EU FOREIGN RELATIONS LAW: LITIGATING TO INCITE OPENNESS OF EU NEGOTIATIONS

Case C-350/12 P *Council of the European Union v Sophie in 't Veld* Judgment of the Court (First Chamber) of 3 July 2014

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FACTS

Dutch Member of the European Parliament Sophie In't veld has served as vice-chair of the European Parliament committee for civil liberties, justice and home affairs and has been a high profile advocate of transparency in transatlantic relations. In addition to her parliamentary work, she has pursued some of these matters in court, both in the US and in the EU, and also has taken some cases before the European Ombudsman.[1] A recent decision of the Court of Justice arising from litigation of in't Veld, supported exceptionally by the European Parliament, as to an EU-US data transfer agreement has arguably much significance for transparency and EU foreign relations and raises questions as to its broader implications for inter-institutional relations.

As is well-known, the EU-US TFTP or SWIFT Agreement[2] arose out of a scandal where the *New York Times* Newspaper published details disclosing secret access obtained by the US to the Belgian-based Society for Worldwide Interbank Financial Telecommunications (SWIFT). The US Central Intelligence Agency (CIA) was revealed to be running a secret program, procuring financial messaging data, in order to track terrorist financing.[3] The EU-US TFTP Agreement was ultimately entered into so as to legitimise the US program in 2009.[4] It was vetoed by the European Parliament in 2010, again exercising its powers of approval accorded by the Treaty of Lisbon, pursuant to Article 218 TFEU.[5] A second SWIFT agreement was reached in 2010 and entered into force also in 2010. The legal basis of that Agreement is in Articles 87(2)(a) and 88(2) TFEU,[6] the former providing for competence in police cooperation in the area of the collection, storage, processing, analysis and exchange of relevant information and the latter, to regulate the tasks and operation of Europol. Also, the new provision of

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[1] See *In 't veld v. Department of Homeland Security* Case No 1:08-cv-0115-RMC, District Judge Collyer presiding (D.C.C, 15 December 2008); See Case T-529/09, *In 't veld v. Council*, Judgment of the General Court of 4 May 2012 [2012] ECR II-000; T-301/10, *In't veld v. European Commission*, decision of the General Court of 19 March 2013, [2013] ECR II-000; Case C-350/12 P, *Council v. in't Veld* [2014] ECR I-000, judgment of 3 July 2014. See further: Elaine Fahey 'Between One-Shotters and Repeat Hitters: A Retrospective on the role of the European Parliament in the EU-US PNR Litigation' in Fernanda Nicol and Bill Davies (eds.) *EU Law Stories* (Cambridge: Cambridge University Press, 2015).

[2] Agreement between the European Union and the United States of America on the processing and Transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, OJ 2010 L 195, 27 July 2010.

[3] 'Bank data is sifted by US in Secret to Block Terror' *The New York Times* (23 June 2006).

[4] And also in the absence of an EU version of the TFTP Agreement for the EU.

[5] See the account of Adriana Ripoll Servent and Alex MacKenzie, 'The European Parliament as norm-taker? EU-US relations after the SWIFT Agreement' 17(5) *European Foreign Affairs Review* (2012), 71.

[6] In conjunction with Article 218(5) TFEU, providing the Council with competence to enter the Agreement.

the Treaty of Lisbon protecting the privacy of the personal data of EU citizens, Article 16 TFEU, is explicitly invoked in a recital to the Agreement.[78]

In 2009, in't Veld sought access under Regulation No 1049/2001,[9] to document 11897/09 of 9 July 2009, containing an Opinion of the Council's Legal Service. The Opinion suggested that the *earlier* legal basis of the SWIFT Agreement was flawed.[10] The Council refused accessed, on the basis that access would undermine the protection of legal advice intended only for the members of the Council discussing a proposed agreement and that its secrecy outweighed the public interest in disclosure. This decision int' Veld sought to challenge in See T-529/09, *In't Veld v. Council*.

