Access to this part of the multicolumn table would make it possible for public opinion to follow the progress of the legislators' discussions.

It is against this background that one can appreciate the relevance of the judgment delivered by the General Court in *De Capitani v. European Parliament*, which dealt with

¹¹ General Court, judgment of 22 March 2018, case T-540/15, *De Capitani v. European Parliament*, para 68.

¹² *De Capitani v. European Parliament*, cit., para. 71. This practice "has contributed significantly to increasing the possibilities for agreement at the various stages in the legislative process".

¹³ R. KARDASHEVA, *Legislative Package Deals in EU Decision-Making: 1999 - 2007*, Ph.D. thesis, London School of Economics, available at www.jstor.org.

¹⁴ The compromise text reached in trilogues is very seldom modified. See Decision of the European Ombudsman of 12 July 2016, setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of trilogues, para. 19.

¹⁵ See L. OBHOLZER, C. REH, *How to Negotiate under Co-decision in the EU Reforming Trilogues and First-Reading Agreements*, in *CEPS Policy Brief*, 8 May 2012, www.ceps.eu; G. RUGGE, *Il ruolo dei triloghi nel processo legislativo dell'UE*, in *Il Diritto dell'Unione Europea*, 2015, p. 809 *et seq.*; V. SALMASO, *I triloghi nel processo decisionale europeo*, in *Forum Costituzionale*, 20 December 2016, www.forumcostituzionale.it. See also European Economic and Social Committee, *Investigation of Informal Trilogue Negotiations Since the Lisbon Treaty - Added Value, Lack of Transparency and Possible Democratic Deficit*, 2017, www.eesc.europa.eu.

¹⁶ See European Parliament, Rules of procedure, Annex XXI, Code of conduct for negotiating in the context of the ordinary legislative procedure, available at www.europarl.europa.eu.

the refusal to grant access to documents used in trilogues and covered by the exception laid down in Art. 4, para. 3, first subparagraph of Regulation 1049/2001, which is related to the protection of the legislative¹⁷ decision-making process that is still ongoing.

II. THE JUDGMENT

II.1. FACTUAL BACKGROUND

Emilio De Capitani,¹⁸ former head of the LIBE Committee Secretariat, lodged an application for the annulment of the Decision of the European Parliament refusing to grant the applicant¹⁹ full access to some of the documents drawn up by, or made available to, the Parliament and more precisely the multi-column tables submitted to some ongoing trilogues.²⁰ The EP's refusal to grant access to the fourth column of the multicolumn tables for ongoing trilogues was based on the exceptions laid down in Art. 4, para. 3, of Regulation 1049/2991, regarding public access to European Parliament, Council and Commission documents. Recital 6 of Regulation 1049/2001 establishes the principle of "wider access to documents in cases where the institutions are acting in their legislative capacity". It provides for exceptions to the principle of access in Art. 4, paras 1, 2 and 3.²¹ Trilogue documents fall within the scope of application of Regulation 1049/2001, which adopts a broad notion of document, pursuant to Art. 2, para. 3.²²

¹⁷ As opposed to administrative decision-making process. The above cited judgment *Council v. Access Info Europe* is an important precedent in CJEU case law concerning access to documents in the course of a legislative procedure. In the case the Court of Justice analysed the decision made by the Council which granted access to the document requested by the Association Access Info Europe from which the reference to the identity of delegations of the Council which had put forward proposals for amendments to Regulation 1049/2001 on access to documents had been removed. Previously, the General Court, in *Access Info Europe*, cit., had considered that the need to protect the delegations' room for manoeuvre during preliminary discussions on the Commission's legislative proposal was not a sufficient basis for application of the exception under the first subparagraph of Art. 4, para. 3, of Regulation 1049/2001.

¹⁸ E. DE CAPITANI, *(EU's) Law are like Sausages. You Should Never Watch them Being Made*, in *European Area of Freedom Security & Justice*, 15 July 2015, free-group.eu.

¹⁹ The European Parliament rejected the first application made by Emilio De Capitani, submitted on the 15 April 2015, concerning access to a very large number of documents from trilogues, on the ground that the request would put an excessive administrative burden on the institution (a compromise made between the principle of good administration and of transparency). European Parliament, Decision A(2015) 4931 of 8 July 2015.

