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THE COURT OF JUSTICE'S CONTRIBUTION TO THE DEVELOPMENT OF THE PRINCIPLE OF TRANSPARENCY

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Summary: The legislative process in the European Union is complex and characterised by the strict legal framework in which it is implemented. The founding treaties provisions and related procedural acts have established the normative approach exercised within the trialogue of the main EU institutions – the European Commission, the Council, and the European Parliament. The position of the three main institutions developed with time and the biggest increase of competences is visible in the case of Parliament. Up until now, we can see the balance of legislative powers between the three institutions – the European Commission in drafting the legislation, and both the European Parliament and the Council in its adoption. Meanwhile, as a result of the proper implementation of legislative competences by the EU institutions according to treaties, there was formulated need to observe the principle of transparency to make the whole process of trialogue understandable and the subject of the external control of the Member States or EU citizens. This principle was more precisely interpreted in the last years, especially thanks to the attitude of the Court of Justice of the EU, by providing interpretation needed to understand that the formal cooperation between EU institutions in the legislative process cannot prevail the principle of transparency in their work and that the documents proposed in the legislative process have to be available for the public and the Member States. As the transparency principle was also set in explanation of the EU Charter of Fundamental Rights, we focus in the paper on the analysis of the progressive work of the Court of Justice of the EU in relation to the development of the principle of transparency according to competences assignment in the Lisbon Treaty, in different but connected areas of decision-making, the legislative process and

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ordinary legislative procedure. The main focus is on the ordinary legislative procedure, as the root of the transparency requested by founding treaties.

Key words: principle of transparency, legislative process, trialogues, right of access to documents, Court of Justice of the EU

1) INTRODUCTION

The legislative process after the Lisbon Treaty ratification experienced a significant shift in the development, reflecting the previous assignment of competences to EU institutions, as well as the ongoing practice. The TFEU makes a distinction between legislative acts (Article 289 TFEU[1]) and non-legislative acts.

Article 289 of the TFEU states that the legislative acts are adopted by the ordinary legislative procedure (paragraph 1) and by the special legislative procedure (paragraph 2). "The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the European Commission (hereinafter as the Commission). This procedure is defined in Article 294."[2] The ordinary legislative procedure had replaced previous co-decision procedure, as Reinisch mention: "The former co-decision procedure was initially intended for measures in the fields of harmonisation, free movement of workers, the freedom of establishment, education, culture, public health, and consumer protection. After the changes introduced by the Treaty of Amsterdam it became applicable to a wide variety of areas. Today, as indicated by its designation as the ordinary legislative procedure, it is certainly the most important law-making procedure."[3]

As stated in Article 294 of the TFEU, there are three main institutions involved in the ordinary legislative procedure – the Commission, the European Parliament, and the Council. "According to the ordinary legislative procedure, the European Parliament and the Council act as co-legislators with symmetric procedural rights. European legislation is therefore seen as the product of a joint adoption by both institutions."[4] Although these institutions `co-decide`, we should be aware that each of the institutions has a different position in the legislative process and presents a different group of interest – the Commission represents the interest of Union, the

[1] ''Treaty on the Functioning European Union, Consolidated Version of the Treaty on the Functioning of the European Union,'' *Official Journal C 326*, 26.10.2012, p. 47–390.

[2] ''Consolidated Version of the Treaty on the Functioning of the European Union'', Article 289, para 1, *Official Journal C 326,* 26/10/2012 P. 0001 – 0390.

[3] August Reinisch, *Essentials of EU law*, Cambridge University Press, Cambridge, 2012, 2nd edition, p. 52.

[4] Robert Schutze, *European Union Law* (with Brexit coverage), Cambridge University Press, Cambridge, 2018, p. 247.