Thus in 2012, the General Court annulled in part the decision of the Council of 29 October 2009 refusing full access to the legal advices. The General Court found that that Regulation No 1049/2001 was intended to confer on the public as wide a right of access as possible to documents of the institutions and that the mere fact that a document concerns an interest protected by an exception thereto did not justify the application of that provision.[11] It held that the choice of the appropriate legal basis had constitutional significance and that any divergence of opinions on that subject could not be equated with a difference of opinion between the institutions. The Court had held that the mere fear of disclosing a disagreement within the institutions regarding the legal basis of a decision authorising the opening of negotiations on behalf of the European Union was an insufficient basis for concluding that the protected public interest in the field of international relations might be undermined. The General Court had limited its examination of the second plea, to the undisclosed parts of document 11897/09 only, and excluded those dealing with the specific content of the proposed agreement or the negotiating directives. Rather, the argument that the Council and its Legal Service could be deterred from asking for and providing written opinions relating to sensitive issues if those opinions subsequently had to be disclosed, were not substantiated by any specific, detailed evidence giving rise to a reasonably foreseeable and not purely hypothetical threat to the Council's interest in receiving frank, objective and comprehensive legal advice.

On appeal to the Court of Justice, the Council claimed that the General Court infringed two provisions of Regulation No 1049/2001 restricting the right of access to documents of the institutions pursuant to the third indent of Article 4(1)(a) of Regulation No 1049/2001, relating to the protection of the public interest as regards international relations, and the second indent of

[7] Which was Articles 82(1)(d) and 87(2)(a) TFEU, the former providing competence for judicial cooperation between the States in criminal matters.

[8] See T-529/09, *In't Veld v. Council* Judgment of the General Court (Fifth Chamber) of 4 May 2012 [2012] ECR II-000.

[9] Council Regulation (EC) 1049/2011 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.

[10] Which was Articles 82(1)(d) and 87(2)(a) TFEU, the former providing competence for judicial cooperation between the States in criminal matters.

[11] See T-529/09, *In't Veld v. Council* Judgment of the General Court (Fifth Chamber) of 4 May 2012 [2012] ECR II-000, citing C-280/11 P *Council* v *Access Info Europe*, Judgment of the Court (First Chamber) of 17 October 2013 [2013] ECR I-000.

Article 4(2) of the regulation, providing for an exception in respect of legal advice. The Council argued that the European Union's negotiating partners could exploit the differences of opinion between the institutions to the European Union's disadvantage and have an adverse impact on the European Union's credibility and effectiveness in international negotiations.[12] Rather, in this context they had a wide margin of discretion which operated to limit the form of judicial review taking place which was at odds with the full review of the decision that the General Court had conducted.

JUDGMENT

Findings of the Advocate General

Advocate General Sharpston ruled in favour of in't veld on 12 February 2014 in a much more forceful vindication of transparency in the negotiation of international agreements by the EU.[13] She held that the Regulation was silent on the particular standard of review pertaining to legal advice dealing with the EU's international relations. Similarly, it was silent on the nature of the public interest in disclosure of such advices. She argued for a broader application of existing access to documents caselaw. In a critical passage, the Advocate General posed the question as to whether '… the three-stage *Turco* test[14] apply to a request for disclosure of a document containing legal advice concerning ongoing international relations? … My view is that it should. It is true that the Court stated in *Turco* that the three stages that it had identified were of 'particular relevance' where the Council acts in a legislative capacity. However, the three stages themselves are framed in terms that are of general application, thus not excluding the possibility that they may apply to other institutional activities.'[15]

