

OPINION OF ADVOCATE GENERAL

POIARES MADURO

delivered on 29 November 2007 ¹(1)

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

Kingdom of Sweden

and

Maurizio Turco

v

Council of the European Union and Others

(Appeal – Access to documents of the institutions – Opinion of the Council’s legal service – Partial refusal)

1. The case before the Court of Justice arose out of two appeals brought by the Kingdom of Spain and by Mr Maurizio Turco against the judgment of the Court of First Instance of the European Communities in *Turco v Council* (2) ('the judgment under appeal'), by which that Court 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 on a proposal for a directive.

2. By their pleas in law in support of these appeals, the appellants request the Court to give a ruling on the scope and application to be given to the exception on the ground of confidentiality laid down in respect of legal advice by the second indent of Article 4(2) of Regulation (EC) No 1049/2001. (3)

I – Background to the appeal

A – The applicable legislation

3. Article 255(1) and (2) EC provides:

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

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

4. On the basis of Article 255(2) EC, the Council adopted Regulation No 1049/2001. The third, fourth, sixth and eleventh recitals in the preamble to that regulation are worded as follows:

(3) ... 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. ...’

5. 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 ... documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents’.

6. Article 2(1) of the Regulation 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’.

7. Article 4 of the Regulation, entitled '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.

...

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. ...'

B – *The facts*

8. 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.

9. On 5 November 2002, on the basis of Article 4(2) of Regulation No 1049/2001, the Council refused Mr Turco access to the opinion in question on the ground that 'given its content, the release of this document could undermine the protection of internal legal advice to the Council' and that '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'.

10. On 22 November 2002, Mr Turco made a confirmatory application 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 constituted an overriding public interest in the disclosure of the opinion of the Council's legal service.

11. By decision of 19 December 2002, 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. As to the remainder, it refused to revise its position. It justified its confirmation of refusal of access on the grounds that the independent 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, and that, furthermore, disclosure of the legal service's opinions could create uncertainty regarding the legality of legislative acts adopted further to those opinions, such as to undermine the presumption of legality which such acts enjoy and, therefore, to jeopardise the legal certainty and stability of the Community legal order. As for the overriding public interest put forward by Mr Turco, it is not, according to the Council, constituted by the mere fact that the disclosure of those opinions given in the context of the debate on legislative initiatives would increase the transparency and openness of the decision-making process, as the same could be said of all written opinions or similar documents of the Council's legal service, thereby making it practically impossible for the Council to refuse access under Article 4(2) of Regulation No 1049/2001 and thus depriving that provision of practical effect.

12. 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 Council's decision of 19 December 2002.

C – *The judgment under appeal*

13. In support of his claim for annulment, the applicant raised a single plea in law relating to infringement of Article 4(2) of Regulation No 1049/2001, which he substantiated with three arguments.

14. Primarily, he submitted that there had been an error as to the legal basis, since legal opinions drawn up in the context of the examination of legislative proposals are 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) which covers only legal opinions drawn up in the context of court proceedings. That interpretation defended by the applicant did not convince the Court of First Instance which held that it was at variance with the wording of the provision, 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 Article 4(2) of that regulation, to provide for an exception relating to legal advice distinct from that relating to court proceedings. In fact legal advice drawn up by the Council's legal service in the context of court proceedings is already included in 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 relevant opinion of its legal service.

15. In the alternative, the applicant 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 all the opinions issued by its legal service merit the protection of the confidentiality of legal advice which that provision ensures, when, far from being able to make categorisations, it can decide on the application of the exception only in each individual case, having regard to a specific analysis of each legal opinion. The applicant also disputed the relevance of the need to protect the legal opinion in question, which was identified by the Council in the contested decision. In reply to the first point, the Court of First Instance acknowledged that the fact that the document in question is a legal opinion cannot, of itself, justify the refusal of access because the Council 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. Furthermore, according to the Court of First Instance, the reasoning given by the Council for its refusal to disclose the entirety of the legal opinion in question seems to relate to all of its legal service's advice on legislative acts and not specifically to the legal opinion in question. The applicant's arguments were, however, rejected for two reasons: the generality of the reasoning was justified by the fact that giving additional information, making particular reference to the contents of the legal opinion in question, would deprive the exception of its purpose, and the fact that the Council finally agreed to disclose the introductory paragraph of the opinion indicates that it considered its content before giving a decision on the request for access. As regards the challenge to the existence of an interest in the protection of the legal opinion in question, which was relied on by the Council, the Court of First Instance discounted any error of assessment, on the grounds that the disclosure of that opinion, firstly, would make public the Council's internal discussions on the question of the legality of the legislative act to which it related and therefore, 'given the particular nature of such documents', give rise to lingering doubts as to that legality and, secondly, could compromise the independence of the opinions of the Council's legal service.

16. Lastly, the applicant complained that the Council did not examine whether there was an overriding public interest, in particular that related to the transparency of the decision-making process and to the principles of openness and democracy, which would justify public access to legal opinions relating to legislative initiatives. There too, the Court of First Instance discounted any error of assessment and made two findings. The principles of transparency, openness and democracy underlie all the provisions of Regulation No 1049/2001, with the result that the overriding public interest mentioned in Article 4(2) of that regulation must, as a rule, be distinct from those principles or, at the very least, the applicant must show, which he failed to do in the present case, 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 requested. Furthermore, it is for the applicant who intends to rely on an overriding public interest capable of justifying the disclosure of a legal opinion to invoke it in his application so as to invite the institution to give a decision on that point, although the institution may itself identify an overriding public interest of that kind.

