

JUDGMENT OF THE COURT (First Chamber)

3 July 2014 (*)

(Appeal — Access to documents of the institutions — Regulation (EC) No 1049/2001 — Third indent of Article 4(1)(a), second indent of Article 4(2), and Article 4(6) — Opinion of the Council's Legal Service concerning the opening of negotiations for the conclusion of an international agreement — Exceptions to the right of access — Protection of the public interest as regards international relations — Protection of legal advice — Decision partially refusing access)

In Case C-350/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 17 July 2012,

Council of the European Union, represented by P. Berman, B. Driessen and C. Fekete, acting as Agents,

applicant,

the other parties to the proceedings being:

Sophie in't Veld, represented by O. Brouwer, E. Raedts and J. Blockx, advocaten,

applicant at first instance,

supported by:

European Parliament, represented by N. Lorenz and N. Görnitz, acting as Agents,

intervener in the appeal,

European Commission, represented by B. Smulders and P. Costa de Oliveira, acting as Agents, with an address for service in Luxembourg,

intervener at first instance,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, A. Borg Barthet, E. Levits, M. Berger and S. Rodin, Judges,

Advocate General: E. Sharpston,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 17 October 2013,

after hearing the Opinion of the Advocate General at the sitting on 13 February 2014,

gives the following

Judgment

1 By its appeal, the Council of the European Union seeks to have set aside the judgment of the General Court of the European Union in *In't Veld v Council*, T-529/09, EU:T:2012:215 ('the judgment under appeal'), by which the General Court annulled in part the decision of the Council of 29 October 2009 refusing Ms in't Veld full access to a document containing the opinion of the Council's Legal Service concerning a recommendation from the European Commission to the Council to authorise the opening of negotiations between the European Union and the United States of America for the conclusion of an international agreement to make available to the United States Treasury Department financial messaging data ('the decision at issue').

Legal context

2 Recitals 2, 4 and 11 in the preamble to 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) read as follows:

'(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

...

(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.

...

(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. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities.'

3 Article 1 of Regulation No 1049/2001 provides:

'The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as "the institutions") documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents,

...'

4 Article 2(3) of that regulation is worded as follows:

'This Regulation shall 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.’

5 Article 4(1), (2) and (6) of that same regulation provides:

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

(a) the public interest as regards:

...

– international relations,

...

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

...

– ... legal advice,

...

unless there is an overriding public interest in disclosure.

...

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

Background to the dispute

6 On 28 July 2009, Ms in’t Veld, a Member of the European Parliament, requested access, under Regulation No 1049/2001, to document 11897/09 of 9 July 2009, containing an opinion of the Council’s Legal Service on the ‘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’ (‘the proposed agreement’).

7 By the decision at issue, the Council authorised only partial access to the document, full access being refused on the basis of 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, relating to the protection, respectively, of the public interest as regards international relations and of legal advice.

8 In that decision, the Council stated, first, that ‘disclosure of [document 11897/09] would reveal to the public information relating to certain provisions in the [proposed agreement] ... and consequently, would negatively impact on the [European Union]’s negotiating position and would also damage the climate of confidence in the ongoing negotiations’. The Council added that ‘disclosure of the document would also reveal to the ... 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’.

9 Secondly, 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 [proposed agreement]’, and that this ‘sensitive issue, which has an impact on the powers of the European Parliament in the conclusion of the [proposed agreement], has been [the] subject of divergent positions between the institutions’. In those circumstances, according to the Council, ‘[d]ivulcation of the contents of [document 11897/09] 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 [proposed agreement]’. In addition, the Council considered ‘that the protection of its internal legal advice relating to a draft international agreement ... outweighs the public interest in disclosure’.

The judgment under appeal and the forms of order sought

10 On 31 December 2009, Ms in’t Veld brought an action for annulment of the decision at issue, relying on four pleas in law in support of the action.

11 The first two pleas in that action alleged infringement of the third indent of Article 4(1)(a) and the second indent of Article 4(2) of Regulation No 1049/2001. The third plea in support of that action was based on the infringement of Article 4(6) of that regulation, relating to partial access to documents of the institutions. The fourth plea alleged breach of the obligation to state reasons.

12 By the judgment under appeal, the General Court upheld, in part, the first plea of Ms in’t Veld, and the second plea in its entirety. Since those first two pleas were considered well founded, the General Court also upheld the third plea. The fourth plea was rejected. On that basis, the General Court partially annulled the decision at issue.

13 On 24 July 2012, the Council brought the present appeal, by which, supported by the Commission, it asks the Court to set aside the judgment under appeal, give final judgment on the matters raised in the appeal and order Ms in’t Veld to pay the costs of both sets of proceedings.

14 Ms in’t Veld, supported by the European Parliament, asks the Court of Justice to dismiss the appeal and to order the Council to pay the costs.

The appeal

15 By its appeal, the Council claims that the General Court infringed two provisions of Regulation No 1049/2001 restricting the right of access to documents of the institutions. The first plea is thus based on an infringement of the third indent of Article 4(1)(a) of Regulation No 1049/2001, relating to the protection of the public interest as regards international relations, and the second alleges infringement of the second indent of Article 4(2) of the regulation, which provides for an exception in respect of legal advice.

