



## Statewatch

### Case Law Summary EU access to documents Regulation

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#### Introduction

The following summary sets out systematically the case law of the EU Courts (the Court of Justice and the lower court, the General Court – previously known as the Court of First Instance) concerning the EU's access to documents regulation (Reg. 1049/2001). It contains excerpts from all of the relevant case law, organized by topic, except for General Court judgments that were either the subject of an appeal to the Court of Justice (since only the Court of Justice judgment is final in these cases) or which were implicitly overturned by a separate judgment of the Court of Justice (such as the General Court's original jurisprudence on the 'Member State veto' issue).

It should be noted that some judgments of the General Court are currently under appeal or could still be the subject of appeal, and so the judgments concerned are not necessarily final; those judgments are still excerpted here, but the cases concerned are mentioned below.

Where there is no English-language version of a judgment, the French language version appears.

#### List of judgments concerning Regulation 1049/2001

##### *Court of Justice*

C-514/07, C-528/07 and C-532/07 – *API v Commission* – 21 Sep. 2010

C-139/07 P – *TGI v Commission* – 29 June 2010

C-28/08 P – *Bavarian Lager v Commission* – 29 June 2010

C-362/08 P – *Internationaler Hilfsfonds v Commission* – 26 Jan. 2010

C-39/05 and C-52/05 P – *Turco v Council* – [2008] ECR I-4723

C-64/05 P – *Sweden v Commission (IFAW)* – [2007] ECR I-11389

C-266/05 P – *Sison v Council* – [2007] ECR I-1233

##### *General Court [Court of First Instance]*

a) Judgments not appealed to the Court of Justice:

T-76/02 – *Messina v Commission* – [2003] ECR II-3203

T-187/03 – *Scippacercola v Commission* – [2005] ECR II-1029

T-2/03 – *VKI v Commission* – [2005] ECR II-1121  
T-391/03 and 70/04 – *Franchet and Byk v Commission* – [2006] ECR II-2023  
T-264/04 – *WWF v Council* – [2007] ECR II-911  
T-380/04 – *Terezakis v Commission* – [2008] ECR II-11\*  
T-42/05 – *Williams v Commission* – [2008] ECR II-156\*  
T-144/05 – *Muniz v Commission* – [2008] ECR II-335\*  
T-166/05 – *Borax v Commission* – [2009] ECR II-28\*  
T-121/05 – *Borax v Commission* – [2009] ECR II-27\*  
T-355/04 and T-446/04 – *Co-Frutta v Commission* – [2010] ECR II-1

b) Judgments which were the subject of an appeal judgment of the Court of Justice:

T-141/05 – *Internationaler Hilfsfonds v Commission* – [2008] ECR II-84\*  
T-194/04 - *Bavarian Lager v Commission* [2007] ECR II-4523  
T-36/04 - *API v Commission* [2007] ECR II-3201  
T-237/02 - *TGI v Commission* [2006] ECR II-5131  
T-110/03, T-150/03 and T-405/03 – *Sison* [2005] ECR II-1429  
T-168/02 – *IFAW* [2004] ECR II-4135  
T-84/03 – *Turco* [2004] ECR II-4061

c) Judgments currently subject to a pending appeal before the Court of Justice:

T-403/05 *MyTravel v Commission* [2008] ECR II-2027  
- appeal (by Sweden) in Case C-506/08 P  
T-237/05 *Editions Jacob v Commission* – 9 June 2010  
- appeal (by Commission) in Case C-404/10 P  
T-111/07 *Agrofert Holdings v Commission* - 7 July 2010  
- appeal (by Commission) in Case C-477/10 P

d) Judgments *potentially* subject to an appeal to the Court of Justice:

T-494/08 to T-500/08 and T-509/08 - *Ryanair v Commission* – 10 Dec. 2010  
T-439/08 - *Joséphidès* – 21 Oct. 2010  
T-474/08 – *Umbach* – 21 Oct. 2010

## Case law excerpts

1) Exceptions:

- a) Article 4(1)(a) [public interest exceptions] in general
- b) International relations (Article 4(1)(a))
- c) Public security (Article 4(1)(a))
- d) Data protection (Article 4(1)(b))
- e) Commercial interests (Article 4(2), first indent)
- f) Legal advice (Article 4(2), second indent)
- g) Court proceedings (Article 4(2))
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3) Member State veto (Article 4(5))

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## Case law excerpts

### 1) Exceptions

a) Article 4(1)(a) [public interest exceptions] in general:

*Sison* judgment:

- 32 So far as the first part of the first ground of appeal is concerned, it is clear from the Court's case-law that the scope of the review of legality incumbent on the Community Courts under Article 230 EC can vary according to the matters under consideration.
- 33 With regard to judicial review of compliance with the principle of proportionality, the Court has thus held that the Community legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. It concluded from this that the legality of a measure adopted in those fields can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see, in particular, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 80 and the case-law there cited).
- 34 Contrary to the appellant's submission, the Court of First Instance, in line with that case-law, correctly held, in paragraph 46 of the judgment under appeal, as regards the scope of the judicial review of the legality of a decision of the Council refusing public access to a document on the basis of one of the exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation No 1049/2001, that the Council must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest. The Court of First Instance also correctly held, in paragraph 47 of the judgment under appeal, that the Community Court's review of the legality of such a decision must therefore be 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.
- 35 In the first place, 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. Such a decision requires, therefore, a margin of appreciation.

- 36 Secondly, 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’.
- 37 In that regard, it is clear from an examination of the preparatory documents which preceded the adoption of that regulation that various proposals intended to define more precisely the scope of the public-interest exceptions to which Article 4(1)(a) of that regulation refers, which would undoubtedly have enabled the opportunities for judicial review in regard to the institution’s assessment to be correspondingly increased, were not accepted.
- 38 That is the case, in particular, with regard to the clarification contained in the Proposal of 27 June 2000 for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ 2000 C 177 E, p. 70), a clarification which was intended to restrict the scope of application of those exceptions to cases which could ‘significantly undermine’ the protection of those interests. That is also the case with regard to the 30th amendment to the abovementioned proposal, contained in the legislative proposal in the Report of the Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs of the European Parliament (A5-0318/2000), where it was suggested that Article 4 be amended in such a way that access would be refused where disclosure of a document could ‘significantly’ undermine public security or a ‘vital interest’ relating to the Union’s international relations.
- 39 Thirdly, and as the Council correctly submits, Article 67(3) of the Rules of Procedure of the Court of First Instance does not cast doubt on the correctness of the principles stated in paragraphs 46 and 47 of the judgment under appeal. That provision, which features in Title II, Chapter 3, Section 2, of those Rules, dealing with measures of inquiry, merely provides in its third subparagraph that ‘[w]here a document to which access has been denied by a Community institution has been produced before the Court of First Instance in proceedings relating to the legality of that denial, that document shall not be communicated to the other parties’. Such a provision is intended, above all, to safeguard the effects of the decision, which has been adopted by an institution, not to disclose a document so long as the Court of First Instance has not decided on the substance of the case, since such non-disclosure is precisely the issue in the dispute submitted to that Court. On the other hand, that procedural provision, even though it shows that the Court may, where appropriate, be required to take cognisance of a document to which the public has been denied access, cannot have any relevance whatever for the purpose of defining the limits of the scope of the judicial review incumbent on the Community Courts under the EC Treaty.
- 40 As regards, fourth, the appellant’s alternative argument based on the alleged particular facts of this case as set out in paragraph 27 of this judgment, these

cannot have any influence on the scope of the judicial review which the Court of First Instance was required to undertake in this case.

- 41 So far as concerns, first, the appellant's assertion that the documents requested contributed in his case to the adoption of an act of a legislative nature, suffice it to observe that, even were it true, such an allegation cannot affect the question whether the disclosure of those documents could undermine the interests protected by Article 4(1)(a) of Regulation No 1049/2001 or, therefore, the question whether the access sought to such documents should be refused. It is appropriate, in particular, to point out in that regard that, whilst providing that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States should be made directly accessible, Article 12(2) of that regulation adds, however, that this is so only subject to Articles 4 and 9 thereof.
- 42 With regard, secondly, to the argument that the appellant seeks to draw from the claim that the documents requested and the first decision refusing access fall entirely within the scope of the EC Treaty and not within that of the common foreign and security policy, suffice it to point out that that claim has not been substantiated in this case. As the Council has pointed out, Decision 2002/848, which included the appellant on the list at issue, is closely linked to Council Common Position 2002/847/CFSP of 28 October 2002 updating Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Council Common Position 2002/462/CFSP (OJ 2002 L 295, p. 1).
- 43 As regards, thirdly, the appellant's specific interest in gaining knowledge of the documents, disclosure of which was requested, it is to be noted, as the Court of First Instance correctly observed in paragraph 50 of the judgment under appeal, that the purpose of Regulation No 1049/2001 is to give the general public a right of access to documents of the institutions and not to lay down rules designed to protect the particular interest which a specific individual may have in gaining access to one of them.
- 44 That is clear from, in particular, Articles 2(1), 6(1) and 12(1) of that regulation, as well as from its title and from the 4th and 11th recitals in its preamble. The first of those provisions guarantees, without distinction, the right of access to any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, the second specifying in that regard that an applicant is not obliged to state reasons for the application. Article 12(1) provides that the institutions are as far as possible to make documents 'directly' accessible to the public in electronic form or through a register. The title of Regulation No 1049/2001 and the 4th and 11th recitals in its preamble also emphasise that the purpose of the regulation is to make the institutions' documents accessible to the 'public'.
- 45 An analysis of the preparatory documents which led to the adoption of Regulation No 1049/2001 also reveals that consideration was paid to the possibility of extending the subject-matter of that regulation by providing for account to be taken of certain specific interests of which persons could avail themselves in order to obtain access to a particular document. Thus, inter alia, the 31st amendment contained in the legislative proposal in the Report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs of the European Parliament suggested the introduction of a new Article 4(2) in the

Commission's Proposal mentioned in paragraph 38 of this judgment, according to which, '[w]hen considering the public interest in the disclosure of the document, the institution shall also take account of the interest raised by a petitioner, complainant or other beneficiary having a right, interest or obligation in a matter'. Similarly, the seventh amendment proposed in the Opinion given by the Committee on Petitions of the European Parliament in the same report sought the insertion of a paragraph in Article 1 of the Commission's Proposal to specify that '[a] petitioner, a complainant, and any other person, natural or legal, whose right, interest or obligation in a matter is concerned (a party) shall also have the right of access to a document which is not accessible to the public, but may influence the consideration of his/her case, as described in this Regulation and in implementing provisions adopted by the institutions'. In that regard, however, it must be stated that none of the suggestions thus formulated was incorporated in the provisions of Regulation No 1049/2001.

- 46 Moreover, it is clear from the wording of Article 4(1)(a) of Regulation No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests.
- 47 It follows from the foregoing that the Court of First Instance was correct to hold, in paragraph 52 of the judgment under appeal, that the particular interest of an applicant in obtaining access to documents cannot be taken into account by the institution called upon to rule on the question whether the disclosure to the public of those documents would undermine the interests protected by Article 4(1)(a) of Regulation No 1049/2001 and to refuse, if that is the case, the access requested.
- 48 Even assuming that the appellant has, as he maintains, a right to be informed in detail of the nature and cause of the accusation made against him, which led to his inclusion on the list at issue, and even if such right entailed access to documents held by the Council, it is thus sufficient to point out that such a right could not be exercised, as the Court of First Instance correctly held in paragraphs 52 to 55 of the judgment under appeal, by having recourse to the mechanisms for public access to documents implemented by Regulation No 1049/2001.
- 49 In light of all of the foregoing, the first part of the first ground of appeal must be held to be unfounded.
- 50 The same applies to the second part of the first ground of appeal, which alleges an infringement of the rights of the defence on the ground that the Court of First Instance did not address the appellant's argument that his right to be informed in detail of the nature and cause of the accusation against him had been infringed. In that regard, suffice it to note that, as will already be clear from what has been said in paragraph 48 of this judgment, that argument was indeed examined and rejected by the Court of First Instance in paragraphs 52 to 55 of the judgment under appeal.

- 51 By the third part of the first ground of appeal, the appellant alleges infringement of his right to an effective legal remedy against the interference with his right to be informed in detail of the nature and cause of the accusation made against him by reason of his inclusion on the list at issue.
- 52 In that regard, however, it is appropriate to point out that, as is clear from paragraph 48 of this judgment, such a right to be informed, assuming it to be established, cannot be exercised by having recourse to the mechanisms for access to documents provided for under Regulation No 1049/2001. It follows that no breach of such a right can result from a decision refusing access adopted under that regulation or, therefore, give rise to judicial censure, in favour of an application for annulment against such a decision. Accordingly, the third part of the first ground of appeal must be held to be unfounded.

*b) International relations (Article 4(1)(a))*

*Sison judgment:*

- 67 With regard to the second part of the second ground of appeal, alleging misapplication of the exception relating to international relations provided for in the third indent of Article 4(1)(a) of Regulation No 1049/2001, it must, by contrast, be accepted at the outset, without the need to examine the other arguments relied on by the appellant in connection with that part of that ground of appeal, that, by basing its reasoning on the circumstance that documents had been submitted to the Council by non-member countries, whereas it is clear from the case-file, as indeed the Council accepts, that such documents emanated from Member States, the judgment of the Court of First Instance is vitiated by a distortion of the facts.
- 68 It is also clear that such distortion in this instance vitiated, to a very great extent, the reasoning developed in paragraphs 79 to 81 of the judgment under appeal, following which the Court of First Instance concluded, in paragraph 82, that the Council had not made a manifest error of assessment in taking the view that disclosure of the document in respect of which disclosure was sought was likely to undermine the public interest as regards international relations.
- 69 It is settled case-law that such a distortion of the facts can be relied on as a ground of appeal and may lead to annulment of the judgment vitiated by it.
- 70 In the present case, however, it must be noted that, as is clear from paragraphs 65 and 66 of this judgment, the Court of First Instance correctly held that the first decision refusing access was validly based on the public-interest exception as regards public security under the first indent of Article 4(1)(a) of Regulation No 1049/2001.
- 71 It must therefore be held that, even if the Court of First Instance had not distorted the facts in the manner described in paragraph 67 of this judgment, and supposing that it would, in that case, have concluded that the Council had been wrong to base its decision on the public-interest exception as regards international relations, that conclusion could not have led to the annulment by the Court of First Instance of the first decision refusing access, as that decision in fact remains valid in the light of the public-interest exception relating to public security.

WWF judgment:

- 36 With regard to the alleged inadequacy of the statement of reasons in the contested decision, settled case-law provides that the purpose of the obligation on the institution to state the reasons for its decision to refuse access to a document is, first, to provide the person concerned with sufficient information to make it possible to determine whether the decision is well founded or whether it is vitiated by an error which may permit its validity to be contested and, secondly, to enable the Community judicature to review the lawfulness of the decision. The extent of that obligation depends on the nature of the measure at issue and the context in which it was adopted (see Case T-187/03 *Scippacercola v Commission* [2005] ECR II-1029, paragraph 66 and the case-law cited).
- 37 In the present case, in the contested decision the Council sets out in detail the reasons for its refusal by providing information which shed light on the subject-matter of the note and the reasons why its disclosure could undermine the protection of the public interest as regards international relations and the Community's financial, monetary and economic policy. As the Council rightly observed, it is not possible to provide all the information as to why the note cannot be disclosed without revealing its contents and without thereby depriving the exception of its very purpose. It follows that the applicant's argument that the Council failed to provide adequate reasons for its refusal cannot be accepted since the reasoning given in the contested decision is sufficiently clear to allow the applicant to understand why the Council did not grant it access to the note, to enable it to challenge that refusal effectively before the Court of First Instance and to enable that court to review the legality of the contested decision.
- 38 As regards the assessment as to whether the note could be disclosed and the refusal to grant access to it under the third and fourth indents of Article 4(1)(a) of Regulation No 1049/2001, it must be pointed out that the provisions of Regulation No 1049/2001 substantially reproduce the content of the earlier legislation as regards the scope of the exceptions to the right of access to documents.
- 39 According to the case-law relating to that legislation, the rule is that the public is to have access to the documents of the institutions and refusal of access is the exception to that rule. Consequently, the provisions sanctioning a refusal must be construed and applied strictly so as not to defeat the application of the rule. Moreover, an institution is obliged to consider in respect of each document to which access is sought whether, in the light of the information available to that institution, disclosure of the document is in fact likely to undermine one of the public interests protected by the exceptions which permit refusal of access. In order for those exceptions to be applicable, the risk of the public interest being undermined must therefore be reasonably foreseeable and not purely hypothetical (see Case T-211/00 *Kuijjer v Council* [2002] ECR II-485, paragraphs 55 and 56 and the case-law cited).
- 40 It is also apparent from the case-law that the institutions enjoy a wide discretion when considering whether access to a document may undermine the public interest and, consequently, that the Court's review of the legality of the institutions' decisions refusing access to documents on the basis of the

mandatory exceptions relating to the public interest must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers (see, to that effect, Case T-14/98 *Hautala v Council* [1999] ECR II-2489, paragraphs 71 and 72, and *Kuijer v Council*, cited in paragraph 39 above, paragraph 53).

- 41 As to whether there was a manifest error of assessment of the facts, as the applicant essentially submits is the case, it must be noted that the Council refused to grant access to the note so as not to risk upsetting the negotiations that were taking place at that time in a sensitive context, which was characterised by resistance on the part of both the developing and the developed countries and the difficulty in reaching an agreement, as illustrated by the breakdown of negotiations at the WTO Ministerial Conference in Cancun in September 2003. Thus, in considering that disclosure of that note could have undermined relations with the third countries which are referred to in the note and the room for negotiation needed by the Community and its Member States to bring those negotiations to a conclusion, the Council did not commit a manifest error of assessment and was right to consider that disclosure of the note would have entailed the risk of undermining the public interest as regards international relations and the Community's financial, monetary and economic policy, which was reasonably foreseeable and not purely hypothetical.
- 42 It follows from the above that the Council has, first, given sufficient reasons for its refusal to grant access to the note and, secondly, not misinterpreted the conditions for applying the exceptions to public access to documents laid down in the third and fourth indents of Article 4(1)(a) of Regulation No 1049/2001.
- 43 Those conclusions cannot be altered by the applicant's arguments concerning the need to balance its interest in having access to the note against the Council's interest in not disclosing it.
- 44 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 mandatory exceptions once the relevant circumstances are shown to exist (see, by analogy, Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, paragraph 58). Those exceptions are therefore different from the exceptions relating to the interest of the institutions in maintaining the confidentiality of their deliberations laid down in Article 4(3) of Regulation No 1049/2001, in the application of which the institutions enjoy a discretion which allows them to balance, on the one hand, their interest in maintaining the confidentiality of their deliberations against, on the other hand, the interest of the citizen in gaining access to documents (see, by analogy, *Carvel and Guardian Newspapers v Council*, cited in paragraph 26 above, paragraphs 64 and 65).
- 45 Since the exceptions at issue in the dispute fall under Article 4(1) of Regulation No 1049/2001, the Council was not required in the present case to balance the protection of the public interest against the applicant's interest in gaining access to the note.

c) *Public security (Article 4(1)(a))*

*Sison* judgment:

- 61 As is clear from Article 1 of Regulation No 1049/2001, read, in particular, in the light of the fourth recital in the preamble, the purpose of the regulation is to give the fullest possible effect to the right of public access to documents held by the institutions.
- 62 However, it also follows from that regulation, particularly from the 11th recital in its preamble and from Article 4, which provides for a scheme of exceptions in that regard, that the right of access to documents is nonetheless subject to certain limitations based on grounds of public or private interest.
- 63 As they derogate from the principle of the widest possible public access to documents, such exceptions must, as the appellant has correctly observed, be interpreted and applied strictly (see, to that effect, *Netherlands and van der Wal v Commission*, paragraph 27).
- 64 In that regard, however, it must be pointed out that, as is already clear from paragraph 34 of this judgment, such a 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 Council 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. For the reasons stated by the Court in its examination of the first ground of appeal, the review by the Court of First Instance of the legality of a Council decision 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.
- 65 With the benefit of those preliminary considerations, it must be held, as regards the first part of the second ground of appeal, that, contrary to the appellant's submission and as the Council correctly contends, the Court of First Instance did not err in law in paragraphs 77 and 78 of the judgment under appeal.
- 66 Indeed, the Court of First Instance having found, in paragraph 77 of the judgment under appeal, that it could readily be accepted that documents held by the public authorities concerning persons or entities suspected of terrorism and coming within the category of sensitive documents as defined by Article 9 of Regulation No 1049/2001 must not be disclosed to the public in order not to prejudice the effectiveness of the operational fight against terrorism and thereby undermine the protection of public security, it could correctly conclude therefrom, in paragraph 78 of the judgment, that the Council did not make a manifest error of assessment in refusing access to the documents requested on the ground that their disclosure would undermine the public interest as regards public security.

*c) Data protection (Article 4(1)(b))*

*Bavarian Lager judgment:*

- 48 It should be noted that the General Court devotes a significant part of its reasoning, and in particular paragraphs 96 to 119 of the judgment under appeal, to the relationship between Regulations Nos 45/2001 and 1049/2001 and then applies, in paragraphs 121 to 139 of that judgment, the criteria which it inferred therefrom to this case.
- 49 As the General Court rightly states in paragraph 98 of the judgment under appeal, when examining the relationship between Regulations Nos 1049/2001 and 45/2001 for the purpose of applying the exception under Article 4(1)(b) of Regulation No 1049/2001 to the case in point, it must be borne in mind that those regulations have different objectives. The first is designed to ensure the greatest possible transparency of the decision-making process of the public authorities and the information on which they base their decisions. It is thus designed to facilitate as far as possible the exercise of the right of access to documents, and to promote good administrative practices. The second is designed to ensure the protection of the freedoms and fundamental rights of individuals, particularly their private life, in the handling of personal data.
- 50 As stated in recital 2 of Regulation No 45/2001, the Union legislature intended to establish a 'fully-fledged system' of protection of personal data, and considered it necessary, in the words of recital 12 thereof, to ensure throughout the Community 'consistent and homogeneous application of the rules for the protection of individuals' fundamental rights and freedoms with regard to the processing of personal data'.
- 51 According to that same recital 12, the rights conferred on data subjects for their protection with regard to the processing of personal data constitute rules for the protection of fundamental rights and freedoms. In the mind of the Union legislature, the Union legislation on the processing of personal data serves to protect fundamental rights and freedoms.
- 52 According to recitals 7 and 14 of Regulation No 45/2001, the measures in question are 'binding measures' which apply to 'all processing of personal data by all Community institutions and bodies' and 'in any context whatsoever'.
- 53 As indicated in recital 1 thereof, Regulation No 1049/2001 forms part of the intention expressed in the second paragraph of Article 1 EU to mark 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.
- 54 According to recital 2 of that regulation, openness 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.
- 55 Regulation No 1049/2001 lays down as a general rule that the public may have access to the documents of the institutions, but provides for exceptions by reason of certain public and private interests. In particular, recital 11 of that

regulation states that, '[i]n assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities'.

- 56 Regulations Nos 45/2001 and 1049/2001 were adopted on dates very close to each other. They do not contain any provisions granting one regulation primacy over the other. In principle, their full application should be ensured.
- 57 The only express link between those two regulations is established in Article 4(1)(b) of Regulation No 1049/2001, which provides for an exception to access to a document where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.
- 58 In this case, in paragraphs 111 to 120 of the judgment under appeal, the General Court limits the application of the exception under Article 4(1)(b) of that regulation to situations in which privacy or the integrity of the individual would be infringed for the purposes of Article 8 of the ECHR and the case-law of the European Court of Human Rights, without taking into account the legislation of the Union concerning the protection of personal data, particularly Regulation No 45/2001.
- 59 It should be observed that, in acting in that way, the General Court disregards the wording of Article 4(1)(b) of Regulation No 1049/2001, which is an indivisible provision and requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with Regulation No 45/2001.
- 60 Article 4(1)(b) of Regulation No 1049/2001 establishes a specific and reinforced system of protection of a person whose personal data could, in certain cases, be communicated to the public.
- 61 According to Article 1(1) of Regulation No 45/2001, the purpose of that regulation is to 'protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data'. That provision does not allow cases of processing of personal data to be separated into two categories, namely a category in which that treatment is examined solely on the basis of Article 8 of the ECHR and the case-law of the European Court of Human Rights relating to that article and another category in which that processing is subject to the provisions of Regulation No 45/2001.
- 62 It is clear from the first sentence of recital 15 of Regulation No 45/2001 that the Union legislature has pointed to the need to apply Article 6 EU and, by that means, Article 8 of the ECHR, '[w]here such processing is carried out by Community institutions or bodies in the exercise of activities falling outside the scope of this Regulation, in particular those laid down in Titles V and VI of the [EU Treaty in its version prior to the Treaty of Lisbon]'. By contrast, such a reference was not found necessary for processing carried out in the exercise of activities within the scope of that regulation, given that, in such cases, it is clearly Regulation No 45/2001 itself which applies.
- 63 It follows that, where a request based on Regulation No 1049/2001 seeks to obtain access to documents including personal data, the provisions of

Regulation No 45/2001 become applicable in their entirety, including Articles 8 and 18 thereof.

