



## Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

15 September 2016\*

(Access to documents — Regulation (EC) No 1049/2001 — Documents relating to discussions preceding 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 legal advice — Rights of the defence — Overriding public interest)

In Case T-710/14,

**Herbert Smith Freehills LLP**, established in London (United Kingdom), represented by P. Wytinck, lawyer,

applicant,

v

**Council of the European Union**, represented by E. Rebasti, M. Veiga and J. Herrmann, acting as Agents,

defendant,

supported by

**European Commission**, represented by P. Van Nuffel, J. Baquero Cruz and F. Clotuche-Duvieusart, acting as Agents,

intervener,

APPLICATION based on Article 263 TFEU and seeking annulment of Decision 18/c/01/14 of the Council of 23 July 2014, refusing access to certain documents relating to the adoption of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 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 and repealing Directive 2001/37/EC (OJ 2014 L 127, p. 1),

THE GENERAL COURT (Eighth Chamber),

composed of D. Gratsias, President, M. Kancheva and C. Wetter (Rapporteur), Judges,

Registrar: M. Junius, Administrator,

having regard to the written procedure and further to the hearing on 22 January 2016,

\* Language of the case: English.

gives the following

## Judgment

### Background to the dispute

- 1 By email of 16 April 2014, the applicant, Herbert Smith Freehills LLP, submitted an application to the Council of the European Union, on the basis of 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), for access to ‘any documents (including internal documents and drafts) authored by officials [of] the Council’s Legal Service that relate to the Legal Service’s assessment of the legal basis of proposals for a new Directive of the European Parliament and of the Council 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 ... and that were drafted in preparation for, in response to, in consequence of, or that otherwise refer to, trilogue meetings relating to [that directive] in 2013’. It also indicated that ‘[a]s part of the Council’s Legal Service’s response to this request, [it expected] to receive (at least) documents (including internal documents and drafts) relating to the Legal Service’s review or consideration of Article 24 of the proposed [directive]’.
- 2 On 4 June 2014, the Council responded to the applicant’s application, refusing to grant access to any of the documents requested.
- 3 In that initial refusal, the Council indicated that no written opinion had been drafted by its Legal Service regarding the issues referred to in the application. Concerning the internal documents and drafts, the Council noted a limited number of written exchanges between an official of the Council’s Legal Service, officials of the Legal Services of the European Parliament and of the European Commission, and delegates of the Member States, and noted that certain elements of that correspondence included, in attachments thereto, intermediate versions of Article 24 of the proposed Directive of the Parliament and of the Council 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 (‘the TPD’) and the parts of the proposal relating thereto. The Council took the view that their disclosure would compromise its interest in seeking and receiving frank, objective and comprehensive legal advice and, concerning the personal data, the privacy of the persons who had taken part in that exchange of emails.
- 4 By email of 16 June 2014, the applicant submitted a confirmatory application for access to the documents listed in its initial application.
- 5 By decision of 23 July 2014, which was notified to the applicant on 24 July 2014, the Council rejected the applicant’s confirmatory application and refused to grant access to the documents identified therein (‘the contested decision’).
- 6 It is apparent from the content of the contested decision that the applicant identified the following documents (collectively, ‘the requested documents’) as being the subject of that refusal to grant access:
  - an email of 21 November 2013, sent by an official of the Council’s Legal Service to officials of the Legal Services of the Parliament and of the Commission, containing preliminary legal positions on the wording of Article 24 of the TPD (‘Document No 1’);

