Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

21 January 2021*

(Appeal – Access to documents of the EU institutions – Regulation (EC) No 1049/2001 – Article 10 – Refusal to grant access – Action before the General Court of the European Union against a decision by the European Parliament refusing to grant access to a document – Disclosure of the annotated document by a third party after the action was lodged – Order that there was no need to adjudicate pronounced by the General Court on the ground that was no longer any interest in bringing proceedings – Error of law)

In Case C-761/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 3 December 2018,

Päivi Leino-Sandberg, residing in Helsinki (Finland), represented by O. W. Brouwer and B. A. Verheijen, advocaten, and by S. Schubert, Rechtsanwalt,

appellant,

supported by:

Republic of Finland, represented by M. Pere, acting as Agent,

Kingdom of Sweden, represented initially by A. Falk, C. Meyer-Seitz, H. Shev, J. Lundberg and H. Eklinder, and subsequently by C. Meyer-Seitz, H. Shev and H. Eklinder, acting as Agents,

interveners in the appeal,

the other party to the proceedings being:

European Parliament, represented by C. Burgos, I. Anagnostopoulou and L. Vétillard, acting as Agents,

defendant at first instance,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič, E. Juhász, C. Lycourgos and I. Jarukaitis (Rapporteur), Judges,

Advocate General: M. Bobek,

Registrar: Calot Escobar,

* Language of the case: English.

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 16 July 2020,

gives the following

Judgment

1 By her appeal, Ms Päivi Leino-Sandberg seeks to have set aside the order of the General Court of the European Union of 20 September 2018, *Leino-Sandberg* v *Parliament* (T-421/17, not published, EU:T:2018:628), ('the order under appeal'), by which it held that there was no longer any need to adjudicate on her action for the annulment of the European Parliament Decision A(2016) 15112 ('the decision at issue'), of 3 April 2017, refusing to grant her access to Decision A(2015) 4931 of the Parliament, of 8 July 2015, addressed to Emilio De Capitani.

Background to the dispute

2 Ms Päivi Leino-Sandberg, a Professor of International and European Law at the University of Eastern Finland, submitted to the European Parliament a request for access to documents of that institution in the context of two research projects relating to transparency in trilogues. In that context, she specifically requested to have access to Decision A(2015) 4931 of the European Parliament of 8 July 2015 refusing to grant Mr Emilio De Capitani full access to documents LIBE-2013-0091-02 and LIBE-2013-0091-03 ('Decision A(2015) 4931' or 'the requested document'). By that decision, the Parliament in essence refused Mr De Capitani access to the fourth column of two tables drawn up in the context of the trilogues that were ongoing at the time.

3 That decision was the subject of an action for annulment lodged by Mr De Capitani, registered by the Registry of the General Court on 18 September 2015 as Case T-540/15. In the meantime, Mr De Capitani made that document available to the public by publishing it on the internet in a blog ('the document at issue').

4 By the decision at issue, the Parliament refused to grant the appellant access to the requested document, on the ground that, as it was being contested by its addressee before the General Court and the judicial proceedings were still in progress, its disclosure would undermine the protection of court proceedings provided for by the second indent of Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

5 By judgment of 22 March 2018, *De Capitani* v *Parliament* (T-540/15, EU:T:2018:167), the Court annulled Decision A(2015) 4931.

Proceedings before the General Court and the order under appeal

6 By application lodged at the Registry of the General Court on 6 July 2017, the appellant brought an action seeking the annulment of the decision at issue. The Republic of Finland and the Kingdom of Sweden applied to intervene in the proceedings in support of the forms of order sought by the appellant.

7 On 14 November 2017, the General Court, by a measure of organisation of procedure adopted pursuant to Article 89 of its Rules of Procedure, asked the appellant, in particular, to indicate whether she had obtained satisfaction by the fact that she was able to access the requested document on the

internet. On 27 March 2018, by a separate document lodged at the Registry of the General Court pursuant to Article 130(2) of the Rules of Procedure, the Parliament lodged an application for a declaration that there was no need to adjudicate.

