



Reports of Cases

Case T-796/14

Philip Morris Ltd
v
European Commission

(Access to documents — Regulation (EC) No 1049/2001 — Documents drawn up in the context of the preparatory works leading to the adoption of the directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products — Refusal to grant access — Exception relating to the protection of court proceedings and legal advice — Exception relating to the protection of the decision-making process — Overriding public interest)

Summary — Judgment of the General Court (Eighth Chamber), 15 September 2016

1. *Actions for annulment — Grounds — Lack of or inadequate statement of reasons — Separate ground from the one concerning substantive legality*

(Arts 263 TFEU and 296 TFEU)

2. *EU institutions — Right of public access to documents — Regulation No 1049/2001 — Exceptions to the right of access to documents — Obligation to state reasons — Scope*

(Art. 296 TFEU; European Parliament and Council Regulation No 1049/2001, Art. 4)

3. *EU institutions — Right of public access to documents — Regulation No 1049/2001 — Exceptions to the right of access to documents — Strict interpretation and application — Obligation to make a specific and individual examination for documents covered by an exception — Scope*

(European Parliament and Council Regulation No 1049/2001, first, second and fourth recitals and Arts 1 and 4)

4. *EU institutions — Right of public access to documents — Regulation No 1049/2001 — Exceptions to the right of access to documents — Duty to balance relevant interests — Scope concerning documents underlying the legislative process*

(European Parliament and Council Regulation No 1049/2001, second and sixth recitals and Art. 4)

5. *EU institutions — Right of public access to documents — Regulation No 1049/2001 — Exceptions to the right of access to documents — Protection of legal advice — Obligation on the institution to examine the nature of the measure as legal advice and the actual possibility of the protection of legal advice being undermined, and to verify the absence of a higher public interest justifying disclosure — Disclosure of legal opinions concerning legislative processes — Obligation on the institution to state in detail its reasons for any decision refusing access*

(European Parliament and Council Regulation No 1049/2001, Art. 4(2), second indent)

6. *EU institutions — Right of public access to documents — Regulation No 1049/2001 — Exceptions to the right of access to documents — Protection of legal advice — Scope — Refusal to disclose an opinion of the legal service of an institution concerning a legislative act forming the subject-matter of an action before the national court and the EU judicature — Lawfulness*

(European Parliament and Council Regulation No 1049/2001, Art. 4(2), second indent)

7. *EU institutions — Right of public access to documents — Regulation No 1049/2001 — Exceptions to the right of access to documents — Protection of court proceedings — Scope — Pleadings submitted by the Commission before the EU judicature in pending cases — General presumption that the exception to the right of access applies — Application to closed cases — Conditions*

(European Parliament and Council Regulation No 1049/2001, Art. 4(2), second indent)

8. *EU institutions — Right of public access to documents — Regulation No 1049/2001 — Exceptions to the right of access to documents — Protection of court proceedings — Scope — Documents not produced solely for the purposes of legal proceedings, but capable of undermining the defensive capacity of the institution concerned in those proceedings — Inclusion — Conditions*

(European Parliament and Council Regulation No 1049/2001, Art. 4(2), second indent)

9. *EU institutions — Right of public access to documents — Regulation No 1049/2001 — Exceptions to the right of access to documents — Protection of court proceedings — Scope — Refusal to disclose documents likely to undermine the position of the institution concerned and the principle of equality of arms in the context of pending proceedings — Lawfulness*

(European Parliament and Council Regulation No 1049/2001, Art. 4(2), second indent)

1. See the text of the decision.

(see para. 28)

2. See the text of the decision.

(see paras 29-31)

3. See the text of the decision.

(see paras 50-54)

4. If an institution applies one of the exceptions provided for in Article 4 of Regulation No 1049/2001, it is for that institution to weigh the particular interest to be protected through non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible, having regard to the advantages stemming, as noted in recital 2 of Regulation No 1049/2001, from increased openness, in that it 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.

Those considerations are clearly of particular relevance where the Council is acting in its legislative capacity, as is apparent from recital 6 of Regulation No 1049/2001, according to which wider access must be granted to documents in precisely such cases. Openness in that respect contributes to

strengthening democracy by enabling citizens to scrutinise all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.

(see paras 55, 56)

5. As regards the exception relating to legal advice laid down in the second indent of Article 4(2) of Regulation No 1049/2001, the examination to be undertaken by the institution concerned when it is asked to disclose a document must necessarily be carried out in three stages corresponding to the three criteria in that provision. Accordingly, that institution must first be satisfied that the document it is being asked to disclose does indeed relate to legal advice. Second, it must examine whether disclosure of the parts of the document in question that have been identified as relating to legal advice would undermine the protection that must be afforded to that advice, in the sense that it would be harmful to an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice. The likelihood of that interest being compromised must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical. Third and lastly, if the institution concerned takes the view that disclosure of a document would undermine the protection of legal advice as defined above, it is incumbent on that institution to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would be compromised thereby.

