

CONFIDENTIALITY OF CENTRAL BANK DOCUMENTATION: LEGAL PROFESSIONAL PRIVILEGE IN THE UK

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ABSTRACT

Le questioni relative alla confidenzialità sono pane quotidiano per l'avvocato di una banca centrale. Lo studio esamina un particolare aspetto della confidenzialità – la consulenza legale fornita alle banche centrali – alla luce degli ultimi sviluppi nel Regno Unito e nella Comunità Europea. Viene esaminato il giudizio della Camera dei Lords nella vertenza del novembre 2004 tra il Three Rivers District Council e la Banca d'Inghilterra, relativa all'inviolabilità della consulenza legale; in tale giudizio venivano prese in considerazione le circostanze nelle quali la consulenza legale fornita alla Banca d'Inghilterra era protetta dall'obbligo di divulgazione e cosa costituisse effettivamente una consulenza legale a tale fine. Viene considerato inoltre come l'Atto per la Libera Informazione nel Regno Unito (UK Freedom of Information Act 2000 – FOIA), entrato in vigore nel gennaio 2005 e che prevede un diritto di accesso di ordine generale alle informazioni in possesso delle autorità pubbliche (inclusa la Banca d'Inghilterra), si occupa in modo specifico della consulenza legale. Lo studio va poi a verificare se la vertenza e il FOIA possano essere più in generale di utilità in ambito del SEBC, e in modo particolare alla luce della gestione del rischio legale, della controversia e delle questioni legate all'accesso alle relative informazioni. Ciò posto, lo studio prende in considerazione la Decisione della BCE del marzo 2004 (2004/3) sull'accesso ai documenti BCE e il giudizio della Corte di Prima Istanza del novembre 2004 nella causa tra Turco e il Consiglio dell'Unione Europea, analizzando in ogni caso l'eccezione relativa alla consulenza legale nell'ambito della legislazione sull'accesso ai documenti.

Issues surrounding confidentiality are part of the daily fare of a central bank lawyer. Central banks handle vast amounts of sensitive information. Duties of confidentiality derive from a myriad of national, Community and foreign law sources, many of which may overlap. There is an equally impressive array of countervailing provisions which may require or permit disclosure. Add to that an increasingly diverse range of provisions, covering such matters as data protection, copyright and human rights, which may also impact on the legal status of information. The legal environment itself is forever changing, triggered in part by developments in information technology and calls for greater transparency within the public sector and for more extensive information-sharing regimes.

This article examines one particular aspect of confidentiality – legal advice provided to central banks – in the light of recent UK and EC developments. It focuses on the House of Lords *Three Rivers* judgment of November 2004 on legal advice privilege, which considered the circumstances in which legal advice provided to the Bank of England was protected from disclosure in litigation and what actually constituted legal advice for this purpose. It also considers how the UK Freedom of Information Act 2000 (FOIA), which came into force in January 2005 and provides a general right of access to information held by public authorities, deals specifically with legal advice. The article goes on to explore, somewhat more tentatively, whether the judgment and the FOIA may be instructive in the ESCB framework more generally, particularly in the light of legal risk management, litigation and public access issues. It considers the ECB Decision of March 2004 (2004/3) on public access to ECB documents and the judgment of the Court of First Instance of November 2004 in *Turco v Council of the European Union*, focusing on the legal advice exceptions. The article is a short excursion into one small corner of a complex landscape, rather than an encyclopaedic review of the law of confidentiality or the law relating to legal professional privilege.

THREE RIVERS DISTRICT COUNCIL VERSUS BANK OF ENGLAND – HOUSE OF LORDS JUDGMENT – NOVEMBER 2004

Following the collapse of the Bank of Credit and Commerce International (BCCI) in 1991 an independent inquiry into the supervision of BCCI was conducted under the chairmanship of Lord Justice Bingham. The Inquiry reported in October 1992. The Bank of England was assisted by external lawyers in the preparation and presentation of the Bank's evidence and submissions to the Inquiry.