17. Since none of the arguments put forward by the applicant found favour with the Court of First Instance, it dismissed the action for annulment of the refusal of access to the opinion of the Council's legal service, by judgment of 23 November 2004.

II – Analysis of the appeals

18. The Kingdom of Sweden and Mr Turco have appealed before the Court of Justice against that judgment of the Court of First Instance. In support of their appeals, the appellants raise pleas in law which, in essence, call in question the reasoning followed by the Court of First Instance in rejecting the arguments which had been put forward at first instance. Mr Turco claims, first, that there was a misinterpretation of the second indent of Article 4(2) of Regulation No 1049/2001, as the Court of First Instance wrongly held that legal opinions relating to draft legislation could fall within the scope of that provision although only Article 4(3) of the Regulation can apply to such opinions. Secondly, Mr Turco and the Swedish Government 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 draft legislation are by definition covered by the exception laid down by that provision in favour of legal advice. Thirdly, the appellants claim that the Court of First Instance misinterpreted and misapplied the concept of an overriding public interest capable of justifying the disclosure of a document which is in principle covered by the exception on the ground of confidentiality provided for in respect of legal advice.

19. Before dealing in detail with those pleas, I must quickly refute the final two pleas in law raised by Mr Turco. Mr Turco claims, first, in essence, that the Court of First Instance contravened the principle of a community governed by the rule of law. By accepting that access to a legal opinion may be refused on the ground that its disclosure could give rise to lingering doubts as to the lawfulness of the legislative act to which it relates, (4) the Court of First Instance favoured the view of a stable legal order based on unlawful acts. It is evident that that argument cannot succeed. By the grounds which the appellant has called in question, the Court of First Instance highlighted the risk that the subjective opinion of the Council's legal service on the lawfulness of a legislative act might, if disclosed, fuel challenges before the courts which may prove to be misplaced. On the other hand, that opinion in no way prejudices the lawfulness of the legislative act to which it refers. The role of the legal service is limited to providing the Council with assistance in its assessment *ex ante* of the lawfulness of an act, but it is not the arbiter of the legality of the acts which that institution adopts, since only the Court of Justice has the power to give a legally binding ruling on that point. Moreover, that is the reason why the Council is perfectly entitled to disregard an unfavourable opinion from its legal service, even though, politically, it would have more difficulty in doing so if the opinion were published. Paradoxically, however, as the Council correctly points out, making its opinions public would be likely to prejudice the independence and the candour with which its legal service issues them and, therefore, the benefit which the institution may derive from them in its *a priori* assessment of the lawfulness of an act.

20. Mr Turco also complains that the Court of First Instance failed to give sufficient reasons in that it did not deal with some of his arguments relating to the independence of the Council's legal service. However, for the purpose of ruling on the application of the exception relating to legal advice, the Court of First Instance did not have to rule on the independence of that legal service or of its members, but on the extent to which the disclosure of its legal opinions could affect the independence, that is to say the sincerity with which it is required to give them. The Court of First Instance ruled on that point by finding that the 'independence of the opinions of [the] legal service' can justify a refusal to disclose. (5) Furthermore, the Court of First Instance cannot properly be criticised for failing to discuss, for the purposes of that assessment, the applicant's assertion that the disclosure of the opinions of the Council's legal service would help to protect that service from improper external influences since, as the Court of First Instance rightly pointed out, the applicant had put forward no explanation in support of it. (6) In that regard it should be borne in mind that 'although the Court of First Instance is required to give reasons for its decisions, it is not obliged to respond in detail to every single argument advanced by a party, particularly if the argument is not sufficiently clear and precise'. (7)

21. Let us come back now to the main points of the appellants' arguments. For the purposes of clarity in the examination of the substance of the appeal, rather than set out each plea in turn, I will divide my analysis into two stages. First I will examine

whether the legal opinions of the Council's legal service relating to draft legislation are covered by the exception set out in the second indent of Article 4(2) of Regulation No 1049/2001 or by that provided for in Article 4(3) thereof. Then I will consider the way in which the second indent of Article 4(2) is to be applied.

A – *The scope of the second indent of Article 4(2) of Regulation No 1049/2001*

22. Does the exception to the right of access to documents, laid down in the second indent of Article 4(2) of Regulation No 1049/2001 in favour of legal advice, cover only legal advice issued in the context of court proceedings? That is Mr Turco's opinion. Thus, according to Mr Turco, the Court of First Instance erred in law in holding that it was lawful for the Council, on the basis of that provision, to refuse access to the legal opinion drawn up by the Council's legal service on the proposal for a Directive laying down minimum standards for the reception of applicants for asylum in Member States. Mr Turco maintains that only Article 4(3) of Regulation No 1049/2001 can provide a basis for a refusal to disclose legal opinions issued by the Council's legal service relating to draft legislation.

23. That argument does not stand up to scrutiny. I am in agreement with the Court of First Instance in considering that the wording of Article 4(2) of Regulation No 1049/2001, the origin of the reference to legal advice in that provision and the practical effect of that reference all militate in favour of not regarding that exception as (only) protecting legal advice drawn up in the context of court proceedings.

