

JUDGMENT OF THE COURT (Grand Chamber)

1 July 2008*

In Joined Cases C-39/05 P and C-52/05 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice, lodged on 31 January and 4 February 2005 respectively,

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

Maurizio Turco, residing in Pulsano (Italy), represented by O. Brouwer and C. Schillemans, advocaten,

appellants,

supported by:

Kingdom of the Netherlands, represented by H.G. Sevenster, C.M. Wissels and M. de Grave, acting as Agents,

intervener on appeal,

* Language of the case: English.

the other parties to the proceedings being:

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

defendant at first instance,

Kingdom of Denmark, represented by B. Weis Fogh, acting as Agent, with an address for service in Luxembourg,

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

United Kingdom of Great Britain and Northern Ireland, represented by V. Jackson, S. Nwaokolo and T. Harris, acting as Agents, and J. Stratford, Barrister, with an address for service in Luxembourg,

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

interveners at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, A. Tizzano, G. Arestis and U. Löhmus, Presidents of Chambers, K. Schiemann (Rapporteur), A. Borg Barthet, M. Ilešič, J. Malenovský and J. Klučka, Judges,

Advocate General: M. Poiares Maduro,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 26 September 2007,

after hearing the Opinion of the Advocate General at the sitting on 29 November 2007,

gives the following

Judgment

- ¹ By their appeals, the Kingdom of Sweden (Case C-39/05 P) and Mr Turco (Case C-52/05 P) seek to have set aside the judgment of the Court of First Instance of the European Communities of 23 November 2004 in Case T-84/03 *Turco v Council* [2004] ECR II-4061 ('the judgment under appeal'), in so far as it dismissed the action for annulment brought by Mr Turco against the decision of the Council of the

European Union of 19 December 2002 which refused him access to 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 ('the contested decision'). The Kingdom of Sweden also requests that the Court itself give judgment in the matter by annulling the contested decision.

- 2 By their pleas in law in support of these appeals, the appellants invite the Court to adjudicate on the scope and application of the exception to the obligation to disclose documents which is provided for, where disclosure would undermine the protection of legal advice, by the second indent of Article 4(2) 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).

Legal context

- 3 Article 255 EC gives, in particular, to any citizen of the European Union a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions defined by the Council on grounds of public or private interest.
- 4 Regulation No 1049/2001 was adopted by the Council on the basis of Article 255(2) EC.
- 5 Recitals 1 to 4, 6 and 11 in the preamble to that regulation are worded as follows:

- (1) The second [paragraph] 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 of the EU Treaty 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) of the EC Treaty.

- ...

- (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 ...'

6 Under the heading 'Purpose', Article 1(a) of Regulation No 1049/2001 states that the purpose of that regulation is 'to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as "the institutions") documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents'.

7 Under the heading 'Beneficiaries and scope', Article 2(1) of Regulation No 1049/2001 grants any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, a right of access to documents of the institutions, 'subject to the principles, conditions and limits defined in this Regulation'.

8 Article 4 of Regulation No 1049/2001, headed 'Exceptions', provides:

'...

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

...

— court proceedings and legal advice,

...

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.

...

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years ...'

- 9 Article 12(2) of Regulation No 1049/2001 provides that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9 of that regulation, be made directly accessible.

Background to the dispute

- 10 On 22 October 2002 Mr Turco 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, under document number 9077/02, 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.

- 11 The Council refused Mr Turco access to that opinion on 5 November 2002, on the basis of Article 4(2) of Regulation No 1049/2001. The reasons given for that refusal were as follows:

‘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 ... Regulation [No 1049/2001]. 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 [that] 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 [that] Regulation.’

