OPINION OF ADVOCATE GENERAL

CRUZ VILLALÓN

delivered on 16 May 2013 (1)

Case C-280/11 P

Council of the European Union

v

Access Info Europe

(Appeal – Regulation (EC) No 1049/2001 – Right of access to European Parliament, Council and Commission documents – Council acting in its 'legislative capacity' – Note by the General Secretariat of the Council concerning proposals put forward in connection with the amendment of Regulation (EC) No 1049/2001 itself – Refusal to grant access to information relating to the identity of the Member States submitting proposals)

1. This appeal raises the question of whether, under Regulation No 1049/2001 (2) on public access to the documents of the institutions, the Council is entitled to refuse to disclose information relating to the identity of the Member States proposing modifications as part of the process of amending that very regulation.

2. In its judgment in Case T-233/09 *Access Info Europe* v *Council*, (3) the General Court held that it is not, thus giving rise to this appeal by the Council, which provides the Court of Justice with an opportunity to develop its case-law on the exception under Article 4(3) of Regulation No 1049/2001 to the requirement to disclose documents.

3. More specifically, this case offers the Court of Justice the chance to clarify, for the first time, the precise extent of the duty to ensure transparency imposed by Regulation No 1049/2001 on the institutions where they are acting not only in their legislative capacity – as in *Sweden and Turco* v *Council* –, (4) but in the course of a legislative procedure.

I – **Legislative framework**

4. Recital 6 in the preamble to Regulation No 1049/2001 states 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.’

5. Article 1(a) provides that the purpose of the regulation is ‘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 provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access’.

6. Pursuant to Article 4(3) of Regulation No 1049/2001, ‘[a]ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure’.

II – **Background**

7. Access Info Europe (‘AIE’) is an association established in Madrid (Spain). On 3 December 2008 it applied to the Council under Regulation No 1049/2001 for access to a note of 26 November 2008 from the General Secretariat to the ‘working party’ set up by the Council in connection with the amendment of Regulation No 1049/2001 itself. That document (‘the requested document’) contains the proposals for amendments, or for re-drafting, put forward by a number of Member States, which are identified therein, at the meeting of the working party on 25 November 2008.

8. On 17 December 2008, the Council granted the applicant partial access to the requested document, the references to the identity of the Member States which had put forward each of the proposals having been removed. By way of justification for refusing to provide that information, the Council stated that its disclosure would seriously undermine the decision-making process and that there was no overriding public interest in disclosure, meaning that, ultimately, the exception to the right of access to documents laid down in Article 4(3) of Regulation No 1049/2001 was applicable.

9. This was confirmed by a decision adopted on 26 February 2009 (‘the contested decision’).

10. It should be noted at this juncture that a full version of the requested document was disclosed on the date the document was adopted (26 November 2008) by the organisation ‘Statewatch’ on its website. That disclosure was not in any way authorised by the Council in advance and the Council claims that it was unaware of it when the contested decision was taken.

11. AIE brought proceedings in the General Court for annulment of the contested decision.

III – **The judgment of the General Court**

12. In a judgment of 22 March 2011 the General Court upheld the action for annulment. Having called to mind the principles governing access to documents (at paragraphs 55 to 58), the General Court first states that application of the exception to access is justified only if the interest protected by the exception is specifically and effectively undermined (paragraphs 59 and 60).

13. Applying these principles to the case at issue, the General Court examines the reasons relied on by the Council to justify refusing access. The first is the reduction of the Member State delegations' room for manoeuvre if their positions in the early stages are made public, since this might result in pressure from public opinion, which might restrict the freedom of the delegations. On this point, the General Court's response is that the principle of democratic legitimacy implies accountability for one's actions, particularly in the context of legislative procedures (paragraphs 68 to 74).

14. Secondly, the General Court does not accept that the preliminary nature of the on-going discussions is a decisive factor in assessing the risk that the decision-making process will be undermined (paragraphs 75 and 76).

15. The judgment under appeal then goes on to reject the idea that the particularly sensitive nature of the proposals made by the Member State delegations can be taken into consideration. These are proposed amendments to Regulation No 1049/2001 that naturally form part of the democratic legislative process and whose content has been made public, and it is only the question of whether or not the identity of those making the proposals should be made known that is at issue here (paragraphs 77 and 78).