In subsequent litigation between the liquidators of BCCI and the Bank of England, the liquidators sought disclosure by the Bank of a large number of documents relating to the Inquiry, which the Bank claimed were covered by legal advice privilege and did not therefore need to be disclosed.¹ The matter came

¹ Under English law there are two main types of legal professional privilege: litigation privilege covers communications that come into being after litigation is in reasonable prospect or is pending (including communications between the lawyer and his client and the lawyer or client and third parties eg an expert witness); and legal advice privilege which is considered below.

before the Court of Appeal, twice, which held in 2003 and 2004 that legal advice privilege only covered material constituting or recording communications between clients and lawyers seeking or giving advice about the clients' legal rights and obligations and that legal advice sought or given for *presentational* purposes (even to an inquiry) was not protected from disclosure.²

The Bank of England appealed to the House of Lords. In its judgment of 11 November 2004, all five Law Lords (Lords Scott, Brown, Rodger, Carswell and Baroness Hale) unanimously rejected the Court of Appeal's approach and re-established the fundamental position of legal advice privilege in English law and the right to obtain legal advice in confidence.³ The judgment confirmed that legal advice necessarily goes wider than just advising on rights and obligations and could include advice on presentational matters provided in a relevant legal context.

In addressing the issue, the Lords considered the basic *policy* underlying legal advice privilege. They acknowledged that there are many relationships, where the common law recognises the confidentiality of communications (eg doctor/patient, accountant/client), but where nevertheless there may be strong public interest or administration of justice reasons why such material may need to be disclosed when relevant to issues in subsequent litigation. In contrast, once a communication or document between a lawyer and the client qualifies for legal advice privilege, the privilege can be waived by the client and it can be overridden by statute, but it is otherwise absolute.

The Lords accepted that there was a long series of authorities which supported this special protection for communications between lawyers and their clients. For example, in *R v Derby Magistrates, ex parte B* [1996] AC 487 Lord Nicholls at 510 said: "The law has been established for at least 150 years, since the time of Lord Brougham LC in 1833 in *Greenough v Gaskell* 1 M & K 98: subject to recognised exceptions, communications seeking professional legal advice, whether or not in connection with pending court proceedings, are absolutely and permanently privileged from disclosure even though, in consequence, the communications will not be available in court proceedings in which they might be important evidence." In the same case Lord Taylor CJ at 507 et seq said: "In *Balabel v Air India* [1988] Ch. 317 the basic principle justifying legal professional privilege was again said to be that a client should be able to obtain legal advice in confidence. The principle which runs through all these cases ... is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent" and that "... once any exception to the general rule is allowed, the client's confidence is necessarily lost" (pp 507 and 508). In *R (Morgan Grenfell Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 Lord Hoffmann described legal professional privilege as "a fundamental human right" and continued (p.607) that "such advice cannot be

2 *Three Rivers District Council v The Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474 and *Three Rivers District Council v The Governor and Company of the Bank of England (No 6)* [2004] EWCA Civ 218.

3 *Three Rivers District Council and others v The Governor and Company of the Bank of England* [2004] UKHL 48.

effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice.”⁴

The Lords accepted that there was well established jurisprudence supporting legal professional privilege in foreign jurisdictions and at an EC level.⁵ The judgment records the comments of Advocate-General Slynn (as he then was), who considered the justification for legal professional privilege in *A M & S Europe Ltd v European Commission* [1983] QB 878 at 913: “[The privilege] springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks.”

Lord Scott observed that the cases had in common the idea that, in a society in which the restraining and controlling framework is built upon a belief in the rule of law, communications between clients and lawyers should be secure against the possibility of scrutiny from others. Baroness Hale added that it was in the interests of the whole community that lawyers give their clients sound advice, accurate as to the law and sensible as to their conduct and that there was little or no chance of the client taking the right or sensible course if the lawyer’s advice was inaccurate or unsound because the lawyer had been given an incomplete or inaccurate picture of the client’s position. In similar vein Lord Rodger noted that the public interest justification for legal professional privilege was the same today as it was 350 years ago: if the advice given by lawyers is to be sound, their clients must make them aware of all the relevant circumstances of the problem. Clients would be reluctant to do so unless they could be sure that what they said about any potentially damaging or embarrassing circumstances would not be revealed later.

