

JUDGMENT OF THE COURT

6 December 2001 [\(1\)](#)

(Appeal - Public right of access to Council documents - Council Decision 93/731/EC - Exceptions to access to documents - Protection of the public interest concerning international relations - Partial access)

In Case C-353/99 P,

Council of the European Union, represented by J. Aussant, G. Maganza and M. Bauer, acting as Agents, with an address for service in Luxembourg,

appellant,

supported by

Kingdom of Spain, represented by R. Silva de Lapuerta, acting as Agent, with an address for service in Luxembourg,

intervener on appeal,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) of 19 July 1999 in Case T-14/98 *Hautala v Council* [1999] ECR II-2489, seeking to have that judgment set aside,

the other parties to the proceedings being:

Heidi Hautala, Member of the European Parliament, represented by O.W. Brouwer and T. Janssens, Avocats, with an address for service in Luxembourg,

applicant at first instance,

supported by

Kingdom of Denmark, represented by J. Molde, acting as Agent, with an address for service in Luxembourg,

and by

United Kingdom of Great Britain and Northern Ireland, represented by J.E. Collins, acting as Agent, and H. Davies, Barrister, with an address for service in Luxembourg,

interveners on appeal,

Republic of Finland, represented first by H. Rotkirch and then by T. Pynnä, acting as Agents, with an address for service in Luxembourg,

Kingdom of Sweden, represented by A. Kruse, acting as Agent, with an address for service in Luxembourg,

and

French Republic,

interveners at first instance,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann, F. Macken, N. Colneric and S. von Bahr (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, J.-P. Puissochet, M. Wathelet, V. Skouris, J.N. Cunha Rodrigues (Rapporteur) and C.W.A. Timmermans, Judges,

Advocate General: P. Léger,

Registrar: D. Louterman-Hubeau, Head of Division,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 13 March 2001,

after hearing the Opinion of the Advocate General at the sitting on 10 July 2001,

gives the following

Judgment

1.

By application lodged at the Registry of the Court of Justice on 22 September 1999, the Council of the European Union brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 19 July 1999 in Case T-14/98 *Hautala v Council* [1999] ECR II-2489 ('the contested judgment) annulling the Council's decision of 4 November 1997 refusing Ms Hautala access to the report of the Working Group on Conventional Arms Exports ('the contested decision).

2.

By order of the President of the Court of 10 February 2000, the Kingdom of Spain was granted leave to intervene in support of the form of order sought by the Council, while the Kingdom of Denmark and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the form of order sought by Ms Hautala.

Legal background

3.

As regards the legal background, the Court of First Instance found:

'1 The Final Act of the Treaty on European Union signed at Maastricht on 7 February 1992 contains a Declaration (No 17) on the right of access to information (hereinafter Declaration No 17), which states:

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. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.

2 At the close of the European Council in Birmingham on 16 October 1992, the Heads of State and of Government issued a declaration entitled A Community close to its citizens (Bull. EC 10-1992, p. 9), in which they stressed the need to make the Community more open. That commitment was reaffirmed by the European Council in Edinburgh on 12 December 1992 (Bull. EC 12-1992, p. 7).

3 On 5 May 1993 the Commission addressed to the Council, the Parliament and the Economic and Social Committee Communication 93/C 156/05 on public access to the institutions' documents (OJ

1993 C 156, p. 5). It contained the results of a comparative survey on public access to documents in the Member States and some non-member countries, and concluded that there was a case for developing further the access to documents at Community level.

4 On 2 June 1993 the Commission adopted Communication 93/C 166/04 on openness in the Community (OJ 1993 C 166, p. 4), setting out the basic principles governing access to documents.

5 At the European Council in Copenhagen on 22 June 1993, the Council and the Commission were invited to continue their work based on the principle of citizens' having the fullest possible access to information (Bull. EC 6-1993, p. 16, point I.22).