16. Fourthly, the General Court rejects the argument that the unusually protracted length of the process for amending Regulation No 1049/2001 is due to problems created by the unauthorised disclosure of the working documents (paragraph 79).

17. Lastly, and also in connection with the unauthorised disclosure, the General Court points out that, following the disclosure, the Council made public a document which, in addition to showing the proposals for amendment of the regulation, stated the identity of the delegations (paragraphs 82 and 83).

IV – **The appeal**

18. On 31 May 2012 the Council brought an appeal against the judgment of the General Court.

19. The appeal is based on three grounds.

20. The first ground relates to an alleged breach of Article 4(3) of Regulation No 1049/2001. The Council is of the opinion that the General Court failed to balance the conflicting rights and interests in the correct manner.

21. The second ground concerns an alleged inconsistency with the case-law of the Court of Justice on access to documents. The Council takes the view that the General Court should have taken account of the case-law allowing reliance on general considerations when refusing to disclose certain categories of documents.

22. The third ground of appeal, relating to an alleged error of law, is in three parts. First, the Council complains that the General Court required evidence of actual harm to the interest protected by the exception under Article 4(3) of Regulation No 1049/2001. Secondly, it argues that the judgment under appeal disregarded the importance of the state of progress of discussions when assessing the risk of serious prejudice to the decision-making process represented by disclosure of the identities of the delegations. Thirdly and lastly, the Council claims that the sensitive nature of the requested document was not taken into consideration.

V – **Procedure before the Court of Justice**

23. AIE, the Czech, Greek and Spanish Governments and the European Parliament have presented written submissions. AIE has replied to the statements in intervention of the European Parliament and of the Czech and Spanish Governments and the Council has replied to the statement in intervention of the European Parliament.

24. The Council, AIE, the Czech, French, Greek and Spanish Governments and the European Parliament attended the hearing, which was held on 21 February 2013.

25. In its first ground of appeal, the Council, supported by the Czech, French, Greek and Spanish Governments, argues that the General Court gave too much weight to the principle of transparency, to the detriment of considerations relating to the principle of effectiveness of the Council's legislative process, which requires a high degree of flexibility to enable Member States to modify their initial positions, thus maximising the chances of reaching a common position. In any event, the Czech, French and Spanish Governments take the view that allowing access to the substantive content of the document would be sufficient to ensure democratic debate, disclosure of the identity of the delegations being unnecessary for these purposes. AIE's reply to this is that the Council first reiterates the case-law of the Court of Justice and then criticises parts of the judgment under appeal that do no more than apply that case-law. AIE takes the view, one that is shared by the European Parliament, that the General Court has balanced the interests at issue in an appropriate manner.

26. With regard to the second ground of appeal, the Council, supported by the Greek Government, maintains that the reasoning of the General Court is incompatible with the case-law, which permits the use of general considerations as a basis for refusing access to certain categories of documents. AIE counters that this ground of appeal makes no express reference to any particular part of the judgment under appeal and is therefore inadmissible. Moreover, AIE, supported by the European Parliament, claims that the Council has never made clear which general presumption is the basis for its refusal to grant access, there being no provision or principle that would justify a presumption of confidentiality in this case, especially as the documents form part of a legislative procedure.

27. By its third ground of appeal, the Council, supported by the Greek and Spanish Governments, complains (in the first part) that it was required to show evidence of actual harm to the interest protected by the exception set out in Article 4(3) of Regulation No 1049/2001, when, in its opinion, it is sufficient to show that there is a risk of harm. AIE and the European Parliament argue that the General Court did not require evidence of actual harm, but merely considered whether the process had actually

been damaged as a result of the unauthorised disclosure of the identity of the delegations, as the Council itself had argued was the case.

28. The Council, with the support of the French and Greek Governments, also complains (in the second part) that no consideration was given to the state of progress of discussions when assessing the risk of serious prejudice to the decision-making process represented by disclosure of the identities of the delegations. The Council considers that it is necessary at the early stages to allow the delegations broad scope for negotiation so that they are able to debate without being subject to the pressure of public opinion. AIE's response to this is that the argument is inadmissible, as it was raised only at the appeal stage. In any event, AIE argues, transparency is especially necessary at the early stages of the process, since public debate would be pointless if it were only possible when the delegations had already reached compromise positions. This is so regardless of the fact that the identification of delegations does not necessarily make it more difficult for them to change their respective positions.