Decision of the Court of Justice

In July 2014, the Court of Justice upheld the reasoning of the General Court rejecting assertions that the existence of a legal debate as to the extent of the powers of the institutions with regard to the international activity of the European Union might give rise to a presumption of the existence of a threat to the credibility of the European Union in the negotiations for an international agreement.[16] Just as the General Court had found that the Council had not demonstrated how disclosure of document would cause risk and undermine its interests, the Court of Justice did not find itself persuaded to the contrary.[17] The Court of Justice held that while the requirements for transparency are greater where the Council is acting in its legislative capacity, initiating and conducting negotiations in order to conclude an international agreement fell in principle within the domain of the executive. The General Court also held that the application of the principle of the transparency

[12] See para. 31.
[13] Opinion of Advocate General Sharpston, delivered on 13 February 2014.
[14] Joined Cases C-39/05 P and C-52/05 P, *Sweden and Turco* v *Council* [2008] ECR I-4723 ('*Turco*').
[15] Para. 69-71.
[16] Case C-350/12 P, *Council of the European Union v Sophie in 't Veld* Judgment of the Court (First Chamber) of 3 July 2014.
[17] Para. 54.

of the decision-making process of the European Union could not be ruled out in international affairs, a conclusion which the Court of Justice also concurred with.

The Court held that the Council was really seeking to justify the application of a single ground for refusal by invoking two different exceptions set out in Article 4. The Council had argued that the European Parliament would seek to use the information contained in the legal opinion in order to influence the ongoing negotiations and to challenge the legality of the Council's decision on the conclusion of the proposed agreement.[18] However, the Court held that that that criticism overlooked the fact that the General Court decided that the Council was justified in refusing access to the specific content of the proposed agreement and the strategic objectives of the EU but that the Council did not provide any evidence to establish how the disclosure of the remainder of that document would have given rise to risk. In *Commission* v *Council*[19] the Court had previously held that certain conduct could jeopardise the successful outcome of negotiations but the Court here found that this was not the case. While the Council further submitted that the General Court should have confined itself to a limited review, the Court of Justice held that the General Court had confined itself to reviewing the statement of reasons underpinning the decision at issue and did not, therefore, infringe the Council's discretion.

COMMENT

In't veld ostensibly has a narrow remit, pertaining mainly to specific disclosures between institutions and legal advice. Arguably, however, it feeds into a significant and broader debate which relates to carving out, (1) the right of the European Parliament to information in international relations (even if the specific case relates to individual rights) and (2) denting secrecy in EU international relations negotiations.

As to the first point, the European Parliament's new right of veto on international agreements in Article 218 TFEU is specifically linked to a right of information in Article 218 (10) TFEU.[20] The recent 'ACTA' affair has rendered salient what Article 218 TFEU mandates as regards transparency in the conduct of EU international relations,[21] which prompted the European Commission to take measures to dispel 'myths' and publish information catalogues about a controversial international agreement. However, this was occurred after significant inter-institutional conflict between the European Commission and European Parliament, at political and judicial level. Notably, the agreement was

[18] Para 109.
[19] Case 22/70 *Commission v Council* [1971] ECR 263.
[20] Council Regulation (EC) 1049/2011 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).
[21] See Council Decision on the conclusion of the Anti-Counterfeiting Trade Agreement (ACTA) between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America, No. 12195/11, 23 August 2011. It was negotiated and signed by the EU and was vetoed by the EP in July 2012 for reasons related to the failure to inform it adequately and on time.

voted down by MEPs because of a lack of information.[22] In't Veld again herself sought public access to the negotiating mandate for ACTA through litigation. The document was subsequently leaked and then was placed by the EU in the public domain. The General Court recently ruled against her on the ground that the interest in shielding the EU's negotiation *strategy* had to prevail, a position that transparency advocates have vigorously opposed.[23]