6 Within the framework of these preliminary steps towards implementing the principle of transparency, the Council and the Commission approved on 6 December 1993 a Code of Conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41, hereinafter the Code of Conduct), aimed at establishing the principles to govern access to documents held by them.

7 The Code of Conduct sets out the following general principle:

The public will have the widest possible access to documents held by the Commission and the Council.

8 Document is defined as any written text, whatever its medium, which contains existing data and is held by the Council or the Commission.

9 The circumstances which may be relied on by an institution as grounds for rejecting a request for access to documents are listed in the Code of Conduct in the following terms:

The institutions will refuse access to any document whose disclosure could undermine:

- the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),

- ...

They may also refuse access in order to protect the institution's interest in the confidentiality of its proceedings.

10 The Code of Conduct further provides:

The Commission and the Council will severally take steps to implement these principles before 1 January 1994.

11 In order to put that undertaking into effect, the Council adopted on 20 December 1993 Decision 93/731/EC on public access to Council documents (OJ 1993 L 340, p. 43).

12 Article 4(1) of Decision 93/731 provides:

Access to a Council document shall not be granted where its disclosure could undermine:

- the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),

- ...

Facts of the case

4.

As regards the facts of the case, the Court of First Instance found:

'13 [Ms Hautala] is a Member of the European Parliament.

14 On 14 November 1996 she put a written question to the Council (Written Question P-3219/96, OJ 1997 C 186, p. 48) seeking clarification of the eight criteria for arms exports defined by the European Council in Luxembourg in June 1991 and in Lisbon in June 1992. In particular, she asked the following questions:

What will the Council do to put an end to violations of human rights which are assisted by arms exports from EU Member States? What are the reasons for the secrecy surrounding the guidelines which the Council's Working Group on Conventional Arms Exports has proposed to the political committee with a view to clarifying the criteria?

15 The Council answered on 10 March 1997, stating in particular:

One of the eight criteria concerns the respect of human rights in the country of final destination, an issue of concern to all Member States. Exchanges between Member States on this and other aspects of arms export policy take place within the Common Foreign and Security Policy (CFSP) Working Group on Conventional Arms Exports, which has been charged with giving particular attention to the implementation of the eight criteria, with a view to reaching a common interpretation thereof.

At its meeting of 14-15 November 1996, the Political Committee [of the Council] approved a report from the Working Group on Conventional Arms Exports, with a view to further enhancing the consistent implementation of the common criteria. The Political Committee also agreed that the Group should continue to follow this matter closely.

Actual decisions on the granting of export licences remain, however, a matter for national authorities. The Council is therefore not in a position to comment on individual export authorisations or on national public information policies in this area.

16 By letter of 17 June 1997, addressed to the Secretary-General of the Council, [Ms Hautala] asked to be sent the report mentioned in the Council's answer (hereinafter the contested report).

17 The contested report was approved by the Political Committee but not by the Council. It was drawn up under the COREU special European correspondence system - adopted by the Member States and the Commission in 1995 within the framework of the CFSP in application of Title V of the Treaty on European Union - and was not distributed through the normal channels of distribution of Council documents. In the Council's practice, the COREU network is reserved for questions falling within Title V. Distribution of documents transmitted via the COREU network is restricted to a limited number of authorised recipients in the Member States, the Commission and the General Secretariat of the Council.

18 By letter of 25 July 1997, the General Secretariat of the Council refused access to the contested report under Article 4(1) of Decision 93/731, stating that it contained highly sensitive information disclosure of which would undermine the public interest, as regards public security.

19 By letter of 1 September 1997, [Ms Hautala] made a confirmatory application, in accordance with Article 7(1) of Decision 93/731.

20 The confirmatory application was considered by the Information Working Party of the Committee of Permanent Representatives at its meeting of 24 October 1997 and by the members of the Council at its meeting of 3 November 1997, following which the necessary simple majority

considered that a negative reply should be given. Four delegations were in favour of releasing the document.