29. Lastly (in the third part), the Council complains that the sensitive nature of the requested document was not taken into consideration. It argues that this sensitive nature stems from the fact that the delegations' proposals related to exceptions to the principle of transparency that would be incorporated into the new regulation, which is an issue on which the Courts of the European Union have recently ruled and which is the subject of debate and pressure from public opinion. Evidence of the sensitive nature is allegedly provided by the problems encountered in the amendment process, which was delayed as a result of the mistrust among the delegations caused by the requested information being leaked, making it very difficult for them to distance themselves from their original positions, thus supposedly demonstrating that the Council was correct in refusing to agree to its disclosure. AIE replies that the General Court did not state that only situations where a fundamental interest of the Union or its Member States is at stake are 'sensitive', and that, in this case, the Council has not given a detailed statement of reasons for its refusal, which, moreover, relates not to a legal opinion but merely to proposed amendments to draft legislation. Otherwise, AIE maintains that the remainder of this part of the ground of appeal is inadmissible because it merely challenges the General Court's assessment of the sensitive nature of the information. AIE, with the support of the European Parliament, argues that, in any event, it is to be expected that the legislative procedure should provoke debate and give rise to lobbying, that being precisely what transparency and democracy are all about. Finally, AIE denies that the leak was the cause of the problems associated with the process of amending the regulation or that it gave rise to changes in working methods.

VI – **Assessment**

A – *The grounds of appeal*

30. Although the appeal is formulated in terms of three grounds, they all, in fact, raise a single argument, with minor differences in approach: the failure to apply the exception provided for in Article 4(3) of Regulation No 1049/2001 correctly.

31. Thus, under the first ground, the complaint is that the General Court has contravened Article 4(3) by failing correctly to balance the conflicting rights and interests, namely the effectiveness of the decision-making process and the right of

access to documents. The second ground is based on a failure to respect the case-law of the Court of Justice on access to certain categories of documents. Lastly, the third ground alleges an error of law in failing to consider certain characteristics of the document and in having held that the Article 4(3) exception requires evidence of a particular kind.

32. Ultimately, everything depends on whether the General Court was correct or not in its interpretation of Article 4(3) of Regulation No 1049/2001. Nevertheless, I will follow the formulation of the appeal as three separate grounds, as indicated, although in addressing them I will cross-reference where appropriate, in the interests of brevity.

B – *Pleas relating to the admissibility of certain grounds of appeal*

33. Although not formally requesting that they be held inadmissible, AIE has pointed out that some of the grounds of appeal could be inadmissible as a result of a failure to specify the relevant passages in the judgment under appeal. This is so in the case of the first two grounds, in which, in the opinion of AIE, the Council merely criticises the judgment of the General Court in a generic way, without expressly referring to specific paragraphs of the decision. Furthermore, in relation to the second part of the third ground of appeal, AIE maintains, first, that the Council has not specified the nature of the peculiarities of its decision-making process, and, second, that it is raising for the first time the argument concerning the possibility that delegations will modify their positions over the course of the legislative process. Apart from that, AIE also claims that some of the Council's arguments are, to some extent, implicitly inviting the Court of Justice to re-evaluate the facts at issue at first instance, particularly as regards the assessment of the sensitive nature of the requested document and the possible reasons for the unusual length of the on-going legislative process.

34. Nevertheless, in that, as I have said, the three grounds of appeal can, in essence, be reduced to one, I do not think that it would be appropriate to hold any of them formally inadmissible. It will be sufficient to indicate, where necessary, the inadequacies of any arguments that are either being raised here for the first time or that entail a reassessment of the facts, thereby running counter to the purpose of an appeal.

C – *Substance*

1. The first ground of appeal

35. The Council complains, first, that the judgment under appeal is in breach of Article 4(3) of Regulation No 1049/2001 in that the General Court has not balanced the conflicting rights and interests in an appropriate way.

36. The Council's criticism is essentially that the General Court allowed the principle of transparency to prevail over the principle of effectiveness of the Council's decision-making process and has overlooked the fact that this process needs scope for negotiation, which is incompatible with the level of transparency required by the General Court.

