Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

15 September 2016*

(Access to documents — Regulation (EC) No 1049/2001 — Documents drawn up in the context of the preparatory works leading to the adoption of the directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products — Refusal to grant access — Exception relating to the protection of court proceedings and legal advice — Exception relating to the protection of the decision-making process — Overriding public interest)

In Case T-796/14,

Philip Morris Ltd, established in Richmond (United Kingdom), represented by K. Nordlander and M. Abenhaïm, lawyers,

applicant,

v

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

defendant,

APPLICATION based on Article 263 TFEU and seeking annulment of Commission Decision Ares(2014) 3142109 of 24 September 2014, in so far as it refuses to grant the applicant full access to the requested documents, with the exception of the redacted personal data contained therein,

THE GENERAL COURT (Eighth Chamber),

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

Registrar: L. Grzegorczyk, Administrator,

having regard to the written procedure and further to the hearing on 21 January 2016,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

1 By email of 22 January 2014, the applicant, Philip Morris Ltd, sent a number of applications for access to documents to the Secretariat-General of the European Commission pursuant 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).

2 Those applications all concerned the legislative procedure that had led to the adoption of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (OJ 2014 L 127, p. 1) ('the TPD').

3 By email of 21 February 2014, the Commission's Directorate-General (DG) for 'Health and Consumers' informed the applicant that, in view of the volume of documents concerned, it was unable to reply within the time limit laid down in Article 7(1) of Regulation No 1049/2001 and proposed to find a solution in accordance with Article 6(3) of that regulation.

4 By letter of 10 March 2014, the applicant accepted the DG for 'Health and Consumers'' proposal to divide the requested documents into various batches. However, it stated that it would refuse that proposal if it meant that, as a result, the applicant would not receive a reply concerning all of the documents covered by its applications by 25 April 2014.

5 By letter of 21 March 2014, the Head of Unit D4 'Substances of human origin and tobacco control' of the DG for 'Health and Consumers' stated that the time limit proposed by the applicant was unreasonable, indicating that it was open to an institution to weigh the interest in public access to documents, on the one hand, against the burden of work so caused, on the other, in order to safeguard, in those particular cases, the interests of good administration. It also stated that it would return to that issue as swiftly as possible in order to determine the next steps to be taken and the time limits to be applied.

6 By letter of 2 April 2014, the Director of the DG for 'Health and Consumers' answered some of the applications for access and informed the applicant that the DG would deal with the applications concerning the other identified documents in various batches.

7 By letter of 23 April 2014, the applicant reminded the Commission that, failing a fair solution, the Commission was bound by the time limits laid down in Article 7(1) of Regulation No 1049/2001, stating that it reserved the right to bring proceedings in the event that its applications were still pending on 1 May 2014. It also requested that the order of priority of the batches be amended slightly, which, for the most part, was accepted by the Commission.

8 By its initial reply of 15 May 2014, the DG for 'Health and Consumers' granted full access (the personal data having been redacted) to the majority of the documents in Batch No 1 (39 documents in total), Batch No 3 (24 documents in total) and Batch No 5 (5 documents in total). It stated that the examination of the documents in Batches Nos 2 and 4 and some of the documents in Batch No 3 was still ongoing. The Commission granted partial access to 13 documents in Batches Nos 1 and 3. The refusal to grant full access was based on the protection of the decision-making process (provided for in the second subparagraph of Article 4(3) of Regulation No 1049/2001), of legal advice (provided for in the second indent of Article 4(2) of Regulation No 1049/2001), of international relations (provided for in the third indent of Article 4(1)(a) of Regulation No 1049/2001), of the commercial interests of a

natural or legal person (provided for in the first indent of Article 4(2) of Regulation No 1049/2001) and on the protection of privacy and the integrity of individuals (provided for in Article 4(1)(b) of Regulation No 1049/2001).

9 By letter of 6 June 2014, the applicant submitted a confirmatory application to the Commission, seeking full access to the 13 documents in respect of which the Commission had granted only partial access.

10 On 1 June 2014, the Secretariat-General of the Commission extended the time limit for a reply by fifteen working days, in accordance with Article 8(2) of Regulation No 1049/2001.

11 On 23 July 2014, a second holding reply was sent to the applicant.

12 On 24 September 2014, the Commission adopted Decision Ares(2014) 3142109 in response to the confirmatory application ('the contested decision'), refusing to grant full access to 6 of the 13 documents concerned by that application.