European Parliament represents the interest of EU citizens and the Council the interest of the Member States.[5] It means, that their role and competences are defined not only by the treaties provisions but also as a result of institutions' way of creation and legitimacy. The Commission, as the representative of the Union interests, is the one responsible for drafting the legislation. The European Parliament, having the direct mandate from EU citizens through elections, has the legitimacy to present and defend citizens' interests, and together with the Council, it is the institution that adopts the legislation. The Council represents the interests of states, as it is composed of the ministers of the Member States. The proper balance between these particular interests is the issue for which the TFEU provides space for negotiations within the legislative procedure. According to Article 295 of the TFEU "The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature."[6] This treaty article establishes the platform for discussion and cooperation between the main EU institutions. However, there is no precise definition of the consultation procedure nor some principles which may guide this cooperation. In this sense, the EU institutions use to rely on general principles of the EU law, respecting the basic EU law principles and values. Meanwhile, in the application practice, there were several situations when the questions arose regarding the transparency of consultation running between the EU institutions as well as the documents present at those consultations.

One of the main objectives of the Lisbon Treaty was the elimination of the democracy deficit. It was expected that citizens would be not only more involved in the decision-making process, but also that they would have access to the information related to the legislative process or even to initiate it through the new institute of citizens' initiative.[7] From this point of view, the principle of transparency due to its character should be considered as a crosscutting principle, present in several EU policies as the fundamental one.[8] And its importance in the legislative

[5] See more in Koen Lenaerts, Amaryllis Verhoeven, ''Institutional Balance as a Guarantee for Democracy in EU Governance'', in *Good Governance in Europe's Integrated Market*, Christian Joerges and Renaud Dehousse, (eds.), Oxford University Press, Oxford, 2002.

[6] "Consolidated version of the Treaty on the Functioning of the European Union", op. cit. Article 295.

[7] Citizens' initiative legal framework: ''Regulation (EU) 211/2011'' and ''Regulation (EU) 1179/2011'', which had been replaced since 1 January 2020 by ''Regulation (EU) 2019/788'' and ''Regulation (EU) 2019/1799.''

[8] See in relation to definition of the transparency principle the definition used by Hana Kováčiková: Uplatňovanie európskych obstarávacích princípov v procese národného verejného obstarávania, *Acta Facultatis Iuridicae Universitatis Comenianae*, vol. 38, No. 2 (2019), pp. 101-120 (see definition on page 108-109).

process is most visible and valuable in considering the EU as the legislative actor balancing the interest of all stakeholders, including citizens and its interest in the content and the legislative process.

2) FORMULATION OF THE PRINCIPLE OF TRANSPARENCY IN THE ORDINARY LEGISLATIVE PROCEDURE

The case started in 2015 when Mr. Emilio De Capitani "asked the European Parliament for access to documents drawn up by the Parliament or made available to it which contain information concerning the positions of the institutions on ongoing co-decision procedures. The request related, in particular, to the multicolumn tables drawn up in connection with trilogues. Those tables generally contain four columns: the first contains the text of the Commission's legislative proposal; the second contains the position of the Parliament as well as the amendments that it proposes; the third contains the position of the Council, and the fourth contains the provisional compromise text or the preliminary positions of the Presidency of Council in relation to the amendments proposed by the Parliament."[9] By a decision of 8 July 2015, the Parliament granted full access to requested five out of seven multi-column tables. It was not full or absolute granted access, there had been still two-column tables in relation to which the Parliament refused access to Mr. De Capitani.

The Parliament decided to disclose the fourth column of the requested documents arguing that it contained "compromise texts and preliminary positions of the Presidency of Council, the disclosure of which would have actually, specifically and seriously undermined the decision-making process of the institution as well as the inter-institutional decision-making process in the context of the ongoing legislative procedure."[10] Mr. De Capitani brought an action before the General Court and claim the decision of the Parliament in the case *De Capitani vs. Parliament*, focusing on the violation of Parliament's obligation to enable free access to the documents as granted by the Treaty on Functioning European Union (article 15 para. 3 of the TFEU) and the Charter of Fundamental Rights (Article 42 of the Charter). His legal arguments were based on the refusal of the Parliament to the register of parliamentary documents because of the Parliament's argument that the legislative procedure to which they related had been closed and there was no reason for free access to documents related to the legislative process, as the final legal act was available.