- 64 By not taking account of the reference in Article 4(1)(b) of Regulation No 1049/2001 to the legislation of the Union concerning the protection of personal data and thus to Regulation No 45/2001, the General Court dismissed at the outset, in paragraph 107 of the judgment under appeal, the application of Article 8(b) of Regulation No 45/2001, and, in paragraph 109 of the judgment under appeal, the application of Article 18 of Regulation No 45/2001. And yet those articles constitute essential provisions of the system of protection established by Regulation No 45/2001.
- 65 Consequently, the particular and restrictive interpretation which the General Court gave to Article 4(1)(b) of Regulation No 1049/2001 does not correspond to the equilibrium which the Union legislature intended to establish between the two regulations in question.
- 66 In this case, it is apparent from the information on the file, and in particular from the contested decision, that, following the requests by Bavarian Lager of 4 May 1998, 5 December 2003 and 9 February 2004, the Commission sent the latter a document containing the minutes of the meeting of 11 October 1996, with five names removed. Of those five names, three persons could not be contacted by the Commission in order to give their consent, and two others expressly objected to the disclosure of their identity.
- 67 In refusing full access to that document, the Commission based its reasoning on Article 4(1)(b) of Regulation No 1049/2001 and Article 8 of Regulation No 45/2001.
- 68 It should be noted that, in paragraph 104 of the judgment under appeal, the General Court, in examining Article 2(a) of Regulation No 45/2001, that is to say the definition of the concept of 'personal data', correctly held that surnames and forenames may be regarded as personal data.
- 69 It also correctly established, in paragraph 105 of that judgment, in examining Article 2(b) of that regulation, that is to say the definition of the concept of 'processing of personal data', that the communication of such data falls within the definition of 'processing', for the purposes of that regulation.
- 70 The General Court was right to conclude, in paragraph 122 of the judgment under appeal, that the list of participants in the meeting of 11 October 1996 appearing in the minutes of that meeting thus contains personal data for the purposes of Article 2(a) of Regulation No 45/2001, since the persons who participated in that meeting can be identified.
- 71 Therefore, the decisive question is whether the Commission could grant access to the document including the five names of the participants in the meeting of 11 October 1996, in compliance with Article 4(1)(b) of Regulation No 1049/2001 and Regulation No 45/2001.
- 72 First of all, it should be noted that Bavarian Lager was able to have access to all the information concerning the meeting of 11 October 1996, including the opinions which those contributing expressed in their professional capacity.

- 73 The Commission, at the time of the first request by Bavarian Lager dated 4 May 1998, sought the agreement of the participants at the meeting of 11 October 1996 to the disclosure of their names. As the Commission indicates in the decision of 18 March 2003, that procedure was in compliance with the requirements of Directive 95/46, in force at that time.
- 74 Following a new request by Bavarian Lager to the Commission, dated 5 December 2003, seeking communication of the full minutes of the meeting of 11 October 1996, the Commission informed Bavarian Lager on 27 January 2004 that, having regard to the entry into force of Regulations Nos 45/2001 and 1049/2001, it was henceforward obliged to treat that request under the specific regime of those regulations, particularly Article 8(b) of Regulation No 45/2001.
- 75 Whether under the former system of Directive 95/46 or under the system of Regulations Nos 45/2001 and 1049/2001, the Commission was right to verify whether the data subjects had given their consent to the disclosure of personal data concerning them.
- 76 This Court finds that, by releasing the expurgated version of the minutes of the meeting of 11 October 1996 with the names of five participants removed therefrom, the Commission did not infringe the provisions of Regulation No 1049/2001 and sufficiently complied with its duty of openness.
- 77 By requiring that, in respect of the five persons who had not given their express consent, Bavarian Lager establish the necessity for those personal data to be transferred, the Commission complied with the provisions of Article 8(b) of Regulation No 45/2001.
- 78 As Bavarian Lager has not provided any express and legitimate justification or any convincing argument in order to demonstrate the necessity for those personal data to be transferred, the Commission has not been able to weigh up the various interests of the parties concerned. Nor was it able to verify whether there was any reason to assume that the data subjects' legitimate interests might be prejudiced, as required by Article 8(b) of Regulation No 45/2001.
- 79 It follows from the above that the Commission was right to reject the application for access to the full minutes of the meeting of 11 October 1996.
- 80 Therefore, the General Court erred in law in concluding, in paragraphs 133 and 139 of the judgment under appeal, that in this case the Commission had wrongly applied Article 4(1)(b) of Regulation No 1049/2001 and held that Bavarian Lager had not established either an express and legitimate purpose in obtaining, or any need to obtain, the document at issue in its entirety.

*Joséphidès judgment:*

- 110 Aux termes de l'article 4, paragraphe 1, sous b), du règlement n° 1049/2001, les institutions refusent l'accès à un document dans le cas où sa divulgation porterait atteinte à la protection de la vie privée et de l'intégrité de l'individu.
- 111 Il est constant que la demande de subvention et la convention de subvention comportent des données concernant des personnes physiques identifiables et entrent donc dans le champ d'application de l'exception prévue à l'article 4, paragraphe 1, sous b), du règlement n° 1049/2001.

- 112 S'agissant de la question de savoir si l'EACEA a dûment procédé à un examen concret et individuel des documents demandés, il y a lieu de relever que, selon la décision de l'EACEA, la demande de subvention comportait des données relatives aux personnes physiques impliquées dans le projet de centre d'excellence, telles que leurs coordonnées personnelles, leur curriculum vitae, ainsi que des informations relatives à leur conduite et à leur moralité, et la divulgation de ces données risquait de porter atteinte à la protection de la vie privée des personnes concernées. En ce qui concerne la convention de subvention, l'EACEA a exposé que la divulgation de la signature des personnes physiques habilitées à signer cette convention risquait de porter atteinte à la protection de la vie privée et de l'intégrité des personnes concernées. En conséquence, elle a décidé d'occulter l'ensemble de ces données et n'a accordé à la requérante qu'un accès partiel aux documents susvisés, conformément à l'article 4, paragraphe 6, du règlement n° 1049/2001.
- 113 Pour parvenir à cette décision, l'EACEA a exposé lors de l'audience avoir distingué deux types de données, d'une part, les données publiques des personnes qui agissent en tant que représentant officiel de l'université de Chypre et, d'autre part, les données privées, et estimé que la divulgation de ces dernières présentait un risque pour la protection de la vie privée et de l'intégrité des personnes concernées. Il convient de considérer que, s'agissant de données à caractère personnel qui se rapportent à des personnes identifiables, l'EACEA a pu à juste titre considérer que leur divulgation constituait une ingérence potentielle dans la vie privée des personnes concernées.
- 114 S'agissant du caractère raisonnablement prévisible du risque invoqué, l'EACEA a précisé, lors de l'audience, avoir constaté, au terme d'un examen détaillé de la nature publique ou privée des données contenues dans les documents demandés, que le curriculum vitae du responsable académique du centre d'excellence, mis en ligne sur le site Internet de l'université de Chypre, était différent de celui qui était joint à la demande de subvention. À cet égard, elle a insisté sur le fait que la manière dont une personne choisit de se présenter sur le plan professionnel fait partie de la sphère privée de sa vie professionnelle et donc de sa vie privée. S'agissant de la convention de subvention, l'EACEA a indiqué avoir constaté que la signature de la personne habilitée à signer, telle qu'elle était reproduite dans la convention de subvention, n'était pas la même que celle figurant sur les documents publics de l'université de Chypre et qu'elle a jugé opportun, par conséquent, de ne pas prendre le risque de la divulguer.
- 115 L'EACEA a également souligné la difficulté de s'assurer du caractère public de chacune des données à caractère personnel concernant, comme en l'espèce, des représentants officiels d'une institution, dans le délai de quinze jours imparti par le règlement n° 1049/2001 pour répondre aux demandes d'accès aux documents. Sur ce point, elle a expliqué que les auteurs de demandes de subvention pouvaient parfois indiquer des numéros de téléphone « spéciaux », qui ne sont pas nécessairement les numéros de téléphone officiels de l'institution qu'ils représentent. Ainsi, n'ayant pas obtenu, dans le délai imparti, la certitude que les données en cause étaient publiques, l'EACEA a estimé par prudence devoir occulter ces données pour qu'il soit satisfait au principe de protection de la vie privée et de l'intégrité de l'individu.

- 116 Les affirmations de l'EACEA démontrent que celle-ci a effectué un examen concret de la demande d'accès aux documents et qu'elle s'est appuyée sur des circonstances propres à l'espèce pour accréditer l'existence d'un risque réel d'atteinte à la protection de la vie privée et de l'intégrité des personnes concernées. Ce risque était d'autant plus prévisible que la divulgation d'un document, qu'il contienne ou non des données à caractère personnel, acquiert un effet erga omnes, empêchant l'institution de s'opposer à ce que ce document soit communiqué à d'autres demandeurs et permettant à toute personne d'avoir accès aux données à caractère personnel en cause.
- 117 Enfin, estimant que le besoin de protection de la vie privée et de l'intégrité de l'individu ne s'appliquait pas à l'ensemble du document, mais qu'il était limité aux données à caractère personnel pour lesquelles le risque d'atteinte à la vie privée et à l'intégrité des personnes concernées avait été constaté, l'EACEA a procédé à une divulgation partielle de la demande de subvention et de la convention de subvention, ce qui confirme que l'EACEA a effectué un examen concret et individuel de chaque document.
- 118 Il y a également lieu de relever que la plupart des données en cause ont un caractère accessoire, ne présentant pas un intérêt substantiel dans le contexte de la présente demande d'accès aux documents. La requérante a d'ailleurs reconnu, lors de l'audience, que certaines de ces données étaient « dérisoires et sans importance » et qu'elles étaient pour la plupart facilement accessibles pour elle.
- 119 Dès lors, il convient de considérer que, en occultant les données à caractère personnel en cause, l'EACEA n'a pas dépassé les limites de ce qui était approprié et nécessaire par rapport à l'intérêt protégé, ni méconnu l'objectif visant à assurer le plus large accès possible aux documents demandés et, contrairement à ce que soutient la requérante, n'a pas procédé à une interprétation extensive de l'exception visée à l'article 4, paragraphe 1, sous b), du règlement n° 1049/2001.
- 120 En conséquence, en procédant à un examen détaillé des documents demandés, en identifiant les données concernées par la protection de la vie privée et de l'intégrité de l'individu et en accordant un accès partiel auxdits documents, l'EACEA a effectué un examen concret et individuel des documents demandés, selon la jurisprudence citée au point 106 ci-dessus.
- 121 Il résulte de ce qui précède que l'EACEA n'a pas interprété de manière erronée l'article 4, paragraphe 1, sous b), du règlement n° 1049/2001 en accordant un accès partiel à la demande de subvention et à la convention de subvention.

*Borax judgment:*

- 31 The purpose of Regulation No 1049/2001, as indicated by recital 4 in its preamble and by its Article 1, is to give the public a right of access to the institutions' documents which is as wide as possible.
- 32 As appears from recital 1 in the preamble, that regulation reflects the intention expressed in the second subparagraph of Article 1 EU to mark 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 recital 2 in the preamble to that regulation notes, the right of public access to the institutions' documents is related to the democratic nature of those institutions.

- 33 When the Commission is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to the institutions' documents set out in Article 4 of Regulation No 1049/2001 (see, to that effect, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-0000, paragraph 35).
- 34 In that respect, the Commission cannot, in this case, base its refusal on the assurance which it contends it gave the experts that they could express themselves personally and that their identities and opinions would not be disclosed. First, the contested decision does not refer to that undertaking and the Commission cannot therefore rely upon it. Secondly, even if it could be invoked in this case, in spite of the contested decision's silence on the matter, the confidentiality undertaking, which the Commission argues binds it to the experts, was concluded between them and that institution and cannot therefore be relied upon against Borax, whose rights of access to the documents are guaranteed subject to the conditions and within the limits laid down by Regulation No 1049/2001. Finally, a refusal of access to the documents can be based only on the exceptions laid down in Article 4 of Regulation No 1049/2001, with the result that the institution in question cannot make such a refusal in reliance on an undertaking to the participants at the meeting if that undertaking cannot be justified by reference to one of those exceptions. It is therefore within the framework of those exceptions alone that the grounds relied upon in support of the refusal must be examined.
- 35 In view of the objectives pursued by Regulation No 1049/2001, the exceptions set out in Article 4 of that regulation must be interpreted and applied strictly (Case C-64/05 P *Sweden v Commission* [2007] ECR I-11389, paragraph 66, and *Sweden and Turco v Council*, paragraph 36).
- 36 It is clear from Article 4(1)(b) of Regulation No 1049/2001 that the institutions are to refuse access to a document if its disclosure would undermine the protection of the privacy or integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.
- 37 According to the case-law, the reasons for any decision of an institution in respect of the exceptions set out in Article 4 of Regulation No 1049/2001 must be stated. If an institution decides to refuse access to a document which it has been asked to disclose, it must explain how access to that document could specifically and effectively undermine the interest protected by an exception laid down in Article 4 of Regulation No 1049/2001 relied on by that institution (see, to that effect, *Sweden and Turco v Council*, paragraphs 48 and 49). It is for the Court to ensure compliance with the obligation to state reasons, raising, of its own motion, any issue of breach of that obligation (Case 18/57 *Nold v High Authority* [1959] ECR 41, 52, and Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67).
- 38 In the contested decision, the Commission cites Article 4(1)(b) of Regulation No 1049/2001, invoking the protection of the privacy and integrity of the individual, without however pleading specific grounds pertaining to the risk of

undermining the protection of privacy or for the infringement of the provisions of Regulation No 45/2001, to which it nevertheless refers before the Court of First Instance.

- 39 In the contested decision, it indeed explains that the meetings of experts organised by the European Chemicals Bureau are held as closed sessions, with the industry's representatives participating at the beginning of meetings so that the relevant industrial sector's point of view is presented and the experts can put any questions they may have. The meeting of 5 and 6 October 2004 was held in the usual way and the Borax representatives participated in it before the closed session. Next, the Commission states that it is necessary to conduct the meetings as closed sessions in order to enable the experts to deliberate and to express themselves freely and independently without being exposed to undue external pressure. It explains that the sound recordings enable each expert who makes a contribution at the meeting to be identified. It states that the disclosure of their identities associated with the expression of their opinions would clearly undermine the experts' integrity by exposing them to that type of pressure. In that part of the contested decision dealing with the application for partial access to the documents at issue, the Commission confines itself to stating that even if their names were deleted, the experts would still be easily identifiable by the language they speak, their accents and the references they make to national context.
- 40 It is only in the proceedings before the Court of First Instance that the Commission has set forth the grounds on which it considers that the disclosure applied for would undermine the experts' privacy and infringe Regulation No 45/2001. As regards the latter exception, regarding the protection of personal data, the contested decision refers to it only in the section dealing with the examination of whether there is an overriding public interest which would justify the disclosure of the documents in question, by stating that such protection 'is not subject to a public interest test'.
- 41 Since the only references to the experts' identities are either associated with the undermining of their integrity, or are devoid of any grounds explaining how the identification of the experts would undermine their privacy or infringe Regulation No 45/2001, the contested decision cannot, as regards the two latter categories of protected interests, be held to contain a sufficient statement of reasons.
- 42 The Commission, in the contested decision, also justifies its refusal to grant access to the documents sought by relying on the undermining of the experts' integrity, within the meaning of Article 4(1)(b) of Regulation No 1049/2001.
- 43 It is settled case-law that the examination required for the purpose of processing an application for access to documents must be specific in nature. The mere fact that a document concerns an interest protected by an exception is not sufficient to justify application of that exception (Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraph 69; see also, to that effect, Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429, paragraph 75). Such application may, as a rule, be justified only if the institution has previously assessed whether access to the document could specifically and effectively undermine the protected interest. In addition, the risk of a protected interest being undermined must be reasonably

foreseeable and not purely hypothetical (see, to that effect, *Sweden and Turco v Council*, paragraph 43).

- 44 By stating, in the contested decision, that disclosure of the experts' identities and of the opinions they expressed in the course of the meeting would clearly undermine their integrity by exposing them to undue external pressure, the Commission made its decision on the basis of general grounds which are incapable of substantiating the existence of such a risk. It appears, in fact, that such justification is not supported by the allegation of any fact, relevant to this case, which would corroborate the existence of pressure or a risk of pressure on the participants in the meeting at issue, particularly on the part of Borax or on its initiative. The same reasoning unsupported by evidence, were it to be accepted, could be applied to all the meetings organised by the Commission for the purpose of obtaining the opinion of experts prior to the adoption of decisions of any nature having effects on the activities of economic operators in the sector concerned by those decisions, whatever that sector might be. Such an interpretation of the scope of Article 4(1)(b) of Regulation No 1049/2001 would be contrary to the strict interpretation of the exception, which requires it to be established that the interest protected would be specifically and effectively undermined.
- 45 The hypothetical nature of the risk of the experts' integrity being undermined is confirmed by the Commission's statements at the hearing. Questioned on the point whether there were, in the present case, any indications giving rise to the assumption that pressure could have been exerted on the experts participating in the meeting, the Commission replied that it had no precise information on that point, but that it was clear from the evidence of persons participating in that type of meeting that, when significant interests were at stake, as in this case, pressure was exerted and the experts were approached or criticised. Those matters, by virtue of their general nature, confirm that the Commission had no detailed information leading to the assumption that there was a risk of the experts' integrity being undermined.
- 46 The Commission added, admittedly, that the personal inquiries carried out by the applicant, in the past, and the criticisms which it made in respect of the experts' qualifications could be regarded as evidence of undue external pressure exerted on them. It stated that it had provided the Court with tangible evidence of the pressure exerted on the experts.
- 47 In support of that statement, the Commission produced a letter of 17 January 2005 which Borax had sent it, in which Borax explained that, in view of the fact that the summary record did not reveal the qualifications of the experts who had participated in the meeting, it made some inquiries which had clearly shown that certain experts had no qualifications in respect of reproductive toxicity.
- 48 However, in the context of an application for annulment under Article 230 EC, the legality of the contested measure is to be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (Joined Cases 15/76 and 16/76 *France v Commission* [1979] ECR 321, paragraph 7, and Case T-115/94 *Opel Austria v Council* [1997] ECR II-39, paragraph 87). The Commission adduced no evidence that the letter, which carries the same date as the contested decision but is not mentioned in that decision, constitutes one of the elements on which it is based. That document

cannot therefore be taken into consideration for the purposes of the examination of the present action.

- 49 In any event, it cannot be inferred from the letter of 17 January 2005, in which Borax challenges the Commission's statement that the persons designated for the purposes of the meeting are experts of standing in the relevant field, that any pressure was exerted in fact on one or more of those experts or that there was even any intention to employ such pressure or any other tactic which could undermine their integrity.
- 50 Nor, for the same reasons pertaining to the purely hypothetical nature of the risk relied upon, can the Court accept the Commission's argument, put forward at the hearing, that an expert's reputation or career could be affected by the revelation of an opinion contrary to a company's interests.
- 51 The Commission's refusal of Borax's application is even less justified since Borax amended its initial request by accepting that the information sought be limited to transcripts of the recordings, from which the experts' names and countries of origin would be omitted. Although the application was apt to remove any possible risk of undermining the protection of the experts' privacy and integrity, it was not accepted.
- 52 It follows from the foregoing that, by refusing to disclose the recordings applied for, on the ground that the protection of the integrity of the individual would thereby be undermined, the Commission infringed Article 4(1)(b) of Regulation No 1049/2001.

*d) Commercial interests ((Article 4(2), first indent)*

*Joséphidès judgment:*

- 122 Conformément à l'article 4, paragraphe 2, premier tiret, du règlement n° 1049/2001, les institutions refusent l'accès à un document dans le cas où sa divulgation porterait atteinte à la protection des intérêts commerciaux d'une personne physique ou morale déterminée, à moins qu'un intérêt public ne justifie la divulgation du document visé.
- 123 Ainsi qu'il a été exposé au point 108 ci-dessus, il appartient à l'institution concernée d'examiner, premièrement, si le document faisant l'objet de la demande d'accès entre dans le champ d'application de l'une des exceptions prévues à l'article 4 du règlement n° 1049/2001, deuxièmement, si la divulgation de ce document porterait concrètement et effectivement atteinte à l'intérêt protégé et, troisièmement, dans l'affirmative, si le besoin de protection s'applique à l'ensemble du document.
- 124 Il y a lieu de constater que la demande de subvention et la convention de subvention contiennent des informations potentiellement confidentielles et relatives aux relations d'affaires entre les parties contractantes, entrant dans le champ d'application de l'exception prévue à l'article 4, paragraphe 2, premier tiret, du règlement n° 1049/2001.
- 125 S'agissant du caractère concret de l'examen de la demande d'accès aux documents, il y a lieu de relever que, selon la décision de l'EACEA, la

divulgarion du projet que l'université de Chypre s'est engagée à réaliser, de la ventilation du budget prévisionnel de ce projet, de la méthodologie et de l'expertise avancées par l'université de Chypre ainsi que des clauses spécifiques à la gestion de ce projet, contenues dans la demande de subvention et dans la convention de subvention, risquait de porter atteinte aux intérêts commerciaux de l'université de Chypre, puisque ces données concernaient le savoir-faire spécifique de cette dernière pour la réalisation de ce type de projets et leur divulgation aurait permis aux tiers de porter une appréciation concrète sur la manière dont cette université exécutait ses obligations contractuelles et, par suite, de porter atteinte à sa réputation.

- 126 S'agissant des données relatives au budget, il convient de rappeler que des éléments relatifs à la structure des coûts d'une entreprise constituent des secrets d'affaires dont la divulgation à des tiers est susceptible de porter atteinte aux intérêts commerciaux de celle-ci (arrêt Terezakis/Commission, précité, point 95). Or, à la suite de la production de la demande de subvention et de la convention de subvention, le Tribunal a pu constater que les éléments relatifs au budget du projet en cause, occultés dans le cadre de l'accès partiel accordé à la requérante, constituaient effectivement des éléments de coûts spécifiques en rapport avec ce projet, dont la divulgation était de nature à porter atteinte aux intérêts commerciaux de l'université de Chypre.
- 127 Quant à la description du projet que l'université de Chypre s'est engagée à réaliser, aux clauses spécifiques à ce projet, de même qu'à la méthodologie et à l'expertise que ladite université a mis en avant dans le cadre de la demande de subvention, il y a lieu de relever que ces éléments ont trait au savoir-faire spécifique de l'université de Chypre et contribuent à la singularité et à l'attractivité des candidatures de cette dernière dans le cadre d'appels à propositions tel que celui qui était en cause, lequel avait pour objet de sélectionner une ou plusieurs candidatures, au terme, notamment, d'un examen comparatif des projets proposés. Ainsi, eu égard notamment au contexte concurrentiel dans lequel elles s'inscrivent, il y a lieu de considérer que les informations en cause sont de nature confidentielle.
- 128 Lors de l'audience, l'EACEA a précisé que le risque tenant à l'atteinte aux intérêts commerciaux devait être considéré comme réel, car les universités qui présentent une demande de subvention en vue de l'attribution d'un centre d'excellence sont en concurrence les unes par rapport aux autres, seules les demandes les plus attractives étant sélectionnées. Elle a ajouté à cet égard que le taux d'attribution des centres d'excellence était de un pour deux centres demandés et qu'il était fréquent, dans la pratique, qu'une université, dont le projet n'a pas été retenu, présente une nouvelle demande dans les années suivantes. Ainsi, la description des projets retenus présente un intérêt certain pour les universités évincées, en vue d'obtenir un centre d'excellence.
- 129 Enfin, ayant considéré que l'application de l'exception visée à l'article 4, paragraphe 2, premier tiret, du règlement n° 1049/2001 ne concernait pas l'intégralité des documents demandés, l'EACEA a procédé à une divulgation partielle de ces documents, en occultant les informations susvisées. Il en résulte que l'EACEA a procédé à un examen concret et individuel des documents demandés au sens de la jurisprudence et que l'occultation des données en cause n'a pas dépassé les limites de ce qui était approprié et nécessaire au regard de l'intérêt protégé.

130 Il s'ensuit que l'EACEA n'a pas interprété de manière erronée l'article 4, paragraphe 2, premier tiret, du règlement n° 1049/2001.

*Agrofert Holdings* judgment:

51 In accordance with the first indent of Article 4(2) of Regulation No 1049/2001, the institutions are to refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, unless there is an overriding public interest in disclosure.

52 In the present case, application of that exception concerns the documents exchanged, on the one hand, between the Commission and the notifying parties and, on the other, between the Commission and third parties.

53 It is necessary to ascertain whether, in the present case, the Commission has assessed, firstly, whether those documents came within the scope of the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001, secondly, whether their disclosure might specifically and actually undermine the protected interest and, thirdly, if so, whether the need for protection applied to the documents in their entirety (see, to that effect, judgment of 30 January 2008 in Case T-380/04 *Terezakis v Commission*, not published in the ECR, paragraph 88).

54 In the first place, the documents exchanged, on the one hand, between the Commission and the notifying parties and, on the other, between the Commission and third parties are likely to concern, inter alia, commercial strategies, turnover, market shares and business relations, and thus commercially sensitive information relating to the parties at issue. Likewise, as the Commission has pointed out in its written submissions, in the context of merger investigation proceedings, the documents supplied to the Commission by the notifying parties concern in particular the parties' market positions, the effects of the merger on the relevant markets and the potential efficiency gains.

55 Accordingly, those documents are likely to contain information which may, where appropriate, be covered by the exception to the right to access laid down in the first indent of Article 4(2) of Regulation No 1049/2001.

56 In the second place, it is necessary to ascertain whether disclosure of those documents was likely specifically and actually to harm the interest protected.

57 In that regard, it must be borne in mind that, in view of the objectives pursued by Regulation No 1049/2001, the exceptions laid down in Article 4 of that regulation must be interpreted and applied strictly (see, to that effect, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 36 and the case-law cited).

58 What is more, the examination required for the purpose of processing a request for access to documents must be specific in nature. On the one hand, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception. Such application may, in principle, be justified only if the institution has previously assessed whether, firstly, access to the document would specifically and actually undermine the protected interest and, secondly, in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, there is no overriding public interest in

disclosure. On the other hand, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. Consequently, the examination which the institution must undertake in order to apply an exception must be carried out in a concrete manner and must be apparent from the reasons for the decision (see, to that effect, Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraph 69, and *Franchet and Byk v Commission*, cited in paragraph 33 above, paragraph 115).

