Briefing

Another step towards ending EU law-making through secret trilogue meetings

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Introduction

"the Parliament maintains that the principle of transparency and the higher requirements of democracy do not and cannot constitute in themselves an overriding public interest [for the disclosure of documents]."

On 22 March the Court of Justice of the European Union (CJEU) handed down another judgment which undermines the practice of agreeing new laws in secret, legislative, meetings of the Council of the European Union and the European Parliament (with the Commission in attendance): **Press release** (pdf) and **Judgment** (pdf).

Under the current process, which affect over 80% of new Justice and Home Affairs laws, the Commission puts forward new measures and the parliament adopts a negotiating position which is public. The Justice and Home Affairs Council (JHA) Council comprised of Member States meets in secret to develop its negotiating position. Each of the 4-column documents contain: the Commission proposal, the European Parliament position, the Council position and the provisional "compromise" position on which they are all agreed (this evolves over a number of months' of negotiating).

This case concerns the refusal of the parliament to give access to the Council's position – which was redacted - for two requested documents. The Court ordered that the Decision of the parliament to refuse full access to the documents be annulled.

The case

Emilio de Capitani applied to the European Parliament for seven documents concerning a new measure on Europol. He was given copies of five documents but refused access to two other documents on 8 July 2015 on the grounds that the fourth column of the 4-column documents contained the preliminary position of the Council and the compromise text. He then appealed this decision to the CJEU.

The arguments of the parties

> *"The Parliament based the contested decision on the first subparagraph of* ***Article 4(3) of Regulation No 1049/2001*** *in so far as, first, the* ***fourth column of the documents at issue contains provisional compromise texts and preliminary positions of the Presidency of Council,*** *the disclosure of which would actually, specifically and* ***seriously undermine the decision-making process of the institution as well as the inter-institutional decision-making process in the context of the ongoing legislative procedure and, second, no overriding public interest which outweighs the public interest in the effectiveness of the legislative procedure had been identified in the present case."***

The parliament contended that the two documents concerned "police cooperation – a very sensitive area" which would harm of the trust between Member States and the decision-making process and:

> *"granting access to the fourth column of the documents at issue would* ***make the Presidency of Council more wary of sharing information and cooperating with the Parliament negotiating team*** *and, in particular, the rapporteur; moreover, the Parliament negotiating team would be forced, on account of the* ***increased pressure from national authorities and interest groups, to make premature strategic choices*** *of determining where to give in to the Council and where to demand more from the Presidency, which* ***would 'complicate dramatically the finding of an agreement on a common position…"***

Article 4.3

Article 4.3 of the Regulation on access to EU documents (1049/2001) says:

> *"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."*

This provision under which most requested for access to documents are refused.[1]

The applicant submitted that:

> *"that access to the fourth column of the documents at issue could be refused to* ***him only if the Parliament had shown that there was a reasonably foreseeable - and not purely hypothetical - likelihood of the decision-making process being seriously undermined****, and* ***how full access to both documents at issue could specifically and actually undermine the protected interest****. He highlights the importance of access to the fourth column of those documents* ***in a representative democracy so that citizens can ask their representatives to account for the choices they have made and, where***

1. See: Statewatch Analyses: **Secret trilogues and the democratic deficit** (pdf) and **Abolish 1st [and 2nd] reading secret deals - bring back democracy "warts and all"** (pdf)

appropriate, to express their views, by the means they consider appropriate, on agreements reached in the relevant trilogues."