24. First the literal interpretation. The wording of the second indent of Article 4(2) of Regulation No 1049/2001 refers generally to the protection of 'legal advice'. The wording used does not state that only legal advice relating to court proceedings would be covered, as would wording such as 'court proceedings and in particular legal advice' or 'legal advice provided in the course of court proceedings'. Accordingly, where the legislature makes no distinction, no distinction should be made. Admittedly, it is apparent from settled case-law that exceptions to the principle of the widest possible public access to documents held by the institutions must be interpreted and applied strictly. (8) Mr Turco infers from this that it should be possible to refuse access to legal opinions given by the legal services of the institutions on draft legislation only by virtue of the more limited exception in Article 4(3) of Regulation No 1049/2001. That exception is indeed applicable only to cases where disclosure of a document 'would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure', while under Article 4(2) access to a document is refused where disclosure 'would undermine the protection of ... legal advice ... unless there is an overriding public interest in disclosure' of that document. The appellant also bases that inference on teleological considerations connected with recital 6 in the preamble to Regulation No 1049/2001, in the words of which '[w]ider access should be granted to documents in cases where the institutions are acting in their legislative capacity'. However, the principles of a strict interpretation of the exceptions and of a wide interpretation of the right of access apply only where there is a need for interpretation. *In claris non fit interpretatio*. As the Court of First Instance correctly pointed out, (9) the reference to 'legal advice' does not raise any difficulty of interpretation.

25. That outcome, which is apparent from the wording of Article 4(2) of Regulation No 1049/2001, is reinforced by the lessons provided by the history of the reference to legal advice in that provision. The legislation which, prior to Regulation No 1049/2001, governed the right of access to documents provided expressly for an exception on the ground of confidentiality only in respect of the protection of court proceedings and not in favour of the protection of the legal advice of the institutions. (10) That is why the Community legislature intended to provide, in Regulation No 1049/2001, for an exception relating to legal advice alongside that relating to court proceedings.

26. If that express reference to legal advice is intended to have a practical effect, it must be agreed that it does not cover only legal advice drawn up in the context of court proceedings, quite the reverse. In the legislative context of the right of access to documents prior to Regulation No 1049/2001, the Court of First Instance had held that the protection of court proceedings covered 'not only the pleadings or other documents lodged, internal documents concerning the investigation of the case before the court, but also correspondence concerning the case between the Directorate-General concerned and the Legal Service or a lawyers' office'. (11) There is, *prima facie*, no reason to depart from that understanding of the expression 'court proceedings' in the context of the new legislative instrument constituted by Regulation No 1049/2001, (12) because it was with knowledge of that case-law meaning of 'court proceedings' that the reference to 'legal advice' was added to that regulation.

27. Accordingly, as the Court of First Instance correctly pointed out, (13) since legal advice drawn up in the context of court proceedings is already included in the exception relating to the protection of court proceedings laid down in the second indent of Article 4(2) of Regulation No 1049/2001, the exception relating to 'legal advice' provided for in the same provision must necessarily have a distinct meaning and cover legal opinions issued by the legal services of the institutions in respect of draft legislation.

28. Mr Turco however submits that the insertion of 'legal advice' in Regulation No 1049/2001 is designed solely to clarify the scope of the exception relating to the protection of court proceedings as interpreted in *Interporc v Commission*. However, if that were the case, another formulation of the kind already mentioned above would undoubtedly have been used by the drafters of that regulation, such as 'court proceedings and in particular legal advice'. Furthermore, the applicant's assertion is disproved by the drafting history of Regulation No 1049/2001. That history clearly indicates that there was no intention at all to establish a link between 'court proceedings' and 'legal advice', but that the purpose of inserting 'legal advice' was to enshrine in legislation the judicial approach (14) which, in order to protect the confidentiality of the opinions of the legal services of the institutions relating to draft legislation, had added to the categories of public interest expressly referred to by the legislative instruments then in force governing the right of access to documents those of 'the stability of the Community legal order' and the 'proper functioning of the institutions'. (15) As the Council has pointed out, the initial Commission proposal for a regulation provided for two separate exceptions, relating to the stability of the Community's legal order and 'court proceedings'. (16) The first exception was subsequently reworded to include 'the ability of the institutions to seek the advice of their legal services' (17) and, following legislative discussion, the wording was finally abridged and clarified to become that in Regulation No 1049/2001. (18)

B – *The application of the second indent of Article 4(2) of Regulation No 1049/2001*

29. Even if the legal opinions of the legal services of the institutions relating to draft legislation were covered by the exception on the ground of confidentiality provided for in the second indent of Article 4(2), both of the appellants complain that the Court of First Instance applied that exception broadly, which goes against the principle of the widest possible access to documents of the institutions, first, by holding that all legal opinions are by definition protected by that exception and, secondly, by excessively restricting the scope of the limit to the exception, related to the existence of an overriding public interest capable of nevertheless

justifying the disclosure of the legal opinion requested. I will examine those two points in turn.

30. The task promises to be difficult. The second indent of Article 4(2) of Regulation No 1049/2001 is one of those provisions whose application can seem to be mission impossible. The legislature has in fact sought to bring together in the same legislative space two requirements which are perfectly contradictory and difficult to reconcile, irresistibly calling to mind Elizabeth Taylor's words to Paul Newman in the film *Cat on a Hot Tin Roof*, based on the play by Tennessee Williams: 'I'm not living with you. We occupy the same cage, that's all'. The Court will scarcely be able to do more than attempt to reduce as much as possible the discomfort of cohabitation in that legislative 'cage'.