- 59 In addition, it follows from Article 4(1) to (3) of Regulation No 1049/2001 that all the exceptions mentioned therein are specified as being applicable to 'a document'. That concrete examination must, therefore, be carried out in respect of each document referred to in the request for access (see, to that effect, *Verein für Konsumenteninformation v Commission*, cited in paragraph 58 above, paragraph 70, and *Franchet and Byk v Commission*, cited in paragraph 33 above, paragraph 116).
- 60 A concrete, individual examination of each document is also necessary where, even if it is clear that a request for access refers to documents covered by an exception, such an examination alone can enable the institution to assess the possibility of granting the applicant partial access under Article 4(6) of Regulation No 1049/2001. In the context of applying the Code of Conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41), approved by the Council and the Commission on 6 December 1993, the Court has, moreover, already rejected as insufficient an assessment of documents by reference to categories rather than on the basis of the actual information contained in those documents, since the examination required of an institution must enable it to assess specifically whether an exception invoked actually applies to all the information contained in those documents (see, to that effect, *Franchet and Byk v Commission*, cited in paragraph 33 above, paragraph 117 and the case-law cited).
- 61 In the present case, however, it is clear that, even though the Commission claims that such an examination was indeed made, that is not at all apparent from the grounds of the decision of 13 February 2007.
- 62 First of all, the documents in respect of which the exception based on the protection of commercial interests is invoked are classified in two categories, that is to say, documents exchanged, on the one hand, between the Commission and the notifying parties and, on the other, between the Commission and third parties, without further details. In particular, no list of those documents has been drawn up.
- 63 Next, the decision of 13 February 2007 states in a general and abstract manner that the documents in question contain commercially sensitive information relating to the commercial strategy of the notifying parties, their sales figures, market shares or customers. It states that, since merger control proceedings are intended to verify whether or not a notified transaction gives the merging parties market power resulting in a significant impediment to effective competition, all documents submitted by the notifying parties for the purpose of such proceedings necessarily relate to commercially sensitive information.

- 64 Such assertions are too vague and general and are not based on any factor related to the present case. The same argument could thus apply to all documents supplied in any merger control proceedings. Such an argument cannot therefore be regarded as demonstrating, to the requisite legal standard, that a concrete and effective examination of each document in question has been carried out in the present case.
- 65 The Commission asserts that it could not have been more precise as to the actual content of the documents in question, since that would have led it to disclose their content and would have deprived the exception of its purpose. That explanation cannot be accepted. In the present case, it was entirely possible to draw up a list of the documents exchanged between the Commission and the parties in the merger control proceedings in question and to describe the content of each document without thereby revealing information which had to remain confidential. The notification form, which sets out the information which notifying parties must supply to the Commission as part of the notification, also lists those documents, stating what they must contain, which was likely to assist significantly in the compilation of such a list. Furthermore, some of that information was disclosed when the final decision was published.
- 66 A fuller and more individual demonstration of the fact that each document at issue was, partially or otherwise, covered by the exception relating to the protection of commercial interests could therefore have been made and explained by the Commission, without thereby depriving the exception of its purpose or compromising the confidentiality of the information which, by reason of that exception, ought to remain secret.
- 67 The arguments put forward by the Commission before the Court are not capable of calling that conclusion into question.
- 68 Firstly, the Commission raises the obligation of professional secrecy and the protection of business secrets under Article 287 EC and Article 17 of the Merger Regulation.
- 69 It must be borne in mind, in that regard, that only certain information is covered by business secrets. Similarly, the obligation of professional secrecy does not have such a scope that it can justify a general and abstract refusal of access to documents submitted in connection with notification of a merger. It is true that neither Article 287 EC nor the Merger Regulation states exhaustively what information, by its very nature, is covered by professional secrecy. Nevertheless, it is apparent from the wording of Article 17(2) of the Merger Regulation, which provides that information acquired through the application of the Regulation of the kind covered by professional secrecy is not to be disclosed, that not all information thus acquired is necessarily covered by professional secrecy. Accordingly, the assessment as to the confidentiality of an item of information requires, on the one hand, that the individual legitimate interests opposing disclosure of the information be weighed against, on the other, the public interest in ensuring that the activities of the Community institutions take place as openly as possible (see, to that effect and by analogy, Case T-198/03 *Bank Austria Creditanstalt v Commission* [2006] ECR II-1429, paragraph 71, and Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse v Commission* [2007] ECR II-4225, paragraphs 63 to 66).

- 70 By undertaking a concrete, individual assessment of the documents requested, in accordance with the first indent of Article 4(2) of Regulation No 1049/2001, the Commission is thus in a position to ensure that the provisions applicable to mergers retain their effectiveness, in full compliance with Regulation No 1049/2001. It follows that the obligation of professional secrecy and the protection of business secrets, which follow from Article 287 EC and from Article 17 of the Merger Regulation, are not such as to release the Commission from undertaking a concrete examination of each document concerned, as required by Article 4(2) of Regulation No 1049/2001.
- 71 The Commission also observes that the exceptions laid down in Regulation No 1049/2001 cannot give rise to a lower level of protection of the interests protected by the provisions applicable to merger proceedings and that the notion of commercial interests is wider than that of business secrets covered by the obligation of professional secrecy.
- 72 Nevertheless, it follows from the foregoing (see paragraph 70 above) that that argument, whatever its basis, cannot in any event justify the absence of an individual, concrete examination of each document in question. It is precisely such an examination that enables the exception based on protection of commercial interests, laid down in the first indent of Article 4(2) of Regulation No 1049/2001, to be applied, while complying with the specific provisions applicable in merger proceedings and, in particular, without thereby lessening the protection afforded to business secrets. In addition, if it is accepted that the notion of commercial interests is wider than that of business secrets, the examination carried out in application of the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001, which protects commercial interests of natural and legal persons, is *a fortiori* likely to ensure protection of business secrets.
- 73 At the hearing, the Commission invoked Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), signed in Rome on 4 November 1950, as a fundamental right to support its argument concerning the need to respect the privacy of undertakings. In reply to a question from the Court, however, it accepted that that basis, which was not referred to in the decision of 13 February 2007, had not been raised in its written pleadings before the Court.
- 74 The Court takes the view that, even if it were to be assumed that that argument could be regarded as amplifying a plea made previously and, as such, as being admissible (see, to that effect, Case 306/81 *Verros v Parliament* [1983] ECR 1755, paragraph 9, and Case C-301/97 *Netherlands v Council* [2001] ECR I-8853, paragraph 169), it is clear that it must, in any event, be rejected.
- 75 The right to respect for private life is a fundamental right which forms an integral part of the general principles of law, the observance of which the Court ensures. Those principles have been expressly restated in Article 6(2) EU, which provides that '[t]he Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law' (see, to that effect, Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, paragraph 37). The right to respect for private life is, moreover, reaffirmed in

Article 7 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1).

- 76 Article 8 of the ECHR, while setting out, in paragraph 1 thereof, the principle that public authorities may not interfere in the exercise of the right to respect for private life, acknowledges, in paragraph 2, that such interference is possible, on condition that it 'is in accordance with the law' and that it constitutes a measure which 'is necessary in a democratic society ... for the protection of the rights and freedoms of others'. The notion of private life may include activities of a professional or business nature of natural or legal persons (judgments of the European Court of Human Rights, *Niemietz v Germany*, 16 December 1992, Series A No 251-B, § 29; *Amann v Switzerland*, 16 February 2000, *Reports of Judgments and Decisions* 2000-II, § 65; and *Société Colas Est and Others v France*, 16 April 2002, *Reports of Judgments and Decisions* 2002-II, § 41), these being activities which may be covered by a merger notification (see, by analogy, in respect of public procurement procedures, Case C-450/06 *Varec* [2008] ECR I-581, paragraph 48). However, even if Article 8 of the ECHR could be invoked to protect the confidentiality of documents the disclosure of which would undermine protection of the commercial interests of a natural or legal person, within the meaning of the first indent of Article 4(2) of Regulation No 1049/2001, as the Commission argues, the fact none the less remains that that cannot release the Commission from carrying out a concrete and effective examination of each document in question, which is required by that provision and is not sufficiently apparent, in the present case, from the grounds of the decision of 13 February 2007.
- 77 Likewise, at the hearing, the Commission pointed out, in reply to a question from the Court, that, during the first phase of the merger notification, no access to the file was granted and all the documents were sent by the parties as confidential documents, a fact which had to be taken into account in applying Regulation No 1049/2001. However, it is clear that the rules on access to the file laid down by the Merger Regulation in no way release the Commission from carrying out a concrete examination of each document, including those submitted on a confidential basis, in the context of a request for access under Regulation No 1049/2001. It is by means of such an examination and the consultation of third parties laid down in Article 4(4) of Regulation No 1049/2001, which, moreover, did not occur in the present case, that the Commission is in a position to assess whether or not access to the documents in question must be refused in the light of the first indent of Article 4(2) of Regulation No 1049/2001 and, as appropriate, to justify, to the requisite legal standard, the refusal to disclose them.
- 78 Secondly, the Commission submits that all the documents provided necessarily contain commercially sensitive information relating to the parties at issue, that a concrete, individual examination is not required in all circumstances, and that the documents provided in the context of a merger constitute a special case and should necessarily be regarded as being manifestly covered by the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001.
- 79 It follows from case-law that a concrete, individual examination of each document requested may, admittedly, not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted. Such could be the case, inter alia, if

certain documents were either, first, manifestly covered in their entirety by an exception to the right of access or, conversely, manifestly accessible in their entirety, or, finally, had already been the subject of a concrete, individual assessment by the Commission in similar circumstances (*Verein für Konsumenteninformation v Commission*, cited in paragraph 58 above, paragraph 75).

- 80 That is not, however, the position in the present case. Under Article 2(3) of Regulation No 1049/2001, the provisions relating to public access to Commission documents apply to all documents held by that institution, that is to say, all documents drawn up or received by it and in its possession, in all areas of activity of the European Union. It cannot, therefore, be accepted that, with regard to mergers, documents sent to the Commission are to be regarded, in their entirety, as being manifestly covered by the exception relating to protection of the commercial interests of the notifying parties and of third parties. Although that exception is, where relevant, applicable to certain of the documents sent to the Commission, that is not necessarily the case with regard to all of the documents or to those documents in their entirety. At the very least, the Commission is under an obligation to make certain thereof by way of a concrete, effective examination of each document, as required by the first indent of Article 4(2) of Regulation No 1049/2001. In that regard, the Commission does not raise any argument alleging that such an examination would have given rise to an excessive workload in the present case.
- 81 Moreover, PKN Orlen points out that it sent confidential documents to the Commission on the basis of the premiss that they would be treated as such. At the hearing, PKN Orlen referred, in that regard, to its legitimate expectation that the documents provided would not be disclosed, in application of Article 17 of the Merger Regulation.
- 82 Any economic operator to whom an institution has given justified hopes may rely on the principle of protection of legitimate expectations (Case T-115/94 *Opel Austria v Council* [1997] ECR II-39, paragraph 93). Moreover, a person may not plead infringement of that principle unless he has been given precise assurances by the administration (Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission* [2006] ECR II-1601, paragraph 210, and Joined Cases T-3/00 and T-337/04 *Pitsiorlas v Council and ECB* [2007] ECR II-4779, paragraph 169 and the case-law cited).
- 83 In the present case, even if the view were to be taken that the argument alleging infringement of the principle of the protection of legitimate expectations was, in essence, raised in PKN Orlen's written pleadings and is not therefore a new plea raised at the hearing, it must be rejected. Article 17 of the Merger Regulation guarantees the non-disclosure of information which, by its very nature, is covered by professional secrecy. It is clear that such a provision does not enshrine an absolute right to the confidentiality of all documents supplied by undertakings (see, in that regard, paragraph 69 above). That provision cannot, therefore, suffice alone as a basis for a legitimate expectation on the part of undertakings that none of the documents which they have provided will be disclosed by the Commission.

- 84 Furthermore, PKN Orlen does not refer to any factor capable of establishing as a fact that the Commission gave it precise assurances as regards non-disclosure, on principle, of the entirety of the documents provided.
- 85 In addition, even if it were to be assumed that the Commission did give PKN Orlen precise assurances as to the confidentiality of the documents in question, such an undertaking could not be used against the applicant, whose rights to access to the documents are guaranteed subject to the conditions and within the limits laid down in Regulation No 1049/2001. A refusal of access to the documents can be based only and exclusively on the exceptions laid down in Article 4 of Regulation No 1049/2001, with the result that the institution in question cannot put forward such a refusal in reliance on an undertaking given to other parties to the transaction if that undertaking cannot be justified by reference to one of those exceptions. It is therefore within the framework of those exceptions alone that the grounds relied on in support of the refusal fall to be examined (see, by analogy, the judgment of 11 March 2009 in Case T-121/05 *Borax Europe v Commission*, not published in the ECR, paragraph 34).
- 86 Finally, in any event, the fact that the parties involved in merger investigation proceedings regard the documents which they send as confidential cannot release the Commission, when in receipt of a request under Regulation No 1049/2001, from the obligation to carry out a concrete, effective examination of the documents requested with a view to possible application of the exceptions laid down in Article 4 of that regulation.
- 87 In those circumstances, it cannot validly be argued that the principle of the protection of legitimate expectations has been infringed.
- 88 Thirdly, the Commission's argument based on Article 17(1) of the Merger Regulation, to the effect that information acquired in that regard may be used only for the purposes of the request, investigation or hearing, must also be rejected. That provision concerns the manner in which the Commission may use the information supplied and does not govern the access to documents guaranteed by Regulation No 1049/2001.
- 89 Accordingly, and without it being necessary to examine the applicant's argument that the third parties involved were not consulted, it is not apparent from the grounds of the decision of 13 February 2007 that, in the present case, the Commission carried out a concrete, individual examination of the documents requested in order to refuse their disclosure. The Commission thereby erred in law and the decision must therefore be annulled in so far as application of the exception based on protection of commercial interests is concerned.
- 90 In the light of the foregoing, there is no need at the present stage to examine whether there may be an overriding public interest justifying disclosure of the documents in question.

*Editions Jacob* judgment:

- 109 Aux termes de l'article 4, paragraphe 2, premier tiret, du règlement n° 1049/2001, les institutions refusent l'accès à un document dans le cas où sa divulgation porterait atteinte à la protection « des intérêts commerciaux d'une

personne physique ou morale déterminée, y compris en ce qui concerne la propriété intellectuelle ».

- 110 L'article 4, paragraphe 4, dudit règlement prévoit que, « dans le cas de documents de tiers, l'institution consulte le tiers afin de déterminer si une exception prévue au paragraphe 1 ou 2 est d'application, à moins qu'il ne soit clair que le document doit ou ne doit pas être divulgué ».
- 111 La Commission estime que, parmi les documents litigieux, les documents visés au point 1 ci-dessus, sous d), e) et h), et au point 2 ci-dessus, sous b), c) (en partie), d), f), g) et i), sont couverts, au moins partiellement, par l'exception relative à la protection des intérêts commerciaux.
- 112 C'est à la lumière des principes rappelés au point 65 ci-dessus qu'il convient d'examiner l'application que la Commission a faite de l'exception prévue à l'article 4, paragraphe 2, premier tiret, du règlement n° 1049/2001 pour refuser l'accès aux documents demandés.
- 113 En l'espèce, en premier lieu, certains des documents pour lesquels cette exception est invoquée sont susceptibles de contenir des informations confidentielles entrant dans le champ d'application de l'exception relative à la protection des intérêts commerciaux. En effet, en raison de leur objet même, ces documents sont, comme le souligne la décision attaquée, susceptibles de contenir des informations relatives aux stratégies commerciales des entreprises concernées.
- 114 En second lieu, il convient d'examiner la question de savoir si la divulgation des documents entrant dans le champ d'application de l'exception relative à la protection des intérêts commerciaux porterait concrètement et effectivement atteinte à l'intérêt protégé.
- 115 Il importe de rappeler que, selon la jurisprudence, l'examen auquel doit procéder l'institution afin d'appliquer une exception doit être effectué de façon concrète et ressortir des motifs de la décision.
- 116 Dans la décision attaquée, la Commission a refusé la divulgation des documents énumérés au point 111 ci-dessus, au motif que ces documents contiendraient des informations sensibles relatives aux stratégies commerciales des entreprises concernées. Leur divulgation porterait donc clairement atteinte aux intérêts commerciaux des entreprises concernées.
- 117 Il ne ressort cependant pas de ces motifs qu'un examen concret et individuel desdits documents ait été opéré. La motivation abstraite et générale fournie par la Commission ne se réfère pas au contenu des documents en cause. Une justification similaire pourrait s'appliquer à tous les documents fournis, dans le cadre de n'importe quelle procédure de contrôle d'une concentration.
- 118 Par ailleurs, les circonstances dans lesquelles l'institution concernée peut, selon la jurisprudence (arrêt VKI, point 41 supra, point 75), se dispenser d'un examen concret et individuel ne sont pas réunies.
- 119 Il résulte en effet de la constatation opérée au point 86 ci-dessus qu'il ne saurait être admis que l'ensemble des documents auxquels l'accès a été refusé en application de l'exception relative à la protection des intérêts

commerciaux sont manifestement couverts dans leur intégralité par cette exception.

- 120 De même, il ne saurait être soutenu qu'il était objectivement impossible à la Commission d'indiquer les raisons justifiant le refus d'accès à chaque document sans divulguer le contenu de ce document ou un élément essentiel de celui-ci et, partant, sans priver l'exception de sa finalité essentielle, ce qui pourrait justifier la généralité, la brièveté et le caractère stéréotypé de la motivation (arrêt du 1<sup>er</sup> février 2007, Sison/Conseil, point 46 supra, point 83, et arrêt du 26 avril 2005, Sison/Conseil, point 41 supra, point 84 ; voir, par analogie, s'agissant du code de conduite de 1993, arrêt WWF UK/Commission, point 46 supra, point 65).
- 121 La Commission pouvait en effet décrire le contenu de chaque document et préciser la nature des informations confidentielles, sans les révéler pour autant. L'obligation, pour les entreprises ayant fourni des informations à la Commission, de signaler celles qu'elles jugent confidentielles et de transmettre une version non confidentielle des documents communiqués, prévue à l'article 17, paragraphe 2, du règlement (CE) n° 447/98 de la Commission, du 1<sup>er</sup> mars 1998, relatif aux notifications, aux délais et aux auditions prévus par le règlement n° 4064/89 (JO L 61, p. 1), permet à la Commission, à tout le moins, de motiver de façon précise le refus d'accès pour chaque document, sans divulguer les informations confidentielles y figurant.
- 122 S'agissant de l'absence de liste identifiant les documents figurant au point 1 ci-dessus, sous d), c'est-à-dire de la correspondance échangée entre la Commission et Lagardère, la Commission avance l'argument selon lequel cette correspondance est répartie sur une vingtaine de classeurs, de sorte que l'établissement d'une liste détaillée par document individuel représenterait une charge administrative disproportionnée. Elle indique, dans la décision attaquée, avoir pris en considération la catégorie de documents dans son ensemble, et affirme, dans ses écritures, qu'elle était autorisée à refuser l'accès à ces documents à l'issue d'un examen sommaire, ces documents étant manifestement et intégralement couverts par l'exception relative à la protection des intérêts commerciaux.
- 123 Cette argumentation doit être rejetée. Ainsi qu'il a été relevé au point 86 ci-dessus, en application de l'article 2, paragraphe 3, du règlement n° 1049/2001, les dispositions relatives à l'accès du public aux documents de la Commission s'appliquent à tous les documents détenus par cette institution, c'est-à-dire à tous les documents établis ou reçus par elle et en sa possession, dans tous les domaines d'activité de l'Union européenne. Il ne saurait donc être admis que, en matière de concentration, la correspondance entre la Commission et les parties intéressées soit considérée comme manifestement couverte par l'exception relative à la protection des intérêts commerciaux. Si cette exception est, le cas échéant, applicable à certains des documents établis par la Commission ou qui lui ont été communiqués, tel n'est pas nécessairement le cas de tous les documents ou de l'intégralité de ces documents. À tout le moins, il incombe à la Commission de s'en assurer par un examen concret et effectif de chaque document, requis par l'article 4, paragraphe 2, premier tiret, du règlement n° 1049/2001.
- 124 L'argument de la Commission et de l'intervenante tiré du respect du secret professionnel, garanti par l'article 287 CE et par l'article 17, paragraphe 2, du

règlement n° 4064/89, et des secrets d'affaires, garanti par l'article 18, paragraphe 3, de ce règlement, doit également être écarté. Ainsi qu'il a été rappelé au point 90 ci-dessus, selon la jurisprudence, dans la mesure où le public a un droit d'accès à des documents contenant certaines informations, ces informations ne sauraient être considérées, par leur nature, comme étant couvertes par le secret professionnel ou la protection des secrets d'affaires (voir, en ce sens, arrêt *Bank Austria Creditanstalt/Commission*, point 90 supra, point 74).

- 125 La requérante reproche également à la Commission de ne pas avoir consulté les entreprises dont la protection des intérêts commerciaux pourrait être atteinte par la divulgation des documents concernés.
- 126 À cet égard, il convient de rappeler que, aux termes de l'article 4, paragraphe 4, du règlement n° 1049/2001, dans le cas de documents émanant d'un tiers, l'institution consulte celui-ci afin de déterminer si une exception prévue à l'article 4, paragraphe 1 ou 2, du même règlement est d'application, à moins qu'il ne soit clair que le document doit ou ne doit pas être divulgué. Il s'ensuit que les institutions ne sont pas obligées de consulter le tiers concerné s'il apparaît clairement que le document doit être divulgué ou ne doit pas l'être. Dans tous les autres cas, les institutions doivent consulter le tiers en question. Dès lors, la consultation du tiers concerné constitue, en règle générale, une condition préalable pour la détermination de l'application des exceptions à l'accès prévues à l'article 4, paragraphes 1 et 2, du règlement n° 1049/2001 dans le cas de documents émanant de tiers (arrêts du Tribunal du 30 novembre 2004, *IFAW Internationaler Tierschutz-Fonds/Commission*, T-168/02, Rec. p. II-4135, point 55, et *Terezakis/Commission*, point 65 supra, point 54).
- 127 L'absence de consultation des tiers auteurs des documents n'est donc conforme au règlement n° 1049/2001 que si l'une des exceptions prévues par ledit règlement s'applique clairement aux documents en cause. Tel n'est pas le cas en l'espèce, ainsi qu'il a été constaté aux points 63 à 98 ci-dessus, s'agissant de l'exception relative à l'objectif des activités d'enquête, et aux points 109 à 124 ci-dessus, s'agissant de la protection des intérêts commerciaux.
- 128 S'agissant des documents émanant de la Commission, c'est à juste titre que cette dernière fait valoir que le règlement n° 1049/2001 ne prévoit pas de procédure de consultation des tiers pour ce type de documents. Dès lors, le grief formulé par la requérante manque en droit en ce qu'il vise les documents dont la Commission est l'auteur.
- 129 Il résulte de l'ensemble de ce qui précède que la décision attaquée est entachée d'une erreur de droit en ce qu'elle a appliqué l'exception prévue à l'article 4, paragraphe 2, premier tiret, du règlement n° 1049/2001 aux documents visés au point 1 ci-dessus, sous d), e) et h), et au point 2 ci-dessus, sous b), c) (en partie), d), f), g) et i), sans qu'il ressorte des motifs de la décision attaquée qu'un examen concret et individuel de chacun de ces documents ait été opéré et sans que les tiers auteurs de certains de ces documents aient été consultés, s'agissant de la divulgation des documents émanant d'eux.

*Co-Frutta* judgment:

- 127 In the present case, the Commission relied on the exception concerning the undermining of the commercial interests of the operators in order to refuse access to the lists specifying, for each operator, the quantity of bananas imported during the period 1994 to 1996 and the provisional reference quantity attributed, for the years 1999 and 2000, whilst pointing out, in the last paragraph of point 3 of the decision of 10 August 2004, that, for the purposes of Regulation No 2362/98, no list of traditional operators exists for the year 1998.
- 128 First of all, it should be noted that those documents contain confidential information concerning banana importing companies and their commercial activities and must accordingly be considered to fall within the scope of the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001.
- 129 Secondly, as regards the question whether the Commission examined whether disclosure of the documents concerned would specifically and actually undermine the protected interest – which the applicant disputes, relying on the general nature of the justification put forward in the decision of 10 August 2004 – it should be borne in mind that the Commission stated in point 4 of the decision that disclosure of the documents could ‘undermine the commercial interests of operators, since they would make public the reference quantities attributed to each operator as well as the quantities actually imported by each operator’.
- 130 It is, in principle, open to the Commission to base its decisions in that regard on general presumptions which apply to certain categories of document, since considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature. It is nevertheless incumbent on the Commission to determine in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose (see, by analogy, *Sweden and Turco v Council*, paragraph 50).
- 131 The documents at issue in the present case concern two specific factors in the common organisation of the market in bananas: for each traditional operator, the quantities of bananas imported and the quantities which the operator is authorised to import. That information enables the commercial activity of the undertakings importing bananas into the Community to be determined. It is difficult to imagine how the Commission could have set out a specific, individual examination of each document without presenting the figures concerned. It must be stated, moreover, that – as is apparent from the list of operators to which the Commission granted access – the applicant is seeking, for the years 1999 and 2000, disclosure of information concerning the imports made by 622 competitor undertakings established in 15 Member States. A specific, individual examination concerning each of those figures, or even concerning each list sent by each Member State, would not enable reasons to be given justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and thereby defeating the very purpose of the exception (see, by analogy, *WWF UK v Commission*, paragraph 65).
- 132 With regard to the applicant’s argument that disclosure of the documents requested cannot undermine the commercial interests of other operators, since the banana trade sector does not constitute a market open to free competition,

it must be held that, according to that line of argument, no document concerning the common organisation of the market would fall within the scope of the first indent of Article 4(2) of Regulation No 1049/2001. Moreover, even within a common organisation of the market, the disclosure of provisional reference quantities and their actual use can undermine the commercial interests of the undertakings concerned, since that information makes it possible to determine in the abstract the maximum volume of operators' activities, as well as the actual volume of activity, and to assess the competitive position of those operators, together with the success of their commercial strategies.

