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INFORMATION NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee/Council
Subject: Judgment of the Court of Justice in Case C-350/12 P - **Council v. Sophie In 't Veld**

1. On 3 July 2014 the Court of Justice ruled in the *In 't Veld* case¹ which was an appeal case brought by the Council against a judgment of the General Court of 4 May 2012.² The present note analyses the Judgment and its principal implications for the Council.

¹ Case C-350/12 P, *Council v. In 't Veld*, judgment of the Court (First Chamber) of 3 July 2014, not yet published.

² Case T-529/09, *In 't Veld v. Council*, of 4 May 2012, not yet published.

2. The matter concerned the Council's refusal to provide full public access to document 11897/09 under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents ("Regulation 1049/2001").³ Document 11897/09 contains 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 SWIFT agreement"). The document is classified as EU RESTREINT. Large parts of the legal advice in the document concerned the question of the legal basis of the SWIFT agreement.

3. The General Court had annulled the Council's decision refusing access to the document ("the contested decision") insofar as that decision sought to protect information going beyond "*those elements of the requested document which concern the specific content of the envisaged agreement or the negotiating directives*".⁴ The Council appealed the judgment. There was no cross-appeal. Therefore, the appeal judgment does not address the issue of public access to parts of the document concerning the specific content of the agreement or the negotiation directives; this matter was not before the Court of Justice on appeal.

³ OJ L 145, 31.5.2001, p. 43.

⁴ Case T-529/09, point 58.

4. In its past case law, the Court of Justice has generally distinguished between, on the one hand, documents drawn up in a legislative context, where the threshold for applying an exception of Regulation 1049/2001 is higher owing to the wider public access afforded to such documents (*Turco*,⁵ *AccessInfo*)⁶ and, on the other hand, documents drawn up in the context of non-legislative activities of the Union, including administrative activities, where it has generally been more willing to accept the application of exceptions (*MyTravel*).⁷ In addition, there are specific cases for which the Court of Justice has recognized the possibility for the institution to rely on presumptions against public disclosure (*API*,⁸ *Agrofert*,⁹ *Odile Jacobs*).¹⁰
5. A key aspect which the Court of Justice was called upon to consider in the present judgment is which threshold has to apply to Legal Service opinions pertaining to on-going international negotiations. In that respect the Court of Justice also pronounced itself on the standard required for demonstrating that disclosure of such a document would risk undermining the interests which the invoked exceptions of Regulation 1049/2001¹¹ seek to protect.

⁵ Joined Cases C-39/05 P and C-52/05 P, *Sweden and Turco v. Council*, [2008] ECR I-4723, ECLI:EU:C:2008:374.

⁶ Case C-280/11 P, *Council v. AccessInfo*, ECLI:EU:C:2013:671.

⁷ Case C-506/08 P, *Sweden v. Commission (MyTravel)*, ECLI:EU:C:2011:496.

⁸ Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, *Commission vs API*, [2010] ECR I-8533, ECLI:EU:C:2010:541.

⁹ Case C-477/10 P, *Commission v. Agrofert*, ECLI:EU:C:2012:394.

¹⁰ Case C-404/10 P, *Commission v. Éditions Odile Jacob SAS*, ECLI:EU:C:2012:393.

¹¹ Article 4 of Regulation 1049/2001 comprises the exceptions to public access on grounds of public or private interest. The following two exceptions were at issue in the Court proceedings:

“(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:*

(...).

— *court proceedings and legal advice,*

(...)

unless there is an overriding public interest in disclosure”.

6. The Council had argued that legal advice concerning international negotiations should benefit from a general presumption against disclosure such as recognised by the Court of Justice in some other fields. Conversely, the defendant in the appeal case had argued before the General Court and the Court of Justice that the procedure to negotiate the SWIFT agreement was akin to a legislative procedure, since the SWIFT agreement would have important and direct implications for all EU citizens. The Court of Justice followed neither the Council nor the respondent Ms In 't Veld on this point, but essentially treated the still disputed parts of the document as a non-legislative document, along the lines of the *MyTravel* case law referred to in point 4 above. In that context it is relevant to note that the Court of Justice did not reiterate the points made by the General Court about the constitutional significance of the issue analysed in the document concerned,¹² but rather limited itself to emphasising that the non-legislative activity of the institutions is also covered by Regulation 1049/2001.¹³
7. In the present judgment the Court of Justice requires the Council to justify in detail why the invoked exceptions of Regulation 1049/2001 applied to all parts of the Council Legal Service opinion that was the subject of the dispute. In particular, the Court of Justice confirmed the findings of the General Court that, if the institution decides to refuse access to a document, it must first explain how disclosure of that document could “*specifically and actually*” undermine the interest protected by the exception under Regulation 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.¹⁴

¹² Case T-529/09, points 47-49.