[9] General Court of the European Union, Press release No 35/18, Luxembourg, 22 March 2018.

[10] Judgement of General Court, *De Capitani vs. Parliament*, T-540/15, ECLI:EU:T:2018:167, 22 March 2018, para 6.

In its decision, the General Court reiterated that "the work of the trilogues constituted a decisive stage in the legislative process" and that, for this reason, "the refusal to grant the access at issue cannot legitimately be justified by its temporary character, without exception and distinction. Such a blanket justification, capable of being applied to all trilogues, could *de facto* operate to all intents and purposes as a general presumption of non-disclosure, reliance on which has, however, been rejected."[11]

By this decision the principle of transparency of the legislative procedures and access to acts of trilogues was supported. The General Court ruled that the principles of publicity and transparency were inherent to the EU legislative process. Denied access to the documents used in the trialogue meetings could affect the democratic process and the accountability of the EU legislature and also threaten the principle of mutual cooperation: "The Court then considered the argument that disclosure would result in a potential loss of trust between the EU institutions and that co-operation between them would likely deteriorate. The Court noted that the institutions were under a duty to practice "mutual sincere cooperation" (Article 13(2) Treaty of the European Union). Furthermore, the risk was purely hypothetical in the absence of specific evidence demonstrating that disclosure would have undermined the loyal co-operation incumbent on the institutions."[12]

Access to the part of the multicolumn table from the trialogue meetings would make it possible to follow the progress of the legislators' discussions and grant access to the public to the overall legislative proceeding. However, this principle must be balanced with the principle of effectiveness of the institutions' work, depending on the piece of work case by case.

In the next case *Commission vs. Patrick Breyer*[13], the CJ EU had focused on the access to the pleadings that a Member State submitted during an infringement procedure before the Court and that were detained by the Commission. An individual asked to access these documents when the jurisdictional proceeding was closed. The Commission partially refused to show the asked documents and, as the outcome of the first instance trial, the Court annulled the denial decision of the Commission, which started an appeal.

It is particularly interesting to focus on the opinion of the Advocate General: after the reconstruction of the role played by the transparency principle in the Treaties, in the Charter of Fundamental Rights and secondary law, and stressing that transparency can be applied also to the ECJ as far as it exercises a non-

[11] *Ibid*, para 109.

[12] *Ibid*, para 103.

[13] Judgment of the Court (Grand Chamber), *European Commission v Patrick Breyer*, C-213/15P, ECLI:EU:C:2017:563, 18 July 2017.

jurisdictional function and that the democratic principle, according to which EU institutional setting has been designed and to its interpretation in the case law, must give the right to access the fullest possible effects. The Advocate General stresses that accessibility can meet only strict limitations in order to protect the public interest (in particular, in legal advice activities and pending judgments) unless it is shown that there is a prominent public interest in knowledge. These features can be found in the Court's internal right to access regulation and have the aim of warranting the neutrality of the decision-making process. According to this legal framework, in the judged case, it was relevant to assess if the written pleadings detained by the Commission are written documents, excluded from access as part of a jurisdictional activity, or can be considered as related to an administrative activity, therefore, being accessible. This was the key element of the first instance trial as the General Court judged that the documents were not related to litigation activity and so it annulled the denial. The decision was in line with the case-law of the Court in a previous similar case[14], according to which a presumption of confidentiality can be found only in the pending case, while the pleading of closed trials can be fully accessed. Furthermore, another element in favour of the right to access is that the documents were in possession of the Commission, which made them part of its institutional activities no matter if they came from a third party. The accessibility has to be judged according to the EU legal framework and not to the one related to the third party national legal environment.

