

CURIA - Documents

JUDGMENT OF THE GENERAL COURT (First Chamber)

7 February 2018 (*)

(Access to documents — Regulation (EC) No 1049/2001 — EU-Turkey statements of 8 and 18 March 2016 — Implementation by the European Union or by the Member States of the measures concerned — Documents drawn up or received by the legal service of an institution — Legal advice — Analyses of the legality of the measures provided for in connection with the implementation of the EU-Turkey statement of 8 March 2016 — Refusal to grant access — Article 4(1)(a) of Regulation No 1049/2001 — Exception relating to the protection of the public interest in respect of international relations — Second indent of Article 4(2) of Regulation No 1049/2001 — Exception relating to the protection of court proceedings — Exception relating to the protection of legal advice)

In Case T-851/16,

Access Info Europe, established in Madrid (Spain), represented by O. Brouwer, E. Raedts and J. Wolfhagen, lawyers,

applicant,

v

European Commission, represented by A. Buchet and M. Konstantinidis, acting as Agents,

defendant,

APPLICATION based on Article 263 TFEU seeking annulment of Commission Decision C(2016) 6029 final of 19 September 2016 confirming the refusal to grant the applicant access to documents from the Commission's Legal Service which purportedly concern the legality of the measures adopted by the European Union and its Member States in implementing the actions set out in the statement of the Heads of State or Government of the European Union of 8 March 2016, adopted following their meeting with the Turkish Prime Minister on 7 March 2016,

THE GENERAL COURT (First Chamber),

composed of I. Pelikánová, President, P. Nihoul and J. Svenningsen (Rapporteur),

Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 8 November 2017,

gives the following

Judgment

Background to the dispute

The EU-Turkey statements

1 On 15 October 2015, the Republic of Turkey and the European Union agreed on a joint action plan entitled ‘EU-Turkey joint action plan’ (‘the joint action plan’) designed to strengthen their cooperation in terms of supporting Syrian nationals enjoying temporary international protection and managing migration, in order to respond to the crisis created by the situation in Syria.

2 The joint action plan aimed to respond to the crisis situation in Syria in three ways, namely, first, by addressing the root causes leading to a mass exodus of Syrians, secondly, by providing support to Syrians enjoying temporary international protection and to their host communities in Turkey and, thirdly, by strengthening cooperation in the field of preventing illegal migration flows towards the European Union.

3 On 29 November 2015, the Heads of State or Government of the Member States of the European Union met with their Turkish counterpart. Following that meeting, they decided to activate the joint action plan and, in particular, to step up their active cooperation concerning migrants who were not in need of international protection, by preventing them from travelling to Turkey and the European Union, by ensuring the application of the established bilateral readmission provisions and by swiftly returning migrants who were not in need of international protection to their countries of origin.

4 On 8 March 2016, a statement by the Heads of State or Government of the European Union, published by the joint services of the European Council and the Council of the European Union, indicated that the Heads of State or Government of the European Union had met with the Turkish Prime Minister in regard to relations between the European Union and the Republic of Turkey and that progress had been made in the implementation of the joint action plan (‘the EU-Turkey statement of

8 March 2016'). That meeting had taken place on 7 March 2016.

5 On 18 March 2016, a statement was published on the Council's website in the form of Press Release No 144/16, designed to give an account of the results of 'the third meeting since November 2015 dedicated to deepening Turkey-EU relations as well as addressing the migration crisis' between 'the Members of the European Council' and 'their Turkish counterpart' ('the EU-Turkey statement of 18 March 2016'). According to that statement, all new irregular migrants crossing from Turkey to Greek islands as from 20 March 2016 will be returned to Turkey and, for every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the European Union taking into account the UN Vulnerability Criteria.

The requests for access to documents

The requests for access to the documents at issue in the present case

6 By email of 17 March 2016, the applicant, the Access Info Europe association, made a request pursuant to Article 6 of 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), to the European Commission's Directorate-General (DG) for Migration and Home Affairs ('DG Home') for access to 'all documents generated or received by the Commission containing the legal advice and/or analysis of the legality under EU and international law of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, OJ [2014] L 134[, p. 3]' ('the first request for access') and to 'all documents generated or received by the Commission containing legal advice and/or analysis of the legality of the actions to be carried out by the [European Union] and its Member States in implementing the actions set out in the statement on the agreement reached with Turkey at the summit held on 7 March 2016 ... documents drawn up both before and since the meeting was held, to date' ('the second request for access').

7 By decision of 3 June 2016 ('the initial decision refusing access'), the Director-General of the Commission's Legal Service ('the Legal Service') informed the applicant that in connection with the first request for access he had identified a document concerning the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, which he nevertheless stated was a public document. In addition, in connection with the second request for access, he informed the applicant that he had identified eight sets

of documents, consisting of notes and emails exchanged between the Legal Service and DG Home between 7 and 31 March 2016, to which the applicant was refused access (with regard to the latter documents, ‘the documents at issue’).

8 The reasons invoked in support of the refusal to grant access to the documents at issue were, first, an undermining of the protection of legal advice and court proceedings within the meaning of Article 4(2) of Regulation No 1049/2001 and, second, an undermining of the Commission’s internal decision-making process within the meaning of Article 4(3) of that regulation. Third, the protection of international relations within the meaning of Article 4(1)(a) of Regulation No 1049/2001 was relied on as justifying, in any event, the refusal to grant the applicant access.

9 By letter of 5 July 2016, the applicant submitted a confirmatory application under Article 7(2) of Regulation No 1049/2001, asking the Commission to reconsider its position.

10 By Decision C(2016) 6029 final of 19 September 2016 (‘the contested decision’), the Commission identified, in connection with the first request for access, a Legal Service document produced on 8 May 2012 as part of consultations, which it enclosed as an annex to that decision. As regards the second request for access, it essentially confirmed the initial decision refusing access and the reasons for that refusal as set out in the initial decision refusing access, except in respect of one document to which it granted partial access, enclosing as an annex a public version which omitted certain information and certain passages. Furthermore, the Commission stated that the part of the second request for access to documents concerning those in the possession of DG Home had been forwarded to that DG, which, by decision of 30 November 2016, granted the applicant access to three documents in its possession, but refused access to a fourth document, namely a letter from the UN High Commissioner for Refugees, relying on the exception provided for in Article 4(1) of Regulation No 1049/2001.

11 The documents at issue in the context of the second request for access are:

- a Legal Service and DG Home joint note of 7 March 2016 for the attention of the cabinet of Commission President Juncker on the question of the return of asylum seekers to Turkey, reference Ares(2016) 2453347 (‘the first document at issue’);
- an email of 9 March 2016, reference Ares(2016) 2453181, from the Legal Service to DG Home, various members of the Commission’s cabinets and the Secretariat-General, with two attachments, containing Legal Service comments in track changes (‘the second document at issue’);

- a series of emails of 10 March 2016, reference Ares(2016) 2443418, from the Legal Service to DG Home, the cabinet of the President and the Secretariat-General, with an attachment ('the third document at issue');
- an email of 16 March 2016, reference Ares(2016) 2447514, from the Legal Service to DG Home on the return of asylum seekers to Turkey ('the fourth document at issue');
- two email exchanges of 18 and 21 March 2016, reference Ares(2016) 2447359, from the Legal Service to DG Home on the question of the Greek Appeal Committees, to which the Commission nevertheless granted the applicant partial access ('the fifth document at issue');
- an email of 29 March 2016, reference Ares(2016) 2444871, from the Legal Service to DG Home, with an attachment ('the sixth document at issue');
- two emails of 28 and 29 March 2016, reference Ares(2016) 1901172, from the Legal Service to DG Home on the readmission of asylum seekers ('the seventh document at issue');
- an email of 31 March 2016, reference Ares(2016) 1901080, from the Legal Service to DG Home, which is purported to contain Legal Service comments on sharing information with the Turkish authorities ('the eighth document at issue').

