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From:	Mr Koen LENAERTS, President of the Court of Justice of the European Union
date of receipt:	15 March 2016
To:	Mr Bert KOENDERS, President of the Council
Subject:	Amendment to the Rules of Procedure of the Court of Justice

Delegations will find attached a letter by the President of the Court of Justice of the European Union of 15 March 2016 submitting for the approval of the Council a draft amendment to the Rules of Procedure of the Court of Justice and the accompanying document.



COURT OF JUSTICE
OF THE
EUROPEAN UNION

President

Luxembourg, 15 March 2016

Mr Bert Koenders
President of the Council of the European Union
175, rue de la Loi
B-1048 Brussels

Dear President,

With reference to the sixth paragraph of Article 253 of the Treaty on the Functioning of the European Union, applicable also to the Treaty establishing the European Atomic Energy Community in accordance with Article 106a thereof, I hereby submit for the approval of the Council a draft amendment of the Rules of Procedure of the Court of Justice.

The purpose of this draft — which must be considered alongside the draft amendment of the Rules of Procedure of the General Court sent to you today by the President of that court — is to insert into the Rules of Procedure of the Court of Justice a provision enabling the Court of Justice, in appeals brought before it, to handle confidential information or material produced before the General Court in accordance with Article 105 of the Rules of Procedure of the General Court. The text is enclosed in all the official languages.

Yours faithfully,

Koen LENAERTS

DRAFT AMENDMENT OF THE RULES OF PROCEDURE OF THE COURT OF JUSTICE

Explanatory notes

This draft amendment of the Rules of Procedure of the Court of Justice follows on from the entry into force on 1 July 2015 of the new Rules of Procedure of the General Court (OJ L 105, 23.4.2015, p. 1).

In Title III, which relates to direct actions, those Rules contain a provision that did not appear in the Rules of Procedure of the General Court of 2 May 1991, as last amended on 19 June 2013, but the application of which could have a significant effect on the subsequent conduct of proceedings if an appeal were to be brought against a decision of the General Court closing the proceedings or disposing of the substantive issues in part only. The provision in question is Article 105 of the Rules of Procedure of the General Court, which governs the General Court's treatment of information or material pertaining to the security of the Union or to that of one or more of its Member States or to the conduct of their international relations.

That article, which was inserted into the new Rules of Procedure of the General Court after lengthy discussions, has two particular features.

First, Article 105 provides for a formal exception to the adversarial principle, recalled in Article 64 of those Rules, since it establishes a mechanism that enables the General Court, on very strict conditions and following a very particular procedure, to rule in the case brought before it while relying on information or material that has not been made available to certain parties — or their representatives — and on which they have not therefore been given an opportunity of expressing their views. As is clear from the wording of Article 105 itself, the information or material concerned is, specifically, information or material that has been produced by a main party in proceedings pending before the General Court but which, owing to its confidential nature, has not been communicated to the other main party.

Secondly, Article 105 presupposes — precisely because of the very sensitive nature of the information or material transmitted to the General Court — that the General Court will pay special attention to the protection of the information or material in question in order to ensure that the precautions taken prior to the production of that information or material are not rendered ineffective because of a failure in the system established to protect it while proceedings are pending before the General Court. To that end, Article 105(11) therefore provides for the General Court to adopt a decision determining in detail the security rules that are to be applied in order to protect the information or material produced in accordance with Article 105(1) or (2) of the Rules of Procedure of the General Court.

In the light of these particular features and the inherent sensitivity of the field concerned, appeals that might be brought before the Court of Justice against a decision which the General Court has adopted in the context of the application of Article 105 of its Rules of Procedure cannot be treated in the same way as ordinary appeals. Special measures must be taken by the Court of Justice to deal with those appeals in an appropriate manner and to ensure that the information or material concerned is afforded a high level of protection, at least equivalent to that which it will have had throughout the proceedings before the General Court.

That is the purpose of this draft. It essentially outlines the regime which it is proposed to introduce in the context of appeals, and which is directly based on the regime instituted by the General Court, whilst bearing in mind the differing nature of actions brought before the two courts.

When it is seised of an appeal, the Court of Justice does not perform the same function as the General Court does when it is seised of an action for annulment of an act adopted by an EU institution. Whereas the General Court makes a specific assessment of all the facts and evidence submitted to it for assessment, including an evaluation of the relevance and confidential nature of the information or material produced before it and a weighing up of the interests involved, the Court of Justice, in an appeal, confines itself to carrying out a review of the lawfulness of the contested decision and to establishing, in particular, whether the General Court has erred in law. In other words, the Court of Justice does not itself assess the relevance to the outcome of the dispute of the information or material produced, but merely establishes, having regard to the appellant's grounds of appeal, whether the General Court has distorted the clear sense of the facts and evidence put before it or erred in its legal characterisation of the facts and evidence.