The core of the ground of appeal by the Commission is the following one: under the Lisbon Treaty there is no right to access a document of jurisdictional character. So, there is an objective and absolute limitation to the access. The thesis is contrasted by the Advocate General, who deeply dismisses any interpretation of the EU legal framework against general access to documents held by institutions. In particular, he suggests that the acts held by the Commission related to a defined judgment can be accessed because there is no space to send the ECJ an application to access a document different from the ones used in administrative activities. The Advocate General adds *de jure condendo* (particularly interesting part) that such a decision should be made by the Court itself rather than by other institutions, which are unable to easily assess if the documents could be relevant for other cases. The extension of transparency also to the documents connected with a judicial proceeding (so-called for having jurisdictional character) refers to the need of an open judicial system formulated in the Lisbon Treaty, and the transparency principle can be applied to the ECJ itself as a result of simultaneous application of the Treaty's provisions and the role of freedom to receive information, underlined in the EU Charter of Fundamental Rights. This approach is so-called judicial openness and it has also a more philosophical

[14] Judgement of the Court, *Sweden and Others v API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, ECLI: EU:C:2010:541, 21 September 2010.

background – according to Bentham. "Openness acts as a safeguard for the proper administration of justice"[15]. Bentham argues, that open justice is the "keenest spur to exertion and the surest of all guards against improbity."[16] The openness or publicity is the very soul of justice – and nowadays can be interpreted as a tool to acquire popular legitimacy, highly needed given the impact recently acquired by international Courts in national legal environments, enhance the quality of jurisdiction itself, and spread democratic control on decisions. The argument resides also on a comparative basis, and its aim is the disclosure of third parties' documents, letting apart internal ones that pertain to the quintessential process of judging. For all these reasons, the Advocate General concludes for the dismissal of the appeal.

The Court follows the opinion of the Advocate General and backs also the API case: there is a presumption of confidentiality as far as the documents held by an institution are related to a pending trial, which can be set apart if the applicant is able to show an opposite interest, while the presumption does not work for closed trials. The Member States, furthermore, do not have a veto power regarding access to the documents sent by them to the EU institutions, but they can only be part of the access procedure, during which they can make their point. Relying on this case-law, it is confirmed that transparency applies to every institution: as a result, openness should be a distinctive feature of the whole EU legal environment, in administrative as well as in jurisdictional activities. According to such reasoning the appeal is dismissed.

The latest case confirming transparency as the principle related to the legislative procedure which has to be observed is *the De Masi vs. ECB*[17]. In this case, the Court deals with the following circumstances: in 2017 two individuals asked the ECB to present a document, assuming it was a legal opinion concerning the interpretation of a memorandum between the ECB itself and the ESCB. The document concerned an emergency lending program, which took place in 2015 and was made by the Greek Central Bank in favour of some distressed Greek banks. In particular, on its basis, the ECB Council decided not to veto the intervention. The access request was refused according to the following legal basis: the decision, according to which the ECB has regulated the right to access its documents, except the accessibility of both legal opinions and the documents, focused at internal procedures.

We can say, that the case states what limits to the right to access are compatible with the transparency principle, and acknowledges to every citizen to understand

[15] Jeremy Bentham, ''Rationale of Judicial Evidence'' in *The works of Jeremy Bentham*, John Bowring (ed.) Vol. VI. (1843), p. 355.

[16] *Ibid*.

[17] Judgment of the General Court (Second Chamber), *Fabio De Masi and Yanis Varoufakis v European Central Bank (De Masi vs ECB*), T-798/17 ECLI:EU:T:2019:154, 12 March 2019.