The subsequent request for access to documents

12 By email of 26 April 2016, the applicant made a request to the Legal Service pursuant to Article 6 of Regulation No 1049/2001 for access to 'all documents generated or received by the Commission containing legal advice and/or analysis of the legality of the actions to be carried out by the [European Union] and its Member States in implementing the actions set out in the statement on the agreement reached with [the Republic of] Turkey at the summit held on 18 March 2016 ... documents drawn up both before and since the meeting was held, to date'.

13 By decision of 16 June 2016, the Director-General of the Legal Service informed the applicant that he had identified three sets of documents produced in connection with the EU-Turkey statement of 18 March 2016, that is, eight documents in total, including seven emails, to which he refused to grant access.

14 After the applicant had submitted a confirmatory application pursuant to Article 7(2) of Regulation No 1049/2001, the Commission essentially confirmed, by Decision C(2016) 6030 final of 19 September 2016, the initial decision refusing access of 16 June 2016 and the reasons for that refusal as set out in that decision. By

application lodged at the Court Registry on 30 November 2016, the applicant brought an action pursuant to Article 263 TFEU against Decision C(2016) 6030 final, which was registered as Case T-852/16.

Procedure and forms of order sought

15 By application lodged at the Registry of the Court on 30 November 2016, the applicant brought the present action.

16 In the reply, the applicant asked the Court to consider ordering the defendant to produce the documents at issue by way of a measure of inquiry. In accordance with Article 88(3) of the Rules of Procedure of the General Court, the Commission had the opportunity to comment on that request in the rejoinder.

17 Given that the applicant was challenging the legality of a decision refusing it access to documents under a number of the exceptions laid down in Article 4 of Regulation No 1049/2001, by stating that the exceptions relied on by the institution concerned were not applicable to the documents requested, the Court, which was in those circumstances bound to order the production of those documents and to examine them (judgment of 28 November 2013, *Jurašinić v Council*, C-576/12 P, EU:C:2013:777, paragraph 27), by order of 4 July 2017, ordered the Commission, under Article 91(c) and Article 92 of the Rules of Procedure, to produce the documents at issue, whilst adding that, in accordance with Article 104 of the Rules of Procedure, they would not be communicated to the applicant.

18 Following a double exchange of pleadings, the written stage of the procedure was closed and the Court decided to open the oral stage of the procedure.

19 On 13 July 2017, the Commission produced the documents at issue.

20 The parties presented oral argument and replied to the questions put by the General Court at the hearing on 8 November 2017, for which the present case was joined with Case T-852/16, *Access Info Europe v Commission*. In its pleadings, the applicant stated inter alia that it did not intend to challenge the Commission's assertion that it had not received documents from the Member States containing legal advice of the kind drawn up by its Legal Service.

21 The applicant claims that the Court should:

- annul the contested decision;
- order the Commission to pay the costs.

22 The Commission contends that the Court should:

- dismiss the action as unfounded;
- order the applicant to pay the costs.

Law

23 In support of its action, the applicant raises, in essence, four pleas in law alleging, first, infringement of the third indent of Article 4(1)(a) of Regulation No 1049/2001; second, infringement of Article 4(2) of that regulation; third, infringement of the first and second subparagraphs of Article 4(3) of that regulation; and, fourth and in the alternative, infringement of Article 4(6) of that regulation.

First plea in law: infringement of the third indent of Article 4(1)(a) of Regulation No 1049/2001

24 In support of the first plea, the applicant asserts that, by refusing access to the documents at issue on the hypothetical basis that disclosure of those documents would undermine international relations, the Commission infringed the third indent of Article 4(1)(a) of Regulation No 1049/2001. In accordance with the case-law as set out in paragraph 64 of the judgment of 3 July 2014, *Council v in 't Veld* (C-350/12 P, EU:C:2014:2039), the Commission was obliged to explain, which it failed to do in the present case, how disclosure of the documents at issue would specifically and actually undermine the EU's position vis-à-vis the Republic of Turkey.

25 Claiming that the documents at issue contained information relating to specific aspects of the EU-Turkey statement of 8 March 2016 and the interpretation of the scope of the provisions of various EU acts relevant to the subject matter of that statement, the applicant maintains that the Commission cannot justify a refusal to grant access to the documents at issue by the fear that disclosure thereof would reveal divergent views on the selection and legality of certain measures implementing the EU-Turkey statement of 8 March 2016. In addition, it submits that the documents at issue must necessarily have contained analyses of the Union's competences or the Union's asylum acquis, as the Commission had invoked, in support of the refusal to disclose them, the exception relating to the protection of court proceedings in connection with the cases which gave rise to the orders of 28 February 2017, *NF v European Council* (T-192/16, EU:T:2017:128), of 28 February 2017, *NG v European Council* (T-193/16, EU:T:2017:129), and of 28 February 2017, *NM v European Council* (T-257/16, EU:T:2017:130) ('the asylum cases'). In the light of the questions settled by the Court in those orders, it is clear that the statements in intervention which the Commission could have lodged if it had been granted leave to intervene in those cases would necessarily have concerned the division of competences between

the European Union and its Member States.

26 Thus, according to the applicant, the Commission cannot claim, without providing further evidence, that the EU's international relations would be affected by disclosure of the documents at issue. In addition, it has failed to specify how the purported ongoing dialogue between the European Union and the Republic of Turkey could be specifically affected if the content of those documents were revealed.

27 Furthermore, 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), the Court emphasised, with regard to access to such documents, that disclosure of documents of this kind by the institutions contributes to conferring greater legitimacy on the institutions in the eyes of Union citizens and increasing their confidence in a democratic system. According to the applicant, an open debate on the implementation of the EU-Turkey statements of 8 and 18 March 2016 should increase the Republic of Turkey's confidence in the measures adopted by the Union and so strengthen rather than undermine the Union's relations with Turkey. It asserts in that regard that it is not possible to establish that international relations are affected solely on the ground that the Union's counterpart, in this instance the Republic of Turkey, does not apply the principle of transparency and, consequently, is not obliged to reveal the content of the legal advice given by its services in connection with discussions with the Union. In any event, that third State will have an interest in ensuring that the measures implementing the EU-Turkey statement of 8 March 2016 have a valid legal basis so as to avoid any future legal challenge thereto, including on the ground that the drafters of those measures lacked the competence to do so.