The Lords went on to consider the kind of communications and documents covered by legal advice privilege and referred approvingly to the Court of Appeal decision in *Balabel v Air India* [1988] 1 Ch 317, where Taylor LJ said at page 330: “Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves

4 Although not cited expressly by the House of Lords, the European Court of Human Rights has upheld the principle that a “person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion” is protected by Art 6 where litigation is contemplated and Art 8 where it is not – see *Campbell v United Kingdom* 15 EHRR 137, 160-1(1992) paras 46,48.

5 For example in *Upjohn Co. v United States* (1981) 449 US 383, a decision of the US Supreme Court, Justice Rehnquist said, at p.389, that the purpose of legal professional privilege was “... to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice...The privilege recognises that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.” Similarly, in *Jones v Smith* [1999] 1 SCR 455, a decision of the Supreme Court of Canada, privilege was justified on the ground that - “Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent. The privilege is essential if sound legal advice is to be given Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients”.

protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. ... Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.”

The concept of the relevant legal context is key to understanding legal advice privilege. In the case in question the “relevant legal context” was the Bingham Inquiry and whether the Bank had properly discharged its public law duties under the Banking Acts. The Lords saw no reason why *presentational* advice sought from lawyers to parties in such an Inquiry should not also be privileged. When the Bank of England consulted external lawyers about the presentation of their evidence to the Bingham Inquiry Unit, Lord Rodger considered it was asking them to put on legal spectacles when reading, considering and commenting on the drafts. It was seeking their comments and assistance as lawyers, how the Bank’s evidence could be most effectively presented to the Inquiry. Legal advice privilege applied therefore to those communications. The Lords considered a wide range of other scenarios (ie besides inquiries) where lawyers provide advice and assistance, which would qualify for legal advice privilege, even where the lawyer’s role is essentially presentational in character.

The judgment re-established the fundamental position of legal advice privilege in English law and the right to obtain legal advice in confidence. Will it be the last word on the subject? Probably not. The Lords recognised that there may occasionally be marginal cases where it is not always clear whether legal advice privilege covers all documents passing between clients and their lawyers. In such cases the courts may from time to time have to decide whether the seeking of advice from lawyers has a relevant legal context and whether it was reasonable for the client to consult the special professional knowledge and skills of a lawyer. Furthermore, the judgment only concerned legal advice privilege (not litigation privilege) and left open the question who precisely is the client (in the case of a company, partnership or public body) for legal advice privilege purposes.

FREEDOM OF INFORMATION ACT 2000

Legal professional privilege is first and foremost a rule of evidence in litigation. However, the concept surfaces in other contexts, notably legislation, which need to be interpreted consistently with the House of Lords judgment. One particular example is the Freedom of Information Act 2000 (the “FOIA”) which came into force in the UK on 1 January 2005.⁶

⁶ In Scotland the Freedom of Information (Scotland) Act 2002 applies, which also came fully into force on 1 January 2005.

The FOIA provides a general right of access to information held by public authorities in the UK.⁷ Information for this purpose means *recorded information* held by the public authority (it is not a right to *documents* as such). The general right of access is subject to certain procedural requirements, cost-compliance limits and various exemptions in sections 21 to 44 of the FOIA. Some of the exemptions (including legal professional privilege and law enforcement) are “qualified” in that the public authority must first decide whether the exemption applies to all or part of the information requested.⁸ If so, it must then consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The other exemptions (including information provided in confidence to the authority and court records) are “absolute” in that there is no supplementary public interest test.⁹ In practice, many of the exemptions in the FOIA are likely to overlap. The Information Commissioner (IC) and the Department for Constitutional Affairs (DCA) have both issued detailed guidance on the scope of the exemptions and the related public interest test.¹⁰