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

The judgment under appeal

16 In order to respond to the first plea in law put forward by Ms in’t Veld in support of her action for annulment, alleging infringement of the third indent of Article 4(1)(a) of Regulation No 1049/2001, the General Court noted, in paragraphs 24 and 25 of the judgment under appeal, 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, and that, therefore, the adoption of such a decision calls for the institution concerned to have a wide margin of discretion for that purpose; the General Court's review of the legality of that decision 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.

- 17 In paragraph 26 of the judgment under appeal, the General Court found that the opinion to which access had been requested in the present case was, in essence, concerned with the legal basis of the Council decision authorising the opening of negotiations, on behalf of the European Union, for the conclusion of the proposed agreement. The General Court therefore considered, in paragraph 30 of the judgment under appeal, that it had to be ascertained whether the Council had shown that access to the undisclosed elements of document 11897/09 could have specifically and actually undermined the public interest concerned.
- 18 To that end, the General Court examined the two grounds on which the Council relied in order to establish that there was a risk of such a threat. As regards the ground that disclosure would have revealed to the public information relating to certain provisions in the proposed agreement, which would have damaged the climate of confidence in the ongoing negotiations, the General Court held, in paragraphs 35 to 39 of the judgment under appeal, that the Council had, on the basis of that ground, lawfully refused access to those passages in document 11897/09 containing the analysis of the specific content of that agreement which could have revealed the strategic objectives pursued by the European Union in the negotiations on the conclusion of that agreement.
- 19 As regards the ground that disclosure of document 11897/09 would have revealed to the counterpart elements pertaining to the position to be taken by the European Union in the negotiations (in particular as regards the choice of legal basis for the proposed agreement), elements which, where the legal advice had been critical, could have been exploited so as to weaken the European Union's negotiating position, the General Court noted in paragraph 46 of the judgment under appeal that the risk involved in the disclosure of positions taken within the institutions regarding the legal basis for concluding a future international agreement was not liable in itself to establish the existence of a threat to the European Union's interest in the field of international relations.
- 20 In that regard, in paragraphs 47 to 50 of the judgment under appeal, the General Court noted, first of all, that the choice of the appropriate legal basis, both for internal and international European Union activity, has constitutional significance and that such a choice 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. As a consequence, since that choice 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. 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.
- 21 Furthermore, in response to the argument put forward by the Commission in that respect, the General Court, in paragraphs 52 and 53 of the judgment under appeal, held that the disclosure of a document establishing the existence of doubts regarding the choice of the legal basis in relation to the conclusion of the proposed agreement was not liable to give rise, in itself, to a threat to the European Union's credibility as a negotiating partner in respect of that agreement. Indeed, any

confusion as to the nature of the powers of the European Union could only be made worse in the absence of a prior objective debate between the institutions concerned regarding the legal basis of the action envisaged.

- 22 Next, in paragraph 54 of the judgment under appeal, the General Court noted that, at the material time, there was a procedure under EU law, in Article 300(6) EC, that was specifically designed to prevent complications, both at EU level and in international law, resulting from an incorrect choice of legal basis in relation to the conclusion of an international agreement binding the European Union.
- 23 In that regard, the General Court, in paragraphs 55 and 56 of the judgment under appeal, underlined the fact that, at the time of the adoption of the decision at issue, the existence of different views concerning the legal basis of the proposed agreement was within the public domain, owing, *inter alia*, to the fact that a Parliament resolution of 17 September 2009 relating to the proposed agreement established the existence of such different views.
- 24 Lastly, in paragraph 57 of the judgment under appeal, the General Court noted that, in invoking the exception based on the protection of the public interest as regards international relations, the Council also made reference to the fact that the opinion of its Legal Service touched on certain points of the draft negotiating directives, knowledge of which could have been exploited by the other party to those negotiations. The General Court held that that consideration did indeed establish a risk that the European Union's interest in the field of international relations might be undermined, but that it justified the exception in question only with respect to those elements of document 11897/09 that related to the content of the negotiating directives.
- 25 In paragraphs 58 to 60 of the judgment under appeal, the General Court concluded from the foregoing considerations that, with the exception of those elements of document 11897/09 concerning the specific content of the proposed agreement or the negotiating directives which could reveal the strategic objectives pursued by the European Union in the negotiations on that agreement, the Council had not shown that the disclosure of other aspects of that document would specifically and actually have undermined the public interest in the field of international relations.
- 26 Consequently, the General Court upheld in part the first plea in law put forward by Ms in't Veld in support of her action for annulment.

Arguments of the parties

- 27 The first ground of appeal raised by the Council alleges infringement, by the judgment under appeal, of the third indent of Article 4(1)(a) of Regulation No 1049/2001, and is in two parts.
- 28 By the first part of this plea, the Council, supported by the Commission, submits that the General Court misinterpreted that provision by considering that a disagreement as to the choice of the legal basis of the EU act regarding the conclusion of an international agreement is not capable of undermining the European Union's interest in the field of international relations.
- 29 According to the Council, since the legal basis of an EU act determines the decision-making procedure that applies, it necessarily affects the balance of powers between the institutions as well. Disputes concerning the applicable legal basis therefore remain, by their very nature, of very great political significance and are potentially highly contentious.
- 30 Referring to *Commission v Council*, 22/70 (EU:C:1971:32) and to Opinion 1/75 (EU:C:1975:145) and Opinion 2/00 (EU:C:2001:664), the Council maintains that the issue of the legal basis of an EU act concerning the conclusion of an international agreement is vitally important for the European

Union's position in the negotiations on such an agreement, since uncertainty as to the determination of the legal basis of such an agreement has a negative impact on those negotiations.