28 The applicant asserts, moreover, that maintaining secrecy regarding the fact that there are questions as to the legal basis and the use of certain measures for implementing the EU-Turkey statement of 8 March 2016 could ultimately seriously harm the Union's international relations. In addition, with regard to those measures, it notes that, at the time of the contested decision, the process for the adoption of the amendments to Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2015 L 248, p. 80), and Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders of Member States and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1), was at an advanced stage. On 4 May 2016, the Commission had already adopted the Proposal for a Regulation of the European Parliament and of the Council amending Regulation No 539/2001

(COM(2016) 279 final) while, on 29 September 2016, the Council adopted Decision (EU) 2016/1754 amending Decision 2015/1601 (OJ 2016 L 268, p. 82).

29 The Commission contends that the first plea should be dismissed as unfounded.

30 In that regard, it states, first, that in the contested decision refusing access it informed the applicant that ‘the EU-Turkey statement and its implementation by the various actors involved [was] of utmost political importance for the EU’s international relations with [the Republic of] Turkey’ and that, specifically, ‘[d]ivulgence of the legal analysis in documents [to which access had been refused], containing legal advice given within the Commission, would present a concrete risk of complicating [the] EU’s position in the dialogue with [the Republic of] Turkey and thereby undermine the EU’s international relations’.

31 Next, recalling that there is a constant dialogue between the Union and the Republic of Turkey on the very sensitive and important issue of the implementation of the EU-Turkey statements of 8 and 18 March 2016 regarding the migration crisis, the Commission contends that it is imperative that that dialogue be conducted in a climate of mutual trust, in which the European Union and the Republic of Turkey find themselves on an equal footing. Disclosure of the documents at issue, which contain internal legal advice to be used by the Commission’s representatives in the context of the Union’s relations with that third State, would upset that balance, allowing the Republic of Turkey to obtain the Union’s internal legal advice and creating a misunderstanding for Union citizens. In that regard, account must be taken of the sensitivity of the issue of migration and the fragility of the situation. At the hearing, moreover, the Commission explained that it had already been transparent by agreeing to disclose to the applicant the subject matter of the documents at issue identified as coming within the scope of its request for access.

32 Lastly, the Commission maintains that, contrary to the assertion made by the applicant, in the contested decision it clearly explained that the documents at issue did not contain legal advice on the question of the delimitation of competences between the European Union and its Member States in the area covered by the EU-Turkey statements of 8 and 18 March 2016, which, in the Commission’s view, do not constitute international agreements within the meaning of Article 218 TFEU, irrespective of the form and nature of those acts. On this point, the orders of 28 February 2017, *NF v European Council* (T-192/16, EU:T:2017:128), of 28 February 2017, *NG v European Council* (T-193/16, EU:T:2017:129), and of 28 February 2017, *NM v European Council* (T-257/16, EU:T:2017:130), which were made in the asylum cases, are not relevant in assessing the legality of the contested

decision refusing access as they were made subsequent to that decision.

General considerations regarding Regulation No 1049/2001

33 As a preliminary observation, it should be noted that, in accordance with recital 1 of Regulation No 1049/2001, that regulation 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 Regulation No 1049/2001, 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, and of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 27).

34 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 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 61; 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 69; and of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 28).

35 That right is nonetheless subject to certain limitations based on grounds of public or private interest (judgment of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 62). More specifically, and in reflection of recital 11, Article 4 of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision (judgments 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 71, and of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 29).

36 As 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; of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 36; and of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 30), with the result that the mere fact that a document concerns an interest protected by an exception is not in itself sufficient to justify

application of the exception (judgments of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 64; of 13 April 2005, *Verein für Konsumenteninformation v Commission*, T-2/03, EU:T:2005:125, paragraph 69; and of 7 June 2011, *Toland v Parliament*, T-471/08, EU:T:2011:252, paragraph 29).

37 If the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and actually undermine the interest protected by an exception provided for in Article 4 of Regulation No 1049/2001 upon which it is relying. Moreover, the risk of that undermining must be reasonably foreseeable and not purely hypothetical (see judgments of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 31 and the case-law cited, and of 3 July 2014, *Council v in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 52).

The specific scheme under Article 4(1) of Regulation No 1049/2001 and its application to the present case

38 The Court of Justice has held that it must be accepted that the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care and that such a decision requires, therefore, a margin of appreciation (judgment of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 35). This is corroborated by the fact that the exceptions set out in Article 4(1) of Regulation No 1049/2001 are framed in mandatory terms and it follows that the institutions are obliged to refuse access to documents falling under any one of those exceptions once the relevant circumstances are shown to exist and that there is no need to balance the protection of the public interest against an overriding general interest (see, to that effect, judgments of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraphs 44 and 45, and of 12 September 2013, *Besselink v Council*, T-331/11, not published, EU:T:2013:419, paragraph 44).

39 In that context, the Court of Justice has held that the criteria set out in Article 4(1)(a) of Regulation No 1049/2001 are very general, since access must be refused, as is clear from the wording of that provision, if disclosure of the document concerned would ‘undermine’ the protection of the ‘public interest’ as regards, inter alia, ‘public security’ or ‘international relations’ and not only, as had been proposed during the legislative procedure which preceded the adoption of that regulation, when

that protection has actually been ‘significantly undermined’ (judgment of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraphs 36 to 38).

40 Thus, the principle of strict construction does not, in respect of the public-interest exceptions provided for in Article 4(1)(a) of Regulation No 1049/2001, preclude the institution concerned from enjoying a wide discretion for the purpose of determining whether disclosure of a document to the public would undermine the interests protected by that provision and, by way of corollary, the review by the General Court of the legality of a decision by that institution refusing access to a document on the basis of one of those exceptions is 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 (judgments of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 64, and of 12 September 2013, *Besselink v Council*, T-331/11, not published, EU:T:2013:419, paragraph 34).

41 Consequently, it must be determined in the present case whether, in the contested decision, the Commission provided plausible explanations as to how access to the documents at issue could specifically and actually undermine the protection of the EU’s international relations and whether, in the Commission’s broad discretion in applying the exceptions in Article 4(1) of Regulation No 1049/2001, the risk of that undermining might be considered reasonably foreseeable and not purely hypothetical.

42 In that regard, the explanation given by the Commission for refusing access to the documents at issue under Article 4(1) of Regulation No 1049/2001 was to the effect that, in its submission, making those documents accessible to the public would have seriously undermined the crucial relations between the European Union and the Republic of Turkey in a highly sensitive situation, namely the management of the migration crisis.

43 Regarding the first document at issue, consisting in a joint note of 7 March 2016 from the Legal Service and DG Home for the attention of the cabinet of President Juncker on the question of the return of asylum seekers to Turkey, the Court notes that that document, whilst containing a paragraph referring cursorily to the scope of Articles 33 and 38 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60) (‘the Asylum Procedures Directive’), essentially sets out the political objectives of the European Union in the management of the migration crisis and included a risk analysis.

44 It has been held in that regard that the disclosure of elements connected with the objectives pursued by the European Union and its Member States in decisions, in particular when they deal with the specific content of an agreement envisaged or the strategic objectives pursued by the European Union in negotiations, would damage the climate of confidence in the negotiations which were ongoing at the time of the decision refusing access to documents containing those elements (see, to that effect, judgment of 4 May 2012, *In 't Veld v Council*, T-529/09, EU:T:2012:215, paragraphs 35, 36 and 39).

45 In those circumstances, the Commission made no manifest error of assessment in relying on the exception relating to the protection of international relations referred to in Article 4(1) of Regulation No 1049/2001 in respect of the first document at issue.