13 The ground for that refusal was the necessity of protecting:

— as regards Documents Nos 1 and 3 to 7, privacy and the integrity of the individual (Article 4(1)(b) of Regulation No 1049/2001);

— as regards Document No 1, legal advice (second indent of Article 4(2) of Regulation No 1049/2001);

— as regards Documents Nos 3 to 7, court proceedings (second indent of Article 4(2) of Regulation No 1049/2001);

— as regards Documents Nos 1 and 3 to 7, the decision-making process (first subparagraph of Article 4(3) of Regulation No 1049/2001);

— in the alternative, as regards Documents Nos 1 and 3 to 7, the decision-making process (second subparagraph of Article 4(3) of Regulation No 1049/2001).

14 In addition, the Commission considered that there was likewise no overriding public interest within the meaning of Article 4(2), *in fine*, and the first and second subparagraphs of Article 4(3), *in fine*, of Regulation No 1049/2001 that would nevertheless justify disclosure of the documents.

15 Lastly, applying Article 4(6) of Regulation No 1049/2001, the Commission granted full access to Documents Nos 2 and 8 to 13 and wider partial access to Documents Nos 1 and 3. It considered that no further partial access was possible for the remaining documents (Documents Nos 1 and 3 to 7), since the redacted parts in those documents were covered, as had already been explained, by the exceptions relied upon.

Procedure and forms of order sought

16 By application lodged at the Registry of the General Court on 4 December 2014, the applicant brought the present action.

17 On 16 March 2015, the Commission submitted its defence.

18 In accordance with Article 47(1) of the Rules of Procedure of the General Court of 2 May 1991, the General Court (Eighth Chamber) decided that a second exchange of pleadings was unnecessary.

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

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

21 By decision of the President of the Eighth Chamber of the General Court of 16 December 2015, Cases T-796/14, T-800/14 and T-18/15 were joined for the purposes of the oral procedure in accordance with Article 68(1) of the Rules of Procedure.

22 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 21 January 2016.

23 The applicant claims that the Court should:

— declare the action admissible;

— annul the contested decision in so far as it refuses full access to Documents Nos 1 and 3 to 7 as listed in the application, with the exception of the data relating to the protection of privacy and the integrity of the individual;

— order the Commission to pay the costs.

24 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

25 In support of the action, the applicant raises three pleas in law, the first alleging a failure to state reasons, the second alleging infringement of the second indent of Article 4(2) of Regulation No 1049/2001 and the third alleging infringement of Article 4(3) of that regulation.

First plea in law: failure to state reasons for the contested decision

26 The applicant alleges that the Commission did not state the reasons for its partial refusal to grant access. First, it claims that the Commission put forward general arguments in order to justify its refusal, without stating the grounds for and relevant factual circumstances of each refusal. Next, as regards the question whether there was an overriding public interest, instead of weighing up the requirements ground by ground, the Commission carried out the same assessment for all the different grounds and documents. For that reason, the contested decision should be annulled. Then, when applying the exception laid down in the second indent of Article 4(2) of Regulation No 1049/2001, the contested decision does not explain whether the justification invoked for each redaction concerned 'legal advice' or 'court proceedings'. Lastly, the principle of equality of arms cannot be relevant in the context of access to documents concerning a legislative procedure.

27 The Commission disputes the merits of those arguments.

28 It should be observed at the outset that, according to settled case-law, the obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (judgments of 22 March 2001, *France* v *Commission*, C-17/99, EU:C:2001:178, paragraph 35, and 26 October 2011, *Dufour* v *ECB*, T-436/09, EU:T:2011:634, paragraph 52).

29 It is settled case-law that the statement of reasons required by Article 296 TFEU must be appropriate to the measure in question and must disclose clearly and unequivocally the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent EU Court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons for a measure meets the requirements of that article must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 63; 6 March 2003, *Interporc* v *Commission*, C-41/00 P, EU:C:2003:125, paragraph 55; 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 80; and 19 November 2014, *Ntouvas* v *ECDC*, T-223/12, not published, EU:T:2014:975, paragraph 20).

30 Regarding a request for access to documents, the reasons for any decision of an institution in respect of the exceptions set out in Article 4 of Regulation No 1049/2001 must be stated. If an institution decides to refuse access to a document it has been asked to disclose, it must explain, first, how access to that document could specifically and effectively compromise the interest protected by an exception laid down in Article 4 of Regulation No 1049/2001 upon which it is relying and, secondly, in the situations referred to in Article 4(2) and (3) of that regulation, whether or not there is an overriding public interest that might nevertheless justify disclosure of the document concerned (judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 48 and 49; 11 March 2009, *Borax Europe* v *Commission*, T-121/05, not published, EU:T:2009:64, paragraph 37; and 12 September 2013, *Besselink* v *Council*, T-331/11, not published, EU:T:2013:419, paragraph 96).