As to the second point, beyond ACTA, one high profile set of negotiations that the decision in *In't Veld* has relevance for are the EU and US negotiations on the Transatlantic Trade and Investment Agreement (TTIP), the trade agreement under negotiation between the EU and US to cut trade barriers and 'behind the borders' barriers (technical regulations, standards, approvals) in a wide variety of sectors.[24] The TTIP negotiations have been *ostensibly* very open as a process. There is an active EU TTIP twitter account (@EU_TTIP), RSS feeds, video-streamed meetings, broad public consultations and prolific document dissemination. However, the TTIP negotiation mandate and draft text was leaked early into the negotiations alongside the official channels of information, in dedicated leaking forums.[25] The Ombudsman late into the TTIP negotiations recently raised questions as to the true place of openness in the negotiations and launched a public consultation.[26] Only in October 2014 did the Member States of the EU finally agreed to the release of the EU negotiation mandate for TTIP, notably after the *In't veld* decision.[27]

There is a perceived shift in the openness of the CJEU to international relations and exceptions to EU openness rules on access to documents. For example, in 2013, the General Court in *Besselink v. Council* required the Council to reconsider its partial disclosure of the negotiation mandate for EU accession to the ECHR, after a national parliament had published it in part.[28] This shift is not going unnoticed in the Member States parliaments.[29] In the broader scheme of things, the Court itself is

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[22] Christina Eckes, Elaine Fahey and Machiko Kanetake, 'International, European and US Perspectives on the Negotiation and Adoption of the Anti-Counterfeiting Trade Agreement (ACTA)', *Currents, XX*(2), (2012) 20. See European Commission, *10 Myths about ACTA*, 1, 1-3 (2012), http://trade.ec.europa.eu/doclib/docs/2012/january/tradoc_148964.pdf. Cf Bart Driessen, *Transparency in EU Institutional Law: A practitioner's handbook,* (2nd ed., Kluwer Law, 2012).

[23] T-301/10, *In't veld v. European Commission*, decision of the General Court of 19 March 2013, [2013] ECR II-000, appeal pending. See also its confirmation in part by the General Court in Case C-331/11 *Besselink v. Council* [2013] ECR I-000 (Council decision authorising ECHR accession negotiations), paras. 70, 72. Cf Marija Bartl and Elaine Fahey, 'A Post National marketplace? Negotiating the Transatlantic Trade and Investment Partnership in Elaine Fahey and Deirdre Curtin (eds), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US legal orders* (Cambridge: Cambridge University Press, 2014); I.e.that the mere 'listing' of EU interests in a negotiation mandate for an international agreement is not in any sense a strategy: Deirdre Curtin, 'Official Secrets and the Negotiation of International Agreements: is the EU Executive Unbound?', 50 *Common Market Law Review*, (2013) 423.

[24] Available at <http://ec.europa.eu/trade/policy/in-focus/ttip/> (last accessed 3 November 2014).

[25] Available at <http://eu-secretdeals.info/ttip/> (last accessed 3 November 2014).

[26] Available at <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/56100/html.bookmark> (last accessed 3 November 2014).

[27] E.g. The EU-Canada free trade agreement (CETA) was leaked in August 2014 by the German broadcaster *ARD*.

[28] See T-331/11, *Besselink v Council of Europe* [2013] ECR II-000, (12 September 2013)

[29] See House of Lords European Scrutiny Committee (8 January 2014) - Contents http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xxvi/8317.htm

> '… it is also apparent that the EU courts are now more open to partial disclosure of institutional documentation, albeit non-court documentation, relevant to the accession process. We refer the

coming under more scrutiny for its transparency practices.[30] The Court of Justice has in *Int Veld* delivered a victory in her favour weighing in against blanket institutional secrecy in the area of international relations. Its context is a significant one, of a push for openness in negotiations during a period of significant EU activity as a global actor. How far this decision will reverberate remains to be seen.

Government to the recent judgment in the case of [See T-331/11] *Besselink v Council of Europe* (12 September 2013)… where the General Court required the Council to reconsider partially disclosing the accession negotiating mandate (pursuant to Article 4(6) of Regulation No 1049/2001) in accordance with the proportionality principle.''

[30] Alemanno, Alberto and Stefan, Oana 'Openness at the Court of Justice of the European Union: Toppling a Taboo', 51(1)*Common Market Law Review*, (2014), 97.