The legal professional privilege exemption in section 42(1) FOIA covers “information, in respect of which a claim to legal professional privilege...could be maintained in legal proceedings”. Accordingly, issues of legal advice privilege (being one type of legal professional privilege) would need to be assessed against prevailing case law (including the House of Lords judgment of last November). In an FOIA context, there is then a separate *public interest* assessment. The DCA guidance on legal professional privilege is particularly interesting as to the kind of factors that may be relevant when balancing the *public interest* considerations:

- The public interest arguments that may weigh *in favour* of disclosure might include: circumstances where the Government would waive its privilege if litigation were afoot; the public interest in public authorities being accountable for the quality of their decision making; ensuring that decisions have been made on the basis of good quality legal advice as part of that process. The weight to be attached to these public interest factors will differ according to the case in question. Given the very substantial public interest in maintaining the confidentiality of material protected by legal professional privilege, the guidance concludes that the public interest is only likely to come down in favour of disclosure in “exceptional circumstances”.

7 There are over 100 000 such authorities in the UK, including for example Government Departments, schools and many general medical practitioners. The Bank of England is one such authority but is in a special position since information held by the Bank with respect to certain of its functions (monetary policy, lender of last resort and its private banking and related business) is not subject to the FOIA at all.

8 “Qualified” exemptions include in summary: (s 22) information intended for future publication; (s 24) certain matters relating to national security; (s 26) defence; (s 27) international relations; (s 28) relations within the United Kingdom; (s 29) the economy; (s 30) investigations and proceedings conducted by a public authority; (s 31) law enforcement; (s 33) audit functions; (s 35) formulation of government policy; (s 36) prejudice to the effective conduct of public affairs; (s 37) health and safety; (s 38) environmental information; (s 40) some personal information; (s 42) legal professional privilege; and (s 43) commercial interests.

9 “Absolute” exemptions include in summary: (s 21) information accessible to the applicant by other means; (s 23) information supplied by or relating to the security services; (s 32) information relating to court records; (s 40) certain personal information; (s 41) information provided in confidence to the public authority; and (s 44) information prohibited from disclosure (eg by statute or Community law obligations).

10 The Information Commissioner is responsible for promoting observance by public authorities of the requirements of the FOIA. The Commissioner has various review and enforcement powers under the FOIA. The Department for Constitutional Affairs is the lead Government Department responsible for freedom of information.

- The public interest arguments which may argue *against* disclosure might include: the need to ensure that a client can obtain legal advice in confidence and the adverse consequences of less than adequate disclosure by the client; the need to ensure that decisions taken by Government are taken in a fully informed legal context with a full appreciation of the facts; the importance of the lawyer being able to present the full picture to his/her client, including arguments for and against (and perceived weaknesses of) his/her final conclusions; a recognition that disclosure of legal advice may unfairly exposing the authority’s legal position to challenge; the risk that lawyers and clients will avoid making a permanent record of the legal advice that is given (or make only a partial record) and the associated risk, as policy develops or litigation decisions are made, of being unable to refer back to advice given along the way. There may even be a reluctance to seek advice at all, resulting in decisions that are legally flawed and attracting successful legal challenges which could otherwise have been avoided; and a recognition that legal advice given in one context may be helpful or relevant to subsequent issues. Disclosure by reference to particular facts might thus prejudice future legal interests in other contexts.

The DCA guidance also considers the situation where parties to actual or prospective litigation might argue for disclosure of the legal advice provided to Government departments concerning the interpretation of legislation on the grounds that there is a public interest in knowing the perceived strength of the case against the department and the legal basis on which the department had decided to defend the case. The guidance notes the countervailing public interest arguments (eg the department’s right to consult its lawyers on a confidential basis, the importance of the department having access to thorough and candid legal advice and in not being considerably disadvantaged in the conduct of its litigation) and concludes that, unless there are exceptional circumstances, such advice would not normally be disclosed.

POSSIBLE IMPLICATIONS AND LESSONS FOR THE ESCB?