31 It is therefore 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, first, whether the requested document does in fact fall within the sphere covered by the exception relied on and, second, whether the need of protection relating to that exception is genuine (judgments of 26 April 2005, *Sison* v *Council*, T-110/03, T-150/03 and T-405/03, EU:T:2005:143, paragraph 61, and 12 September 2013, *Besselink* v *Council*, T-331/11, not published, EU:T:2013:419, paragraph 99).

32 In the present case, it is apparent from the grounds of the contested decision that the Commission based the refusal to grant full access, so far as it is relevant to the present case, on the exceptions laid down in the second indent of Article 4(2) (protection of court proceedings and legal advice) and the first and second subparagraphs of Article 4(3) (protection of the decision-making process) of Regulation No 1049/2001.

33 It can also be seen from those grounds, when read in conjunction with the initial decision, that the documents at issue, in respect of which only partial access was granted, are as follows:

— Document No 1: 'Note for the file — Unit C6 meeting with LS and SG', dated 6 May 2011, containing the minutes of a meeting between representatives from the Commission's DG for 'Health and Consumers' and its Legal Service;

— Document No 3: minutes of the Impact Assessment Steering Group meeting on the revision of the Tobacco Products Directive, held on 19 July 2012;

— Document No 4: email of 13 March 2012 sent by an official of the DG for 'Enterprise and Industry' regarding certain issues discussed internally during the process of drafting the Tobacco Products Directive;

— Document No 5: email of 11 May 2011 sent by an official of the DG for 'Internal Market and Services' to various Directorates-General regarding the fourth meeting of the Impact Assessment Steering Group;

— Document No 6: email of 20 March 2012 sent by an official of the DG for 'Internal Market and Services' to various Directorates-General;

— Document No 7: email of 20 July 2012 sent by an official of the DG for 'Internal Market and Services' to other officials of the same DG and containing the minutes of a meeting between various Commission services held on 19 July 2012.

34 First, the Commission considered that disclosure of Document No 1, which contained an opinion of its Legal Service, would jeopardise legal advice as protected by the exception laid down in the second indent of Article 4(2) of Regulation No 1049/2001, an exception intended to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice. Disclosure would place in the public domain internal opinions on highly sensitive issues that had become the subject of litigation. Regarding Documents Nos 3 to 7, drawn up for internal use in the context of preliminary deliberations and consultations concerning the adoption of legislative proposals and containing observations from various Commission services relating to the packaging and labelling of tobacco products and arrangements for the sale of tobacco products, it considered that disclosure of those documents would undermine the court proceedings also protected by the exception laid down in the second indent of Article 4(2) of Regulation No 1049/2001.

35 Both in the context of the protection of legal advice and in the context of the protection of court proceedings, the Commission considered that full disclosure of the requested documents could have a negative effect on its ability effectively to defend the validity of the TPD. It stated that the likelihood of the protected interests being compromised was not hypothetical but genuine and tangible, and mentioned, in that regard:

— the action brought by Poland before the Court of Justice of the European Union against the European Parliament and the Council of the European Union (a case which has since given rise to the judgment of 4 May 2016, *Poland* v *Parliament and Council* (C-358/14, EU:C:2016:323));

— the fact that the adoption of the TPD had been strongly opposed by the tobacco industry and, consequently, questions referred for a preliminary ruling concerning the validity of that directive and the measures by the Member States were expected in the near future, as had been the case with the first Tobacco Products Directive;

— the fact that, in the meantime, the applicant had itself announced the bringing of proceedings before the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) (United Kingdom), against the TPD, which would mean that, in all likelihood, the Court of Justice of the European Union would have to be informed of the case by way of a reference for a preliminary ruling;

— the various disputes pending before the World Trade Organisation (WTO) (this last ground having been relied on only in the context of the exception relating to court proceedings in respect of Documents Nos 3 to 7).

36 In addition, the Commission considered that disclosure of Documents Nos 1 and 3 to 7 would also undermine the protection of the decision-making process laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001. The Tobacco Products Directive being the subject of legal proceedings before the Court of Justice of the European Union, the Commission cannot rule out the possibility, in the event that the TPD is annulled, that the legislative decision-making process concerning that file would have to be re-launched and that any such possible legislative process would be seriously affected by full disclosure of documents containing reflections on that subject. In that context, the Commission considered in the contested decision that disclosure of the redacted parts of the documents in question would undermine the decision-making process within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001 and that, so long as legal proceedings are pending, the decision-making process cannot be regarded as having come to a definitive end. In the alternative, the Commission considered that the documents were also covered by the exception laid down in the second subparagraph of Article 4(3) of Regulation No 1049/2001.

