

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
23 November 2004 (1)

(Openness – Public access to Council documents – Partial refusal of access –
Regulation (EC) No 1049/2001 – Exceptions)

In Case T-84/03,

Maurizio Turco, residing in Pulsano (Italy), represented by O.W. Brouwer,
T. Janssens and C. Schillemans, lawyers,

applicant,

supported by

Republic of Finland, represented by T. Pynnä and A. Guimaraes-Purokoski,
acting as Agents, with an address for service in Luxembourg,

Kingdom of Denmark, represented initially by J. Liisberg and subsequently by
J. Molde, acting as Agents, with an address for service in Luxembourg,
and

Kingdom of Sweden, represented by A. Kruse and K. Wistrand, acting as Agents,
with an address for service in Luxembourg,

interveners,

v

Council of the European Union, represented by J.-C. Piris and M. Bauer, acting
as Agents,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented
by C. Jackson, acting as Agent, and by P. Sales and J. Stratford, Barristers, with
an address for service in Luxembourg,
and

Commission of the European Communities, represented by M. Petite,
C. Docksey and P. Aalto, acting as Agents, with an address for service in
Luxembourg,

APPLICATION for annulment of the Council's decision of 19 December 2002
partially refusing the applicant access to certain documents appearing on the
agenda of the Justice and Home Affairs Council meeting of 14 and 15 October
2002,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges,
Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 24 June
2004,

gives the following

Judgment

Legal framework

1

Article 255 EC provides:

‘1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

...’

2

Recitals 1, 2, 3, 4, 6 and 11 in the preamble to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), adopted pursuant to Article 255 EC, state as follows:

‘(1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 ... EU ... and in the Charter of Fundamental Rights of the European Union.

(3) The conclusions of the European Council meetings held at Birmingham, Edinburgh and Copenhagen stressed the need to introduce greater transparency into the work of the Union institutions. This Regulation consolidates the initiatives that the institutions have already taken with a view to improving the transparency of the decision-making process.

(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) ... EC

...’

(6) Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions’ decision-making process. Such documents should be made directly accessible to the greatest possible extent.

...’

(11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities.

...’

3

Article 4 of that regulation provides:

‘Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a)

the public interest as regards:

-
public security,
-
defence and military matters,
-
international relations,
-
the financial, monetary or economic policy of the Community or a Member State;
(b) privacy and the integrity of the individual, in particular in accordance with
Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would
undermine the protection of:

-
commercial interests of a natural or legal person, including intellectual property,
-
court proceedings and legal advice,
-

the purpose of inspections, investigations and audits,
unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by
an institution, which relates to a matter where the decision has not been taken by
the institution, shall be refused if disclosure of the document would seriously
undermine the institution's decision-making process, unless there is an overriding
public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations
and preliminary consultations within the institution concerned shall be refused
even after the decision has been taken if disclosure of the document would
seriously undermine the institution's decision-making process, unless there is an
overriding public interest in disclosure.

...'

Facts

4

By e-mail of 22 October 2002 the applicant submitted a request to the Council for
access to the documents appearing on the agenda of the Justice and Home Affairs
Council meeting which took place in Luxembourg on 14 and 15 October 2002,
including an opinion of the Council's legal service on a proposal for a Council
Directive laying down minimum standards for the reception of applicants for
asylum in Member States.

5

By e-mail of 5 November 2002 the Council granted the applicant's request in
respect of 15 of the 20 documents. It refused the applicant full access to four
documents relating to legislative proposals (documents Nos 12903/02, 12616/02,
12616/02 COR 1 and 12619/02) on the basis of the first subparagraph of Article
4(3) of Regulation No 1049/2001. The Council also refused the applicant access to
the opinion of its legal service mentioned in paragraph 4 above (document No
9077/02) on the basis of Article 4(2) of that regulation. With regard to that
opinion, the Council stated:

'Document [No] 9077/02 is an opinion of the Council legal service concerning a
proposal for a Council Directive laying down minimum standards for the reception
of applicants for asylum in Member States.