- 31 The European Union's negotiating partners could exploit the differences of opinion between the institutions to the European Union's disadvantage. Moreover, any doubts as to the legal capacity of an institution to conduct negotiations would also have an impact on the European Union's credibility and effectiveness in international negotiations, and would adversely affect its ability to bring them to a successful conclusion.
- 32 As regards the reference to Article 300(6) EC, in the Council's submission this is wholly irrelevant. First, no institution had availed itself of this possibility in the present case. Secondly, the availability of that procedure does not in any way mitigate the harm caused by disclosing legal advice relating to a dispute about a legal basis.
- 33 In addition, the Parliament resolution of 17 September 2009 referred to by the General Court, which was adopted a few months after document 11897/09 was drawn up, had revealed the substance of divergent opinions unlawfully, since that information had never been disclosed by the Council under Regulation No 1049/2001. In those circumstances, the General Court was wrong to justify its decision on the basis, in particular, that the information had been made public by the European Parliament; to conclude otherwise would condone the disclosure of information in contravention of Articles 6 to 8 of that regulation. In any event, that resolution merely noted the existence of a difference of views between the institutions, which did not imply that the full content of the opinion in question had been put in the public domain.
- 34 By contrast, Ms in't Veld, supported by the European Parliament, submits that the Council's arguments are based on a misreading of the judgment under appeal, in so far as the General Court did not consider that disagreement as to the legal basis of an international agreement could never undermine the public interest in the field of international relations. In fact the General Court merely stated that such a disagreement is not, in itself, a sufficient basis for concluding that there is a threat to that interest.
- 35 That error in the premiss of the Council's reasoning rendered its arguments in support of the first part of the first plea ineffective.
- 36 In any event, according to Ms in't Veld, those arguments are unfounded. Whilst the decision of an institution to proceed on an incorrect basis could actually undermine the European Union's international relations, the fact remains that the disclosure of an opinion of that institution as to the legal basis of negotiations does not affect this.
- 37 Ms in't Veld adds that the choice of legal basis is a purely internal issue, so that it is doubtful that the European Union's negotiating partners could use uncertainties as to its choice in order to obtain a better deal. On the contrary, the negotiating partners of the European Union in principle have an interest in ensuring that the proposed international agreement is concluded on a lawful basis, so as to reduce to a minimum the risk of any future challenge to that agreement, including on the grounds of lack of competence of the institutions to represent the parties to it. Likewise, the European Union's credibility in negotiations can be undermined only by the choice of a wrong legal basis and not by the debate on that choice.
- 38 Lastly, as regards the Parliament resolution of 17 September 2009, the General Court had referred to it only in so far as it confirmed not the content but the existence of differences of opinion between the Council and the European Parliament on the choice of an adequate legal basis for the purpose of conducting such negotiations, which was public knowledge and which also appeared in

the decision at issue itself.

- 39 By the second part of its first ground of appeal, the Council, supported by the Commission, submits that where the institutions rely on one of the exceptions laid down in Article 4(1) of Regulation No 1049/2001 in order to justify a decision relating to access to a document, they have a wide margin of discretion; therefore the Court's review of the legality of such a decision should be limited.
- 40 However, in the present case, the General Court had undertaken a full review of the decision at issue. In particular, in paragraph 58 of the judgment under appeal, it had explicitly concluded that 'the Council has not shown how, specifically and actually, wider access to [document 11897/09] would have undermined the public interest in the field of international relations'. According to the Council, that phrase, and in particular the words 'specifically and actually', demonstrate that the General Court did not just check whether the facts had been accurately stated and whether there had been a manifest error of assessment of the facts, but rather required the Council to prove that the disclosure of that document would lead to harm.
- 41 Ms in't Veld, supported by the European Parliament, contends, in opposition to that argument, that it is the case-law of the Court of Justice that requires the institution concerned to provide proof that the disclosure of a document to which access has been refused would specifically and actually undermine one of the interests protected by Article 4 of Regulation No 1049/2001. The General Court had confined itself to examining the two arguments raised by the Council and by the Commission to justify the non-disclosure of document 11897/09 without infringing the Council's discretion, given that the arguments of those institutions referred to manifest errors of assessment which the General Court is empowered to review in the context of a limited review. The General Court had not, therefore, assessed the specific content of the proposed agreement or the negotiating directives, and therefore did not replace the Council's assessment with its own.

Findings of the Court

- 42 As regards the first part of the first plea put forward by the Council in support of its appeal, it must be held that that part of the plea is based on a misreading of the judgment under appeal.
- 43 Contrary to what may be inferred from the Council's and the Commission's reasoning, the General Court did not in any way rule out the possibility that the disclosure of a disagreement between institutions as to the choice of legal basis empowering an institution to conclude an international agreement on behalf of the European Union might undermine the protection of the interest protected by the third indent of Article 4(1)(a) of Regulation No 1049/2001.
- 44 On the contrary, the General Court merely stated, in paragraph 46 of the judgment under appeal, first of all, that the risk involved in disclosing positions taken within the institutions with regard to that choice does not in itself establish the existence of a threat to the European Union's interest in the field of international relations. It went on to point out, in paragraph 50 of that judgment, that the mere fear of disclosure of the existence of divergent opinions within the institutions regarding the appropriate legal basis on which to adopt a decision authorising the opening of negotiations on behalf of the European Union is not a sufficient basis for concluding that the public interest in the field of international relations may be undermined. Lastly, in paragraph 52 of that judgment, it ruled out the possibility that 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 might give rise to a presumption of the existence of a threat to the credibility of the European Union in the negotiations for an international agreement.