37 Second, the Commission ruled out the existence of an overriding public interest in disclosure. While recognising the importance of transparency in order to enable citizens to participate in the democratic process and the presumption of openness as regards documents concerning a legislative process, the Commission nonetheless considered that the protection of its internal reflections, of the principle of equality of arms and of its decision-making process was of greater importance. In addition, it considered that the interest relied upon by the applicant was private and not public.

38 It should be observed that it is apparent from those reasons for the contested decision that, in accordance with the case-law cited in paragraphs 29 and 30 above, the Commission indicated, sufficiently clearly and comprehensibly, the reasons why it considered, first, that access to the requested documents could specifically and actually compromise the interest protected by the exceptions relied upon as laid down in Article 4 of Regulation No 1049/2001, and, second, that there was no overriding public interest that might nevertheless justify disclosure of those documents.

39 Furthermore, it should be added that, as is apparent from the applicant's written pleadings, the statement of reasons provided in the contested decision enabled it to understand the reasons for the refusal to grant access and to prepare its action. In addition, that statement of reasons is also sufficient to enable the Court to exercise its power of review.

40 In the light of the foregoing, it must be concluded that the contested decision contains an adequate statement of reasons. The issue of the merits of the exceptions relied upon in respect of the requested documents must be examined in the context of the second and third pleas in law.

41 Consequently, the first plea in law must be rejected as unfounded.

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

42 By the second plea in law, in the first place, the applicant alleges that the Commission has not shown how disclosure would in each case specifically and actually undermine the protection of legal advice or court proceedings. In the second place, it submits that the exception relating to court proceedings is not applicable.

43 Concerning the reasons given regarding the legal advice, the applicant submits that the institutions should — as a matter of course — disclose opinions of their Legal Services that relate to the legislative process and that the Commission has provided no explanation showing why, in the present case, full disclosure of the documents at issue would specifically and actually undermine the protection of legal advice. Abstract references to the Legal Service's ability to defend the validity of the TPD are

not relevant to either the exception protecting legal advice or the exception protecting 'court proceedings'. Lastly, the Commission failed to carry out a detailed and specific assessment of whether an overriding public interest could justify disclosure of each of the documents in question.

44 The applicant submits that the exception relating to court proceedings is not applicable. The documents in question were drawn up purely in the context of preliminary consultations and deliberations with a view to the adoption of the legislative proposal in question and none of those documents was created in the context of pending, closed, or future court proceedings.

45 As regards the Commission's reference to the proceedings before the WTO, the applicant argues that the obligation to construe the exceptions restrictively necessarily excludes such proceedings, for the WTO dispute settlement mechanism is not a 'court'. In addition, WTO proceedings are based on a wholly separate and distinct legal framework and the requested documents cannot be relevant to a WTO case.

46 The Commission disputes the merits of those arguments.

47 The Commission contends that, regarding the protection of legal advice, it gave sufficient reasons explaining why Document No 1 warranted such protection.

48 The Commission argues that the exception relating to the protection of court proceedings has to be interpreted as covering, both before and after the commencement of such proceedings, not only the documents included in the case-file and the documents drawn up solely for the purposes of specific court proceedings, but also other internal documents closely 'related' or 'relevant' to future or pending court proceedings, since disclosing such documents would overturn the principle of equality of arms and would harm the serenity and proper conduct of the court proceedings.

49 It should be borne in mind that, in accordance with recital 1 thereof, Regulation No 1049/2001 reflects the intention expressed in the second paragraph of Article 1 TEU of marking a new stage in the process of creating an 'ever closer union among the peoples of Europe', in which decisions are taken as openly as possible and as closely as possible to the citizen. As is stated in recital 2 of that regulation, the right of public access to documents of the institutions is related to the democratic nature of those institutions (judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 34; 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 68; and 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 72).

50 To that end, the purpose of Regulation No 1049/2001, as indicated in recital 4 and Article 1 thereof, is to give the public a right of access to documents of the institutions that is as wide as possible (judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 33; 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 69; and 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 73).

