

# THE RIGHT OF ACCESS TO THE DOCUMENTS OF THE CODE OF CONDUCT GROUP

LEGAL REMEDIES AGAINST ACCESS RESTRICTIONS WITHIN THE FRAMEWORK OF THE  
ACTIVITIES PERFORMED BY THE SPECIAL COMMITTEE ON TAX RULINGS AND OTHER  
MEASURES SIMILAR IN NATURE OR EFFECT (TAXE) OF THE EUROPEAN PARLIAMENT

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**LEGAL OPINION COMMISSIONED BY THE FRACTION OF THE EUROPEAN UNITED  
LEFT/NORDIC GREEN LEFT (GUE/NGL) IN THE EUROPEAN PARLIAMENT**

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## A. AIMS AND OBJECTIVES

In February 2015, following the “Luxembourg leaks” on fiscal practices of Luxembourg, the European Parliament (EP) established the Special Committee (TAXE) on tax rulings and other measures similar in nature or effect in the Member States, with the aim of investigating the compatibility of aggressive tax competition in the field of corporate taxation with EU legislation and to recommend measures to restrict tax fraud and tax avoidance. At the end of 2015 the EP renewed and supplemented the mandate of TAXE. The Committee will continue its activities on this basis until mid-2016. In a second stage, the Committee will monitor the activities of the EU Commission (COM) in the field of fiscal state aid and examine Member States compliance with the law of the EU. Pursuant to the decision of the European Parliament of 2 December 2015 on setting up a special committee on tax rulings and other measures similar in nature or effect (TAXE 2), its powers, numerical strength and term of office (2015/3005(RSO)) the Special Committee is vested with the following powers:

- “(a) to analyse and examine practice in the application of Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) regarding tax rulings and other measures similar in nature or effect issued by Member States since 1 January 1991;
- (b) to analyse and assess the Commission's practice of keeping under constant review, pursuant to Article 108 TFEU, all systems of aid existing in Member States, proposing to

the Member States appropriate measures required by the progressive development or by the functioning of the internal market, checking whether aid granted by a State or through State resources is compatible with the internal market and not misused, deciding that the State concerned is to abolish or alter such aid within a certain period of time, and referring the matter to the Court of Justice of the European Union if the State concerned does not comply, which has allegedly resulted in a high number of tax rulings incompatible with EU state aid rules;

- (c) to analyse and examine compliance by Member States since 1 January 1991 with obligations set out in Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union(3) , regarding the obligation to cooperate and provide all necessary documents

- (d) to analyse and examine compliance with the obligations set out in Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums(4) and Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC(5) , regarding communication by Member States to other Member States since 1 January 1991, by spontaneous exchange, of information on tax rulings;

- (e) to analyse and assess the Commission's

practice as regards the proper application of Directives 77/799/EEC and 2011/16/EU regarding communication by Member States to other Member States, by spontaneous exchange, of information on tax rulings;

(f) to analyse and assess compliance by the Member States with the principle of sincere cooperation enshrined in Article 4(3) of the Treaty on European Union, such as fulfilment of the obligations to facilitate the achievement of the Union's tasks and to refrain from any measure which could jeopardise the attainment of the Union's objectives, given the alleged large scale of aggressive tax planning facilitated by Member States, and the likely significant consequences this has had on public finances of and in the EU;

(g) to analyse and assess aggressive tax planning carried out by companies established or incorporated in the Member States, also regarding the third-country dimension including the exchange of information with third countries in this respect;

(h) to make any recommendations that it deems necessary in this matter”.

Of key importance for the work of the Committee are the documents of the Code of Conduct Group on Business Taxation (CoCG), set up by the Economic and Financial Affairs Council (Ecofin) on 9 March 1998, with the objective of coordinating tax policies of the Member States (OJC 99/1 of 1 April 1998). To date, the COM has not provided full access to these documents. Access to documents of the CoCG has been re-

stricted in particular as follows:

1. The request of MEP Fabio De Masi (according to Regulation (EC) 1049/2001) to publish all documents regarding the work of the CoCG and drawn up by the COM after 1998, was not granted. With its **Decision of 9 December 2015**, the COM rejected this request.

2. The application filed with the COM by the Chairman of TAXE for access to the documents of the Code of Conduct Group ("European Commission documents (including minutes) concerning the EU Code of Conduct Group for Business Taxation") was only partly granted by the COM with its **Decision of 9 November 2015**: (a) Not all documents are submitted to the members of the Committee, (b) the documents are partly blacked out and (c) they can only be accessed in a reading room, to which only restricted access is granted.

The following legal opinion examines the lawfulness of both decisions of the COM on the restriction of access to the documents of the CoCG and the prospects of success of an action for annulment against these decisions.

## **B. REMEDIES**

The prospects of success with regards to an action for annulment against the decisions of the COM of 9 December 2015 and 9 November 2015 are evaluated according to Art. 263(4) TFEU. If there is a factual connection between both decisions, the participants in the actions are identical and in both cases the European

Court of Justice is competent *ratione materiae*, the actions against both decisions can be combined in a joinder of actions.

### **I. Action for annulment against the Decision by the COM of 9 December 2015.**

A nullity action against the Decision of 9 December 2015 must be admissible and must have reasonable grounds.

The Decision by the COM of 9 December 2015 was adopted with regards to a second application by MEP Fabio De Masi, pursuant to Art. 7(2) Transparency Regulation (EC) 1049/2001 (hereinafter Transparency Regulation). Two first applications according to Art. 6 (1) Transparency Regulation (both of 29 September 2015) had been submitted previously, demanding access to all documents of the CoCG since its foundation in 1998. The first application of 29 September 2015 specifically included the request to disclose the following documents:

"Any formal or informal notes, minutes or other written records from Commission representatives attending meetings of the Code of Conduct group on business taxation since its inception on 9.3.1998."

The second application of 29 September 2015 referred to the following documents:

"Any room document or other written input prepared by the Commission in the context of the work of the Code of Conduct Group on business taxation since its inception on 9.3.1998."

The two applications were not separated by the COM, but a reference number was formally assigned to the second application (GestDEM 2015/5101), and a decision taken on 29 October 2015. The decision with regards to both first applications is based, according to the COM, on the following:

"Any informal notes, minutes or other written records from Commission representatives attending meetings of the Code of Conduct group on business taxation since its coming into existence (since 9.3.1998)".

In the second application according to Art. 7(2) Transparency Regulation of 18 November 2015, access was again requested in the first place to all documents mentioned in both first applications, whereby access was requested to

"[a]ny formal and informal notes, minutes or other written records from the European Commission as well as any room document or other written input prepared by the Commission in the context of the work of the Code of Conduct Group on business taxation since its inception on 9.3.1998."

The second application of 18 November 2015 also contained a subsidiary request for the following documents:

- A copy of the summary database produced by the European Commission on the basis of the work of the Code of Conduct Group and other fora covering corporate taxation which contains a list and/or assessment of all potentially harm-

ful tax practices in European Union Member States.

- The European Commission's minutes of Code of Conduct Group meetings between 01/01/2010 and 15/11/2015. This should be far less than 100 documents in total and would not constitute a disproportionate burden.
- All room documents prepared by the European Commission for Code of Conduct Group meetings dealing with patent boxes as well as the use, application and exchange between administrations of tax rulings and/or advance pricing agreements.

The COM subsequently took a decision on the second application on 9 December 2015. The second application of 18 November 2015 was not allowed in the resolution of the COM. The application was not mentioned and therefore not allowed by implication. Instead, the Decision declares the subsidiary part of the second application of 18 November 2015 as a new first application according to the Transparency Regulation. Furthermore, in its decision the Commission refers to the DG TAXUD (Directorate General for Taxations and Customs Union), which would handle the alternative request within the legal framework Transparency Regulation 1049/2001. To date, no decision has been taken with regard to this subsidiary request.