8 On 20 April 2018, the appellant lodged with the Registry of the General Court her observations on the application for a declaration that there was no need to adjudicate, asking the Court to reject that application.

9 By the order under appeal, the General Court held that there was no longer any need to adjudicate on the appellant's action as, following the disclosure of the document at issue on the internet, the action had become devoid of purpose. The General Court excluded the application of the case-law of the Court of Justice that an applicant may retain an interest in seeking the annulment of an act of a European Union institution to prevent its alleged unlawfulness recurring in the future. According to the General Court, the refusal made by the Parliament was specific to the case and ad hoc in nature.

Forms of order sought by the parties before the Court of Justice

10 By its appeal, the appellant claims that the Court of Justice should:

– set aside the order under appeal;

– give a final ruling on the dispute;

– order the Parliament to pay the costs, and

– order the interveners to bear their own costs.

11 The Republic of Finland submits that the Court should:

– set aside the order under appeal, and

– refer the case back to the General Court for reconsideration.

12 The Kingdom of Sweden contends that the Court should:

– set aside the order under appeal, and

– give final judgment on the matter.

13 The Parliament contends that the Court should:

– dismiss the appeal, and

– order the appellant to pay the costs.

The appeal

14 In support of her appeal, the appellant puts forward two grounds. By her first ground of appeal, she criticises the General Court for having concluded that the action had become devoid of purpose and that there was no longer any need to adjudicate. By her second ground of appeal, the appellant criticises the General Court for having held that the publication of the document at issue by a third party had entailed the loss of her interest in bringing proceedings.

The first ground of appeal

Arguments of the parties

15 By her first ground of appeal, which contains two complaints, the appellant submits, in essence, that the General Court committed an error of law in finding that the publication of the document at issue on the internet, by the addressee thereof, had resulted in the action at first instance becoming devoid of purpose.

16 The appellant submits, first, that the General Court failed to apply the principle established by the judgment of 4 September 2018, *ClientEarth* v *Commission* (C-57/16 P, EU:C:2018:660), according to which legal proceedings retain their purpose where, notwithstanding the publication of the documents sought, the institution which had originally refused to grant access to those documents does not withdraw its decision. In the present case, the Parliament has not withdrawn the decision at issue.

17 Second, the appellant criticises the General Court for having applied a criterion that was overly narrow and incorrect by merely considering whether the appellant could 'in an entirely legal manner' use the document at issue, following its publication by Mr De Capitani on his blog. In that regard, and as Mr De Capitani had himself indicated that the published version of the requested document was 'a version emphasised/notated', the appellant submits that her status as a researcher required to comply with academic standards of quality, objectivity, and research ethics put her under an obligation to use only information obtained from authentic sources. In addition, it does not follow from the purpose of Regulation No 1049/2001 that the regulation must be interpreted as meaning that the publication of a document by a third party may be a substitute for public access granted by the institution in question under that regulation.

18 The Finnish and Swedish Governments support the appellant's arguments and consider that the legal proceedings have not become devoid of purpose.

19 In particular, the Finnish Government observes that, to its knowledge, the Court has never held that the disclosure of a document by a third party is relevant for the purposes of assessing whether the interest of an applicant in bringing proceedings persists in a case regarding the applicant of Regulation No 1049/2001. That government submits, moreover, that the circumstances at issue in the cases that gave rise to the order of 11 December 2006, *Weber* v *Commission* (T-290/05, not published, EU:T:2006:381) and to the judgments of 3 October 2012, *Jurašinović* v *Council* (T-63/10, EU:T:2012:516), and of 15 October 2013, *European Dynamics Belgium and Others* v *EMA* (T-638/11, not published, EU:T:2013:530), to which the general Court referred in paragraph 27 of the order under appeal, are different from the circumstances at issue in the present case.