21 By letter of 4 November 1997 (hereinafter the contested decision), the Council rejected the confirmatory application, in the following terms:

I refer to your letter of 1 September 1997 in which you make a confirmatory application, pursuant to Article 7(1) of Decision 93/731/EC, for access to [the contested report].

Your application was reviewed by the Council on the basis of an examination of the document in question.

As a result of this consideration, the Council has concluded that disclosure of [the contested report] could be harmful for the EU's relations with third countries.

Access to the document in question is therefore to be refused by virtue of Article 4(1) of Decision 93/731/EC in order to protect the public interest with regard to international relations.

22 The contested report prompted the Council to adopt, on 8 June 1998, a code of conduct for arms exports. That code was published.

The contested judgment

5.

By application lodged at the Registry of the Court of First Instance on 13 January 1998, Ms Hautala sought the annulment of the contested decision.

6.

Ms Hautala put forward three pleas in law in support of her application: infringement of Article 4(1) of Decision 93/731 (the first plea), infringement of Article 190 of the EC Treaty (now Article 253 EC) (the second plea), and breach of the fundamental principle of Community law that citizens of the European Union must be given the widest and fullest possible access to documents of the Community institutions, and of the principle of protection of legitimate expectations (the third plea).

7.

The Court of First Instance started by finding that it had jurisdiction to hear the application. On this point, it stated as follows:

'40 It should be noted, first, that under Article 113 of its Rules of Procedure the Court may at any time of its own motion consider whether there exists any absolute bar to proceeding with a case.

41 The fact that the contested report comes under Title V of the Treaty on European Union has no effect on the jurisdiction of the Court. The Court has already held in [Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289], paragraphs 81 and 82, that Decision 93/731 applies to all Council documents, irrespective of their content. It also held that, under Article J.11(1) of the Treaty on European Union (Articles J to J.11 of that Treaty have been replaced by Articles 11 to 28 EU), acts adopted pursuant to Article 151(3) of the EC Treaty (now, after amendment, Article 207(3) EC), which is the legal basis for Decision 93/731, are applicable to measures within the scope of Title V of the EU Treaty.

42 Thus, in accordance with the conclusion reached in *Svenska Journalistförbundet* (paragraph 85), documents relating to Title V of the Treaty on European Union are covered by Decision 93/731 in the absence of provisions to the contrary. The fact that under Article L of that Treaty [(now, after amendment, Article 46 EU)] the Court of First Instance does not have jurisdiction to assess the lawfulness of acts falling within Title V thus does not exclude its jurisdiction to rule on public access to those acts.

8.

The Court of First Instance went on to annul the contested decision, upholding Ms Hautala's first plea in so far as it criticised the Council for taking the view that it was not obliged to consider whether it could grant partial access authorising disclosure of the parts of the contested report which were not covered by the exception based on protection of the public interest. In this respect, it stated:

'75 As regards the third argument [of the first plea], which is supported by the Swedish Government, namely that the Council infringed Article 4(1) of Decision 93/731 by refusing to grant access to the passages in the contested report which are not covered by the exception based on protection of the public interest, it should be observed that the Council considers that the principle of access to documents applies only to documents as such, not to the information contained in them.

76 It is thus for the Court to verify whether the Council was obliged to consider whether partial access could be granted. Since this is a question of law, review by the Court is not limited.

77 Decision 93/731 is a measure of internal organisation adopted by the Council on the basis of Article 151(3) of the EC Treaty. In the absence of specific Community legislation, the Council determines the conditions for dealing with requests for access to its documents (see, to that effect, Case C-58/94 *Netherlands v Council* [1996] ECR I-2169, paragraphs 37 and 38). Consequently, if the Council so wished, it could decide to grant partial access to its documents, under a new policy.

78 Decision 93/731 does not expressly require the Council to consider whether partial access to documents may be granted. Nor, as the Council accepted at the hearing, does it expressly prohibit such a possibility.

79 In view of the above, the basis on which the Council adopted Decision 93/731 must be borne in mind for the purpose of interpreting Article 4 of that decision.