51 It is true that that right is nonetheless subject to certain limitations based on grounds of public or private interest. More specifically, and in accordance with recital 11 thereof, Article 4 of Regulation No 1049/2001 lays down a series of exceptions authorising the institutions to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision (judgments of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 62; 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraphs 70 and 71; 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 74; and 17 October 2013, *Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 29).

52 Nevertheless, since such exceptions derogate from the principle of the widest possible public access to documents, they must be interpreted and applied strictly (judgments of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 63; 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 36; 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 73; and 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 75).

53 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, however, sufficient to justify the application of that exception (judgments of 3 July 2014, *Council* v *in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 51, and 13 April 2005, *Verein für Konsumenteninformation* v *Commission*, T-2/03, EU:T:2005:125, paragraph 69).

54 First, if the institution concerned decides to refuse access to a document it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and actually compromise the interest protected by the exception, among those provided for in Article 4 of Regulation No 1049/2001, upon which it relies. Moreover, the likelihood of that interest being compromised must be reasonably foreseeable and not purely hypothetical (see judgment of 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 76 and the case-law cited).

55 Second, if an institution applies one of the exceptions provided for in Article 4 of Regulation No 1049/2001, it is for that institution to weigh the particular interest to be protected through non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible, having regard to the advantages stemming, as noted in recital 2 of Regulation No 1049/2001, from increased openness, in that it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 45; 17 October 2013, *Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 32; and 3 July 2014, *Council* v *in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 53).

56 Moreover, the Court has also held that those considerations are clearly of particular relevance where the Council is acting in its legislative capacity, as is apparent from recital 6 of Regulation No 1049/2001, according to which wider access must be granted to documents in precisely such cases. Openness in that respect contributes to strengthening democracy by enabling citizens to scrutinise all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights (judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 46, and 17 October 2013, *Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 33). Although that case-law concerns a request for access to Council documents, it is also relevant to Commission documents drawn up in the context of a legislative process.

Protection of legal advice

57 The applicant criticises, in essence, the vague grounds relied upon by the Commission, grounds which, in the applicant's view, have, in any event, already been rejected in case-law.

58 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 institution concerned when it is asked to disclose a document must necessarily be carried out in

three stages corresponding to the three criteria in that provision (judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 37, and 3 July 2014, *Council* v *in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 95).

59 Accordingly, that institution must first be satisfied that the document it is being asked to disclose does indeed relate to legal advice. Second, it must examine whether disclosure of the parts of the document in question that have been identified as relating to legal advice would undermine the protection that must be afforded to that advice, in the sense that it would be harmful to an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice. The likelihood of that interest being compromised must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical. Third and lastly, if the institution concerned takes the view that disclosure of a document would undermine the protection of legal advice as defined above, it is incumbent on that institution to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would be compromised thereby (see, to that effect, judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 38 to 44, and 3 July 2014, *Council* v *in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 96).

60 The Court has also held that, in so far as the interest in protecting the independence of that institution's Legal Service could be compromised by disclosure of opinions of that Legal Service issued in the course of legislative procedures, that likelihood would have to be weighed up against the overriding public interests underlying Regulation No 1049/2001. Such an overriding public interest is constituted by the fact that disclosure of documents containing the opinions of an institution's Legal Service on legal questions arising when legislative initiatives are being debated increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinise the information which has formed the basis of a legislative act, as referred to, in particular, in recitals 2 and 6 of that regulation (judgment of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 67).

61 It is apparent from the considerations mentioned above that Regulation No 1049/2001 imposes, in principle, an obligation to disclose the opinions of an institution's Legal Service relating to a legislative process (judgment of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 68).

62 That finding does not, however, preclude a refusal, on account of the protection of legal advice, to disclose a specific legal opinion, given in the context of a legislative process, but being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question. In such a case, it is incumbent on the institution concerned to give a detailed statement of reasons for such a refusal (judgment of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 69).

63 In the present case, the Court could find, following the production of the documents in connection with the measure of inquiry adopted by its order of 11 November 2015, that Document No 1 was an opinion of the Commission's Legal Service.

64 Although it follows from the judgment of 1 July 2008, S*weden and Turco* v *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374), that, in principle, a legal opinion must be disclosed, that judgment does not preclude a refusal to disclose a legal opinion in specific cases.

65 In addition, it is true that the Court has rebutted the argument that disclosure of a legal opinion could compromise an institution's ability subsequently to defend the validity of a legislative act before a court as being such a general argument that it could not justify an exception to the openness provided for by Regulation No 1049/2001 (see, to that effect, judgment of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 65).