- 45 Such an interpretation of the third indent of Article 4(1)(a) of Regulation No 1049/2001 is not incorrect in law.
- 46 It must be noted in that regard that Regulation No 1049/2001 is designed — as is stated in recital 4 and reflected in Article 1 — to confer on the public as wide a right of access as possible to documents of the institutions (*Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 28 and the case-law cited).
- 47 However, that right is none the less subject to certain limitations based on grounds of public or private interest. More specifically, and in reflection of recital 11, Article 4 of Regulation No 1049/2001 provides for a number of exceptions enabling the institutions to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision (*Council v Access Info Europe*, EU:C:2013:671, paragraph 29 and the case-law cited).
- 48 Nevertheless, as such exceptions derogate from the principle of the widest possible public access to documents, they must be interpreted and applied strictly (*Council v Access Info Europe*, EU:C:2013:671, paragraph 30 and the case-law cited).
- 49 As is apparent from the judgment under appeal, document 11897/09 contains an opinion of the Council's Legal Service, issued in the context of the adoption of the Council's decision authorising the opening of negotiations, on behalf of the European Union, in respect of the proposed agreement.
- 50 Ms in't Veld does not dispute, moreover, that the exception to the right of access linked to the protection of the public interest as regards the European Union's international relations is capable of applying to such a document.
- 51 However, the mere fact that a document concerns an interest protected by an exception to the right of access laid down in Article 4 of Regulation No 1049/2001 is not sufficient to justify the application of that provision (see, to that effect, *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 116).
- 52 Indeed, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, first 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. In addition, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical (*Council v Access Info Europe*, EU:C:2013:671, paragraph 31 and the case-law cited).
- 53 Moreover, if the institution applies one of the exceptions provided for in Article 4(2) and (3) of Regulation No 1049/2001, it is for that institution to weigh the particular interest to be protected through non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible, having regard to the advantages of increased openness, as described in recital 2 to Regulation No 1049/2001, in that it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (*Council v Access Info Europe*, EU:C:2013:671, paragraph 32 and the case-law cited).
- 54 However, as is evident from paragraph 7 of the judgment under appeal, the Council did not provide anything in the decision at issue to demonstrate how disclosure of document 11897/09 would risk specifically and actually undermining the interest protected by the third indent of Article 4(1)(a) of Regulation No 1049/2001.

- 55 Furthermore, the arguments put forward by the Council do not establish that the General Court's reasoning in relation to the interpretation of that provision is incorrect in law.
- 56 In the first place, the case-law invoked by the Council does not reveal any general rule under which disclosure of the existence of a divergence of views among the institutions as to the legal basis on which one of them is empowered to open negotiations to conclude an international agreement and, therefore, the determination of the appropriate EU act for that purpose, would in itself undermine the public interest as regards the European Union's international relations.
- 57 First of all, in *Commission v Council* (EU:C:1971:32, paragraph 86), the Court held that to have suggested to third countries, at an advanced stage of the negotiations in respect of an international agreement, that there was now a new distribution of powers within the European Union could jeopardise the successful outcome of those negotiations. That does not correspond at all to the situation in which there is disclosure, at most, of a divergence of opinion between institutions as to the legal basis of a decision authorising the negotiation of an international agreement. Nor does it mean that the decision in question could, on that basis, be invalidated.
- 58 Next, in *Opinion 1/75* (EU:C:1975:145), the Court referred to the negative international repercussions that might flow from a possible decision of the Court to the effect that an agreement is, either by reason of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaty. Lastly, in *Opinion 2/00* (EU:C:2001:664, paragraphs 5 and 6), the Court emphasised that to proceed on an incorrect legal basis is liable to invalidate the act concluding the agreement, and that that is liable to create complications both at EU level and in international law. The Court's considerations in the context of those Opinions are set in the context of an examination of the objective of the procedure laid down in Article 300(6) EC (now Article 218(11) TFEU). In the present case, not only did the parties not avail themselves of that procedure for prior referral to the Court of Justice before the conclusion of the proposed agreement, but in any case the risk that the Council's decision on the opening of negotiations might be the subject of a judicial decision declaring it to be incompatible with the Treaties was not contemplated.
- 59 In the second place, the General Court's reference in paragraph 54 of the judgment under appeal to the procedure laid down under Article 300(6) EC is merely descriptive. Such a reference must clearly be understood as an indication that it is the Treaty itself which lays down a judicial procedure concerning the legal issues that may be linked to the legal basis of a decision concerning the conclusion of an international agreement, a procedure which precedes the signing of the agreement and which is public, thereby ruling out any presumption that a discussion that is made public, concerning the correct legal basis for such a decision, can automatically specifically and actually undermine the public interest as regards international relations.
- 60 Lastly, in third place, in its assessment of the existence of a risk of a threat to that interest, the General Court was fully entitled, in paragraph 55 of the judgment under appeal, to take into consideration the fact that the main content of document 11897/09 had been made public in a Parliament resolution. In the context of that assessment, which concerns the risk that disclosure of a document would lead to harm to the interest protected under Article 4 of Regulation No 1049/2001, the fact that the earlier disclosure was not in accordance with that regulation is not relevant; the inferences to be drawn from such unlawfulness may have to be drawn in the context of other legal remedies provided for by the Treaties.
- 61 Having regard to the foregoing, it must be concluded that the first part of the first plea put forward by the Council in support of its appeal is unfounded.
- 62 By the second part of that plea, the Council submits that the General Court wrongly carried out a

