

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

4 May 2012 (*)

(Access to documents – Regulation (EC) No 1049/2001 – Opinion of the Council’s Legal Service on a recommendation from the Commission to authorise the opening of negotiations for an international agreement – Partial refusal to grant access – Exception relating to the protection of the public interest in the field of international relations – Exception relating to the protection of legal advice – Specific and foreseeable threat to the interest in question – Overriding public interest)

In Case T-529/09,

Sophie in ’t Veld, residing in Brussels (Belgium), represented by O. Brouwer and J. Blockx, lawyers,

applicant,

v

Council of the European Union, represented initially by M. Bauer, C. Fekete and O. Petersen, and subsequently by M. Bauer and C. Fekete, acting as Agents,

defendant,

supported by

European Commission, represented by C. O’Reilly and P. Costa de Oliveira, acting as Agents,

intervener,

APPLICATION for annulment of the Council’s decision of 29 October 2009 refusing full access to document 11897/09 of 9 July 2009 containing an opinion of the Council’s Legal Service entitled ‘Recommendation from the Commission to the Council to authorise the opening of negotiations between the European Union and the United States of America for an international agreement to make available to the United States Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing – Legal basis’.

THE GENERAL COURT (Fifth Chamber),

composed of S. Papasavvas, President, V. Vadapalas (Rapporteur) and K. O’Higgins, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 7 September 2011,

gives the following

Judgment

Background to the dispute

- 1 The applicant, Ms Sophie in ’t Veld, is a Member of the European Parliament.
- 2 On 28 July 2009, under 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), she requested access to the opinion of the Council's Legal Service concerning a recommendation from the Commission to the Council to authorise the opening of negotiations between the European Union and the United States of America for an international agreement to make available to the United States Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing ('document 11897/09').
- 3 On 8 September 2009, the Council of the European Union refused access to document 11897/09, invoking grounds set out in the third indent of Article 4(1)(a) and the second indent of Article 4(2) of Regulation No 1049/2001.
 - 4 On 28 September 2009, the applicant sent the Council a confirmatory application asking that institution to reconsider its position.
 - 5 By decision of 23 October 2009, communicated to the applicant by letter of 29 October 2009, the Council authorised partial access to document 11897/09 while still maintaining its negative response regarding full access to that document, invoking the exceptions laid down in the third indent of Article 4(1)(a) and the second indent of Article 4(2) of Regulation No 1049/2001 ('the contested decision').
 - 6 In the contested decision, the Council stated, first, that 'disclosure of [document 11897/09] would reveal to the public information relating to certain provisions in the envisaged Agreement ... and, consequently, would negatively impact on the [European Union]'s negotiating position and would also damage the climate of confidence in the on-going negotiations'. The Council added that 'disclosure of the document would also reveal to the [European Union's negotiating] counterpart elements pertaining to the position to be taken by the [European Union] in the negotiations which – in the case [where] the legal advice was critical – could be exploited so as to weaken the [European Union]'s negotiating position' (paragraph 6 of the contested decision).
 - 7 Second, the Council stated that document 11897/09 contained 'legal advice, where the Legal Service analyses the legal basis and the respective competences of the [European Union] and the European Community to conclude the Agreement' and that that 'sensitive issue, which has an impact on the powers of the European Parliament in the conclusion of the Agreement, has been [the] subject of divergent positions between the institutions'. In those circumstances, '[d]ivulcation of the contents of the requested document would undermine the protection of legal advice, since it would make known to the public an internal opinion of the Legal Service, intended only for the members of the Council within the context of the Council's preliminary discussions on the envisaged Agreement' (paragraph 10 of the contested decision). Furthermore, the Council 'concluded that the protection of its internal legal advice relating to a draft international Agreement ... outweighs the public interest in disclosure' (paragraph 15 of the contested decision).
 - 8 Lastly, pursuant to Article 4(6) of Regulation No 1049/2001, the Council granted 'partial access ... to the introductory part on page 1, paragraphs 1-4 and the first sentence of paragraph 5 of the document which [were] not covered by any exceptions under Regulation [No] 1049/2001' (paragraph 16 of the contested decision).

Procedure and forms of order sought

- 9 By application lodged at the Court Registry on 31 December 2009, the applicant brought the present action.
- 10 By document lodged at the Court Registry on 17 May 2010, the European Commission applied for leave to intervene in support of the form of order sought by the Council. That request was granted by an order of the President of the Sixth Chamber of the General Court of 7 July 2010.