20 For its part, the Parliament contends that the first ground of appeal should be rejected.

21 First, the Parliament submits that the facts underlying the present case, and those that gave rise to the judgment of 4 September 2018, *ClientEarth* v *Commission* (C-57/16 P, EU:C:2018:660), are different and that the reasoning followed by the Court in that judgment cannot be transposed to this case. The only point that that judgment and this case have in common is that the institution in question did not withdraw the decision at issue.

22 Second, the Parliament submits that the argument concerning quality standards and the impossibility for an academic researcher to rely on research conducted on the internet was not raised before the General Court. That, according to the Parliament, is thus a new plea which extends the subject matter of the dispute and which, therefore, must be rejected as inadmissible.

23 In addition, the Parliament observes that the General Court did not find that, or even examine whether, the publication of the document at issue by Mr De Capitani was validly capable of being a substitute for public access, but only assessed whether the appellant could make use of it, in an entirely legal manner, for the purposes of her academic work.

24 Furthermore, as regards the Finnish Government's assertion that the appellant could not have complete certainty as to the legitimacy of the publication and of the use of the document at issue, the Parliament submits that it had never expressed any doubt as to the fact that Mr De Capitani, the addressee of the requested document, was in fact the person who had published the document at issue. The Parliament submits that there is no doubt on that point.

25 Finally, the Parliament stresses that, contrary to what is suggested by the Finnish Government, it is clear from the case-law cited in the order under appeal that the General Court laid down a general criterion when it held that an action for annulment of a decision refusing access to documents no longer has any purpose when the documents in question have been made accessible by a third party and the applicant can access them and use them in a way which is as lawful as if he or she had obtained them as a result of his or her application under Regulation No 1049/2001.

Findings of the Court

26 By her first ground of appeal, the appellant, supported by the Finnish and Swedish Governments, submits, in essence, that the General Court committed an error of law in finding that the action had become devoid of purpose. By the first complaint, she submits that as the Parliament had not withdrawn the decision at issue, the action retained its purpose. By the second complaint, she submits that the General Court applied a too narrow and incorrect criterion by merely considering whether the appellant could legally use the document at issue, following its publication by a third party on the internet, in a version that was annotated and underlined, whereas her status as an academic researcher required her to use only information obtained from authentic sources.

27 As regards the plea of inadmissibility, set out in paragraph 22 of this judgment, alleging that the second complaint was not raised before the General Court, it must be recalled that, according to the case-law of the Court of Justice, to allow a party to put forward for the first time before the Court of Justice a plea in law which that party has not raised before the General Court would be to allow it to bring before the Court of Justice a case of wider ambit than that presented before the General Court. In an appeal, the Court's jurisdiction is, as a general rule, confined to a review of the assessment by the General Court of the pleas argued before it. However, an argument which was not raised at first instance does not constitute a new plea that is inadmissible at the appeal stage if it is simply an amplification of an argument already developed in the context of a plea set out in the application before the General Court (judgment of 10 April 2014, *Areva and Others* v *Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraphs 113 and 114 and the case-law cited).

28 In the present case, it must be observed that the appellant submits, in essence, in paragraph 3 of her observations on the application for a declaration of no need to adjudicate submitted to the General Court, that a document cannot be regarded as having been the subject of a 'publication' as such, where it has been disclosed on the internet by a private person, since such disclosure is not comparable to access granted to it by the institution or its publication by that institution.

29 Therefore, and even though the appellant did not expressly state, at first instance, that her status as an academic researcher obliged to comply with academic standards of quality and objectivity required her to use only information obtained from authentic sources, the second complaint, alleging that the General Court applied an overly narrow and incorrect criterion when basing its findings on the fact that the applicant could legally use the document at issue following its publication by a third party, is the amplification of the argument she made before the General Court.