Given its content, the release of this document could undermine the protection of
internal legal advice to the Council as referred to in Article 4(2) of the Regulation.
In the absence of any specific reasons pointing to a particular overriding public
interest in disclosure, the General Secretariat has concluded that, on balance, the
interest in protecting internal legal advice outweighs the public interest and has
therefore decided to refuse access to this document pursuant to Article 4(2) of the
Regulation. This exception covers the entire content of the document.

Consequently, it is not possible to grant partial access pursuant to Article 4(6) of
the Regulation.'

6

By letter of 22 November 2002, the applicant made a confirmatory application
under Article 7(2) of Regulation No 1049/2001. The applicant claimed that the

Council had incorrectly applied the exceptions to the right of public access to the documents of the institutions, provided for in Article 4(2) and (3) of Regulation No 1049/2001 and that the overriding public interest in disclosure of the documents in question is the principle of democracy and citizen participation in the legislative process.

7

By letter of 19 December 2002 ('the contested decision'), the Council rejected the applicant's confirmatory application. As regards the four documents relating to legislative proposals the letter stated:

'Although progress has been made by the Council on these matters, the deliberations on the legislative acts in question are still going on. The Council holds, therefore, the view that, in those circumstances, the release of the entire documents would be premature and considers that, on balance, the interest in protecting the institution's decision-making process still outweighs the public interest ... with regard to the identification of the delegations whose positions are recorded in the documents, as this could considerably reduce the flexibility of delegations to re-consider their positions or lead to a re-opening of the debate and thereby seriously undermine the Council's decision-making process.'

8

As regards the opinion of its legal service, the Council, in the contested decision, considered that only the first paragraph of the opinion could be disclosed and that it was appropriate to confirm the decision of 5 November 2002 refusing the applicant access to the remainder of that opinion. Regarding the existence of an overriding public interest within the meaning of that article, the Council stated:

'The Council considers that such an overriding public interest is not constituted by the mere fact that the release of those documents containing the legal service's advice on legal questions arising in the debate on legislative initiatives would be in the general interest of increasing transparency and openness of the institution's decision-making process. In fact, this criterion would apply to virtually all written opinions or similar documents of the legal service, thereby making it practically impossible for the Council to refuse access to any legal service opinion under Regulation No 1049/2001. The Council considers that such a result would be clearly contrary to the will of the legislator as it is expressed in Article 4(2) of Regulation No 1049/2001, since it would deprive that provision of any practical effect.'

9

By letter of 19 May 2003, the Council informed the applicant that the four documents relating to legislative proposals to which he had had only partial access had, in part, been made public in their entirety or, as to the remainder, had been sent to him personally.

Procedure

10

By application lodged at the Registry of the Court of First Instance on 28 February 2003, the applicant brought the present action.

11

By order of 20 October 2003, the President of the Fifth Chamber of the Court of First Instance granted leave to intervene to the Republic of Finland, the Kingdom of Denmark and the Kingdom of Sweden, in support of the applicant, and to the Commission and the United Kingdom of Great Britain and Northern Ireland, in support of the Council.

12

The interveners lodged their statements in intervention within the time-limits set.

13

Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure.

14

The parties presented oral argument and replied to the Court's questions at the hearing on 24 June 2004.

Forms of order sought by the parties

15

The applicant claims that the Court should:

- annul the contested decision;
 - order the Council to pay the costs, including those of the interveners.
- 16 The Council contends that the Court should:
- declare that there is no need to adjudicate on the action in so far as the contested decision refused full access to the four documents relating to legislative proposals;
 - decide on the costs relating to the case not proceeding to judgment, pursuant to Article 87(6) of the Rules of Procedure of the Court of First Instance;
 - dismiss the remainder of the application as unfounded;
 - order the applicant to pay the costs.
- 17 The Republic of Finland, in support of the applicant, claims that the Court should annul the contested decision.
- 18 The Kingdom of Sweden, in support of the applicant, claims that the Court should annul the contested decision in so far as it refuses the applicant access to the Council's legal opinion.
- 19 The Commission, in support of the Council, contends that the Court should:
- dismiss the application;
 - order the applicant to pay the costs, including those relating to the Commission's intervention.
- 20 The United Kingdom of Great Britain and Northern Ireland, in support of the Council, contends that the Court should dismiss the application.

