



Council of the
European Union

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From: Legal Service
To: Permanent Representatives Committee (Part 2)/Council
Subject: Case before the General Court
T-755/14 Herbert Smith Freehills against Commission

1. By an application registered with the General Court on 14 November 2014, Herbert Smith Freehills LLP has brought an action before the General Court for the annulment, pursuant to Article 263 TFEU, of the Commission's decision to refuse public access to certain e-mails sent by members of the Commission Legal Service during the trilogue negotiations leading to the adoption of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products.¹ Certain of these e-mails are part of an exchange of correspondence with a member of the Council Legal Service and contain legal views on the drafting of Article 24 of the Directive.

¹ OJ L 127, 29.4.2014, p. 1–38.

2. The applicant invokes the following grounds in support of his claim for annulment:
 - a) Breach of Article 4(2), second indent, of the Regulation 1049/2001 in that none of the undisclosed documents identified by the Commission falls within the scope of the exception relating to the protection of court proceedings.
 - b) Breach of Article 4(2), second indent, of the Regulation 1049/2001 in that not all documents identified by the Commission fall within the scope of the exception relating to the protection of legal advice; and
 - c) Breach of Article 4(2), second indent, of the Regulation 1049/2001 in that there is an overriding public interest in the disclosure of the requested documents.
3. The present application for annulment is closely related to a parallel case that the same applicant has brought against the Council, and which concerns the Council's refusal to give public access to the emails sent by a member of its Legal Service to the Commission Legal Service in the framework of the same exchange of correspondence (case T-710/14 Herbert Smith Freehills LLP v. Council of the European Union)
4. The facts and the legal issues dealt with in the two cases are largely overlapping. The Commission has decided to intervene in support of the Council's position in the case brought against the Council. The Council Legal Service therefore recommends that the Council intervene in the present case and support the conclusions of the Commission. Following the publication of the case in the Official Journal on 26 January 2015, the deadline for introducing a request to intervene expires on 19 March 2015.
5. In the light of the above, Coreper is invited to recommend to the Council that it approves the introduction of a request to intervene in Case T-755/14, in support of the conclusions of the Commission.