full review of the legality of the decision at issue, when it should have confined itself to a limited review, as is clear from the case-law of the Court of Justice.

- 63 It must be noted in that regard that while it is true that, as regards the scope of the judicial review of the legality of a decision of an institution refusing public access to a document on the basis of one of the exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation No 1049/2001, that institution must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest. The review by the Courts of the European Union of the legality of such a decision must therefore 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 or a misuse of powers (*Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 34).
- 64 However, where the institution concerned refuses access to a document the disclosure of which would undermine one of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, that institution remains obliged, as noted in paragraph 52 of the present judgment, to explain how disclosure of that document could specifically and actually undermine the interest protected by an exception provided for in that provision, and the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical.
- 65 In paragraph 58 of the judgment under appeal, the General Court found that, with the exception of those elements of document 11897/09 which concern the specific content of the proposed agreement or the negotiating directives, which could reveal the strategic objectives pursued by the European Union in the negotiations concerning that agreement, the Council had not shown how, specifically and actually, wider access to that document would have undermined the public interest in the field of international relations.
- 66 To that end, the General Court confined itself to verifying the statement of reasons for the decision at issue in that regard. After having pointed out, in paragraph 41 of the judgment under appeal, that the Council was maintaining that that decision referred to the risk associated with the disclosure of those elements of the analysis relating to the legal basis of the proposed agreement, even if that was not explicitly apparent from that decision, the General Court, on the basis of that consideration, then confined itself to declaring, in paragraphs 46 to 50 of that judgment, that that statement of reasons for the decision at issue was insufficient in law, since merely noting the existence of that risk did not in itself satisfy the requirement whereby the institution concerned must establish, specifically and actually, the existence of a threat to the European Union's interest in the field of international relations. The General Court ruled in that regard that, since the choice of the legal basis rests on objective factors and does not fall within the discretion of the institution, any divergence of opinion 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, and which might have been liable to damage the interests of the European Union in the field of international relations.
- 67 By contrast, in paragraphs 57 and 58 of the judgment under appeal, the General Court considered that the statement of reasons put forward by the Council in support of the decision at issue was sufficient in itself as regards the elements of document 11897/09 concerning the specific content of the proposed agreement or the negotiating directives, and concluded in paragraph 59 of that judgment that the Council had established the risk of a threat to the public interest in the field of international relations with regard to those elements only.
- 68 It follows from the foregoing that the General Court confined itself to reviewing the statement of reasons underpinning the decision at issue and did not, therefore, infringe the Council's discretion.

69 In the light of those considerations, the second part of the first plea put forward by the Council in support of its appeal is also unfounded; accordingly this plea must be rejected in its entirety.

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

The judgment under appeal

70 In the light of its finding following examination of the first plea in law put forward by Ms in't Veld in support of her action for annulment, the General Court limited its examination of the second plea, alleging infringement of the second indent of Article 4(2) of Regulation No 1049/2001, to the undisclosed parts of document 11897/09 only, and excluded those dealing with the specific content of the proposed agreement or the negotiating directives.

71 In paragraphs 69 and 70 of the judgment under appeal, first of all, the General Court held that the grounds of the decision at issue, according to which the Council and its Legal Service could be deterred from asking for and providing written opinions relating to sensitive issues if those opinions subsequently had to be disclosed, were not substantiated by any specific, detailed evidence which could establish in the present case the existence of a reasonably foreseeable and not purely hypothetical threat to the Council's interest in receiving frank, objective and comprehensive legal advice.

72 In paragraph 71 of the judgment under appeal, the General Court also held that, since the possibility that the public interest in the field of international relations could be undermined was 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 concerned the field of the international relations of the European Union was not in itself sufficient for the application of the exception laid down in the second indent of Article 4(2) of that regulation.

73 In paragraphs 72 to 74 of the judgment under appeal, the General Court went on to note that, although it may be conceded that where international negotiations are still ongoing, enhanced protection is necessary in respect of the documents of the institution involved in those negotiations, in order to rule out any threat to the interests of the European Union during the process of those 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. In the context of the exception provided for in the second indent of Article 4(2) of that regulation, the Council cannot legitimately 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. 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.

74 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, the General Court considered, in paragraph 78 of the judgment under appeal, that an argument of such a general nature could not justify an exception to the transparency required by Regulation No 1049/2001.

75 Lastly, according to the General Court, it was for the Council to balance the particular interest to be protected by non-disclosure of document 11897/09 against any overriding public interest justifying disclosure.