80 Declaration No 17 recommended that the Commission should submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions. That commitment was restated at the European Council in Copenhagen on 22 June 1993, which invited the Council and the Commission to continue their work based on the principle of citizens' having the fullest possible access to information.

81 In the preamble to the Code of Conduct, the Council and the Commission refer expressly to Declaration No 17 and the conclusions of the European Council in Copenhagen as the basis for their initiative. The Code of Conduct states the general principle that the public will have the widest possible access to documents.

82 Furthermore, the Court of Justice stressed in *Netherlands v Council*, paragraph 35, the importance of the public's right of access to documents held by public authorities. The Court of Justice noted that Declaration No 17 links that right with the democratic nature of the institutions. In his Opinion in that case ([1996] ECR I-2171, point 19), the Advocate General stated, with reference to the individual right to information, as follows:

Instead, the basis for such a right should be sought in the democratic principle, which constitutes one of the cornerstones of the Community edifice, as enshrined now in the Preamble to the Maastricht Treaty and Article F [of the Treaty on European Union, now, after amendment, Article 6 EU] of the Common Provisions.

83 The Court of First Instance recently held in *Svenska Journalistförbundet*, paragraph 66, referring to *Netherlands v Council*, that:

The objective of Decision 93/731 is to give effect to the principle of the largest possible access for citizens to information with a view to strengthening the democratic character of the institutions and the trust of the public in the administration.

84 Next, it should be noted that where a general principle is established and exceptions to that principle are then laid down, the exceptions should be construed and applied strictly, in a manner which does not defeat the application of the general rule (see, to that effect, [Case T-105/95 *WWF UK v Commission* [1997] ECR II-313], paragraph 56, and [Case T-124/96 *Interporc v Commission* [1998] ECR II-231], paragraph 49). In the present case, the provisions to be construed are those of Article 4(1) of Decision 93/731, which lists the exceptions to the above general principle.

85 Furthermore, the principle of proportionality requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view (Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 38). In the present case, the aim pursued by the Council in refusing access to the contested report was, according to the reasons stated in the contested decision, to protect the public interest with regard to international relations. Such an aim may be achieved even if the Council does no more than remove, after examination, the passages in the contested report which might harm international relations.

86 In that connection, the principle of proportionality would allow the Council, in particular cases where the volume of the document or the passages to be removed would give rise to an unreasonable amount of administrative work, to balance the interest in public access to those fragmentary parts against the burden of work so caused. The Council could thus, in those particular cases, safeguard the interests of good administration.

87 Accordingly, Article 4(1) of Decision 93/731 must be interpreted in the light of the principle of the right to information and the principle of proportionality. It follows that the Council is obliged to examine whether partial access should be granted to the information not covered by the exceptions.

88 As appears from paragraph 75 above, the Council did not make such an examination, since it considers that the principle of access to documents applies only to documents as such and not to the information contained in them. Consequently, the contested decision is vitiated by an error of law and must therefore be annulled.

89 It follows that there is no need for the Court to rule on the two other pleas in law put forward by [Ms Hautala] in support of her application.

The appeal

Pleas in law and arguments of the parties

9.

The Council, supported by the Kingdom of Spain, asks the Court to set the contested judgment aside, dismiss the application made at first instance as unfounded, order Ms Hautala to pay the costs of the proceedings at first instance, and make an appropriate decision on the costs of the appeal.

10.

According to the Council and the Spanish Government, the Court of First Instance erred in law by interpreting Decision 93/731 as obliging the Council to consider whether access should be granted to the items of information contained in a document which are not covered by the exceptions set out in Article 4 of that decision.

11.

The Council begins by submitting that according to the actual wording of Decision 93/731, which provides for access to 'documents, not to 'information, it is only Council documents as such which are concerned by the decision, not the information in them. The Council must only examine whether the document asked for, in its existing form without any alteration, can be disclosed or not. In those

circumstances, the Court of First Instance erred in law by deducing from Decision 93/731 an obligation on the Council not to grant a request for access to a document, but to edit the document and thus create a new document containing only the information capable of being disclosed, solely in order to supply 'information to the public. Moreover, such an obligation would be difficult to put into practice and would involve a considerable administrative burden for the Council.