Irrespective of how the COM will deal with the subsidiary request, an action for annulment according to Art. 263(4) TFEU against the decision of the Commission of 9 December 2015, should

the request for full access to these documents not be granted, is admissible and has reasonable justification on the following grounds:

### **1. Admissibility**

The claim in the form of an action for annulment against the decision by the Commission of 9 December 2015, pursuant to Art. 263(4) TFEU is admissible.

The Court of Justice is competent *ratione materiae* as the court of first instance for actions of nullity by natural and legal persons. This is based on Art. 256(1) first sentence of the first subparagraph TFEU, in conjunction with Art. 51 of the CJEU Statute of the European Court of Justice.

European citizens, as natural persons pursuant to Art. 263(4) TFEU, may actively be a party to an action for annulment. The Commission as defendant is a passive party pursuant to Art. 263(1) TFEU.

The applicant MEP Fabio De Masi has the right to bring an action by filing of a suit of nullity. MEP Fabio De Masi is the addressee of the Decision by the Commission of 9 December 2015, Art. 263(4) Alt.1 TFEU.

The causes of action are mentioned in Art. 263(2) TFEU. A violation of the Treaties, or of any rule of law to be applied to their implementation (Alt. 3), in this case the Transparency Regulation 1049/2001, is applicable.

The action for annulment is to be filed within two months, Art. 263(6) TFEU. The period for filing this action starts on 10 December 2015 (Art. 101(1) a Rules of Procedure Court of Justice). It ends on 10 February 2016 (Art. 101(1)(b) Rules of Procedure Court of Justice).

## 2. Reasonable grounds

There is reasonable justification for the action for annulment pursuant to Art. 263(4) TFEU. The Decision by the COM of 9 December 2015 violates the right of the MEP De Masi to a decision on his second application of 18 November 2015, as provided in Art. 8(3) Transparency Regulation 1049/2001. The Decision of 9 December 2015 also violates the subjective right of access to documents as provided in Art. 15(3) TFEU as well as any rule of law relating to the application of the treaties, as provided in Art. 15(3) TFEU in conjunction with Art. 2(1) Transparency Regulation. Full access to all documents of the CoCG from 1998 onwards must be granted. The exemptions stated in the Transparency Regulation 1049/2001 are not relevant in the present case. This specifically applies to the exemption rules in Art. 4(3) Transparency Regulation (internal institutional usage and decision process) and Art. 4(1)(b) Transparency Regulation (sensitivity of information). Finally, the workload which would be generated by granting access to all documents of the CoCG from 1998 onwards is not disproportionate.

### a. Applicable Law

Art. 15(3) first subparagraph TFEU, in conjunction with Art. 2(1) Transparency Regulation establishes an individual and general right of access without presupposition to the documents of the institutions of the EU. These legal provisions regarding access to documents are supplemented by the provisions in Art. 10(3) third sentence of TEU with regards to the open decision-making process of the EU with citizens' participation, open and transparent dialogue with associations and civil society (Art. 11(2) TEU) as well as broad consultations with the parties concerned to be carried out by the Commission (Art. 11(3) TEU). Also the Charter of Fundamental Rights of the European Union in Art. 41(2) (b) and Art. 42 Charter of Fundamental Rights provides right of access to personal files as well as general access to documents.<sup>1</sup> These regulations are rightly considered as the key building stone of European Democracy:

“the principle of transparency enables European citizens to participate closely in the EU decision-making process. By being well informed on the decisions adopted by the EU legislator and by the EU administration, European citizens may engage in a discussion as to whether they agree or disagree with those decisions. At the same time, transparency enhances the legitimacy of the EU institutions, given that their actions (or their failures to act) are open to public scrutiny. The right of access to documents and the principle of openness give concrete expression to that principle”.<sup>2</sup>

The citizens of the Union and each natural or

<sup>1</sup> In complete Wegener in: Calliess/Ruffert, TEU/TFEU, Comments, 4th edition, Munich 2011, Art. 15 TFEU, no. 1.

<sup>2</sup> Koen Lenaerts, The principle of democracy in the case law of the European Court of Justice, in: *International & Comparative Law Quarterly* 62 (2013), p. 271 et seq (300).



legal person residing in or with a registered office in a Member State of the EU are entitled to the pivotal right of democracy which is transparency and right of access to documents. The parties obligated to satisfy this provision are all institutions, bodies or other organisations of the Union, pursuant to Art. 15(3) subparagraph 1 TFEU. The object of this entitlement are the documents of the Union. This applies irrespective of the medium used for these documents. According to Art. 2(3) Transparency Regulation this applies to all documents in all areas of activity of the Union which have been drawn up or received by the institution and which it is in possession of.

If a document has already been released by an institution and it is easily accessible to the applicant, information provided by the institution on how the required document can be obtained is sufficient, Art. 10(2) Transparency Regulation. According to Art. 4(5) Transparency Regulation a Member State may request the institution not to diffuse a document originating from that Member State without its prior authorization. In that case the Member State must also base its refusal on the exemptions established in the Transparency Regulation, and expressly justify this with regard to the transparency principle.<sup>3</sup>

The right to unlimited and full access to documents, according to Art. 15(3) subparagraph 2 TFEU, is subject to the general principles established by regulations and on the basis of restrictions determined by public and private interest, which are defined as secondary legislation in Art. 4 Transparency Regulation.

## **b. Cause of action: Violation of the Transparency Regulation**

In the present case, the implementation of this legal framework gives rise to right of access to documents drawn up by the COM within the scope of the work of the CoCG. The refusal of access by the COM is based on the erroneous implementation of Art. 15(3) TFEU in conjunction with Art. 2(1) Transparency Regulation and the exemptions in Art. 4 Transparency Regulation.

### **(1) Unlawful Implementation of Art. 4(3) Transparency Regulation**

In its refusal the COM invokes the exemption given in the Transparency Regulation (“internal usage”) in Art. 4(3) Transparency Regulation. In the present case this exemption cannot be applied. The refusal of access to documents of the CoCG based on this principle violates the right established in Art. 15(3) TFEU in conjunction with Art. 2(1) Transparency Regulation.

The COM gives a general justification for its decision by citing the sensitivity of information in the documents of the CoCG, alleging that the diffusion of these documents would undermine the decision-making process<sup>4</sup> in the CoCG. This is unlawful. No substantiated explanation is given as to how the disclosure of data would seriously undermine the decision-making process. Additionally, there is a public interest opposed to a possible interest in maintaining secrecy.

<sup>3</sup> CJEU, Judgment of 18 December 2007, Sweden/Commission, IFAW (64/05 P, [2007], I-11398, no. 88).

<sup>4</sup> For this requirement see Alemanno, Unpacking the principle of openness in EU law: transparency, participation and democracy, in: E.L.Rev. 39 (2014), p. 72 et seq.

The reasoning that the refusal of full access to a document is justified by the fact that the required document is connected to an activity mentioned in the exemptions of the regulation, is not sufficiently grounded in the case-law of CJEU rulings.<sup>5</sup> The COM should rather provide detailed information on the extent to which access to this document would actually and specifically seriously undermine the decision-making process of the Council.<sup>6</sup> Seriously undermining the public interest must be foreseeable and not of a hypothetical nature only.<sup>7</sup> It is necessary to demonstrate that the protected public interest is actually being undermined.<sup>8</sup>

In its Decision of 29 October 2015 (the only decision in which reference was made to the application for full access) the Commission assumes that the required documents with regard to the activities of the CoCG must be considered as “confidential”. By express determination of the Council (no. 13 of the conclusions by the Council of 9 March 1998 on the establishment of the “Code of Conduct group” (Business Taxation) the documents of the CoCG are considered confidential.

According to the general exemptions mentioned in Art. 4(3) Transparency Regulation, access to the documents created by the COM on the activities of the CoCG may not be refused. Art. 4(3) subparagraph 1 Transparency Regulation provides for refusal of access to a document drawn up by an institution for internal usage or

received by it, and regarding which no decision has yet taken by the institution if disclosure of the document would seriously undermine the decision-making process of the institution and there is no public interest which outweighs this consideration. And Art. 4(3) subparagraph 2 Transparency Regulation also extends the exemption to such documents containing opinions for internal use as part of deliberations and preliminary consultations within the corresponding institution, if – in contrast to subparagraph 1 – a decision already has been taken.