76 In that regard, the General Court, in paragraphs 81 to 95 of the judgment under appeal, noted that

the requirements for transparency are greater where the Council is acting in its legislative capacity. Yet, initiating and conducting negotiations in order to conclude an international agreement fall, in principle, within the domain of the executive. However, the General Court also added that application of the principle of the transparency of the decision-making process of the European Union could not 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, such as the proposed 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. In that regard, the fact that document 11897/09 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 an assessment of 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. Moreover, the fact that the procedure for concluding the proposed agreement was still ongoing at the time of the adoption of the decision at issue is not conclusive in ascertaining whether, despite that risk, there exists any overriding public interest justifying disclosure. 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.

77 On the basis of those considerations, the General Court upheld the second plea in law put forward by Ms in't Veld in support of her action for annulment.

Arguments of the parties

78 The second ground of appeal raised by the Council alleges infringement of the second indent of Article 4(2) of Regulation No 1049/2001, and is in two parts.

79 By the first part of this plea, the Council, supported by the Commission, claims that the General Court failed to consider the specific nature of the subject-matter dealt with in the legal opinion contained in document 11897/09 and erroneously applied the 'specific and actual harm' standard.

80 In particular, the General Court had overlooked the specific circumstances of the present case, in particular the fact that the international negotiations on a sensitive matter relating to cooperation in the fight against terrorism were ongoing at the material time, and that the institutions were in disagreement regarding the choice of the legal basis of the proposed agreement. The fact that the General Court failed to take into consideration, for the purposes of the exception in the second indent of Article 4(2) of Regulation No 1049/2001, the subject-matter dealt with in the legal opinion was inconsistent with the case-law of the Court of Justice, according to which the area of activity to which a document relates and its sensitive nature are relevant for the purposes of applying the relative exceptions provided for in Article 4(2) and (3) of that regulation.

81 According to the Council, the General Court's insistence, in paragraph 73 of the judgment under appeal, on the fact that the interests related to the negotiation of the international agreement had 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' is based on the false premiss that an institution cannot rely on the same factual elements in order to justify the application of different exceptions under Article 4 of that regulation, since that premiss is supported neither by the wording of the regulation itself nor by the relevant case-law, the Council citing in support of its view *Commission v Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 55, and *Commission v Éditions Odile Jacob* EU:C:2012:393, paragraphs 113 to 115.

- 82 The Council adds in that regard that the General Court committed an error of law by requiring it to establish the existence of specific and actual harm to the protection of legal advice and to submit specific, detailed evidence proving the existence of that harm.
- 83 In any event, the Council had explained, in the decision at issue, how, in the present case, public access to document 11897/09 was likely to undermine the interest protected by the exception in the second indent of Article 4(2) of Regulation No 1049/2001. In particular, there was a real risk that the European Parliament might seek to use elements in the legal opinion in the political exchanges between the institutions in order to influence the pending negotiations. Moreover, the negotiations had still been pending at the material time, while the Court of Justice had never ruled in favour of disclosure of a legal opinion in such circumstances.
- 84 Lastly, the Council submits that the General Court's view, in paragraph 101 of the judgment under appeal, that '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', is inconsistent with the case-law of the Court of Justice, which admits that internal documents including legal opinions benefit from a higher level of protection while the relevant procedure is pending. It is also contrary to the wording of the second subparagraph of Article 4(3) of Regulation No 1049/2001, which provides for a specific exception regarding the protection of internal documents relating to a matter where the decision has not been taken by the institution.
- 85 According to Ms in't Veld, supported by the European Parliament, the General Court in fact confined itself to considering whether the fact that the legal advice related to the European Union's international relations should have changed its analysis, and concluded in paragraph 71 of the judgment under appeal that this circumstance was not 'in itself' sufficient to justify a refusal based on the protection of legal advice.
- 86 In addition, the General Court's statement in paragraph 88 of the judgment under appeal that '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' did not mean that legal advice in relation to the legal basis of those negotiations is 'particularly sensitive'. In fact, the judgment under appeal already allowed the Council to redact information from the opinion containing 'strategic elements of the negotiations' because it allowed the Council to redact 'those passages in the requested document containing the analysis of the specific content of the [proposed] agreement which could have revealed the strategic objectives pursued by the European Union in the negotiations'. The part of the judgment which concerns the exception relating to legal advice therefore discussed only the remainder of document 11897/09. The Council's arguments are therefore unfounded.
- 87 As to the General Court's alleged error in the application of the 'specific and actual harm' standard, Ms in't Veld refers back to her arguments in that regard which were set out in the second part of the first plea.
- 88 Lastly, with regard to the alleged existence of exceptional circumstances in the present case, Ms in't Veld maintains, in response to the Council's arguments, that, first, as regards the fact that disclosure should be refused on the ground that the legal advice related to an internal discussion in the Council on the commencement of the negotiations, that is not relevant, since all legal advice constitutes internal discussions on the topic on which they are prepared. Secondly, as regards the fact that the advice relates to the 'sensitive matter' of terrorism and terrorist-financing, the Council had not explained why this would be relevant for the purposes of justifying the restriction of access to an opinion concerning the legal basis for concluding an international agreement such as the