- an email of 26 November 2013, sent by an official of the Council’s Legal Service to the legal adviser of a Member State, containing a very brief explanation of the main legal objective of a specific draft; an intermediate version of Article 24 of the TPD and the parts of the Commission’s proposal relating thereto are enclosed as an attachment (‘Document No 2’);
  - an email of 2 December 2013, sent by an official of the Council’s Legal Service to officials of the Legal Services of the Parliament and of the Commission, containing a very brief comment on the possible interpretation of a text; an intermediate version of Article 24 of the TPD and the parts of the Commission’s proposal relating thereto are enclosed as an attachment (‘Document No 3’);
  - an email of 3 December 2013, sent by an official of the Council’s Legal Service to an official of the Directorate-General (DG) ‘B 4B’ of the General Secretariat of the Council, referring very briefly to a draft attached thereto; an intermediate version of Article 24 of the TPD and the parts of the Commission’s proposal relating thereto are enclosed as an attachment (‘Document No 4’);
  - an email of 4 December 2013, sent by an official of the Council’s Legal Service to officials of the Legal Services of the Parliament and of the Commission, referring to a judgment and setting out brief preliminary positions on its relevance (‘Document No 5’).
- 7 In the contested decision, the Council stated that the requested documents contained legal advice in the form of informal exchanges regarding the preliminary legal positions on a provision of the TPD which was particularly controversial and was the subject of complex and difficult discussions within the Council and between the institutions.
- 8 Next, the Council noted that the TPD had been strongly opposed by the tobacco industry during the legislative process, that another tobacco producer had initiated judicial proceedings before the courts of England and Wales contesting the legality of the TPD and that there was therefore a real and foreseeable likelihood that a reference would be made for a preliminary ruling. The Council also drew attention to indications that Poland was considering the possibility of bringing an action for annulment of the TPD before the Court of Justice of the European Union. In the same vein, the Council considered that the ‘free movement clause’ laid down in Article 24 of the TPD and analysed in the requested documents would inevitably form part of the announced judicial proceedings. In those circumstances, the Council took the view that disclosure of the requested documents could have undermined the effectiveness of its defence before the courts and, consequently, the principle of equality of arms and the rights of the defence.
- 9 The Council also emphasised that the documents drafted by the officials of its Legal Service on an informal preliminary basis should enjoy specific protection, precisely because they were informal and intermediate. In the Council’s view, disclosure of those documents could have a significant impact on the way in which the Legal Service operates and on its freedom to express its views, and, ultimately, could compromise its ability to seek and receive ‘frank, objective, and comprehensive’ legal advice.
- 10 Consequently, the Council concluded that the requested documents fell under the second indent of Article 4(2) of Regulation No 1049/2001, which concerns the protection of legal advice.
- 11 Regarding the existence of an overriding interest justifying disclosure, the Council considered, given the particularly sensitive nature of the legal advice in question, which concerned issues that could be the subject of litigation, that the interest in transparency and in participation in the legislative process did not take precedence, in the present case, over the need to protect the legal views set out in the requested documents, which were, in any event, only of a preliminary nature and did not reflect the official views of the Council.

12 Regarding the question whether partial access could be granted, the Council concluded that the parts of the requested documents covered by that application for partial access all fell within the scope of the exception relied upon.

13 Lastly, on the basis of Article 4(1)(b) of Regulation No 1049/2001, the Council refused to grant access to the personal data contained in the documents.

### **Procedure and forms of order sought**

14 By application lodged at the Registry of the General Court on 6 October 2014, the applicant brought the present action, together with an application for an expedited procedure.

15 By decision of 7 November 2014, the General Court (Eighth Chamber) rejected the application for an expedited procedure.

16 On 19 December 2014, the Council submitted its defence.

17 The reply was lodged at the Court Registry on 25 February 2015.

18 By document lodged at the Court Registry on 8 January 2015, the Commission sought leave to intervene in the present proceedings in support of the form of order sought by the Council. By order of 3 March 2015, the President of the Eighth Chamber of the General Court granted the Commission leave to intervene.

19 On 15 April 2015, the Commission lodged its statement in intervention.

20 The rejoinder was received at the Court Registry on 16 April 2015.

21 The applicant's observations regarding the statement in intervention were submitted on 29 May 2015.

22 Acting upon a report of the Judge-Rapporteur, the General Court (Eighth Chamber) decided to open the oral part of the procedure.

23 By order of 11 November 2015, the Court ordered the Council to produce copies of the requested documents, pursuant to Article 91(c) of the Rules of Procedure of the General Court, and stated that, pursuant to Article 104 of those Rules, those documents were not to be communicated to the applicant. The Council complied with that order within the prescribed period.

24 The parties presented oral argument and answered the oral questions put to them by the Court at the hearing, which took place on 22 January 2016.

25 The applicant claims that the Court should:

- annul the contested decision;
- order the Council to pay the costs.

26 The Council and the Commission contend that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

## Law

- 27 In support of its application for annulment, the applicant, having withdrawn its third plea in the reply, raises two pleas in law, the first alleging infringement of the second indent of Article 4(2) of Regulation No 1049/2001 and the second alleging infringement of Article 4(6) of that regulation.

