



C-39/05 P and C-52/05 P Sweden and Turco v Council and Commission, judgment of 1 July 2008

Access to documents – legal advice on legislative procedures

The Court of Justice considers the conditions governing the public disclosure of legal advice where that advice is provided in the context of legislative procedures.

Mr Turco had applied to the Council for access to an opinion of its legal service on a proposal for directive laying down minimum standards for the reception of applicants for asylum in the Member States. The Council had refused to grant access to this document on the basis of the second indent of Article 4(2) of Regulation (EC) No 1049/2001, under which the institutions are to refuse access to a document where its disclosure would undermine the protection of legal advice, unless there is an overriding public interest in the disclosure of the document in question.

Following Mr Turco's decision to bring an action before it for the annulment of that decision to refuse access (Case T-84/03), by judgment of 23 November 2004, the Court of First Instance dismissed the action, taking the view that the disclosure of legal advice such as that in question could give rise to lingering doubts as to the lawfulness of the legislative acts which that advice concerns and also call into question the independence of the opinions of the Council's legal service. In addition, the Court of First Instance took the view that there was no overriding public interest capable of justifying disclosure, it being understood that that overriding interest must normally be distinct from the underlying principles of the Regulation, in particular the principle of transparency.

Sweden and Mr Turco brought an appeal against that judgment before the Court of Justice claiming, *inter alia*, that the Court of First Instance had erred in law in its interpretation of Regulation (EC) No 1049/2001 in so far as it held that the decision to refuse access could comply with the obligation to give reasons and be justified by reference to a general need for confidentiality which applies to legal advice relating to legislative questions.

The Court of Justice stated that the examination to be undertaken by the institution with a view to reaching a decision on the disclosure of legal advice must be carried out in three stages. First, the institution must satisfy itself that, over and above the way in which the document is described, it does indeed relate to legal advice.

Next, it must examine whether disclosure of the document in question – or of certain parts thereof – would undermine the protection of that legal advice, by calling into question the institution's interest in seeking and receiving frank, objective and comprehensive advice. In that regard, a general and abstract claim to the effect that disclosure could lead to doubts as to the lawfulness of the legislative act concerned does not suffice to conclude that protection of such advice would be undermined. **In the view of the Court, it is precisely openness – by allowing divergences between various points of view to be openly debated – which contributes to the enhanced participation of citizens in the decision-making process as well as to the greater legitimacy, efficiency and accountability of the institutions vis-à-vis citizens in a democratic system.** Similarly, the independence of the Council's legal service is not, in principle, called into question as a result of the disclosure of legal advice. **Disclosure of a specific legal opinion may be refused only if this poses a real risk to the interest of the institution concerned in seeking and receiving frank, objective and comprehensive advice, for example in relation to advice of a particularly sensitive nature or having a wide scope that goes beyond the context of the legislative process in question.**



Finally, where an institution is of the opinion that disclosure of advice would undermine a protected legitimate interest, it is nevertheless incumbent on that institution to establish whether the requirements of transparency do not of themselves constitute an overriding public interest, within the meaning of Regulation (EC) No 1049/2001, justifying the disclosure of the document. This is the case in principle in respect of opinions given in the context of a legislative procedure.

Applying this guidance to the case in question, the Court of Justice quashed the judgment of the Court of First Instance and then – giving judgment on the substance of the case as it is permitted to do under Article 61 of its Statute – annulled the decision of the Council refusing access to the legal opinion at issue.