proposed agreement. To the extent that the opinion describes the content of that agreement and the strategic objectives of the European Union, the General Court had decided that the Council was not obliged to disclose them. As to the other parts of the opinion — that is those concerning the legal basis on which to conclude the proposed agreement — their possibly sensitive nature would not depend on the subject-matter of the agreement itself. Thirdly, as regards the fact that the negotiations on that agreement were still ongoing, the General Court had rightly explained that if citizens were precluded from gaining access to internal documents of the institutions on the ground that the decision-making process had not been concluded, they would never be able to participate in that process. Furthermore, the Council's reference in that context to Article 4(3) of Regulation No 1049/2001 was irrelevant, since that exception had not been invoked in the decision at issue. Fourthly, in the light of the argument that disclosure of the document would increase the chances that the European Parliament 'might seek to use elements in the legal opinion in the political exchanges between the institutions in order to influence the pending negotiations', Ms in't Veld notes that, as a Member of that Parliament, she had already been able to take cognisance of the content of document 11897/09 even before the decision at issue was adopted, and therefore, if she had wanted to use those elements in the negotiations with the Council, she could already have done so.

- 89 By the second part of its second plea, the Council, supported by the Commission, claims that the General Court made an error of law in applying, in the context of the present case, case-law of the Court of Justice according to which it is necessary, in the balancing exercise required by the last phrase of Article 4(2) of Regulation No 1049/2001, to take account of the fact that a legal opinion has been issued in the context of a legislative procedure (*Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374). The General Court's reasoning was based on the premiss that the same level of transparency should apply to the European Union's decision-making process during the negotiation of an international agreement affecting the European Union's legislative activity as applies to the legislative process of the European Union itself, which would amount to an unwarranted extension of the judgment in *Sweden and Turco v Council* (EU:C:2008:374) beyond the legislative sphere.
- 90 In fact, there is an important distinction between cases where the European Union is acting in its legislative capacity and those where it is acting in its executive capacity in conducting international relations. Regulation No 1049/2001 itself recognised the special protection to be accorded to international relations, the confidentiality of which is protected by an exception set out in the third indent of Article 4(1)(a), a provision in respect of which the legislator had not, however, foreseen a balancing of the competing interests.
- 91 Although issues of democratic accountability and EU citizens' participation do arise in relation to the conclusion of an international agreement and its subsequent implementation by means of EU legislative acts, the Council maintains that that cannot be the case during the preceding negotiation phase, in so far as it is impossible to inform EU citizens at large without simultaneously informing the international partners with whom the European Union is negotiating.
- 92 Against that argument, Ms in't Veld notes that the General Court allowed the Council to redact the passages in document 11897/09 discussing the specific content of the proposed agreement which could have revealed the strategic objectives of the European Union; therefore those arguments could not be relevant for the discussion of the legal basis of the agreement, as no 'strategic elements' derived from that.
- 93 In addition, the fact that the legal advice related to international relations and that Article 4(1) of Regulation No 1049/2001 contains a special 'mandatory' exception protecting the European Union's international relations does not remove the need to take into account the possibility of an

overriding public interest in the context of Article 4(2) of that regulation. It is precisely because of the impact of the proposed agreement on the legislative activity of the European Union — that is the impact it has on rules that are binding on all EU citizens — that the need to confer greater legitimacy on the institutions and the increased confidence of citizens in them constitute an overriding interest.

- 94 Lastly, as regards the point raised by the Council that, in the context of ongoing negotiations, it is impossible to inform citizens at large without simultaneously informing the international partners with whom the European Union is negotiating, Ms in't Veld states that, while that may be a relevant consideration for the refusal of public access to that part of document 11897/09 concerning the strategic objectives and negotiating tactics, that would not be the case as regards the remainder of that document, which concerns only the question of the legal basis.

Findings of the Court

- 95 As a preliminary point, it should be borne in mind that, according to the case-law of the Court, as regards the exception relating to legal advice laid down in the second indent of Article 4(2) of Regulation No 1049/2001, the examination to be undertaken by the Council when it is asked to disclose a document must necessarily be carried out in three stages, corresponding to the three criteria in that provision (*Sweden and Turco v Council*, EU:C:2008:374, paragraph 37).
- 96 Accordingly, the Council must first satisfy itself that the document which it is asked to disclose does indeed relate to legal advice. Secondly, it must examine whether disclosure of the parts of the document in question which have been identified as relating to legal advice would undermine the protection which must be afforded to that advice, in the sense that it would be harmful to an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice. The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical. Thirdly and lastly, if the Council takes the view that disclosure of a document would undermine the protection of legal advice as defined above, it is incumbent on the Council to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would thereby be undermined (see, to that effect, *Sweden and Turco v Council*, EU:C:2008:374, paragraphs 38 to 44).
- 97 By the first part of its second ground of appeal, the Council, in the first place, claims that the General Court failed to take account, when assessing the risk that the disclosure of document 11897/09 would undermine the interest protected by the second indent of Article 4(2) of Regulation No 1049/2001, of the fact that the content of that document was particularly sensitive, since it concerned ongoing international negotiations on a matter relating to cooperation in the fight against terrorism.
- 98 It is sufficient to note in that regard that the General Court did in fact take that point into consideration in paragraph 71 of the judgment under appeal, but ruled that that fact, in itself, was not sufficient for the application of the relevant exception to the right of access, since the possibility that the public interest in the field of international relations could be undermined is provided for by a separate exception.
- 99 That interpretation is not wrong in law.
- 100 First, it is true that an EU institution, when assessing a request for access to documents which it holds, may take into account more than one of the grounds for refusal set out in Article 4 of Regulation No 1049/2001 (see, to that effect, *Commission v Éditions Odile Jacob* EU:C:2012:393,

paragraph 113, and *Commission v Agrofert Holding* EU:C:2012:394, paragraph 55).