Are the House of Lords judgment and the FOIA and related guidance instructive in the ESCB context more generally? The judgment concerns procedural matters of English law and the FOIA applies to public authorities in the UK, so they may not at first sight score very highly on the search engine “relevance” indicator. But, if the uniquely English law aspects of the judgment and the FOIA are put to one side, there may be rather more common ground. Three particular areas come to mind – legal risk management, litigation/investigations and public access legislation – where it is tentatively suggested that they may serve as useful sources of comparative approach in their own right and may highlight considerations which may be relevant in other jurisdictions.

LEGAL RISK

Central banks need sound legal advice and assistance. This goes to the heart of how central banks manage legal risk. In order to provide such advice and

assistance, central banks need to be able to discuss matters freely and frankly with their lawyers (in-house or external), who in turn need to be aware of all relevant circumstances and need to be able to convey the full picture to the client, including any weaknesses. The House of Lords judgment highlights the importance in this respect (in the UK context at least) of clients being able to obtain legal advice on a confidential basis and lays down some parameters as to what may constitute legal advice for this purpose.

Are these relevant considerations for central banks in other jurisdictions? Principles of confidentiality and professional secrecy are of course well-embedded at a national and EC level. At an ESCB/Eurosystem level, for example, various confidentiality provisions may be relevant (eg Art 38 of the ESCB Statute and the ECB Rules of Procedure of February 2004 and the General Council Rules of Procedure of June 04).¹¹ It might nevertheless be worth considering whether national law, EC law, other provisions (eg European Convention on Human Rights) and/or local professional rules provide *adequate* safeguards regarding *lawyer/client communications*, whether there are any limitations to such safeguards (eg depending on who holds the material) and whether it is clear to whom advice and assistance is being provided.

LITIGATION/INVESTIGATIONS

The status of legal advice provided to central banks might also be relevant in *litigation* involving central banks (directly or as third parties) or *investigations* (eg by the European Anti-Fraud Office – OLAF). Various factors may be relevant in this respect. For example, in contrast to the position in many Civil law jurisdictions, in the UK there is a general and wide duty on a party involved in litigation to disclose to the other party documents and material relevant to the dispute, including any documents which may adversely affect his case. On the other hand, *in-house lawyers* under English law have the same status as external lawyers on matters of legal professional privilege, whereas this would not appear to be the case in all EU jurisdictions.

The position of *in-house lawyers* under EC law is still developing. The general principle of privileged lawyer/client communications was recognised in 1982 in *AM&S Europe Ltd v European Commission*, when the ECJ held that such communications in EC competition proceedings would be protected, but only if the communication was for the client’s “right of defence” and the lawyer was in private practice (ie not an in-house lawyer).¹² That position may perhaps change. In an *interim* decision of the Court of First Instance in October 2003 in *Akzo Nobel Chemicals v Commission* (another competition-related case), the President of the CFI acknowledged that the question whether communications involving *in-house lawyers* should also benefit from legal professional privilege now merited “very special attention”, particularly since the *AM&S* decision was “based...on an interpretation of the principles common to the

¹¹ ECB Decision of 19 February 2004 (ECB/2004/2) and ECB Decision of 17 June 2004 (ECB/2004/12) respectively.

¹² Case 155/79. 1982 ECR 1575.

Member States dating from 1982'.¹³ The President went on to say that the evidence “tends to show that increasingly in the legal orders of the Member States and possibly, as a consequence, in the Community legal order, there is no presumption that the link of employment between a lawyer and an undertaking will always, and as a matter of principle, affect the independence necessary for the effective exercise of the role of collaborating in the administration of justice by the courts if, in addition, the lawyer is bound by strict rules of professional conduct, which where necessary require that he observe the particular duties commensurate with his status”. Although a subsequent ECJ ruling of 27 September 2004¹⁴ overruled the CFI’s interim order, a ruling from the CFI on the main case is still awaited.