1. The question of the application on a case-by-case basis of the exception on the ground of confidentiality laid down in respect of legal advice

31. According to both appellants, the Court of First Instance erred in upholding the existence of a general need for confidentiality in respect of legal opinions, resulting in the exclusion of those opinions as a document category from the right of access. In doing so, it failed to have regard to the requirement for an individual and specific examination since a request for access can be refused only in the light of the content of each document requested. That plea cannot be upheld as it is based in part on an incorrect reading of the judgment under appeal and in part on an incorrect understanding of the scope of the exception relating to legal advice.

a) The principle of a case-by-case examination

32. It is, admittedly, apparent from well-established case-law that access to documents which have been requested can be refused only following an assessment, carried out in respect of each document requested, to determine, in the light of the information which it contains, whether its disclosure would actually undermine a public interest protected by an exception on the ground of confidentiality. That requirement for a specific and individual examination stems firstly from the principle that the exceptions to the right of access must be interpreted and applied strictly. (19) It is also imposed by the principle of proportionality which requires an institution to contemplate partial access to a document for the purpose of disclosing items of information therein which are not covered by an exception to the access to documents; (20) confidentiality can be extended only in so far as is necessary to protect the public interest justifying the derogation from the principle of transparency. Those approaches, which were already current under the law as it stood prior to Regulation No 1049/2001, are all the more valid under that regulation, in so far as the regulation seeks to govern the exercise of a right which, due to its being enshrined in Article 255 EC by the Treaty of Amsterdam, has acquired the status of a fundamental right. (21) It thus comes as no surprise that the case-law has transposed them into the context of the application of Regulation No 1049/2001. According to the Community judicature, as the purpose of that piece of legislation is to give the fullest possible effect to the right of public access to documents held by the institutions, the exceptions on the ground of confidentiality which are provided for must be interpreted and applied strictly. (22) It follows that the examination required for the purpose of processing a request for access to documents must, first, be specific in nature because the mere fact that a document concerns an interest protected by an exception is not sufficient to justify application of that exception and, in addition, the institution to which the request is made must have previously assessed, having regard to the items of information which the document contains, whether access to the document was likely specifically and actually to undermine the protected interest, and the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. The examination must also be individual in nature and be carried out in respect of each document requested because only such an examination can enable the institution to assess the possibility of granting the applicant partial access. (23)

33. In the present case, however, the Court of First Instance, far from permitting the Council, as the appellants allege, to carry out an abstract and overall assessment of the risk of undermining the protection of legal advice which disclosure of the document requested would have created, acted in accordance with the principles set out above. After expressly pointing out the Council's obligation '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', (24) it investigated whether that institution had correctly fulfilled that obligation.

34. For that purpose, the Court of First Instance first satisfied itself that the document requested was indeed a legal opinion and found that it was 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'. (25) However, the Court of First Instance did not limit the requirement of a case-by-case examination to that. It also investigated whether 'the Council has made an error of assessment in finding ... that the disclosure of the legal opinion in question would undermine the protection to which that type of document may be entitled' because 'the fact that the document in question is a legal opinion cannot, of itself, justify application of the exception relied upon'. (26) In addition, it was only after noting that the Council had finally disclosed the introductory paragraph of the legal opinion in question that the Court of First Instance rejected the complaint that the Council had not considered the content of the opinion for the purpose of giving a decision on the request for access in question.

35. The approach of the Court of First Instance must be commended. The response to be given to an application for access must be assessed 'on the basis of the actual information contained in the documents' and not by reference to categories of documents. Thus, it is not because a document is an opinion of the Council's legal service relating to draft legislation or because it is headed 'legal opinion' that it must automatically enjoy the protection of the confidentiality of legal advice which is guaranteed by the second indent of Article 4(2) of Regulation No 1049/2001. Going beyond its drafter and its name, it is necessary to ensure that it does contain a legal opinion. If that is indeed the case, it is also important to draw a distinction between the arguments which, in the opinion, constitute general legal considerations and indicate its subject-matter, and those which actually express the opinion of the legal service on the legality of the draft legislation. Given the requirement to accommodate the possibility of partial access, the former must be disclosed, and the Court of First Instance satisfied itself that this had been done by pointing out that the Council had finally communicated to Mr Turco the introductory paragraph which stated that the opinion in question contained 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. (27)

36. It is true that not only must a specific and individual assessment be carried out, but also that compliance with that obligation must be apparent from the grounds of the decision to refuse access. The statement of reasons given by the institution to justify a refusal of access cannot thus as a rule be limited to general assessments in respect of the nature or the type of documents of which the document requested is one, but must be based on items of information which are actually to be found in that document. (28) However, it is apparent from the case-law that a general statement of reasons referring to a category of documents is acceptable in cases where it proves impossible to give specific reasons justifying the refusal of access to a

document without disclosing the content of the document or an essential aspect of it and, accordingly, by undermining the interest which the exception on the ground of confidentiality is designed to protect, depriving the exception of its very purpose. (29) That is why Mr Turco cannot justifiably complain that the Court of First Instance did not require the Council to provide a statement of reasons specific to the document requested. It is true that the Court of First Instance expressly acknowledged that the considerations set out by the Council to justify the refusal of access constituted reasoning applicable to all the Council's legal advice on legislative acts and not specifically to the opinion in question. It nevertheless found that the generality of the reasoning was justified in the present case '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 [purpose]'. (30)

b) The limits of a case-by-case examination

37. The approach of the Court of First Instance must also be properly understood. The generality of the statement of reasons for the refusal of access given by the Council in the present case is also accounted for because the requirement for a specific and individual examination of applications for access to legal advice cannot be without limits. Everything in the document requested which is the expression of the opinion of the legal service on the legality of the draft legislation, that is to say everything constituting the legal advice proper, is as a general rule protected by the second indent of Article 4(2) of Regulation No 1049/2001. Nothing but the legal advice, but all the legal advice, is covered by that provision. A case-by-case examination is thus designed only to establish to what extent the document requested is within the scope of the exception on the ground of confidentiality provided for in favour of legal advice, that is to say to identify that, in the document, which expresses the legal advice. The second indent of Article 4(2) of Regulation No 1049/2001 established a general presumption of confidentiality in respect of the legal advice given by the legal services of the institutions on draft legislation, precisely for the reasons put forward by the Council in the present case to justify its decision refusing access to the legal opinion requested.