30 Accordingly, the second complaint within the first ground of appeal is admissible.

31 As regards the merits of the first ground of appeal, it should be recalled that, in paragraph 27 of the order under appeal, the General Court recalled its case-law according to which an action for the annulment of a decision refusing access to documents no longer has any purpose when the documents in question have been made accessible by a third party and the applicant can access them and use them in a way which is as lawful as if he or she had obtained them as a result of his or her application under Regulation No 1049/2001. Furthermore, in paragraph 28 of that order, the General Court held that that case-law applied a fortiori in the present case 'given that a full version of the [document at issue] [had been] made accessible by the addressee of the document himself, with the effect that there [was] no doubt that the applicant can use it in an entirely legal manner for the purposes of her university work.'

32 It is important to bear in mind that, in accordance with the Court's settled case-law, an applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible. That purpose must continue to exist, like the interest in bringing proceedings, until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be liable, if successful, to procure an advantage for the party bringing it (judgments of 28 May 2013, *Abdulrahim* v *Council and Commission*, C-239/12 P, EU:C:2013:331, paragraph 61; of 23 November 2017, *Bionorica and Diapharm* v *Commission*, C-596/15 P and C-597/15 P, EU:C:2017:886, paragraphs 84 and 85; of 6 September 2018, *Bank Mellat* v *Council*, C-430/16 P, EU:C:2018:668, paragraph 50; and of 17 October 2019, *Alcogroup and Alcodis* v *Commission*, C-403/18 P, EU:C:2019:870, paragraph 24).

33 In the present case, it must be held that even if the document at issue has been disclosed by a third party, the decision at issue has not been formally withdrawn by the Parliament, with the result that the legal proceedings, contrary to what the General Court held, in particular in paragraphs 27 and 28 of the order under appeal, retained their purpose (see, to that effect, the judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 45 and the case-law cited).

34 Therefore in order to ascertain whether the General Court should have ruled on the substance of the action, it is necessary to examine, in accordance with the case-law of the Court recalled in paragraph 32 of this judgment, whether the appellant could continue to invoke, notwithstanding that disclosure, an interest in bringing proceedings, which requires the determination of whether the appellant has obtained, by that disclosure, full satisfaction having regard to the objectives she pursued by her request for access to the document in question (see, to that effect, the judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 47).

35 As a preliminary matter, it must be observed that, while it is true that interest in bringing proceedings, which must continue until the final decision is delivered failing which there will be no need to adjudicate, constitutes a procedural condition independent of the substantive law applicable to the substance of the case, it cannot however be detached from that law as whether there is an interest in bringing proceedings must be assessed in the light of the substantive claim that has been made in the application initiating the proceedings.

36 In that regard, it should be borne in mind that, in accordance with recital 1 thereof, Regulation No 1049/2001 reflects the intention of the European Union legislature, expressed in the second paragraph of Article 1 TEU, to mark a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen (judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 73 and the case-law cited).

37 That core EU objective is also reflected in Article 15(1) TFEU, which provides that the institutions, bodies, offices and agencies of the European Union are to conduct their work as openly as possible, that principle of openness also being expressed in Article 10(3) TEU and in Article 298(1) TFEU, and in the enshrining of the right of access to documents in Article 42 of the Charter of Fundamental Rights of the European Union (judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 74 and the case-law cited).

38 From that perspective, Regulation No 1049/2001 seeks, as recital 4 and Article 1 thereof state, to confer on the public as wide a right of access as possible to documents of the EU institutions (judgment of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 33).

39 To that end, Article 2 of Regulation No 1049/2001 provides, in paragraph 1, that 'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this regulation' and adds, in paragraph 4, that 'without prejudice to Articles 4 and 9 [of this regulation], documents shall be made accessible to the public either following a written application or directly in electronic form or through a register'.

40 Thus, the regulation establishes, first, the right, in principle, for any person to access documents of an institution and, second, the obligation, in principle, of an institution to grant access to its documents.

41 Article 4 of the regulation lists exhaustively the exceptions to the right of public access to documents of the institutions on the basis of which the institutions may refuse access to a document, in order to prevent disclosure of the document from undermining one of the interests protected by Article 4 (see, to that effect, judgment of 28 November 2013, *Jurašinović* v *Council*, C-576/12 P, EU:C:2013:777, paragraph 44 and the case-law cited).