133 Moreover, it is necessary to determine whether that risk must, as the applicant claims, be weighed against an overriding public interest (*Sweden and Turco v Council*, paragraph 67, and Case T-166/05 *Borax Europe v Commission* [2009] ECR II-0000, paragraph 51; see also paragraph 124 above). The aim behind the application for access to the documents is that of verifying the existence of fraudulent practices on the part of the applicant's competitors. The applicant thus pursues, amongst other objectives, the protection of its commercial interests. However, it is not possible to categorise the applicant's commercial interests as being an 'overriding public interest' which prevails over the protection of the commercial interests of traditional operators, the objective underlying the refusal of access to a part of the documents requested. In addition, the pursuit of the public interest in identifying cases of fraud in order to ensure the smooth operation of the banana market is not a matter for the operators, but for the competent Community and national public authorities, where appropriate following an application made by an operator.

134 In addition, the applicant relies on Article 4(7) of Regulation No 1049/2001 and claims that the quantities imported from 1994 to 1996 and from 1998 to 2000 should no longer benefit from protection.

135 Article 4(7) of Regulation No 1049/2001 provides:

'The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.'

136 It follows from that provision that documents the disclosure of which would undermine commercial interests benefit from special protection, since access to them may be prohibited for a period of more than 30 years. However, such protection must, in any event, be justified in the light of the content of those documents.

137 The documents to which access is requested go to the heart of the importing business, since they indicate the market shares, commercial strategy and sales policy of the undertakings in question. The content of those documents thus justifies a period of protection.

138 It follows from Articles 3 and 4 of Regulation No 2362/98 and Article 1 of Commission Regulation (EC) No 250/2000 of 1 February 2000 on imports of bananas under the tariff quotas and of traditional ACP bananas, and fixing the

indicative quantities for the second quarter of 2000 (OJ 2000 L 26, p. 6), that, for traditional operators, actual imports between 1994 and 1996 served as the basis for determining the reference quantities for the years 1999 and 2000. Thus, even imports carried out in 1994 had a direct influence on the reference quantities for the year 2000.

- 139 The date which must be singled out for the purposes of reviewing the lawfulness of the Commission decision is that of its adoption. On 10 August 2004, the Commission's examination concerned documents dating from four years earlier. In that way, since the figures from 1994 influence those for 2000 and the refusal of access dates from 2004, a period of four years must be regarded as a period during which protection of the commercial interests concerned is justified.
- 140 The application by the Commission of the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001 must accordingly be considered to be justified.

*Terezakis* judgment:

- 85 It has consistently been held that the exceptions to document access must be interpreted and applied strictly so as not to frustrate application of the general principle of giving the public the widest possible access to documents held by the institutions (see, by analogy in relation to Decision 94/90, Case T-309/97 *Bavarian Lager v Commission* [1999] ECR II-3217, paragraph 39, and Case T-191/99 *Petrie and Others v Commission* [2001] ECR II-3677, paragraph 66). Moreover, the principle of proportionality requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view (*Council v Hautala*, cited in paragraph 75 above, paragraph 28).
- 86 Furthermore, the examination required for the purpose of processing a request for access to documents must be specific. First, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception (see, to that effect, Case T-20/99 *Denkavit Nederland v Commission* [2000] ECR II-3011, paragraph 45). Such application may, in principle, be justified only if the institution has previously determined (i) that access to the document would specifically and actually undermine the protected interest and (ii) in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, that there is no overriding public interest in disclosure. Second, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical (see, to that effect, Case T-211/00 *Kuijjer v Council* [2002] ECR II-485, paragraph 56). Consequently, the examination which the institution must undertake in order to apply an exception must be carried out in a specific manner and must be apparent from the reasons for the decision (see, to that effect, Case T-14/98 *Hautala v Council* [1999] ECR II-2489, paragraph 67; Case T-188/98 *Kuijjer v Council* [2000] ECR II-1959, paragraph 38; and Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraph 69).
- 87 A specific, individual examination of each document is also necessary where, even if it is clear that a request for access refers to documents covered by an exception, only such an examination can enable the institution to assess the possibility of granting the applicant partial access under Article 4(6) of

Regulation No 1049/2001. In the context of applying the Code of conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41), the Court has moreover already considered an assessment of documents by reference to categories rather than on the basis of the actual information contained in those documents to be insufficient, since the examination required of an institution must enable it to assess specifically whether an exception invoked actually applies to all the information contained in those documents (Case T-123/99 *JT's Corporation v Commission* [2000] ECR II-3269, paragraph 46; *Verein für Konsumenteninformation v Commission*, cited in paragraph 86 above, paragraph 73; and Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2006] ECR II-2023, paragraph 117).

- 88 It is therefore for the institution to assess, first, whether the document to which the request for access relates falls within the scope of one of the exceptions provided for by Article 4 of Regulation No 1049/2001, second, whether the disclosure of that document would specifically and actually undermine the protected interest and, third, if so, whether the need for protection applies to the whole of the document.
- 89 It is in the light of those principles that it is necessary to examine the Commission's application of the exception provided for by Article 4(2), first indent, of Regulation No 1049/2001 in refusing access to the main contract.
- 90 According to that provision, the institutions are to refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, unless there is an overriding public interest in disclosure.
- 91 First, as has been set out in paragraph 57 above, a contract such as that at issue in the present case is likely to contain confidential information concerning the contracting companies and their business relations and must therefore be regarded as falling within the scope of the exception laid down by Article 4(2), first indent, of Regulation No 1049/2001.
- 92 Second, as to whether the Commission duly undertook a specific, individual examination of the content of the main contract, which the applicant disputes by reference to the general terms of the reasoning put forward in the contested decision, it must be borne in mind that the Commission stated, first, that the contract contains detailed information about the contracting parties, their business relations and specific cost components related to the project, and concluded that the disclosure of that document to third parties other than the shareholders of the contracting parties would undoubtedly affect their commercial interests. The Commission then stated that it had concluded on the basis of the contracting parties' reply that disclosure would indeed be harmful to their commercial interests and, moreover, that it had duly taken into consideration the rulings of the Polimeles Protodikio Athinon and the Efetio Athinon, in which the need to protect the commercial interests of the contracting parties had been recognised.
- 93 As the applicant submits, the reasons on which the Commission relies – concerning the fact that the main contract contains detailed information about the contracting parties and their business relations – are general and abstract in nature and applicable per se to any commercial contract and do not show that the Commission undertook a specific, individual examination of the content

of the main contract. Furthermore, if all information relating to a company and its business relations were regarded as being covered by the protection which must be given to commercial interests in accordance with Article 4(2), first indent, of Regulation No 1049/2001, effect would not be given to the general principle of giving the public the widest possible access to documents held by the institutions.

- 94 Similarly, the consideration taken of the rulings of the Polimeles Protodikio Athinon and the Efetio Athinon, is not covered by any of the exceptions to the right of access provided for by Regulation No 1049/2001 and, moreover, does not relate to the content of the document or to the possible effect of disclosure of the main contract on the protection of the contracting parties' commercial interests. It is not therefore capable of establishing that the Commission duly undertook a specific, individual examination of the main contract in order to assess whether its disclosure would specifically and actually undermine the commercial interests of the contracting parties. The same applies to the examination of the response of those parties to the consultation carried out by the Commission pursuant to Article 4(4) of Regulation No 1049/2001.
- 95 Finally, as regards the reason given in the contested decision to the effect that the contract contains information on the specific cost components related to the project, it must be held that, in principle, precise information relating to the cost structure of an undertaking constitutes business secrets, the disclosure of which to third parties is likely to undermine its commercial interests. Moreover, Article 287 EC expressly provides that the members of the institutions, the members of committees, and the officials and servants of the Community are required, even after their duties have ceased, not to disclose information about the cost components of undertakings.
- 96 However, in the present case, following the Commission's production of the main contract in accordance with Article 65(b), Article 66(1) and the third subparagraph of Article 67(3) of the Rules of Procedure, the Court found that while that document in fact contained precise amounts in respect of the various works items provided for in it, and not, strictly speaking, in respect of the cost components of the contracting parties, substantial passages in the contract clearly did not in any event concern the 'specific cost components related to the project' to which the Commission refers in the contested decision.
- 97 Furthermore, while it clearly cannot be denied that those passages contain information about the contracting parties and their business relations, that finding is not, as has already been stated, sufficient to conclude that their disclosure would specifically and actually undermine the commercial interests of those parties.
- 98 It follows that the Commission's examination of the parts of the contract other than those concerning the specific cost components related to the project does not enable an assessment to be made specifically as to whether the exception relied on genuinely applies to all the information contained in the main contract. It is evident on reading the main contract, furthermore, that not only does it not seem to be impossible to give reasons justifying the need for confidentiality in respect of the whole of the main contract without disclosing its content and, thereby, depriving the exception of its very purpose (see, to that effect, Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, paragraph 65) – and in fact the Commission does not allege this to be the case – but, moreover,

numerous clauses of the contract are drafted in general and standard terms which manifestly do not touch on the contracting parties' commercial interests, with the result that partial access to information about them would not undermine those interests. That applies, for example, to the clauses relating to the definitions of terms used in the contract, the settlement of disputes, and the majority of the clauses in Part A of the main contract, which, as regards precise details of the implementation of the contract, refer to the annexes thereto.

- 99 As to 'specific cost components related to the project', assuming that their disclosure to third parties might be genuinely harmful to the contracting parties' commercial interests, it must be noted that there is nothing to prevent the Commission, when giving partial access, from obscuring passages of the main contract which refer to them.
- 100 In that respect, it must be borne in mind that, in refusing partial access to the main contract, the Commission merely stated that those parts of the contract which could be disclosed were also contained in the Greek authorities' application for financial assistance from the Cohesion Fund, a copy of which had already been provided to the applicant by the Commission.
- 101 However, far from being capable of justifying a refusal of partial access to the main contract, that reasoning constitutes, on the contrary, an admission by the Commission that certain parts of the main contract could be disclosed and, consequently, that partial access should be granted.
- 102 Moreover, it follows from an examination of the Greek authorities' application for financial assistance from the Cohesion Fund which is annexed to the applicant's application to this Court and which, according to the Commission, corresponds to those parts of the main contract which are capable of being disclosed, that the Cohesion Fund application contains a detailed summary of the contract price broken down by works item. Therefore, inasmuch as the 'specific cost components related to the project' must be understood to mean, in particular, such a breakdown of the contract price, the decision is vitiated by a clear contradiction since, on the one hand, it rejects the request for full access to the main contract on the ground that the contract contains information on the specific cost components related to the project and, on the other, it rules out the possibility of partial access on the ground that that information appears in the application for financial assistance that was sent to the applicant.
- 103 In that respect, it must be noted that, when called upon by the Court at the hearing to specify the passages of the contract which relate to the contracting parties' commercial interests, within the meaning of Regulation No 1049/2001, not only did the Commission not claim that the whole contract was covered by the protection required to be given to the contracting parties' commercial interests but moreover it included in the various matters which it regarded as being confidential the prices stated in the contract and the whole of appendix 7, which are actually included in the application for financial assistance which the Commission sent to the applicant. On being questioned by the Court in that regard, the Commission merely maintained that the main contract contains clauses relating to the detailed arrangements for determining costs and for the reduction of certain costs, and that it is not only the amounts in question which are relevant, but also the whole of the system set up in respect of those amounts.

- 104 Therefore, neither the contested decision nor the contradictory and imprecise explanations provided by the Commission during the proceedings enable the ‘specific cost components related to the project’ – the disclosure of which was considered by the Commission to be capable of undermining the commercial interests of the contracting parties – to be specifically identified with the requisite precision.
- 105 It follows from all the foregoing that it cannot be concluded from the reasons given in the contested decision that the disclosure of the main contract would have specifically and actually undermined the contracting parties’ commercial interests. Since it is not for the Court to substitute its assessment for that of the Commission, the contested decision must be annulled in so far as it refuses access, even partially, to the main contract.

*e) Legal advice ((Article 4(2), second indent))*

*Turco judgment:*

- 32 Before dealing with the pleas relied on in support of the appeals, it is necessary to consider the relevant rules relating, first, to the examination to be undertaken by the Council where disclosure of an opinion of its legal service relating to a legislative process is requested and, secondly, to the statement of reasons which the Council must provide in order to justify any refusal to disclose.

The examination to be undertaken by the institution

- 33 Regulation No 1049/2001 seeks, as indicated in recital 4 of the preamble and Article 1, to give the public a right of access to documents of the institutions which is as wide as possible.
- 34 As appears from recital 1 of the preamble to Regulation No 1049/2001, that regulation reflects the intention expressed in the second paragraph of Article 1 of the EU Treaty, which was inserted by the Treaty of Amsterdam, to mark 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 recital 2 of the preamble to Regulation No 1049/2001 notes, the right of public access to documents of the institutions is related to the democratic nature of those institutions.
- 35 When the Council is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents of the institutions set out in Article 4 of Regulation No 1049/2001.
- 36 In view of the objectives pursued by Regulation No 1049/2001, those exceptions must be interpreted and applied strictly (see Case C-64/05 P *Sweden v Commission and Others* [2007] ECR I-0000, paragraph 66).
- 37 As regards the exception relating to legal advice laid down in the second indent of Article 4(2) of Regulation No 1049/2001, the examination to be undertaken by the Council when it is asked to disclose a document must

necessarily be carried out in three stages, corresponding to the three criteria in that provision.

- 38 First, the Council must satisfy itself that the document which it is asked to disclose does indeed relate to legal advice and, if so, it must decide which parts of it are actually concerned and may, therefore, be covered by that exception.
- 39 The fact that a document is headed 'legal advice/opinion' does not mean that it is automatically entitled to the protection of legal advice ensured by the second indent of Article 4(2) of Regulation No 1049/2001. Over and above the way a document is described, it is for the institution to satisfy itself that that document does indeed concern such advice.
- 40 Second, the Council must examine whether disclosure of the parts of the document in question which have been identified as relating to legal advice 'would undermine the protection' of that advice.
- 41 In that regard, it must be pointed out that neither Regulation No 1049/2001 nor its *travaux préparatoires* throw any light on the meaning of 'protection' of legal advice. Therefore, that term must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.
- 42 Consequently, the exception relating to legal advice laid down in the second indent of Article 4(2) of Regulation No 1049/2001 must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice.
- 43 The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical.
- 44 Third and last, if the Council takes the view that disclosure of a document would undermine the protection of legal advice as defined above, it is incumbent on the Council to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would thereby be undermined.
- 45 In that respect, it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 of the preamble to Regulation No 1049/2001, from increased openness, in that this 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.
- 46 Those considerations are clearly of particular relevance where the Council is acting in its legislative capacity, as is apparent from recital 6 of the preamble to Regulation No 1049/2001, according to which wider access must be granted to documents in precisely such cases. Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize 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.

- 47 It is also worth noting that, under the second subparagraph of Article 207(3) EC, the Council is required to define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in such cases. Similarly, Article 12(2) of Regulation No 1049/2001 acknowledges the specific nature of the legislative process by providing that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States should be made directly accessible.

The requirements to be satisfied by the statement of reasons

- 48 The reasons for any decision of the Council in respect of the exceptions set out in Article 4 of Regulation No 1049/2001 must be stated.

- 49 If the Council decides to refuse access to a document which it has been asked to disclose, it must explain, first, how access to that document could specifically and effectively undermine the interest protected by an exception laid down in Article 4 of Regulation No 1049/2001 relied on by that institution and, secondly, in the situations referred to in Article 4(2) and (3) of that regulation, whether or not there is an overriding public interest that might nevertheless justify disclosure of the document concerned.

- 50 It is, in principle, open to the Council to base its decisions in that regard on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature. However, it is incumbent on the Council to establish in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose.

- 51 It is in the light of those legal considerations that the pleas on which the appellants base their appeals must be examined.

- 52 The second plea will be examined first.

*The second plea*

- 53 The second plea is divided into three parts, all three of which allege that the Court of First Instance misinterpreted the second indent of Article 4(2) of Regulation No 1049/2001. By the first part, the appellants submit that the Court of First Instance misconstrued that provision by not properly verifying whether the Council had examined the document in question in a sufficiently detailed manner before refusing to disclose it. By the second part, the appellants complain that the Court of First Instance accepted reasons for the refusal stated in general terms relating to all legal opinions of the Council's legal service concerning legislative acts rather than specifically to the legal opinion in question. By the third part, the appellants maintain that the Court of First Instance infringed that provision by accepting that there was a general need for confidentiality as regards legal opinions on legislative questions.

- 54 The Council takes the view that the first and second parts of this plea are based on a confusion between, on the one hand, the principle that each document should be assessed on the basis of its content and, on the other hand, the possibility of relying on generalised reasoning. As regards the third part of that plea, the Council maintains the position which it defended before the Court of First Instance, namely that there is a general need for confidentiality in respect of legal advice on legislative questions, since, first, the disclosure of such advice could give rise to lingering doubts as to the lawfulness of the legislative act concerned and, secondly, the independence of its legal service would be compromised by systematic disclosure of that advice.
- 55 As regards the first part of this plea, it must be held that the Court of First Instance could reasonably conclude from the fact that the Council agreed to disclose the introductory paragraph of the legal opinion in question but refused access to the rest of that opinion by relying on the protection of legal advice that that institution had indeed examined the request for disclosure of that legal opinion in the light of the latter's content and had thus at the very least completed the first stage of the examination described in paragraphs 37 to 47 of this judgment. Consequently, the first part of this plea must be rejected.
- 56 As regards the second part of this plea, the fact that the Court of First Instance accepted that reasons of a general kind could be taken into account by the Council in order to justify the partial refusal of access to the legal opinion at issue does not, as follows from paragraph 50 of this judgment, in itself invalidate the Court of First Instance's examination of that refusal.
- 57 It must, however, be pointed out, first, that the Court of First Instance did not require the Council to have checked whether the reasons of a general nature on which it relied were in fact applicable to the legal opinion whose disclosure was requested. Secondly, as will be apparent from the considerations concerning the third part of this plea which follow, the Court of First Instance erred in holding that there was a general need for confidentiality in respect of advice from the Council's legal service relating to legislative matters.
- 58 Neither of the two arguments raised in that regard by the Council and restated by the Court of First Instance in paragraphs 78 and 79 of the judgment under appeal can substantiate that assertion.
- 59 As regards, first, the fear expressed by the Council that disclosure of an opinion of its legal service relating to a legislative proposal could lead to doubts as to the lawfulness of the legislative act concerned, 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 lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole.
- 60 Furthermore, the risk that doubts might be engendered in the minds of European citizens as regards the lawfulness of an act adopted by the Community legislature because the Council's legal service had given an unfavourable opinion would more often than not fail to arise if the statement of

reasons for that act was reinforced, so as to make it apparent why that unfavourable opinion was not followed.

- 61 Consequently, to submit, in a general and abstract way, that there is a risk that disclosure of legal advice relating to legislative processes may give rise to doubts regarding the lawfulness of legislative acts does not suffice to establish that the protection of legal advice will be undermined for the purposes of the second indent of Article 4(2) of Regulation No 1049/2001 and cannot, accordingly, provide a basis for a refusal to disclose such advice.
- 62 As regards, secondly, the Council's argument that the independence of its legal service would be compromised by possible disclosure of legal opinions issued in the course of legislative procedures, it must be pointed out that that fear lies at the very heart of the interests protected by the exception provided for in the second indent of Article 4(2) of Regulation No 1049/2001. As is apparent from paragraph 42 of this judgment, that exception seeks specifically to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice.
- 63 However, in that regard, the Council relied before both the Court of First Instance and the Court on mere assertions, which were in no way substantiated by detailed arguments. In view of the considerations which follow, there would appear to be no real risk that is reasonably foreseeable and not purely hypothetical of that interest being undermined.
- 64 As regards the possibility of pressure being applied for the purpose of influencing the content of opinions issued by the Council's legal service, it need merely be pointed out that even if the members of that legal service were subjected to improper pressure to that end, it would be that pressure, and not the possibility of the disclosure of legal opinions, which would compromise that institution's interest in receiving frank, objective and comprehensive advice and it would clearly be incumbent on the Council to take the necessary measures to put a stop to it.
- 65 As regards the Commission's argument that it could be difficult for an institution's legal service which had initially expressed a negative opinion regarding a legislative act in the process of being adopted subsequently to defend the lawfulness of that act if its opinion had been published, it must be stated that such a general argument cannot justify an exception to the openness provided for by Regulation No 1049/2001.
- 66 In view of those considerations, there appears to be no real risk that is reasonably foreseeable and not purely hypothetical that disclosure of opinions of the Council's legal service issued in the course of legislative procedures might undermine the protection of legal advice within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001.
- 67 In any event, in so far as the interest in protecting the independence of the Council's legal service could be undermined by that disclosure, that risk would have to be weighed up against the overriding public interests which underlie Regulation No 1049/2001. As was pointed out in paragraphs 45 to 47 of this judgment, such an overriding public interest is constituted by the fact that disclosure of documents containing the advice of an institution's legal service on legal questions arising when legislative initiatives are being debated

increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act, as referred to, in particular, in recitals 2 and 6 of the preamble to Regulation No 1049/2001.

- 68 It follows from the above considerations that Regulation No 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process.
- 69 That finding does not preclude a refusal, on account of the protection of legal advice, to disclose a specific legal opinion, given in the context of a legislative process, but being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question. In such a case, it is incumbent on the institution concerned to give a detailed statement of reasons for such a refusal.
- 70 In that context, it must also be borne in mind that, under Article 4(7) of Regulation No 1049/2001, an exception can only apply for the period during which protection is justified on the basis of the content of the document.
- 71 Having regard to all those considerations, it is apparent that the Court of First Instance erred in holding, in paragraphs 77 to 80 of the judgment under appeal, that the contested decision could comply with the obligation to give reasons and be justified by reference to a general need for confidentiality which applies to legal advice relating to legislative questions.

*Agrofert Holdings* judgment:

- 119 It follows from the second indent of Article 4(2) of Regulation No 1049/2001 that the institutions are to refuse access to a document where disclosure would undermine the protection of court proceedings and legal advice, unless there is an overriding public interest in disclosure.
- 120 In the present case, that provision concerns the refusal of access to two documents, that is to say, first, the reply of the Commission's Legal Service regarding the inter-service consultation note containing a draft decision on the notification (Internal Document 3) and, second, the exchange of e-mails concerning that draft between the competent service and the Commission's Legal Service (Internal Document 4).
- 121 First of all, those documents, which were sent to the Court (see paragraph 25 above), contain advice given by the Commission's Legal Service. Document 3 and, at least in part, Document 4 must therefore be regarded as legal advice within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001.
- 122 The question then arises as to whether disclosure of those documents is liable to undermine the protection of legal advice within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001.
- 123 In that regard, it must be borne in mind that the exception relating to legal advice must be interpreted as intended to protect the Commission's interest in seeking legal advice and receiving frank, objective and comprehensive advice. The risk of that interest being undermined must, in order to be capable of being

relied on, be reasonably foreseeable and not purely hypothetical (see, to that effect, *Sweden and Turco v Council*, cited in paragraph 57 above, paragraphs 42 and 43).

- 124 In addition, if the Commission decides to refuse access to a document which it has been requested to disclose, it must explain how access to that document could specifically and effectively undermine the interest protected by an exception laid down in Article 4 of Regulation No 1049/2001 (see, to that effect, *Sweden and Turco v Council*, cited in paragraph 57 above, paragraph 49).
- 125 It is, in principle, open to the Commission to base its decisions in that regard on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature. However, it is incumbent on the Commission to establish in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose (see, to that effect, *Sweden and Turco v Council*, cited in paragraph 57 above, paragraph 50).
- 126 In the present case, the decision of 13 February 2007 refuses access to the legal advice in question by merely pointing out the need to maintain its confidentiality in order to be able to obtain full and frank legal advice.
- 127 By so doing, the Commission bases itself on a general consideration, capable of being raised in connection with any other request for disclosure relating to documents of the same type, without specifically ascertaining, for each of the legal opinions requested, whether that general consideration was actually applicable to the facts of the present case.
- 128 The decision of 13 February 2007 does not in any way explain how access to the documents requested could, having regard to the facts of the present case, specifically and effectively undermine the interest protected, that is to say, that of having the benefit of full and frank legal advice. It gives no indication as to how the risk of undermining the interest protected is reasonably foreseeable and not purely hypothetical. In the present case, the merger proceedings had been closed by decision of 20 April 2005, and thus for more than one year, when the request for access was made on 28 June 2006. Since that decision was not the subject of an appeal, it was definitive at the date on which the request was made. In addition, there is no mention of any connected pending proceedings or proceedings concerning the same sector. In those circumstances, the Commission fails to show how disclosure of the legal advice in question would, in the present case, constitute a genuine risk, reasonably foreseeable and not purely hypothetical, to the protection of its legal advice, within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001. Accepting the Commission's argument in the present case would amount to permitting refusal of access to that category of documents on the sole ground that they consist of legal advice.
- 129 The argument, raised at the hearing, that the Commission is acting as an administrative authority and not in its legislative capacity cannot call that conclusion into question. Even if it may be inferred from the case-law of the Court of Justice that greater openness is required where the requested document has formed the basis of a legislative act (see, to that effect, *Sweden*

*and Turco v Council*, cited in paragraph 57 above, paragraphs 45 and 46), openness remains the principle, including in the case where the institution is acting as an administrative authority. Such general and abstract reasoning as that used in the present case, underlying a general need for confidentiality of the Commission's legal advice, cannot be regarded as sufficient, as otherwise the principle of strict interpretation of the exceptions laid down in Article 4 of Regulation No 1049/2001, in particular of that relating to the protection of legal advice, would be undermined.

130 Finally, with regard to the refusal to grant partial access to the legal advice in question, the Commission explains that the documents concerned are very brief and that the parts which could be disclosed were not severable from those which could not.

131 That, however, cannot of itself suffice to justify the refusal of access to those documents in their entirety. Such an explanation, although relating to the content of the documents in question, leaves unanswered the question of how access, including partial access, to the legal advice in question could specifically and effectively undermine the interest protected, that is to say, the ability to obtain frank, objective and comprehensive legal advice.

