

*Confidential treatment of information before the
General Court of the European Union*

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Fundamental rules

➤ Article 47 of the Charter of Fundamental Rights:

“Everyone [...] has the right to an effective remedy before a Tribunal [...] Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial Tribunal [...]”

➤ Article 64 of the Rules of Procedure:

“[Subject to specific provisions] the General Court shall take into consideration only those procedural documents and items which have been made available to the representatives of the parties and on which they have been given an opportunity of expressing their views.”

Key point: Article 64 of the Rules of Procedure establishes the adversarial principle, thereby implementing a basic parameter of a fair trial. Said principle may be deviated from only on the basis of an express provision protecting the confidentiality of certain information and in ways respecting the right to effective judicial protection to the greatest possible extent.



Confidentiality

Two main sets of circumstances:

- Confidential treatment vis-à-vis interveners (Article 144 of the Rules of procedure);
- Confidential treatment vis-à-vis a main party (Articles 103, 104 & 105 of the Rules of procedure).

Confidential treatment vis-à-vis interveners

- Where an application to intervene is granted, a main party may request that certain information be treated as confidential vis-à-vis the intervener. The latter may challenge such request.
- Procedural handling:

Article 144(7) of the Rules of procedure:

“If the application to intervene is granted, the intervener shall receive a copy of every procedural document served on the main parties, save, where applicable, for the confidential information excluded from such communication [...].”

Basic distinction between

➤ Information which is by nature secret or confidential (business secrets of a commercial, competition-related, financial or accounting nature, national security, external relations, etc.);

and

➤ Other documents or information which may be secret or confidential, for a reason that is for the party requesting confidential treatment to furnish (order of 22 February 2005, Hynix Semiconductor v Council, T-383/03, EU:T:2005:57, paras 34 et s.)

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- Does confidential treatment vis-à-vis interveners constitute an exception from the adversarial principle?
 - The answer depends on whether an intervener enjoys the procedural rights of a main party.
 - A number of circumstances show that he doesn't:
 - An intervener cannot request a hearing [Art. 106(2)];
 - An intervener cannot raise an “independent” plea;
 - An intervener cannot deviate from the form of order sought by the main party in support of which he intervenes.

Confidential treatment vis-à-vis a main party

First scenario: Litigation pertaining to access to documents

- Regulation (EC) n° 1049/2001 relates to public access to documents held by the European Parliament, the Council or the Commission.
- Institutions may refuse such access based on specific exceptions provided for in the Regulation.
 - Public security, defence, international relations;
 - Commercial interests, Court proceedings, legal advice, inspections;
 - Decision-making process.

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- An action may be brought against such a refusal.
 - For the purposes of reviewing the legality of such refusal the Court may need to see the document to which access was refused.

Procedure: Adoption of a measure of enquiry under Article 91(c) of the Rules of procedure ordering the defendant to produce the document(s).



Article 104 of the Rules of procedure:

“Where, following a measure of inquiry referred to in Article 91(c), a document to which access has been denied by an institution has been produced before the General Court in proceedings relating to the legality of that denial, that document shall not be communicated to the other parties.”

- Is the fact that the Court, but not the applicant, will see the document to which access has been denied a genuine deviation from the adversarial principle in cases relating to public access to documents?
- Various arguments point to a negative answer:
 - The legal framework relating to access to documents creates an *actio popularis* not linked to any subjective interest;
 - Allowing the applicant access to the document on the sole basis of a pending action would render devoid of purpose a judicial procedure in which the legality of a decision denying access to said document is reviewed.

Confidential treatment vis-à-vis a main party

Second scenario: General litigation

- A main party may request confidential treatment of material it has been ordered to produce.

Article 103(1) of the Rules of procedure:

“1. Where it is necessary for the General Court to examine, on the basis of the matters of law and of fact relied on by a main party, the confidentiality, vis-à-vis the other main party, of certain information or material produced before the General Court following a measure of inquiry referred to in Article 91(b) that may be relevant in order for the General Court to rule in a case, that information or material shall not be communicated to that other party at the stage of such examination.”



3 Key points:

- Type of incident concerning only main parties (formally introduced in 2015);
- Issue relating only to information gathered by virtue of a measure of inquiry, not to information produced on the initiative of a main party to support their case;
- Pending examination of the request, the information is granted provisional confidential status.

- The substance of the examination:

Article 103(2) of the Rules of procedure:

“2. Where the General Court concludes in the examination provided for in paragraph 1 that certain information or material produced before it is relevant in order for it to rule in the case and is confidential vis-à-vis the other main party, it shall weigh that confidentiality against the requirements linked to the right to effective judicial protection, particularly observance of the adversarial principle.”

Key point: The confidential character of the information is to be assessed on the basis of the substantive rules developed in relation to confidential treatment of information *vis-à-vis* interveners (information by nature secret or confidential - subjective reasons justifying confidential treatment). But this assessment is followed by the weighing of confidentiality against judicial protection.

➤ Possible outcomes:

Article 103(3) of the Rules of procedure:

“3. After weighing up the matters referred to in paragraph 2, the General Court may decide to bring the confidential information or material to the attention of the other main party, making its disclosure subject, if necessary, to the giving of specific undertakings, or it may decide not to communicate such information or material, specifying, by reasoned order, the procedures enabling the other main party, to the greatest extent possible, to make his views known, including ordering the production of a non-confidential version or a non-confidential summary of the information or material, containing the essential content thereof.”



➤ Article 103(3) provides for two options:

- a) A decision to communicate the confidential information as such in return for compliance with undertakings, such as the representative of a party committing to not disclose such information to his/her client.
- b) A decision not to communicate the confidential information as such but in a different form (redacted version, non-confidential summary etc.)