46 As regards the second document at issue, in the transmission email of DG Home, it is presented as setting out the 'initial thinking [of that DG] of how to implement the points on return ... and resettlement ... in the statement of the EU Heads of State or Government' and was returned to it by the Legal Service accompanied by comments clarifying certain points.

47 As regards the first attachment to the second document at issue, it describes the manner in which illegal migrants and asylum seekers whose applications have been rejected may be returned to Turkey from Greece, inter alia under Articles 33 and 38 of the Asylum Procedures Directive, and gives an overview of a set of operational arrangements for discussion and adoption by those two States. The second attachment to that document canvasses the legal options available for the implementation of the EU-Turkey statement of 8 March 2016, including use of the Voluntary humanitarian admission programme with Turkey and the possibility of amending Decision 2015/1601, along with the ensuing budgetary implications.

48 In that regard, it should be noted that, in the context of international negotiations, the positions taken by the European Union are, by definition, subject to change depending on the course of those negotiations, and on concessions and compromises made in that context by the various stakeholders. The formulation of negotiating positions may involve a number of tactical considerations on the part of the negotiators, including the European Union itself, so that disclosure of the European Union's own negotiating positions in international negotiations could undermine the protection of the public interest as regards international relations (judgment of 12 September 2013, *Besselink v Council*, T-331/11, not published, EU:T:2013:419, paragraphs 70 and 72).

49 In the present case, the Court considers that the content of the second document at issue, which cannot be revealed in further detail without disregarding the scope of the interest protected by that provision, came within the protection of international relations under the third indent of Article 4(1)(a) of Regulation No 1049/2001, *inter alia* because for the recipient of that document, namely the cabinet of the President of the Commission, it was a strategic document in the discussions between the European Union, its Member States and the Republic of Turkey. The Commission thus made no manifest error of assessment in refusing access to that document in the contested decision.

50 As regards the third document at issue, the email exchanges of which it consists concern the consultation of the Legal Service about a document attached to that exchange. That document relates directly to the content of the European Union's position in its relations with the Republic of Turkey concerning the migration crisis. Accordingly, nor did the Commission make a manifest error of assessment in refusing access to the applicant under Article 4(1) of Regulation No 1049/2001.

51 As regards the fourth document at issue, it forms part of an exchange of emails by which DG Home put questions to the Legal Service in order to obtain clarification as to whether '[the Hellenic Republic could] apply the inadmissibility procedures before carrying out the Dublin procedure'. Thus, contrary to the Commission's assertions in the contested decision and even though it may have been requested as part of the implementation of the EU-Turkey statement of 8 March 2016 and as part of drawing up the statement of 18 March following, that document did not *per se* contain any stated position of the European Union concerning the Republic of Turkey and, more generally, did not relate to the EU's international relations. Therefore, in refusing access to that document by relying on Article 4(1) of Regulation No 1049/2001, the Commission made a manifest error of assessment.

52 The fifth document at issue consists of an email exchange between DG Home and the Legal Service, by which that DG, in preparation for a meeting to be held with the Greek authorities, sought the opinion of the Legal Service on various aspects of the Greek legislation in the light of the requirements of Article 46 of the Asylum Procedures Directive and Article 47 of the Charter of Fundamental Rights of the European Union. Once again, contrary to the Commission's assertions in the contested decision and even though it may have been requested as part of the implementation of the EU-Turkey statement of 18 March 2016, the fifth document at issue, to which partial access had nevertheless been granted, did not *per se* contain any stated position of the European Union concerning the Republic of Turkey and,

more generally, did not relate to the EU's international relations. Therefore, in partially refusing access to that document by relying on Article 4(1) of Regulation No 1049/2001, the Commission made a manifest error of assessment.

53 The sixth and seventh documents at issue form part of an email exchange between DG Home and the Legal Service concerning the detailed rules for the implementation of the EU-Turkey statement of 18 March 2016, in order to respond to the query from the Netherlands authorities, who at that time were in charge of the Presidency of the Council of the European Union, so as to formulate a response to the Turkish authorities on one of the detailed rules opposed by them in the frame of drawing up an explanatory memorandum between the Hellenic Republic and the Republic of Turkey, which memorandum was attached to that email exchange.

54 In that regard, the Court considers that, by their content, which cannot be further revealed either for the purposes of the present action, the sixth and seventh documents at issue come within the protection of the public interest as regards international relations under the third indent of Article 4(1)(a) of Regulation No 1049/2001, with the result that the Commission made no manifest error of assessment in refusing the applicant access to those two documents.

55 Moreover, the fact that, in the sixth document at issue, the question of the European Union's participation in the explanatory memorandum between the Hellenic Republic and the Republic of Turkey is referred to briefly does not call this conclusion into question. The Court further notes that, contrary to the applicant's assertions, the documents at issue do not contain analyses or discussions of the delimitation of competences between the European Union and its Member States in the management of the migration crisis and the adoption of the EU-Turkey statements of 8 and 18 March 2016.

56 The eighth document at issue forms part of an email exchange between DG Home and the Legal Service, in which the latter is asked to assist the DG in its understanding of the specific detailed rules on how the Asylum Procedures Directive is to be implemented in certain States, in the light of their national legislation and practices, as the DG understood them to be at that time. That document constitutes detailed legal advice on those matters. However, although it contains assessments on the implementation of asylum law in those States, the Court considers that, despite having broad discretion in that regard, the Commission failed to demonstrate how the protection of the public interest as regards the EU's international relations would have been affected by the disclosure of that document.

57 It follows from the foregoing considerations that, as regards the Commission's refusal to grant access to the first to third and the sixth and seventh documents at issue, the first plea must be rejected since, first, the Commission made no manifest error of assessment in justifying that refusal on the ground that the disclosure of such documents carries a specific risk of complicating the European Union's position in the dialogue with the Republic of Turkey and, consequently, of affecting the European Union's relations and, second, the Commission was entitled to merely provide a summary statement of that ground where, as was the case here, providing more comprehensive information would have entailed revealing the very content of the documents coming within the protection provided for by that provision, in disregard of the scope of the imperative protection provided for by the legislature in the wording of Article 4(1) of Regulation No 1049/2001.

58 On the other hand, the first plea must be upheld in part as regards the Commission's refusal to grant access under Article 4(1) of Regulation No 1049/2001 in respect of the fourth, fifth and eighth documents at issue.

59 Since access to the documents at issue was also refused on the basis of Article 4(2) and (3) of Regulation No 1049/2001, it must still be determined whether those other grounds for refusal were applicable in the present case, justifying, in any event, the tenor of the contested decision.

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

60 By its second plea, the applicant submits that, in the contested decision, the Commission infringed Article 4(2) of Regulation No 1049/2001. That plea is broken down into three parts which will now be examined in turn.

First part of the second plea, relating to the protection of court proceedings

61 In support of the first part of the second plea, the applicant claims that, by the contested decision, the Commission infringed Article 4(2) of Regulation No 1049/2001 in so far as, in the present case, it applied a general presumption of refusal to grant access to the documents at issue. First, the case-law does not recognise the possibility of applying such a presumption except in respect of pending court proceedings. On the date of adoption of the contested decision, however, no court proceedings were pending. Second, the case-law also makes clear that the general presumption of undermining the protection of court proceedings applies only to pleadings lodged in the course of such proceedings, which is not the case with the documents at issue.