²⁰ These trilogues concerned the proposal for a Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Cepol).

²¹ Art. 4, para. 1, provides for mandatory exceptions without balancing exercise required. D ADAMSKI, *How Wide Is The Widest Possible? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited*, in *Common Market Law Review*, 2009, p. 521 *et seq.* Art. 4, para. 2, provides for a number of exceptions to disclosure, which have to be balanced with overriding public interests. Transparency can be invoked as overriding public interest. See *Sweden and Turco v. Council*, cit. para. 74. The European Parliament

The European Parliament argued that disclosure of the documents requested would have actually, specifically and seriously undermined the decision-making process of the institution as well as the inter-institutional decision-making process and, therefore, access should have been refused until the co-legislators approved the agreed-upon text. Furthermore, in their interventions, the Council and Commission proposed that the General Court finds a general presumption of non-disclosure of the fourth column of trilogue tables while the trilogue procedure is ongoing.

De Capitani challenged the refusal made by the European Parliament, relying on two pleas. The first was the misapplication of Art. 4, para. 3, first subparagraph, since the institution had failed to satisfy the requisite legal standard, that is how disclosing the documents requested could specifically and actually undermine the decision-making process, and, second plea, it had wrongly excluded the existence of an overriding public interest in their disclosure.

II.2. THE FINDINGS OF THE GENERAL COURT

The General Court was clearly aware of the relevance of the issue and it has in fact considered the claim admissible although the documents required had been published on the European Parliament's register at the end of the legislative procedure and they were consequently made available to the public. According to a settled case law, the applicant retains an interest in seeking the annulment of the act of a EU institution to prevent its alleged unlawfulness from recurring in the future.²³ This is exactly the case, since the main grounds for refusal were of general application and could be relied on by the European Parliament in the case of future requests concerning documents (fourth column) of ongoing trilogues.

The judgment of the General Court is structured as follows: two preliminary observations are made, the first recalling the CJEU case law as applied to Regulation 1049/2001,²⁴ the second is on the principle characteristics of trilogues.²⁵ The General Court then considers whether there is a general presumption of confidentiality for the fourth column of the trilogue documents,²⁶ and whether the European Parliament has complied with its obligation to provide explanations, in accordance with the case law, as to how full access

proposed the repealing of Art. 4, para. 3, of Regulation 1049/2001 in its resolution P6_TA(2009)0114 of 11 march 2009 on public access to European Parliament, Council and Commission documents (recast).

²² Regulation 1049/2001 applies 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.

²³ *De Capitani v. European Parliament*, cit., para. 30.

²⁴ *Ibidem*, paras 57-67.

²⁵ *Ibidem*, paras 68-75.

²⁶ *Ibidem*, paras 76-84.

to the documents under consideration could specifically and actually undermine the interest protected by the exception laid down in the first subparagraph of Art. 4, para. 3.²⁷

General presumptions of non-accessibility, established by the Court of Justice case law as regards documents covered by the exception laid down in Art. 4, para. 2, third subparagraph, have been invoked in several cases before the CJEU.²⁸ This means that access to an act covered by a general presumption can be refused without the institution having to concretely examine each document. In *De Capitani v. European Parliament* the General Court dismissed the Commission and the Council's argumentation whereby the effectiveness²⁹ and the integrity of the legislative process, as set out in Art. 13, para. 1, TEU and Art. 294 TFEU, entitle the institutions to rely on the general presumption of non-disclosure of the fourth column of tables from ongoing trilogues. The General Court, after having recalled the relationship between the legislative procedure and transparency, underlines that the widest possible access can be limited only on the ground of the strict limitation laid down in Art. 4, para. 3, first paragraph of Regulation 1049/2001. The General Court has found there to be a general presumption of non-disclosure only in relation to a set of documents which belonged to a file relating to ongoing administrative or judicial proceedings but never in respect of the legislative process.³⁰

Having rejected the general presumption of non-disclosure, the General Court considers the existence of a serious prejudice to the decision-making process, as provided for in Art. 4, para. 3, of Regulation 1049/2001.