37. In order to give my response to this first ground of appeal I will need to consider a number of points of principle relating to the Council's decision-making process where

it is acting in its legislative capacity. The fact that the Council is taking part in a procedure of a legislative nature will always determine its *modus operandi*, which is generally that of an intergovernmental institution.

a) The Council acting in its 'legislative capacity'

38. The material facts in the present case pre-date the entry into force of the Lisbon Treaty, which reinforces the 'legislative' perception of the role of the Council as the organ that was, historically, the generator par excellence of European Union law. This is not, therefore, a case of applying Article 289 TFEU, which now defines what the legislative procedure is to 'consist' of and hence in what circumstances the institutions are acting as a legislative authority. As a result, this is no longer a matter in which the institutions themselves have any discretion, nor one which depends on the meaning given in any particular case to references in the EC Treaty to the procedures laid down in Articles 251 and 252, neither of which is designated 'legislative'. (5)

39. However, the process of 'embracing' the concept, underlying logic and universal idea of 'the legislative' had already started and was in existence prior to Lisbon. In fact, ever since the Treaty of Amsterdam the concept of 'the legislative' had had a place in the language of the EU. Under the second subparagraph of Article 207(3) EC the Council was already required to define 'the cases in which it is to be regarded as acting in *its legislative capacity*', (6) precisely so as to allow the right of access to documents under Article 255(1) EC to be exercised. I consider it very telling that the Treaty of Amsterdam both enshrined the right of access to documents of the institutions, on the one hand, and referred to the special consideration to be given to the 'legislative capacity' of the Council, on the other. Moreover, this was done in a manner that indicated that the appropriate context for exercising the right of access was where the Council was acting in a 'legislative capacity', thus acknowledging the close relationship that, in principle, exists between legislative procedures and the principles of openness and transparency. (7)

40. Thus, the obvious progress that the Lisbon Treaty represents in this area should not lead us to overlook the fact that the 'language of legislation', so to speak, was not introduced by this Treaty. The previously existing primary legislation incorporated this language, and hence also its implications, quite naturally.

41. Furthermore, in the realm of secondary legislation it is noteworthy that recital 6 in the preamble to Regulation No 1049/2001 itself states that '[w]ider access should be granted to documents in cases where the institutions are acting in their legislative capacity'. The case before us is just such a case, as is apparent from Article 7 of the Council's Rules of Procedure in force at the time of the relevant facts in these proceedings, (8) by virtue of which '[t]he Council acts in its legislative capacity within the meaning of the second subparagraph of Article 207(3) of the EC Treaty when it adopts rules which are legally binding in or for the Member States, by means of regulations, directives, framework decisions or decisions, on the basis of the relevant provisions of the Treaties …'.

42. On the basis of the foregoing it is not hard to conclude that, despite the differences that may exist between national legislation and EU 'legislation', or between Member State legislatures and the EU 'legislature', the 'legislative procedure' by which

the Council is bound under Article 289 TFEU in relation to the adoption of regulations (and that followed by the Council when acting in its 'legislative capacity' pursuant to Article 207 EC) is conceptually very close to the national 'legislative procedure', speaking from the point of view of its underlying purpose and thus the principles on which it must be based. In the end, they have in common the need to satisfy the imperative requirements of democratic legitimacy. (9)

43. Thus, the law-making procedure that lies at the heart of this appeal should be regarded as 'legislative' within the true and proper meaning of the term under the public law of individual States. In this regard, the important thing is that the result of the procedure is a measure that, owing to its characteristics (general application, binding nature, ability to override national laws – which are created by truly democratic authorities –), requires a certain level of democratic legitimacy and this can only be bestowed by a procedure based on the principles that have traditionally governed the workings of national legislatures that are representative in nature.

b) The note from the General Secretariat of the Council to the working group. Content and scope: an internal document?

44. Having established the scope of the expression 'legislative procedure', we must now examine, in the context of such a procedure, the nature of the document that the Council was unwilling to make available to AIE in its complete form.

45. As stated in paragraph 6 of the judgment under appeal, this was 'a note ... from the Secretariat General of the Council to the Working Party on Information set up by the Council, concerning the proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents'. The General Court goes on to say that the document 'contains the proposals for amendments, or for re-drafting, entered by a number of Member States at the meeting of the working party on 25 November 2008'.

46. As the Council has explained in its written observations, (10) the note in question forms part of the procedure followed by the Council when processing a 'legislative file', (11) pursuant to the Council's Rules of Procedure, as they stood at the time.