### *Preliminary observations*

- 28 It should be borne in mind that, in accordance with recital 1 thereof, Regulation No 1049/2001 reflects the intention expressed in the second paragraph of Article 1 TEU of marking 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. As is stated in recital 2 of that regulation, the right of public access to documents of the institutions is related to the democratic nature of those institutions (judgments of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 34; 21 September 2010, *Sweden and Others v API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 68; and 21 July 2011, *Sweden v MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 72).
- 29 To that end, the purpose of Regulation No 1049/2001, as indicated in recital 4 and Article 1 thereof, is to give the public a right of access to documents of the institutions that is as wide as possible (judgments of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 33; 21 September 2010, *Sweden and Others v API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 69; and 21 July 2011, *Sweden v MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 73).
- 30 It is true that that right is none the less subject to certain limitations based on grounds of public or private interest. More specifically, and in accordance with recital 11 thereof, Article 4 of Regulation No 1049/2001 lays down a series of exceptions authorising the institutions to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision (judgments of 21 September 2010, *Sweden and Others v API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraphs 70 and 71; 21 July 2011, *Sweden v MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 74; and 17 October 2013, *Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 29).
- 31 Nevertheless, since such exceptions derogate from the principle of the widest possible public access to documents, they must be interpreted and applied strictly (judgments of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 63; 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 36; 21 September 2010, *Sweden and Others v API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 73; and 21 July 2011, *Sweden v MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 75).
- 32 The mere fact that a document concerns an interest protected by an exception to the right of access laid down in Article 4 of Regulation No 1049/2001 is not sufficient to justify the application of that exception (judgments of 3 July 2014, *Council v in’t Veld*, C-350/12 P, EU:C:2014:2039, paragraph 51, and 13 April 2005, *Verein für Konsumenteninformation v Commission*, T-2/03, EU:T:2005:125, paragraph 69).
- 33 First, if the institution concerned decides to refuse access to a document that it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and actually compromise the interest protected by the exception, among those provided for in Article 4 of Regulation No 1049/2001, upon which it relies. Moreover, the likelihood of that interest being

compromised must be reasonably foreseeable and not purely hypothetical (see judgment of 21 July 2011, *Sweden v MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 76 and the case-law cited).

- 34 Second, 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 (judgments of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 45; 17 October 2013, *Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 32; and 3 July 2014, *Council v in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 53).
- 35 Moreover, the Court has also held that 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 (judgments of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 46, and 17 October 2013, *Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 33).

*First plea in law: infringement of the second indent of Article 4(2) of Regulation No 1049/2001*

- 36 By its first plea in law, which is divided into two parts, the applicant complains of two infringements by the Council of the second indent of Article 4(2) of Regulation No 1049/2001.
- 37 In the first part, the applicant claims that Documents Nos 1, 2, 3 and 5 do not fall within the scope of the exception relating to legal advice laid down in the second indent of Article 4(2) of Regulation No 1049/2001.
- 38 In the second part, it argues that, even if Documents Nos 1, 2, 3 and 5 were to fall within the scope of the second indent of Article 4(2) of Regulation No 1049/2001, they, together with Document No 4, would nevertheless have to be communicated because there is an overriding public interest in their disclosure.

*First part of the first plea in law*

- 39 According to the applicant, the exception relating to legal advice laid down in the second indent of Article 4(2) of Regulation No 1049/2001 should not be extended to cover emails exchanged with third parties in the context of a legislative process. Indeed, Documents Nos 1, 2, 3 and 5 are merely the product of an inter-institutional debate concerning the content of a proposed legislative act. The exception applies only to internal advice provided by the legal service of the institution in question. Therefore, the Council erred in invoking the exception concerned in respect of the communications sent to officials of the Legal Services of the Parliament and of the Commission and to the legal adviser of a Member State.
- 40 The Council and the Commission contest the applicant's arguments.