According to the European Parliament, the decision-making process would be "actually, specifically and seriously" affected for several reasons, but it shall be noted that these are of general application. If accepted by the General Court, this argument would actually amount to a general presumption of non-disclosure. To justify its refusal to grant access to the documents requested, the European Parliament relied on some general considerations: the provisional nature of the information contained in the fourth column, the risk of undermining mutual trust and cooperation with the Council,

²⁷ *Ibidem*, paras 85-113.

²⁸ See *Sweden and Turco v. Council* [GC], cit., in particular the legal opinion of the Commission legal service. See also Court of Justice: judgment of 21 September 2010, joined cases C-514/07 P, C-528/07 P and C-532/07, *P Sweden/API and Commission*, para. 73; judgment of 29 June 2010, case C-139/07, *Technische Glaswerke Ilmenau*, in respect of documents regarding an ongoing state aid investigation; judgment of 11 May 2017, case C-562/14, *Sweden v. Commission*, concerning EU pilot procedure; General Court: judgment of 15 September 2016, case T-710/14, *Herbert Smith Freehills v. Council*, concerning legal opinions; judgment of 13 November 2015, joined cases T-424/14 and 425/14, *Client Earth v. European Commission*, concerning access to the European Commission's impact assessment. The appeal is still pending at the time of writing this *Insight*, but see the Opinion of AG Bot delivered on 28 November 2017, case C-57/16 P, *Client Earth v. European Commission*.

²⁹ The need to preserve the effectiveness of its decision-making process (Art. 207(3) TEC) has been delayed by the Lisbon Treaty.

³⁰ *De Capitani v. European Parliament*, cit., para. 82.

the public pressure on the people involved in negotiations making it more difficult to reach an agreement on the basis of the package deal approach, the reduction of the space to think and the temporary character of the refusal to grant access.

As for the argument that disclosure by the European Parliament of the fourth column would negatively affect cooperation between the institutions, it should be considered that the relationship between the Council and the Parliament is based on loyal cooperation which, as the General Court itself recalls, is one of the structural principles of the EU legal order and, with specific reference to the legislative process, contributes to the effectiveness of the procedure. In other words, the smoothness of the process lies heavily in the mutual trust and collaboration between the legislators. The tripartite meetings, as mentioned above, constitute a method that strengthens such cooperation, by allowing contact between the legislative institutions (and the Commission) from the early stages of the process. It should be considered that the position agreed on by the Council and the European Parliament is the result of negotiations that took place between the institutions, but also within the Council – where the Presidency works to reach a compromise text among member States – and within the European Parliament – where trade-off is sought among the political groups. If the European Parliament gives access to the fourth column, it would unilaterally³¹ make public a text that is the result of a provisional compromise reached within the Council and that is liable to be modified as a result of further negotiations. In short, disclosure by the Parliament of the fourth column would mean making open to public a specific moment of the process, which is founded on a method of negotiation and cooperation and on mutual trust between the institutions whose positions are continually evolving and that often take the form of a package deal. The Presidency of the Council, the argument goes, would thus be more cautious about sharing information and about cooperating with the European Parliament Rapporteur, would the European Parliament grant access to the fourth column of the multicolumn table.

However, the General Court is not convinced by this argument and points out that the institutions are required to collaborate, especially in the course of the legislative process, in which cooperation is a condition for effectively conducting the legislative procedure, and that any deterioration in the confidence incumbent on the institutions would constitute a failure to fulfil that duty.³² Moreover, the General Court finds that the European Parliament has not satisfied the standard of proof required, since it has not produced any “tangible evidence” that access to the fourth column would have undermined the loyal cooperation.³³ Therefore, according to the General Court the risk remained hypothetical.

³¹ In this case, the European Parliament has consulted the Council and the Commission before taking the decision that refused access to the documents requested.

³² *De Capitani v. European Parliament*, cit., para. 103.

³³ *Ibidem*, para. 65.