12.

The Council submits, next, that, contrary to what the Court of First Instance stated, the aim pursued by Directive 93/731 is not to lay down a right to 'information but a specific right of access to the Council's existing 'documents only, the same documents that were available to the members of the institution and on the basis of which it took its decision. The Court of First Instance was therefore wrong to interpret Decision 93/731 'in the light of the principle of the right to information.

13.

Finally, according to the Council, in the absence of a general principle of Community law conferring on citizens an absolute right of access to its documents, the Court of First Instance misapplied the principle of proportionality. The principle of proportionality finds expression in the list in Article 4 of Decision 93/731 of the circumstances which justify exceptions to the right of access to documents. That list, interpreted restrictively and in the light of the objective pursued by the decision, namely to provide for access to 'documents of the Council, makes it possible to ensure that that principle is fully complied with. On the other hand, no right of partial access to Council documents may be derived from that principle.

14.

The Spanish Government considers, similarly, that, as Community law now stands, no 'principle of the right to information exists as stated in the contested judgment. Moreover, the principle of proportionality cannot require the Council to consider partial access to a document whose disclosure would endanger one of the interests protected by Article 4(1) of Decision 93/731, a provision which, in such a case, clearly obliges the Council to refuse access to the document in question.

15.

Ms Hautala contends, on the other hand, that the Court should dismiss the appeal and order the Council to pay the costs. The Kingdom of Denmark, the United Kingdom, the Republic of Finland and the Kingdom of Sweden make similar claims.

16.

According to Ms Hautala and those Governments, the contested judgment correctly interpreted Decision 93/731 by requiring the Council to consider granting partial access to documents which contain information covered by the exceptions laid down in Article 4(1) of that decision.

17.

Such an obligation on the Council follows both from the wording of Decision 93/731 and from the aim it pursues, namely to ensure that citizens have the widest possible access to information, with a view to strengthening the democratic nature of the Community institutions and the public's confidence in the administration.

18.

According to Ms Hautala, the same conclusion follows from the obligation to interpret Community law in the light of the general principles of Community law, which include the principle of the right to information. The Council should thus, in order to ensure the widest possible access of citizens to information, grant partial access to documents where they cannot be disclosed in full.

19.

Ms Hautala and the Danish, United Kingdom, Finnish and Swedish Governments contend that the obligation to grant partial access to Council documents also derives from the principle that exceptions to a general rule must be interpreted strictly, and from the principle of proportionality.

20.

Finally, according to Ms Hautala, even if Decision 93/731 does not require the Council to consider partial access, that requirement follows directly from the fundamental principle of Community law that citizens of the European Union must be given the widest and fullest possible access to documents of the institutions of the Union. Article 255(1) EC, inserted by the Treaty of Amsterdam, confirms the citizen's fundamental right of access to the documents of the institutions.

Findings of the Court

21.

As the Court of First Instance observed in paragraph 78 of the contested judgment, while Decision 93/731 does not expressly require the Council to consider whether partial access to documents may be granted, it does not expressly prohibit such a possibility either.

22.

In the context of its interpretation of Decision 93/731, the Court of First Instance first correctly pointed out the origin of that decision, in paragraphs 80 and 81 of the contested judgment. Thus in Declaration No 17, 'Declaration on the right of access to information, the conference of the representatives of the Governments of the Member States considered that 'transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration and recommended that the Commission should submit to the Council no later than 1993 a report on measures designed to improve 'public access to the information available to the institutions. That commitment was reaffirmed at the European Council in Copenhagen on 22 June 1993, which invited the Council and the Commission to 'continue their work based on the principle of citizens' having the fullest possible access to information. Moreover, in the preamble to the Code of Conduct, the Council and the Commission referred expressly to Declaration No 17 and the conclusions of the European Council in Copenhagen as the basis for their initiative. Finally, the Code of Conduct states the general principle that the public will have 'the widest possible access to documents held by the Commission and the Council.