62 Furthermore, the applicant considers that, in the present case, the Commission has not demonstrated how disclosure of the documents at issue would specifically and actually undermine the protection of court proceedings. In that regard, it emphasises that the documents at issue were not prepared for the purposes of court proceedings. Despite the fact that the actions which gave rise to the orders in the asylum cases were lodged after the second request for access was made, the applicant claims that the documents at issue were prepared in order to discuss the relevant Union acquis, which reaches far beyond the scope of those actions.

63 In any event, the applicant notes that the Commission was not a defendant in the asylum cases and that, consequently, it cannot invoke the principle of equality of arms or, more generally, rely on the protection of court proceedings in respect of all the documents connected with the subject matter of those court proceedings which were pending at the time. In addition, the applicant considers that the Commission contradicts itself where it relies on that protection in the present case by claiming that the documents at issue are connected with those cases, whilst maintaining that those documents primarily concerned the amendments to Decision 2015/1601 and Regulation No 539/2001. In reality, those documents contained only objective elements, disclosure of which could not undermine the Commission's position in the abovementioned court proceedings.

64 The Commission contends that the first part of the second plea should be rejected, asserting, first of all, that, contrary to the argument put forward by the applicant, in the contested decision it did not invoke a general presumption of non-disclosure based on the exception relating to the protection of court proceedings or on any other exception provided for in Regulation No 1049/2001. The decision to refuse access was made following an individual examination of the content of the documents at issue and, with regard to the argument that the documents at issue do not constitute pleadings lodged in the course of court proceedings, the Commission relies on the judgments of 15 September 2016, *Philip Morris v Commission* (T-796/14, EU:T:2016:483, paragraph 88), and of 15 September 2016, *Philip Morris v Commission* (T-18/15, not published, EU:T:2016:487, paragraph 64), which the applicant considers contrary to the case-law of the Court of Justice, in which the General Court ruled that the exception relating to the protection of court proceedings also covered documents which were not drawn up solely for the purposes of court proceedings.

65 In the Commission's view, on the date of adoption of the contested decision, which is the only date of relevance to the present case, disclosure of the documents at

issue would inevitably have resulted in the disclosure of the content of its future statements in intervention in the asylum cases, which are expressly mentioned in the contested decision, as at the time the documents at issue had a relevant connection to those cases. Thus, for the purpose of the principle of equality of arms, and even though it was not a defendant in those cases and ultimately was not granted leave to intervene because of the settlement of those cases by way of orders and did not therefore have the opportunity to lodge statements in intervention, it was necessary and justified to refuse access to the documents at issue pursuant to the second indent of Article 4(2) of Regulation No 1049/2001. In that context, the Commission disputes the applicant's assertion that its future statements in intervention would necessarily have related to the division of competences between the European Union and its Member States, while emphasising that, in those cases, it confined itself to answering the questions put by the General Court under Article 24 of the Statute of the Court of Justice of the European Union.

66 In that regard, it must be remembered that, first, 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 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 (see judgments of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 31 and the case-law cited, and of 3 July 2014, *Council v in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 52).

67 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 of 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 (see judgments of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 32 and the case-law cited, and of 3 July 2014, *Council v in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 53).

68 As regards the exception relating to the protection of 'court proceedings' referred to in the second indent of Article 4(2) of Regulation No 1049/2001, it means

that the protection of the public interest precludes the disclosure not only 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 of 3 October 2012, *Jurašinović v Council*, T-63/10, EU:T:2012:516, paragraph 66 and the case-law cited), that is to say, pleadings or other documents lodged, but also internal documents concerning the investigation of the pending case, and correspondence between the DG concerned and the institution's Legal Service or a law firm, 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 the confidentiality and safeguarding of professional privilege for lawyers (judgments of 15 September 2016, *Philip Morris v Commission*, T-796/14, EU:T:2016:483, paragraph 76, and of 15 September 2016, *Philip Morris v Commission*, T-18/15, not published, EU:T:2016:487, paragraph 52).

69 In that context, the existence of a general presumption of non-disclosure has been acknowledged in respect of the pleadings in court proceedings as provided for in the second indent of Article 4(2) of Regulation No 1049/2001, so long as those proceedings remained pending (judgments 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; of 15 September 2016, *Philip Morris v Commission*, T-796/14, EU:T:2016:483, paragraph 77; and of 15 September 2016, *Philip Morris v Commission*, T-18/15, not published, EU:T:2016:487, paragraph 53), although that presumption was applicable only in the case of specific pending proceedings and could not, as a rule, be relied on by the institution concerned 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).

70 The Court of Justice has also held that the exception relating to the protection of court proceedings meant that such protection was necessary to ensure observance of the principles of equality of arms and the sound administration of justice. Access to documents by one party could well upset the vital balance between the parties to a dispute — the state of balance which is at the basis of the principle of equality of arms — since only the institution concerned by an application for access to its 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).

71 It is *inter alia* for this reason that, in dealing with cases relating to access to preliminary views put together by an institution in connection with the drafting of a legislative proposal, the Court has considered that, notwithstanding what it held in its judgment of 6 July 2006, *Franchet and Byk v Commission* (T-391/03 and T-70/04, EU:T:2006:190, paragraphs 88 to 91 and the case-law cited), the case-law referred to in the preceding paragraph of this judgment did not rule out the possibility that documents other than pleadings and documents exchanged with the Legal Service of an institution specifically in connection with pending proceedings might come within the scope of the exception relating to the protection of court proceedings. In that regard, emphasising that the principle of equality of arms and the sound administration of justice were at the heart of the protection provided for in the second indent of Article 4(2) of Regulation No 1049/2001, the Court considered that 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 (judgments of 15 September 2016, *Philip Morris v Commission*, T-796/14, EU:T:2016:483, paragraph 88, and of 15 September 2016, *Philip Morris v Commission*, T-18/15, not published, EU:T:2016:487, paragraph 64).

72 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 have been 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 (judgments of 15 September 2016, *Philip Morris v Commission*, T-796/14, EU:T:2016:483, paragraph 90, and of 15 September 2016, *Philip Morris v Commission*, T-18/15, not published, EU:T:2016:487, paragraph 65).

73 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 either with a dispute pending before the Courts of the European Union, in respect of which the institution concerned is invoking that exception, or with proceedings pending before a national court, 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 (judgments of 15 September 2016, *Philip Morris v*

Commission, T-796/14, EU:T:2016:483, paragraphs 88 and 89, and of 15 September 2016, *Philip Morris v Commission*, T-18/15, not published, EU:T:2016:487, paragraph 64).

74 It is in the light of those considerations from the Court's case-law that the first part of the second plea must be examined, it being noted that, contrary to the applicant's assertions, the detailed case-law relating to the exception referred to in the second indent of Article 4(2) of Regulation No 1049/2001, as recapitulated previously and as results from the judgments of 15 September 2016, *Philip Morris v Commission* (T-796/14, EU:T:2016:483), and of 15 September 2016, *Philip Morris v Commission* (T-18/15, not published, EU:T:2016:487), is not derived from a broad interpretation of that exception that would have run counter to the Court of Justice's case-law which, incidentally, has not to date had to address such a question directly.

75 In the present case, it is clear that the documents at issue were not drawn up specifically in connection with pending court proceedings.