66 However, unlike in the case which gave rise to the judgment of 1 July 2008, *Sweden and Turco* v *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374), in the present case, at the time of adoption of the contested decision (24 September 2014), an action brought at the end of June by the applicant, challenging the TPD and involving a strong likelihood of a reference for a preliminary ruling, having regard to the controversial legal issues connected with the TPD and the history of the legislative process relating to the adoption of the TPD (see paragraph 91 below), was pending before the courts of the United Kingdom.

67 The Commission was therefore entitled to consider that a reference for a preliminary ruling was foreseeable in the near future. In addition, on 22 July 2014 the Republic of Poland had brought an action before the Court of Justice of the European Union contesting the validity of a number of provisions of the TPD which, according to the Republic of Poland, infringed Article 114 TFEU, the principle of proportionality and the principle of subsidiarity.

68 As a result, the Commission's argument that both its ability to defend its position during court proceedings and the principle of equality of arms would be compromised is not without merit.

69 Indeed, it is apparent from the disclosed parts of Document No 1 that the Legal Service was of the opinion that, in respect of certain policy options, some of which had been redacted, contained in the draft Impact Assessment and connected with tobacco products, the European Union was not competent to legislate or the policy option was not proportionate in the light of Article 114 TFEU.

70 Disclosure of the redacted parts of Document No 1 could undermine the protection of legal advice, that is to say, the protection of an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice, and the position of the Commission's Legal Service in its defence of the validity of the TPD before the Court of Justice of the European Union on an equal footing with the other parties, in so far as it would reveal the position of the Commission's Legal Service on sensitive and contentious issues before it had even had the opportunity to present that position during the court proceedings, although no similar obligation was imposed on the other party.

71 Lastly, concerning the argument that the Commission failed to carry out a detailed and specific assessment of whether an overriding public interest could justify disclosure of the documents in question, it should be pointed out that it can be seen from the contested decision that the Commission provided reasons pertaining to its rights of the defence which justified making the public interest connected with transparency subject to the grounds underlying the exception which it had raised. It also explained that the applicant's interest in obtaining the widest possible access to the documents was not a public interest, but was clearly a private interest. Consequently, it cannot be held that the Commission failed to carry out a specific assessment or that it failed to set out the grounds justifying its decision.

72 Accordingly, the complaint concerning the infringement of the second indent of Article 4(2) of Regulation No 1049/2001 regarding the protection of legal advice must be rejected.

Protection of court proceedings

73 As has been mentioned in paragraph 44 above, the applicant disputes the applicability of the exception relating to court proceedings in respect of Documents Nos 3 to 7. In addition, it argues that the Commission did not explain why disclosure would specifically and actually undermine the protection of court proceedings.

74 It should be borne in mind that among the exceptions exhaustively listed in Article 4 of Regulation No 1049/2001 there is an exception relating to the protection of court proceedings.

75 It is apparent from case-law that the expression 'court proceedings' is to be interpreted as meaning that the protection of the public interest precludes disclosure of the content of documents drawn up solely for the purposes of specific court proceedings (see judgments of 6 July 2006, *Franchet and Byk* v *Commission*, T-391/03 and T-70/04, EU:T:2006:190, paragraphs 88 and 89 and the case-law cited, and 3 October 2012, *Jurašinović* v *Council*, T-63/10, EU:T:2012:516, paragraph 66 and the case-law cited).

76 Similarly, it has been held that 'documents drawn up solely for the purposes of specific court proceedings' must be understood to mean pleadings or other documents lodged, internal documents concerning the investigation of the case, and correspondence between the DG concerned and the Legal Service or a law firm concerning the case, the purpose of this definition of the scope of the exception in that case being to ensure both the protection of work done within the Commission and confidentiality and the safeguarding of professional privilege for lawyers (judgment of 6 July 2006, *Franchet and Byk* v *Commission*, T-391/03 and T-70/04, EU:T:2006:190, paragraph 90).

77 The existence of a general presumption has also been acknowledged in respect of the pleadings in court proceedings envisaged in the second indent of Article 4(2) of Regulation No 1049/2001, so long as those proceedings remain pending (judgment of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 94).

78 In that context, the Court held that pleadings lodged before it in court proceedings were wholly specific since they were inherently more a part of the judicial activities of the Court than of the administrative activities of the Commission, those latter activities not requiring, moreover, the same breadth of access to documents as the legislative activities of an EU institution.

79 According to that case-law, such pleadings are drafted exclusively for the purposes of those court proceedings, in which they play the key role. It is by means of the application initiating proceedings that the applicant defines the parameters of the dispute and it is, in particular, during the written procedure that the parties provide the EU judicature with the information on the basis of which it is to adjudicate (judgment of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 78).