However, neither exemption to the transparency requirement apply in this case, for the following reasons:

#### **(a) Prohibition of a general refusal of access**

Confidentiality classification according to no. 13 of the conclusions of the Council of 9 March 1998, of the Founding Charter of the CoCG, does not prejudice the present exemption as provided by Art. 4(3) Transparency Regulation.

A general classification of all documents of CoCG as “confidential” cannot justify restriction of access.<sup>9</sup> General assertions of confidentiality are not sufficient as a required reason with regard to Art. 4 Transparency Regulation.<sup>10</sup> The fact that the documents of the CoCG are classified as confidential might, according to the case-law of the Court of Justice<sup>11</sup> be an indication of the sensitive contents of the document

<sup>5</sup> CJEU, Judgment of 27 February 2014, Commission/Enbw Energie Baden Württemberg (365/2 P, no. 64) with further proof.

<sup>6</sup> CJEU, Judgment of 27 February 2014, Commission/Enbw Energie Baden Württemberg (365/2 P, no. 64) with further proof.

<sup>7</sup> Wegener, in: Callies/Ruffert, TEU/TFEU, Comments, 4th Edition, Munich 2011, Art. 15 TFEU, marginal nos. 32. 35; Court of Justice, Judgment of 7 February 2002, Kuyjer/Rat – II (T-211/00, [2002], II-485, no. 56).

<sup>8</sup> Dupont-Lassalle, Accès aux documents et protection des relations internationales, in: Revue Mensuelle Lexisnexis Juriclasseur 10/2014, p. 17 et seq.

<sup>9</sup> Adamski, Access to Documents, Accountability and the Rule of Law. Do Private Watchdogs Matter?, in: European Law Journal 20 (2014), p. 520 et seq.

classified as such, this is not sufficient grounds for justifying application of the exemptions according to Art. 4(3) Transparency Regulation. The applicability of Art. 9 Transparency Regulation in conjunction with Art. 2(5) Transparency Regulation only implies that requests for access to these documents are subject to a special process according to this provision.<sup>12</sup>

Art. 4 Transparency Regulation neither provides a corresponding exemption rule on the access to confidential documents. The systematic wording of Art. 9 Transparency Regulation, apart from the exemptions of Art. 4 Transparency Regulation, indicates that the confidentiality classification of documents does not imply a further autonomous exemption with regards to the basic right of access to documents.<sup>13</sup> The linking of Art. 9 Transparency Regulation to the exemption provisions of Art. 4(1) letter a Transparency Regulation explains the similarity of documents classified as confidential and the exemptions therein provided. This could imply that the institution (in a first step) examines to what extent "sensitive" classification is required for the protection of interests in Art. 4(1) letter a Transparency Regulation.<sup>14</sup> If confidentiality classification is required, it may then satisfy the exemption rules of Art. 4 Transparency Regulation; in the present case it could therefore seriously undermine the decision-making process of the institution (Art. 4(3) Transparency Regulation). This would mean that in each individual case and regardless of the previous classification of

documents by Member States, the Commission must examine to what extent this is important for the protection of public safety, defense and military matters, international relations and the financial, monetary or economic policy of the Community or a Member State. Only this procedure can guarantee that no general remedy can be applied to the "sensitivity" of information, but that a decision is made based on the alleged protection of interests in each specific case.

An examination of the sensitivity of information contained in the documents has not taken place. In its Decision of 29 October 2015, the COM only makes reference to point 13 of the Foundation Charter and does not explain why the data are considered as sensitive nor which interests are to be protected.

Neither can the COM justify the protection of interests, since the minutes of the meeting have been published, by claiming the approval by the Member States is required according to Art. 9(3) Transparency Regulation. For the Member States are not the originators of a "minutes" type of document. These are minutes of meetings which are elaborated by the COM itself and do not come under the provisions of Art. 9(3) Transparency Regulation.

General prior recognition that the documents of the CoCG are unconditionally and immutably classified as sensitive by the Council according to the Transparency Regulation would imply that

<sup>10</sup> Frenz, *Handbuch Europarecht, Europäische Grundrechte*, Heidelberg 2009, no. 4716.

<sup>11</sup> Court of Justice, Judgment of 4 May 2012, in 't Veld/Rat (529/09, no. 21); Court of Justice Judgment of 26 April 2005, Sison/Rat (110/03, 150/03, 405/03, 110/03, 150/03, 405/03, [2005], II-1429, no. 73).

<sup>12</sup> CJEU, Judgment of 28 November 2013, Jurasinovic/Rat (576/12 P [2013], I-0000, marginal nos. 43, 46).

<sup>13</sup> Frenz, *Handbuch Europarecht, Europäische Grundrechte*, Heidelberg 2009, no. 4714.

<sup>14</sup> Frenz, *ibid.*, no. 4716.

the obligation for transparency is at the full discretion of EU institutions. This cannot be the case either because – insofar as committees with participation at Member State level are concerned – each Member State would have the right to veto right with regard to the documents access.<sup>15</sup> This would result in especially important documents groups being removed from the scope Transparency Regulation.<sup>16</sup>

The Decision by the COM of 29 October 2015 illustrates the severity of such a risk, insofar as the COM emphasizes here that the Member States would only have participated in the CoCG

“because they were assured that the information and any subsequent document would not be disclosed beyond that group.”

If such an exemption mechanism with regard to the principle of transparency were to be accepted, the right of the public to access documents would be thwarted, without objective grounds having to be provided. This contradicts the case-law of the CJEU which considers assurance of confidentiality a priori and without justification to be inadmissible<sup>17</sup> because otherwise the practical effectiveness of the right of access to documents would be considerably restricted.<sup>18</sup>

### **(b) No undermining of the decision-taking process**

Nor can access be refused to documents of the

CoCG which are drawn up for internal use and which refer to such matters on which the Council has already made a decision – as provided for in the judgment of 29 October 2015 – by invoking a supposed undermining of the decision-making process.

Art. 4(3) subparagraph 1 Transparency Regulation, which is referenced by the COM in its decision, only applies to such matters in which the institution has not yet made a decision. It can scarcely be the case that since the foundation of the CoCG in 1998, only such documents of Member States are available on matters where the European Council has not yet taken a decision. Besides, this would also question the functionality of the group, which, precisely through communication and information on the tax measures of the Member States, has the task to assess these measures within the framework of the Code of Conduct and to make regular reports to the Council.<sup>19</sup> Once the decision-making process is ended, it is not possible to refuse the diffusion of all documents, with the exception of documents subject to subparagraph 2 Transparency Regulation, even if diffusion would have seriously undermined the result of the decision-making process before an order was issued.<sup>20</sup>

Regarding documents subject to Art. 4(3) subparagraph 1 Transparency Regulation (also for those on which no decision has yet been made), serious undermining of the decision-making pro-

<sup>15</sup> Krajewski/Rösslein, in: Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, 57. EL, Munich 2015, Art. 15 TFEU, no. 53.

<sup>16</sup> CJEU, Judgment of 18 December 2007, Sweden/Commission, IFAW (64/05 P, [2007], I-11398, no. 62).

<sup>17</sup> CJEU, Judgment of 18 December 2007, Sweden/Commission, IFAW (64/05 P, Reports 2007, I-11398, no. 64) with citations.

<sup>18</sup> CJEU, *ibid.*, with citations.

<sup>19</sup> Letter H of the final conclusions of the Economic and Financial Affairs Council of 1 December 1997 on Tax Policies (98/C 2/01).