- 11 The composition of the Chambers of the General Court changed and the Judge-Rapporteur was assigned to the Fifth Chamber, to which this case was accordingly assigned.
- 12 By way of a measure of inquiry pursuant to Article 65 of the Rules of Procedure, by order of 7 July 2011 the General Court ordered the Council to produce document 11897/09 without disclosing it to the applicant or the Commission. The Council complied with that measure of inquiry within the prescribed time-limit.
- 13 By way of measures of organisation of procedure, on 13 July 2011 the Court put written questions to the parties; those questions were answered by the parties within the prescribed time-limit.
- 14 At the hearing on 7 September 2011, the parties presented oral argument and answered the questions put to them by the Court.
- 15 The applicant claims that the Court should:
- annul the contested decision;
 - order the Council to pay the costs, including the costs of any intervening parties.
- 16 The Council and the Commission claim that the Court should:
- dismiss the action;
 - order the applicant to pay the costs, including the costs of the Commission.

Law

- 17 As a preliminary point, it should be borne in mind that Regulation No 1049/2001, as is clear from Article 1 when read in the light of recital 4 in the preamble thereto, is intended to give the fullest possible effect to the right of public access to documents of the institutions.
- 18 Since the exceptions laid down in Article 4 of Regulation No 1049/2001 derogate from that principle, they must be interpreted and applied strictly (see Case C-506/08 P *Sweden v MyTravel and Commission* [2011] ECR I-0000, paragraph 75 and the case-law cited).
- 19 Thus, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and actually undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon which it is relying (see *Sweden v MyTravel and Commission*, paragraph 18 above, paragraph 76 and the case-law cited).
- 20 In that regard, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception. Such application may, in principle, be justified only if the institution has previously assessed, firstly, whether access to the document would specifically and actually undermine the protected interest and, secondly, in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, whether there was no overriding public interest in disclosure. Further, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical (see Case T-36/04 *API v Commission* [2007] ECR II-3201, paragraph 54 and the case-law cited).
- 21 Although the fact that, pursuant to Council Decision 2001/264/EC of 19 March 2001 adopting the Council's security regulations (OJ 2001 L 101, p. 1), the document is classified as 'RESTREINT UE' may be an indication as to the sensitive content of that document, it is not

sufficient to justify application of the exceptions set out in Article 4 of Regulation No 1049/2001 (see, to that effect, Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429, paragraph 73).

22 In support of the action, the applicant invokes four pleas in law, the first alleging infringement of the third indent of Article 4(1)(a) of Regulation No 1049/2001, the second alleging infringement of the second indent of Article 4(2) of that regulation, the third alleging infringement of Article 4(6) of that regulation and the fourth alleging infringement of the duty to state reasons.

First plea, alleging infringement of the third indent of Article 4(1)(a) of Regulation No 1049/2001

23 Under the third indent of Article 4(1)(a) of Regulation No 1049/2001, the institutions are to refuse access to a document where disclosure would undermine the protection of the public interest in the field of international relations.

24 It should be borne in mind that the decision to be adopted by an institution pursuant to that provision is of a complex and delicate nature and calls for the exercise of particular care, having regard in particular to the singularly sensitive and essential nature of the protected interest.

25 Since such a decision calls for a wide margin of discretion, the General Court's review of its legality must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers (Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 34).

26 In the present case, it is clear from the contested decision that document 11897/09, to which the applicant is requesting access, is an opinion of the Council's Legal Service, issued in the context of the adoption of the Council decision authorising the opening of negotiations, on behalf of the European Union, for an international agreement between the European Union and the United States of America in order to make available to the United States Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing. Moreover, it is not in dispute that that opinion is, in essence, concerned with the legal basis of that decision and with the respective competences of the European Union and the European Community (paragraphs 5 and 10 of the contested decision).

27 The applicant submits that the document in question is not covered by the exception relating to the protection of the public interest in the field of international relations, having regard to its subject-matter. According to the applicant, the legal basis for a decision authorising the opening of negotiations is an issue of internal EU law which is not likely to have an impact on the substance of negotiations and, hence, on the international relations of the European Union.

28 It should be noted that, contrary to what the applicant claims, document 11897/09, having regard to its content and the context in which it was drawn up, is capable of being covered by the exception in question.

29 In fact, that document was drawn up specifically for the opening of negotiations which were to lead to the conclusion of an international agreement. Thus, although it deals with the issue of the legal basis, which is an issue of internal EU law, the analysis carried out by the Council's Legal Service is necessarily linked to the specific context of the envisaged international agreement.

30 Under those circumstances, it must be ascertained whether the Council has shown that access to the undisclosed elements of document 11897/09 could have specifically and actually undermined the public interest concerned.