80 The Court also held that the exception relating to the protection of court proceedings implied that such protection was necessary to ensure observance of the principles of equality of arms and the sound administration of justice. The granting of access to documents to one party could upset the vital balance between the parties to a dispute, a state of balance which was at the root of the principle of equality of arms, inasmuch as only the institution concerned by an application for access to documents, and not all the parties to the proceedings, would be bound by the obligation of disclosure (judgment of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraphs 85 to 87).

81 In addition, the Court held that the presumption against disclosure of pleadings was justified in the light of the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Courts of the European Union (judgment of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraphs 96 to 99).

82 Lastly, the Court ruled that the general presumption mentioned above was applicable only to specific pending proceedings. Although disclosure of pleadings lodged in pending court proceedings was presumed to undermine the protection of those proceedings, because of the fact that those pleadings constituted the basis on which the Court carried out its judicial activities, the Court ruled that that was not the case where the proceedings in question had been closed by a decision of the Court (judgment of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 130).

83 Once the court proceedings are at an end, there are no longer grounds for presuming that disclosure of pleadings lodged in the course of those proceedings may undermine the protection of those proceedings. The Court did not rule out the possibility that disclosure of pleadings relating to court proceedings that were closed but connected to other proceedings still pending could create a risk that the latter proceedings might be undermined, especially where the parties to the pending case were not the same as those in the case which had been closed. Nevertheless, such a risk depends on several factors, such as the degree of similarity between the arguments put forward in the two cases. If the Commission's pleadings were to be repeated only in part, partial disclosure could be sufficient to prevent any risk of undermining the pending proceedings. Accordingly, only a specific examination of the pleadings to which access is requested can enable the Commission to establish whether their disclosure may be refused on the basis of the second indent of Article 4(2) of Regulation No 1049/2001 (judgment of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraphs 132 to 135).

84 In the present case, it is common ground that Documents Nos 3 to 7 were drawn up in the years preceding the commencement of any court proceedings. Indeed, as can be clearly seen from the contested decision, those documents were drawn up in the context of preliminary consultations and deliberations with a view to the adoption of the legislative proposal in question. Consequently, for that reason alone, they cannot be regarded as having been drawn up solely for the purposes of specific court proceedings (see, to that effect, judgment of 3 October 2012, *Jurašinović* v *Council*, T-63/10, EU:T:2012:516, paragraph 76).

85 However, the Commission seeks, in the context of the exception relating to the protection of court proceedings, an interpretation also covering documents which are not drawn up solely for the purposes of court proceedings on the ground, in essence, of the principle of equality of arms and of its rights of the defence, which may be compromised by a restrictive interpretation of that exception. According to the Commission, if disclosure of pleadings connected with specific court proceedings could compromise its position in those proceedings, the same is true as regards a document revealing to the public its position on issues that may be the subject of future proceedings that have not yet been brought but are reasonably foreseeable.

86 It should be borne in mind that, in accordance with the case-law cited in paragraph 52 above, the exceptions referred to in Article 4 of Regulation No 1049/2001 must be interpreted and applied strictly.

87 In the same vein, it should be borne in mind that the case which gave rise to the judgment of 21 September 2010, *Sweden and Others* v *API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541), primarily deals with specific documents, namely pleadings, and the question of when a general presumption is applicable and when a specific examination must be carried out in relation to pleadings.

88 However, it does not follow from the case-law cited above that other documents are to be excluded, in any event, from the scope of the exception relating to the protection of court proceedings. Indeed, it can be seen from that case-law that the principles of equality of arms and the sound administration of justice are at the heart of that exception (judgment of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 85). The need to ensure equality of arms before a court justifies the protection not only of documents drawn up solely for the purposes of specific court proceedings, such as pleadings, but also of documents whose disclosure is liable, in the context of specific proceedings, to compromise that equality, which is a corollary of the very concept of a fair trial. However, in order for the exception to apply, it is necessary that the requested documents, at the time of adoption of the decision refusing access to those documents, should have a relevant link with a dispute pending before the Courts of the European Union, in respect of which the institution concerned is invoking that exception, and that disclosure of those documents, even though they were not drawn up in the context of pending court

proceedings, should compromise the principle of equality of arms and, potentially, the ability of the institution concerned to defend itself in those proceedings. In other words, it is necessary that those documents should reveal the position of the institution concerned on contentious issues raised during the court proceedings relied upon.