Law

- 21 In support of his application, the applicant submits that, with regard to the four documents relating to legislative proposals, the Council acted in breach of Article 4(3) of Regulation No 1049/2001 and of its duty to state reasons. With regard to the legal opinion in question, the applicant claims that the Council acted in breach of Article 4(2) of that regulation.
The refusal of access to the entirety of the four documents relating to legislative proposals
Arguments of the parties
- 22 The Council states that, when the application was made, documents No 12616/02 and No 12616/02 COR 1 had not been made public in their entirety although the regulation to which the documents relate had already been adopted. The documents were, however, fully released on the internet on 26 March 2003. The Council states in this regard that, despite its efforts to make those documents available on the internet, as provided for by Article 11(6) of Annex II, entitled 'Specific provisions regarding public access to Council documents', to Council Decision 2002/682/EC, Euratom of 22 July 2002 adopting the Council's Rules of Procedure (OJ 2002 L 230, p. 7), and owing to an administrative backlog, it was not possible to do so before the present action was brought.
- 23 As regards documents No 12619/02 and No 12903/02, it was decided on 19 May 2003 to release them entirely even though the legislative proceedings connected with them had not yet led to the adoption of a final text.
- 24 Since the applicant's request concerning those documents has been satisfied, the Council, supported by the United Kingdom of Great Britain and Northern Ireland, considers that the action has become devoid of purpose in so far as it concerns the

refusal to give him full access to those four documents. Consequently, there is no need to adjudicate on this part of the action (order of the Court of First Instance of 17 September 1997 in Case T-26/97 *Antillean Rice Mills v Commission* [1997] ECR II-1347, paragraph 15).

25

Therefore, it is not necessary to reply to the applicant's arguments regarding the right of access to those documents.

26

The applicant accepts that, due to the Council's decision to grant access to those four documents relating to legislative proposals, this action has become devoid of purpose in so far as it concerns the refusal to give him full access to those documents. However, the applicant points out that the Council has given no explanation for its change of position as to the disclosure of the documents.

27

If the Council were, however, to take the position that it has not reconsidered the reasoning underlying the contested decision, the application would not be devoid of purpose. The Council should not be able to escape judicial review by deciding to disclose the documents concerned. Moreover, the legality of a decision should be assessed at the date on which it was taken: this is an expression of the principles of legality and access to justice. The applicant therefore requests that the Court reject the Council's request for a declaration that there is no need to adjudicate on the action and considers, in any event, that the Council must be ordered to pay the costs in accordance with the second subparagraph of Article 87(3) of the Rules of Procedure.

Findings of the Court

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The Court notes that, by letter of 19 May 2003, the Council informed the applicant that documents No 12903/02, No 12616/02, No 12616/02 COR 1 and No 12619/02 had been disclosed in their entirety.

29

Since the applicant has had access to those four documents, the annulment of the contested decision, in so far as it refuses the applicant access to those documents in part, would have no additional effect in relation to the release of those documents in their entirety.

30

Since the action has become devoid of purpose in so far as concerns the category of documents considered, there is no need to adjudicate on that point.

The refusal of access to the opinion of the Council's legal service
Arguments of the parties

31

The applicant claims that the Council's refusal to give him access to the opinion of its legal service infringes Article 4(2) of Regulation No 1049/2001. He puts forward three arguments to that effect.

32

The applicant submits, primarily, that Article 4(2) of Regulation No 1049/2001 does not apply to legal opinions relating to draft legislation. He claims that the exception to the principle of public access to documents contained in that article refers to 'court proceedings and legal advice'. This exception is not therefore intended to cover all the Council's internal or external legal opinions but is designed to ensure that legal advice drawn up in the context of actual or potential future legal proceedings, which is comparable to written communications between a lawyer and a client, will not be disclosed unless there is an overriding public interest in its disclosure. Moreover, the European Ombudsman reached the same conclusion in one of his reports to the Parliament.