In so far as the interest in protecting the independence of that institution's legal service could be compromised by disclosure of opinions of that legal service issued in the course of legislative procedures, that likelihood would have to be weighed up against the overriding public interests underlying Regulation No 1049/2001. Such an overriding public interest is constituted by the fact that disclosure of documents containing the opinions of an institution's legal service on legal questions arising when legislative initiatives are being debated increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinise the information which has formed the basis of a legislative act, as referred to, in particular, in recitals 2 and 6 of that regulation. It is apparent from the considerations mentioned above that Regulation No 1049/2001 imposes, in principle, an obligation to disclose the opinions of an institution's Legal service relating to a legislative process. That finding does not, however, preclude a refusal, on account of the protection of legal advice, to disclose a specific legal opinion, given in the context of a legislative process, but being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question. In such a case, it is incumbent on the institution concerned to give a detailed statement of reasons for such a refusal.

(see paras 58-62)

6. It is true that refusal to disclose a legal opinion, on the ground that such disclosure could compromise an institution's ability subsequently to defend the validity of a legislative act before a court, cannot, as a general argument, justify an exception to the openness provided for by Regulation No 1049/2001.

However, it is different where, at the time of adoption of the decision refusing to disclose a specific legal opinion, given in the context of a legislative process, not only is there an action pending before the courts of a Member State challenging the validity of the legal act concerned and involving a strong likelihood of a reference for a preliminary ruling, but an action has been brought before the EU judicature by a Member State challenging the validity of a certain number of provisions of the same act on grounds of infringement of the FEU Treaty and the principle of proportionality. In so far as the document requested contains certain redacted parts which refer to the opinion of the legal service of the institution concerned as regards the Union's lack of competence to legislate and non-compliance with the principle of proportionality, disclosure of those parts could undermine the protection of legal advice, that is to say, the protection of an institution's interest in seeking legal

advice and receiving frank, objective and comprehensive advice, and the position of the said legal service in its defence of the validity of the legislative act in question before the Court of Justice of the European Union on an equal footing with the other parties. Such disclosure would reveal the position of the legal service of the institution concerned before it had even had the opportunity to present that position during the court proceedings, although no similar obligation was imposed on the other party to the proceedings.

(see paras 65-67, 69, 70)

7. See the text of the decision.

(see paras 77-83)

8. The principles of equality of arms and the sound administration of justice are at the heart of the exception concerning the protection of legal proceedings laid down in the second indent of Article 4(2) of Regulation No 1049/2001. The need to ensure equality of arms before a court justifies the protection not only of documents drawn up solely for the purposes of specific court proceedings, such as pleadings, but also of documents whose disclosure is liable, in the context of specific proceedings, to compromise that equality, which is a corollary of the very concept of a fair trial. However, in order for the exception to apply, it is necessary that the requested documents, at the time of adoption of the decision refusing access to those documents, should have a relevant link with a dispute pending before the Courts of the European Union, in respect of which the institution concerned is invoking that exception, and that disclosure of those documents, even though they were not drawn up in the context of pending court proceedings, should compromise the principle of equality of arms and, potentially, the ability of the institution concerned to defend itself in those proceedings. In other words, it is necessary that those documents should reveal the position of the institution concerned on contentious issues raised during the court proceedings relied upon.

Those considerations can also be applied to proceedings pending before a national court at the time of adoption of a decision refusing access to the requested documents, on condition that they raise a question of interpretation or validity of an act of EU law so that, having regard to the context of the case, a reference for a preliminary ruling appears particularly likely. In those two cases, although those documents have not been drawn up in the context of specific court proceedings, the integrity of the court proceedings concerned and the equality of arms between the parties could be seriously compromised if parties were to benefit from privileged access to internal information belonging to the other party and closely connected to the legal aspects of pending or potential but imminent proceedings.

(see paras 88-90)

9. The principle of equality of arms requires the institution by which the contested act was issued to be in a position effectively to defend the legality of its actions before the courts. That possibility would be seriously compromised if the institution in question were to be obliged to defend itself, not only having regard to the pleas in law and arguments raised by the applicant, or in the context of future preliminary ruling proceedings, but also having regard to the positions taken internally concerning the legality of the various options envisaged during the preparation of the act in question. In particular, in the matter of access to documents, the disclosure of documents containing that type of position is such as to oblige the institution concerned, as a result, to defend itself against assessments by its own staff which have, ultimately, been disregarded. That fact could upset the balance between the parties to court proceedings, inasmuch as the applicant could not be obliged to disclose that type of internal assessment.

Accordingly, disclosure of such documents to the public while court proceedings concerning the interpretation and the legality of the act in question are pending could compromise the defensive position of the institution concerned and the principle of equality of arms, in so far as it would reveal the internal legal positions of its services on contentious issues although no similar obligation would be imposed on the other party.

(see paras 97, 98)