- 101 However, by its arguments, the Council is really seeking to justify the application of a single ground for refusal — the protection of the public interest as regards international relations — by invoking to that end two different exceptions set out in Article 4 of Regulation No 1049/2001. Yet even on the assumption that identical facts could justify the application of two different exceptions, where — as in the present case — an applicant has unsuccessfully relied on the exception expressly laid down for the protection of international relations, that applicant cannot then be justified in referring to the same facts in order to establish a presumption that an exception protecting another interest — such as legal advice — should apply, without explaining how the disclosure of those documents could specifically and actually undermine that other interest.
- 102 Secondly, the General Court itself acknowledged in paragraph 88 of the judgment under appeal that 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. In that regard, the Council's complaint that the General Court failed to draw the appropriate conclusions from that consideration has no basis in fact, since it is precisely on the basis of that consideration that the General Court, in paragraphs 35 to 39 of the judgment under appeal, considered that access to that part of document 11897/09 which contained the strategic elements of the negotiations could legitimately be refused on the basis of the exception set out in the third indent of Article 4(1)(a) of Regulation No 1049/2001.
- 103 In the second place, the Council claims that the General Court erroneously applied the 'specific and actual harm' standard.
- 104 In that regard, it is sufficient to note that, in the light of the case-law mentioned in paragraph 52 of the present judgment, the General Court correctly observed in paragraph 69 of the judgment under appeal that the risk that the disclosure of document 11897/09 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.
- 105 In order to provide the necessary explanations to establish the existence of such a risk, it is necessary, contrary to the Council's and Commission's assertions, to carry out the examination described in paragraph 96 of the present judgment, even if the document to which access is sought does not concern a legislative procedure.
- 106 Admittedly the Court emphasised, in paragraph 46 of the judgment in *Sweden and Turco v Council* (EU:C:2008:374), that the considerations, whereby it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 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, are of particular relevance where the Council is acting in its legislative capacity.
- 107 However, the Court of Justice has also stated that the non-legislative activity of the institutions does not fall outside the scope of Regulation No 1049/2001. Suffice it to note in that respect that Article 2(3) of that regulation states that the latter applies to all documents held by an institution, that is to say, drawn up or received by it and in its possession, in all areas of EU activity (see, to that effect, *Sweden v MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraphs 87, 88 and 109).

- 108 In the third place, the Council claims that, contrary to the criticism levelled at it by the General Court, as set out in the judgment under appeal, it had explained why, in the light of the circumstances of the case, public access to document 11897/09 was likely to undermine the interest protected by the exception in Article 4 of Regulation No 1049/2001.
- 109 As regards, on the one hand, the Council's arguments as to the existence of a real risk of harm to the international negotiations, in that the European Parliament would seek to use the information contained in the legal opinion in order to influence the ongoing negotiations and to challenge the legality of the Council's decision on the conclusion of the proposed agreement, suffice it to note that that criticism overlooks the fact that the General Court decided that the Council was justified in refusing access to those parts of document 11897/09 that related to the specific content of the proposed agreement and the strategic objectives which the European Union pursued in the negotiations. However the Council did not provide any evidence to establish how the disclosure of the remainder of that document would have given rise to such risks.
- 110 On the other hand, as regards the Council's argument that the General Court failed to take account of the fact that the negotiations were ongoing at the time of the request for access to document 11897/09, it must be noted that the General Court did in fact explicitly examine that consideration in paragraphs 72 and 73 of the judgment under appeal, and concluded that it had 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.
- 111 In the light of the foregoing considerations, the first part of the second plea raised by the Council in support of its appeal must be rejected.
- 112 Given that the Council has, in the context of the first part of its second ground of appeal, unsuccessfully challenged the General Court's reasoning in the judgment under appeal — on the basis of which the General Court held, in paragraph 102 of that judgment, that the matters invoked in the decision at issue did not prove that the disclosure of document 11897/09 would have undermined the protection of legal advice —, there is no need to examine the second part of that plea, since the arguments set out are ineffective. That part of the plea relates to the General Court's alternative grounds, according to which the Council had in any event failed to ascertain whether there was an overriding public interest justifying fuller disclosure of document 11897/09 in accordance with the second indent of Article 4(2) of Regulation No 1049/2001.
- 113 It follows from all of the foregoing considerations that the second plea must also be rejected; accordingly the appeal must be dismissed in its entirety.

Costs

- 114 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs.
- 115 Under Article 138(1) of the Rules of Procedure, which applies to the procedure on an appeal by virtue of Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 140(1) of the Rules of Procedure provides that the institutions which have intervened in the proceedings are to bear their own costs.
- 116 Since the Council has been unsuccessful and Ms in't Veld has applied for costs, the Council must be ordered to pay the costs. The European Parliament and the Commission shall bear their own costs.

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

- 1. Dismisses the appeal;**
- 2. Orders the Council of the European Union to pay the costs;**
- 3. Orders the European Parliament and the European Commission to bear their own costs.**

[Signatures]

* Language of the case: English.