- 12 On 22 November 2002, Mr Turco made a confirmatory application to the Council asking it to reconsider its position, claiming 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 principle of democracy and citizen participation in the legislative process constitutes an overriding public interest in the disclosure of, inter alia, the legal opinion in question.
- 13 By the contested decision, the Council agreed to disclose the introductory paragraph of that opinion, in which it is stated that the opinion contains the advice of the Council’s legal service on the question of the powers of the Community regarding access to the labour market by third-country nationals, but it refused to reconsider its position as to the remainder. In essence, it justified its confirmation of refusal of access on the ground, first, that the advice of its legal service deserves particular protection,

because it is an important instrument which enables the Council to be sure of the compatibility of its acts with Community law and to move forward the discussion of the legal aspects at issue. Secondly, disclosure of the legal service's opinions could create uncertainty regarding the legality of legislative acts adopted further to those opinions and, therefore, jeopardise the legal certainty and stability of the Community legal order. As for the overriding public interest put forward by Mr Turco, the Council stated as follows:

‘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.’

Procedure before the Court of First Instance and the judgment under appeal

¹⁴ By application lodged at the Registry of the Court of First Instance on 28 February 2003, Mr Turco brought an action for annulment of the contested decision. In support of that action, he raised, as regards the refusal of access to the legal opinion in question, a single plea in law alleging infringement of Article 4(2) of Regulation No 1049/2001, which was divided into three parts.

¹⁵ First and primarily, he submitted that there had been an error as to the legal basis of the contested decision, since legal opinions drawn up in the context of the examination of legislative proposals are, in his view, covered by the exception laid down by

Article 4(3) of Regulation No 1049/2001 and not by that referred to in Article 4(2) of that regulation, which covers only legal opinions drawn up in the context of court proceedings.

16 That interpretation was rejected by the Court of First Instance; it held that it was at variance with the wording of Article 4(2), which does not include such a restriction, and that it would mean that the inclusion of legal advice among the exceptions under Regulation No 1049/2001 had no practical effect, since the Community legislature intended, in that provision, to provide for an exception relating to legal advice distinct from that relating to court proceedings. Legal advice drawn up by the Council's legal service in the context of court proceedings was already covered by the exception relating to the protection of court proceedings. Consequently, according to the Court of First Instance, the Council could legitimately rely on the exception relating to legal advice which is set out in the second indent of Article 4(2) of Regulation No 1049/2001, in order to decide whether it should give the applicant access to the legal opinion in question.

17 Secondly and in the alternative, Mr Turco submitted that there had been a misapplication of Article 4(2) of Regulation No 1049/2001, as the Council was wrong to take the view that the opinions issued by its legal service, by their very nature, merit the protection which that provision ensures. Furthermore, the Council ought not to base its decisions on presumptions of a general nature and can decide on the application of the exception concerned only on a case-by-case basis, after a specific analysis of each legal opinion whose disclosure is sought. Mr Turco also disputed the relevance of the need identified by the Council in the contested decision to protect the legal opinion in question.

18 In that regard, the Court of First Instance held that disclosure of advice such as the legal opinion in question could, first, give rise to lingering doubts as to the lawfulness of legislative acts to which such advice relates and, secondly, could compromise the independence of the opinions of the Council's legal service; thus the Council made no error of assessment in deciding that there was a general interest in the protection of legal opinions such as that in question. Furthermore, the Court of First Instance pointed out that the reasoning for the partial refusal of access to the legal opinion at issue and the decision to disclose the introductory paragraph thereof showed that the

Council had considered the content of that opinion. In this connection, the Court of First Instance stated as follows in paragraphs 69 to 80 of the judgment under appeal:

‘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 [Case C-350/92] *Spain v Council* [[1995] ECR I-1985], as well as the order in [Case T-610/97 R] *Carlsen and Others v Council* [[1998] ECR II-485], and the judgment in [Case T-44/97] *Ghignone and Others v Council* [[2000] ECR-SC I-A-223 and II-1023].

- 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.'

¹⁹ Thirdly, Mr Turco submitted, still in the alternative, that the principle of transparency constitutes an 'overriding public interest' within the meaning of Article 4(2) of Regulation No 1049/2001 and that the legal opinion in question should, in any event, have been disclosed in accordance with that principle.

²⁰ As regards that part of the plea, the Court of First Instance held, in paragraphs 82 to 85 of the judgment under appeal, that the Council was justified in considering that the overriding public interest capable of justifying the disclosure of a document

must, as a general rule, be distinct from the principles relied upon by Mr Turco, which underlie Regulation No 1049/2001 in its entirety, stating:

‘82 ... 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 ...