Another reason to decline full access to documents put forward by the European Parliament was that disclosure could result in public pressure from national authorities and interest groups on the European Parliament's negotiating team. The General Court, after recalling that "in a system based on the principle of democratic legitimacy, co-legislators must be held accountable for their actions to the public" and that citizens "must be in a position to follow in detail the decision-making process within the institutions"³⁴ concludes that, the risk of external pressure, which can constitute a legitimate ground for restricting access to documents, must be established with certainty. However, the European Parliament has not adduced any evidence of such an external pressure in the event of disclosure.³⁵

As for the provisional nature of the information, the Court considers first – on the basis of a literal interpretation of Art. 4, para. 3, first subparagraph of Regulation 1049/2001, which does not make any distinction on account of according to the state of progress of the discussions – that the exception laid down in this provision applies irrespective of the formal or informal context or in an early, late or final stage of the decision-making process.³⁶ Second, as the Court stated in *Access Info Europe v. Council*,³⁷ proposals are by their nature to be discussed and to be modified following discussions. An applicant "will be perfectly able to grasp that, in line with the principle that 'nothing is agreed until everything is agreed', the information contained in the fourth column is liable to be amended throughout the course of the trilogue discussions until an agreement on the entire text is reached".³⁸ Quite surprisingly, the European Parliament has also mentioned the space to think³⁹ argument in order to justify refusal to access. According to the explanatory memorandum accompanying the proposal for Regulation 1049/2001, space to think refers to the possibility to limit transparency as regards documents expressing "individual opinions or reflecting free and frank discussions or the provision of advice as part of internal consultations and deliberations, as well as informal messages (e-mail messages or telephone conversations)".⁴⁰ In a 1999 document the Commission affirmed that "access would not extend to working documents in the form of a contribution to internal proceeding" and access to certain documents should be refused "to avoid interference in the decision-making process and to prevent premature publication of a document from giving rise to 'misunderstandings' or jeopardising the interest of the institution". A similar position was

³⁴ *Ibidem*, para. 98.

³⁵ *Ibidem*, para. 99.

³⁶ This observation was also made by the General Court in case *Access Info Europe v. Council*, cit., para. 76.

³⁷ *Access Info Europe v. Council*, cit., para. 69.

³⁸ *De Capitani v. European Parliament*, cit., para. 102.

³⁹ Committee on Civil Liberties, Justice and Home Affairs, doc. A7-0245/2011 of 22 June 2011, Report on public access to documents (Rule 104(7)) for the years 2009-2010, paras. 25-29.

⁴⁰ Communication COM(2000) 30 final of 26 January 2000 from the Commission, *Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents*, para 4.

taken by the Council.⁴¹ According to the legislators, the disclosure of the negotiators' positions could lead to a stiffening of the standpoints or may lead participants to assume more ideological attitudes or approaches that could gain public opinion support.⁴² States and institutions often claim that the pressure exercised on the delegations by public opinion could hinder the possibility of compromise.

The General Court, which in the *Sweden and Turco v. Council* judgment considered that the obligation of transparency in the legislative procedure implies a narrow interpretation of the space to think exception, admits that the risk of external pressure can constitute a ground for restricting access to documents, but that this must "be established with certainty, and evidence must be adduced to show that there is a reasonably foreseeable risk that the decision to be taken would be substantially affected owing to that external pressure".⁴³ The General Court did not find such evidence in the case at hand.

One could argue that there is a difference between the space to think within an institution and a space to think within the legislative procedure. A space to think within a trilogue is tantamount to refusing to consider these tripartite meetings as part of the legislative procedure (as hinted by the Council), a position that the European Parliament itself rejected.⁴⁴ It is in fact an important conclusion reached by the General Court that trilogues are a substantial phase of the legislative process, and therefore they are subject to the transparency requirements applicable to legislative procedures.

In any case, according to the General Court, access to trilogue documents does not call into question the possibility of a free exchange of views among the institutions, which might take place during meetings for the preparation of the text between the various participants.⁴⁵

As for the temporary character of the refusal to provide access to the documents requested, the General Court notes that since trilogues may last several months, the information may be foreclosed to the public for the duration of this period. According to the General Court, a refusal made on this ground would amount to a general presumption of non-disclosure. It is worth noting that the Ombudsman required the multi-column tables to be disclosed "as soon as possible after the negotiations have been concluded".⁴⁶ Early disclosure is clearly more problematic since it exposes negotiators'

⁴¹ For an overview see www.statewatch.org.