<sup>20</sup> Gellermann, in: Streinz, *TEU/TFEU*, Art. 15 TFEU, 2nd Edition, Munich 2012, no. 17; CJEU, Judgment of 21 September 2010, Sweden/API, Commission (514/07 P, [2010], I-0000, no. 130 et seq.).



cess must be given. Recognition of this exception leads to an especially severe restriction of the right of access, for the fundamental function of the right of access to documents consists in the fact that the public is empowered to influence the decision-making process of public authorities. In each case disclosure of information and documents comes too late, namely after the decision has been made. It would then only be possible to monitor it at best.<sup>21</sup> The exemption in Art. 4(3) subparagraph 1 Transparency Regulation applies to the protection of the freedom of decision and of the decision-making process of institutions which could be undermined by access to internal documents.<sup>22</sup> Therefore, when balancing the general transparency principle with protection of the decision-making process, a refusal of access to documents can only be justified when there is a more serious level of undermining than when the other exemptions in Art. 4 Transparency Regulation are accepted.<sup>23</sup> However, this must be justified in detail. This is missing in the decision of the COM of 29 October 2015.

Art. 4(3) subparagraph 2 Transparency Regulation protects documents referenced to a decision which has already been made. Here also, serious undermining of the decision-making process is required in order to justify an exemption. Protection is granted according to the exact wording of the decision-making process of the corresponding institution; however this is already completed. Only the freedom of deci-

sion remains as something to be protected in relation to any future decisions. Contrary to subparagraph 1, the scope of implementation of this exemption is limited to specific document types. The exemption from transparency can only apply to such documents containing opinions within the framework of deliberations and preliminary consultations where a decision has already been made in the decision-making process,

This means for the documents of the CoCG that each document type must be examined individually as to whether the above-mentioned conditions are met. This can never be based on general assumptions, and especially not in respect of room documents of the COM.

Neither is a general reference to the special protection of the decision-making process of the CoCG sufficient as the required justification in the case of exemptions from transparency, since the obligations of the Member States and the tasks of the CoCG have already been established in the Foundation Charter and in the Code of Conduct. The Code of Conduct and the founding decision determine according to which categories and measures and for which aim decisions are made by the Council. Since restrictions to the right of full access to documents also must be interpreted in a strict sense according to case-law of the CJEU,<sup>25</sup> in order to ensure the general principle that the public has the widest possible access to documents,<sup>26</sup>

<sup>21</sup> Riemann, *Die Transparenz der Europäischen Union*, Berlin 2004, p. 214.

<sup>22</sup> Frenz, *Handbuch Europarecht, Europäische Grundrechte*, Heidelberg 2009, Rn. 4709.

<sup>23</sup> Fahey, *EU Foreign Relations Law: Litigating to Incite Openness in EU Negotiations*, in: *EJRR* 4/2014, S. 553 ff..

<sup>24</sup> Frenz, *Handbuch Europarecht, Europäische Grundrechte*, Heidelberg 2009, no. 4710; Riemann, *Die Transparenz der Europäischen Union*, Berlin 2004, p. 214.

<sup>25</sup> CJEU, Judgment of 17 October 2013, *Access Info Europe/Rat* (280/11 P, no. 30) with citations.

<sup>26</sup> Wegener in *Calliess/Ruffert, Art. 15 TFEU, Comment*, 4th Edition, Munich 2011, no. 34; CJEU, Judgment of 17 October 2013, *Access Info Europe/Rat* (280/11 P, no. 28) with citations.

stringent requirements are set to determine the existence of a transparency exemption for the “Integrity of the Decision-Making Process” in Art. 4(3) Transparency Regulation. The CoCG is not an “institution” according to Art. 4(3) Transparency Regulation. Thus the protection of the integrity of the decision-making process in the CoCG does not exist in this case. A point of reference could only be the decision-making process in the council. But the extent to which opening up access to documents drawn up by the COM within the framework of the activities of the CoCG could seriously undermine the decision-making process in the Council has not been explained by the COM in any case.

### **(c) Prevailing public interest in access**

Finally public interest contrary to the assumption of an exemption must also be determined. Such “public interest” should be a specific public interest, which outweighs the interest protected by the exception provision.<sup>27</sup> The applicant must present concrete conditions justifying a prevailing public interest in the diffusion of the corresponding documents.<sup>28</sup>

The prevailing public interest within the framework of the CoCG lies specifically in the fact that its contents refer to prejudicial tax measures which may significantly affect the location of business activities in the Union<sup>29</sup> and hence taxation, for example, is no longer levied at the place of real commercial activity (letterbox com-

panies). Prejudicial tax measures, according to letter B of the Code of Conduct, are measures which, measured against the taxation level usually implemented in the corresponding Member States, bring about a clearly lower effective taxation of companies, including zero taxation.<sup>30</sup>

These issues refer to possible violations of the Code of Conduct and European Union law. In this context the public interest in disclosure and possibly planned measures prevails so that future violations of the rules shall be avoided in this context.

### **(2) Unlawful assumption of the exemption in Art. 4(1)(b) Transparency Regulation**

Besides, in its decision of 29 October 2015 the COM cites the exemption under Art. 4(1)(b) Transparency Regulation and mentions the protection of privacy and integrity of the individual, especially the provisions in the data protection regulation 45/2001. However, refusal of access to the documents of the CoCG based on this ground violates the right protected in Art. 15(3) TFEU in conjunction with Art. 2(1) Transparency Regulation.

Also, with regard to this exemption, a narrow interpretation is applied regarding restrictions of the right of full access to documents in accordance with the case-law of the court.<sup>31</sup> Personal privacy encompasses the rights of the individual in private and family life, home and correspond-

<sup>27</sup> Abazi & Hillebrandt, The legal limits to confidential negotiations, in: Common Market Review 52 (2015), p. 825 et seq.

<sup>28</sup> CJEU Judgment of 2 October 2014, Strack/Commission (127/13 P, [2015], 2250, no. 128) with citations.

<sup>29</sup> Decisions of the Council and government representatives of the Member States in the Council on 1 December 1997 on a Code of Conduct for Company Taxation, point A of the Code of Conduct for tax measures aimed at business taxation.

<sup>30</sup> Decisions of the Council and government representatives of the Member States in the Council on 1 December 1997 on a Code of Conduct for Company Taxation, point B of the Code of Conduct for the tax measures aimed at Business Taxation.

<sup>31</sup> CJEU, Judgment of 17 October 2013, Access Info Europe/Council (280/11 P, no. 30), with citations.

<sup>32</sup> Frenz, Handbuch Europarecht, Europäische Grundrechte, 2009, Heidelberg, no. 4679.

ence.<sup>32</sup> Integrity as a subject of protection is not anchored in law and, depending on the interpretation, means the integrity or inviolability of these goods.<sup>33</sup>

The COM should provide detailed reasons as to what extent the documentation of prejudicial state policies on Business Taxation affects personal privacy and integrity of individuals. Documents on applicable or planned tax measures of the Member States and in documents on the administrative practice and interpretation of tax laws in Member States, including legal and administration regulations, clearly do not affect the need to protect personal privacy and integrity of the individual.

Even if these subjects of protection were affected, this would not automatically prioritize them vis-à-vis the interests of the public. The CJEU is not undertaking an abstract consideration of the protected legal subjects of Regulations 45/2001 and 1049/2001, but interrelates these regulations.<sup>34</sup> According to the court, the right of access to documents as provided for in Art. 2 Transparency Regulation, corresponds to a legal obligation for “processing” personal data in the sense of Art. 5(b) of Regulation 45/2001.<sup>35</sup> The court also determines that the transmission of personal data, to which the exemption under Art. 4 Transparency Regulation does not apply, does not in principle undermine the rightful interests of the persons concerned according to Art. 8(b) of Regulation 45/2001.<sup>36</sup>

In no manner has the COM explained which individual interests are to be considered here. The concealment of illegal practices can as little be justified by an alleged individual interest in secrecy.

The data from the CoCG are not covered by the exception in Art. 4(1)(b) Transparency Regulation. Regulation 45/2001 cannot justify assumption of the exemption in Art. (4)(1)(b) Transparency Regulation.