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.’

²¹ Consequently, the Court of First Instance dismissed the application in so far as it related to the refusal of access to the legal opinion in question.

Procedure before the Court and forms of order sought by the parties

- 22 By their appeals, the Kingdom of Sweden and Mr Turco request that the judgment under appeal be set aside in so far as it refuses to grant Mr Turco access to the legal opinion in question. The Kingdom of Sweden also requests that the Court itself give judgment in the matter by annulling the contested decision. Mr Turco on the other hand, asks that, if necessary, the case be referred back to the Court of First Instance for judgment.
- 23 By order of the President of the Court of 19 April 2005, the two appeals were joined for the purposes of the written and oral procedure and the judgment.
- 24 By order of the President of the Court of 5 October 2005, the Kingdom of the Netherlands was granted leave to intervene in support of the forms of order sought by the appellants.
- 25 The Kingdom of Denmark, the Kingdom of the Netherlands and the Republic of Finland submit that the appeals should be upheld.
- 26 The United Kingdom of Great Britain and Northern Ireland, the Council and the Commission contend that the appeals should be dismissed.

The appeals

- 27 The appeals put forward five pleas in law, the first three of which refer to the three parts of the plea in law relied on by Mr Turco at first instance.
- 28 First, Mr Turco, supported by the Kingdom of the Netherlands, submits that there was a misinterpretation of the second indent of Article 4(2) of Regulation No 1049/2001 on the part of the Court of First Instance, in that it was wrong to consider that legal opinions relating to legislative proposals could fall within the scope of that provision although only Article 4(3) of the Regulation can apply to such opinions.
- 29 Secondly, the Kingdom of Sweden and Mr Turco, supported by the Kingdom of the Netherlands and the Republic of Finland, submit that the Court of First Instance misapplied the second indent of Article 4(2) of Regulation No 1049/2001 in holding that legal opinions of the Council's legal service relating to legislative proposals are by their very nature covered by the exception laid down in that provision.
- 30 Thirdly, Mr Turco, supported by the Kingdom of the Netherlands and the Republic of Finland, submits that the Court of First Instance inaccurately interpreted and applied the notion of an overriding public interest capable, under Article 4(2) of Regulation No 1049/2001, of justifying the disclosure of a document which is in principle covered by the exception provided for in that provision in respect of the confidentiality of legal advice.
- 31 The final two pleas in law raised by Mr Turco rely, respectively, on the principle that the Community legal order is based on the rule of law and a failure on the part of the Court of First Instance to give sufficient reasons for the judgment under appeal.

Initial observations

32 Before dealing with the pleas relied on in support of the appeals, it is necessary to consider the relevant rules relating, first, to the examination to be undertaken by the Council where disclosure of an opinion of its legal service relating to a legislative process is requested and, secondly, to the statement of reasons which the Council must provide in order to justify any refusal to disclose.

The examination to be undertaken by the institution

33 Regulation No 1049/2001 seeks, as indicated in recital 4 of the preamble and Article 1, to give the public a right of access to documents of the institutions which is as wide as possible.

34 As appears from recital 1 of the preamble to Regulation No 1049/2001, that regulation reflects the intention expressed in the second paragraph of Article 1 of the EU Treaty, which was inserted by the Treaty of Amsterdam, to mark 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 recital 2 of the preamble to Regulation No 1049/2001 notes, the right of public access to documents of the institutions is related to the democratic nature of those institutions.

35 When the Council is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents of the institutions set out in Article 4 of Regulation No 1049/2001.