- 31 The Council states that the disclosure of document 11897/09 would undermine the public interest in the field of international relations, since that disclosure would not only reveal to the public information relating to certain provisions in the envisaged agreement, which would damage the climate of confidence in the ongoing negotiations, but also would reveal to the European Union's negotiating counterpart elements pertaining to the position to be taken by the European Union in those negotiations. This information could be exploited so as to weaken the European Union's position (paragraph 6 of the contested decision).
- 32 Accordingly, the application of the exception in question must be examined separately on each of the two grounds invoked by the Council in the contested decision.
- 33 First, regarding the risk of disclosing to the public information relating to certain provisions in the envisaged agreement, the applicant submits that, even if the document in question were to contain such information, it could only consist in an objective description of the facts, probably not exceeding the information already disclosed in public documents. According to the applicant, in any event, an analysis of the strategic objectives pursued by the European Union in the negotiations in question is likely to constitute only a small part of the document and the rest should be disclosed.
- 34 The Council claims that the document contains information concerning the content of the envisaged agreement, the disclosure of which could have revealed certain aspects of the strategic objectives pursued by the European Union.
- 35 In that regard, it should be noted that the General Court, having familiarised itself with the document in question by way of the measure of inquiry, was able to establish that the legal analysis carried out in that document included some passages connected with the objectives pursued by the European Union in the negotiations, especially insofar as that document deals with the specific content of the envisaged agreement.
- 36 As the Council correctly points out in paragraph 6 of the contested decision (see paragraph 6 above), the disclosure of those elements would damage the climate of confidence in the negotiations which were ongoing at the time the contested decision was adopted.
- 37 In that regard, the applicant cannot usefully rely on the fact, invoked at the hearing, that some of the information relating to the content of the envisaged agreement has been made public both by the Council itself and during debates in the Parliament.
- 38 Indeed, the risk invoked by the Council stems from the disclosure of the particular assessment of those matters by its Legal Service and, therefore, the mere fact that the matters themselves were known to the public does not invalidate that consideration.
- 39 Accordingly, it must be found that the Council could lawfully invoke the risk that the interest protected by the exception in the third indent of Article 4(1)(a) of Regulation No 1049/2001 might be undermined in order to refuse to disclose those passages in the requested document containing the analysis of the specific content of the envisaged agreement which could have revealed the strategic objectives pursued by the European Union in the negotiations.
- 40 Second, it is necessary to examine the ground alleging a risk of revealing to the '[European Union's] negotiating counterpart elements pertaining to the position to be taken by the [European Union] in the negotiations which – in the case [where] the legal advice was critical – could be exploited so as to weaken the [European Union]'s negotiating position' (paragraph 6 of the contested decision).
- 41 The Council submits that the ground in question refers to the risk of disclosing the elements of the analysis relating to the legal basis of the future agreement, although the Court notes that this is not explicitly apparent from paragraph 6 of the contested decision.
- 42 In its written pleadings and at the hearing, the Council stated that, in that ground, it was

referring to the fact that the opinion of its Legal Service contained the analysis of the legal basis for the future agreement and therefore of the action which the Council was to take with a view to signing the agreement. According to the Council, irrespective of whether the legal basis chosen for the negotiations was the correct one, any disclosure of information relating thereto would have affected the European Union's negotiating position and could have had a negative impact on the substance of the negotiations. The Council submits that all the undisclosed parts of that document are covered by that second ground, even if not all passages of the requested document were covered by the ground alleging a risk of disclosure of information concerning the envisaged agreement.

- 43 The applicant claims that it is difficult to see how a discussion of the legal basis of an agreement could undermine the international relations of the European Union. In that regard, she submits that transparency regarding the legal basis would contribute to conferring greater legitimacy on the Council as a negotiating partner. According to the applicant, it is the absence of transparency which would damage international relations in the long term, especially because, in the present case, the Council has admitted that the subject under discussion had 'an impact on the powers of the European Parliament in the conclusion of the Agreement' and 'has been [the] subject of divergent positions between the institutions' (paragraph 10 of the contested decision).
- 44 The Council claims that, with regard to the then ongoing negotiations, the disclosure of any 'controversy' concerning the legal basis of the future agreement might have given rise to confusion as to the European Union's competence and thus weakened its position during the international negotiations. It states that, if the Council's Legal Service had given a negative opinion on certain points of the negotiating position, this could have been exploited by the other party to the negotiations.
- 45 The Commission submits that, in the context of international relations, where doubts are expressed in public regarding the legal basis of negotiations, it does not give the institutions greater legitimacy but, on the contrary, may undermine their legitimacy in the eyes of the international partner, to the detriment of the negotiations concerned.
- 46 It should be noted that, contrary to the claims of the Council and the Commission, the risk of disclosing positions taken within the institutions regarding the legal basis for concluding a future agreement does not in itself establish the existence of a threat to the European Union's interest in the field of international relations.
- 47 In that regard, it should first of all be noted that the choice of the appropriate legal basis, both for internal and international European Union activity, has constitutional significance. Since the European Union has only conferred powers, it must necessarily link the measure which it wishes to adopt to a provision of the Treaty which empowers it to approve such a measure (Case C-370/07 *Commission v Council* [2009] ECR I-8917, paragraph 47).
- 48 Moreover, the choice of the legal basis for a measure, including one adopted in order to conclude an international agreement, does not follow merely from the conviction of its author, but must rest on objective factors which are amenable to judicial review, such as, in particular, the aim and the content of the measure (see Opinion 2/00 [2001] ECR I-9713, paragraph 22 and the case-law cited).
- 49 Therefore, since the choice of the legal basis rests on objective factors and does not fall within the discretion of the institution, any divergence of opinions on that subject cannot be equated with a difference of opinion between the institutions as to matters which relate to the substance of the agreement.
- 50 Accordingly, the mere fear of disclosing a disagreement within the institutions regarding the legal basis of a decision authorising the opening of negotiations on behalf of the European Union is not a sufficient basis for concluding that the protected public interest in the field of international relations may be undermined.