The importance of legal privilege in relation to investigations is reflected in the ECB’s Decision of 3 June 2004 (ECB/2004/11) concerning the terms and conditions for European Anti-Fraud investigations of the ECB.¹⁵ Recital (4) of the Decision notes that internal investigations by OLAF are subject, inter alia, to “Article 6(2) of the Treaty on European Union [this refers to the European Convention on Human Rights] and to other principles and fundamental rights common to the Member States and recognised by the Court of Justice, such as, for instance, the confidentiality of legal advice (legal privilege).”

PUBLIC ACCESS LEGISLATION

Public access legislation exists, or is currently under consideration, in a number of EU Member States. Such legislation (as with the FOIA) typically provides a general right of access to information or documents subject to certain procedural requirements and exemptions/exceptions. The ECB has itself recently adopted a Decision on public access to ECB documents.¹⁶ Where such acts are qualified in relation to *legal advice or legal professional privilege*, the kind of issues raised in the House of Lords judgment and the FOIA guidance may be of interest.

The ECB Decision confers a general right of access to ECB documents.¹⁷ It is aimed primarily (though not exclusively) at documents held by the ECB.¹⁸ The right of access is subject to certain procedural requirements and ‘exceptions’

13 Joined cases T-125/03 and T-253/03 of 30 October 2003.

14 C-7/04 P (R).

15 The ECB Decision was adopted pursuant to Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations by the European Anti-Fraud Office (OLAF).

16 ECB/2004/3 of 4 March 2004 on public access to ECB documents. The Decision was adopted pursuant to Art 12.3 of the ESCB/ECB Statute and the ECB Rules of Procedure of 19 February 2004 (ECB/2004/2) and repealed the earlier ECB Decision on public access to ECB documents of 3 November 1998 (ECB/1998/12). The Decision was adopted in line with the Joint Declaration of the European Parliament, the Council and the Commission of 30 May 2001 calling on the other institutions and bodies of the Union to adopt internal rules on public access to documents which take account of the principles and limits set out in Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents.

17 An ‘ECB document’ means any content whatever its medium drawn up or held by the ECB (thus including documents received by the ECB from third parties) and relating to its policies, activities or decisions, as well as documents originating from the European Monetary Institute and from the Committee of Governors of the central banks of the Member States of the European Economic Community.

18 Art 5 provides that national central banks may only disclose documents drawn up by the ECB (or documents from the European Monetary Institute or Committee of Governors) following prior consultation with the ECB (unless it is clear that the document shall/shall not be disclosed).

listed in Art 4 of the Decision.¹⁹ One of the exceptions covers court proceedings and legal advice (Art 4(2): “where disclosure would undermine the protection of ... court proceedings and legal advice,... unless there is an overriding public interest in disclosure”). As with the FOIA legal professional privilege exemption, the Art 4(2) exception is subject to a public interest override and may overlap with one or more of the other exceptions. The ECB Decision is largely modelled on Regulation (EC) 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 L 145, 31.5.2001, p 43). The *court proceedings and legal advice* exception in Art 4(2) of the ECB Decision is effectively the same as that in Art 4(2) of Regulation 1049/2001.²⁰

This latter provision was recently assessed by the Court of First Instance in *Turco v Council of the European Union* (Case T-84/03 of 23 November 2004). The case concerned a public access request to the Council for a Council Legal Service opinion on a proposed Council Directive, to which the Council had refused access on the grounds of the Art 4(2) legal advice exception. The Court rejected the applicant’s submission that the *court proceedings and legal advice* exception in Art 4(2) only covered legal advice drawn up in the context of actual or prospective legal proceedings and did not cover legal advice relating to legislative proposals (paras 53-67). The Court noted that legal advice drawn up in the context of *court proceedings* is already covered by the court proceedings exception (see eg *Interporc v Commission*, Case T-92/98 [1999] ECR II-3521) and that the express reference to “legal advice” in Art 4(2) therefore has a distinct meaning from the court proceedings exception.²¹ The Court acknowledged that the Council had to consider specifically whether “disclosure of the legal opinion would undermine the protection to which that type of document may be entitled” (ie simply because the document was a legal opinion was not enough in itself to justify application of the exception), but nevertheless concluded that the legal opinion was indeed “legal advice” and that it was entirely compatible with the Regulation for the Council to withhold the whole of the opinion (paras 69-74). The Court also accepted that the independence of legal opinions of the Council Legal Service constitutes an interest to be protected and that the applicant failed to explain how disclosure

