

THE PRINCIPLE OF TRANSPARENCY BETWEEN THE EFFECTIVENESS OF THE EU'S DECISION-MAKING PROCESS AND DEMOCRATIC PARTICIPATION

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DECLARATION (No. 17) ANNEXED TO THE MAASTRICHT TREATY ON THE RIGHT OF ACCESS TO INFORMATION

The Conference considers that **transparency of the decision-making process strengthens the democratic nature of the institutions** and the public's confidence in the administration [...].

DECLARATIONS (No. 41) ANNEXED TO THE AMSTERDAM TREATY ON THE PROVISIONS RELATING TO TRANSPARENCY, ACCESS TO DOCUMENTS AND THE FIGHT AGAINST FRAUD

The Conference considers that the European Parliament, the Council and the Commission, when they act in pursuance of the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, should draw guidance from the provisions relating to **transparency**, access to documents and the fight against fraud in force within the framework of the Treaty establishing the European Community.

THE TREATY OF LISBON (2009)

Article 1 TEU

This Treaty marks 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.**

Article 10 TEU

3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken **as openly and as closely as possible to the citizen.**

Article 15 TFEU

1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work **as openly as possible.**

2. The European Parliament shall meet **in public**, as shall the Council when considering and voting on a draft legislative act. (→ **Article 16(8) TEU**)

3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a **right of access to documents of the Union's institutions, bodies, offices and agencies** [...]

Each institution, body, office or agency shall ensure that its proceedings are **transparent** and shall elaborate in its own Rules of Procedure specific provisions regarding **access to its documents** [...]

Article 298 TFEU

1. In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an **open, efficient and independent European administration** [...]

THE CHARTER OF FUNDAMENTAL RIGHTS

Article 41

Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

[...]

(b) **the right of every person to have access to his or her file**, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

[...]

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language

Article 42

Right of access to documents

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, bodies, offices and agencies of the Union**, whatever their medium.

✓ **RIGHT OF ACCESS TO ONE'S OWN FILE** → only documents contained in an administrative file; existence of a specific interest; sectoral rules (*e.g.*, competition law).

✓ **RIGHT OF ACCESS TO DOCUMENTS** → broad sense of «document»; no legal or economic interest.

**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**

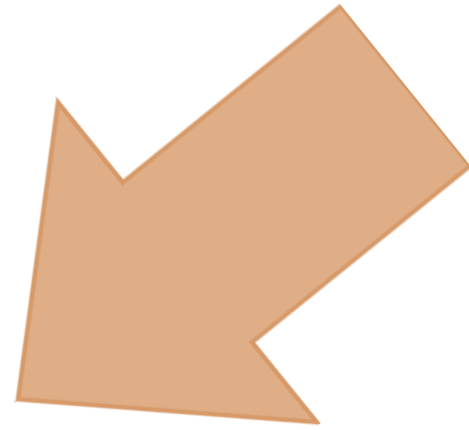
In principle, all documents
of the institutions are accessible
to the public

“Exceptions” under Article 4 on
grounds of public or private interests
(*e.g.*, public security, data protection, intellectual
property, court proceedings and legal advice,
documents drawn up by institutions for internal use)

**...unless there is an overriding public interest
in disclosure!**

REMEDIES

Art. 8 (3) REGULATION (EC) No. 1049/2001



**RIGHT TO COMPLAIN
TO THE OMBUDSMAN**

(ART. 20(2) TFUE; ART. 228 TFEU; ART. 43 CFR)

**JUDICIAL REMEDY
ACTION FOR ANNULMENT**

(ART. 263 TFEU)





Decision on the Council of the European Union's Refusal to Give Full Public Access to Documents Related to Negotiations on the Draft 'Digital Markets Act' (Case 1499/2021/SF)

8. While the Ombudsman appreciated that some Member States may be reluctant to disclose that their initial positions have changed in the course of the legislative process, she considered that being willing to change position and compromise is **essential for democratic decision-making**. If citizens are to be able to exercise their **right to participate in the democratic debate, they must be able to follow it as it develops and have timely access to all the relevant information**. The Ombudsman found that the redacted parts of the documents are not particularly sensitive, especially in so far as they contain Member States' technical questions addressed to the Commission to clarify their understanding of the legislative proposal.

[...]

11. In light of the above, the Ombudsman considered that **the Council had not sufficiently demonstrated how full disclosure of the Member States' position would specifically and actually undermine the protection of an ongoing decision-making process**.

12. The Ombudsman thus found that the Council's refusal to give full public access to the legislative documents at issue constituted maladministration.



“*DE CAPITANI SAGA*”

General Court, Judgment of 22 March 2018 in case T-540/15, *De Capitani v Parliament*

- Interest in bringing proceedings
- The nature of trilogues
- The existence of serious prejudice to the decision-making process

98 [...] ***the expression of public opinion*** in relation to a particular provisional legislative proposal or agreement agreed in the course of a trilogue and reflected ***in the fourth column of a trilogue table forms an integral part of the exercise of EU citizens’ democratic rights***, particularly since such agreements are generally subsequently adopted without substantial amendment by the co-legislators.



“DE CAPITANI SAGA”

**CJEU, Judgment of 21 January 2021
in case C-761/18 P, *Leino-Sandberg v EP***

- Interest in bringing proceedings
- Disclosure of the annotated document by a third party after the action was lodged

48. Therefore [...] 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 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 [...] 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.



“*DE CAPITANI SAGA*”

General Court, Judgment of 25 January 2023 in case T-163/21, *De Capitani v Council*

- Interest in bringing proceedings
- The applicability of the first subparagraph of Article 4(3) of Regulation No 1049/2001 to legislative documents

95 [...] *it must be pointed out that whether or not a document is ‘technical’ is not a relevant criterion for the purposes of the application of the first subparagraph of Article 4(3) of Regulation No 1049/2001. Next, and in any event, **the actual content of the documents at issue shows that they contain normative proposals for various legislative texts and that they therefore form part of the normal legislative process.** The documents at issue are therefore in no way ‘technical’. Lastly, the members of Council working groups are given a mandate from the Member States that they represent and, at the time of deliberation on a given legislative proposal, **they express the position of their Member State within the Council when the Council acts in its capacity as co-legislator.** The fact that those working groups are not authorised to adopt the definitive position of that institution does not mean, however, that their work does not form part of the normal legislative process, which, moreover, the Council does not dispute, or that the documents that they draw up are ‘technical’ in nature.*

AFTER QATARGATE

[European Parliament resolution of 16 February 2023 on the establishment of an independent EU ethics body \(2023/2555\(RSP\)\)](#)

**Road to the establishment
of an independent ethics body
in order to restore citizens' trust
in the EU institutions?**

Thank you very much
for your attention!