- 51 Next, the Commission, referring to Joined Cases C-317/04 and C-318/04 *Parliament v Council and Commission* [2006] ECR I-4721, paragraphs 67 to 70, invokes the threat to the European Union's credibility during negotiations which could result from the disclosure of a document establishing the existence of doubts regarding the choice of the legal basis. The Commission points out that proceeding on an incorrect legal basis is liable to invalidate the act concluding the agreement and so vitiate the European Union's consent to be bound by that agreement.
- 52 Nevertheless, it should be noted that such a threat cannot be presumed from the existence of a legal debate as to the extent of the powers of the institutions with regard to the international activity of the European Union.
- 53 Indeed, any confusion as to the nature of its powers, liable to weaken the European Union in defending its position in international negotiations, which may arise from the failure to indicate a legal basis (see, to that effect, *Commission v Council*, paragraph 47 above, paragraph 49), can only be made worse in the absence of a prior objective debate between the institutions concerned regarding the legal basis of the action envisaged.
- 54 Moreover, at the material time, there was a procedure under EU law, in Article 300(6) EC, specifically designed to prevent complications, both at European Union level and in international law, resulting from an incorrect choice of legal basis (see Opinion 1/75 [1975] ECR 1355, 1360 and 1361).
- 55 Those findings are all the more justified in the present case because, at the time of the adoption of the contested decision, the existence of different views concerning the legal basis of the envisaged agreement was within the public domain.
- 56 In particular, the existence of divergent opinions within the institutions was mentioned in the Parliament resolution of 17 September 2009 on the envisaged international agreement to make available to the United States Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing.
- 57 Moreover, in so far as, in invoking the ground in question, the Council also makes reference to the fact that the opinion of its Legal Service touches on certain points of the draft negotiating directives, knowledge of which could have been exploited by the other party to the negotiations, it should be noted that that consideration, although sufficient to establish a risk that the European Union's interest in the field of international relations may be undermined, only concerns those elements of the requested document which relate to the content of the negotiating directives.
- 58 It follows that, with the exception of those elements of the requested document which concern the specific content of the envisaged agreement or the negotiating directives, which could reveal the strategic objectives pursued by the European Union in the negotiations, the Council has not shown how, specifically and actually, wider access to that document would have undermined the public interest in the field of international relations.
- 59 In the light of all of the foregoing, the first plea is in part successful, since the Council has not established the risk of a threat to the public interest in the field of international relations concerning the undisclosed parts of the requested document relating to the legal basis of the future agreement, such risk having been established only for those elements relating to the specific content of the agreement envisaged or the negotiating directives capable of revealing the strategic objectives pursued by the European Union in the negotiations.
- 60 Accordingly, the contested decision must be partially annulled insofar as it refuses access to the undisclosed parts of the requested document other than those which relate to the specific content of the agreement envisaged or the negotiating directives which could reveal the strategic objectives pursued by the European Union in the negotiations.

Second plea, alleging infringement of the second indent of Article 4(2) of Regulation No 1049/2001