➤ Conclusion:

Subject to the rules that govern cases relating to access to documents (Article 104), the Court is allowed to take into account ***only*** information *on which the representatives of the main parties had the opportunity to comment.*

Confidential treatment vis-à-vis a main party

Third scenario: Highly confidential material

- Material pertaining to the security of the EU and its Member States and/or the conduct of their international relations.
- The special instance of restrictive measures.

- Within the limits of its powers, the EU takes action at the international stage against terrorism and regimes suppressing basic human rights or defying fundamental principles of the world peace and order. The EU may also decide to help successor democratic regimes recover funds (Art. 29 TEU, 215 TFEU).
- Such action may take the form of restrictive measures against individuals and entities (mainly arms embargos, asset freezing, travel ban).
- Individuals and entities listed in an instrument imposing restrictive measures may bring an action for annulment.
- Especially in cases involving terrorism, the defendant institution may claim that the relevant inculpatory evidence is highly confidential for reasons relating to the security of the EU or its Member States or to the conduct of their international relations.

- Restrictive measures are “interim” or “urgent” measures adopted on the basis of probabilities and aiming at undercutting a person’s capacity to cause harm. Cases relating to restrictive measures are therefore not criminal cases.
- Judgments in landmark cases have provided for the “raw material” that was transformed into a new Article 105 of the Rules of Procedure
 - ❖ E.g. judgment of 18 July 2013, *Commission and Others v Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518 and
 - ❖ judgment of 4 December 2008, *People’s Mojahedin Organization of Iran v Council*, T-284/08, EU:T:2008:550

➤ Article 105(1)&(3) of the Rules of procedure:

“1. Where [...] a main party intends to base his claims on certain information or material but submits that its communication would harm the security of the Union or that of one or more of its Member States or the conduct of their international relations, he shall produce that information or material by a separate document. [Said party shall] [set] out the overriding reasons which, to the extent strictly required by the exigencies of the situation, justify the confidentiality of that information or material being preserved and which militate against its communication to the other main party. [...]

3. [Pending examination of the request], that information or material is not communicated to the other main party.

➤ Article 105(4)&(5) of the Rules of procedure:

“4. Where the General Court decides [...] that the information or material produced before it is relevant [...] and is not confidential [...], it shall ask the party concerned to authorise the communication of that information or material to the other main party. If the first party objects to such communication [...] that information or material shall not be taken into account in the determination of the case and shall be returned to that party.

5. Where the General Court decides [...] that certain information or material produced before it is relevant [...] and is confidential vis-à-vis the other main party [...] [i]t shall weigh the requirements linked to the right to effective judicial protection [...] against the requirements flowing from the security of the Union or of one or more of its Member States or the conduct of their international relations.

➤ Article 105(6) of the Rules of procedure:

“6. [t]he General Court shall make a reasoned order specifying the procedures to be adopted to accommodate the requirements referred to in paragraph 5, such as the production by the party concerned [...] of a non-confidential version or a non-confidential summary of the information or material, containing the essential content thereof and enabling the other main party, to the greatest extent possible, to make its views known.”

Key point: So far, no substantial difference compared to Article 103. The framework varies significantly in paragraph 8.

➤ Article 105(8) of the Rules of procedure:

“8. Where the General Court considers that information or material which [...] has not been communicated to the other main party in accordance with the procedures referred to in paragraph 6 is essential [...] it may, by way of derogation from Article 64 and confining itself to what is strictly necessary, base its judgment on such information or material. When assessing that information or material, the General Court shall take account of the fact that a main party has not been able to make his views on it known.”



➤ Article 105 of the Rules of procedure:

Key points:

- a) The steps described above are largely based on past experience as reflected in landmark cases (e.g. judgment of 18 July 2013, *Commission and Others v Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paras 119 – 134). Said procedure is thus considered as appropriate in order to strike a fair balance between the adversarial principle and the security of the Union and its Member-States. On condition of striking such balance, article 47 of the Charter of fundamental rights ,must be deemed respected.



➤ Article 105 of the Rules of procedure:

Key points:

- b) In the presence of essential and highly confidential information, the General Court is under a double obligation:
- First, it shall devise arrangements accommodating, to the greatest possible extent, the adversarial principle [105(6)].
 - Second, it shall base its findings to the lesser possible extent on such material while taking into account that one main party may have not been able to comment thereon [105(8)].

➤ Article 105 of the Rules of procedure:

Key points:

- c) In presence of essential and confidential information, can there be full derogation from the adversarial principle under Article 105?

“It is legitimate to consider possibilities such as the disclosure of a summary outlining the information’s content or that of the evidence in question. Irrespective of whether such possibilities are taken, it is for the Courts of the European Union to assess whether and to what extent the failure to disclose confidential information or evidence to the person concerned and his consequential inability to submit his observations on them are such as to affect the probative value of the confidential evidence (*Commission and Others v Kadi*, para 129).



➤ Article 105 of the Rules of procedure:

Key points:

- d) Yes, a derogation may occur subject to strictly defined conditions which aim to render said derogation as proportionate as possible and therefore compatible with article 47 of the Charter.
- Non-confidential version is purposeless ;
 - The Court takes into account what is strictly necessary;
 - The Court takes into account the impossibility of a main party to submit observations.



➤ To sum-up:

- a. The Court can only take into account the material on which the main parties have had the opportunity to make their views known;
- b. One genuine exception: Article 105 of the Rules of procedure relating to a specific kind of highly confidential material and subject to specific procedural guarantees.



Our times have put the ideal form of the adversarial principle under the strong light of harsh realities.

Observing the rights of the defence, establishing and enforcing a regulatory environment whereby the adversarial principle is respected is not only a matter of subjective fundamental rights but also a matter of sound judgment for the administration and the Courts.

And thus, a matter of public interest as well.