47. Under Article 19(2) of the Rules of Procedure, matters on the agenda of the Council 'shall be examined in advance by Coreper unless the latter decides otherwise. Coreper shall endeavour to reach agreement at its level to be submitted to the Council for adoption. It shall ensure adequate presentation of the dossiers to the Council and, where appropriate, shall present guidelines, options or suggested solutions'. Furthermore, according to Article 19(3), '[co]mmittees or working parties may be set up by, or with the approval of, Coreper with a view to carrying out certain preparatory work or studies defined in advance'.

48. The note in question was a document that had been drawn up for one of the 'working parties' mentioned in Article 19(3) of the Rules of Procedure, (12) to wit, the one that had been set up by the Council under the name 'Working Party on Information'. It contained 'the proposals for amendments, or for re-drafting, entered by a number of Member States' in the course of a meeting of the working party, the purpose of which was to examine the Commission's proposed amendments to

Regulation No 1049/2001. (13) It was therefore a ‘working document’ recording the proposals of various Member State delegations to the working party set up to prepare the Council’s final decision concerning the Commission’s proposed amendments to Regulation No 1049/2001.

49. It is clear that the ‘note’ represents the equivalent of what would be ‘amendments’ in a national legislative procedure. Arguably, as it is a document created within what is called, in the Council’s terminology, a ‘working party’ that was set up to prepare a Council decision, it could also be seen as ‘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’, as referred to in the first subparagraph of Article 4(3) of Regulation No 1049/2001. It could even be seen as ‘a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned’, as provided for in the second subparagraph of Article 4(3).

50. This ‘internal use’ is part of a legislative procedure. (14) It may occur at a very early stage, but that stage is ‘legislative’ in just the same way as any of the other stages that together constitute the procedure for drawing up a measure such as that which might eventually amend Regulation No 1049/2001.

51. It should be noted that the language used in Regulation No 1049/2001, describing the scope of the Article 4(3) exception in terms of ‘opinions for internal use’, is scarcely appropriate when referring to a ‘legislative’ procedure. It could even be argued that, in the context of a legislative procedure, there is no such thing as an ‘internal opinion’; up to a point openness is an inherent part of the working method of a legislature. Where procedures are preliminary in nature and occur prior to the strictly legislative procedure, which was the case in *Sweden and Turco* v *Council*, as I have already mentioned, that is a different matter entirely.

52. This does not mean that the Article 4(3) exception is *a priori* inapplicable to the institutions when they are acting strictly in their legislative capacity, but it does mean that in the debate between ‘serious harm’ (the exception) and ‘overriding public interest’ (the exception to the exception) the balance is ‘tipped’ a little in favour of the latter.

53. Moreover, this case differs from *Sweden and Turco* v *Council* in that, rather than involving a document from a legal service or from a technical or administrative body, it involves information relating to the position of Member States vis-à-vis a proposed legislative amendment. Unlike *Sweden and Turco* v *Council* the case concerns a document which contains information of a political nature that actually emanated from the very Member States that would later be adopting the decision in the Council. Both politically and in material terms, then, those making the proposals in the working party and those taking the decision in the Council were, in this case, one and the same.

54. Ultimately, it seems clear that we find ourselves in the situation referred to in recital 6 in the preamble to Regulation No 1049/2001, according to which ‘[w]ider access should be granted to documents in cases where the institutions are acting in their legislative capacity’, as the Court of Justice noted in *Sweden and Turco* v *Council*. (15)

55. ‘Wider access’ does not, however, mean ‘absolute access’, since the very use of the expression ‘widest possible access’ indicates that unconditional access is not necessarily required in every case. Instead it means that the exceptions provided for in Regulation No 1049/2001 must be interpreted in a way that pays particular attention to the requirements imposed by the nature of the activity that is being carried out, in this case by the Council.

56. However, the restriction cannot go as far as the ‘guidelines’ followed by the Council in its application of Regulation No 1049/2001, which are referred to in paragraphs 16 to 25 of the Council’s appeal. Under these guidelines, the Council will not, as a matter of principle, disclose the names of the delegations concerned in any document on which the institution has not yet taken a decision. For reasons which I will go on to explain, I take the view that to apply this rule indiscriminately, without regard to the nature of the proceedings of which the document forms part is inconsistent with the meaning and objectives of Regulation No 1049/2001.

c) The balancing of the interests at issue by the General Court

57. With regard to its main argument, I disagree with the Council’s view and find that, in concluding that the exception under Article 4(3) of Regulation No 1049/2001 was not applicable, the judgment under appeal did properly balance the conflicting rights and interests, namely the effectiveness of the decision-making process, on the one hand, and the right of access, on the other.