38. A short historical summary of that provision is sufficient to demonstrate that. Advocate General Jacobs had already suggested that an opinion given by the Council's legal service may not, without the express authorisation of the Council, be invoked by a party before the Court because its disclosure 'would obviously be prejudicial to the public interest in the provision of independent legal advice'. (31) As I have already mentioned, (32) the Community judicature itself, less than three years later, had adopted an exception on the ground of confidentiality in respect of opinions of the legal services of the institutions concerning draft legislation on the ground that 'were documents of that nature to be disclosed, the discussions and exchange of views within the institutions on the legality and scope of the legal measure to be adopted would be made public and hence, ..., the Council might lose all interest in requesting the Legal Services for written opinions'; on the ground in other words 'that disclosure of those documents could give rise to uncertainty with regard to the legality of Community measures and have a negative effect on the functioning of the Community institutions'. (33) Thereafter, the Community judicature had also justified that exception by 'public policy, which requires that the institutions can receive the advice of their legal service, given in full independence'. (34) As I have already pointed out, that is the judicial approach which the legislature endorsed in Regulation No 1049/2001.

39. A principle of non-disclosure of legal advice was thus laid down, which covers inter alia all the legal assessments given by the legal services of the institutions in respect of draft legislation. Even though some Member States, such as the Kingdom of Sweden, have provided for the opposite approach in their national legislation, that principle of non-disclosure is the result of a political choice on the part of the Community legislature which has let itself be convinced by the reasons pointed out above.

40. The interest protected by the exception on the ground of confidentiality which is provided for in respect of legal advice justifies as a general rule the secrecy of all the legal opinions of the legal services of the institutions in respect of draft legislation. Access to any of those opinions is capable of specifically and actually undermining the ability of an institution to get an opinion from its legal service which is frank, objective, comprehensive and, therefore, of use to the institution for the purpose of assessing the legality of a piece of legislation. The disclosure of such an opinion would mean that the legal service would display reserve and caution in drafting it, so as not to affect the institution's scope for decisions. Its usefulness to the institution would be appreciably weakened. What is more, it is to be feared that the possibility of its legal opinions being disclosed may cause a legal service henceforth to express the main points only orally, which would reduce transparency even more than does the application of the principle of non-disclosure of legal advice. It should be remembered that the best can sometimes be the enemy of the good. Furthermore, where the institution chose not to follow a negative opinion from its legal service, the disclosure of that opinion could, in the event of a subsequent challenge before the courts, harm the institution's capacity to defend its action, particularly as it would be represented by its legal service.

41. Contrary to what both appellants maintain, there is thus no need to draw a distinction between the legal assessments in a legal opinion which deserve the protection provided for in the second indent of Article 4(2) of Regulation No 1049/2001 and those which do not. It would in particular be contrary to the interest protected to seek to distinguish between 'positive' or 'inoffensive' opinions, which should be disclosed, and 'negative' or 'sensitive' opinions, which should remain confidential. As the Council correctly contended, a refusal to disclose would indicate that it was a negative opinion and would bring with it all the harmful effects already mentioned and which the exception on the ground of confidentiality specifically seeks to avoid. Nor is it possible to follow the Swedish Government, according to which it is necessary to take account of the stage reached in the deliberations on a legislative act. In that regard also, the Council correctly contended that the legality of a legislative act can be challenged at any time by means of a reference for a preliminary ruling or a plea of illegality. On that point I can only completely agree with the finding of the Court of First Instance according to which 'given the special nature of opinions of the Legal Services, it would not appear that those documents are bound, over the years, to lose their confidential character'. It added that 'their disclosure could still be detrimental to the public interest in the stability of the Community legal order and the proper functioning of the Community institutions, inasmuch as time is not likely to alter the reasons ... justifying such an exception to the right of access'. (35) Considerations relating to the passage of time cannot thus make it possible to challenge effectively the fact that Regulation No 1049/2001 laid down a principle of non-disclosure in respect of all legal advice. That does not mean, however, that those considerations have no bearing but, as will be seen, the time which has passed can be taken into account only at the stage of assessing an overriding public interest which would justify the disclosure of a legal opinion by way of derogation from the confidentiality which it enjoys as a general rule.