33

Legal opinions relating to legislative proposals are therefore not covered by the second indent of Article 4(2) of Regulation No 1049/2001. The appropriate provision, which could justify refusal of access to legal opinions drafted in the context of the examination of legislative proposals, is Article 4(3) of the regulation. The Council made an error of law by failing to rely on that provision in the contested decision.

34

Furthermore, pursuant to consistent case-law, all exceptions to the principle of the widest possible access to documents held by an institution should be interpreted and applied strictly and on a case-by-case basis. The applicant claims that the factors raised by the Council in fact support the view that it was precisely the legislature's intention to limit the meaning of 'legal advice' to legal advice drawn up in the context of actual or potential legal proceedings. It follows that the exception in Article 4(2), second indent, of Regulation No 1049/2001 relating to 'court proceedings and legal advice' does not cover both legal advice drafted in the course of the legislative procedure and legal advice drawn up in the context of legal proceedings. Notwithstanding the uncertainty as regards earlier legislative measures relating to access to documents and the Court of First Instance's interpretation in that respect in Case T-92/98 *Interporc v Commission* [1999] ECR II-3521, Regulation No 1049/2001 now makes it clear that 'court proceedings' encompasses not only the pleadings and other documents lodged in court proceedings, but also 'legal advice' drawn up in the context of such actual or potential proceedings.

35

In the alternative, assuming that the second indent of Article 4(2) of Regulation No 1049/2001 applies to this case, the applicant, supported by the Kingdom of Sweden, the Kingdom of Denmark and the Republic of Finland, points out that that exception must be interpreted and applied strictly.

36

According to the applicant and the Republic of Finland, the Council's interpretation of that exception is too wide and results in the Council refusing to give access to almost all the documents drafted by its legal service. The Republic of Finland observes further that the position adopted by the Council is inconsistent with the principle of proportionality.

37

Although the Council can refuse access to the opinions of its legal service, it can do so only after analysing each legal opinion individually and establishing the concrete reasons justifying refusal of access (Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289, paragraph 112, and Case T-211/00 *Kuijjer v Council* [2002] ECR II-485, paragraph 56). However, in the present case the Council has failed to demonstrate that the disclosure of the legal opinion in question would undermine the protection of legal advice.

38

The Kingdom of Denmark states, in that regard, that the Council has failed to assess whether the legal opinion in question could be disclosed, because the Council takes the view that all the opinions drawn up by its legal service in the course of the legislative procedure constitute a category which is not subject to disclosure. However, in its view and in the view of the Republic of Finland, the Council is required in each individual case to weigh up the interests set out in Article 4(2) of Regulation No 1049/2001. The Republic of Finland adds that in assessing the exception in that article account should also be taken of the passage of time between the drafting of the legal advice and the request for access thereto.

39

The applicant submits that a general prohibition on disclosing all legal service opinions cannot be inferred from the case-law. That case-law does not preclude a distinction between legal advice drafted in the course of the legislative procedure and legal advice drawn up in the context of court proceedings. Furthermore, the judgments relied on by the Council are not relevant to the present case since the problems which arose in the cases leading to those judgments related to whether opinions of the Council's legal service could be produced without specific permission in the context of proceedings before the Court of First Instance. The applicant, the Kingdom of Denmark and the Republic of Finland point out that those cases did not moreover relate to the application of Regulation No 1049/2001. The applicant refers in that regard to the judgment in Case C-350/92 *Spain v Council* [1995] ECR I-1985, paragraph 35, Advocate General Jacobs's Opinion (at page I-1988) in the same case and the judgment in Case T-44/97 *Ghignone and Others v Council* [2000] ECR-SC I-A-223 and II-1023, paragraph 48.