- 61 Taking into account the conclusion reached following the examination of the first plea, the examination of the current plea should be confined to the undisclosed parts of the requested document, other than those which relate to the specific content of the envisaged agreement or the negotiating directives, since the latter parts are covered by the exception relating to the protection of the public interest in the field of international relations.
- 62 By virtue of the second indent of Article 4(2) of Regulation No 1049/2001, the institutions are to refuse access to a document where disclosure would undermine the protection of legal advice, unless there is an overriding public interest in disclosure.
- 63 If the Council intends to rely on the second indent of Article 4(2) of Regulation No 1049/2001, it must carry out an examination in three stages, corresponding to the three criteria therein.
- 64 Firstly, 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 what parts of it are actually concerned and may, therefore, come within that exception. Secondly, the Council must examine whether disclosure of the parts of the document identified as relating to legal advice would undermine the protection of that advice. Thirdly, if the Council takes the view that disclosure would undermine the protection of legal advice, it must ascertain whether there is any overriding public interest justifying disclosure, notwithstanding the fact that its ability to seek and receive frank, objective and comprehensive advice would thereby be undermined (Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraphs 37 to 44).
- 65 In the present case, regarding the first criterion, it is not in dispute that document 11897/09 is indeed legal advice concerning the legal basis in EU law of an envisaged international action – as is clear from its heading – and that the entirety of its undisclosed content may be covered by the exception concerned.
- 66 Next, regarding a risk that its interest in seeking and receiving frank, objective and comprehensive advice could be undermined, the Council indicates, firstly, that the requested disclosure would have the result of making known to the public ‘an internal opinion of the Legal Service, intended only for the members of the Council within the context of [that institution]’s preliminary discussions on the envisaged Agreement’, which might ‘lead the Council to decide not to request written opinions from its Legal Service’ (paragraph 10 of the contested decision). Secondly, the Council highlights the risk that its Legal Service might itself ‘refrain from putting in writing views which might expose the Council to risk in the future [, which] would impact on [their] content’ (paragraph 11 of the contested decision). Thirdly, the Council claims that ‘disclosure to the public of [its] internal legal advice ... would seriously undermine [that] Service’s capacity in the future to present and defend ... the Council’s position in court proceedings, a position which may differ from the one previously recommended by the Legal Service’ (paragraph 12 of the contested decision).
- 67 The applicant submits, in essence, that those findings are not sufficient to show that the interest relating to the protection of legal advice would be undermined.
- 68 The Council, supported by the Commission, submits that it correctly applied the second indent of Article 4(2) of Regulation No 1049/2001 to refuse public access to the requested document, stating inter alia that the issue analysed in the document was sensitive and that it would have been impossible for the Council to provide any more evidence on how the disclosure of document 11897/09 would have risked impairing, individually and concretely, the protection of legal advice, without revealing the contents of the document itself and, thereby, depriving the exception of its very purpose.
- 69 It should be borne in mind that the risk that the disclosure of a document could specifically and

actually undermine an institution's interest in seeking and receiving frank, objective and comprehensive advice must be reasonably foreseeable and not purely hypothetical (*Sweden and Turco v Council*, paragraph 64 above, paragraphs 40, 42 and 43).

70 However, the grounds put forward by the Council for refusing access to document 11897/09 are not sufficient to establish the existence of such a risk by any detailed reasoning. In fact, the grounds of the contested decision, according to which the Council and its Legal Service could be deterred from asking for and providing written opinions relating to sensitive issues, are not substantiated by any specific, detailed evidence which could establish the existence of a reasonably foreseeable and not purely hypothetical threat to the Council's interest in receiving frank, objective and comprehensive advice.

71 Furthermore, since the possibility that the public interest in the field of international relations could be undermined is provided for by a separate exception, covered by the third indent of Article 4(1)(a) of Regulation No 1049/2001, the mere fact that the legal advice contained in document 11897/09 concerns the field of the international relations of the European Union is not in itself sufficient for the application of the exception laid down in the second indent of Article 4(2) of that regulation.

72 It is true that, at the hearing, the Council pointed out that the negotiations relating to the envisaged agreement were still ongoing at the time the contested decision was made.

73 None the less, although it may be conceded that, in those circumstances, enhanced protection should be afforded to Council documents in order to rule out any threat to the interests of the European Union during the process of international negotiations, that consideration has already been taken into account by the recognition of the wide discretion given to the institutions in applying the exception under the third indent of Article 4(1)(a) of Regulation No 1049/2001.

74 However, as regards the exception provided for in the second indent of Article 4(2) of that regulation, the Council cannot reasonably rely on the general consideration that a threat to a protected public interest may be presumed in a sensitive area, in particular concerning legal advice given during the negotiation process for an international agreement.

75 Nor may a specific and foreseeable threat to the interest in question be established by a mere fear of disclosing to EU citizens differences of opinion between the institutions regarding the legal basis for the international activity of the European Union and, thus, of creating doubts as to the lawfulness of that activity.

76 The finding that the risk that the disclosure of legal advice relating to a decision-making process could give rise to doubts concerning the lawfulness of the adopted acts is not sufficient to constitute a threat to the protection of legal advice (*Sweden and Turco v Council*, paragraph 64 above, paragraph 60, and *Sweden v MyTravel and Commission*, paragraph 18 above, paragraph 113) is, in principle, transposable to the field of the international activity of the European Union, because the decision-making process in that area is not exempt from the application of the principle of transparency. Suffice it to recall in that regard that Article 2(3) of Regulation No 1049/2001 states that that regulation is to apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.

77 The Council does not invoke any specific argument to justify derogation from that finding in the present case.

78 Regarding the Council's argument concerning the risk of a threat to the ability of its Legal Service to defend, in court proceedings, a position on which it had issued a negative opinion, it should be borne in mind that, as the Court has observed on a number of occasions, an argument of such a general nature cannot justify an exception to the transparency required by Regulation No 1049/2001 (see, to that effect, *Sweden and Turco v Council*, paragraph 64 above, paragraph 65, and *Sweden v MyTravel and Commission*, paragraph 18 above,

paragraph 116).