This essential difference between the functions performed by the two courts therefore means that it is possible to envisage a more succinct provision in the Rules of Procedure of the Court of Justice than Article 105 of the Rules of Procedure of the General Court, one that focuses on the matters that are relevant when dealing with an appeal brought, in this field, against a decision of the General Court closing the proceedings, that is to say, very specifically (and in chronological order): the making available to the Court of Justice of the information or material concerned (see paragraph 1 of the proposed Article 190a); the protection afforded by that provision to the information or material throughout the proceedings, as reflected, in particular, in the non-communication of the information or material concerned to the parties to the proceedings and in the non-disclosure in documents issued by the court of confidential matters contained in that information or material (see paragraphs 2 and 3 of the proposed Article); and, at the end of the appeal procedure, the return of the information or material at issue to the main party that produced it to the General Court, or the making available of that information or material to the General Court if, after annulling the contested decision, the Court of Justice refers the case back to the General Court for a ruling (see paragraph 4 of the proposed Article).

Like Article 105 of the Rules of Procedure of the General Court, the proposed Article provides, lastly, in its final paragraph, for the Court of Justice to lay down the security rules necessary for the protection of the information or material made available to the Court of Justice in such an appeal (see Article 190a(5)). The adoption and publication of those rules — which will obviously be identical to those laid down by the General Court — will enable full effect to be given to the provisions of the new Article 190a.

In order for the proposed mechanism to operate and to enable the Court of Justice to carry out an effective and genuine review of the General Court's decision, account must nevertheless be taken of an added difficulty arising from the fact that, according to the present wording of Article 105(10) of the Rules of Procedure of the General Court, the information or material referred to in paragraph 5 of that provision — that is the information or material which has been produced by a main party under Article 105(1) or (2) of those Rules and which has not been communicated to the other main party, owing to its confidential nature — is to be returned to the party concerned as soon as the decision closing the proceedings before the General Court is adopted. It follows from this that, in the event of an appeal, the Court of Justice would have no guarantee that the document or the material in question was still in the possession of the party that produced it at first instance or, if that was the case, that the document or material produced before the Court of Justice was exactly the same as that on which the General Court relied in order to rule in the case.

In order to prevent that risk, the General Court has therefore drawn up a draft amendment — submitted together with this text — of its Rules of Procedure so as to provide for the retention by that court of the information or material referred to in Article 105(5) until the expiry of the period for lodging an appeal referred to in the first paragraph of Article 56 of the Statute of the Court of Justice of the European Union. As previously stated, the information or material concerned would, in the event of an appeal, be made available to the Court of Justice, which would not return it to the party in question — or to the General Court in the event of the case being referred back to it — until after the end of the appeal procedure.

THE COURT OF JUSTICE,

Having regard to the Treaty on the Functioning of the European Union, and in particular the sixth paragraph of Article 253 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 106a(1) thereof,

Having regard to the Protocol on the Statute of the Court of Justice of the European Union, and in particular Article 63 thereof,

Whereas following the entry into force of the Rules of Procedure of the General Court on 1 July 2015, it is appropriate to insert into the Rules of Procedure of the Court of Justice a provision enabling the Court of Justice to deal appropriately, in appeals brought before it, with information or material which has been produced by a main party before the General Court in accordance with Article 105(1) or (2) of the Rules of Procedure of the General Court and which, owing to its confidential nature, has not been communicated to the other main party,

With the approval of the Council given on ...,

HAS ADOPTED THE FOLLOWING AMENDMENT OF ITS RULES OF PROCEDURE:

Article 1

The following article is inserted in Title V, Chapter 8, of the Rules of Procedure of the Court of Justice of 25 September 2012 ¹:

‘Article 190a — Treatment of information or material produced before the General Court in accordance with Article 105 of its Rules of Procedure

1. Where an appeal is brought against a decision of the General Court adopted in proceedings in which information or material has been produced by a main party in accordance with Article 105 of the Rules of Procedure of the General Court and has not been communicated to the other main party, the Registry of the General Court shall make that information or material available to the Court of Justice, on the conditions laid down in the decision referred to in paragraph 11 of that Article.
2. The information or material referred to in paragraph 1 shall not be communicated to the parties to the proceedings before the Court of Justice.

¹ OJ L 265, 29.9.2012, p. 1, as amended on 18 June 2013 (OJ L 173, 26.6.2013, p. 65).

3. The Court of Justice shall ensure that the confidential matters contained in the information or material referred to in paragraph 1 are not disclosed in the decision which closes the proceedings or in any Opinion of the Advocate General.
4. The information or material referred to in paragraph 1 shall be returned to the party that produced it before the General Court as soon as the decision closing the proceedings before the Court of Justice has been served, save where the case is referred back to the General Court. In the latter case, the information or material concerned shall again be made available to the General Court, on the conditions laid down in the decision referred to in paragraph 5.
5. The Court of Justice shall adopt, by decision, the security rules for protecting the information or material referred to in paragraph 1. That decision shall be published in the *Official Journal of the European Union*.

Article 2

1. This amendment of the Rules of Procedure, authentic in the languages referred to in Article 36 of the Rules, shall be published in the *Official Journal of the European Union* and shall enter into force on the day of its publication.
2. The provisions of Article 190a shall apply only from the entry into force of the decision referred to in Article 190a(5).

Done at Luxembourg, ...