40

Concerning the order of the President of the Court of First Instance of 3 March 1998 in Case T-610/97 R *Carlsen v Council* [1998] ECR II-485, cited by the Council in the contested decision, the applicant submits that the decision to prohibit the disclosure of the legal opinion in question in that case was taken in the context of interim proceedings, which implies a less far-reaching analysis of the facts and legal issues involved. It would have been difficult for the Court of First Instance in that case to come to any other conclusion without prejudging the outcome of the main proceedings.

41

With regard to the necessary independence of the opinions of its legal service relied upon by the Council in support of its refusal to disclose the legal opinion in question, the applicant, supported by the Kingdom of Denmark, submits that under Article 22 of the Rules of Procedure of the Council the legal service pursues the interests of the institution to which it organically belongs and is hierarchically answerable and that it plays a clear role in the legislative function of that institution. Disclosure of the opinions of the legal service would therefore help to protect it against improper external influences and, in particular, against influences from the Member States, and to safeguard its impartiality.

42

Furthermore, as the applicant and the Republic of Finland submit, the agents of the legal services of the Community institutions and the legal services themselves have a task different from that of lawyers external to the institution. Thus they do not have the same type of independence as characterises the legal profession.

43

The Kingdom of Sweden submits, in that regard, that although certain pieces of information in legal opinions may fall within the scope of the exception set out in the second indent of Article 4(2) of Regulation No 1049/2001, the institution must assess the possibility of their disclosure in the light of the information which they contain and determine whether that disclosure would undermine the protection of legal advice. It cannot therefore be considered, as a general rule, that legal opinions are confidential.

44

The Kingdom of Sweden adds that the legislature did not wish to exclude disclosure of legal advice from the scope of Regulation No 1049/2001. It submits also that other factors must be taken into consideration for the purposes of that assessment. Thus Article 207(3) EC aims at greater openness within the legislative process. Furthermore, the stage reached by the legislative procedure and the nature of the act to be adopted may be significant.

45

In the further alternative, the applicant submits that, even if the Council was justified in applying the second indent of Article 4(2) of Regulation No 1049/2001, it could not have considered that the disclosure of its legal service's opinion would undermine the protection of legal advice.

46

He alleges, first, that the Council has not explained in what way disclosure of the legal opinion in question would undermine the protection of legal advice. The Council merely indicates that independent legal advice is essential to its workings and that its disclosure would lead to uncertainty as to the lawfulness of legislative acts.

47

In the applicant's view, the Council's argument that the disclosure of legal opinions could affect their independence cannot be accepted. Indeed, the Council has failed to show in what way disclosure of legal opinions would constrain the legal service to modify them. Their disclosure would rather encourage the legal service to act with diligence, independence and objectivity, since third parties will be able to scrutinise those opinions. The applicant adds that many legal opinions merely involve a brief analysis of the legal basis of the proposed legislation without containing detailed and confidential arguments from the legal service. Finally, the applicant notes that in many Member States, such as Italy or the Netherlands, legal advice on legislative proposals which is drafted by legal services or committees and intended for governments is publicly available. Given the importance which is attributed at national level to access to such legal advice, the

applicant submits that he had a legitimate expectation of obtaining such information from the Council.

48

Regarding the Council's argument that a challenge to the legality of finally adopted legislative acts could be helped by the disclosure of legal opinions relating to the legislative procedure, the applicant points out that only the exception set out in Article 4(3) of Regulation No 1049/2001 is applicable. However, the Council has not relied upon that provision and therefore its arguments on this point should be disregarded.

49

In any event, disclosure of a legal opinion will not as such affect the legality of the legislative act in question, since acts of the Community institutions are presumed valid as long as they have not been annulled by the Community Courts.

50

Secondly, there is an overriding public interest in public access to legal opinions relating to legislative initiatives. Furthermore, the Council considered incorrectly that the overriding public interest justifying disclosure cannot consist in the principles of transparency and openness. The Kingdom of Denmark submits, in that regard, that the interest in openness in the decision-making process takes precedence over the interests put forward by the Council in order to refuse disclosure of legal opinions.

51

In conclusion, the applicant submits that the Council has infringed Article 4(2) of Regulation No 1049/2001 and that it has acted in breach of citizens' fundamental political and civil rights as guaranteed, in particular, by Article 6 EU.