- 36 In view of the objectives pursued by Regulation No 1049/2001, those exceptions must be interpreted and applied strictly (see Case C-64/05 P *Sweden v Commission and Others* [2007] ECR I-11389, paragraph 66).
- 37 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.
- 38 First, the Council must satisfy itself that the document which it is asked to disclose does indeed relate to legal advice and, if so, it must decide which parts of it are actually concerned and may, therefore, be covered by that exception.
- 39 The fact that a document is headed 'legal advice/opinion' does not mean that it is automatically entitled to the protection of legal advice ensured by the second indent of Article 4(2) of Regulation No 1049/2001. Over and above the way a document is described, it is for the institution to satisfy itself that that document does indeed concern such advice.
- 40 Second, the Council must examine whether disclosure of the parts of the document in question which have been identified as relating to legal advice 'would undermine the protection' of that advice.
- 41 In that regard, it must be pointed out that neither Regulation No 1049/2001 nor its *travaux préparatoires* throw any light on the meaning of 'protection' of legal advice. Therefore, that term must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.

42 Consequently, 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.

43 The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical.

44 Third and last, 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 thereby be undermined.

45 In that respect, it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, *inter alia*, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 of the preamble to Regulation No 1049/2001, from increased openness, in that this 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.

46 Those considerations are clearly of particular relevance where the Council is acting in its legislative capacity, as is apparent from recital 6 of the preamble to 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 allowing citizens to scrutinize 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.

47 It is also worth noting that, under the second subparagraph of Article 207(3) EC, the Council is required to define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in such cases. Similarly, Article 12(2) of Regulation No 1049/2001 acknowledges the specific nature of the legislative process by providing that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States should be made directly accessible.

The requirements to be satisfied by the statement of reasons

48 The reasons for any decision of the Council in respect of the exceptions set out in Article 4 of Regulation No 1049/2001 must be stated.

49 If the Council decides to refuse access to a document which it has been asked to disclose, it must explain, first, how access to that document could specifically and effectively undermine the interest protected by an exception laid down in Article 4 of Regulation No 1049/2001 relied on by that institution and, secondly, in the situations referred to in Article 4(2) and (3) of that regulation, whether or not there is an overriding public interest that might nevertheless justify disclosure of the document concerned.

50 It is, in principle, open to the Council to base its decisions in that regard on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature. However, it is incumbent on the Council to establish in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose.

51 It is in the light of those legal considerations that the pleas on which the appellants base their appeals must be examined.

52 The second plea will be examined first.

The second plea

53 The second plea is divided into three parts, all three of which allege that the Court of First Instance misinterpreted the second indent of Article 4(2) of Regulation No 1049/2001. By the first part, the appellants submit that the Court of First Instance misconstrued that provision by not properly verifying whether the Council had examined the document in question in a sufficiently detailed manner before refusing to disclose it. By the second part, the appellants complain that the Court of First Instance accepted reasons for the refusal stated in general terms relating to all legal opinions of the Council's legal service concerning legislative acts rather than specifically to the legal opinion in question. By the third part, the appellants maintain that the Court of First Instance infringed that provision by accepting that there was a general need for confidentiality as regards legal opinions on legislative questions.

54 The Council takes the view that the first and second parts of this plea are based on a confusion between, on the one hand, the principle that each document should be assessed on the basis of its content and, on the other hand, the possibility of relying on generalised reasoning. As regards the third part of that plea, the Council maintains the position which it defended before the Court of First Instance, namely that there is a general need for confidentiality in respect of legal advice on legislative questions, since, first, the disclosure of such advice could give rise to lingering doubts as to the lawfulness of the legislative act concerned and, secondly, the independence of its legal service would be compromised by systematic disclosure of that advice.

- 55 As regards the first part of this plea, it must be held that the Court of First Instance could reasonably conclude from the fact that the Council agreed to disclose the introductory paragraph of the legal opinion in question but refused access to the rest of that opinion by relying on the protection of legal advice that that institution had indeed examined the request for disclosure of that legal opinion in the light of the latter's content and had thus at the very least completed the first stage of the examination described in paragraphs 37 to 47 of this judgment. Consequently, the first part of this plea must be rejected.
- 56 As regards the second part of this plea, the fact that the Court of First Instance accepted that reasons of a general kind could be taken into account by the Council in order to justify the partial refusal of access to the legal opinion at issue does not, as follows from paragraph 50 of this judgment, in itself invalidate the Court of First Instance's examination of that refusal.
- 57 It must, however, be pointed out, first, that the Court of First Instance did not require the Council to have checked whether the reasons of a general nature on which it relied were in fact applicable to the legal opinion whose disclosure was requested. Secondly, as will be apparent from the considerations concerning the third part of this plea which follow, the Court of First Instance erred in holding that there was a general need for confidentiality in respect of advice from the Council's legal service relating to legislative matters.
- 58 Neither of the two arguments raised in that regard by the Council and restated by the Court of First Instance in paragraphs 78 and 79 of the judgment under appeal can substantiate that assertion.
- 59 As regards, first, the fear expressed by the Council that disclosure of an opinion of its legal service relating to a legislative proposal could lead to doubts as to the lawfulness of the legislative act concerned, it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only