¹³ Case C-350/12 P, point 107.

¹⁴ *Ibid*, point 52.

8. In the present judgment the Court of Justice examined the two exceptions invoked by the Council, (i.e. the protection of international relations and of legal advice) and whether the General Court had rightfully concluded that Council had failed to demonstrate such specific and actual harm to the protected interests covered by those exceptions. The Court of Justice confirms the General Court's findings: the Court of Justice rejects the argumentation of the Council that revealing the existence of differences between the institutions on the legal basis (and hence on the internal procedures to be followed) has a potential incidence on the Union's credibility vis-à-vis the United States.¹⁵ However, the Court of Justice does not rule out that a disagreement between the institutions as to the question of the appropriate legal basis might undermine a protected interest under Regulation 1049/2001¹⁶
9. In particular, with regard to the exception relating to the protection of legal advice in Article 4(2), second indent, of Regulation 1049/2001, the Court of Justice holds that the assessment in three steps provided for in the *Turco judgment* also applies in respect of documents drawn up in a non-legislative context.¹⁷ However, it did not expand the application of *other* parts of that judgment. In particular, it does not apply the presumption in the *Turco* judgment in favour of disclosure of legal opinions drawn up in the context of legislative activities to also cover legal advice in a non-legislative context.
10. The present judgment by the Court of Justice has the following principal implications:

¹⁵ Ibid, point 54.

¹⁶ Cf. point 43 of the judgment: "*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.*"

¹⁷ Ibid points 105-107, the three steps being described in point 96.

- (i) First, the judgment illustrates that it is becoming increasingly difficult to demonstrate that disclosure of a specific document would “*specifically and actually*” undermine an interest protected by an exception in Article 4 of Regulation 1049/2001 as required by recent case law,¹⁸ hereunder without revealing the information which it is sought to protect. In that respect the onus put on the Council to demonstrate a reasonably foreseeable and not purely hypothetical risk almost amounts to requiring it to provide *evidence* of a risk which logically has not yet materialised.
- (ii) Second, in its reasoning, the Court of Justice demonstrates a readiness to scrutinise very closely the specific argumentation for refusing access in spite of the fact that the Council, in accordance with case law, enjoys a wide margin of appreciation in assessing the applicability of Article 4(1)(a) of the Regulation. Even though, in its judgment, the Court of Justice acknowledges the existence of a wide margin of appreciation,¹⁹ the Court anyway goes on to analyse thoroughly the detailed assessment carried out by the General Court by qualifying it as being a matter of verification of the statement of reasons for the contested decision.²⁰

¹⁸ See e.g. *Turco*, point 49 (where it was ‘specifically and effectively’); *MyTravel*, point 76 (‘specifically and effectively’); *AccessInfo*, point 31, and *In ’t Veld*, points 52, 54, 59, 61, 64 and 65.

¹⁹ In point 63.

²⁰ In points 66-68.

(iii) Third, the Council had argued that the Parliament had, in its resolution of 17 September 2009, referred to the substance of divergent opinions on the issue of legal basis for the SWIFT agreement, but that this information had not been disclosed by the Council and was made public by the Parliament unlawfully. Consequently, the respondent in the appeal case should not have been able to rely on such unlawfully disclosed information, in order to invoke that no actual damage had occurred following that unlawful release. The Court of Justice rejects this argument and holds that the General Court was right to take account of the unauthorised release by the Parliament in assessing the risk that disclosure would harm the interests protected under the invoked exceptions.²¹ This represents a departure from previous case law, in which the Courts had recognised that release of information in breach of Regulation 1049/2001 could not in any way prejudice the position of the institution under that Regulation.²²

11. In conclusion, apart from the third point in paragraph 10, above, the Judgment does not imply a departure from the previous case law but illustrates the high requirements the Council must meet before it can demonstrate actual and specific harm caused by the public release of documents in a non-legislative context. The Judgment has no implications for the parts of documents that contain negotiating directives.

²¹ Cf. point 60 of the judgment which reads as follows: “*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*”.

²² E.g. C-445/00, *Austria v. Council* (Order), [2002] ECR I-9151, points 11 and 12, Case T-331/11, *Besselink v. Council*, Order of 21 February 2013 (not yet reported) and case law mentioned there.