how the EU institutions establish their policies. The legal reasoning used by the Tribunal, at first, identifies the importance of the right to access in the European legal framework as a way to promote good government and then it focuses on the limitations to this right, which – as far as the ECB administrative activity is concerned – must be set in the internal document according to the Treaty. The ECB act, that set the rules of right to access, is the Decision 2004/258, whose aim is to find an adequate balance between accessibility, the protection of public interest related to the independence of the Central Banks decision-making process and the sensible matters (monetary policy, systemic risk pre-emption and credit vigilance) which are entitled to the ECB. As a result, in this internal regulation, the right of access suffers a two folded limitation: it can be limited in a relative way to protect public or private interests involved in the decision process or in an absolute way to protect ECB independence. As a result, it is strictly forbidden to access a document that was used for internal purposes. The Tribunal identifies then the correct way to interpret the Decision: as it poses a limitation to a right, it must be interpreted and applied in a restrictive manner. Furthermore, it is possible to deny access legitimately, only if there is not a prevailing interest in the general public knowledge of the contents of the documents detained by the ECB. As a result, the Tribunal must judge in each case if the general knowledge prevails on confidentiality analysing *in concreto* the positions of the parties. The legal framework poses a general presumption of confidentiality, so it is an applicant's burden to contrast this presumption. This is an important difference in comparison to what happens as far as documents detained by the Parliament, the Commission and the Council are concerned: in these cases, there is no presumption, so the institution must identify the prejudice to the public interest deriving from the knowledge of one of its documents and, furthermore, the public interest harm test does not apply to closed procedures, unless the document can be identified as part of preliminary consultations, thus becoming again confidential. So, from a general point of view, the right to access the documents detained by the ECB has less extended protection in comparison to what happens in other EU institutions, also because it is crafted so that confidentiality must be rigidly kept both about the internal decision process and the information exchange channel between the ECB and national authorities.

Therefore, being the legal framework, the Tribunal acknowledges that the document for which access was asked pertains to the correct legal interpretation of the protocol between the ECB and the ECBS as far as the ECB's powers are sketched, and that it was used in the deliberative procedure that authorized the lending operation; furthermore, the opinion could be used for future emergency operations of the same sort. In particular, the Court stresses that the content of the document focuses on assessing if the ECB Council has a veto or limitation powers on an emergency lending program that can be put in action by a Central Bank which is part of the Eurosystem. In addition to these factual elements, the Tribunal stresses that the ECB directive Council meetings are however confidential, and only the Council

itself can judge whether to make public its decisions or not. As a result, the choice not to give access to the documents required by the applicants is identified as correct by the Tribunal. In fact, the document is both a legal opinion (this feature was unsuccessfully questioned by the applicants) and it was used as a part of an internal discussion that led to a decision by the ECB. Furthermore, another relevant point to assess its confidentiality is that it can be used in other procedures: this occurrence makes the preparatory aim of the document even clearer and its confidentiality still actual. These elements, which were identified in the non-disclosure decision, are thought by the Tribunal to be sufficient as a legitimate motivation of denial, whose correctness can be checked only *ab externo*: it is enough for the ECB to stress that the knowledge of the document can put in danger the independence of its decision process to identify a prevailing interest to confidentiality. It should have been the burden of the applicants to contrast this presumption, showing the reason why there was a prevalent and concrete public interest in the accessibility of the document. The Tribunal adds, as the openness of the decision process is concerned, that it is sufficient that the final document of a procedure is made public – as it happened in the case under its scrutiny – to warrant the respect of the accountability principle of the EU institutions. According to this reasoning, the legitimacy of the denial was confirmed; currently, there is an appeal pending in this case.

In this particular case, the fact that the right to access is extremely limited as far as the ECB decisions and procedures are concerned can be hardly assessed as coherent. In fact, the role and the powers of the Central Bank have largely deepened as a result of the sovereign debt crisis and the building of a new EU legal framework regarding credit, although there is still prevailing and presumptive confidentiality of the ECB operations. In order to warrant full accountability and a more democratic standard, only a deeper right to access could balance this recent evolution; in particular, the confidentiality presumption is hard to be passed over by individual applicants that are not in possession of useful information to overthrow it, and it can be justified with uneasiness if even jurisdictional becomes more accessible for third parties.