23.

It is therefore apparent even from the context in which Decision 93/731 was adopted that the Council and the Spanish Government are wrong in submitting that that decision concerns only access to 'documents as such rather than to the information contained in them.

24.

Next, as the Court of First Instance observed in paragraph 82 of the contested judgment, the Court of Justice stressed in paragraph 35 of its judgment in *Netherlands v Council* the importance of the public's right of access to documents held by public authorities and noted that Declaration No 17 links that right with the 'democratic nature of the institutions.

25.

The aim pursued by Decision 93/731, as well as being to ensure the internal operation of the Council in conformity with the interests of good administration (*Netherlands v Council*, paragraph 37), is to provide the public with the widest possible access to documents held by the Council, so that any exception to that right of access must be interpreted and applied strictly (see, to that effect, with reference to Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ L 46, p. 58), Joined Cases C-174/98 P et C-189/98 P *Netherlands and Van der Wal v Commission* [2000] ECR I-1, paragraph 27).

26.

The interpretation put forward by the Council and the Spanish Government would have the effect of frustrating, without the slightest justification, the public's right of access to the items of information contained in a document which are not covered by one of the exceptions listed in Article 4(1) of Decision 93/731. The effectiveness of that right would thereby be substantially reduced.

27.

Finally, contrary to the submissions of the Council and the Spanish Government, the Court of First Instance did not err in law by holding that the principle of proportionality also requires the Council to consider partial access to a document which includes items of information whose disclosure would endanger one of the interests protected by Article 4(1) of Decision 93/731.

28.

On this point, the Court of First Instance correctly referred, in paragraph 85 of the contested judgment, to the case-law of this Court holding that the principle of proportionality requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view.

29.

Beside the fact that no reason has been put forward to show why an institution should be able to keep secret the items of information in a document which are not covered by the exceptions laid down in Article 4(1) of Decision 93/731, a refusal to grant partial access would be manifestly disproportionate for ensuring the confidentiality of the items of information covered by one of those exceptions. As the Court of First Instance observed in paragraph 85 of the contested judgment, the aim pursued by the Council in refusing access to the contested report could be achieved even if the Council did no more than remove, after examination, the passages in the report which might harm international relations.

30.

The Court of First Instance also applied the principle of proportionality correctly when, in paragraph 86 of the contested judgment, in response to the Council's argument based on the excessive administrative burden which would be entailed by an obligation to ensure partial access to the documents it holds, it reserved the possibility of safeguarding the interests of good administration in particular cases.

31.

Accordingly, without its being necessary to consider whether, as the Council and the Spanish Government submit, the Court of First Instance was wrong in basing itself on the existence of a 'principle of the right to information, that Court was right to hold in paragraph 87 of the contested judgment that Article 4(1) of Decision 93/731 must be interpreted as meaning that the Council is obliged to examine whether partial access should be granted to the information not covered by the exceptions, and to annul the contested decision on finding that the Council had not made such an examination since, in its opinion, the principle of access to documents applied only to documents as such and not to the information contained in them.

32.

The appeal must therefore be dismissed.

Costs

33.

Under Article 69(2) of the Rules of Procedure, which applies to appeals by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Ms Hautala has applied for the Council to pay the costs and the Council has been unsuccessful, it must be ordered to pay the costs. Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, the Kingdom of Spain, the Kingdom of Denmark, the United Kingdom, the Republic of Finland and the Kingdom of Sweden must bear their own costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the appeal;

2. Orders the Council of the European Union to pay the costs;

3. Orders the Kingdom of Spain, the Kingdom of Denmark, the United Kingdom of Great Britain and Northern Ireland, the Republic of Finland and the Kingdom of Sweden to bear their own costs.

Delivered in open court in Luxembourg on 6 December 2001.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President

[1:](#) Language of the case: English.