### **(3) No disproportionality**

According to the Commission the sensitivity of some information in the documents of the CoCG with regard to the exemptions in Art. 4 Transparency Regulation would result in a disproportionate workload for the institution which must examine in detail whether partial publication of data (Art. 4(6) Transparency Regulation) is required in each case and which must possibly black out individual passages in the document.

According to case-law, in such cases where the volume of documents or the volume of the parts of the documents to be blacked out would lead to disproportionate administrative costs; therefore the significance of the abridged parts and the resulting workload must be balanced with each other.<sup>37</sup> In such cases the institution may protect the interests of proper administration.<sup>38</sup>

<sup>33</sup> Frenz, *Handbuch Europarecht, Europäische Grundrechte*, 2009, Heidelberg, no. 4680.

<sup>34</sup> Frenz, *Handbuch Europarecht, Europäische Grundrechte*, 2009, Heidelberg, no. 4683.

<sup>35</sup> Court of Justice, Judgment of 8 November 2007, *Bavarian Lager/Commission* (194/04, [2007], II-4523, no. 106).

<sup>36</sup> Court of Justice, Judgment of 8 November 2007, *Bavarian Lager/Commission* (194/04, [2007], II-4523, no. 108).

<sup>37</sup> CJEU, Judgment of 6 December 2001, *Rat/Hautala* (353/99 P, [2001], I-9565, no. 24 et seq.).

<sup>38</sup> CJEU, Judgment of 6 December 2001, *Rat/Hautala* (353/99 P, [2001], I-9565, no. 24 et seq.).

Nevertheless, disproportionality may not refer to the work of institutions when assessing the sensitivity of documents. In such a case, the COM could erode the principle of transparency with a general reference, not verifiable in detail, referring to the workload. Since the general principle also applies here that any institution when faced with the requirement of transparency

“should weigh the special interest which is protected by non-disclosure of the corresponding document, against the general interest in accessibility to the document, considering the advantages which derive from greater transparency, as established in the second recital of Regulation 1049/2001, namely enhanced participation of citizens in the decision-making process and greater legitimacy, efficiency and responsibility of the administration with regards to citizens in a democratic system.”<sup>39</sup>

In the context of this consideration and the required emphasis on the public interest, the general reference to the workload is not sufficient grounds for non-accessibility of the desired documents.

#### **(4) Violation of Art. 4(6) Transparency Regulation**

With the refusal of full access to documents the COM further violates Art. 4(6) Transparency Regulation. Pursuant to Art. 4(6) Transparency Regulation, if only parts of the required docu-

ment are subject to one of the exemptions, the other parts of the documents still must be disclosed. The COM refers to this possibility, but does not make use of it, particularly with regard to the grounds for assumption of the exemption in Art. 4(1)(b) Transparency Regulation.

In accordance with the case-law of the court the institution must grant such partial access, if the intended goal of refusing access to the document can be achieved by the institution confining itself to blacking out the parts which could undermine the protected public interest.<sup>40</sup>

#### **(5) Violation of Art. 7(1) and Art. 8(1) Transparency Regulation**

According to the decision of 9 December 2015 the Commission also violates the provisions of Art. 7(1) and Art. 8(1) Transparency Regulation, since a reason for the refusal of full access to the document is missing which would allow the cause and the reasons for the refusal to be examined.<sup>41</sup>

The reason must enable applicants to exercise their power to defend their rights and must allow the court to exercise its monitoring powers.<sup>42</sup> This is not so in the present case. A general reference to one of the grounds for exemption is insufficient.<sup>43</sup> A reason must be provided with regard to every document.<sup>44</sup> With regard to a second application the reason must go into detail into the counterarguments of the applicants;

<sup>38</sup> EuGH, Urteil vom 6. Dezember 2001, Rat/Hautala (353/99 P, Slg. 2001, I-9565, Rn. 24 ff).

<sup>39</sup> CJEU, Judgment of 3 July 2014, in't Veld/EP et. al. (C-350/12 P, no. 53).

<sup>40</sup> Court of Justice, Judgment of 4 May 2012, in't Veld/Rat (T-529/09, no. 118) and citations.

<sup>41</sup> CJEU, Judgment of 18 December 2007, Sweden/Commission, IFAW (64/05 P, [2007], I-11398, no. 89).

<sup>42</sup> Wegener, in: Calliess/Ruffert, EUV/AEU, Kommentar, 4. Auflage, München 2011, Art. 15 AEU, Rn. 41.

<sup>43</sup> Lentner, Access to Documents of the Institutions, in: European Law Reporter 4/2014, p. 123 et seq.; CJEU, Judgment of 6 February 1998, Interporc/Commission (124/96, [1998], II-231, no. 53) with citations.

<sup>44</sup> Wegener, in: Calliess/Ruffert, TEU/TFEU, Comment, 4. Edition, Munich 2011, Art. 15 TFEU, no. 41, Judgment of 17 June 1998, Tidningen Journalisten/Rat (174/95, [1998], II-2289, no. 112) with citations..



a mere repetition of the first refusal is not sufficient.

Particularly, in the present case, the sole reference to the confidentiality of the documents does not correspond to the required reason with regard to exemptions from transparency. Since in the first place it is established in Art. 9(4) Transparency Regulation that a reason must also be provided in the case of sensitive documents – in such a way that the protected interests are not undermined. Secondly, the corresponding obligation to provide justification is derived from Art. 41(2)(c) of the Charter of Fundamental Rights and Art. 296 second sentence of TFEU. And thirdly, in accordance with the case-law of the CJEU, if an application is filed for access to a document originating in a Member State, the COM should initiate a "loyal dialogue" with the former on implementation of the exemption provision in Art. 4(1) to (3) Transparency Regulation.<sup>45</sup>

Also in this case implementation of Art. 9 of the Transparency Regulation in conjunction with Art. 2(5) Transparency Regulation in relation to CoCG documents merely implies that applications for access to these documents are subject to special treatment in accordance with this provision.<sup>46</sup> Therefore, at this point it should be considered that pursuant to Art. 4(5) Transparency Regulation, a Member State may request an institution not to disclose a document originating in a Member State without its prior authorization.

In the event that disclosure of the document is opposed by the Member State, it must justify this on the basis of exemptions.<sup>47</sup> In accordance with the decision of the supreme court, an institution cannot uphold the opposition of a Member State against the diffusion of a document originating in the latter if there are no sufficient grounds.<sup>48</sup>

The same applies to the requested documents. These originated either in Member States or derive from information of the Member States for their internal use within the CoCG and the Council, but these equally contain – in the form of minutes of the meetings, written records, transcripts – the information claimed as sensitive by the Commission.

No justification is provided by the COM in their contested decision for application of the exemption contained in Art. 4(3) Transparency Regulation beyond the (assumed) sensitivity of the data by the COM nor any evidence substantiating the opposition of the Member States. For this reason, alone it is unlawful.

## **(6) Violation of Art. 6(3) Transparency Regulation**

Also pursuant to Art. 6(3) Transparency Regulation it is shown that an exemption from transparency is not provided in the present case. The refusal of access due to the disproportional workload, which would arise when making such

<sup>45</sup> CJEU, Judgment of 18 December 2007, Sweden/Commission, IFAW (64/05 P, [2007], I-11398, no. 86).

<sup>46</sup> CJEU, Judgment of 28 November 2013, Jurasinovic/Council (C-576/12 P [2013], I-0000, marginal nos. 43, 46).

<sup>47</sup> CJEU, Judgment of 18 December 2007, Sweden/Commission, IFAW (64/05 P, [2007], I-11398, no. 87).

<sup>48</sup> CJEU, Judgment of 18 December 2007, Sweden/Commission, IFAW (64/05 P, [2007], I-11398, no. 88).

a significant volume of documents available, does not in particular represent an absolute exemption from the right of access to documents pursuant to Art. 15(3) TFEU in conjunction with Art. 2(1) Transparency Regulation. No general principle<sup>49</sup> can be derived from the case-law for the restriction of the right to access documents due to “[...] a kind of efficiency principle of the administration [...]”.<sup>50</sup> The interests should at least be balanced with each other.<sup>51</sup>

The obligation to grant partial access is already given in Art. 4(6), Art. 7(3) and Art. 8(2) Transparency Regulation. Art. 6(3) Transparency Regulation regulates the application which references a very significant volume of documents. The “reasonable” solution provided for in this provision must be the result of joint consultation leading to a pragmatic solution. In the present case the COM has not only refused such a consultation, but by its refusal of disclosure it has unilaterally dictated an inappropriate solution – since it does not adequately emphasize public interests. This also violates Art. 6(3) Transparency Regulation.