52

The Council, the United Kingdom of Great Britain and Northern Ireland and the Commission dispute the applicant's arguments.
Findings of the Court

53

Regulation No 1049/2001, adopted pursuant to Article 255 EC, establishes the principles, conditions and limitations governing the exercise of the right of public access to the documents of the Parliament, the Council and the Commission in order to secure a more significant role for citizens in the decision-making process, to ensure that the administration acts with greater propriety, efficiency and responsibility vis-à-vis the citizens in a democratic system and to help to strengthen the principles of democracy and respect for fundamental rights.

54

Under the second indent of Article 4(2) of Regulation No 1049/2001, the institutions are required to refuse access to a document where its disclosure would undermine the protection of court proceedings and legal advice, unless there is an overriding public interest in such disclosure.

55

First of all, the applicant submits that the only legal advice covered by that article is that drawn up by the legal services in the context of court proceedings and not that drawn up in the course of the institutions' legislative activity. Since the legal opinion in question here concerns a proposal for a Council directive laying down minimum standards for the reception of applicants for asylum in the Member States, the exception under the second indent of Article 4(2) of Regulation No 1049/2001 cannot apply to it.

56

However, the wording of that provision cannot support the argument that only documents capable of undermining the protection of legal advice drawn up in the context of court proceedings are covered.

57

In addition, neither the Code of Conduct concerning public access to Council and Commission documents approved by those two institutions on 6 December 1993 (93/730/EC (OJ 1993 L 340, p. 41)) nor the institutions' decisions concerning public access to their documents adopted prior to Regulation No 1049/2001 (Council Decision 93/731/EC of 20 December 1993 (OJ 1993 L 340, p. 43), Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 (OJ 1994 L 46, p. 58) and European Parliament Decision 97/632/EC, ECSC, Euratom of 10 July 1997 (OJ 1997 L 263, p. 27)), specifically referred, as an exception to the right of

public access to those documents, to the protection of the legal advice of those institutions. Those texts refer, however, to the protection of court proceedings.

58

It follows that the Community legislature intended, in Regulation No 1049/2001, to provide for an exception relating to legal advice distinct from that relating to court proceedings.

59

In that regard, the interpretation suggested by the applicant, according to which the legal advice covered by the second indent of Article 4(2) of Regulation No 1049/2001 is that drawn up in the course of court proceedings pursued by the institutions' legal services, would have required the legislator to give a specific indication to that effect, by providing, for example, that the intended protection related to 'court proceedings and, particularly, legal advice in connection therewith'. Such is not however the case.

60

It is true that, according to settled case-law, the exceptions to access to documents fall to be interpreted and applied restrictively so as not to frustrate application of the general principle of giving the public the widest possible access to documents held by the institutions (see, by analogy, concerning Decision 94/90, Case T-309/97 *Bavarian Lager v Commission* [1999] ECR II-3217, paragraph 39, and Case T-191/99 *Petrie and Others v Commission* [2001] ECR II-3677, paragraph 66).

61

The principle set forth in the case-law applies, however, only to the definition of the scope of an exception where that exception is capable of giving rise to several different constructions. In this case, the expression 'legal advice' does not, in itself, present any difficulty of interpretation, so that there is no reason for thinking that it covers only advice drawn up in the context of court proceedings. Moreover, the consequence of the contrary construction suggested by the applicant would be that the inclusion of legal advice among the exceptions under Regulation No 1049/2001 had no practical effect.

62

Therefore, the words 'legal advice' must be understood as meaning that the protection of the public interest may preclude the disclosure of the contents of documents drawn up by the Council's legal service in the context of court proceedings but also for any other purpose.

63

In addition, as regards 'court proceedings' within the meaning of Decision 94/90, the Court has held that that term covers not only the pleadings or other documents lodged and internal documents concerning the investigation of the case before the Court but also correspondence concerning the case between the directorate-general concerned and the legal service or a lawyer's practice (*Interporc v Commission*, cited above, paragraph 41).