132 In the light of the foregoing, the refusal to grant access, including partial access, to the legal advice requested must be annulled as being wrong in law, on the ground that the Commission has not shown that disclosure of all of the documents in question would specifically and effectively undermine the protection of legal advice, without it being necessary to examine whether there may be an overriding public interest in that regard.

*Editions Jacob* judgment:

152 Aux termes de l'article 4, paragraphe 2, deuxième tiret, du règlement n° 1049/2001, les institutions refusent l'accès à un document dans le cas où sa divulgation porterait atteinte à la protection des procédures juridictionnelles et des avis juridiques, à moins qu'un intérêt public supérieur ne justifie la divulgation du document demandé.

153 La Commission a refusé de divulguer l'avis de son service juridique du 10 octobre 2002 portant sur l'application de l'article 3, paragraphe 5, sous a), du règlement n° 4064/89, document visé au point 1 ci-dessus, sous g), en se fondant sur cette disposition.

154 Tout d'abord, il y a lieu de constater que ledit document, communiqué au Tribunal (voir point 23 ci-dessus), contient, par-delà sa dénomination, un avis juridique émis par le service juridique de la Commission. Ce document doit donc être considéré, dans son intégralité, comme un avis juridique au sens de l'article 4, paragraphe 2, deuxième tiret, du règlement n° 1049/2001, susceptible de tomber dans le champ d'application de l'exception prévue par cette disposition.

155 Ensuite, il y a lieu de déterminer si la divulgation de cet avis juridique porterait atteinte à la protection des avis juridiques au sens de l'article 4, paragraphe 2, deuxième tiret, du règlement n° 1049/2001.

- 156 À cet égard, il y a lieu de rappeler que l'exception relative aux avis juridiques doit être interprétée comme visant à protéger l'intérêt de la Commission à demander des avis juridiques et à recevoir des avis francs, objectifs et complets. Le risque d'atteinte à cet intérêt doit, pour pouvoir être invoqué, être raisonnablement prévisible, et non purement hypothétique (arrêt Turco, point 68 supra, points 42 et 43).
- 157 En l'espèce, la décision attaquée justifie le refus de divulgation de l'avis concerné au motif que les avis juridiques sont des documents internes ayant pour but essentiel d'offrir à la Commission et à ses services des opinions sur des questions juridiques, sur la base desquelles la Commission et ses services adoptent leurs positions définitives. Il serait essentiel que ces avis puissent être donnés en toute franchise et en toute objectivité. Dans le cas d'espèce, la communication de l'avis du service juridique de la Commission, ainsi que des questions soumises à celui-ci par la DG « Concurrence », aurait pour effet de rendre publique une discussion interne relative à la portée de l'article 3, paragraphe 5, sous a), du règlement n° 4064/89. Si ledit service juridique avait dû tenir compte de la publication ultérieure de son avis, ce dernier ne serait pas exprimé en toute indépendance. Dès lors, l'élaboration d'un avis écrit sur cette question perdrait tout son intérêt, ce qui priverait la Commission d'un instrument essentiel à la bonne exécution de ses tâches.
- 158 Il convient de constater que ce n'est pas la seule circonstance que le document en cause est un avis juridique qui est invoquée par la Commission dans la décision attaquée pour justifier l'application de l'exception concernée, mais le fait que la divulgation de cet avis risquerait de transmettre au public des informations sur l'état des discussions internes entre la DG « Concurrence » et son service juridique, relatives à la portée de l'article 3, paragraphe 5, sous a), du règlement n° 4064/89.
- 159 Or, la divulgation de la note en cause serait susceptible de conduire le service juridique de la Commission à faire preuve, à l'avenir, de retenue et de prudence dans la rédaction de telles notes afin de ne pas affecter la capacité de décision de la Commission dans les matières où elle intervient en qualité d'administration.
- 160 Il convient également de relever que, en l'espèce, le risque d'atteinte à la protection des avis juridiques prévue à l'article 4, paragraphe 2, deuxième tiret, du règlement n° 1049/2001 est raisonnablement prévisible et non purement hypothétique. En effet, outre les raisons indiquées aux points 157 et 159 ci-dessus, la divulgation de ces avis risque de mettre la Commission dans la situation délicate dans laquelle son service juridique pourrait se voir obligé de défendre devant le Tribunal une position qui n'était pas celle qu'il avait fait valoir en sa qualité de conseil des services chargés du dossier au cours des discussions internes qui ont eu lieu lors de la procédure administrative. Or, le risque qu'une telle opposition se produise est susceptible d'affecter considérablement, à la fois, la liberté d'opinion dudit service juridique et sa capacité à défendre efficacement devant le juge de l'Union, sur un pied d'égalité avec les autres représentants légaux des différentes parties à la procédure juridictionnelle, la position définitive de la Commission et le processus décisionnel interne de cette dernière. La Commission, en effet, décide en tant que collège, en fonction de la mission particulière qui lui est impartie et doit avoir la liberté de défendre une position juridique qui diffère de celle prise initialement par son service juridique.

- 161 Par ailleurs, à la différence des cas où les institutions agissent en qualité de législateur, dans lesquels un accès plus large aux documents devrait être autorisé aux termes du considérant 6 du règlement n° 1049/2001 (arrêt Turco, point 68 supra, point 46), l'avis juridique litigieux a été élaboré dans le cadre des fonctions purement administratives de la Commission. Or, l'intérêt du public à obtenir communication d'un document au titre de l'obligation de transparence, qui tend à assurer une meilleure participation des citoyens au processus décisionnel et à garantir une plus grande légitimité, une plus grande efficacité et une plus grande responsabilité de l'administration à l'égard des citoyens dans un système démocratique, n'est pas le même lorsque ce document relève d'une procédure administrative visant l'application des règles régissant le contrôle des concentrations ou le droit de la concurrence en général ou lorsqu'il est relatif à une procédure dans le cadre de laquelle l'institution concernée intervient en qualité de législateur.
- 162 Il y a donc lieu de rejeter le grief de la requérante selon lequel la divulgation de l'avis du service juridique visé au point 1 ci-dessus, sous g), ne porterait pas atteinte à la protection des avis juridiques.
- 163 Il résulte de l'ensemble de ce qui précède que les premier et second moyens sont fondés, sauf en ce qui concerne le refus de divulgation de l'avis du service juridique visé au point 1 ci-dessus, sous g).

*MyTravel* judgment:

- 122 The second indent of Article 4(2) of Regulation No 1049/2001 provides that the Commission is to refuse access to a document where disclosure would undermine the protection of 'court proceedings and legal advice', unless there is an overriding public interest in disclosure of the document.
- 123 The expression 'legal advice' must be understood as meaning that the protection of the public interest may preclude disclosure of the content of documents drawn up by the Commission's legal service, not only in the course of legal proceedings, but also on any other ground.
- 124 In the present case, it is apparent from the second decision that it is not merely the fact that the documents at issue were – following individual examination – held to constitute legal advice, which was invoked by the Commission as a basis for its application of the exception, but also the fact that disclosure of the notes in reply from the legal service would risk communicating to the public information on the state of internal discussions between DG Competition and the legal service on the lawfulness of the assessment of the compatibility of the Airtours/First Choice concentration with the common market, which would, as such, risk affecting decisions which might fall to be made as regards the same parties or in the same sector (see paragraphs 22, 99 and 100 above).
- 125 To accept that the notes in question should be disclosed would be liable to lead the legal service to display reticence and caution in the future in the drafting of such notes in order not to affect the Commission's decision-making capacity in areas in which it is involved in its administrative capacity.

- 126 It must also be held that the risk of undermining the protection of legal advice laid down by the second indent of Article 4(2) is reasonably foreseeable and not purely hypothetical. As well as the reasons referred to in paragraph 124 above, disclosure of that advice would risk putting the Commission in the difficult position in which its legal service might see itself required to defend a position before the Court which was not the same as the position which it had argued for internally in its role as adviser to the services responsible for the file, which it was its duty to perform during the administrative procedure. It is clear that the risk of such a conflict arising would be liable to have a considerable effect on both the freedom of the legal service to express its views and its ability effectively to defend before the Community judicature, on an equal footing with the other legal representatives of the various parties to legal proceedings, the Commission's definitive position and the internal decision-making process of that institution which reaches its decisions, as a College, having regard to the particular task assigned to it, and which must have the freedom to defend a legal position which differs from that initially adopted by its legal service.
- 127 That analysis is not called into question by the fact that the *Airtours* decision, in respect of which the notes in reply from the legal service were written, has been annulled by the Court. The exception at issue protects documents prepared at a point prior to the adoption of the definitive decision, irrespective, in principle, of whether that decision is subsequently sustained or annulled in proceedings before the Community judicature.
- 128 Consequently the applicant's complaint that disclosure of the notes in reply from the legal service would not undermine the protection of legal advice must be rejected.
- 129 As regards the existence of an overriding public interest which would, were it to be established, justify disclosure of those documents, reference should be made to paragraphs 38 and 60 to 66 above. Consequently, the applicant's complaint that there is an overriding public interest in disclosure of the internal documents covered by the exception relating to the protection of legal advice must be rejected.

*f) Court proceedings ((Article 4(2), second indent)*

*API case:*

- 76 Accordingly, it must be determined whether general considerations supported a finding that the Commission was entitled to base its decision on the presumption that disclosure of those pleadings would undermine the court proceedings and that, in so doing, it was not under an obligation to carry out a specific assessment of the content of each of those documents.
- 77 First and foremost in that connection, it should be noted that pleadings lodged before the Court of Justice in court proceedings are wholly specific since they are inherently more a part of the judicial activities of the Court than of the administrative activities of the Commission, those latter activities not requiring, moreover, the same breadth of access to documents as the legislative activities of an EU institution (see, to that effect, *Commission v Technische Glaswerke Ilmenau*, paragraph 60).

- 78 Those pleadings are drafted exclusively for the purposes of the court proceedings, in which they play the key role. It is by means of the application initiating proceedings that the applicant defines the parameters of the dispute and it is, in particular, during the written procedure – the oral procedure not being obligatory – that the parties provide the Court with the information on the basis of which it is to adjudicate.
- 79 It is clear, both from the wording of the relevant provisions of the Treaties and from the broad logic of Regulation No 1049/2001 and the objectives of the relevant EU rules, that judicial activities are as such excluded from the scope, established by those rules, of the right of access to documents.
- 80 As regards, first, the relevant provisions of the Treaties, it is quite clear from the wording of Article 255 EC that the Court is not subject to the obligations of transparency laid down in that provision.
- 81 The purpose of that exclusion emerges even more clearly from Article 15 TFEU, which replaced Article 255 EC and which, while extending the scope of the principle of transparency, specifies – in the fourth subparagraph of paragraph 3 thereof – that the Court of Justice is to be subject to paragraph 3 only when exercising its administrative tasks.
- 82 It follows that the fact that the Court of Justice is not among the institutions which, in accordance with Article 255 EC, are subject to those obligations is justified precisely because of the nature of the judicial responsibilities which it is called upon to discharge under Article 220 EC.
- 83 For that matter, that interpretation is also borne out by the broad logic of Regulation No 1049/2001, the legal basis for which is Article 255 EC itself. Article 1(a) of Regulation No 1049/2001, which defines the scope of that regulation, makes no reference to the Court and, by dint of that omission, excludes it from the institutions subject to the obligations of transparency which it lays down, while Article 4 of that regulation devotes one of the exceptions to the right of access to the documents of the institutions precisely to the protection of court proceedings.
- 84 Thus, it follows both from Article 255 EC and from Regulation No 1049/2001 that the limitations placed on the application of the principle of transparency in relation to judicial activities pursue the same objective: that is to say, they seek to ensure that exercise of the right of access to the documents of the institutions does not undermine the protection of court proceedings.
- 85 In that regard, it should be noted that the protection of court proceedings implies, in particular, that compliance with the principles of equality of arms and the sound administration of justice must be ensured.
- 86 With regard, first, to equality of arms, it should be noted that – as the General Court pointed out, in substance, in paragraph 78 of the judgment under appeal – if the content of the Commission’s pleadings were to be open to public debate, there would be a danger that the criticism levelled against them, whatever its actual legal significance, might influence the position defended by the Commission before the EU Courts.

- 87 In addition, such a situation could well upset the vital balance between the parties to a dispute before those Courts – 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.
- 88 Furthermore, it should be borne in mind in that regard that the principle of equality of arms – together with, among others, the principle of *audi alteram partem* – is no more than a corollary of the very concept of a fair hearing (see, by analogy, Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 31; Case C-89/08 P *Commission v Ireland and Others* [2009] ECR I-0000, paragraph 50; and Case C-197/09 RX-II *Réexamen M v EMEA* [2009] ECR I-0000, paragraphs 39 and 40).
- 89 As the Court has held, the principle of *audi alteram partem* must apply to all parties to proceedings before the EU Courts, whatever their legal status. It follows that the EU institutions may also rely on that principle when they are parties to such proceedings (see, to that effect, *Commission v Ireland and Others*, paragraph 53).
- 90 API is therefore incorrect in arguing that, being a public institution, the Commission cannot rely on a right to equality of arms because that right is available only to individuals.
- 91 Admittedly, as API contends, it is Regulation No 1049/2001 itself which imposes obligations of transparency only on the institutions which it lists. Nevertheless, the fact that such obligations are imposed only on the institutions concerned cannot, in the context of pending court proceedings, lead the procedural position of those institutions to be undermined vis-à-vis the principle of equality of arms.
- 92 As regards, secondly, the sound administration of justice, the exclusion of judicial activities from the scope of the right of access to documents, without any distinction being drawn between the various procedural stages, is justified in the light of the need to ensure that, throughout the court proceedings, the exchange of argument by the parties and the deliberations of the Court in the case before it take place in an atmosphere of total serenity.
- 93 Disclosure of the pleadings in question would have the effect of exposing judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings.
- 94 It is therefore appropriate to allow a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings, for the purposes of the second indent of Article 4(2) of Regulation No 1049/2001, while those proceedings remain pending.
- 95 Such disclosure would flout the special nature of that category of documents and would be tantamount to making a significant part of the court proceedings subject to the principle of transparency. As a consequence, the effectiveness of the exclusion of the Court of Justice from the institutions to which the principle

of transparency applies, in accordance with Article 255 EC, would be largely frustrated.

- 96 In addition, such a presumption is also justified in the light of the Statute of the Court of Justice of the European Union and the Rules of Procedure of the EU Courts (see, by analogy, *Commission v Technische Glaswerke Ilmenau*, paragraph 55).
- 97 Although the Statute of the Court of Justice provides that the hearing in court is to be public (Article 31), it restricts those entitled to receive communication of procedural documents to the parties and to the institutions whose decisions are in dispute (Article 20, second paragraph).
- 98 Similarly, the Rules of Procedure of the EU Courts provide for procedural documents to be served only on the parties to the proceedings. In particular, Article 39 of the Rules of Procedure of the Court of Justice, Article 45 of the Rules of Procedure of the General Court and Article 37(1) of the Rules of Procedure of the Civil Service Tribunal provide that the application is to be served only on the defendant.
- 99 It is clear, therefore, that neither the Statute of the Court of Justice nor the above Rules of Procedure provide for any third-party right of access to pleadings submitted to the Court in court proceedings.
- 100 Account must be taken of that fact for the purposes of interpreting the exception provided for under the second indent of Article 4(2) of Regulation No 1049/2001, for if third parties were able, on the basis of Regulation No 1049/2001, to obtain access to those pleadings, the system of procedural rules governing the court proceedings before the EU Courts would be called into question (see, by analogy, *Commission v Technische Glaswerke Ilmenau*, paragraph 58).
- 101 In that regard, it should be noted that API is beside the point in arguing that other national legal systems have adopted different approaches, by providing, inter alia, that courts may permit access to pleadings lodged before them. As the Commission maintains, and as the General Court rightly held in paragraph 85 of the judgment under appeal, the Rules of Procedure of the EU Courts make no provision for a third-party right of access to procedural documents lodged at their registries by the parties.
- 102 On the contrary, it is precisely the existence of those Rules of Procedure, by which matters concerning the pleadings in question remain governed, and the fact that not only do they make no provision for a third-party right of access to the case-file but, in accordance with Article 31 of the Statute of the Court of Justice, they actually do provide that a hearing may be heard *in camera* or that certain information, such as the names of parties, may be kept confidential, which lend authority to the presumption that disclosure of those pleadings would undermine court proceedings (see, by analogy, *Commission v Technische Glaswerke Ilmenau*, paragraphs 56 to 58).
- 103 It is true that, as the Court has stated, such a general presumption does not exclude the right of an interested party to demonstrate that a given document, disclosure of which has been applied for, is not covered by that presumption (*Commission v Technische Glaswerke Ilmenau*, paragraph 62). The fact

remains that, in the present case, it does not appear from the judgment under appeal that API availed itself of that right.

- 104 In the light of all the above considerations, it must be held that the General Court erred in law in holding that, in the absence of any evidence capable of rebutting that presumption, the Commission is under an obligation, after the hearing has taken place, to carry out a concrete assessment of each document requested in order to determine whether, given the specific content of that document, its disclosure would undermine the court proceedings to which it relates.

*[as regards documents concerning infringement proceedings:]*

- 130 It must be noted from the outset that, although, for the reasons set out in paragraphs 68 to 104 above, the disclosure of pleadings lodged in pending court proceedings is presumed to undermine the protection of those proceedings, because of the fact that the pleadings constitute the basis on which the Court carries out its judicial activities, that is not the case where the proceedings in question have been closed by a decision of the Court.

- 131 In the latter case, there are no longer grounds for presuming that disclosure of the pleadings would undermine the judicial activities of the Court since those activities come to an end with the closure of the proceedings.

- 132 Admittedly, the possibility cannot be ruled out that – as the Commission alleges – disclosure of pleadings relating to court proceedings which are closed but connected to other proceedings which remain pending may create a risk that the later proceedings might be undermined, especially where the parties to the pending case are not the same as those to the case which has been closed. In such a situation, if the Commission were to use the same arguments in support of its legal position in both sets of proceedings, disclosure of its arguments in the pending proceedings could give rise to the risk that they might be undermined.

- 133 Nevertheless, such a risk depends on a number of factors, such as the degree of similarity between the arguments put forward in the two cases. If the Commission's pleadings are repeated only in part, partial disclosure could be sufficient to prevent any risk of undermining the pending proceedings.

- 134 Accordingly, only a specific examination of the documents to which access is requested, undertaken in accordance with the criteria referred to in paragraph 72 above, can enable the Commission to establish whether their disclosure may be refused on the basis of the second indent of Article 4(2) of Regulation No 1049/2001.

- 135 It follows that the General Court was fully entitled to hold, in substance, that the risk that a protected interest might be undermined – a condition for the application of that provision – cannot be presumed on the basis of a mere link between the two sets of court proceedings concerned.

*[as for the question of the public interest override:]*

- 152 It should be noted, first of all, that, after stating that, in principle, the overriding public interest – as referred to in the last line of Article 4(2) of Regulation

No 1049/2001 – must be distinct from the principle of transparency, the General Court went on to find in paragraph 97 of the judgment under appeal that the fact that a party requesting access does not invoke a public interest distinct from the principle of transparency does not automatically imply that it is unnecessary to weigh the interests at stake: according to the General Court, ‘the invocation of those same principles may, in the light of the particular circumstances of the case, be so pressing that it overrides the need to protect the documents in question’.

- 153 Accordingly, the Kingdom of Sweden and API are incorrect in stating that the General Court ruled out the possibility that the interest in transparency could constitute an overriding public interest for the purposes of the above provision.
- 154 Next, as the Commission and the United Kingdom argue, the General Court – in paragraphs 98 and 99 of the judgment under appeal – weighed the interest in transparency against the interest relating to protection of the aim of preventing all external influences on the proper conduct of court proceedings.
- 155 Thus, API’s argument that the General Court did not undertake that balancing exercise is also unfounded.
- 156 Lastly, as regards the argument of the Kingdom of Sweden to the effect that the General Court did not carry out that balancing exercise correctly in that it failed to take into account the content of the documents in question, it should be noted that, according to the General Court, it is only where the particular circumstances of the case substantiate a finding that the principle of transparency is especially pressing that that principle can constitute an overriding public interest capable of prevailing over the need for protection of the disputed documents and, accordingly, capable of justifying their disclosure in accordance with the last line of Article 4(2) of Regulation No 1049/2001.
- 157 As it is, even if it were possible to justify the disclosure of documents on that basis where it is presumed that disclosure will undermine one of the interests protected by the system of exceptions provided for under Article 4(2) of Regulation No 1049/2001, it must be held that it is apparent from paragraph 95 of the judgment under appeal that API merely claimed that the public’s right to be informed about important issues of Community law, such as those concerning competition, and about issues which are of great political interest, which is true of the issues raised by infringement proceedings, prevails over the protection of the court proceedings.
- 158 Nevertheless, such vague considerations cannot provide an appropriate basis for establishing that, in the present case, the principle of transparency was in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question.
- 159 In those circumstances, the General Court was fully entitled to find that the interest relied on by API was not such as to justify disclosure of the pleadings in question and that, accordingly, it was unnecessary to carry out a concrete examination of the content of those documents in those circumstances.

*Franchet and Byk* judgment:

- 88 The expression 'court proceedings' has been interpreted by the Court of First Instance, in the context of the application of Decision 94/90, as meaning that the protection of the public interest precludes the disclosure of the content of documents drawn up solely for the purposes of specific court proceedings (*Interporc II*, paragraph 40).
- 89 Given that the term 'court proceedings' has thus already been interpreted in the context of the right of public access to the institutions' documents, the Court considers that that definition is also relevant for the purposes of Regulation No 1049/2001.
- 90 Similarly, the Court of First Instance has already held that the words 'documents drawn up solely for the purposes of specific court proceedings' must be understood to mean the pleadings or other documents lodged, internal documents concerning the investigation of the case, and correspondence concerning the case between the Directorate-General concerned and the Legal Service or a lawyers' office. The purpose of this definition of the scope of the exception is to ensure both the protection of work done within the Commission and confidentiality and the safeguarding of professional privilege for lawyers (*Interporc II*, paragraph 41).
- 91 However, the Court of First Instance has held that the exception based on the protection of public interest (court proceedings) contained in the code of conduct cannot enable the Commission to escape from its obligation to disclose documents which were drawn up in connection with a purely administrative matter. That principle must be respected even if the disclosure of such documents in proceedings before the Community judicature might be prejudicial to the Commission. The fact that court proceedings for annulment were initiated against the decision taken following the administrative procedure is immaterial in that regard (*Interporc II*, paragraph 42).
- 92 It is appropriate to examine, in the light of that case-law, whether the documents sent by OLAF to the Luxembourg and French authorities and the documents sent by OLAF to the Commission are documents drawn up solely for the purposes of specific court proceedings.
- 93 It is apparent from recital 1 to Regulation No 1073/1999 that the aim of OLAF's investigations is the protection of the Communities' financial interests and the fight against fraud and any other illegal activities detrimental to the Communities' financial interests. According to recital 5 to that regulation, OLAF's responsibility extends beyond the protection of financial interests to include all activities relating to safeguarding Community interests against irregular conduct liable to result in administrative or criminal proceedings. It is therefore to attain those objectives that OLAF carries out internal and external investigations, the results of which are presented in a report, in accordance with Article 9 of Regulation No 1073/1999, and that OLAF forwards information to the national authorities and the institutions, in accordance with Article 10 of Regulation No 1073/1999.
- 94 In accordance with Article 9(2) of Regulation No 1073/1999, OLAF's reports constitute, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors, admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary.

- 95 The action taken by the national competent authorities or the institutions in response to the reports and information forwarded by OLAF is however within their sole and entire responsibility (order of the President of the Court in Case C-521/04 P(R) *Tillack v Commission* [2005] ECR I-3103, paragraph 32).
- 96 Therefore, it is possible that a communication from OLAF to the national authorities, pursuant to Article 10(1) and (2) of Regulation No 1073/1999 or to an institution, pursuant to Article 10(3) of that regulation, would not lead to the opening of judicial proceedings at national level or disciplinary or administrative proceedings at Community level.
- 97 To find under these circumstances that the various documents sent by OLAF were drawn up solely for the purposes of court proceedings would not correspond to the interpretation given by the case-law to that exception and runs counter to the obligation to construe and apply the exceptions restrictively (see paragraph 84 above).
- 98 Moreover, compliance with national procedural rules is sufficiently safeguarded if the institution ensures that disclosure of the documents does not constitute an infringement of national law. Therefore, in the event of doubt, OLAF should have consulted the national court and should have refused access only if that court objected to disclosure of the documents (*van der Wal*, paragraph 28).
- 99 It is clear from the documents before the Court that such consultation did not take place, as indeed the Commission admitted during the hearing when replying to a question from the Court.
- 100 The first contested decision states only in this respect:
- ‘Since judicial investigations are in progress in France and Luxembourg, access to the dossier is governed by the procedural rules which apply in those two countries. You may approach the competent French and/or Luxembourg authorities, in order to request access to the dossier which was sent to them. This will then be for them to decide, and OLAF will not object to their decision.’
- 101 Such an approach is inconsistent with that taken by the Court of Justice in *van der Wal* (paragraph 29). According to the Court, a procedure whereby the institution consults the national court in the event of doubt avoids the applicant’s having to make a request first to the competent national court and then to the Commission if that court considers that national procedural law does not preclude disclosure of the documents requested but considers that the application of Community rules may lead to a different solution. The procedure is therefore also consistent with the requirements of good administration.
- 102 Consequently, it must be held that the first contested decision is vitiated by an error in so far as it finds that the documents requested in the context of Case T-391/03 fall within the exception based on the protection of court proceedings within the meaning of Regulation No 1049/2001.