⁴² "Inconvenient though transparency may be, when carrying out legislative as well as non-legislative functions, it must be said that it has never been claimed that democracy made legislation 'easier' if easy is taken to mean 'hidden from public scrutiny' as public scrutiny places serious constraints on those involved in legislating". Opinion of AG Cruz Villalón delivered on 16 of May 2013, case C-280/11 P, *Access Info Europe*, para. 67.

⁴³ *De Capitani v. European Parliament*, cit., para. 99.

⁴⁴ European Parliament Resolution P7_TA(2011)0378 of 14 September 2011 on public access to documents, para. 29.

⁴⁵ *De Capitani v. European Parliament*, cit., para. 106.

⁴⁶ European Ombudsman, decision of 12 July 2015, case OI/8/2015/JAS, para. 56.

positions during the process and at a time when negotiations are still ongoing and dossiers have not been finalised yet. However, only access to documents in the negotiating phase allows a more effective control by the public.

In the end, it can safely be said that the applicant won “across the board”, with the only exception being the view, rejected by the General Court, that the European Parliament lacks any discretion to refuse access. In fact the General Court considers that this claim would amount to making Art. 4, para. 3, first subparagraph, of Regulation 1049/2001 ineffective. The institution has the right to deny access to legislative documents, but only if it relies on that exception “in duly justified case”.⁴⁷

Finally, the General Court, having established that the European Parliament infringed the first subparagraph of Art. 4, para. 3, of Regulation 1049/2001, annulled the contested Decision. Therefore, it was not necessary to determine the existence of an overriding public interest that could justify the disclosure of that information.

III. CONCLUDING REMARKS

The judgment is a further step in a growing body of the CJEU case law regarding the access to documents and it confirms that it is difficult for EU institutions to apply the Art. 4, para. 3, exceptions to disclosure of documents created, transmitted or received in the course of the legislative process. This case represents an important contribution to the transparency of the legislative process, in particular because, for the first time, the Court evaluates the granting of access to documents used in trilogues, which are considered an integral part of the legislative procedure.

By excluding a general presumption of non-disclosure for the fourth column of the multicolumn table, the General Court compels the European Parliament to satisfy the (high) standard of proof required by the General Court when Art. 4, para. 3, of Regulation 1049/2001 is invoked in order to deny access to this document used in ongoing trilogues. The refusal of access must be based on tangible elements and objective reasons which show that the risk is not hypothetical but could reasonably be foreseen. It has been confirmed that justifications against public disclosure based on space to think for the institutions in the legislative process are very narrowly construed. In any case the institution is required to assess the request of access to documents it holds on a case-by-case approach. Access to the fourth column of the tables during the negotiating process is the most important result in terms of transparency of trilogues.

That said, one has the impression that the claim has been artfully made in order to obtain a judgment, not only on the access to trilogue documents and, in particular, to the fourth column of the multicolumn table, but also to emphasise the lack of transparency of tripartite meetings, that is of a procedure which is not sufficiently known out-

⁴⁷ *De Capitani v. European Parliament*, cit., para. 112.

side the circle of experts in EU law. It is also worth noting that the request was made to the European Parliament, which is the institution that is considered most sympathetic to the issues of transparency, and of democratic control, representation and debate in the legislative process. For example, in the process of review of amending Regulation 1049/2001,⁴⁸ the Parliament proposed to repeal Art. 4, para. 3. Moreover, the European Parliament has tried to enhance transparency in trilogue. For example, the Parliament's competent committee had to adopt orientation votes prior to entering into trilogues with the Council.⁴⁹ Therefore, the access request to the fourth column appears to be similar to the child who is crying in Andersen's fairy tale. It was generally perceived that the practice of trilogue required all institutions involved to adapt to a method of informality, package deal and close negotiations that was, however, most congenial to the Council as an intergovernmental institution than to the Parliament. The latter has, however, refused access to documents of ongoing trilogues and it has based its refusal on justifications which seem inconsistent with the previous case law of the Court on transparency. It would have come as a surprise had the Court accepted the general reasons invoked, in particular the space to think argument that would have removed this important process of negotiations among legislators from public scrutiny.

The application of the high standard of transparency to trilogues as required in the legislative process and the restrictive interpretation of derogations mean that the access to acts of trilogue can be limited only under exceptional circumstances and on a case-by-case assessment and indicate an important change of direction compared to the previous situation.