3) CONCLUSION

Openness or transparency principle is now identified as one of the fundamental elements of the EU institutions' decision-making process, which has to be especially observed in the legislative process of the EU institutions.[18] The General Court and

[18] In relation to the implementation of the transparency in other EU policies see also: Ondrej Blažo, Hana Kováčiková, ''Access to the market and the transparency as principles of public procurement in the legal environment of the EU Neighbourhood Policy'' in *International and Comparative Law Review*, Comenius University in Bratislava, Vol. 18, No. 2 (2018), pp. 218-236.

also the Court of Justice of the EU in its rulings and interpretations provided acknowledged its extension following the Lisbon Treaty. It now applies to the European Parliament, the Commission, the Council and even to the ECJ, with some limitations related to privacy protection in juridical proceedings as far as open trials are concerned or to the guarantee of judge's neutrality.

Considering the above-mentioned Court's attitude, we can see its active work in favour of greater transparency in the EU agenda. It follows the aim of the Lisbon Treaty to make the EU closer to its citizens and eliminate the democratic deficit connected with the inefficient exercise of the granted rights as the right to access to documents. Although the Court's approach and ruling confirm the intention to observe the principle of transparency properly, we can see differences in implementation in decision-making, in the legislative process, and legislative ordinary procedure, but still there exist some legal limits.

The transparency is now understood as one of the crosscutting principles. But we should be aware that there may come to many situations when it cannot be applied in its full understanding and interpretation. This especially covers situations and legislation proposals connected with privacy (including personal data and business privacy) or some drafts connected with security and defence policy. Meanwhile, in this area, there is a missing case-law, but the previous decisions should be leading cases in understanding the principal necessity to observe transparency in the EU law adoption as well as the implementation.

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DOPRINOS EVROPSKOG SUDA PRAVDE RAZVOJU PRINCIPA TRANSPARENTNOSTI

Apstrakt: Zakonodavni postupak u Evropskoj uniji je složen, i karakteriše ga strogi zakonski okvir u kojem se sprovodi. Odredbe o osnivačkim ugovorima i povezani proceduralni akti uspostavili su normativni pristup koji se primenjuje u trijalogu glavnih institucija Evropske unije – Evropske komisije, Saveta i Evropskog parlamenta. Položaj tri glavne institucije razvijao se s vremenom, a najveći porast nadležnosti vidljiv je u slučaju Parlamenta. Do sada je postojala ravnoteža zakonodavnih ovlašćenja između ove tri institucije - Evropske komisije u izradi zakona, a Evropskog parlamenta i Saveta u njegovom usvajanju. U međuvremenu, kao rezultat pravilnog sprovođenja zakonodavnih nadležnosti institucija Evropske unije u skladu sa ugovorima, formulisana je potreba da se poštuje načelo transparentnosti kako bi celokupan postupak trijaloga bio razumljiv i predmet spoljne kontrole od strane država članica ili građana Evropske unije. Ovaj princip je još preciznije interpretiran poslednjih godina, posebno zahvaljujući stavu Suda Europske unije, koji daje tumačenja potrebna za razumevanje kako formalna saradnja između institucija Evropske unije u zakonodavnom postupku ne sme da prevlada načelo transparentnosti u njihovim radu. U tom smislu dokumenti predloženi u zakonodavnom postupku moraju biti dostupni javnosti i državama članicama. Kako je načelo transparentnosti ustanovljeno i Poveljom Evropske unije o osnovnim pravima, mi se u radu fokusiramo na analizu progresivnog rada Evropskog Suda pravde u vezi s razvojem načela transparentnosti, a u skladu sa Lisabonskim ugovorom u različitim ali povezanim oblastima odlučivanja, zakonodavnom procesu i redovnom zakonodavnom postupku. Glavni fokus je na redovnom zakonodavnom postupku kao osnovi transparentnosti u skladu sa osnivačkim ugovorima.

Ključne reči: načelo transparentnosti, zakonodavni postupak, trijalozi, pravo pristupa dokumentima, Sud pravde Europske unije