42. It is apparent that it is in the very nature of the public interest which underlies the exception provided for in the second indent of Article 4(2) of Regulation No 1049/2001 to protect the confidentiality of all legal opinions given in respect of draft legislation. The Court of First Instance was thus justified in holding that the disputed refusal of access was lawful 'given the particular nature of such documents' and because 'the independence of the opinions of [a] legal service ... can constitute an interest to be protected'. (36)

43. Thus, although there is no doubt, as the Court of First Instance ruled on another occasion, that 'the obligation for an institution to undertake a concrete, individual assessment of the content of the documents covered in the application for access is an approach to be adopted as a matter of principle ..., which applies to all the exceptions in paragraphs 1 to 3 of Article 4 of Regulation No 1049/2001, whatever may be the field to which the documents sought relate', (37) the extent to which that requirement applies in connection with the implementation of the exception on the ground of confidentiality in respect of legal advice and in connection with the application of the other exceptions differs. In the latter cases, whether the disclosure of a document may actually be detrimental to the interest protected depends not only on the subject-matter of the document, but also on the nature of the information it contains. For example, it is not because a document relates to an inspection or investigation that its disclosure would automatically endanger the completion of that action and thus undermine the protection of the purpose of inspections or investigations. (38) Likewise, the fact that a document contains information or negative evaluations about the political situation or the protection of human rights in a third country does not necessarily mean that its disclosure would affect the Union's international relations. (39)

44. I readily admit that the analysis which I am suggesting imposes significant limits on the case-by-case examination of the exception on the ground of confidentiality in respect of legal advice. That is, however, once again, merely the consequence of the difficulty of giving a practical effect and a reasonable meaning in practice to a perfectly contradictory legislative formulation.

45. It follows from the above that the Court of First Instance did not fail to have regard to the requirement for an individual and specific examination of the documents requested for the purposes of applying the exception on the ground of confidentiality in respect of legal advice.

2. The exception to the exception, based on the existence of an overriding public interest

46. The confidentiality of legal advice cannot however be absolute. The principle of non-disclosure of that advice which is laid down by the second indent of Article 4(2) of Regulation No 1049/2001 must, according to the wording of that provision, give way if an 'overriding public interest' none the less justifies the disclosure of the document requested. Moreover, it is also for the purpose of weighing the interest protected by the exception to the right of access provided for in favour of legal advice against possible overriding public interests that a specific examination of the document requested is necessary. (40)

47. In that regard, Mr Turco complains that the Court of First Instance erred in finding that the overriding public interest capable of justifying the disclosure of a document must, as a rule, be distinct from the principles underlying Regulation No 1049/2001, that is to say, the principles of transparency, openness and democracy or of the participation of citizens in the decision-making process, unless the applicant shows that, having regard to the specific facts of the case, the invocation of those principles is so pressing that it overrides the need to protect the document in question. He also complains that the Court of First Instance made it impossible for itself to ascertain whether the Council had properly weighed the overriding public interest against the need for protection of legal advice by not ordering that the legal opinion in question be produced.

a) The identification of the overriding public interest

48. The first complaint referred to above raises the sensitive question of the nature of the 'overriding public interest' within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001 which would justify the disclosure of a legal opinion by way of derogation from the confidentiality which that kind of document is as a rule guaranteed. Is this a question of the public interest in access to documents which, in the specific circumstances of the present case, would prevail over the public interest which demands that legal advice be protected, or of a public interest which is different from and superior to the public interest in access to documents?

49. By favouring the latter option, the Court of First Instance made the applicant responsible for the task of identifying a public interest which is different from and superior to the public interest in transparency, openness, democracy and the participation of citizens in the decision-making process. That is a task so formidable that there is hardly any likelihood that access to a document would ever be granted on the ground that there is an overriding public interest. (41) An applicant comes up against the insuperable difficulty of identifying public interests which would be of more importance than the 'usual' public interest connected with transparency.

50. However, that interpretation of the wording of Regulation No 1049/2001 is not necessary. The argument put forward by the Court of First Instance that, in so far as the principles of transparency, openness, democracy and the participation of citizens in the decision-making process underlie all the provisions in that regulation, the overriding public interest capable of justifying the disclosure of a document by way of derogation from the general confidentiality of legal advice must, as a rule, be distinct from those principles does not convince me. In actual fact, what is imposed, in my opinion, by the last phrase in Article 4(2) of Regulation No 1049/2001 is the obligation, for the institution concerned, to weigh the public interest protected by the exception on the ground of confidentiality against the public interest in access to documents, in the light of the content of the document requested and the specific circumstances of the case. In other words, the ratio legis of that provision, so far as concerns the exception on the ground of confidentiality in respect of legal advice, is that, although the public interest which underlies the protection of legal advice prevails as a rule over the public interest in access to documents, an analysis of the circumstances of the case and of the content of the legal opinion requested may tip the scales in the opposite direction.

51. That is also the interpretation which Advocate General Geelhoed defended in taking the view that it 'is clear from the explicit wording' of Article 4(2) and (3) of Regulation No 1049/2001 that those provisions 'require institutions, in considering whether access to documents should be refused, to balance the particular interest to be protected by refusing disclosure (e.g. protection of commercial interests, court proceedings or the institutions' decision-making process) against the general, public interest in the document concerned being made accessible'. (42) It is also more in that direction that the case-law of the Court of First Instance subsequent to the judgment under appeal seems to be moving. Referring to the exceptions laid down in Article 4(3), the Court of First Instance points out that they give the institutions a discretion 'which allows them to balance, on the one hand, their interest in maintaining the confidentiality of their deliberations against, on the other hand, the interest of the citizen in gaining access to documents'. (43)

52. It seems to me that that is the only reading capable of giving any effect to the exception to the exceptions on the ground of confidentiality, based on the existence of an overriding public interest. The illustrations of overriding public interests provided by the Council at the hearing demonstrate that. Even though the Council shares the Court of First Instance's analysis that those

interests must be distinct from the principles underlying Regulation No 1049/2001, the illustrations make clear the difficulty, it not the impossibility of the distinction. For example, the possibility, which was referred to, of disclosing non-controversial legal advice: it is explained by the fact that the objective of the protection of legal advice, which consists in the preservation of an institution's ability to obtain frank and independent advice and the desire not to provide challenges in respect of the legality of a legislative act, does not require the confidentiality of that advice, with the result that the public interest in access to documents regains precedence. Similarly, the case of legal opinions issued for publication, which is justified by the fact that disclosure has the specific aim of cutting short any discussion on the legality of the institution's action.