19 Art 4(1) provide that the ECB shall refuse access to a document where disclosure would undermine the protection of: (a) the public interest as regards: the confidentiality of the proceedings of the ECB’s decision-making bodies; the financial, monetary or economic policy of the Community or a Member State; the internal finances of the ECB or of the NCBs; protecting the integrity of euro banknotes; public security; international financial, monetary or economic relations; (b) the privacy and the integrity of the individual...; and (c) the confidentiality of information that is protected as such under Community law. In addition to the court proceedings and legal advice exception (commented on in the main text), Art 4(2) provides that the ECB shall refuse access where disclosure would undermine the protection of the commercial interests of a natural or legal person (including intellectual property) or the purpose of inspections, investigations and audits unless there is an overriding public interest in disclosure.

20 The Commission’s 2004 Report on the implementation of the principles in EC Regulation 1049/2001 provides a useful summary of the key case law on the court proceedings and legal advice exception in Art 4(2). Commission 30 January 2004 COM (2004) 45 – see para 3.4.2.

21 The Court, drawing on the *Interporc* judgment, noted (para 63) that the term *court proceedings* within the meaning of Decision 94/90 covered not only pleadings and other documents lodged and internal documents concerning the investigation of the case before the Court, but also correspondence concerning the case between the directorate-general concerned and the legal service or a lawyer’s practice. NB the *Interporc* judgment goes on to make clear (para 45) that the court proceedings exception would not cover “documents drawn up in connection with a purely administrative matter”.

of the legal opinion in question would help to protect the Council's Legal Service from improper external influences (para 79).

As regards the public interest override in Art 4(2), the Court also rejected the applicant's arguments that the Council had not examined whether there was such an interest and that the principles of transparency, openness and of democracy or of the participation of citizens in the decision-making process, are overriding public interests which warrant the disclosure of the legal opinion (paras 81–85). In the Court's view these principles were implemented by Regulation No 1049/2001 *as a whole*; the overriding public interest in Art 4(2) was, as *a rule*, distinct from the general principles underlying the Regulation. Moreover, although the institution may itself identify an overriding public interest, it was for the applicant to invoke such an interest in his application so as to invite the institution to give a decision on that point. Since the Council did not make an error of assessment in its finding on the overriding public interests invoked by the applicant, the Court concluded that the Council could not be criticised for not having identified other overriding public interests.

The *Turco* case provides an interesting and up-to-date insight into the Court's approach to Community public access legislation. It may prove to be equally relevant when applying the parallel legal advice exception and the related public interest assessment in the ECB Decision 2004/3.²²

CONCLUSION

This article has focused on legal advice provided to central banks in the light of recent UK and EC developments. The *Three Rivers* case – published two weeks before *Turco* – highlights the importance of clients being able to obtain legal advice on a confidential basis and provides some parameters as to what may constitute legal advice for this purpose. This raises a broad range of associated issues, including the manner in which central banks manage legal risk. The UK FOIA and the ECB Decision 2004/3 both provide mechanisms for protecting legal advice provided to central banks; the related FOIA guidance and the *Turco* case suggest a broad similarity in the range of considerations that may need to be taken into account in applying the legal advice exception/exemption. In turn, this draws on Community and national jurisprudence on legal professional privilege. Looking ahead, it might reasonably be expected: first, that there will be further developments in the legal environment at a national and Community level concerning matters in the field of legal professional privilege, confidentiality and information issues more generally (driven by various legal, political and technological considerations); second, that there will be increasing overlap and convergence between Community and national instruments, laws and jurisprudence in this field; and third that central bank lawyers will remain busy in this field in the coming months and years.

²² The applicant has since filed an appeal against the judgement of 23 November 2004 (Case C-52/05 P-OS C 106, 30.04.2005, p.14).