- 41 The second indent of Article 4(2) of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where disclosure would undermine the protection of legal advice, unless there is an overriding public interest in disclosure of that document.
- 42 It should be borne in mind that, according to the case-law of the Court, 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 Council when it is asked to disclose a document must necessarily be carried out in three stages corresponding to the three criteria in that provision (judgments of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 37, and 3 July 2014, *Council v in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 95).
- 43 Accordingly, the Council 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 Council takes the view that disclosure of a document would undermine the protection of legal advice as defined above, it is incumbent on the Council 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 (see, to that effect, judgments of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 38 to 44, and 3 July 2014, *Council v in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 96).
- 44 The Court has also held that, in so far as the interest in protecting the independence of the Council's Legal Service could be compromised by disclosure of opinions of the Council's 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 advice 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 the Council's Legal Service relating to a legislative process (judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 67 and 68).
- 45 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 (judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 69).
- 46 As can be seen from paragraph 39 above, in the first part of the first plea in law the applicant is calling in question the first stage of the examination carried out by the Council.
- 47 As regards the concept of 'legal advice', it should be noted that Article 4 of Regulation No 1049/2001 provides no basis for the interpretation of that concept given by the applicant.
- 48 In the first place, it should be pointed out that the concept of 'legal advice' is not defined in Regulation No 1049/2001. However, it is apparent from the case-law deriving from the judgment of 1 July 2008, *Sweden and Turco v Council* (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 38 and 39), that

the concept of 'legal advice' relates to the content of a document and not to its author or its addressees. As is apparent from a literal interpretation of the words 'legal advice', this is a question of advice relating to a legal issue, regardless of the way in which that advice is given. In other words, it is irrelevant, for the purposes of applying the exception relating to the protection of legal advice, whether the document containing that advice was provided at an early, late or final stage of the decision-making process. In the same way, the fact of the advice having been given in a formal or informal context has no effect on the interpretation of those words.

- 49 In the second place, there is nothing in the wording of the second indent of Article 4(2) of Regulation No 1049/2001 to support the conclusion that that provision concerns only advice provided or received internally by an institution.
- 50 In that regard, it should be borne in mind that it is apparent from the judgment of 1 July 2008, *Sweden and Turco v Council* (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 42), that the exception relating to legal advice laid down in the second indent of Article 4(2) of Regulation No 1049/2001 must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice.
- 51 Although, as a general rule, an institution seeks advice from its own legal service, there is nothing to prevent that institution, where appropriate, from outsourcing its request for that advice. That is the case, for example, where the institution in question seeks advice from a law firm.
- 52 Accordingly, the question whether the legal advice emanates from an internal or external author is irrelevant so far as the institution relying on the exception relating to the protection of advice is concerned.
- 53 Lastly, there is also nothing to prevent the institution which has invoked the exception relating to the protection of legal advice from sharing that advice with 'a third party'. The fact that a document containing legal advice issued by an institution has been sent to the legal services of other institutions or to a Member State does not alter, as such, the nature of that document.
- 54 Accordingly, contrary to the applicant's assertions, it does not follow from the second indent of Article 4(2) of Regulation No 1049/2001 that legal advice must be issued by an institution for internal use only.
- 55 In that regard, it should be emphasised that, in the present case, as was argued by the Council and as the Court found following the production of the documents in connection with the measure of organisation of procedure referred to in paragraph 23 above, this is a question of an exchange between the three institutions in the context of a trilogue, which, by definition, involves exchanges carried out 'outside' the institution concerned in order to adopt a final legislative text.
- 56 A trilogue is an informal tripartite meeting in which the representatives of the Parliament, the Council and the Commission take part. The aim of such exchanges is to reach a prompt agreement on a set of amendments acceptable to the Parliament and the Council. Although the legislative discussions conducted during a trilogue often concern political issues, they may also sometimes concern technical legal issues. In the latter case, on occasion, the legal services of the three institutions must discuss and agree on a position, an agreement that must subsequently be approved by each of the three institutions in accordance with their respective internal procedures.
- 57 Thus, the ordinary legislative procedure set out in Article 294 TFEU, the procedure pursuant to which the TPD was adopted, comprises three stages (first reading, second reading and third reading with conciliation), but it may be concluded after any one of those stages if the Parliament and the Council come to an agreement. Although the procedure may require up to three readings, the increased use of trilogues shows that an agreement is often reached during the first reading.

- 58 In the present case, the TPD was adopted on the basis of a first reading by the Parliament. In view of the ending of the respective terms of office of the Parliament and of the Commission in June and October 2014, trilogue negotiations were conducted between the Parliament, the Council and the Commission at the Parliament's request in order to negotiate, inter alia, the content of Article 24 of the TPD and to agree on the wording of that provision.
- 59 The exchanging of legal views between the legal services of three institutions in order to reach a compromise regarding a legislative text in the context of a trilogue may, where appropriate, be described as legal advice and, as a result, may fall under the exception relating to legal advice.
- 60 The legal services act under a mandate and with the aim of reaching an agreement. They thus simultaneously act as negotiators and advisers with regard to legal matters.
- 61 Lastly, as regards the applicant's argument that Document No 2, an email sent by the Council to a Member State and thus, according to the applicant, a document exchanged with a third party, accordingly does not fall within the scope of the exception relating to legal advice, it should be noted that the Council is made up of the Member States. Accordingly, the exchanging of correspondence between the services of the Council and the permanent representatives of the Member States in the context of a legislative process may, where appropriate, be covered by the exception relating to legal advice laid down in the second indent of Article 4(2) of Regulation No 1049/2001.
- 62 It follows from the foregoing that the Council correctly took the view that the documents at issue concerned legal advice within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001. Accordingly, the first part of the first plea in law must be rejected.