58. We must keep to the precise terms of the question at issue here and should therefore bear in mind that the Council agreed to provide *all* the documentation requested by AIE, ‘except’ the identity of the Member States. In this regard, it must be acknowledged that the Council has been making an effort to act in a more open way, particularly where it is acting in a legislative capacity. The question, however, is whether it has gone far enough.

59. Fundamentally, the question at issue is therefore this: does the identity of the Member States submitting ‘amendments’ in a ‘legislative procedure’ constitute information that may be refused under the exception provided for in Article 4(3) of Regulation No 1049/2001?

60. The answer to this question must, in my view, be in the negative.

61. I can only agree with the view of the General Court and argue that knowing the identity of the Member States that have submitted the various proposals discussed over the course of the work on the amendment of Regulation No 1049/2001 is a minimum and essential item of evidence to enable those to whom the future measure is addressed to demand political accountability. That is precisely the reason why access to this information serves in a direct way to satisfy the ultimate purpose of the legislative procedure, namely to give democratic legitimacy to the legislation that emerges from that procedure.

62. I concede that the Council is right in pointing out that the fact that this information is made known may be a hindrance to the negotiating strategies of members of the Council and, in that sense, may undermine the effectiveness of the decision-

making procedure. The issue here, however, is that this argument is distinctly less powerful where it no longer refers to the Council's activities in areas other than law-making. In a case such as the present, where the Council is acting in its 'legislative capacity', this argument, which is not in itself completely unfounded, cannot be decisive in the context of the exception provided for in Article 4(3) of Regulation No 1049/2001.

63. 'Legislating' is, by definition, a law-making activity that in a democratic society can only occur through the use of a procedure that is public in nature and, in that sense, 'transparent'. Otherwise, it would not be possible to ascribe to 'law' the virtue of being the expression of the will of those that must obey it, which is the very foundation of its legitimacy as an indisputable edict. In a representative democracy, and this term must apply to the EU, it must be possible for citizens to find out about the legislative procedure, since if this were not so, citizens would be unable to hold their representatives politically accountable, as they must be by virtue of their electoral mandate.

64. In the context of this public procedure, transparency therefore plays a key role that is somewhat different from its role in administrative procedures. While, in administrative procedures, transparency serves the very specific purpose of ensuring that the authorities are subject to the rule of law, in the legislative procedure it serves the purpose of legitimising the law itself and with it the legal order as a whole.

65. It could even be said that what the Council sees as seriously undermining its decision-making process is the best way of ensuring that the legislative procedure in which the Council is engaged in this case is properly carried through. In other words, it is reduced transparency that might, in a case such as the present, undermine the procedure that should be followed in amending a regulation such as Regulation No 1049/2001.

66. Following the General Court's line of reasoning, our response to the Council might be that the disadvantages that transparency brings, in terms of effectiveness, for the negotiation and adoption of decisions might perhaps be such as to justify sacrificing it where the Council is acting as an intergovernmental body and carrying out functions of that nature, but that can never be the case where it is participating in a legislative procedure. In other words, from an objective point of view, transparency might seem to be a disadvantage in the context of inter-State 'negotiations', but not in 'deliberations' between parties that must reach agreement on the content of a 'legislative' measure. While, in the first case, the predominant concern of each State may be its own interest, in the second case that concern must be the interest of the Union, which is a common interest, founded on the implementation of its fundamental principles, among them democracy. (16)

67. 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.

68. As the Court of Justice has stated, '[t]he possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights'. (17) And if citizens are to find these out, they must

necessarily be able to scrutinise ‘all the information which has formed the basis of a legislative act’. (18) Consequently, to hide from public view the identity of those making the proposals being discussed during one of the stages in the legislative procedure is to deprive the citizen of an item of evidence that is necessary for the effective exercise of a fundamental democratic right, namely the ability effectively to hold politically accountable the participants in the process of shaping the public will into the form of a piece of legislation.

69. It is worth stating, once again, that Member States taking part in an EU legislative procedure as members of an institution are more like the common perception of a national legislature than they are like a sovereign body playing a role in relations governed by international law. The mind-set of discretion and even secrecy, which is justified in the context of relations between sovereign players, is out of place in the context of the European Union, which, in this respect, sees itself primarily and increasingly as a community based on the principles of the rule of law and democracy.