- 79 It follows that the grounds relied on in the contested decision, in view of their general and hypothetical nature, are not sufficient to show that the public interest relating to the protection of legal advice may be undermined.
- 80 Moreover, contrary to the Council's claims, the general nature of the grounds concerned cannot be justified by the impossibility of providing further evidence, given the sensitive content of the requested document. No risk that the interest invoked may be undermined arises either from the context in which document 11897/09 was drawn up or from the subjects dealt with in it, and furthermore the Council has not indicated the further evidence which it could have put forward by relying on the contents of that document.
- 81 Lastly, regarding the third criterion of the examination provided for in the second indent of Article 4(2) of Regulation No 1049/2001, it was for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against any overriding public interest justifying disclosure.
- 82 In particular, account should be taken of the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 in 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 (*Sweden and Turco v Council*, paragraph 64 above, paragraph 45).
- 83 Those considerations are clearly of particular relevance where the Council is acting in its legislative capacity, as is apparent from recital 6 in the preamble to Regulation No 1049/2001, according to which wider access must be granted to documents in precisely such cases (*Sweden and Turco v Council*, paragraph 64 above, paragraph 46).
- 84 In that respect, the parties are in disagreement as to whether, in the process leading up to the adoption of an international agreement concerning matters of European Union legislation, the Council is acting in its legislative capacity.
- 85 The applicant submits that the agreement referred to in document 11897/09 is of a legislative nature, within the meaning of Article 12(2) of Regulation No 1049/2001 in particular, especially as it has binding effects in the Member States as regards the transmission of financial messaging data to the authorities of a third country.
- 86 The Council contends that it was not acting in its legislative capacity. In that regard, it invokes Article 7 of its Decision 2006/83/EC, Euratom, of 15 September 2006 adopting the Council's Rules of Procedure (OJ 2006 L 285, p. 47). That article lists the cases where the Council acts in its legislative capacity pursuant to the second subparagraph of Article 207(3) EC; discussions leading to the adoption of acts concerning international relations are not contained in that list.
- 87 It should be noted that the provisions invoked, which seek, in essence, to define the cases or documents which must, in principle, be directly accessible to the public, merely serve as a guide in determining whether or not the Council has acted in its legislative capacity for the purposes of applying the exceptions in Article 4 of Regulation No 1049/2001.
- 88 It should be observed that initiating and conducting negotiations in order to conclude an international agreement fall, in principle, within the domain of the executive. Moreover, public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations. Therefore, during that procedure, it must be held that the Council is not acting in its legislative capacity.

- 89 None the less, application of the considerations connected with the principle of the transparency of the decision-making process of the European Union, referred to in paragraph 82 above, cannot be ruled out in international affairs, especially where a decision authorising the opening of negotiations involves an international agreement which may have an impact on an area of the European Union's legislative activity.
- 90 In the present case, the envisaged agreement between the European Union and the United States of America is an agreement which concerns, in essence, the processing and exchange of information in the context of police cooperation, which may also affect the protection of personal data.
- 91 It should be borne in mind, in that regard, that the protection of personal data constitutes a fundamental right, upheld by Article 8 of the Charter of Fundamental Rights of the European Union (OJ 2007 C 303, p. 1), and applied, inter alia, by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) and by Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1)
- 92 Accordingly, the Council was obliged to take into account the area affected by the agreement in question by establishing, in accordance with the principle of the widest possible public access to documents, whether the general interest connected with a greater transparency in the procedure in question justified the full – or fuller – disclosure of the requested document, despite the risk that the protection of legal advice might be undermined.
- 93 In that regard, as the applicant indicates, there was an overriding public interest in the disclosure of document 11897/09, since it would contribute to conferring greater legitimacy on the institutions and would increase EU citizens' confidence in those institutions by making it possible to have an open debate on the points where there was a divergence of opinion regarding, moreover, a document discussing the legal basis of an agreement which, once concluded, would have an impact on the fundamental right to the protection of personal data.
- 94 In paragraph 15 of the contested decision, the Council states, after 'having carefully weighed the Council's interest in the protection of the internal legal advice given by its Legal Service against the public interest in the disclosure of the ... document', that 'the protection of its internal legal advice relating to a draft international Agreement currently under negotiation outweighs the public interest in disclosure'. In that regard, the Council rejects the applicant's argument that the 'possible contents of the envisaged Agreement and views on the competence and legal basis for the Community to enter into this international Agreement that will bind the Community and affect the European citizens' could constitute an overriding public interest that should be taken into account.
- 95 It should be held that, in excluding, in those grounds, any possibility of taking into account the area affected by the envisaged agreement in determining whether there was, in some circumstances, an overriding public interest in the disclosure of the requested document, the Council failed to weigh the opposing interests when applying the exception provided for in the second indent of Article 4(2) of Regulation No 1049/2001.
- 96 That finding cannot be undermined by the Council's contention that the public interest in the protection of legal advice in the context of ongoing international negotiations displays similarities to the public interest in the protection of legal advice falling within the purely administrative functions of the Commission, as referred to in Case T-403/05 *MyTravel v Commission* [2008] ECR II-2027, paragraphs 49, 125 and 126.
- 97 First, the Court of Justice, in *Sweden v MyTravel and Commission* (paragraph 18 above), set aside that judgment of the General Court invoked by the Council. Second, it is precisely

openness concerning legal advice that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergent 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 (*Sweden v MyTravel and Commission*, paragraph 18 above, paragraph 113).