*g) Inspections, investigations and audits ((Article 4(2), third indent)*

*API* judgment:

- 118 With regard to the substance, it should be noted that although, admittedly, the procedures provided for under Articles 226 EC and 228 EC have the same purpose, that is to say, to ensure the effective application of EU law, the fact remains that they constitute two distinct procedures, each with its own subject-matter.
- 119 The procedure established under Article 226 EC is designed to obtain a declaration that the conduct of a Member State is in breach of EU law and to terminate that conduct (see Joined Cases 15/76 and 16/76 *France v Commission* [1979] ECR 321, paragraph 27, and Case C-456/05 *Commission v Germany* [2007] ECR I-10517, paragraph 25), while the procedure provided for under Article 228 EC has a much narrower ambit, being designed only to induce a defaulting Member State to comply with a judgment establishing a breach of obligations (Case C-304/02 *Commission v France* [2005] ECR I-6263, paragraph 80).
- 120 It follows that, once the Court of Justice has held, by a judgment delivered on the basis of Article 226 EC, that a Member State has failed to fulfil its obligations, the continuation of negotiations between that Member State and the Commission is no longer designed to establish the existence of the infringement – which is precisely what the Court of Justice has found – but to determine whether the necessary conditions for the bringing of an action under Article 228 EC are met.
- 121 In addition, as regards the possibility that the infringement proceedings may lead to an amicable settlement, it is clear that, once the infringement has been found by judgment of the Court of Justice delivered on the basis of Article 226 EC, an amicable settlement is no longer possible in the case of that infringement.
- 122 Accordingly, it must be held that the General Court did not err in law by holding that it cannot be presumed that disclosure of pleadings lodged in a procedure which ultimately led to the delivery of a judgment on the basis of Article 226 EC undermines investigations which could lead to proceedings being brought under Article 228 EC.

*TGI* judgment:

- 50 As a preliminary observation, it should be noted that the application made by TGI concerns the whole of the administrative file regarding procedures for reviewing the State aid granted to it.
- 51 It should be remembered that, having been adopted on the basis of Article 255(2) EC, Regulation No 1049/2001 is designed, as recital 4 and Article 1 thereof indicate, to confer on the public as wide a right of access as possible to documents of the institutions. It is also apparent from the said regulation, in particular from recital 11 and from Article 4 thereof, which lays down a regime of exceptions in that regard, that that right of access is nevertheless subject to certain limits based on reasons of public or private interest.

- 52 In this case, the Commission had refused, precisely, to communicate to TGI documents relating to procedures for reviewing State aid which had been granted to it, invoking the exception to the right of access laid down in Article 4(2), third indent, of Regulation No 1049/2001, based on protection of the purposes of inspections, investigations and audits. As is apparent from paragraph 76 of the judgment under appeal, those documents, such as covered by the application for access brought by TGI on the basis of that regulation, do indeed fall within an activity of 'investigation', within the meaning of that provision.
- 53 It is true that, in order to justify refusal of access to a document the disclosure of which has been requested, it is not sufficient, in principle, for that document to fall within an activity mentioned in Article 4(2) of Regulation No 1049/2001. The institution concerned must also supply explanations as to how access to that document could specifically and effectively undermine the interest protected by an exception laid down in that article (Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 49).
- 54 However, the Court has acknowledged that it is, in principle, open to the Community institution to base its decisions in that regard on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature (*Sweden and Turco*, paragraph 50).
- 55 As regards procedures for reviewing State aid, such general presumptions may arise from Regulation No 659/1999 and from the case-law concerning the right to consult documents on the Commission's administrative file. In that regard, it should be noted that, according to recital 2 thereof, Regulation No 659/1999 is designed to codify the consistent practice of the Commission in applying Article 88 EC, that practice having been developed and established in conformity with the case-law.
- 56 Regulation No 659/1999, and, in particular, Article 20 thereof, do not lay down any right of access to documents in the Commission's administrative file for interested parties in the context of the review procedure opened in accordance with Article 88(2) EC.
- 57 By contrast, Article 6(2) of the said regulation provides that comments received by the Commission in the context of the said review procedure are to be submitted to the Member State concerned, the latter then having the opportunity to reply to those comments within a given time-limit. The procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the Member State responsible for granting the aid, and the Commission cannot, without infringing the rights of the defence, use in its final decision information on which that Member State was not afforded an opportunity to comment (Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* [2002] ECR I-7869, paragraph 81).
- 58 It follows from the above that the interested parties, except for the Member State responsible for granting the aid, do not have a right under the procedure for reviewing State aid to consult the documents on the Commission's administrative file. Account must be taken of that fact for the purposes of interpreting the exception laid down by Article 4(2), third indent, of Regulation

No 1049/2001. If those interested parties were able to obtain access, on the basis of Regulation No 1049/2001, to the documents in the Commission's administrative file, the system for the review of State aid would be called into question.

- 59 It is true that the right to consult the administrative file in the context of a review procedure, opened in accordance with Article 88(2) EC, and the right of access to documents, pursuant to Regulation No 1049/2001 are legally distinct, but the fact remains that they lead to a comparable situation from a practical point of view. Whatever the legal basis on which it is granted, access to the file enables the interested parties to obtain all the observations and documents submitted to the Commission, and, where appropriate, adopt a position on those matters in their own observations, which is likely to modify the nature of such a procedure.
- 60 Moreover, it is important to note that, in contrast with cases where the Community institutions act in the capacity of a legislature, in which wider access to documents should be authorised pursuant to recital 6 of Regulation No 1049/2001, as was the case in *Sweden and Turco v Council*, documents relating to procedures for reviewing State aid, such as those requested by TGI, fall within the framework of administrative functions specifically allocated to the said institutions by Article 88 EC.
- 61 It follows from the above considerations as a whole that, for the purposes of interpreting the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001, the General Court should, in the judgment under appeal, have taken account of the fact that interested parties other than the Member State concerned in the procedures for reviewing State aid do not have the right to consult the documents in the Commission's administrative file, and, therefore, have acknowledged the existence of a general presumption that disclosure of documents in the administrative file in principle undermines protection of the objectives of investigation activities.
- 62 That general presumption does not exclude the right of those interested party to demonstrate that a given document disclosure of which has been requested is not covered by that presumption, or that there is a higher public interest justifying the disclosure of the document concerned by virtue of Article 4(2) of Regulation No 1049/2001.
- 63 By failing to take that fact into consideration, and by wrongly holding, in paragraphs 87 to 89 of the judgment under appeal, that it was not obvious in this case that access to all the documents relating to procedures for reviewing State aid covered by TGI's request for access on the basis of Regulation No 1049/2001 had to be refused, without first carrying out a concrete, individual examination of those documents, the General Court erred in its interpretation of Article 4(2), third indent, of the said regulation.

*Ryanair* judgment:

- 70 For the purposes of interpreting the exception laid down in the third indent of Article 4(2) of Regulation No 1049/2001, it is appropriate to take account of the fact that interested parties other than the Member State concerned in the procedures for reviewing State aid do not have the right to consult the documents in the Commission's administrative file, and, therefore, to

acknowledge the existence of a general presumption that disclosure of documents in the administrative file in principle undermines protection of the objectives of investigation activities (*Commission v Technische Glaswerke Ilmenau*, paragraph 61).

- 71 Thus, the Commission may, pursuant to the third indent of Article 4(2) of Regulation No 1049/2001, refuse access to all the documents relating to the procedure for the review of State aid, and may do so without first making a concrete, individual examination of those documents (*Commission v Technische Glaswerke Ilmenau*, paragraph 67).
- 72 The general presumption referred to in paragraph 70 above ('the general presumption') does not exclude the right of those interested parties to demonstrate that a given document disclosure of which has been requested is not covered by that presumption, or that there is a higher public interest justifying the disclosure of the document concerned by virtue of Article 4(2) of Regulation No 1049/2001 (*Commission v Technische Glaswerke Ilmenau*, paragraph 62).
- 73 In the present cases, first, although certain documents are identified or classified in categories, the applications submitted by the applicant concern, in fact, all the administrative files concerning the procedures for the review of alleged State aid granted by several airport operators. The documents requested are therefore covered, in principle, by the general presumption.
- 74 As regards the applicant's argument that the Commission's internal documents are not covered by the general presumption, it is appropriate to note that, in *Commission v Technische Glaswerke Ilmenau*, the Court of Justice applied the general presumption to administrative files which contained internal Commission documents. The applicant's argument must therefore be rejected.
- 75 Secondly, as regards documents identified expressly and individually in the confirmatory applications, that is to say, the complaints and the notification from the French authorities (Case T-499/08), the applicant does not put forward any argument to the effect that they are not covered by the general presumption.
- 76 Moreover, as regards the general references, made by the applicant in its confirmatory applications, to the documents referred to in the decisions to initiate the formal investigation procedures published in the *Official Journal of the European Union*, those documents are referred to overall, by way of example, in order to support the applicant's argument that it is inconceivable that the exception relating to protection of the purpose of investigations is applicable to all the documents in the file in their entirety.
- 77 Thus, even if the reference to those documents could be regarded as a request for disclosure of a given document or documents within the terms of paragraph 72 above, the applicant's assertions are too vague and general to show that those documents are not covered by the general presumption.
- 78 Accordingly, it must be held that the applicant adduced no evidence in its confirmatory applications capable of rebutting the general presumption.

- 79 The fact that the applicant identified, in the application or in the amendment to its heads of claim, documents which it claims should be disclosed because of their purely administrative content cannot cast any doubt on that finding.
- 80 Those documents were not identified expressly and individually in the confirmatory applications, but only after the adoption of the express decisions. In the absence of requests specifically for those documents in the confirmatory applications, it must be held that the Commission was not bound to carry out a concrete, individual examination of them in the express decisions and could apply to them the general presumption that their disclosure would undermine the purpose of the investigation.
- 81 Thirdly, the applicant's argument that the rights of the defence justify the disclosure of the documents must be rejected. It is clear from the case-law that a procedure in respect of State aid is opened against a Member State and that the recipient of the aid cannot therefore invoke the rights of the defence during the investigation (see, to that effect, Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* [2002] ECR I-7869, paragraphs 81 and 82, and Joined Cases T-195/01 and T-207/01 *Government of Gibraltar v Commission* [2002] ECR II-2309, paragraph 144).
- 82 Furthermore, the applicant has not shown how the principles of openness and transparency and the interests of air transport consumers take preference over the public interest in the protection of the purpose of investigations under the third indent of Article 4(2) of Regulation No 1049/2001.
- 83 Accordingly, the Commission was entitled in law to conclude that there was no overriding public interest justifying disclosure of the documents.

*Agrofert Holdings* judgment:

- 94 The third indent of Article 4(2) of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure of the document concerned.
- 95 In the present case, application of that exception also relates to documents exchanged, on the one hand, between the Commission and the notifying parties and, on the other, between the Commission and third parties.
- 96 First of all, it is common ground that those documents relate to an investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.
- 97 Next, it must be borne in mind that that provision must be interpreted as applying only if disclosure of the documents in question may endanger the completion of inspections, investigations or audits (*Franchet and Byk v Commission*, cited in paragraph 33 above, paragraph 109).
- 98 In the present case, however, the Commission's investigation which gave rise to the decision of 20 April 2005 not to object to the notified merger had been completed when the decision of 13 February 2007 was adopted. Accordingly,

there was no ongoing investigation concerning the merger in question at the date of the latter decision.

- 99 Consequently, disclosure of the documents requested could not jeopardise completion of the investigation relating to the merger in question.
- 100 The Commission's argument that any disclosure of the documents provided by the parties involved would undermine the climate of trust and mutual cooperation, thereby compromising the objectives of the investigations protected by the third indent of Article 4(2) of Regulation No 1049/2001, must also be rejected.
- 101 In accordance with the case-law already cited (see paragraphs 57 to 60 above), the examination required for treatment of a request for access to documents must be individual and concrete. The mere fact that a document relates to an interest protected by an exception cannot suffice to justify application of that exception. Furthermore, the risk of undermining a protected interest must be reasonably foreseeable and not purely hypothetical. Consequently, the examination which the institution must carry out in order to apply an exception must be concrete and must be evident from the grounds of the decision.
- 102 In the present case, however, the decision of 13 February 2007 confines itself to setting out, in a general manner, the fact that all the documents in question contain sensitive information, required and provided for the sole purpose of the investigation proceedings at issue, and that their disclosure would diminish the climate of mutual trust between the Commission and undertakings, on the basis of which the latter provide the necessary information, even that not strictly required by the relevant legislation.
- 103 Such considerations, which are very vague and general, do not permit the view to be taken that the Commission's argument is valid in effect for each of the documents in question. The fears expressed by the Commission remain no more than mere assertions and, consequently, are hypothetical. Although there are indeed grounds for accepting that the need to preserve the confidentiality of certain information or documents justifies the Commission's refusing access to them on the basis of the third indent of Article 4(2) of Regulation No 1049/2001, it is clear that, in the present case, the Commission has ruled *in abstracto* on the harm which disclosure of all the documents requested might cause to its investigative activities.
- 104 The Commission has thus failed to demonstrate to the requisite legal standard that disclosure of all the documents in question would cause concrete, actual harm to the protection of the objectives of investigations, and the decision of 13 February 2007 is vitiated by an error of law in that regard.

*Editions Jacob* judgment:

- 63 Aux termes de l'article 4, paragraphe 2, troisième tiret, du règlement n° 1049/2001, les institutions refusent l'accès à un document dans le cas où sa divulgation porterait atteinte à la protection des objectifs des activités d'inspection, d'enquête et d'audit, à moins qu'un intérêt public supérieur ne justifie la divulgation du document visé.

- 64 Dans la décision attaquée, la Commission a estimé que tous les documents litigieux étaient couverts par l'exception relative à la protection de l'objectif des activités d'enquête prévue par l'article 4, paragraphe 2, troisième tiret, du règlement n° 1049/2001.
- 65 Il convient de souligner qu'il appartenait à l'institution concernée, en application des principes rappelés aux points 41 à 47 ci-dessus, d'examiner si, premièrement, le document faisant l'objet de la demande d'accès entraînait dans le champ d'application de l'une des exceptions prévues à l'article 4 du règlement n° 1049/2001, deuxièmement, la divulgation de ce document portait concrètement et effectivement atteinte à l'intérêt protégé et, troisièmement, dans l'affirmative, le besoin de protection s'appliquait à l'intégralité du document (arrêt du Tribunal du 30 janvier 2008, Terezakis/Commission, T-380/04, non publié au Recueil, point 88).
- 66 Il convient tout d'abord de déterminer si la Commission a estimé à juste titre que tous les documents auxquels l'accès est demandé avaient trait à des activités d'enquête. À cet égard, la requérante fait valoir que certains des documents visés par la demande d'accès ont été transmis par les entreprises concernées avant la notification de l'opération de concentration, en dehors de toute procédure formelle prévue par le règlement n° 4064/89.
- 67 Les documents communiqués antérieurement au 14 avril 2003 l'ont été au titre de la procédure informelle, dite « de prénotification ». En dépit du caractère informel de cette procédure à la date de la transmission des documents, ces derniers doivent être considérés comme relevant de l'enquête menée par la Commission au titre de son contrôle des opérations de concentration. Ils ont été versés au dossier d'instruction de la Commission dans la procédure en cause, comme l'indiquent le courrier du directeur général de la DG « Concurrence » en date du 14 février 2005, qui identifie ces documents comme faisant partie de ce dossier, ainsi que la décision attaquée, qui précise que l'ensemble des documents demandés ont été « établis ou reçus dans le cadre du traitement [de la procédure en cause] ». Il en résulte que tous les documents demandés concernent effectivement une activité d'enquête.
- 68 Toutefois, la circonstance qu'un document concerne une activité d'enquête ne saurait, à elle seule, suffire à justifier l'application de l'exception invoquée. Selon la jurisprudence, toute exception au droit d'accès aux documents de la Commission doit en effet être interprétée et appliquée strictement (arrêts de la Cour du 18 décembre 2007, Suède/Commission, C-64/05 P, Rec. p. I-11389, point 66, et du 1<sup>er</sup> juillet 2008, Suède et Turco/Conseil, C-39/05 P et C-52/05 P, Rec. p. I-4723, ci-après l'« arrêt Turco », point 36 ; arrêt Franchet et Byk, point 41 supra, point 84).
- 69 S'agissant de l'application ratione temporis desdites exceptions, l'article 4, paragraphe 7, du règlement n° 1049/2001 prévoit en outre que les exceptions visées aux paragraphes 1 à 3 dudit règlement s'appliquent uniquement au cours de la période durant laquelle la protection se justifie eu égard « au contenu du document ».
- 70 Il convient donc de déterminer si l'exception relative à la protection de l'objectif des activités d'enquête était encore applicable, ratione temporis, alors que l'enquête en cause avait abouti à l'adoption de deux décisions de la Commission, la décision de compatibilité et la décision d'agrément, qui

n'étaient pas encore définitives, compte tenu des deux recours pendants devant le Tribunal visant à leur annulation (affaires T-279/04 et T-452/04).

- 71 Il n'est pas contesté que l'enquête menée par la Commission dans le cadre de son contrôle de l'opération de concentration, qui a conduit à l'adoption de la décision de compatibilité, le 7 janvier 2004, et de la décision d'agrément, le 30 juillet 2004, était terminée au moment de l'adoption de la décision attaquée, le 7 avril 2005. La Commission fait cependant valoir que, en cas d'annulation de la décision de compatibilité, elle serait amenée à adopter une nouvelle décision, et donc à rouvrir l'enquête et que l'objectif de cette enquête serait clairement mis en péril si des pièces établies ou reçues dans le cadre de la procédure de contrôle concernée étaient rendues publiques.
- 72 Selon la jurisprudence, l'article 4, paragraphe 2, troisième tiret, du règlement n° 1049/2001 doit recevoir une interprétation selon laquelle cette disposition, qui vise à protéger « les objectifs des activités d'inspection, d'enquête et d'audit », n'est applicable que si la divulgation des documents en question risque de mettre en péril l'achèvement de ces activités (arrêt Franchet et Byk, point 41 supra, point 109).
- 73 Certes, les différents actes d'enquête ou d'inspection peuvent rester couverts par l'exception tirée de la protection des activités d'inspection, d'enquête et d'audit tant que les activités d'enquête ou d'inspection se poursuivent, même si l'enquête ou l'inspection particulière ayant donné lieu au rapport auquel l'accès est demandé est terminée (voir arrêt Franchet et Byk, point 41 supra, point 110, et la jurisprudence citée).
- 74 Néanmoins, admettre que les différents documents ayant trait à des activités d'inspection, d'enquête ou d'audit sont couverts par l'exception tirée de l'article 4, paragraphe 2, troisième tiret, du règlement n° 1049/2001 tant que les suites à donner à ces procédures ne sont pas arrêtées reviendrait à soumettre l'accès auxdits documents à un événement aléatoire, futur et éventuellement lointain, dépendant de la célérité et de la diligence des différentes autorités (arrêt Franchet et Byk, point 41 supra, point 111).
- 75 Une telle solution se heurterait à l'objectif consistant à garantir l'accès du public aux documents des institutions, dans le but de donner aux citoyens la possibilité de contrôler d'une manière plus effective la légalité de l'exercice du pouvoir public (voir, en ce sens, arrêt Franchet et Byk, point 41 supra, point 112).
- 76 En l'espèce, admettre que les documents demandés sont toujours couverts par l'exception prévue à l'article 4, paragraphe 2, troisième tiret, du règlement n° 1049/2001 tant que les décisions de compatibilité et d'agrément adoptées à la suite de l'enquête concernée ne sont pas définitives, c'est-à-dire tant que le Tribunal et, le cas échéant, la Cour n'ont pas rejeté les recours introduits contre elles ou, en cas d'annulation, tant qu'une ou plusieurs nouvelles décisions n'ont pas été adoptées par la Commission, reviendrait à soumettre l'accès à ces documents à un événement aléatoire, futur et éventuellement lointain.
- 77 Il résulte de ce qui précède que les documents demandés n'entraient plus, lors de l'adoption de la décision attaquée, dans le champ d'application de l'exception relative à la protection des objectifs des activités d'enquête.

- 78 Il convient de relever que, à supposer même que lesdits documents aient été susceptibles de relever du champ d'application de l'exception relative à la protection de l'objectif des activités d'enquête, il ne ressort aucunement des motifs de la décision attaquée que la Commission ait opéré un examen concret et individuel des documents demandés.
- 79 Afin de justifier son refus de divulguer les documents demandés, la Commission invoque tout d'abord, dans la décision attaquée, la mise en péril de l'objectif de l'enquête qu'elle devrait rouvrir en cas d'annulation de la décision de compatibilité, si des pièces établies ou reçues dans le cadre de la procédure de contrôle ayant abouti à l'adoption de cette décision étaient rendues publiques à ce stade.
- 80 Ensuite, la Commission affirme, dans la décision attaquée, que, de façon plus générale, la divulgation d'informations qui lui sont fournies dans le cadre d'une procédure de contrôle des concentrations romprait le climat de confiance et de coopération entre elle et les parties intéressées, indispensable pour lui permettre de recueillir toutes les informations dont elle a besoin en vue de mener de telles enquêtes et de prendre des décisions fondées en la matière.
- 81 Enfin, la Commission expose que chacun des documents visés contient des informations relatives à la stratégie commerciale des entreprises concernées, des commentaires et des demandes de sa part ou des réactions des entreprises aux vues exprimées par elle.
- 82 De telles affirmations sont trop vagues et générales et ne s'appuient sur aucun élément propre à l'espèce. Le même raisonnement pourrait s'appliquer à tous les documents fournis dans le cadre de n'importe quelle procédure de contrôle d'une concentration, la motivation abstraite et générale fournie par la Commission ne se référant pas au contenu des documents en cause.
- 83 L'argument de la Commission selon lequel, d'une part, une motivation individuelle serait susceptible de porter atteinte à l'intérêt protégé et, d'autre part, une motivation détaillée par rapport au contenu d'un document serait susceptible de divulguer des informations protégées par l'une des exceptions prévues par le règlement n° 1049/2001 doit être écarté. Une démonstration, pour chaque document en cause, des raisons pour lesquelles ce document était, partiellement ou non, couvert par l'exception relative à la protection de l'objectif des activités d'enquête pouvait être effectuée et être explicitée par la Commission, sans pour autant priver l'exception de sa finalité, ni compromettre la confidentialité des informations qui ont vocation, en raison de cette exception, à rester secrètes.
- 84 Par ailleurs, il convient de relever que ni l'établissement d'un inventaire détaillé des documents demandés, ni la répartition de ces documents entre les différentes exceptions invoquées par la Commission pour justifier son refus d'accès, ni l'accès accordé à certains des documents demandés ne sont, à eux seuls, de nature à établir qu'un examen concret et individuel des documents auxquels l'accès a été refusé a été effectué.
- 85 S'agissant des documents mentionnés au point 1 ci-dessus, sous d), c'est-à-dire de l'intégralité de la correspondance entre la Commission et Lagardère entre le mois de septembre 2002 et la notification de l'opération de concentration, la Commission soutient qu'un examen concret et individuel n'est

pas requis lorsqu'il est clair que les documents concernés doivent ou ne doivent pas être divulgués.

- 86 Comme cela a été souligné au point 45 ci-dessus, la jurisprudence admet, certes, qu'un examen concret et individuel peut ne pas être nécessaire lorsqu'il est manifeste que l'accès doit être refusé ou bien au contraire accordé. Tel n'est cependant pas le cas en l'espèce. En effet, en application de l'article 2, paragraphe 3, du règlement n° 1049/2001, les dispositions relatives à l'accès du public aux documents de la Commission s'appliquent à tous les documents détenus par cette institution, c'est-à-dire à tous les documents établis ou reçus par elle et en sa possession, dans tous les domaines d'activité de l'Union européenne. Il ne saurait donc être admis que, en matière de concentration, la correspondance entre la Commission et les parties intéressées soit considérée comme manifestement couverte par l'exception relative à la protection de l'objectif des activités d'enquête. Si cette exception est, le cas échéant, applicable à certains des documents établis par la Commission ou qui lui ont été communiqués, tel n'est pas nécessairement le cas de tous les documents ou de l'intégralité de ces documents. À tout le moins, il incombe à la Commission de s'en assurer par un examen concret et effectif de chaque document, requis par l'article 4, paragraphe 2, premier tiret, du règlement n° 1049/2001.
- 87 L'argument de la Commission selon lequel, d'une manière générale, la divulgation d'informations qui lui ont été fournies dans le cadre d'une procédure de contrôle d'une concentration romprait le climat de confiance et de coopération entre elle et les parties intéressées doit aussi être rejeté. De telles considérations sont également trop vagues et trop générales pour établir l'existence d'un véritable risque, raisonnablement prévisible et non purement hypothétique, d'atteinte à l'intérêt protégé concerné. L'examen auquel doit procéder l'institution afin d'appliquer une exception doit être effectué de façon concrète et ressortir des motifs de la décision (arrêts VKI, point 41 supra, point 69, et Franchet et Byk/Commission, point 41 supra, point 115). En l'espèce, la Commission s'est prononcée in abstracto sur l'atteinte que la divulgation des documents concernés pourrait porter à son activité d'enquête, sans démontrer à suffisance de droit que la divulgation de ces documents porterait concrètement et effectivement atteinte à la protection de l'objectif des activités d'enquête.
- 88 Certes, la Commission a tenté d'illustrer ce risque en se référant, dans le mémoire en défense, à la publication d'un cabinet d'avocats, invitant, à la suite de l'arrêt VKI, point 41 supra, les entreprises faisant l'objet d'une enquête de la Commission à faire preuve de prudence lorsqu'elles transmettent des informations à la Commission, compte tenu du risque de divulgation ultérieure au titre du droit d'accès aux documents. Outre le fait que le caractère concret de l'examen auquel la Commission a procédé doit ressortir des motifs de la décision et non de ses écritures devant le Tribunal, cet élément n'est pas de nature, à lui seul, à démontrer que le risque allégué par la Commission est raisonnablement prévisible et non purement hypothétique. Quelle que soit la prudence à laquelle elles s'estiment tenues, pour des raisons qui leur sont propres, les entreprises concernées ne peuvent s'exonérer de leur obligation réglementaire de fournir les renseignements demandés par la Commission au titre du contrôle des concentrations.