#### Second part of the first plea in law

- 63 In the second part, the applicant claims that, in so far as Documents Nos 1 to 5 are protected by the second indent of Article 4(2) of Regulation No 1049/2001, there is an overriding public interest in their disclosure.
- 64 It refers, in that regard, to the judgment of 1 July 2008, *Sweden and Turco v Council* (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 46). According to the applicant, it is apparent from that judgment that legal advice issued in the context of a legislative process must, in principle, be disclosed and that disclosure of such advice 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. In that context, the applicant argues that the requested documents concern an essential element of the constitutional order of the European Union, namely the legal basis of the TPD, which is connected with the principle of conferral affirmed in Article 5 TEU. In addition, that essential element is the subject of a question of interpretation raised before the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) (United Kingdom), which, according to the applicant, also demonstrates a substantial public interest.
- 65 The Council, supported by the Commission, challenges the idea that, in legislative matters, there is always an overriding interest justifying disclosure of requested documents. Both institutions invoke, in that regard, the specific advice issued regarding Article 24 of the TPD, which is advice of a sensitive and contentious nature. They contend that disclosure of that advice would compromise the interest in seeking and receiving frank, objective and comprehensive advice, the ability of the Council and of the Commission to define and adapt their line of defence during the future court proceedings, and the serenity and integrity of legal discussions before the Courts of the European Union. In view of those risks, the alleged public interest in disclosure relied on by the applicant does not outweigh the interest in protecting the legal advice in question.

- 66 As a preliminary point, it should be noted that the applicant has not raised an objection contesting the existence of a real, reasonably foreseeable and not purely hypothetical likelihood that disclosure of the requested documents in their entirety would undermine the protection of legal advice within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001. Its allusion in its written pleadings to its doubts as to the particularly sensitive nature of the documents in question takes place solely in the context of weighing the Council's interest in protecting the advice in question and the overriding interest justifying disclosure of that advice. Therefore, the examination carried out by the Council concerning the existence of a real likelihood that disclosure of the requested documents could compromise its interest in seeking legal advice and receiving frank, objective and comprehensive advice does not form part of the subject matter of the present dispute.
- 67 To the extent that disclosure of legal advice would be likely to compromise the protected interest, that likelihood should be weighed up against the overriding interests underlying Regulation No 1049/2001. As can be seen from the case-law cited in paragraph 34 above, it is for the institution concerned 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.
- 68 An overriding public interest capable of justifying disclosure of a document need not necessarily be distinct from the principles underlying Regulation No 1049/2001 (see, to that effect, judgments of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 74 and 75, and 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 92).
- 69 However, a statement setting out purely general considerations is not sufficient to establish that an overriding public interest prevails over the reasons justifying the refusal to disclose the documents in question (see, to that effect, judgments of 21 September 2010, *Sweden and Others v API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 158; 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93; 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 105; and 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 131).
- 70 In the present case, it is apparent from the contested decision that, according to the Council, there is no overriding public interest justifying disclosure of the requested documents. In essence, as is apparent from paragraph 26 of the contested decision, summarised in paragraph 11 above, the Council considered, given the particularly sensitive nature of the legal advice in question, which concerned issues that could be the subject of litigation, that the interest in transparency and in participation in the legislative process did not take precedence, in the present case, over the need to protect the legal views set out in the requested documents.
- 71 None of the arguments put forward by the applicant and summarised in paragraph 64 above allows that assessment to be called into question.
- 72 In the first place, regarding the argument that the transparency necessary for the legislative process to be understood constitutes in itself a public interest that must be protected and that the Council failed to take into account, it must be held that, in the light of the case-law cited in paragraph 69 above, such a general consideration cannot provide an appropriate basis for establishing that, in the present case, the principle of transparency is of especially pressing concern and could thus prevail over the reasons justifying the refusals to grant access to the requested documents (see, to that effect and by analogy, judgment of 21 September 2010, *Sweden and Others v API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraphs 157 and 158).