98 At the hearing, the Commission explained how, in its opinion, *Sweden v MyTravel and Commission* (paragraph 18 above) differed from the present case and, therefore, could not reasonably be relied on. According to the Commission, firstly, a mandatory exception, namely that relating to the protected public interest in the field of international relations, has been invoked in the present case, unlike the situation in that judgment. Secondly, the legal advice contained in document 11897/09 concerns a sensitive area, that of international relations, and, thirdly, the procedure for concluding the international agreement was still ongoing when the Council refused to disclose document 11897/09, whereas the decision-making procedure in *Sweden v MyTravel and Commission* (paragraph 18 above) had finished.

99 Those arguments are not convincing. Firstly, the fact that the document in question concerns an area potentially covered by the exception referred to in the third indent of Article 4(1)(a) of Regulation No 1049/2001, relating to the protection of the public interest in the field of international relations, is irrelevant for the purposes of assessing the application of the separate exception, relating to the protection of legal advice, provided for in the second indent of Article 4(2) of that regulation.

100 Secondly, whilst the fact that the procedure for concluding the international agreement was still ongoing at the time of the adoption of the contested decision may be invoked in assessing the risk that the public interest relating to the protection of legal advice might be undermined, that argument is not conclusive in ascertaining whether, despite that risk, there exists any overriding public interest justifying disclosure.

101 Indeed, the public interest in the transparency of the decision-making process would become meaningless if, as the Commission proposes, it were to be taken into account only in those cases where the decision-making process has come to an end.

102 It follows from all of the foregoing that the matters invoked in the contested decision do not prove that the disclosure of the document in question would have undermined the protection of legal advice and that, in any event, contrary to the provisions of the second indent of Article 4(2) of Regulation No 1049/2001, the Council failed to ascertain whether there was an overriding public interest justifying a fuller disclosure of document 11897/09.

103 Accordingly, the second plea must be upheld.

Third plea, alleging infringement of Article 4(6) of Regulation No 1049/2001

104 According to Article 4(6) of Regulation No 1049/2001, if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document are to be released.

105 According to the case-law of the Court, examination of partial access to a document of the European Union institutions must be carried out in the light of the principle of proportionality (Case C-353/99 P *Council v Hautala* [2001] ECR I-9565, paragraphs 27 and 28).

106 It is clear from the very wording of Article 4(6) of Regulation No 1049/2001 that an institution is required to consider whether it is appropriate to grant partial access to requested documents and to limit any refusal to information covered by the relevant exceptions referred to in that article. The institution must grant partial access if the aim pursued by that institution in refusing access to a document may be achieved by merely blanking out the passages which might

harm the public interest to be protected (Case T-264/04 *WWF European Policy Programme v Council* [2007] ECR II-911, paragraph 50; see also, to that effect, *Council v Hautala*, paragraph 105 above, paragraph 29).

107 In the present case, it is clear from paragraph 16 of the contested decision that the Council did examine the possibility of granting the applicant partial access to the requested document in deciding to disclose certain parts of that document, namely the introductory part on page 1, paragraphs 1 to 4 and the first sentence of paragraph 5 of the analysis contained in the opinion.

108 It should be noted, as was raised by the applicant, that that partial access is very restricted, since the disclosed version of the document in question is limited, in essence, to its introductory part.

109 None the less, it should be ascertained, in the light of the principle of proportionality, whether the restricted nature of the partial access granted in the present case is justified in view of the exceptions invoked.

110 In that regard, on the one hand, regarding the exception set out in the third indent of Article 4 (1)(a) of Regulation No 1049/2001, it should be borne in mind that the Council has a wide discretion when assessing whether the disclosure of a document could undermine the public interest in the field of international relations, taking into account the sensitive and essential nature of the protected interest (see paragraph 25 above).

111 In the present case, it is clear from the examination of the first plea that the Council has merely established the risk of a threat to the public interest in the field of international relations concerning those elements which relate to the specific content of the envisaged agreement or the negotiating directives and which could reveal the strategic objectives pursued by the European Union in the negotiations (see paragraph 59 above).

112 In that regard, it must be held that that ground only applies to part of the redacted passages of the document concerned. Those passages also contain legal considerations relating to the relevant rules of EU law or dealing generally with the application of those rules in the area covered by the envisaged agreement, which may not automatically be considered as concerning the specific content of the agreement or the negotiating directives.

113 Under those circumstances, the error established in applying the third indent of Article 4(1)(a) of Regulation No 1049/2001 leads to the conclusion that the analysis in the contested decision as to the extent of the partial access was unlawful.