as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole.

60 Furthermore, the risk that doubts might be engendered in the minds of European citizens as regards the lawfulness of an act adopted by the Community legislature because the Council's legal service had given an unfavourable opinion would more often than not fail to arise if the statement of reasons for that act was reinforced, so as to make it apparent why that unfavourable opinion was not followed.

61 Consequently, to submit, in a general and abstract way, that there is a risk that disclosure of legal advice relating to legislative processes may give rise to doubts regarding the lawfulness of legislative acts does not suffice to establish that the protection of legal advice will be undermined for the purposes of the second indent of Article 4(2) of Regulation No 1049/2001 and cannot, accordingly, provide a basis for a refusal to disclose such advice.

62 As regards, secondly, the Council's argument that the independence of its legal service would be compromised by possible disclosure of legal opinions issued in the course of legislative procedures, it must be pointed out that that fear lies at the very heart of the interests protected by the exception provided for in the second indent of Article 4(2) of Regulation No 1049/2001. As is apparent from paragraph 42 of this judgment, that exception seeks specifically to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice.

63 However, in that regard, the Council relied before both the Court of First Instance and the Court on mere assertions, which were in no way substantiated by detailed arguments. In view of the considerations which follow, there would appear to be no real risk that is reasonably foreseeable and not purely hypothetical of that interest being undermined.

- 64 As regards the possibility of pressure being applied for the purpose of influencing the content of opinions issued by the Council's legal service, it need merely be pointed out that even if the members of that legal service were subjected to improper pressure to that end, it would be that pressure, and not the possibility of the disclosure of legal opinions, which would compromise that institution's interest in receiving frank, objective and comprehensive advice and it would clearly be incumbent on the Council to take the necessary measures to put a stop to it.
- 65 As regards the Commission's argument that it could be difficult for an institution's legal service which had initially expressed a negative opinion regarding a legislative act in the process of being adopted subsequently to defend the lawfulness of that act if its opinion had been published, it must be stated that such a general argument cannot justify an exception to the openness provided for by Regulation No 1049/2001.
- 66 In view of those considerations, there appears to be no real risk that is reasonably foreseeable and not purely hypothetical that disclosure of opinions of the Council's legal service issued in the course of legislative procedures might undermine the protection of legal advice within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001.
- 67 In any event, in so far as the interest in protecting the independence of the Council's legal service could be undermined by that disclosure, that risk would have to be weighed up against the overriding public interests which underlie Regulation No 1049/2001. As was pointed out in paragraphs 45 to 47 of this judgment, 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 scrutinize the information which has formed the basis of a legislative act, as referred to, in particular, in recitals 2 and 6 of the preamble to Regulation No 1049/2001.

68 It follows from the above considerations 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.

69 That finding does not 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.

70 In that context, it must also be borne in mind that, under Article 4(7) of Regulation No 1049/2001, an exception can only apply for the period during which protection is justified on the basis of the content of the document.

71 Having regard to all those considerations, it is apparent that the Court of First Instance erred in holding, in paragraphs 77 to 80 of the judgment under appeal, that the contested decision could comply with the obligation to give reasons and be justified by reference to a general need for confidentiality which applies to legal advice relating to legislative questions.

72 It follows that the second and third parts of this plea are well founded. In those circumstances, the judgment under appeal must be set aside in so far as it relates to the refusal of access to the legal opinion in question and orders Mr Turco and the Council each to pay half of the costs.