70. In this context, although admittedly the Council provided AIE with all the requested information with the exception of the identity of those submitting the proposals, I cannot accept that this was enough fully to satisfy the principle of transparency. In effect, AIE was able to find out the ‘opinions’ of the Member States, but not the identity of those holding them. While, arguably, an opinion can be perfectly valid in its own right in the sphere of intellectual debate, in a political context it is also valid, and particularly so, in that is *someone’s* opinion.

71. For this reason I am unable to endorse the argument of the Czech, French and Spanish Governments to the effect that transparency and, consequently, democratic debate is ensured by granting access to the material content of the document only. To do so would perhaps allow an abstract debate on the proposals at issue, but this would still lack the added value of knowing who supported them and who criticised them. Democratic political debate involves, above all, accountability; and to have accountability it is essential to know the identity of those participating in the debate and, in particular, the terms on which they are doing so.

72. As the General Court states in paragraph 69 of the judgment under appeal, ‘in a system based on the principle of democratic legitimacy’, those responsible for the proposals made [in] ‘the context of a procedure in which the institutions act in a legislative capacity’ ‘must … be publicly accountable for their actions’ and their identity must therefore be known. The General Court comments, at paragraphs 70 to 72 of its judgment, that the harm that the Council refers to in this regard is more a sign of a largely unsubstantiated preconception that citizens and the institutions are unable properly to comprehend the deeper meaning of democratic debate and, specifically, the fact that it is normal to alter a position or strategy precisely as a result of rational discussion between accountable bodies.

73. In short, the General Court has balanced the conflicting rights and interests in an appropriate manner and the first ground of appeal should therefore be dismissed.

2. The second ground of appeal

74. Under the second ground of appeal, the Council claims inconsistency with the case-law of the Court of Justice which permits reliance on general considerations when refusing to disclose certain categories of documents. (19)

75. Certainly, the case-law of the Court of Justice referred to does accept that, for certain categories of documents, there is a presumption that disclosure could in principle adversely affect the procedure to which they relate. However, this presumption rests on the premiss that, under the procedure in question, there are special arrangements for access to these documents. The existence of those arrangements supports the presumption that the disclosure of such documents could, in principle, adversely affect the purpose served by the procedure to which they relate.

76. This is not by any means an irrebuttable presumption since '[t]hat general presumption does not exclude the right of [the] interested parties' (that is to say those who do not have a right of access to documents in the review procedure) 'to demonstrate that a given document … is not covered by that presumption, or that there is a higher public interest justifying the disclosure of the document'. (20)

77. In this case, however, although the Council claims to have relied before the General Court on the existence of a general presumption in favour of not disclosing the identity of the Member States, as requested by AIE, in fact paragraph 49 of the appeal shows that the Council was actually making the points that the document in question related to particularly sensitive issues and that the decision-making process was at a very early stage, so that disclosure might be seriously detrimental to the decision-making process.

78. In my view, the foregoing does not suggest reliance on the existence of special access arrangements, other than those provided for in Regulation No 1049/2001, but rather putting forward reasons for refusing to grant access to the specific information requested. The General Court has, in my opinion, responded to those reasons in an adequate and reasoned way in paragraphs 68 to 78 of the judgment under appeal, in which it repeatedly points out that the Council's arguments are too abstract. On this point I must agree with AIE's view that a ground of appeal that in reality seeks to have the Court of Justice revisit the assessment of the facts carried out by the General Court cannot be accepted.

3. The third ground of appeal

79. The Council's third and final ground of appeal is in three parts and alleges an error of law.

80. First, the Council argues that the General Court was incorrect in requiring evidence of actual harm to the interest protected by the exception in Article 4(3) of Regulation No 1049/2001. In my view, this criticism is unfounded. Rather than having required such evidence, the General Court has, on the contrary, merely rebutted the arguments used by the Council precisely to show that disclosing the identity of the Member States had undermined the decision-making process.

81. In fact, when, as the Council argues in paragraph 57 of its appeal, the General Court states that the discussion between the representatives of a Government and a

parliamentary committee did not show that the decision-making process had been harmed (paragraphs 73 and 74 of the judgment under appeal), the General Court is actually replying to the Council's own statement to the effect that the unauthorised disclosure of the identity of the Member States by Statewatch had been the cause of actual harm to the decision-making process. So, if the General Court discussed the issues at a more concrete level, it was only because the Council had called upon it to do so.