### 3. Interim result

The action for annulment pursuant to Art. 263(4) TFEU against the decision of the COM of 9 December 2015 is therefore fully admissible and well founded.

The decision violates the right of MEP De Masi to full access to the documents of the CoCG

from 1998 onwards pursuant to Art. 15(3) TFEU in conjunction with Art. 2(1) of the regulation. This should be granted by the Commission.

The assumption of exemption regulations with regard to this right under Art. 4(3) of the regulation (internal institutional use and protection of the decision-making process) is unlawful due to the general refusal to allow access. By reference to the confidentiality classification of No. 13 of the Foundation Charter of the CoCG, the COM claims general confidentiality for all documents of this group. This does not meet the requirements for justification and cannot be justified by any further exemption rule in Art. 4 Transparency Regulation. If there is an interest to be protected under Art. 4 of the regulation, this must be reviewed by the Commission and an explanation provided why the data are sensitive and which interest to be protected is covered by the same. Everything else is tantamount to a veto right of Member States with regard to document access.

Furthermore, there is no undermining of the decision-making process pursuant to Art. 4(3) Transparency Regulation. The CoCG is not an EU institution. In what way diffusion of documents of the CoCG by the COM may undermine the decision-making process of the Council has not been demonstrated by the COM. Moreover, a prevailing public interest in access to the documents of the CoCG can be assumed.

<sup>49</sup> CJEU, Judgment of 2 October 2014, Strack/Commission (C-127/13 P).

<sup>50</sup> Frenz, *Handbuch Europarecht, Europäische Grundrechte*, Heidelberg 2009, no. 4717.

<sup>51</sup> CJEU, Judgment of 2 October 2014, Strack/Commission (C-127/13 P, no. 27).

Also the application of Art. 4(1)(b) of the regulation (sensitivity of information) is unlawful. The need to protect personal privacy and integrity of individuals is clearly not affected. Regulation 45/2001 in particular cannot support the assumption of exemptions in Art. 4 Transparency Regulation. Neither is granting of full access to the documents a disproportionate workload for the institution.

Finally, in total Art. 4(6) Transparency Regulation, Art. 6(3) Transparency Regulation, Art. 7(1) Transparency Regulation and Art. 8(1) Transparency Regulation have been violated. The COM has not applied Art. 4(6) Transparency Regulation (partial access) or Art. 6(3) Transparency Regulation (informal consultation). Art. 7(1) Transparency Regulation and Art. 8(1) Transparency Regulation have been violated because the COM has not provided a reason which would allow the cause and the reasons for its refusal to be ascertained.

## **II. Action for annulment against the Decision by the COM of 9 November 2015.**

It is questionable whether an action for annulment is also admissible and justified against the decision of the COM of 9 November 2015.

In this decision the COM states with regard to access to documents for the period of 1998-2009: "[...] je tiens à vous informer que mes services consultent également les autorités

des Etat membres au sujet d'une trentaine de documents contenant des informations qu'elles ont fournies. Les conclusions seront tirées du résultat des consultations en vue d'un envoi ou d'une consultation des documents, à partir du 16 novembre prochain."

The wording "ou d'une consultation des documents" in this case refers to the Room Reading procedure ordered by the COM for the relevant documents. In execution of this order the TAXE Secretariat communicated the following to the members of the Committee on the same day:

"Please find attached the reply letter of Commissioner Moscovici regarding additional documents and consultation of additional confidential documents. [...] the documents that the Commission services are checking with Member States and should be available in the reading room during the second phase of consultation which will start on 16.11.2015."

On 10 November 2015, i.e. the next day, the TAXE Secretariat communicated the following:

"To follow up on the letter received from Commissioner Moscovici yesterday regarding the consultation of documents, the secretariat checked with the Commission services on the practical organisation of the second phase of consultation of confidential documents:

- The existing arrangement (from the first phase, attached) will be updated to refer to the docu-

ments of the period 1998 -2009 and to insert new consultation dates.

- Political groups can either keep the list of representatives from the first phase or if they prefer they can establish a new list of representatives always respecting the quota of 3 representatives per group – either MEPs or political advisers. (MEP assistants – as in the first phase- cannot take part in this exercise) [...]"

The "arrangement" transmitted by the Decision of the COM of 8 October 2015 for consultation by MEPs of CoCG documents classified as confidential is attached to this communication. The COM explains in its decision of 8 October 2015 regarding consultation of the documents in the period 2010-2015:

"Suite à nos échanges au sujet de l'arrangement permettant à certains membres du Comité TAXE d'avoir accès aux documents que je n'ai pu vous transmettre le 3 juin dernier, j'ai le plaisir de vous faire parvenir en annexe un arrangement qui, je l'espère, vous agréera."

The COM has appended to this decision an "Arrangement for the examination of confidential documents by the Special Committee on Tax Rulings and Other measures Similar in Nature or Effect (TAXE Committee)". It reads as follows:

"In accordance with the Framework Agreement on relations between the European Parliament and the European Commission of 20 October 2010, it is hereby agreed that Members of the TAXE Committee are authorised to examine confidential documents, during a meeting in camera,

under the following conditions :

1- Documents concerned:

The documents concerned are Commission working documents for discussion in meetings of the Code of Conduct group between 2010 and 2015. In accordance with the Council conclusions of 9 March 1998, the work of the Code of Conduct group is confidential and is based on confidential documents. Their transmission to the EP is therefore governed by the provisions of Annex II of the Framework Agreement. In accordance with point 2.1. of Annex II of the Framework Agreement, information from Member States that have not provided their consent to the examination of the documents will be redacted from the documents. Moreover and in accordance with point 3.2.2. of Annex II of the Framework Agreement, personal data will be expunged from the documents.

The documents will be numbered between 1 and 25.

2- Persons entitled to examine the documents:

The President, three Members of each political group and three representatives of the Secretariat of the TAXE Committee will have the possibility to examine the documents insofar as they have signed a solemn declaration, before the meeting, that they will not divulge the contents of any document to any third person.

3- conditions for the organisation of the meeting:

The Commission services (DG TAXUD) will organise a meeting in camera in the premises of the Commission.

It will imply that any personal electronic device (such as smartphones, cameras, camcorders, etc...) which enables reproduction or making available of a document to a third party, will



have to be handed over to the Commission representatives in charge of the organisation of the meeting, before the beginning of the meeting.

It will not be allowed to take notes during the meeting.

Two sets of the documents mentioned under point 1 will be at the disposal of the members of the meeting, between 9.30 am and 5.30 pm. [...]"

It is clear that access to documents of the CoCG is restricted as stated above by the decision of the COM of 9 November 2015. The COM's decision here is aimed at the application filed by the Chairman of the Special TAXE Committee on 22 April 2015 with the COM, requiring access to documents of the CoCG. One aim of the application is the diffusion of the following documents:

"European Commission documents (including minutes) concerning the EU Code of Conduct Group for Business Taxation".

This request was only partially granted. (a) Not all documents are shown to the members of the Committee, (b) the documents are partly blacked out and (c) these can only be accessed in a reading room, to which only restricted access is granted.