The third plea

73 It is apparent from the considerations relating to the second plea that the third plea is also well founded. This also justifies the setting aside of the judgment under appeal in so far as it relates to the refusal of access to the legal opinion in question and orders Mr Turco and the Council each to pay half of the costs.

74 As has been held in paragraphs 44 to 47 and paragraph 67 of this judgment, the Court of First Instance misinterpreted Article 4(2) of Regulation No 1049/2001 in deciding that the overriding public interest capable of justifying the disclosure of a document, must, as a rule, be distinct from the principles which underlie that regulation.

75 It is clear that the provisions of a legislative act must be applied in the light of the principles underlying it.

The first, fourth and fifth pleas

76 As the second and third parts of the second plea and the third plea have been upheld and justify the judgment under appeal being set aside in so far as it relates to the refusal of access to the legal opinion in question and to the costs incurred by Mr Turco and the Council in relation to that action, there is no need to examine the first, fourth and fifth pleas submitted by Mr Turco in support of his appeal, since those pleas cannot result in that judgment being set aside to any greater extent.

The consequences of the partial setting aside of the judgment under appeal

77 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, if the Court quashes the decision of the Court of First Instance, it may itself give final judgment in the matter, where the state of the proceedings so permits. That is the case here.

78 The contested decision was adopted on the basis of a two-fold error as regards, first, the existence of a general need for confidentiality as regards legal advice relating to legislative processes that is protected by the second indent of Article 4(2) of Regulation No 1049/2001, and, secondly, the view that the principles underlying that regulation cannot be regarded as an ‘overriding public interest’ within the meaning of Article 4(2) of that regulation.

79 It follows from paragraphs 40 to 47, 56 to 68, 74 and 75 of this judgment that the pleas relied on by Mr Turco at first instance, claiming, first, that the Council erred in taking the view that there was a general need for confidentiality with regard to the opinions of its legal service relating to legislative procedures, that general need being protected by the second indent of Article 4(2) of Regulation No 1049/2001, and, second, that the Council did not properly ascertain whether, in the present case, there was an overriding public interest, are well founded.

80 Consequently, the contested decision must be annulled.

Costs

81 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, the

Court is to make a decision as to costs. Article 69 of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 of those Rules, provides in its second paragraph that the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. The first subparagraph of Article 69(4) provides that the Member States and the institutions which intervene in the proceedings are to bear their own costs.

- 82 Since the appeals have been successful, the Council must be ordered to pay the costs relating to the appeal incurred by the Kingdom of Sweden and by Mr Turco, as applied for in their pleadings.
- 83 The Council and the other parties to the appeal are to bear their own costs relating to the proceedings on appeal.
- 84 Since the Court has, moreover, upheld the action brought by Mr Turco before the Court of First Instance, the Council must also be ordered to pay the costs incurred by Mr Turco in the proceedings at first instance, as applied for in Mr Turco's pleadings at first instance.
- 85 The Council is to bear its own costs relating to the proceedings at first instance.

On those grounds, the Court (Grand Chamber) hereby:

1. **Sets aside the judgment of the Court of First Instance of the European Communities of 23 November 2004 in Case T-84/03 *Turco v Council* in so far as it relates to the decision of the Council of the European Union of 19 December 2002 refusing Mr Turco access to opinion No 9077/02 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 and orders Mr Turco and the Council each to pay half of the costs;

- 2. Annuls the decision of the Council of the European Union of 19 December 2002 refusing Mr Turco access to opinion No 9077/02 of the Council's legal service;**

- 3. Orders the Council of the European Union to pay the costs incurred by the Kingdom of Sweden in the appeal proceedings and those incurred by Mr Turco in the appeal proceedings and the proceedings at first instance which resulted in that judgment of the Court of First Instance of the European Communities;**

- 4. Orders the Kingdom of Denmark, the Kingdom of the Netherlands, the Republic of Finland, the United Kingdom of Great Britain and Northern Ireland, the Council of the European Union and the Commission of the European Communities to bear their own costs relating to the appeal;**

- 5. Orders the Council of the European Union to bear its own costs relating to the proceedings at first instance.**

[Signatures]