53. Likewise, the passage of time must be taken into account by the institution concerned in so far as it may lessen the intensity of the public interest considerations justifying the general confidentiality of legal advice to the point of tipping the scales in favour of the public interest in transparency. That could in particular be the case where the legislative act which had been the subject of the legal opinion requested has, in the meantime, been repealed.

54. In the present case, the Council thus had to balance the need to protect legal advice, related to the safeguarding of the stability of the Community legal order and the independence of the advice of its legal service, against the public interest in transparency. That duty of striking a balance, which lies with the institution concerned, cannot be limited, contrary to the findings of the Court of First Instance in the judgment under appeal, (44) to the prior demonstration by the applicant that, having regard to the specific facts of the case, the principle of transparency is so pressing that it overrides the need to protect the legal opinion in question. That would be to forget that one of the fundamental reasons for the specific and individual examination imposed on the institution concerned lies in that duty of balancing public interests. (45) It would above all place on the applicant a burden of proof which is far too heavy: how could he show the interest in disclosing a legal opinion notwithstanding the general interest in keeping it confidential when he does not know its content? He will, as in the present case, more often than not be reduced to relying on the overriding public interest in general terms. Only the Council can, – and must –, carry out such an assessment on the basis of the content of the document in question and of the specific circumstances of the case. Moreover, in a decision subsequent to the judgment which is the subject of the present appeal, the Court of First Instance seems no longer to wish to place such a burden of proof on the applicant. It held that the fact that a party requesting access does not invoke a public interest distinct from the principles of transparency and democracy 'does not automatically imply that it is unnecessary to weigh up the interests at stake' in so far as 'the invocation of those same principles may, in the light of the particular circumstances of the case, be so pressing that it overrides the need to protect the documents in question.' (46)

55. By holding that the overriding public interest capable of justifying the disclosure of a document must, as a rule, be distinct from the principles of transparency, openness and of democracy or of the participation of citizens in the decision-making process which underlie Regulation No 1049/2001, unless the applicant adduces evidence to establish 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 requested, the Court of First Instance thus misinterpreted the last phrase of Article 4(2) of Regulation No 1049/2001 and, consequently, erred in law.

b) The review of the balancing of public interests

56. Mr Turco, supported by the Netherlands Government, also complains that the Court of First Instance did not grant his application for measures of organisation of procedure to have the Council asked to submit the legal opinion in question to the Court of First Instance. In so doing, that Court did not give itself an opportunity to review whether the Council had properly assessed the opposing public interests. It is, in fact, for that Court of First Instance to review the Council's balancing of public interests which is required by the use of the exception on the ground of confidentiality in respect of legal advice, whilst leaving to that institution a wide discretion. Effective judicial review will normally require the Court of First Instance to have become aware of the content of the legal advice in question, whilst keeping it confidential from the applicant, as permitted under Article 67(3) of its Rules of Procedure. Moreover, for that purpose, the Court of First Instance generally calls on the institution concerned to produce the legal opinion in question. (47) The usefulness of such a measure of organisation of procedure still, however, depends on an assessment to be carried out by the Court of First Instance in each case. In the present case, since, as has been demonstrated, the Court of First Instance misinterpreted the concept of an overriding public interest which would justify a derogation from the confidentiality of legal advice, it is neither necessary nor even possible to give an opinion on the merits of the plea raised by Mr Turco in that regard.

III – Judgment on the substance of the case

57. Under Article 61 of the Statute of the Court, if the appeal is well founded, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits. That applies in the present case. It is apparent from the statement of reasons in the contested decision that the Council refused to disclose the legal opinion in question in the name of the overriding public interest relied on by Mr Turco because it took the view that the overriding public interest referred to in the last phrase of Article 4(2) of Regulation No 1049/2001 cannot be constituted by the public interest in transparency and in the openness of the decision-making process. On the basis of that legally flawed analysis, the Council did not assess whether the public interest in transparency might not, in the present case, prevail over the need for protection which, as a rule, justifies the confidentiality of legal advice and, thus, justify the disclosure of the legal opinion requested. Consequently, the plea in law raised by Mr Turco at first instance, according to which the Council did not examine the existence of the overriding public interest which he was invoking, is well founded. On those grounds, the contested decision refusing disclosure must be annulled.

IV – Conclusion

58. On the grounds set out above I suggest that the Court should:

- 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* as being vitiated by a breach of Community law consisting in a misinterpretation and a misapplication of the last phrase 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;
- annul the decision of the Council of 19 December 2002 which refused Mr Maurizio Turco access to the opinion of its legal service on a proposal for a directive laying down minimum standards for the reception of applicants for asylum in Member States.

1 – Original language: French.

2 – Case T-84/03 *Turco v Council* [2004] ECR II-4061.

3 – 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).

4 – See paragraph 78 of the judgment under appeal.

5 – Judgment under appeal, paragraph 79.

6 – Ibidem.

7 – Case C-197/99 P *Belgium v Commission* [2003] ECR I-8461, paragraph 81, and judgment of 11 January 2007 in Case C-404/04 P *Technische Glaswerke Ilmenau v Commission*, not published in the ECR, paragraph 90.

8 – For a recent restatement, see Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 63, and Case T-36/04 *API v Commission* [2007] ECR II-0000, paragraph 53.

9 – Paragraph 61 of the judgment under appeal.