### **1. Admissibility**

The claim is admissible as an action for annulment against the decision of the COM of 9 November 2015 pursuant to Art. 263(4) TFEU

### **a. Object of the claim**

The decision of 9 November 2015 is a decision of the Commission and therefore a suitable cause of action in a nullity action pursuant to Art. 263(4) TFEU. The decision of 9 November 2015, which in consideration of the decision of 8 October 2015 enables access to the documents of the CoCG from the period 1998-2002 according to a restrictive procedure, constitutes a legally binding instrument of the Commission having legal effect with regard to the Parliamentary Members of the Special TAXE Committee. The decision of 9 November 2015 on the restrictive procedure definitely concludes a special procedure. It has legal effect and due to the fact that the rule is also applicable to the decisions against Union institutions and the parts thereof, it is a decision in the sense of Art. 288(4) TFEU, and therefore a suitable cause of action.

Even if the regulation could not be considered as a decision in the sense of Art. 288(4) TFEU, a suitable cause of action is provided. The objects in a nullity action can also include non-standard legal instruments, in order to ensure the intent and purpose of the nullity action, namely the guarantee that the law is observed in the application of the treaties. The contestable acts in nullity actions are therefore not restricted to possible actions of the institutions in the sense of Art. 288 TFEU. In accordance with point 3.3.2 of Appendix II to the Interinstitutional Agreement, the Special Taxes Chairman and the competent Commissioner have agreed the modalities of such a procedure. Therefore also the agreement between the Special TAXE Chairman

and the competent member of the COM is an act in the sense of Art. 263(2) TFEU and thus a suitable object of a nullity action.

Nor does the decision of the COM lack external impact. The CJEU considered an action for annulment inadmissible against a decision of the Parliamentary president who had held the request to set up a committee of inquiry to be admissible and had decided that “the contested action (...) could not have any legal effect with regard to third parties. The committees of inquiry (...) namely have investigative authority only; therefore, the actions for which they are set up only concern the internal organization of the work of the (...) Parliament.” And a similar decision was made by the court within the framework of an action contesting the legitimacy of the procedure for the appointment of the chairman of an interparliamentary delegation, which is only responsible for information and contacts, and the actions regarding its composition only concern the internal organization of the work of the Parliament. However, unlike the intra-institutional actions in these cases, here it is primarily a question of the rights of MEPs in their parliamentary work being undermined by a decision of the COM. Therefore the external effect is given here. The fact that the chairman of the committee did not initiate any legal action against the decision of the COM does not oppose the possibility that the rights of an individual member of the Committee are violated or the external effect produced by the decision of the COM.

## **b. Right to take legal action**

Members of the EP as the addressees of the decisions of the institutions pursuant to Art. 263(4) Alt. 1 TFEU have the right to take legal action.

When answering the question whether individual members of the Special Committee TAXE can be considered as the addressees of the decision, it is irrelevant that the decisions are not directly addressed to the MEPs as members of the Committee and that the procedure regarding the Reading Room was not directly agreed by the MEPs with the COM. In all cases the direct addressee in the COM decision pursuant to Art. 204 no.1 of the Rules of Procedure of the EP is the elected Chairman of the committee, who jointly with the Vice-Chairman composes and represents the Board of the Committee. The MEPs who are members of TAXE are in all cases particularly affected by the decision and therefore have the right to take legal action in the sense of Art 263(4) Alt. 2 TFEU.

The decision of 9 November 2015 concerns the rightful interests of MEPs as Members of Parliament in full access to documents and information, Art. 230(2) TFEU in conjunction with Art. 10(2) TEU as regards the duty of disclosure. These parties are directly affected by the decision of the COM because full access to the documents is prevented, with the order itself, and not merely a subsequent implementation measure, interfering in the sphere of interest of the MEPs.

In conclusion, individuals are also affected. The individual capacity as a member of the Special Tax Committee sets the members of the Committee apart from all other Members of the EP.

Also in this case the term for bringing an action is two months from notification pursuant to Art. 263(6) TFEU. The term for bringing an action against the decision starts on 10 November 2015 (Art. 101(1a) Const. Order of the Court of Justice) and the same ends on 10 January 2016 (Art. 101(1b) Const. Order of the Court of Justice).

Therefore the action for annulment is admissible.

## **2. Reasonable grounds**

There is reasonable justification for the action for annulment pursuant to Art. 263(4) TFEU. The decision of 9 November 2015, whereby access to documents is refused or unlawfully restricted, violates the right of the individual members of the committee with regard to the duty of disclosure pursuant to Art. 230(2) TFEU in conjunction with Art. 10(2) TEU as regards the duty of disclosure.

### **a. Right of access to documents pursuant to Art. 230 TFEU**

MEPs have a right of access to documents pursuant to Art. 230(2) TFEU in conjunction with Art. 10(2) EU as regards the duty of disclosure, which must not lag behind access rights deriving from the Transparency Regulation 1049/2001.

Art. 230(2) TFEU states: “The Commission shall reply orally or in writing to questions put to it by the European Parliament or by its Members.” In accordance with these rights to question, the COM has the duty to disclose pursuant to Art. 230(2) in conjunction with Art. 128 and further, Rules of Procedure of the European Parliament, as well as pursuant to Art. 128 no. 1 Rules of Procedure of the European Parliament.

This duty to disclose also refers to the duty of providing access to documents of the institutions of the Union, provided this is required for the exercise of parliamentary control by the Parliament.

This follows from the wording and systematic and teleological interpretation of the right to question. According to the wording of the rule the COM has the obligation to reply to questions. The COM is also legally bound also in terms of how to reply. The response must be “immediate, complete and truthful” because the right to question pursuant to Art. 230(2) TFEU is also influenced by the principle of loyal collaboration pursuant to Art. 13(2) second sentence TFEU.

The scope of the obligation to reply is further systematically emphasized by the objective of Art. 230(2) TFEU, by which the Parliament must be specifically enabled to comply with its task to exercise political control over the COM pursuant to Art. 14(1) TFEU.

Parliamentary control as a core component of the democratic structure of the Union presupposes the sense and purpose that the deci-

sion-making process of the Parliament should be based on all information available as far as possible. For this is the simple principle for each democratic decision-making process.

It follows from the above considerations that the COM's duty of disclosure within the framework of Art. 230(2) TFEU in view of the principle of loyal cooperation under Art. 13(2) second sentence TFEU and the task of the Parliament to exercise political control in accordance with Art. 14(1) TFEU must enable the democratic decision-making process of the Parliament. This also implies – at the level of EU legislation this is no different from the level of national parliaments – the duty to make available information accessible to the Parliament. Therefore Art. 230(2) TFEU also establishes the fundamental duty to provide access to documents of the EU institutions, insofar as these are required for the exercise of Parliamentary control by the Parliament.

This duty regarding the disclosure of documents applies to the COM, not only *vis-à-vis* the EP but also *vis-à-vis* the individual members. This results from the fact that the EP is a working parliament. This means that the work of MEPs with regard to content is mainly performed by committees, where work is prepared through resolutions and reports that are put to the vote in plenary session. MEPs must also have subjective access rights to documents, irrespective of the requirements and majorities of individual committees, whose rights of access to documents have already been established in the Rules of Procedure of the European Parliament or in the

mandate of the Committee. Only then can effective protection of minorities be provided at the level of the actual decision-making process because the decision-making process of the individual in contentious disputes with and against other Members of the Parliament is the essence of parliamentary work.

From a systematic perspective the existence of a general primary right of access for EU citizens is an argument in favor of the existence of a duty to disclose relevant documents for the Parliament and individual members.

Art. 15(3) TFEU in conjunction with the Transparency Regulation provides EU citizens with a primary subjective right of access to documents of the institutions. It is a question primarily of the implementation of the principle of openness and transparency of the actions of the Union. These principles should also be implemented in the interpretation of the rights of MEPs pursuant to Art. 230(2) TFEU in conjunction with Art. 10(2) TEU as regards the duty of disclosure, since the transparent and open action stipulated in Art. 15(1) TFEU presupposes access to information.