64

Given that the term 'court proceedings' has already been interpreted in the context of the right of public access to the institutions' documents, the Court considers that that definition, reached for the purpose of interpreting Decision 94/90, is relevant for the purposes of Regulation No 1049/2001.

65

Thus, since legal advice drawn up in the context of court proceedings is already included in the exception relating to the protection of court proceedings, within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001, the express reference to 'legal advice' among the exceptions necessarily has a meaning distinct from that of the exception relating to court proceedings.

66

It follows that the applicant is not justified in claiming that a legal opinion relating to an institution's legislative activity, such as that in question in this case, cannot come within the exception relating to legal advice within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001.

67

In the light of the foregoing, the Council was justified in relying on the exception under the second indent of Article 4(2) of Regulation No 1049/2001 in order to

determine whether it should give the applicant access to the opinion of its legal service.

68

Secondly, the applicant alleges that the Council did not examine the legal opinion in question, on the ground that legal opinions are, by nature, confidential. He also disputes the relevance of the Council's argument based on the need for its legal service to safeguard its independence.

69

It is appropriate to note that the institution is bound to assess in each individual case whether the documents whose disclosure is sought actually fall within the exceptions set out in Regulation No 1049/2001 (see, by analogy, as regards Decision 94/90, Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal v Commission* [2000] ECR I-1, paragraph 24).

70

In this case, the document in question is an opinion of the Council's legal service concerning a proposal for a Council directive laying down minimum standards for the reception of applicants for asylum in Member States.

71

However, the fact that the document in question is a legal opinion cannot, of itself, justify application of the exception relied upon. Indeed, as previously observed, any exception to the right of access to the institutions' documents under Regulation No 1049/2001 must be interpreted and applied strictly (see, to that effect, Case T-20/99 *Denkavit Nederland v Commission* [2000] ECR II-3011, paragraph 45).

72

It is therefore for the Court to assess, in this case, whether the Council has made an error of assessment in finding, pursuant to the second indent of Article 4(2) of Regulation No 1049/2001, that the disclosure of the legal opinion in question would undermine the protection to which that type of document may be entitled.

73

In order to justify its refusal to disclose the entirety of the legal opinion in question, the Council contends, in essence, in the contested decision, that the advice of its legal service is an important instrument enabling it to ensure that its acts are compatible with Community law and to pursue the discussion of the legal aspects at issue. It argues also that such disclosure could give rise to uncertainty as regards the legality of legislative acts adopted following such advice. The Council also refers to the Opinion of Advocate General Jacobs in *Spain v Council*, as well as the order in *Carlsen and Others v Council*, and the judgment in *Ghignone and Others v Council*.

74

It is true that that reasoning, relating to the need for protection relied upon, seems to relate to all the Council's legal advice on legislative acts and not specifically to the legal opinion in question. However, the generality of the Council's reasoning is justified by the fact that giving additional information, making particular reference to the contents of the legal opinion in question, would deprive the exception relied upon of its effect.

75

In addition, although the Council at first refused the applicant access to the legal opinion in question, it is clear from the contested decision that it finally agreed to disclose the introductory paragraph only of the opinion. In that introductory paragraph, it is stated that the opinion in question contains the advice of the Council's legal service on the question of the Community's powers regarding access of third country nationals to the labour market.

76

It follows that the complaint that the Council did not consider the contents of the legal opinion in question for the purpose of giving a decision on the request for access in question is unfounded.

77

As regards the relevance of the need, identified by the Council in the contested decision, for protection of that advice, the Court finds that the disclosure of the legal opinion in question would have the effect of making public the Council's internal discussions on the question of the Community's powers regarding access

of third country nationals to the labour market and, more widely, on the question of the legality of the legislative act to which it relates.

78

The disclosure of such advice could, given the particular nature of such documents, give rise to lingering doubts as to the lawfulness of the legislative act in question.

79

In addition, it is important to point out that the Council is justified in considering that the independence of the opinions of its legal service, drawn up at the request of other services of that institution or at least intended for them, can constitute an interest to be protected. In that regard, the applicant has not explained how, in the circumstances of this case, disclosure of the legal opinion in question would help to protect the Council's legal service from improper external influences.