114 Moreover, regarding the exception set out in the second indent of Article 4(2) of Regulation No 1049/2001, it is clear from the examination of the second plea above that the Council has not established the risk of a threat to the public interest in question, and the invocation of that interest cannot thus justify the limiting of disclosure in the contested decision.

115 It follows from all of the foregoing that, insofar as concerns the partial access to the document, the Council has not fulfilled its obligation to refuse access only to the information covered by the invoked exceptions.

116 Accordingly, the examination of the third plea leads to the partial annulment of the contested decision insofar as it refuses access to the undisclosed parts of the requested document other than those concerning the specific content of the envisaged agreement or the negotiating directives which could reveal the strategic objectives pursued by the European Union in the negotiations.

Fourth plea, alleging infringement of the duty to state reasons

117 Having regard to the findings reached following the examination of the first three pleas, it must

- still be ascertained whether the Council has fulfilled its duty to state reasons concerning the refusal to disclose those parts of the requested document which concern the specific content of the envisaged agreement or the negotiating directives, in respect of which the exception relating to the protection of the public interest in the field of international relations has legitimately been invoked.
- 118 It is for the institution which has refused access to a document to provide a statement of reasons from which it is possible to understand and ascertain, firstly, whether the document requested does in fact fall within the sphere covered by the exception relied on and, secondly, whether the need for protection relating to that exception is genuine (*Sison v Council*, paragraph 21 above, paragraph 61).
- 119 In paragraph 5 of the contested decision, the Council points out that the international negotiations concerning the signing of the agreement in question between the European Union and the United States of America were ongoing at the time when document 11897/09 was drawn up. In paragraph 6 of that decision, the Council indicates that the requested document 'discusses the legal aspects of the draft negotiating directives for an international agreement between the EU and the US on a sensitive matter relating to the prevention and combating of terrorism and terrorist financing'. The Council adds that '[that] document contains an analysis of the legal basis of the proposed Agreement, where the Legal Service discusses the contents of the envisaged Agreement, as recommended by the Commission' and that disclosure thereof 'would reveal to the public information relating to certain provisions in the envisaged Agreement ... and consequently, would negatively impact on the [European Union]'s negotiating position and would also damage the climate of confidence in the on-going negotiations'.
- 120 It should be noted that, in those grounds, the Council provided a clear and coherent statement of reasons concerning its refusal to disclose those parts of the requested document which concern the specific content of the agreement or the negotiating directives.
- 121 In addition, the general nature of that statement of reasons, insofar as the Council does not identify the sensitive content which could be revealed by disclosure, is justified by a concern not to disclose the information which the invoked exception, relating to the protection of the public interest in the field of international relations, seeks to protect (see, to that effect, *Sison v Council*, paragraph 25 above, paragraph 82).
- 122 Accordingly, it must be found that the Council has provided reasons, to the requisite legal standard, for its decision insofar as it has refused access to those parts of the requested document which concern the specific content of the envisaged agreement or the negotiating directives.
- 123 In light of all of the foregoing, the contested decision must be partially annulled insofar as it refuses access – contrary to the third indent of Article 4(1)(a), the second indent of Article 4(2) and Article 4(6) of Regulation No 1049/2001 – to the undisclosed parts of the requested document other than those concerning the specific content of the envisaged agreement or the negotiating directives which could reveal the strategic objectives pursued by the European Union in the negotiations.
- 124 In that regard, it should be noted that, although the unlawfulness mentioned does not vitiate the Council's assessment concerning those parts of the requested document, it is not for the Court to substitute itself for the Council and to indicate the parts to which access should have been granted, because the Council is required, when implementing this judgment, to take into account the reasoning set out in it (see, to that effect, Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2006] ECR II-2023, paragraph 133).
- 125 It follows that it will be for the Council to assess, taking into account the grounds of this judgment, the extent to which access to the undisclosed parts of the document in question is likely specifically and actually to undermine the interests protected by the exceptions in Article

4 of Regulation No 1049/2001.

Costs

- 126 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, according to Article 87(3), where each party succeeds on some and fails on other heads, the General Court may order that the costs be shared or that each party bear its own costs. In addition, under the first subparagraph of Article 87(4) of the Rules of Procedure, the institutions which have intervened in the proceedings are to bear their own costs.
- 127 As the applicant and the Council have each been partially unsuccessful in this case, they shall each bear their own costs. The Commission shall bear its own costs.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

- 1. Annuls the Council's decision of 29 October 2009 insofar as it refuses access to the undisclosed parts of document 11897/09 other than those which concern the specific content of the envisaged agreement or the negotiating directives;**
- 2. Dismisses the action as to the remainder;**
- 3. Orders each party to bear its own costs.**

Papasavvas

Vadapalas

O'Higgins

Delivered in open court in Luxembourg on 4 May 2012.

[Signatures]

[Language of the case: English.](#)