42 Thus, Article 10 of that regulation, which concerns the rules governing access to documents following an application, provides in paragraph 1 thereof that such access is exercised 'either by consulting them on the spot or by receiving a copy, including, where available, an electronic copy, according to the applicant's preference'.

43 Furthermore, it should be observed that Article 10(2) of Regulation No 1049/2001 provides that 'the institution may fulfil its obligation of granting access to documents by informing the applicant how to obtain the requested document', but that is the case only 'if a document has already been released by the institution concerned and is easily accessible to the applicant'.

44 Thus, by informing the applicant how to obtain the requested document, which has already been released by the institution concerned, that institution satisfies its obligation to grant access to that document in the same way as if it had itself directly communicated it to the applicant. Such information constitutes, in effect, an essential prerequisite to confirm the exhaustive and complete nature and lawful use of the requested document.

45 By contrast, it cannot be held that the institution concerned satisfies its obligation to grant access to a document on the sole ground that the document has been disclosed by a third party and that the applicant has obtained knowledge of it.

46 Contrary to a situation in which the institution itself has disclosed a document, thus allowing the applicant to obtain knowledge of it and to make use of it legally, while being assured of the exhaustive and complete nature of that document, a document disclosed by a third party cannot be regarded as constituting an official document, or as expressing the official position of the institution, in the absence of an unequivocal endorsement by that institution according to which the document obtained emanates from it and expresses its official position.

47 If the position defended by the Parliament and adopted by the General Court were upheld, an institution would be relieved of its obligation to grant access to the requested document even where none of the conditions permitting it to avoid that obligation, laid down in Regulation No 1049/2001 were satisfied.

48 Therefore, in a situation such as that in the present case, where the appellant has only obtained access to the document at issue disclosed by a third party and where the Parliament continues to refuse to grant her access to the requested document, it cannot be considered that the appellant has obtained access to that document, within the meaning of Regulation No 1049/2001, nor that, therefore, she no longer has any interest in seeking the annulment of the decision at issue solely as a result of that disclosure. On the contrary, in such circumstances, the appellant retains a genuine interest in obtaining access to an authenticated version of the requested document, within the meaning of Article 10(1) and (2) of the regulation, guaranteeing that that institution is the author and that the document expresses its official position.

49 Consequently, the General Court erred in law, in paragraphs 27 and 28 of the order under appeal, in treating the disclosure of a document by a third party as being the same as disclosure by the institution concerned of the requested document, within the meaning of Regulation No 1049/2001, and in having concluded, in paragraph 37 of that order, that there was no longer any need to adjudicate on the appellant's action on the ground that, since the document had been disclosed by a third party, the appellant could access it and use it in a way which is as lawful as if she had obtained it as a result of her application under Regulation No 1049/2001.

50 It follows from the foregoing that the first ground of appeal must be upheld and the order under appeal must be set aside, without it being necessary to examine the other arguments raised in that ground, or those raised in the second ground of appeal.

The action before the General Court

51 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court may, after quashing the decision of the General Court, itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

52 In the present case, since the General Court upheld the Parliament's application for a declaration that there was no longer any need to adjudicate without having examined the substance of the appellant's action, the Court considers that the state of the proceedings does not permit a final decision to be given. Accordingly, the case must be referred back to the General Court.

Costs

53 Since the case is being referred back to the General Court, it is appropriate to reserve the costs.

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

1. **Sets aside the order of the General Court of the European Union of 20 September 2018, *Leino-Sandberg* v *Parliament* (T-421/17, not published, EU:T:2018:628);**

2. **Refers the case back to the General Court of the European Union;**

3. **Reserves the costs.**

Regan Ilešič Juhász

Lycourgos Jarukaitis

Delivered in open court in Luxembourg on 21 January 2021.

A. Calot Escobar
Registrar

E. Regan
President of the Fifth Chamber