- 73 In the second place, regarding the argument that an overriding public interest was also established by the fact that there were proceedings pending before the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court), it should be borne in mind that the applicant is acting on behalf of British American Tobacco UK Ltd, which initiated those proceedings on 27 June 2014, contesting the validity of the TPD, in particular Article 24 thereof, in the light of Article 114 TFEU, and which requested that court to make a reference to the Court of Justice of the European Union for a preliminary ruling regarding the validity of the TPD. The fact that the applicant has brought an action before the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court), suggests that this is more of a private interest than an overriding public interest. Moreover, the applicant, while awaiting a preliminary ruling by that Court, applied for an expedited procedure (see paragraph 14 above), claiming that it had a clear interest in having access to the documents in question in order both better to prepare its observations in the context of the expected preliminary ruling procedure and to submit those documents to the Court of Justice of the European Union and, thus, demonstrates its private interest.
- 74 It should be noted that, regarding its being necessary for the applicant to obtain disclosure of the requested documents on the basis of an overriding interest in order to be in a position better to prepare for its involvement in the court proceedings mentioned above, such an argument does not, as such, constitute a public interest justifying disclosure that is capable of prevailing over the protection of confidentiality, within the meaning of Article 4 of Regulation No 1049/2001. Taking into account the general principle of access to documents as affirmed in Article 15 TFEU and recitals 1 and 2 of that regulation, that interest must be objective and general in nature and must not be indistinguishable from individual or private interests.
- 75 Accordingly, in view of the foregoing, the second part of the first plea in law cannot succeed.

*Second plea in law: infringement of Article 4(6) of Regulation No 1049/2001*

- 76 By its second plea in law, the applicant claims that the Council failed to apply Article 4(6) of Regulation No 1049/2001 correctly, in so far as it did not grant partial access to the requested documents. It argues that any threat to the protection of legal advice could have been significantly reduced if the emails had been redacted. In addition, it submits that, at the very least, the intermediate draft versions of Article 24 of the TPD attached to Documents Nos 2, 3 and 4 must be disclosed.
- 77 It should be borne in mind that, pursuant to Article 4(6) of Regulation No 1049/2001, if only parts of the requested document are covered by any of the exceptions set out in that article, the remaining parts of the document are to be released.
- 78 In the present case, the Council considered, in the contested decision, that the parts of the correspondence that were the subject of the applicant's request for access were covered in their entirety by the exception relating to the protection of legal advice and that it was therefore impossible to grant partial access.
- 79 The Council also added, in the statement of defence, that disclosure of the salutations or trivial logistic information contained in the emails identified would have not provided any relevant information to the applicant and would have therefore been pointless.
- 80 In that regard, it is worth noting, as the Council has, that, according to settled case-law, the institutions are entitled to refuse partial access in cases where examination of the documents in question shows that partial access would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant (judgment of 12 July 2001, *Mattila v Council and Commission*, T-204/99, EU:T:2001:190, paragraph 69).

- 81 Therefore, since the parts of the documents in question that are the subject of the applicant's request for access are covered in their entirety by the exception relating to the protection of legal advice and the remaining parts concern only salutations and trivial logistic information, the Council was entitled to conclude that there was no sense in granting partial access.
- 82 Regarding the intermediate versions of the text of Article 24 of the TPD attached to Documents Nos 2, 3 and 4, it should be pointed out that the advice exchanged between the three legal services was reflected, by the 'track changes' function, in the text of those versions and forms an integral part of the legal advice. As a result, the same reasoning as that set out in paragraphs 71 to 75 above is applicable.
- 83 It follows that the second plea in law must be rejected and, accordingly, the action must be dismissed in its entirety.

### **Costs**

- 84 Under Article 134(1) 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. As the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Council, in accordance with the form of order sought by the latter.
- 85 Under Article 138(1) of the Rules of Procedure, institutions which have intervened in the proceedings are to bear their own costs. Accordingly, the Commission must be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Herbert Smith Freehills LLP to bear its own costs and to pay those incurred by the Council of the European Union;**
- 3. Orders the European Commission to bear its own costs.**

Gratsias

Kancheva

Wetter

Delivered in open court in Luxembourg on 15 September 2016.

[Signatures]