- 89 L'argument de la Commission tiré de l'article 17, paragraphe 1, du règlement n° 139/2004, aux termes duquel « les informations recueillies en application du[dit...] règlement ne peuvent être utilisées que dans le but poursuivi par la demande de renseignements, le contrôle ou l'audition », n'est pas davantage convaincant. Cette disposition, dont la rédaction est, en substance, similaire dans la version invoquée par la Commission ou dans celle applicable à la présente affaire, à savoir le règlement n° 4064/89, vise la manière dont la Commission peut utiliser les informations fournies et ne régit pas l'accès aux documents garanti par le règlement n° 1049/2001. Elle ne saurait être interprétée comme faisant obstacle à l'exercice du droit d'accès aux documents garanti par l'article 255 CE et par le règlement n° 1049/2001. De plus, elle doit être lue à la lumière du paragraphe 2 de l'article 17 du règlement n° 139/2004, qui exclut uniquement la divulgation des informations « qui, par leur nature, sont couvertes par le secret professionnel ». Les entreprises notifiantes devaient donc s'attendre à ce que les informations recueillies non couvertes par le secret professionnel soient divulguées.
- 90 Or, selon la jurisprudence, dans la mesure où le public a un droit d'accès à des documents contenant certaines informations, ces informations ne sauraient être considérées comme étant couvertes, par leur nature, par le secret professionnel (arrêt du Tribunal du 30 mai 2006, *Bank Austria Creditanstalt/Commission*, T-198/03, Rec. p. II-1429, point 74). L'obligation de secret professionnel ne revêt donc pas une portée telle qu'elle puisse justifier un refus d'accès général et abstrait aux documents transmis dans le cadre de la notification d'une concentration. Certes, ni l'article 287 CE ni les règlements n° 4064/89 et n° 139/2004 n'indiquent de façon exhaustive quelles informations sont couvertes, par leur nature, par le secret professionnel. Il ressort cependant de la formulation de l'article 17, paragraphe 2, de ces règlements, que toutes les informations recueillies ne sont pas nécessairement couvertes par le secret professionnel. Dès lors, l'appréciation du caractère confidentiel d'une information nécessite une mise en balance entre, d'une part, les intérêts légitimes qui s'opposent à sa divulgation et, d'autre part, l'intérêt général qui veut que les activités des institutions communautaires se déroulent dans le plus grand respect possible du principe d'ouverture (voir, en ce sens, arrêts du Tribunal *Bank Austria Creditanstalt/Commission*, précité, point 71, et du 12 octobre 2007, *Pergan Hilfsstoffe für industrielle Prozesse/Commission*, T-474/04, Rec. p. II-4225, points 63 à 66).
- 91 En procédant à l'examen concret et individuel des documents sollicités, conformément à l'article 4, paragraphe 2, premier tiret, du règlement n° 1049/2001, la Commission est ainsi en mesure d'assurer l'effet utile des dispositions applicables en matière de concentration, en pleine cohérence avec le règlement n° 1049/2001. Il s'ensuit que l'obligation de secret professionnel, résultant de l'article 287 CE et de l'article 17 des règlements n° 4064/89 et n° 139/2004, n'est pas de nature à dispenser la Commission de l'examen concret de chaque document en cause, requis par l'article 4, paragraphe 2, du règlement n° 1049/2001.
- 92 Enfin, la Commission avance, dans la duplique, l'assertion selon laquelle la divulgation des documents transmis par les entreprises concernées avant la notification de l'opération de concentration méconnaîtrait les obligations de confidentialité s'imposant à elle en vertu de l'article 287 CE, de l'article 17 du règlement n° 139/2004 et d'un document établi par elle, intitulé « Meilleures

pratiques pour la conduite des procédures communautaires de contrôle des concentrations ».

- 93 Cet argument doit également être rejeté, pour les motifs exposés au point 90 ci-dessus.
- 94 Il résulte de ce qui précède que ni l'article 287 CE ni l'article 17 des règlements n° 4064/89 et n° 139/2004 ne sont susceptibles de s'opposer à la divulgation d'un document qui ne serait pas couvert par l'une des exceptions prévues par le règlement n° 1049/2001.
- 95 Il en va a fortiori ainsi des orientations figurant dans le document établi par la Commission et intitulé « Meilleures pratiques pour la conduite des procédures communautaires de contrôle des concentrations ». Sans qu'il soit nécessaire de se prononcer sur la question de savoir s'il s'agit d'un instrument juridique contraignant et, en particulier, de déterminer s'il s'agit d'un acte produisant des effets de droit, il y a lieu de relever que ce document, non publié au Journal officiel et dont le point 2.4 précise expressément qu'il ne crée ni ne modifie les droits ou les obligations établis par le traité instituant la Communauté européenne, ne saurait s'opposer à la divulgation d'un document auquel l'accès est garanti par l'article 255 CE et le règlement n° 1049/2001.
- 96 Il n'y a donc pas lieu d'examiner si les informations figurant dans les documents demandés sont couvertes par le secret professionnel, en sus de l'examen de la légalité de la décision attaquée au regard du règlement n° 1049/2001.
- 97 Il résulte de l'ensemble de ce qui précède que la Commission a commis une erreur de droit en refusant l'accès aux documents demandés au motif qu'ils étaient couverts par l'exception prévue par l'article 4, paragraphe 2, troisième tiret, du règlement n° 1049/2001, relative à la protection des objectifs des activités d'inspection, d'enquête et d'audit, alors que ces documents n'entraient plus, lors de l'adoption de la décision attaquée, dans le champ d'application de cette exception et, en tout état de cause, sans qu'il ressorte des motifs de la décision attaquée qu'un examen concret et individuel de chacun de ces documents a été opéré.
- 98 La décision attaquée est donc entachée d'illégalité sur ce point.

*MyTravel* judgment:

- 71 The third indent of Article 4(2) of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where its disclosure would undermine the protection of 'the purpose of inspections, investigations and audits', unless there is an overriding public interest in disclosure of the document in question.
- 72 That provision applies only if disclosure of the documents in question may endanger the completion of inspections, investigations or audits (*Franchet and Byk v Commission*, cited in paragraph 32 above, at paragraph 109).
- 73 Moreover, according to settled case-law, the examination required for the purpose of processing a request for access to documents must be specific in nature. First, the mere fact that a document concerns an interest protected by

an exception is not of itself sufficient to justify the application of that exception. Secondly, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. Consequently, the examination carried out by the institution in order to apply an exception must be specific and be evident from the statement of reasons of the decision (*Franchet and Byk v Commission*, cited in paragraph 32 above, at paragraph 115).

74 That specific examination must, moreover, be carried out in respect of each document referred to in the request for access. It is clear from Regulation No 1049/2001 that all the exceptions mentioned in Article 4(1) to (3) are specified as being applicable 'to a document'. A specific and individual examination of each document is also necessary where, even if it is clear that a request for access refers to documents covered by an exception, only such an examination can enable the institution to assess the possibility of granting the applicant partial access under Article 4(6) of Regulation No 1049/2001 (*Franchet and Byk v Commission*, cited in paragraph 32 above, at paragraphs 116 and 117).

75 In the present case, the inventory annexed to the first decision relies only on the exception in question as a basis for its refusal, on that ground alone, to disclose document 15, entitled 'Minutes from the conversation of a member of the case team in Case M.1524 Airtours/First Choice on the Airtours case conducted on 24 June 2002'.

76 When questioned on that point at the hearing, the Commission indicated to the Court that the reason for which the exception laid down by the third indent of Article 4(2) of Regulation No 1049/200 applied to that document appeared in the following sentence of the first decision:

'With regard to parts of documents 13 and 16 and all the other working papers, I confirm the initial examination of the Directorate-General for Competition according to which the working papers are *a fortiori* also covered by the exceptions provided for under Articles 4(2), 2nd and 3rd indent, and 4(3), 2nd subparagraph, of Regulation [No] 1049/2001.'

77 Such considerations are too vague and general and it is not possible on reading the first decision and its annexes to understand in what way the 'inspections, investigations and audits' of the Commission could have been threatened by the disclosure of document 15.

78 In the absence of explanations of that kind, the Commission has not demonstrated to the requisite legal standard that the exception laid down by the third indent of Article 4(2) of Regulation No 1049/2001 applied to document 15. Consequently, the first decision must be annulled in that regard, without it being necessary to examine the line of argument relating to the existence of an overriding public interest.

#### *Conclusions in relation to the first decision*

79 It follows from the above that the Commission did not commit an error of assessment in considering, in accordance with the second subparagraph of Article 4(3) of Regulation No 1049/2001, that disclosure of the whole of the report and of working papers 4 to 14 and 16 to 19 would seriously undermine its decision-making process and that there was no overriding public interest

that might none the less justify disclosure of those documents. As a result, it is not necessary in the interest of procedural economy to examine the applicant's complaints relating to the other exceptions invoked in the first decision in order to refuse the disclosure of a particular part of the report or of the working papers in respect of which the exception in question was invoked.

80 Conversely, as regards working document 15, it follows from the above that the Commission has not established to the requisite legal standard that the exception laid down by the third indent of Article 4(2) of Regulation No 1049/2001 applied to that document (see paragraph 71 et seq. above).

81 In conclusion, the action must be dismissed in so far as it covers the first decision except for working document 15, in respect of which the decision must be annulled.

*Terezakis judgment:*

113 First of all, the applicant submits, in essence, that the audit commissioned by the Regional Policy DG and carried out by external experts is not covered by Article 4(2), third indent, of Regulation No 1049/2001 on the grounds that it was not approved by the College of Commissioners and that OLAF decided not to open an investigation.

114 According to Article 4(2), third indent, of Regulation No 1049/2001, the institutions are to refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

115 Regulation No 1049/2001 does not therefore lay down any formal or procedural requirement for audits whose protection may justify a refusal of access. In particular, the applicability of the exception provided for in Article 4(2), third indent, of the regulation does not depend on whether the College of Commissioners has approved the audit in question, whether OLAF has decided to open an investigation, or whether the audit is carried out by external experts.

116 Furthermore, according to Article 12(4) of Regulation No 1164/94, without prejudice to checks carried out by Member States in accordance with national laws, regulations and administrative provisions and to the provisions of Article 246 EC or to any inspection arranged on the basis of Article 279(c) EC, the Commission may, through its officials or agents, carry out on-the-spot checks, including sample checks, in respect of projects financed by the Cohesion Fund, and may examine the control arrangements and measures established by the national authorities, which are to inform it of measures taken to that end. It follows that the Commission is empowered to carry out financial checks in respect of projects financed by the Cohesion Fund without being under a prior obligation to obtain a formal decision by OLAF.

117 Second, as regards the applicant's assertion that, by refusing to grant access to those documents, the Commission infringed Annex V to Decision E (96) 1356, which provides that the Member State concerned is required to ensure open and easy access to relevant information requested by the public, it is sufficient to note that Decision E (96) 1356 is addressed to the beneficiary Member State and does not impose any obligation on the Commission as regards informing the public about the co-financed project.

- 118 Third, and finally, as regards the applicant's assertion that the Commission did not provide him with sufficient information about the purpose and duration of the audit, it must be observed that, in his letter of 5 February 2004 to the applicant and produced by the applicant as evidence, the Director-General of the Regional Policy DG stated that the Directorate-General had decided in June 2003 to carry out a supplementary audit of the project in order to 'deepen' the examination undertaken on the occasion of a previous audit mission which lasted from 4 to 8 March 2002. He went on to state that the Regional Policy DG was seeking, in this way, to respond to certain points raised by members of the European Parliament, by European citizens and in press articles. Moreover, in the reply of 29 April 2004 to the applicant's request for access of 5 April 2004, the Commission stated, in conclusion, that he would be informed of the conclusions of the audit when these were available. It follows that the Commission cannot be regarded as having failed to provide the applicant with any information about the audit being carried out.
- 119 In any event, it must be noted that, even on the assumption that the Commission did not provide information about the purpose and duration of the audit, that cannot in itself affect the legality of the contested decision. In the context of a decision refusing access to a document on the basis of Regulation No 1049/2001, the Commission is required to set out the reasons justifying the application to the particular case of one of the exceptions to the right of access provided for by the Regulation, but is nevertheless not required to provide more information than is necessary in order for the person requesting access to understand the reasons for its decision and for the Court to review the legality of that decision. It must be held, however, that the contested decision satisfies those requirements.
- 120 As regards, in particular, the alleged lack of information about the purpose and duration of the audit, there is no dispute about the fact that an audit was underway at the date of the contested decision and that it concerned the project in particular. Nor, moreover, does the applicant allege that the Commission infringed Article 4(7) of Regulation No 1049/2001, according to which the exceptions as laid down in Article 4(1) to (3) only apply for the period during which protection is justified on the basis of the content of the document.
- 121 It follows from the foregoing that the applicant's claim that the absence of that information shows that the Commission wrongly invokes the existence of an ongoing audit solely in order to justify its refusal of access has no valid legal or factual basis and must therefore be rejected as being purely speculative.

*Franchet and Byk* judgment:

- 108 ...[I]n the present case, it is appropriate to determine whether documents relating to inspections, investigations or audits were covered by the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001, where the specific inspections, investigations or audits were finished and had led to the drawing-up of final reports, but the action to be taken to follow up those reports had not yet been decided.
- 109 The Court of First Instance has held that the third indent of Article 4(2) of Regulation No 1049/2001 must be interpreted in such a way that this provision, the aim of which is to protect 'the purpose of inspections, investigations and

audits', applies only if disclosure of the documents in question may endanger the completion of inspections, investigations or audits.

- 110 Certainly, it is apparent from the case-law that various acts of investigation or inspection may remain covered by the exception based on the protection of inspections, investigations and audits as long as the investigations or inspections continue, even if the particular investigation or inspection which gave rise to the report to which access is sought is completed (see, to that effect, *Denkavit Nederland v Commission*, paragraph 48).
- 111 Nevertheless, to allow that the various documents relating to inspections, investigations or audits are covered by the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001 until the follow-up action to be taken has been decided would make access to the IAS documents dependent on an uncertain, future and possibly distant event, depending on the speed and diligence of the various authorities.
- 112 Such a solution would be contrary to the objective of guaranteeing public access to documents relating to any irregularities in the management of financial interests, with the aim of giving citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers (see, to that effect, Case T-123/99 *JT's Corporation v Commission* [2000] ECR II-3269, paragraph 50).
- 113 It is therefore appropriate to ascertain whether, at the time of the adoption of the contested decisions, inspections and investigations were still in progress which could have been jeopardised by the disclosure of the requested documents, and whether these activities were carried out within a reasonable period.
- 114 In that connection, it should be noted that, according to settled case-law, the legality of an individual contested measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (see Joined Cases 15/76 and 16/76 *France v Commission* [1979] ECR 321, paragraph 7, and Case C-449/98 P *IECC v Commission* [2001] ECR I-3875, paragraph 87).
- 115 Moreover, according to settled case-law, the examination required for the purpose of processing a request for access to documents must be specific in nature. First, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception (see, to that effect, *Denkavit Nederland v Commission*, paragraph 45). Second, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. Consequently, the examination which the institution must undertake in order to apply an exception must be carried out in a concrete manner and must be apparent from the reasons for the decision (Case T-188/98 *Kuijjer v Council* [2000] ECR II-1959, paragraph 38, and Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-0000, 'VKI', paragraphs 69 and 72).
- 116 That concrete examination must, moreover, be carried out in respect of each document referred to in the request for access. It is apparent from Regulation No 1049/2001 that all the exceptions mentioned in Article 4(1) to (3) are specified as being applicable 'to a document' (*VKI*, paragraph 70).

- 117 A concrete, individual examination of each document is also necessary where, even if it is clear that a request for access refers to documents covered by an exception, only such an examination can enable the institution to assess the possibility of granting the applicant partial access under Article 4(6) of Regulation No 1049/2001. In the context of applying the code of conduct, the Court has moreover already rejected as insufficient an assessment of documents by reference to categories rather than on the basis of the actual information contained in those documents, since the examination required of an institution must enable it to assess specifically whether an exception invoked actually applies to all the information contained in those documents (*JT's Corporation v Commission*, paragraph 46, and *VKI*, paragraph 73).
- 118 It is therefore for the institution to assess, first, whether the document requested falls within one of the exceptions provided for by Article 4 of Regulation No 1049/2001, second, if so, whether the need for protection relating to the exception concerned is genuine and, third, whether it applies to the whole document.
- 119 The Court of First Instance must, therefore, examine whether the contested decisions were adopted in accordance with the aforementioned rules.
- 120 Concerning the documents sent to the French and Luxembourg authorities, it should be recalled that OLAF's investigation was finished and it is common ground that, at the time of the adoption of the first contested decision, neither the Luxembourg or the French authorities had decided what action to take in the light of the information sent by OLAF pursuant to Article 10 of Regulation No 1073/1999.
- 121 The information was sent to the national authorities with the aim of providing them with material which showed, in OLAF's view, different irregularities, and which, in accordance with Article 9(2) of Regulation No 1073/1999, could constitute admissible evidence in national court proceedings.
- 122 To grant access to these documents, even partial, could compromise the effective use of this material by the national authorities, given that the persons implicated in the suspected irregularities could have acted in such a way as to prevent the efficient conduct of the various procedures or investigations which those authorities might decide to initiate. The documents sent included, in particular, audit reports of companies, reports of interviews with Eurostat officials, reports concerning the checking of expenses and inspection reports, the disclosure of which could have informed the persons concerned about the actions which the national authorities were going to take.
- 123 Moreover, at the time of the adoption of the first contested decision, that is, on 1 October 2003, a reasonable period to decide what action to take in the light of the information sent by OLAF had not yet elapsed, as the information was sent to the Luxembourg authorities only on 4 July 2002 and to the French authorities only on 19 March 2003.
- 124 It follows that the Commission made no errors of law or of assessment in taking the view that, at the time of the adoption of the first contested decision, access to the documents sent to the French and Luxembourg authorities had to be refused on the ground that disclosure of these documents would undermine the protection of the purpose of inspections, investigations and audits.

- 125 The same findings apply to the final IAS report. At the time of the adoption of the second contested decision, that is, 19 December 2003, the investigation concerning Eurostat was still not finished and the Commission had not yet decided on the consequences of the final IAS report. Thus, disclosure of the IAS report, even in it had been rendered anonymous, could have enabled the persons concerned to try to influence the result of the investigations, inspections or audits to follow.
- 126 Concerning the communication from OLAF to the Commission referred to in the press release of 19 May 2003, the Court has found that it also contains such precise information on the conduct of the various investigations concerning Eurostat that the refusal to disclose it, on the ground that to do so could undermine the protection of the purpose of inspections, investigations and audits for the same reasons as given above, was justified at the time of the adoption of the first contested decision.
- 127 With regard to the other communications from OLAF to the Commission, the first contested decision states that 'all of these communications contain results of the investigation, the disclosure of which would prejudice the judicial proceedings in progress in France and Luxembourg'.
- 128 It may be seen from these vague and general remarks that OLAF made a decision *in abstracto* on the risk that disclosure of the documents concerned could pose to the measures that the Commission considered necessary for the protection of its interests or to the judicial proceedings in progress in France and Luxembourg, without showing to the requisite legal standard that disclosure of these documents would actually prejudice the protection of the purpose of inspections, investigations and audits and that the exception invoked actually applied to all the information contained in those documents.
- 129 Consequently, it has not been demonstrated, in the present case, that investigations or inspections would have been actually threatened by the disclosure of the communications from OLAF to the Commission other than that referred to in the press release of 19 May 2003.
- 130 Moreover, OLAF did not indicate in the first contested decision whether the risks which it described actually applied to all of the information in those documents. It is apparent from the first contested decision that OLAF based its assessments on the nature of the documents requested rather than on particular information actually contained in the documents in question. This was an error of law requiring the annulment of the contested decision (Case C-353/99 P *Council v Hautala* [2001] ECR I-9565, paragraph 31).
- 131 Consequently, it has not been shown to the requisite legal standard that the exception based on the protection of the purpose of inspections and investigations, assuming it to be applicable in the present case, applied to all of the communications from OLAF to the Commission other than that referred to in the press release of 19 May 2003.
- 132 The Court has found that at least part of these documents did not seem to fall in any way within the exception under the third indent of Article 4(2) of Regulation No 1049/2001.

- 133 It is not for the Court to substitute itself for the Commission and to indicate the documents to which total or partial access should have been granted, the institution being required, when giving effect to this judgment, to take into account the reasoning set out in it.
- 134 The same findings apply to the annexes to the IAS report of 7 July 2003, access to which was refused by the Commission on the sole ground that the investigation and the assessment which it carried out in order to draw the conclusions therefrom were still in progress and that those reports could still be used by OLAF in the context of its own investigations.
- The existence of an overriding public interest
- 135 It must still be examined whether an overriding public interest exists which should have justified disclosure of the documents sent to the French and Luxembourg authorities, the communication from OLAF to the Commission referred to in the press release of 19 May 2003 and the final IAS report.
- 136 In that respect, it should be recalled that, under Article 2(1) of Regulation No 1049/2001, the beneficiaries of the right of access to documents of the institutions are '[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State'. That provision makes it clear that the purpose of the regulation is to guarantee access for everyone to public documents and not merely access for the requesting party to documents concerning him.
- 137 Consequently, the particular interest which may be asserted by a requesting party in obtaining access to a document concerning him personally cannot be taken into account.
- 138 The general interest which the applicants claim is the right to a fair hearing. It is certainly true that the right to a fair hearing is in itself a general interest. However, the fact that this right is manifested in the present case by the applicants' individual interest in defending themselves implies that the interest which the applicants invoke is not a general, but rather a private, interest.
- 139 Consequently, the Commission did not err in law in taking the view that the right to a fair hearing invoked by the applicants as an overriding interest is not an overriding public interest justifying disclosure of the requested documents.

#### **h) Decision-making (Article 4(3))**

*Agrofert Holdings* judgment:

- 135 The second subparagraph of Article 4(3) of Regulation No 1049/2001 provides that access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned is to be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.
- 136 In the present case, the decision of 13 February 2007 identifies seven categories of internal documents covered by the request for access. It is

common ground that some of those documents are pure transmission documents which lack substantive content and were not included in the request for access, as the applicant acknowledged at the hearing.

- 137 The application of the exception based on the protection of the decision-making process must therefore be regarded as concerning, apart from Documents 3 and 4 examined above in the light of the exception concerning the protection of legal advice, an inter-service consultation note containing a draft decision on the notification (Document 2) and the answers of the other services concerned with regard to that note (Document 5).
- 138 Firstly, it must be held that those documents, which were sent to the Court (see paragraph 25 above), are documents preparatory to the final decision and were exchanged within the Commission to enable the documents formalising the institution's position to be drafted. They contain 'opinions for internal use as part of deliberations and preliminary consultations' within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001 and therefore do indeed come within the scope of that provision.
- 139 The applicant's argument that the decision on the merger had been taken some time previously cannot entirely preclude reliance being placed on the exception laid down in Article 4(3) of Regulation No 1049/2001, since the second subparagraph of Article 4(3) provides expressly that that exception can be invoked even after the decision has been taken.
- 140 Secondly, it is appropriate to consider whether the refusal to grant access to the internal documents requested is, in the present case, justified by the exception based on the protection of the decision-making process of the institution.
- 141 In accordance with settled case-law, application of that exception presupposes that it has been demonstrated that access to the internal documents requested was likely specifically and actually to undermine protection of the Commission's decision-making process and that the risk of that interest being undermined was reasonably foreseeable and not purely hypothetical (in addition to the case-law cited in paragraphs 57 to 60 above, see also, to that effect, judgment of 18 December 2008 in Case T-144/05 *Muñiz v Commission*, not published in the ECR, paragraph 74 and the case-law cited).
- 142 In addition, in order to be covered by the exception in the second subparagraph of Article 4(3) of Regulation No 1049/2001, the decision-making process must be seriously undermined. That will be the case, in particular, where disclosure of the documents in question has a substantial impact on the decision-making process. The assessment of that serious nature depends on all of the circumstances of the case including, inter alia, the negative effects on the decision-making process relied on by the institution as regards the disclosure in question (see, by analogy, *Muñiz v Commission*, cited in paragraph 141 above, paragraph 75).
- 143 In the present case, the decision of 13 February 2007 mentions the fact that disclosure of the documents requested would seriously undermine the protection of the Commission's decision-making process. That decision emphasises, in that regard, the collective nature of the decision-making process, the need to maintain trust and freedom of expression of the services,

and the fact that disclosure of the documents requested would diminish the cooperation of those concerned by the merger.

- 144 First of all, it must be noted that those points of justification are put forward in a general and abstract manner without being substantiated by detailed arguments based on the content of the documents in question. Such considerations are therefore liable to be raised in respect of any other document of the same type. Accordingly, they cannot suffice as justification for refusing access to the documents requested in the present case, as otherwise the principle of strict interpretation of the exceptions laid down in Article 4 of Regulation No 1049/2001, and in particular of that laid down in the second subparagraph of Article 4(3) of that regulation, would be undermined.
- 145 In addition, it is clear, in the present case, that the Commission has in no way demonstrated that disclosure of the documents in question would have a substantial effect on the decision-making process in the light of the facts of the case.
- 146 Firstly, the Commission merely asserts that disclosure of the documents in question would undermine the collective nature of its decision-making process. Nevertheless, even if it were possible for that to be the case, disclosure of the internal documents in question is not of itself, in principle, such as seriously to undermine the protection of the Commission's decision-making process, within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001. Thus, such an assertion does not dispense the Commission from ascertaining, on a document-by-document basis, whether disclosure of the various opinions given by its services would seriously undermine the protection of its decision-making process. It is only once a concrete, effective examination has been carried out for each document requested that the Commission can, as necessary, judge whether disclosure, total or partial, of the internal documents in question would, by reason of their content, seriously undermine its decision-making process. It is, however, clear from the grounds of the decision of 13 February 2007 that no such examination was carried out. It follows, on the contrary, that the Commission based its findings on the nature of the documents requested rather than on the items of information actually contained in the documents in question.
- 147 Secondly, the Commission's argument based on trust and freedom of expression of its services must be rejected. In that regard, it must be borne in mind that such a factor does not play a decisive role, as the crucial issue is whether the concerns of the relevant institution are objectively justified (see, to that effect, *Muñiz v Commission*, cited in paragraph 141 above, paragraph 90). In the present case, however, the Commission's assertions are not supported by any evidence. Consequently, they appear too hypothetical to be capable of demonstrating that those concerns are objectively justified. Although the Commission's services can be required, in the context of their internal exchanges, to raise factors which may justify application of the exception based on the protection of the decision-making process, in particular with regard to notifications of mergers, that is not, however, the case, in principle, for all of the Commission's internal documents on the sole ground that they set out the opinions of those services. Such an interpretation would run counter to the principle that the exceptions laid down in Article 4 of Regulation No 1049/2001 must be interpreted strictly.