89 The considerations mentioned above can also be applied to proceedings pending before a national court at the time of adoption of a decision refusing access to the requested documents, on condition that they raise a question of interpretation or validity of an act of EU law so that, having regard to the context of the case, a reference for a preliminary ruling appears particularly likely.

90 In those two cases, although those documents have not been drawn up in the context of specific court proceedings, the integrity of the court proceedings concerned and the equality of arms between the parties could be seriously compromised if parties were to benefit from privileged access to internal information belonging to the other party and closely connected to the legal aspects of pending or potential (but imminent) proceedings.

91 It is well known, in that regard, that the legislative proposal concerning tobacco products is one of the most debated of all the recently adopted EU proposals. Thus, like the first Tobacco Products Directive, which had been the subject of persistent legal controversy, it was therefore foreseeable that the TPD would also be the subject of such legal controversy.

92 It has been established that, as has already been noted above, at the time of adoption of the contested decision, an action challenging the TPD brought by the applicant at the end of June 2014 was pending before the courts of the United Kingdom. In July 2014, the Republic of Poland had also brought an action before the Court of Justice of the European Union contesting the validity of a number of provisions of the TPD which, in its view, infringed Article 114 TFEU, the principle of proportionality and the principle of subsidiarity.

93 The Commission was therefore fully entitled to consider, having regard to the history of the legislative process relating to the adoption of the TPD, that a reference for a preliminary ruling was highly likely in the near future and, consequently, that disclosure of the documents in question could undermine the principle of equality of arms in the expected preliminary ruling proceedings.

94 It is therefore necessary to examine whether Documents Nos 3 to 7 are ‘relevant’ to the two sets of court proceedings mentioned above and, accordingly, whether disclosure of those documents could undermine the principle of equality of arms, the main ground relied upon by the Commission in order to justify its refusal to disclose those documents in full.

95 It should be noted that the Commission granted full access or very wide partial access to most of the requested documents. Similarly, it should be noted that, in view of the brevity of the redacted parts in certain documents, it was not possible for the Commission to give a more detailed explanation of the content of those documents without disclosing them.

96 Moreover, it must be found, following the production of the documents in the context of the measure of inquiry ordered on 11 November 2015, that the redacted parts of Documents Nos 3 to 7 related to questions concerning the packaging and labelling of tobacco products and arrangements for the sale of tobacco products, questions likely to be connected with the legislative powers of the European Union, the legal basis chosen and the proportionality of the proposed measure. In addition, this is a question of positions taken by the officials of the various Directorates-General of the Commission concerning the legality of the various envisaged options.

97 The principle of equality of arms requires the institution by which the contested act was issued to be in a position effectively to defend the legality of its actions before the courts. That possibility would be seriously compromised if the institution in question were to be obliged to defend itself, not only

having regard to the pleas in law and arguments raised by the applicant, or, as in the present case, in the context of future preliminary ruling proceedings, but also having regard to the positions taken internally concerning the legality of the various options envisaged in the context of the drawing up of the act in question. In particular, unlike the situation for documents that contain elements constituting the factual basis of the Commission's exercise of its powers, disclosure of which may prove to be necessary in order to meet the objectives set out in paragraph 30 above, disclosure of documents containing that type of position is such as to oblige the institution concerned, as a result, to defend itself against assessments by its own staff which have, ultimately, been disregarded. That fact could upset the balance between the parties to court proceedings, inasmuch as the applicant could not be obliged to disclose that type of internal assessment (see, to that effect, judgment of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 87).

98 Accordingly, disclosure of such documents to the public while court proceedings concerning the interpretation and the legality of the act in question are pending could compromise the Commission's defensive position and the principle of equality of arms, in so far as it would reveal the internal legal positions of its services on contentious issues although no similar obligation would be imposed on the other party.

99 Having regard to the foregoing, the second plea in law must be rejected. In addition, given that the Commission based its refusal on several exceptions and that its reliance upon the exception relating to the protection of legal advice was justified for Document No 1 and its reliance on the exception relating to the protection of court proceedings was justified for Documents Nos 3 to 7, it is not necessary to examine the merits of the third plea in law alleging infringement of Article 4(3) of Regulation No 1049/2001 concerning the exception relating to the protection of the decision-making process, a plea which must, in any event, be rejected.

100 It follows that the action must be dismissed.

Costs

101 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders Philip Morris Ltd to pay the costs.

Gratsias Kancheva Wetter

Delivered in open court in Luxembourg on 15 September 2016.

[Signatures]