If, as observed above, the judgment of the General Court contributes to the enhancement of transparency in trilogues, two questions should be considered. First: does the judgment of the General Court, read together with the recent Ombudsman's conclusions on transparency, mean that the tripartite meetings will be fully open to scrutiny? And, second, what could the possible impact of the judgment on trilogues be?

The answer to the first question is obviously negative. As clarified by the General Court, the European Parliament can refuse access to trilogue documents on the basis of the exceptions provided in Art. 4, para. 3, if it substantiates its refusal. Moreover, the General Court has not excluded in principle that the institutions can negotiate behind closed doors, that is there may be free exchange of views among the institutions, which could take place during meetings with the various participants for the preparation of the text. As the General Court itself noted, the appellant requested access to the fourth column of the table and did not seek to obtain direct access to ongoing trilogue work.

⁴⁸ The European Parliament adopted its first reading in December 2011, but the process has not progressed. European Parliament – Committee on Civil Liberties, Justice and Home Affairs, Report of 17 February 2014 on public access to documents, available at www.europarl.europa.eu.

⁴⁹ See European Parliament, Resolution 2015/2287(INI) of 13 April 2016, request in favour of public access to documents used in the legislative process, paras 21-27.

As regards the second question, although it is clearly too early to assess the consequences of the judgment, there may be different responses from the two institutions. The role of the Parliament as the champion of transparency is tarnished and, therefore, it is to be expected that the institution will do its best to improve this characteristics in trilogues. One could also expect passive resistance from the Council, if one has to take into account the reaction of the Council to the previous judgment of the Court of Justice in *Council v. Access Info Europe*. In fact, the practice of the Council after this judgment has only partially changed: the Council reserved the right to assess the impact of the public disclosure of names of delegations on the decision-making process and on the Member States' negotiating flexibility. Therefore, this means that it records Member States' names in preparatory documents, where it is deemed appropriate.⁵⁰ This is a criterion which gives a high level of discretion to the institution and which seems to contradict the case law of the General Court which requires the institution to demonstrate the existence of a sufficiently serious and reasonably foreseeable risk, not merely a hypothetical one,⁵¹ in order to justify the application of the exception provided for in the first subparagraph of Art. 4, para. 3.⁵² However, recently, the Ombudsman in its inquiry into transparency of the Council legislative process,⁵³ found that the institution's systematic failure to record the names of Member States, along with their positions on legislative matters, constitute maladministration, and it recommended the systematic record of the Member States' identity, also during the preparatory stages of the legislative procedures.

At the end of the day, the question is whether there could be some trade-off between transparency and efficiency. The sixth recital of the preamble of Regulation 1049/2001 stresses the need to safeguard the effectiveness of the decision-making process, as did Arts 255 and 207, para. 3, of the Treaty establishing the European Community. However, the Lisbon Treaty has repealed this reference and, therefore, although efficiency can be considered a principle governing decision-making process. Primary law constitutes the interpretative context of Regulation 1049/2001 and the Treaty clearly tilts the balance in favour of openness and disclosure of documents in the legislative procedure.

The real challenge is to find a way to open trilogues to scrutiny and transparency in a way that allows them to perform the task for which they have been established. Otherwise, the risk is that the EU legislators will find some alternative methods of negotiating 'away' from the public eye. The Lisbon Treaty, by deleting the reference to (Council's) efficiency in decision-making has tilted the balance in favour of transparency, and the

⁵⁰ Evaluation of the impact of the Court ruling in case C-280/11 P (*Council v. Access Info Europe*), Doc. 8863/16 of 18 May 2016. See also M. HILLEBRAND, S. NOVAK, *Integration without Transparency? Reliance on the Space to Think in the European Council and Council*, in *Journal of European Integration*, 2016, p. 527 *et seq.*

⁵¹ General Court, judgment of 7 June 2011, Case T-471/08, *Toland v. European Parliament*.

⁵² *Sweden and Turco v. Council* [GC], cit., para. 57; *Access Info Europe*, cit., paras 59 and 67.

⁵³ European Ombudsman, Recommendation of 9 February 2018, case OI/2/2017/TE on the Transparency of the Council Legislative Process, para. 21.

General Court has further reduced this space. In other words efficiency has still a role to play, but a very narrow one.