76 However, on 19 September 2016, the date on which the contested decision was adopted and which is the only date of relevance to the present case (see, to that effect, judgment of 26 January 2010, *Internationaler Hilfsfonds v Commission*, C-362/08 P, EU:C:2010:40, paragraph 54), three sets of court proceedings, namely the asylum cases, were pending and related specifically to the legality of the EU-Turkey statement of 18 March 2016, which had succeeded the EU-Turkey statement of 8 March 2016. Moreover, in those cases the Commission, who was not a defendant, had already by that date lodged an application for leave to intervene under Article 143 of the Rules of Procedure.

77 Moreover, the Court observes that the documents at issue were drawn up by the Legal Service, which itself was responsible for representing the Commission in those court proceedings, and are closely linked to the legal aspects of the dispute at the heart of those court proceedings. Those documents concern the detailed rules for returning migrants residing without authorisation in accordance with the asylum procedures put in place by EU law, in particular the concept of 'safe third country' at the heart of asylum cases. Therefore, there was a foreseeable and not hypothetical risk that the disclosure of those documents would affect the Commission's position as intervener inasmuch as they contain legal views, which are essentially preliminary, on the aspects at issue in asylum cases.

78 In those circumstances, it must be accepted that the Commission was entitled to rely in the contested decision on the exception relating to the protection of court

proceedings as referred to in the second indent of Article 4(2) of Regulation No 1049/2001 in respect of all of the documents at issue.

79 In that regard, contrary to the applicant's claims, the Commission did not apply a presumption of non-disclosure under the protection of court proceedings, but rather conducted an individual examination of each of the documents at issue. That is corroborated by the fact that it did grant partial access to the fifth document at issue.

80 Consequently, the first part of the second plea must be rejected.

Second part of the second plea, relating to the protection of legal advice

81 In the second part of the second plea, the applicant submits that the legal advice and analysis to which the second request for access relates concern the adoption of the legal instruments which have been or will be adopted to implement the EU-Turkey statements of 8 and 18 March 2016 with the result that, from its point of view, they were related to a legislative process, in this instance the process for amending Decision 2015/1601 and Regulation No 539/2001, meaning that the Commission could not refuse to disclose them.

82 Notwithstanding this aspect and even assuming that 'the context of the preliminary views contained in the Requested Documents did not concern the abovementioned legislative proceedings', the applicant considers that in the contested decision the Commission did not in any case show how disclosure of the documents at issue would prevent it from receiving frank, objective and comprehensive advice within the meaning of the case-law. It merely asserted peremptorily that their disclosure 'would deprive it of an essential element ... on the implementation of the EU-Turkey Statement'. In the judgment of 1 July 2008, *Sweden and Turco v Council* (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 57 to 64), the Court of Justice determined that legal advice relating to a legislative matter must in principle be disclosed. In any event, according to the applicant, in so far as the documents at issue were intended to inform the Commission regarding the Union's competence to issue the EU-Turkey statements of 8 and 18 March 2016 and regarding the Union's asylum acquis, the Commission could not reasonably have expected that the legal advice would remain confidential. It should instead have expected it to be made public at some point and, in this regard, the applicant cannot see how, in general, disclosure of documents such as those at issue would prevent the Commission from requesting legal advice.

83 In its reply, the applicant states that, even if the protection of legal advice could justify the contested decision, that decision should nevertheless be annulled for lack

of reasoning due to the Commission's inconsistent description and confused arguments regarding the nature and content of the documents at issue and the context in which they were drawn up.

84 The Commission contends that the second part of the second plea should be rejected as unfounded, stating, first of all, that, contrary to the claim made by the applicant, the documents at issue were not drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States within the meaning of paragraph 68 of the judgment of 1 July 2008, *Sweden and Turco v Council* (C-39/05 P and C-52/05 P, EU:C:2008:374). Those documents are merely preliminary views relating to the matters that were under discussion in relation to the proposals for amending Decision 2015/1601 and Regulation No 539/2001. They cannot therefore be considered to be documents drawn up for the purpose of the legislative procedures relating to those two acts of EU law currently in force. Because they constitute only legal advice of an internal and preliminary nature, they could, in the Commission's view, be misconstrued or misunderstood if they were disclosed outside the context in which they were drawn up.

85 In the contested decision, the Commission explained to the applicant that there was ongoing work in liaison with the competent national authorities regarding the sensitive matter of the refugee crisis. Disclosure of the documents at issue pertaining to the interpretation of the Union's asylum acquis would have a serious impact on the Commission's interest in seeking frank, objective and comprehensive advice in a context where the Commission has been in constant and intense contact since March 2016 with the authorities of the Member States involved, notably the Hellenic Republic, on the necessary measures to be taken in order to ensure the implementation of the EU-Turkey statements of 8 and 18 March 2016 and the control of the migration crisis.

86 In that regard, the applicant's argument that the documents at issue contain a purportedly objective interpretation and that the questions addressed in those documents have been the subject of academic debate cannot prevent the Commission from protecting its ability to receive frank, objective and comprehensive advice in a sensitive area and during a very delicate moment for the implementation of the EU-Turkey statement of 18 March 2016, bearing in mind that the Commission has regularly made information regarding the implementation of that statement available to the public.

87 Lastly, the Commission contends that the ground for annulment concerning an alleged lack of reasoning was invoked only in the reply and, in the absence of valid

reasons put forward by the applicant to justify its late introduction, should be rejected as inadmissible. In any event, the applicant has not substantiated this argument, which is, moreover, manifestly unfounded.

88 As a preliminary point, it should be remembered that the aim of the exception relating to legal advice provided for in the second indent of Article 4(2) of Regulation No 1049/2001 is to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice and that, in order for an institution to be able to rely on that exception, it is also necessary that the risk of undermining that interest be reasonably foreseeable and not purely hypothetical (judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 42 and 43).

89 In that regard, with respect to the fact that disclosure of an opinion of the Legal Service relating to a legislative proposal could lead to doubts as to the legality of the legislative act concerned, it has been held that it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the legality of an isolated act, but also as regards the legitimacy of the decision-making process as a whole (judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 59).

90 In the present case, however, it is clear that, contrary to the applicant's assertions when it mentions the reference, in the contested decision and in connection with the exception referred to in Article 4(3) of Regulation No 1049/2001, to the proposals for amending Decision 2015/1601 and Regulation No 539/2001, the documents at issue are not legal advice relating to a specific legislative proposal. Notwithstanding the reference in the second document at issue to the potential need to amend Decision 2015/1601, they are — preliminary — positions of the Legal Service on a number of aspects of EU law on asylum matters and in connection with the political commitments negotiated and undertaken, under the name 'EU-Turkey statements', between the Heads of State or Government of the European Union and their Turkish counterpart.

91 That is not to say that the non-legislative activity of the institutions falls outside the scope of Regulation No 1049/2001. Suffice it to bear in mind in that regard that Article 2(3) of that regulation states that it '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' (see, to that effect, judgments of 21 July 2011, *Sweden v MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraphs 87, 88 and 109, and of 3 July 2014, *Council v in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 107 and the case-law cited).