Art. 10(2) TEU constitutionally states that the citizens at Union level are directly represented in the EP. Pursuant to Art. 14(1) and (2) TEU the EP and thus the MEPs are active together with the council as a legislative institution and hence represent the citizens of the European Union in order to make laws through a democratically legitimized process. Hence, such civic rights of access to documents must apply in equal meas-

ure to MEPs. Otherwise it would mean that Art. 10(2) TEU and the process that leads to a legitimized representative democracy in the first place (in the sense of Art. 10(1) TEU for example) would amount to losing the right to information. Therefore this right of MEPs to access documents must exist to the same – i.e. full and unrestricted – extent, as provided by Art. 15(3) TFEU and the Transparency Regulation. Hence, since neither blacking out, nor non-provision nor the Room Reading procedure can be justified, the COM has not only violated the Transparency Regulation but also the rights of MEPs pursuant to Art. 230 TFEU.

Since the right granted under Art. 230 TFEU comprises subjective access rights of Members of the EP to all document types of EU institutions, the regulation of competences between Member States and the European Union are, in this case, immaterial.

Members of the EP do not have full access to documents of the CoCG. The decision of the COM of 9 November 2015 restricts the rights of committee members and is contrary to the law.

#### **b. Violation of the Interinstitutional Framework Agreement**

The decision of the COM also violates the Interinstitutional Framework Agreement as such. The individual MEPs have a subjective legal interest in compliance with it as guaranteed by Art. 230 TFEU.

Appendix II of the interinstitutional agreement "Framework Agreement on the relationship between the European Parliament and the European Commission" of 20 November 2010 (in the following Appendix II to the Framework Agreement) regulates under point 1 the scope of implementation and modalities for access to and handling of confidential information (point 3) when transmitting confidential information by the COM to the Parliament. Pursuant to Art. 295 second sentence TFEU, these framework agreements may have a binding character, provided that they comply with primary legislation and do not cancel out the scope for control by the EP, which is specifically guaranteed through Art. 14 TEU.

The decision of 9 November 2015 refers to the decision of the COM of 8 November 2015. The agreement of 8 October 2015, which was made between the Chairman of the Special Committee and the competent member of the COM, is not consistent with the modalities under point 3 of Appendix II to the Interinstitutional Agreement because it is not an equivalent ruling as provided by point 3.2.4. The rationale of the right of access to documents pursuant to Art. 230(2) TFEU in conjunction with Art. 10(2) TFEU as regards the duty of disclosure – namely the widest access as possible – must be implemented with the interpretation of the Appendix II to the Framework Agreement.

Unlike the decision of 9 November 2015, the Framework Agreement does not establish any possibility to implement a reading room procedure within the COM. The Framework Agree-



ment establishes that the relevant information is submitted to the Parliament. The Framework Agreement further provides, under point 3.2.1, the possibility to restrict the group of addressees of confidential information. None of the options provided here allows a restriction to three representatives (MEPs or political party agents) per political group, as is contained in the decision of the COM of 9 November 2015.

Also Appendix II of the framework agreement does not indicate any time restriction of access to documents by the MEPs. It was nevertheless agreed to a limited time period from 16 November 2015 to 20 November 2015. However practical reasons cannot establish a time restriction to five days. Regarding the temporal scale to access to documents here too the rationale of Art. 230 TFEU – broadest possible access – must be observed.

Besides, the scope of implementation (point 1) of Appendix II to the Interinstitutional Agreement is not applied. The documents of the Code of Conduct group are not classified as confidential within the concept of "EU classified documents" (Point 1.2.2. Appendix II to the Interinstitutional Agreement). Pursuant to point 1.2.3. "other confidential information" is all confidential information, including the information subject to professional secrecy, which is required by the Parliament and/or transmitted by the COM.

Appendix II to the Interinstitutional Agreement cannot cancel out such transparency principles based on primary legislation. This would imply that the right of access to information in

accordance with the Transparency Regulation 1049/2001 was broader than the right to information of MEPs pursuant to Art. 230 TFEU. However, no distinction can be made with regard to the legal evaluation of the legitimacy of assessing the confidentiality of information when access to a document is required by an EU citizen or a MEP. In both cases, the broadest possible access must be granted to documents of European institutions.

The restrictions on access to documents by the decision of the COM of 9 November 2015 therefore violate the Interinstitutional Agreement of 20 November 2010 and also Art. 230 TFEU.

### **3. Interim result**

The decision of the COM of 9 November 2015 restricting the access to documents and linking these to a reading room procedure unlawfully impedes full access to documents of EU institutions and violates the Interinstitutional Agreement of 20 November 2010 and the right under Art. 230(2) TFEU in conjunction with Art. 10(2) TEU regarding duty of disclosure.

An action for annulment filed by individual committee members is admissible and well founded.

## **C. SUMMARY**

**1. The COM's Decision of 9 December 2015**, by which the COM rejected the request to provide access to all documents which have been drawn up by the COM since 1998 on the work

of the CoCG, is unlawful. It violates the right of the MEP De Masi pursuant to Art. 8(3) and Art. 15(3) TFEU in conjunction with Art. 2(1) Transparency Regulation 1049/2001. The exemption regulations of Regulation 1049/2001 can not justify disclosure:

**a) The assumption of the exemption regulations with regard to this right under Art. 4(3) of the regulation (internal institutional use and protection of the decision-making process) is unlawful due to the general refusal to allow access.** By reference to the confidentiality classification of No. 13 of the Foundation Charter of the CoCG, the COM claims general confidentiality for all documents of this group. This does not meet the requirements for justification and cannot be justified by any further exemption rule in Art. 4 Transparency Regulation. If there is an interest to be protected under Art. 4 of the regulation, this must be reviewed by the COM and an explanation provided why the data are sensitive and which interest to be protected is covered by the same. Everything else is tantamount to a veto right of Members States with regard to document access.

**b) Furthermore, there is no undermining of the decision-making process pursuant to Art. 4(3) Transparency Regulation.** The CoCG is not an EU institution. In what way diffusion of documents of the CoCG by the COM may undermine the decision-making process of the Council has not been demonstrated by the COM. Moreover, a prevailing public interest in access to the documents of the CoCG can be assumed.

**c) Also the application of Art. 4(1)(b) of the Regulation (sensitivity of information) is unlawful. The need to protect personal privacy and integrity of individuals is clearly not affected.** Regulation 45/2001 in particular cannot support the assumption of exemptions in Art. 4 Transparency Regulation. Neither is granting of full access to the documents a disproportionate workload for the institution.

**d) Finally, in total Art. 4(6) Transparency Regulation, Art. 6(3) Transparency Regulation Art. 7(1) Transparency Regulation and Art. 8(1) Transparency Regulation have been violated.** The COM has not applied Art. 4(6) Transparency Regulation (partial access) or Art. 6(3) Transparency Regulation (informal consultation). Art. 7(1) Transparency Regulation and Art. 8(1) Transparency Regulation have been violated because the COM has not provided a reason which would allow the cause and the reasons for its refusal to be ascertained.

**2. The Decision of the COM of 9 November 2015 by which the COM only grants restricted access to documents for the members of the TAXE Committee, whereby not all documents are shown, the documents are partially blacked out and can only be consulted in a reading room, is unlawful on the following grounds:**

**a) MEPs have a primary and subjective right to full access to documents pursuant to Art. 230(2) TFEU in conjunction with Art. 10(2) TEU as regards the duty to provide information. This must be given at least to the extent guaranteed by Art. 15(3) TFEU in conjunction with the Trans-**

parency Regulation. Since full access to documents is not facilitated, the COM is violating the right of access for MEPs pursuant to Art. 230 TFEU.

**b)** The Decision of 9 November 2015 also violates the Interinstitutional Agreement between EP and COM, in the compliance of which individual MEPs have a subjective legal interest. Regarding implementation of the agreement the rationale of Art. 230 TFEU – broadest possible access – must be observed. The Decision of 9 November 2015 provides for a reading room procedure, which has a more restrictive structure than allowed in the Framework Agreement in Appendix II. This refers particularly to the restriction of access to two MEPs and one agent per political group, time restrictions for viewing the documents and execution of the procedure inside the building of the COM.

**3.** The actions of nullity against these decisions pursuant to Art. 263(4) TFEU are admissible and well founded.



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