82. Concerning the second part, the Council argues that the judgment under appeal disregarded the importance of the state of progress of discussions when assessing the risk of serious prejudice to the decision-making process that the disclosure of the identities of the delegations might represent.

83. Without prejudice to the reasons given by the General Court at paragraphs 75 and 76 of the judgment under appeal, I will at this juncture merely refer back to the point made at point 50 of this Opinion to the effect that the logic behind the guiding principles of the legislative procedure must extend to each and every one of its stages.

84. Thirdly and finally, the Council complains that the sensitive nature of the requested document was not taken into account. In this regard, in addition to once more referring to the general points made at points 63 to 71, I need only state that, again, the Council's criticisms reveal only that it disagrees with the General Court's assessment of the facts.

85. In the light of the foregoing, I propose that the Court of Justice should also dismiss the remaining grounds of appeal.

VII – **Costs**

86. Pursuant to Article 184(1) and Article 138(1) of the Rules of Procedure, I propose that the Court order the Council to pay the costs.

VIII – **Conclusion**

87. In the light of the foregoing considerations, I propose that the Court should:

(1) Dismiss the appeal;

(2) Order the Council to pay the costs.

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1 – Original language: Spanish.

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2 – Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, p. 43).

3 – [2011] ECR II-1073.

4 – Joined Cases C-39/05 P and C-52/05 P [2008] ECR I-4723. The document at issue there was an opinion of the Council legal service concerning a proposal for a Council Directive. It was, therefore, an internal document of a preliminary nature vis-à-vis the legislative procedure.

5 – In this regard, it could be said that, by referring to concepts as significant as ‘legislative procedure’ (Article 289 TFEU), the Lisbon Treaty intends to encompass the entire range of meanings evoked by this type of term. Where the Council draws up or participates in drawing up legislation that is of general application, binding and directly applicable (Article 288 TFEU), it is creating in European Union law the equivalent of a national statute. As the Treaties provide that this type of measure is drawn up using a procedure that is referred to as ‘legislative’ (Article 289 TFEU), it must be concluded that this procedure must be based on the principles that are typical of this type of procedure in national legal orders. On the Council’s procedures and internal organisation following the Lisbon Treaty in general, see Lenaerts, K., and van Nuffel, P., *European Union Law*, Third edition., Sweet and Maxwell, London, 2011, 13-047 to 13-060.

6 – Emphasis added.

7 – On the origins of the right of access in the EU sphere, see Guichot, E, *Transparencia y acceso a la información en el Derecho europeo*, Cuadernos Universitarios de Derecho Administrativo, Derecho Global, Seville, 2011, pp. 77 to 104.

8 – Adopted by Council Decision 2006/683/EC, Euratom of 15 September 2006 (OJ 2006 L 285 p. 47).

9 – In this regard, see *Sweden and Turco* v *Council*, paragraph 46.

10 – Paragraphs 10 to 20.

11 – Ibid., paragraph 11.

12 – The provision states that '[co]mmittees or working parties may be set up by, or with the approval of, Coreper with a view to carrying out certain preparatory work or studies defined in advance'. The meetings of these committees or working parties 'shall be chaired by a delegate of the Member State whose turn it is to chair the … Council meetings' being prepared in each case.

13 – COM(2011) 137.

14 – Since the situation is that covered by Article 7 of the Rules of Procedure cited at point 41: 'The Council acts in its legislative capacity … when it adopts rules which are legally binding in or for the Member States, by means of regulations, directives …'.

15 – Paragraph 46. The General Court expressed a similar view in paragraph 69 of the judgment under appeal.

16 – Curtin, D., 'Judging EU Secrecy', *Cahiers de Droit Européen* 2/2012, Bruylant, pp. 459-490 [461], refers to the importance that, for the EU, still attaches to the memory of the days when the its method of government was 'diplomacy' rather than 'democracy'.

17 – *Sweden and Turco* v *Council*, paragraph 46.

18 – Loc. cit.

19 – *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-506/08 P *Sweden* v *Commission and MyTravel* [2011] ECR I-0000, paragraph 74.

20 – *Commission* v *Technische Glaswerke Ilmenau*, paragraph 62.