92 In the present case, the documents at issue contain interdepartmental legal consultations within the Commission and do not constitute legal advice definitively fixing the institution's position and, contrary to the applicant's claims, nor are they legal advice issued as part of legislative procedures, such as those which were at issue in the case that 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). Those consultations, addressed exclusively to the cabinets of the President of the Commission and the member of the Commission responsible for Home Affairs, were sought at short notice, in order to assist representatives of the Commission's representatives in their meetings with the representatives of the Hellenic Republic and the Republic of Turkey on the measures the latter were to adopt as part of the implementation of the commitments undertaken in the EU-Turkey statements of 8 and 18 March 2016.

93 In that regard, as correctly pointed out by the Commission, the disclosure of such legal advice, which was preparatory and internal and drawn up for the purpose of political dialogue between the institution and representatives of a Member State and a third State would have actually undermined, in a foreseeable manner, the Commission's interest in seeking and receiving frank, objective and comprehensive advice from its various departments in order to prepare its final position as an institution, in an area of certain high political sensitivity and in a context of urgency in order to address a delicate migration situation. The interdepartmental consultations, which took the form of the documents at issue but which had been accompanied by telephone conversations, are preparatory work that is essential in the proper running of that institution.

94 The frankness, objectivity and comprehensiveness, as well as the expeditiousness of those legal consultations, given in a situation of urgency — as evidenced by inter alia the late hours at which the emails at issue were sometimes sent by the members of the Legal Service to the cabinet of the President of the Commission and the DG placed under the authority of the member of the Commission responsible for Home Affairs — would have been affected in the present case if the drafters of those consultations, drafted in haste in order to lay the groundwork for meetings between officials of that institution and those of a Member

State and a third State, had had to anticipate that such emails would be made available to the public.

95 Lastly, as regards the applicant's complaint set out in the reply alleging a lack of reasoning on the part of the Commission in the contested decision or an insufficient statement of reasons, suffice it to note that, contrary to the applicant's claims, the description of the nature and content of the documents to which access was refused and the grounds for refusal set out by the Commission in the contested decision, including the review of the context in which they were drawn up, are not contradictory and fulfil the requirements of Article 296 TFEU. Consequently, this complaint must in any event be rejected, without its being necessary to examine the plea of inadmissibility on this point put forward by the Commission in the rejoinder.

96 In the light of the foregoing, the second part of the second plea must be rejected.

Third part of the second plea, relating to the existence of an overriding public interest in disclosure of the documents at issue

97 Even if the existence of a general presumption that the protection of court proceedings and legal advice would be undermined or of a specific threat to that protection could be recognised in the present case, the applicant submits in the alternative, in the third part of the second plea, that there was an overriding public interest in disclosure of the documents at issue within the meaning of the last clause of Article 4(2) of Regulation No 1049/2001. The institutions of the Union cannot be held accountable or demonstrate the legitimacy of the decisions they take on behalf of all EU citizens unless EU citizens can understand the legal context in which those decisions are made. Citizens should thus be granted access to the documents at issue, even if such disclosure could potentially undermine the protection of court proceedings and legal advice.

98 In any event, the applicant maintains that the contested decision disregards the last clause of Article 4(2) of Regulation No 1049/2001 in so far as the Commission failed to examine the existence of a public interest in disclosure and, more generally, to weigh the interests served by disclosure with those against disclosure. In that regard, the applicant disputes the Commission's assertion that it merely put forward general considerations which could not provide an appropriate basis for establishing that the principle of transparency was especially pressing in the present case. Reliance on the particular nature of the migration crisis and of the measures taken to address it is sufficient in the present case to justify the existence of a particular public

interest in disclosure within the meaning of the last clause of Article 4(2) of Regulation No 1049/2001.

99 The Commission contends that the third part of the second plea should be rejected as unfounded, emphasising that in the contested decision it indicated to the applicant that the latter had merely invoked the principle of transparency without showing why that principle was especially pressing in the present case and capable of prevailing over the legitimate grounds for non-disclosure of the documents at issue.

100 In the present case, the Commission examined the existence of an overriding public interest but — according to the Commission — the fact remains that it was for the applicant to show that there was an overriding public interest. On this point, the applicant merely mentioned general considerations concerning society's right to be aware and citizens' right to understand the legal context in question, which, from the Commission's point of view, were totally incapable of demonstrating that the principle of transparency was especially pressing in the present case and capable of prevailing over the grounds for non-disclosure of the documents at issue, especially since the Commission had ensured that citizens were informed by providing up-to-date information, such as the communication of 16 March 2016 entitled 'Next operational steps in EU-Turkey cooperation in the field of migration'. Furthermore, the fact that there is academic debate cannot constitute proof of the existence of an overriding public interest within the meaning of the last clause of Article 4(2) of Regulation No 1049/2001.

101 In any event, the Commission maintains that the exception relating to the protection of international relations was applicable to some of the documents at issue. No provision has been made by the Union legislature for weighing that exception, which is governed by Article 4(2) of Regulation No 1049/2001, against an overriding public interest in disclosure.

102 It should be borne in mind as a preliminary point that, when an institution applies one of the exceptions provided for in Article 4(2) and (3) of Regulation No 1049/2001, it must 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 of 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 (see judgment of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 32 and the

case-law cited).

103 It is however for the party requesting access to refer to specific circumstances to establish an overriding public interest which justifies disclosure of the documents concerned (judgments of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 94; of 16 July 2015, *ClientEarth v Commission*, C-612/13 P, EU:C:2015:486, paragraph 90; and of 23 January 2017, *Justice & Environment v Commission*, T-727/15, not published, EU:T:2017:18, paragraph 49).

104 That being so, the overriding public interest which may justify the disclosure of a document need not necessarily be distinct from the principles which underlie Regulation No 1049/2001 (judgments of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 92, and of 16 July 2015, *ClientEarth v Commission*, C-612/13 P, EU:C:2015:486, paragraph 92).

105 In that regard, the principle of transparency, underlying Regulation No 1049/2001 and relied on by the applicant, 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 (judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 46).

106 In the present case, once again, it is clear that the documents at issue here were not drawn up for the purpose of a legislative procedure as referred to in the FEU Treaty.

107 The applicant, however, has put forward general considerations relating to the principle of transparency, which imply, in the public interest, that citizens are able to participate more closely in the decision-making process and that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 45).

108 In that regard, first of all, since it has been held that the refusal to disclose the first to third and the sixth and seventh documents at issue came within the exceptions referred to in Article 4(1) of Regulation No 1049/2001, the third part of the second plea must be rejected as ineffective as regards those documents. Under that provision, the institutions are obliged to refuse access to documents falling under any one of those mandatory exceptions once the relevant circumstances are shown to

exist and there is no need to balance the protection of the public interest against an overriding general interest (judgments of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraphs 44 and 45, and of 12 September 2013, *Besselink v Council*, T-331/11, not published, EU:T:2013:419, paragraph 44).

109 Next, contrary to the applicant's assertions, the general considerations relating to the principle of transparency, on which it relies in the confirmatory application, were taken into account by the Commission in the contested decision, but the Commission took the view that they were incapable of demonstrating that the principle of transparency was especially pressing in the present case and capable of prevailing over the grounds justifying the refusal to disclose the documents at issue.

110 It should also be noted in that regard that, contrary to the argument put forward by the applicant, in the documents at issue the drafters thereof did not examine the division of competences between the European Union and its Member States for the purposes of the adoption of the EU-Turkey statements of 8 and 18 March 2016.