He states that:

> *"the Parliament* ***did not specify why the legislative proposal at issue, solely because it falls within the area of police cooperation, was to be regarded as being very sensitive*** *and did not justify how it would have harmed the trust between the Member States or between the institutions if the compromise text in the fourth column of the two documents at issue had been disclosed.* ***He states that the fact that intense discussions may result or do result from a legislative proposal does not in any way mean that an issue is sensitive to the point of justifying its being kept secret."***

Further the applicant said that no good reason was given as to the view that access would give rise to: "increased public pressure" as the text in question was temporary and the claimed need for "efficiency" in law-making is not cited in Article 294 TEU. And further that:

> *"that, in accordance with the case-law,* ***the discretion left to the institutions not to disclose documents that are part of the normal legislative process is extremely limited or non-existent****.(…) To hold otherwise would mean that, by using trilogues during the first reading, the legislative procedure provided for in the Treaty be circumvented and EU citizens prevented from accessing documents to which they would otherwise have access."*

The Parliament contended that new laws concerning "police forces" is sensitive and "objectively delicate".

The Council and the Commission took a position of no compromise and proposed that:

> *"****the Court find there to be a general presumption of non-disclosure of the fourth column of trilogue tables while the trilogue procedure is ongoing.*** *That presumption is dictated by the need to ensure that the integrity of the procedure be preserved by limiting intervention by third parties…"*

The findings of the court

Amongst the Courts findings are the following:

> *"In accordance with the principle that derogations are to be interpreted strictly,* ***if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by the exception*** *— among those laid down in Article 4 of Regulation No 1049/2001 —* ***upon which it is relying. Moreover, the risk of that undermining must be reasonably foreseeable and not purely hypothetical*** *(judgments of 21 July 2011, Sweden v MyTravel and Commission, C‑506/08 P, EU:C:2011:496, paragraph 76; of 17 October 2013, Council v Access Info Europe, C‑280/11 P, EU:C:2013:671, paragraph 31, and of 15 September 2016, Herbert Smith Freehills v Council, T‑710/14, EU:T:2016:494, paragraph 33).* ***The mere fact that a document concerns an interest protected by an exception is not of itself sufficient to justify application of that exception."***

On the nature of trilogues which:

> *"form an 'established practice by which most EU legislation is adopted' and are therefore regarded, by the Parliament itself, as 'decisive phases of the legislative process' (see Parliament resolution of 28 April 2016 on public access to documents, paragraphs 22 and 26).* ***At the hearing, the Parliament stated that currently between 70 and 80% of the European Union's legislative acts are adopted following a trilogue****. (…)*
>
> *Furthermore,* ***it is common ground that trilogue meetings are held in camera*** *and that the* ***agreements reached in those meetings, usually reflected in the fourth column of trilogue tables, are subsequently adopted, mostly without substantial amendment, by the co-legislators, as confirmed by the Parliament in its defence and at the hearing."***
>
> ***"it is precisely openness in the legislative process that contributes to conferring greater legitimacy on the institutions in the eyes of EU citizens and increasing their confidence in them*** *by allowing divergences between various points of view to be openly debated****. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole*** *(…)*
>
> *"****giving the public the widest possible right of access … entails that the public must have a right to full disclosure of the requested documents, the only means of limiting that right being the strict application of the exceptions provided for in Regulation No 1049/2001,*** *those considerations are clearly of particular relevance where those documents are part of the European Union's legislative activity, a fact reflected in recital 6 of Regulation No 1049/2001, which states that even wider access must be granted to documents in precisely such cases.* ***Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of 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…"***

And:

> "***the Court finds that no general presumption of non-disclosure can be upheld in relation to the fourth column of trilogue tables concerning an ongoing legislative procedure."***

The existence of serious prejudice to the decision-making process

> *"that the documents at issue relate to* ***the area of police cooperation cannot per se suffice in demonstrating the special sensitivity of the documents. To hold otherwise would mean exempting a whole field of EU law from the transparency requirements of legislative action in that field."***

> ***"it is clear from the complete version of the documents at issue, now published by the Parliament (see point 26 above), that the provisional proposals or agreements entered into the fourth column of those documents concerned abstract and general matters without any mention whatsoever of sensitive information****"*

On the fundamental issue of democratic accountability:

> *"as far as concerns the considerations of a general nature advanced in the contested decision, first,* ***it must be noted, as regards the assertion that access, during a trilogue, to the fourth column of the documents at issue would increase public pressure on the rapporteur, shadow rapporteurs and political groups, that, in a system based on the principle of democratic legitimacy, co-legislators must be held accountable for their actions to the public. If citizens are to be able to exercise their democratic rights they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information*** *(judgment of 22 March 2011, Access Info Europe v Council, T‑233/09, EU:T:2011:105, paragraph 69). Furthermore, Article 10(3) TEU states that* ***every citizen is to have the right to participate in the democratic life of the Union and that decisions are to be taken as openly and as closely as possible to the citizen. Thus, the expression of public opinion in relation to a particular provisional legislative proposal or agreement agreed in the course of a trilogue and reflected in the fourth column of a trilogue table forms an integral part of the exercise of EU citizens' democratic rights, particularly since, as noted in paragraph 72 above, such agreements are generally subsequently adopted without substantial amendment by the co-legislators."***

On the so-called "space to think":

> *"as regards the need, emphasised by the Parliament, the Council and the Commission in the context of the present proceedings****, to have space to think, the Court points out that trilogues are part of the legislative process, as has been stated in paragraph 75 above, and that trilogues represent, in the words of Parliament itself, 'a substantial phase of the legislative procedure, and not a separate "space to think"' (Parliament resolution of 14 September 2011 on public access to documents, paragraph 29)".***

It is noted that there are usually months of secret trilogues:

> "***The applicant thus stated at the hearing, without being contradicted, that the duration of trilogues lasted on average seven to twelve months. There could therefore be a significant period of time during which trilogue work remains a secret from the public****. In addition, the duration of that work remains open-ended in so far as it varies according to each legislative procedure."*

On the parliament's hap-hazard method of reporting back to the lead committee and MEPs:

> *"the minutes which the Parliament's negotiating team participating in the trilogues is required to draw up for the next meeting of the relevant parliamentary committee, pursuant to the second subparagraph of Rule 73(4) of the Rules of Procedure of the Parliament,* ***are not capable of remedying the lack of transparency in trilogue***

> ***work during that period of time.*** *In response to the measures of organisation of procedure, the Parliament explained that* ***these minutes were characterised by 'great flexibility in their form' and that '[there] [was] no uniform practice as regards the form and disclosure of the minutes reporting between the various parliamentary committees'.*** *Such minutes can thus take the form of a communiqué from the president or rapporteur of the relevant commission, addressed to all members* ***or only to the coordinators' meeting, the latter of which is generally held in camera****, or generally of an oral communiqué, or even a brief note in the news bulletin of that committee.* ***The absence of detailed and uniform minutes, and the variable disclosure thereof, do not therefore mitigate the lack of transparency of ongoing trilogue work****."*

The court cites parliament report – which calls for and end to secret trilogues - to support its findings:

> *"The Court notes, moreover, that, in its resolution of 11 March 2014 on public access to documents,* ***the Parliament called on the Commission, the Council and itself 'to ensure the greater transparency of informal trilogues, by holding the meetings in public, publishing documentation including calendars, agendas, minutes, documents examined, amendments, decisions taken, information on Member State delegations and their positions and minutes, in a standardised and easily accessible online environment, by default and without prejudice to the exemptions listed in Article 4(1) of Regulation No 1049/2001****"*

Another victory – another step towards full transparency

Emilio de Capitani's successful case in the ECJ follows a long line of similar cases - Carvel, Turco, Hautala, Access Info and others – and marks a very important win.

Tony Bunyan, Statewatch Director, comments:

> *"The parliament discusses and adopts its negotiating position in the open – but as the court noted – it needs to formalise proper procedures for reporting back on the progress of measures. On the other hand the Council's discussions on reaching its negotiating position are held in secret working parties – with most documents marked "LIMITE" (not publicly accessible). Many of the arguments for democratic accountability to citizens emphasised by the court also apply to the positions taken by Members States in these closed fora.*
>
> *And finally, secret trilogues should be open to the public so that we can all see democracy in action."*

.Background

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