10 – See code of conduct concerning public access to Council and Commission documents of 6 December 1993 (93/730/EC) (OJ 1993 L 340, p. 41); Council Decision 93/731/EC of 20 December 1993 (OJ 1993 L 340, p. 43); Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 (OJ 1994 L 46, p. 58); and European Parliament Decision 97/632/EC, ECSC, Euratom of 10 July 1997 (OJ 1997 L 263, p. 27).

11 – Case T-92/98 *Interporc v Commission* [1999] ECR II-3521, paragraph 41.

12 – The Court of First Instance has, moreover, explicitly held that this is the case: see Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2006] ECR II-2023, paragraph 89, and *API v Commission*, paragraph 60.

13 – Paragraph 65 of the judgment under appeal.

14 – See the Order of the President of the Court of First Instance in Case T-610/97 R *Carlsen and Others v Council* [1998] ECR II-485.

15 – Academic legal writing has not, moreover, been mistaken in regarding that as a restatement of the approach in *Carlsen*: see in particular, De Leeuw, M.E., 'The regulation on public access to European Parliament, Council and Commission documents in the European Union: are citizens better off?', *ELR* Vol. 28 (2003), no 3, p. 324, 334, and Peers, S., 'The new regulation on access to documents: a critical analysis', *YEL* 2002, p. 385, 400.

16 – Proposal for regulation 2000/C 177 E/10 of the European Parliament and of the Council regarding public access to European

Parliament, Council and Commission documents (OJ 2000 C 177 E, p. 70).

17 – Proposal compromise drafted by the French presidency in December 2000 (Doc. 14938/00 of 22 December 2000).

18 – Amended proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (COM (2001) 299 final, OJ 2001 C 240 E, p. 165).

19 – See inter alia Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal v Commission* [2000] ECR I-1, paragraph 27; Case T-124/96 *Interporc v Commission* [1998] ECR II-231, paragraphs 49 to 52; Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289, paragraphs 110 to 112; Case T-204/99 *Mattila v Council and Commission* [2001] ECR II-2265, paragraph 87; and Case T-211/00 *Kuijer v Council* [2002] ECR II-485, paragraphs 55 and 56.

20 – See inter alia Case C-353/99 P *Council v Hautala* [2001] ECR I-9565, paragraphs 26 to 30; Case T-123/99 *JT's Corporation v Commission* [2000] ECR II-3269, paragraph 44; and *Kuijer v Council*, paragraph 57.

21 – In respect of that 'promotion' of the right of access to documents, I refer to the demonstration in my Opinion in Case C-64/05 P *Sweden v Commission and Others* (points 37 to 40), which is still pending before the Court.

22 – See in particular *Sison v Council*, paragraphs 61 to 63.

23 – For a restatement of that obligation to make a specific and individual assessment, see most recently *API v Commission*, paragraphs 54 to 56; see, previously, Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraphs 69 to 74; Case T-237/02 *Technische Glaswerke Ilmenau v Commission* [2006] ECR II-0000, paragraphs 77 to 79; and *Franchet and Byk v Commission*, paragraphs 105 and 115 to 117.

24 – Paragraph 69 of the judgment under appeal.

25 – Paragraph 70 of the judgment under appeal.

26 – Paragraphs 71 and 72 of the judgment under appeal.

27 – See paragraph 75 of the judgment under appeal.

28 – See inter alia *JT's Corporation v Commission*, paragraphs 46 and 65; *Franchet and Byk v Commission*, paragraph 130; *Technische Glaswerke Ilmenau v Commission*, paragraphs 77 and 80 to 83, and *API v Commission*, paragraphs 66 to 68.

29 – See inter alia *Sison v Council*, paragraph 83, and *API v Commission*, paragraph 67.

30 – Paragraph 74 of the judgment under appeal.

31 – Opinion in Case C-350/92 *Spain v Council* [1995] ECR I-1985, I-1988, point 35.

32 – See above, point 26 of the Opinion.

33 – See the order in *Carlsen and Others v Council*, paragraph 46.

34 – Order in Case C-445/00 *Austria v Council* [2002] ECR I-9151, paragraph 12; Case T-44/97 *Ghignone and Others v Council* [2000] ECR SC I A 223 and II-1023, paragraph 48; and Case T-357/03 *Gollnisch and Others v Parliament* [2005] ECR II 1, paragraph 34.

35 – *Carlsen and Others v Council*, paragraph 50.

36 – Paragraphs 78 and 79 of the judgment under appeal.

37 – *Technische Glaswerke Ilmenau v Commission*, paragraph 85, and *API v Commission*, paragraph 57.

38 – See *Franchet and Byk v Commission*, paragraphs 104 to 134.

39 – See *Kuijjer v Council*.

40 – See, to that effect, *API v Commission*, paragraph 54.

41 – As has been correctly pointed out in academic legal writing: see in particular Kranenborg, H.R., 'Is it time to revise the European regulation on public access to documents?', *European public law* Vol. 12, 2006, no 2, p. 251, in particular pp. 259, 261 and 262.

42 – Opinion in *Sison v Council*, point 27.

43 – Case T-264/04 *WWF European Policy Programme v Council* [2007] ECR II 0000, paragraph 44.

44 – See paragraph 83 of the judgment under appeal.

45 – See *API v Commission*, paragraph 54.

46 – *Ibidem*, paragraph 97.

47 – See *Mattila v Council and Commission*, paragraph 18; *Kuijjer v Council*, paragraph 21; and *Franchet and Byk v Commission*, paragraph 36.