80

In the light of the foregoing, the Council made no error of assessment in considering that there was an interest in protecting the legal opinion in question.

81

Thirdly, as regards the existence of an overriding public interest within the meaning of Article 4(2) of Regulation No 1049/2001 in disclosure of the legal opinion in question, the applicant claims that the Council has not examined whether there is such an interest. The applicant submits, in that regard, that the principles of transparency, openness and of democracy or of the participation of citizens in the decision-making process, are overriding public interests which warrant the disclosure of the legal opinion in question.

82

However, those principles are implemented by the provisions of Regulation No 1049/2001 as a whole, as evidenced by recitals 1 and 2 of the preamble, which refer explicitly to the principles of openness, of democracy and of greater participation of citizens in the decision-making process (see paragraph 2 above).

83

The overriding public interest, under Article 4(2) of Regulation No 1049/2001, capable of justifying the disclosure of a document which undermines the protection of legal advice must therefore, as a rule, be distinct from the above principles which underlie that regulation. If that is not the case, it is, at the very least, incumbent on the applicant to show that, having regard to the specific facts of the case, the invocation of those same principles is so pressing that it overrides the need to protect the document in question. That is not, however, the case here.

84

In addition, although it may be possible that the institution in question itself identifies an overriding public interest capable of justifying the disclosure of such a document, it is for the applicant who intends to rely on such an interest to invoke it in his application so as to invite the institution to give a decision on that point.

85

In this case, since the Council did not make an error of assessment in finding that the overriding public interests invoked by the applicant did not justify disclosure of the legal opinion in question, it cannot be criticised for not having identified other overriding public interests.

86

In the light of the foregoing, this application must be rejected in so far as it relates to the refusal of access to the Council's legal opinion.

The application for measures of organisation of procedure

87

The Court finds that there is no need to rule on the application for measures of organisation of procedure made by the applicant in his pleadings and seeking an order that the Council transmit to the Court in their entirety the documents whose disclosure is sought.

88

In so far as that application seeks the production to the Court of the four documents relating to legislative proposals, it has become devoid of purpose, since the applicant has had access to those documents.

89

In so far as that application seeks the production to the Court of the legal opinion in question, there is no need to grant it, since the Court considers itself sufficiently informed by the contents of the case-file.

Costs

90

Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 87(6) thereof provides that, where a case does not proceed to judgment, the costs are in the discretion of the Court of First Instance.

91

As the Court has stated above, the action has become devoid of purpose in so far as it concerns the refusal of full access to the four documents of the Council relating to legislative proposals (documents No 12616/02, No 12616/02 COR 1, No 12903/02 and No 12619/02).

92

In its pleadings, the Council admitted that documents No 12616/02 and No 12616/02 COR 1 should have been transmitted to the applicant prior to the commencement of these proceedings. As it was, the Council's conduct induced the commencement of the proceedings in so far as they concern those two documents and led to the applicant incurring unnecessary costs.

93

As regards documents No 12619/02 and No 12903/02, the Council finally decided to transmit them to the applicant after the commencement of these proceedings, even though the legislative acts to which they related had not yet been adopted, without explaining that change of attitude.

94

The Council must therefore bear half of its costs relating to the proceedings and pay one half of the costs incurred by the applicant.

95

On the other hand, the applicant having failed in so far as the action relates to the refusal of access to the Council's legal opinion, it is appropriate to order him to bear half of his own costs relating to the proceedings as well as half of the costs incurred by the Council.

96

Under the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1.

Dismisses the action in so far as it concerns the refusal of access to the Council's legal opinion;

2.

Declares that there is no need to adjudicate as to the remainder;

3.

Orders the applicant and the Council each to bear half of the costs of the proceedings;

4.

Orders the interveners to bear their own costs.

Lindh

García-Valdecasas

Cooke

Delivered in public in Luxembourg on 23 November 2004.

H. Jung
Registrar

P. Lindh
President