111 This finding is not called into question by the fact that, subject to what may be revealed from the documents at issue without undermining the protection of the public interest as regards international relations, in the documents at issue, one sentence, contained in the sixth of those documents, notes that certain aspects referred to in the explanatory memorandum between the Hellenic Republic and the Republic of Turkey may come within the competences of the European Union and, therefore, entail participation by the European Union in that memorandum. Similarly, in the seventh of those documents, a brief reference is made to the fact that participation of the European Union, according to the detailed rules laid down in Article 218 TFEU, could be necessary if obligations relating to the readmission agreement between those two States were to be created. In fact, such considerations concern the implementation of the EU-Turkey statements but are unrelated to the question of the European Union's competence to issue those statements, as raised by the applicant. It should be borne in mind that in asylum cases the Court has held that the EU-Turkey statement of 18 March 2016 cannot be regarded as an act adopted by the European Council, or by another institution, body or agency of the European Union.

112 In those circumstances, in the light of the arguments put forward by the applicant, it must be held that the applicant has failed to establish how the principle of transparency was especially pressing in the present case to the point of justifying, at least in respect of the documents not covered by the exceptions referred to in

Article 4(1) of Regulation No 1049/2001, the disclosure of the documents at issue, the non-disclosure of which came within the protection of court proceedings and legal advice. That is all the more so in a context where the Commission has regularly disseminated general information publicly (see, to that effect, judgment of 23 January 2017, *Justice & Environment v Commission*, T-727/15, not published, EU:T:2017:18, paragraph 60). For the sake of completeness, the Court notes that this also holds true for the documents covered by the exceptions referred to in Article 4(1) of Regulation No 1049/2001.

113 The third part must be rejected, as must therefore the second plea as a whole.

Fourth plea in law: infringement of Article 4(6) of Regulation No 1049/2001

114 Under the fourth plea, put forward in the alternative and which should be considered before the third plea, the applicant disputes the Commission's statement that partial access to the documents at issue was not possible. In view of the nature of those documents, it is inconceivable that the entirety of the text contained therein would be covered by the exceptions invoked by the Commission. Consequently, in refusing to grant the applicant partial access in the contested decision, the Commission infringed Article 4(6) of Regulation No 1049/2001.

115 The Commission contends that the plea should be rejected, emphasising that it had explained in the contested decision that it had considered the possibility of granting partial access to the documents at issue but discarded it on the ground that the documents were covered in their entirety by the exceptions justifying non-disclosure under Regulation No 1049/2001.

116 In that regard, according to Article 4(6) of Regulation No 1049/2001, '[i]f only parts of the requested document are covered by any of the exceptions, the remaining parts of the document are to be released'.

117 According to settled case-law, examination of partial access to a document of the European Union institutions must be carried out in the light of the principle of proportionality (judgment of 12 September 2013, *Besselink v Council*, T-331/11, not published, EU:T:2013:419, paragraph 83; see also, to that effect, judgment of 6 December 2001, *Council v Hautala*, C-353/99 P, EU:C:2001:661, paragraphs 27 and 28).

118 It is clear from the very wording of Article 4(6) of Regulation No 1049/2001 that an institution is required to consider whether it is appropriate to grant partial access

to requested documents and to confine any refusal to information covered by the relevant exceptions. The institution must grant such partial access if the aim pursued by that institution in refusing access to a document could be achieved if the institution merely struck out the passages which might harm the public interest to be protected (judgments of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraph 50, and of 12 September 2013, *Besselink v Council*, T-331/11, not published, EU:T:2013:419, paragraph 84; see also, to that effect, judgment of 6 December 2001, *Council v Hautala*, C-353/99 P, EU:C:2001:661, paragraph 29).

119 In the present case, it is clear that, in the contested decision and as it indicated in that decision, the Commission did examine the possibility of granting the applicant partial access to the documents at issue. That is, moreover, corroborated by the fact that it granted the applicant partial access to the fifth document at issue.

120 Next, the Court considers that, similarly to what it did in respect of the fifth document at issue, it was possible for the Commission to grant partial access to the first sentence of the part entitled ‘Legal framework’ of the first document at issue and to the first sentence of point I(a) entitled ‘EU Legal Framework’, of Attachment 1 to the second document at issue. Those passages are purely descriptive of the provisions in question, but they do not contain a legal or strategic position coming within the exceptions referred to in Article 4(1) and (2) of Regulation No 1049/2001.

121 However, there is nothing in the documents at issue produced by the Commission before the Court to show that it would have been possible to grant partial access to the other documents without that step revealing the content of those parts of the documents in respect of which the refusal to grant access was justified, in particular as regards the strategic objectives underlying the discussions on the implementation, under the direction of the European Union, of the EU-Turkey statements by the Hellenic Republic and the Republic of Turkey.

122 In that regard, the European Union Courts have held that, in such a case, the defendant institution, in the present case the Commission, is not required to identify, in the statement of reasons for the contested act, the sensitive content of the documents at issue that cannot be revealed by the disclosure, where such a step would entail revealing information the protection of which is covered by the exception relied on, relating to the protection of the public interest as regards international relations (see, to that effect, judgments of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 82, and of 12 September 2013, *Besselink v Council*, T-331/11, not published, EU:T:2013:419, paragraph 106).

123 The same holds true for the fourth and eighth documents at issue and the undisclosed part of the fifth document at issue, the content of which could not be partially revealed without undermining the protection for court proceedings and legal advice.

124 Consequently, subject to what has been held above in paragraph 120, the fourth plea must be upheld in part and rejected as to the remainder.

**Third plea in law: infringement of Article 4(3) of Regulation
No 1049/2001**

125 Given that, first, the rejection of the first and second pleas and the partial rejection of the fourth plea mean that the Commission was entitled — except for the parts of the documents referred to in paragraph 120 of the present judgment — to rely on the exceptions provided for in Article 4(1) and (2) of Regulation No 1049/2001 and, second, the considerations relating to the fourth plea hold true even if the exception referred to in Article 4(3) of that regulation were to be applicable, it is no longer necessary to examine the merits of the third plea, concerning the latter exception.

126 Therefore, without its being necessary to rule on the third plea, it is appropriate to:

- annul the contested decision in so far as the Commission refused to grant partial access to the first sentence of the part entitled ‘Legal framework’ of the first document at issue and to the first sentence of point I(a) entitled ‘EU Legal Framework’ of Attachment 1 to the second document at issue;
- dismiss the application as to the remainder.

Costs

127 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. However, pursuant to Article 134(3) of those rules, the parties are to bear their own costs where each party succeeds on some and fails on other heads.

128 Since the applicant has failed only in part, it is appropriate to order each party to bear their own costs.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

1. **Annuls European Commission Decision C(2016) 6029 final of 19 September 2016, in so far as it refuses to grant partial access to Access Info Europe to the first sentence of the part entitled ‘Legal framework’ of the Commission document with the reference Ares(2016) 2453347, and to the first sentence of point I(a) entitled ‘EU Legal Framework’, of Attachment 1 to the Commission document with the reference Ares(2016) 2453181;**
2. **Dismisses the action as to the remainder;**
3. **Orders each party to bear its own costs.**

Pelikánová Nihoul Svenningsen

Delivered in open court in Luxembourg on 7 February 2018.