- 148 Thirdly, the Commission submits that disclosure of the documents in question would diminish the will to cooperate on the part of the various parties to a merger notification procedure.
- 149 It must be borne in mind, on the one hand, that those parties are subject, under the specific rules applicable, to certain obligations as to the supply of information and documents. On the other, the exceptions laid down in Article 4 of Regulation No 1049/2001 allow access to certain documents to be refused and are therefore intended to protect that cooperation, including informal cooperation, of the parties to the notification, on condition that the refusal to grant access has sufficient justification in law. In the present case, the decision of 13 February 2007 is not based on any particular fact in the case such as to establish the existence of a risk that the decision-making process would be seriously undermined if the internal documents requested were to be disclosed.
- 150 Accordingly, the Commission has not demonstrated to the requisite legal standard that the exception laid down in the second subparagraph of Article 4(3) of Regulation No 1049/2001 applied to the internal documents requested.
- 151 Finally, with regard to the refusal to grant partial access to the internal documents, it follows from the foregoing that, contrary to the Commission's submissions, that refusal is based on the type of documents requested rather than on their content.
- 152 In addition, as has already been held with regard to legal advice (see paragraphs 130 and 131 above), the Commission's explanation, consisting of an assertion that that advice is in the form of very brief documents, it not being possible to separate the parts thereof which can be disclosed from those which cannot be disclosed, cannot of itself suffice to justify the refusal to grant access to the internal documents in their entirety.
- 153 Accordingly, the refusal to grant access, including partial access, to the internal documents requested must be annulled as being incorrect in law, without it being necessary to examine whether there is an overriding public interest.

*Editions Jacob* judgment:

- 136 Aux termes de l'article 4, paragraphe 3, second alinéa, du règlement n° 1049/2001, « l'accès à un document contenant des avis destinés à l'utilisation interne dans le cadre de délibérations et de consultations préliminaires au sein de l'institution concernée est refusé même après que la décision a été prise, dans le cas où la divulgation du document porterait gravement atteinte au processus décisionnel de l'institution, à moins qu'un intérêt public supérieur ne justifie la divulgation du document visé ».
- 137 L'accès à deux des trois notes de la Commission visées au point 1 ci-dessus, sous g), a été refusé par la Commission en vertu de l'exception prévue à l'article 4, paragraphe 3, second alinéa, du règlement n° 1049/2001. Il s'agit d'une note du 10 février 2002 de la DG « Concurrence » au service juridique de la Commission, demandant un avis sur l'application de l'article 3, paragraphe 5, sous a), du règlement n° 4064/89, et d'une note du 4 novembre 2002 résumant l'état du dossier, établie pour le membre de la Commission chargé de la concurrence.

- 138 Premièrement, il y a lieu de constater que ces documents, qui ont été communiqués au Tribunal (voir point 23 ci-dessus), sont des documents préparatoires à la décision finale et ont été échangés au sein de la Commission pour permettre l'élaboration des documents formalisant la prise de position de l'institution. Ils contiennent des « avis destinés à l'utilisation interne dans le cadre de délibérations et de consultations préliminaires », au sens de l'article 4, paragraphe 3, second alinéa, du règlement n° 1049/2001, et relèvent donc bien du champ d'application de cette disposition.
- 139 Deuxièmement, il convient d'examiner si le refus d'accès aux documents internes demandés est, en l'espèce, justifié par l'exception tirée de la protection du processus décisionnel de l'institution.
- 140 Selon une jurisprudence constante, l'application de cette exception suppose qu'il soit démontré que l'accès aux documents sollicités était susceptible de porter concrètement et effectivement atteinte à la protection du processus décisionnel de la Commission et que ce risque d'atteinte était raisonnablement prévisible et non purement hypothétique (voir arrêt du Tribunal du 18 décembre 2008, Muñiz/Commission, T-144/05, non publié au Recueil, point 74, et la jurisprudence citée).
- 141 De surcroît, pour relever de l'exception prévue à l'article 4, paragraphe 3, premier alinéa, du règlement n° 1049/2001, l'atteinte au processus décisionnel doit être grave. Il en est notamment ainsi lorsque la divulgation des documents visés a un impact substantiel sur le processus décisionnel. Or, l'appréciation de la gravité dépend de l'ensemble des circonstances de la cause, notamment des effets négatifs sur le processus décisionnel, invoqués par l'institution quant à la divulgation des documents visés (arrêt Muñiz/Commission, point 140 supra, point 75).
- 142 En l'espèce, la décision attaquée évoque le préjudice sérieux que subirait le processus décisionnel si les délibérations internes des services de la Commission relatives à cette affaire étaient rendues publiques. Elle souligne l'importance s'attachant à ce que la Commission soit en mesure de préparer ses décisions en toute sérénité, à l'abri de toute pression extérieure et que ses services puissent exprimer librement leurs points de vue afin d'éclairer la prise de décision. Selon elle, la faculté, pour le personnel de la Commission, de formuler de tels points de vue serait sérieusement réduite si l'éventualité d'une publication devait être prise en compte.
- 143 Il y a lieu de constater que ces justifications sont invoquées de manière générale et abstraite, sans être étayées par des argumentations circonstanciées au regard du contenu des documents en cause. De telles considérations sont ainsi susceptibles d'être invoquées à propos de n'importe quel document de même nature. Dès lors, elles ne sauraient suffire à justifier le refus d'accès aux documents sollicités en l'espèce, sous peine de porter atteinte au principe d'interprétation stricte des exceptions prévues à l'article 4 du règlement n° 1049/2001, et en particulier à celle prévue à l'article 4, paragraphe 3, second alinéa, dudit règlement.
- 144 Partant, la Commission n'a pas démontré que l'exception prévue à l'article 4, paragraphe 3, second alinéa, du règlement n° 1049/2001 s'appliquait aux documents internes sollicités.

145 Dès lors, le refus d'accès intégral aux documents internes demandés doit être annulé pour erreur de droit, sans qu'il soit besoin d'examiner la question de l'existence d'un intérêt public supérieur.

*Borax* judgment:

62 Under the second subparagraph of Article 4(3) of Regulation No 1049/2001, access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned is to be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

63 According to the settled case-law referred to in paragraph 43 above, the examination required for the purpose of processing a request for access to documents must be specific in nature. On the one hand, the mere fact that a document concerns an interest protected by an exception is not sufficient to justify application of that exception. Such application may, as a rule, be justified only if the institution has previously assessed whether access to the document would specifically and effectively undermine the protected interest. On the other hand, the risk of a protected interest being undermined must, to be relied upon, be reasonably foreseeable and not purely hypothetical. In the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, the institution must also assess whether there is an overriding public interest in the disclosure of the document concerned (*Sweden and Turco v Council*, paragraphs 44 and 45).

64 It must be determined whether, by refusing access to the recordings at issue on the ground that their disclosure would seriously undermine its decision-making process, the Commission infringed the provisions of the second subparagraph of Article 4(3) of Regulation No 1049/2001.

65 According to what the Commission stated in the contested decision, disclosure of the recordings would seriously undermine its decision-making process, since the recordings contain individual opinions for internal use as part of deliberations and preliminary consultations within the institution. The Commission also stated, in the contested decision, that it was of paramount importance to preserve a certain space to think, so that the discussions could take place in a frank and open climate in order that it could correctly assess the issues at stake. It continued that, since disclosure of the recordings would expose the experts to undue external pressure, they would be reluctant to give their opinions freely in future. However, their advice is crucial to the Commission's decision-making process in that area, since it does not have the necessary specialised knowledge available in-house.

66 The Commission's argument that the recordings cannot be disclosed because they contain individual opinions expressed for internal purposes in a preliminary phase of the final decision conflicts with the very letter of the second subparagraph of Article 4(3) of Regulation No 1049/2001. That provision, in fact, expressly allows access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned.

- 67 Nor can the Commission justify its refusal of access to the recordings at issue by the necessity of protecting experts from any external pressure in order to preserve a climate of confidence favourable to frank discussions and not to deter experts from freely expressing their opinions in future.
- 68 Indeed, while the Community legislature has provided for a specific exception to the right of public access to the documents of the Community institutions as regards legal advice, it has not done the same for other advice, in particular scientific advice, such as that expressed in the recordings at issue. The Court of Justice has ruled that it could not correctly be held that there is a general need for confidentiality in respect of advice from the Council's legal service relating to legislative matters (*Sweden and Turco v Council*, paragraph 57). A fortiori, the same principle must be applied to the advice at issue, for which the Community legislature has not laid down a specific exception and which remains subject to the general rules applicable to the public right of access to documents.
- 69 Furthermore, in the terms of recital 6 in the preamble to Regulation No 1049/2001, wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, while at the same time preserving the effectiveness of the institutions' decision-making process. In this instance, the opinions expressed in the recordings in question were obtained for the purpose of adopting measures classifying the substances concerned.
- 70 It follows that scientific opinions obtained by an institution for the purpose of the preparation of legislation must, as a rule, be disclosed, even if they might give rise to controversy or deter those who expressed them from making their contribution to the decision-making process of that institution. The risk, relied upon by the Commission, that public debate born of the disclosure of their opinions may deter experts from taking further part in its decision-making process is inherent in the rule which recognises the principle of access to documents containing opinions intended for internal use as part of consultations and preliminary deliberations, which obviously include consultations of experts. It cannot, however, be inferred from the existence of such a risk that any disclosure of a scientific opinion with significant consequences, particularly economic or financial, for the economic operator concerned, will have a deterrent effect as regards its author or, even if that were shown, that the risk is such as seriously to undermine the institution's decision-making process, as where that institution would find it impossible to consult other experts.
- 71 In this case, the Commission justifies its refusal in a general and abstract way without specifying how the disclosure of the recordings would concretely and effectively undermine the process by which it decides on the classification of the substances in question. In fact, the risk of external pressure and the reluctance of experts to express their opinions freely and frankly, relied upon by the Commission, are based on mere assertions, unsupported by any properly reasoned argument.
- 72 Since it has not been shown that the Commission's decision-making process would be undermined, the criterion of seriousness of such an undermining has certainly not been met.

- 73 The Commission cannot contend that its work would be less efficient if it were constrained to cease tape recording meetings. That assertion rests on the idea, contrary to Regulation No 1049/2001, that access to the documents sought would force it to forego that type of medium. In fact, the propriety of a refusal of access must be determined in the light of the document itself, that is to say, under Article 3 of Regulation No 1049/2001, of its content and not its medium. It follows that, under Article 4 of Regulation No 1049/2001, access to a sound recording may be refused only if it contains information capable of undermining a protected interest, subject to the conditions laid down by that provision, whatever may be the medium concerned. The fear evinced by the Commission of having to give up recourse to certain operating methods is therefore unjustified.
- 74 It follows that the Commission infringed the second subparagraph of Article 4(3) of Regulation No 1049/2001 by refusing, in the contested decision, on the ground that it would seriously undermine its decision-making process, to produce the recordings in question or their transcripts.

*Muniz* judgment:

- 68 It should be pointed out, first of all, that the legality of the contested decision must be assessed on the basis of the facts and the law as they stood at the time when the decision was adopted (Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2006] ECR II-2023, paragraph 114).
- 69 It must then be noted that, at the time when the contested decision was adopted, the refusal to disclose all the requested documents fell within the scope of the exception to the right of access provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001.
- 70 In that regard, the Commission asserted, in essence, in the contested decision, that the conditions laid down in that article were satisfied, as the requested documents related to matters where the Commission had not yet taken a decision, and that the disclosure of those documents would seriously undermine the Commission's decision-making process. To justify that refusal, the Commission relied, in the contested decision, on a number of grounds which can be split into two groups.
- 71 As regards the first group of grounds put forward by the Commission, concerning the characteristics of the procedure in question, first it should be noted that the Commission relied on the preliminary nature of the analysis of technical matters contained in the requested documents, on the informal nature of the Working Group, and on the fundamental nature of that 'space to think' in its decision-making process. Second, it relied on the fact that the outcome of the Working Group's meetings were reflected in the documents examined by the Nomenclature Committee, or in its minutes, and that the applicant has had access to those minutes and to the agendas of the Nomenclature Committee's meetings.
- 72 In the second group of grounds put forward by the Commission, concerning the consequences of possible access to the requested documents, the Commission relied on the fact that disclosure of the requested documents at the time when the contested decision was adopted would have exposed the

Nomenclature Committee to unnecessary and detrimental pressure and would have prevented it from holding frank discussions in a cooperative atmosphere, and also on the fact that the capacity of Commission staff and experts participating in working meetings to express their views would be curtailed if, when drafting documents such as those requested, they had to take into account the possibility that their opinions might be disclosed to the public. Lastly, the Commission stressed that the decision-making process would be seriously undermined if it could no longer rely on full and frank advice from its services.

- 73 As regards the justification for the exception at issue, the Court must examine, first, whether those reasons relied upon by the Commission in refusing access to the requested documents demonstrate that such access would have seriously undermined that institution's decision-making process and then, if necessary, whether there is an overriding public interest in disclosure of the requested documents.
- 74 In that regard, it is appropriate to bear in mind settled case-law, according to which it must be shown that the access in question was likely specifically and actually to undermine the interest protected by the exception, and that the risk of that interest being undermined was reasonably foreseeable and not purely hypothetical (see Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraph 69, and the case-law cited).
- 75 In addition, in order to be covered by the exception in the first subparagraph of Article 4(3) of Regulation No 1049/2001, the decision-making process would have to be 'seriously' undermined. That is the case, in particular, where the disclosure of the documents in question has a substantial impact on the decision-making process. The assessment of that serious nature depends on all of the circumstances of the case including, inter alia, the negative effects on the decision-making process relied on by the institution as regards disclosure of the documents in question.
- 76 In the present case, the decision-making process at issue relates to measures on the classification of goods adopted by the Commission, following an opinion of the Nomenclature Committee, where the classification in the Combined Nomenclature of the Common Customs Tariff of particular goods is likely to give rise to difficulty or be controversial, and is governed by Regulation No 2658/87. The outcome of that decision-making process has a definite impact, in particular on operators' imports, since a new classification generally leads to a change in the customs duty applied to imports.
- 77 That decision-making process, which is of a legislative nature, consists, in essence, of the representative of the Commission submitting to the committee of which he is the chairman, and which comprises Member State representatives, a draft of the measures to be adopted, so that the committee can deliver its opinion by the majority required under Article 205(2) EC within a time-limit which the chairman may lay down according to the urgency of the matter. If those proposed measures are not in accordance with the opinion of the committee, the Commission must communicate, to the Council, a proposal relating to the measures to be taken. In the absence of a different decision adopted by the Council by qualified majority within three months from the date on which the proposal was communicated to it, the Commission adopts the proposed measures (Article 10 of Regulation No 2658/87).

- 78 As regards the first group of grounds put forward by the Commission, it is important to note that the requested documents all emanate from the Working Group which was created pursuant to Article 8 of the rules of procedure of the Customs Code Committee to support the work of the Nomenclature Committee. More specifically, the Working Group, which met from 21 to 23 September 2004, was given the task of preparing the Nomenclature Committee meeting of November 2004. It is common ground that the files involving the requested documents had not yet been examined in the Nomenclature Committee, on the date of the first request on 13 October 2004 (see paragraphs 11 and 12 above). In that context, the Commission pointed to the informal nature of the working group and the preliminary nature of its analysis of technical matters contained in those documents. Such arguments are, however, irrelevant.
- 79 While it is true that the requested documents were involved at an early stage of the decision-making process, it is nevertheless the case that they were drawn up or received by the Commission and were in its possession within the meaning of Article 2(3) of Regulation No 1049/2001, which provides that its provisions 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'. Therefore, that article must be regarded as applying to all the requested documents and, indeed, the Commission has not disputed that.
- 80 Moreover, the exception with which Article 4(3) of Regulation No 1049/2001 is concerned covers access to documents for internal use which relate to a matter where the institution has not yet taken a decision. However, neither by its wording nor by reason of the interest that it protects does that exception preclude the possibility of requesting access to documents for internal use containing a preliminary analysis.
- 81 As regards, in particular, the informal nature of the Working Group, at the hearing the Commission pointed to the fact that, on the one hand, the composition of the group varied, in that it depended on the actual presence of the Member States invited to participate in it and, on the other, that the Working Group did not have a formal role in the decision-making process, as the Nomenclature Committee's adoption of a position constituted the important formal step. Furthermore, the Commission added that what was discussed within the Working Group was raised again in the Nomenclature Committee, which has the authority to give the required opinion.
- 82 It is clear that those explanations as to the informal nature of the Working Group do not alter in the slightest the fact that documents emanating from the Working Group 'can be disclosed', in the sense indicated in paragraphs 79 and 80 of the present judgment, that is to say, can be disclosed subject to the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001. It should be added that, although the Nomenclature Committee is not bound by the Working Group's proposal, it is nevertheless the case that documents drawn up or received by the Working Group are of interest to that committee for the purpose of delivering its opinion. That is particularly so when the Nomenclature Committee, basing itself on the technical expertise of the Working Group, confines itself to referring, in its minutes, to documents submitted by the latter.

- 83 That is also the position in the present case. It is clear from the minutes of the Nomenclature Committee's meetings of 20 September 2004 and 11 and 12 November 2004, annexed to the application, that that committee made reference to the Working Group's documents, namely, inter alia, the files on the classification of goods and the minutes of the discussions within the Working Group. However, the Nomenclature Committee's reference was made without recording, in the minutes, the essential content of those documents or at the very least the main points of the assessments of that committee concerning the work of the Working Group.
- 84 Therefore, the Commission's argument that the outcome of the work of the Working Group is reflected in the documents examined by the Nomenclature Committee, or in its minutes, and that the applicant has had access to those documents must be rejected. Such access cannot be regarded as satisfying the requirements of the public's right to the widest measure of access to documents and of openness which inter alia 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, as is clear from recitals 2 and 4 in the preamble to, and Article 1(a) of, Regulation No 1049/2001.
- 85 It follows that, in the present case, contrary to the Commission's contentions, neither the preliminary nature of the analysis contained in the requested documents, nor the informal nature of the Working Group with which they are associated, nor the fact that the outcome of the work of the Working Group was reflected in the documents examined, is such as to justify special treatment under Regulation No 1049/2001 in regard to the application of the exception in question to the right of access to those documents.
- 86 As regards the second group of grounds put forward by the Commission, it should be pointed out, first, that the protection of the decision-making process from targeted external pressure may constitute a legitimate ground for restricting access to documents relating to the decision-making process. Nevertheless, the reality of such external pressure must be established with certainty, and evidence must be adduced to show that there was a reasonably foreseeable risk that the classification decision to be taken would be substantially affected owing to that external pressure. That is not, however, the situation in this case.
- 87 In that regard, it must be pointed out, at the outset, that the risk of external pressure is referred to in a vague and general way in the contested decision. In addition, the Commission's submissions in that context are not sufficiently concrete and substantiated to constitute evidence to show that there would have been a genuine risk of external pressure if the requested documents had been disclosed before the Nomenclature Committee's opinion had been delivered.
- 88 In fact, the Commission limited itself to asserting that there was a possibility of such external pressure on account of the significant commercial interests in matters of customs tariff classification. However, that mere possibility cannot per se constitute a legitimate ground for restricting access to documents since, in accordance with the first subparagraph of Article 4(3) of Regulation No 1049/2001, the exception provided for therein must be interpreted and applied strictly (see, to that effect, Case C-266/05 P *Sison v Council* [2007] ECR I-1233,

paragraph 63, and *Franchet and Byk v Commission*, cited in paragraph 68 above, paragraph 84).

- 89 The Commission did express some concerns, namely, that the capacity of its staff and the experts participating in the working meetings to express their opinions would be curtailed if, during the drafting of documents such as the requested documents, they had to take into account the possibility that their opinions would be disclosed to the public. At the hearing, the Commission specified, in that regard, that if the members of the Working Group knew that their opinions might be made public, they would no longer be able to express themselves freely.
- 90 For the purpose of deciding whether there is a legitimate reason for fearing that the disclosure of documents might undermine the decision-making process, the institution's perspective, set out in the preceding paragraph, must indeed be taken into account. However, that factor does not play a decisive role, as the determinant issue is whether the concerns of the relevant institution are objectively justified.
- 91 That is not the case here. Since the Commission's contentions are not corroborated by other evidence, they do not establish that its concerns are objectively justified.
- 92 Furthermore, the fact that the institution in question promised to respect the confidentiality of discussions between its staff and experts participating in the working meetings, supposing that such a promise was made, cannot justify protection of the opinions expressed to an extent which goes beyond that laid down in Article 4(3) of Regulation No 1049/2001.
- 93 In any event, it must be observed that there is no objective reason to differentiate, on that point, between the Working Group and the Nomenclature Committee, whose minutes and other documents are disclosed on request without that compromising the ability of its members to express themselves freely. In addition, it should be pointed out that it is the Working Group itself which decides what will be included in its minutes.
- 94 Having regard to the foregoing, the pleas in law must be accepted and it must be held that the reasons put forward by the Commission in the contested decision are not sufficient to establish that there was a risk that the decision-making process would be seriously undermined if the requested documents had been disclosed. The Commission was therefore not entitled to rely on the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001 to refuse access to the requested documents. Consequently, it infringed that article and Article 2(1) of that regulation in relation to its obligations on openness.

*MyTravel* judgment:

- 40 Under the second subparagraph of Article 4(3) of Regulation No 1049/2001, access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned is to be refused, even after the decision has been taken, if disclosure of the

document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure of the document.

41 In the present case it is necessary first of all to ascertain whether the Commission committed an error of assessment in taking the view that, pursuant to the provision referred to above, disclosure of the report and the working papers in respect of which total or partial access was not granted would seriously undermine its decision-making process. If relevant, it will then be necessary to examine whether the Commission committed an error of assessment in its analysis of the existence of an overriding public interest.

– The extent of undermining of the decision-making process by disclosure of the report

42 In the first place, it is clear that the report is a 'document containing opinions for internal use as part of deliberations and preliminary consultations within the [Commission]', for the purposes of the second subparagraph of Article 4(3) of Regulation No 1049/2001.

43 It is apparent from the mandate of the working group, which was communicated to the applicant as an annex to the first decision, that the group was created in order to analyse the different stages in the administrative and judicial procedures in the *Airtours*/First Choice case and to propose appropriate conclusions (point A 'Objectives'). In accordance with the mandate, the working group was required to examine the following issues and indicate any possible points of disagreement with the Court: '(1) is an appeal against the [*Airtours*] judgment appropriate? (2) which weaknesses ... has the judgment revealed, in particular in the administrative procedure leading to the decision? (3) which conclusions can be drawn from this case with respect to internal procedures ... ? (4) can lessons be learned from any other activity areas of DG Competition? (5) which aspects of substantive competition policy addressed in the [*Airtours*] judgment deserve further examination in ongoing or future reviews ... ? (6) are there implications on other competition cases pending before the Court?' (point C 'Issues to be examined'). The mandate also stated that the report was to be submitted for discussion with the Member of the Commission responsible for competition matters (point D 'Time Schedule'), which was done on 25 July 2002, that is to say, before the expiry of the period for bringing an appeal.

44 Thus, the whole of the report concerns opinions for internal use as part of deliberations and preliminary consultations within the Commission. It is accordingly, as such, capable of falling within the scope of application of the second subparagraph of Article 4(3) of Regulation No 1049/2001.

45 In the second place, regardless of whether or not it is well founded, the applicant's argument that the presumption in favour of disclosure is stronger where the decision envisaged in the document at issue has been adopted (see paragraph 36 above), cannot rule out all possibility of relying on the exception laid down in the second subparagraph of Article 4(3) of Regulation No 1049/2001. It is apparent from the very wording of that provision that the exception in question may be relied upon 'even after the decision has been taken'. Therefore, the mere fact that the Commission did not bring an appeal against the *Airtours* judgment and that a variety of recommendations contained in the report were implemented (point I.3 of the first decision) does not of itself lead to the conclusion that disclosure of that report cannot be, or can no longer

be, liable seriously to undermine that institution's decision-making process. Consequently, that argument must be rejected as being irrelevant.

- 46 Point 3.4.4 of the report on the implementation of the regulation, which the applicant has relied upon in support of its line of argument, does not alter that assessment. In that report, the Commission was attempting to produce a first qualitative evaluation of the application of Regulation No 1049/2001 in the light of the principles of the transparency policy pursued by the Community institutions (report on the implementation of the regulation, 'Foreword', p. 2). With regard to the second subparagraph of Article 4(3) of the regulation, the Commission states in point 3.4.4 that the existence of serious harm is particularly difficult to establish when refusal concerns a decision that has been adopted, in so far as the decision-making process in question has been completed and the disclosure of a preparatory document drawn up for internal deliberations concerning that matter should, in such a case, seriously undermine the institution's capacity to take future decisions, which could risk becoming too abstract. Nevertheless, that statement does not mean that the Commission means thereby to rule out the possibility of relying on the exception in question where it can establish that disclosure of the report would seriously undermine its decision-making process, even if certain decisions have been taken on the basis of the contents of that document.
- 47 In the third place, as regards the nature of a serious threat to the decision-making process, the Commission states, in essence, in the first decision that disclosure of the report would call into question the freedom of its authors to express their views and the opinions and assessments of those authors would be disclosed to the public, even though it had been their intention to put forward their views only to the addressee of the report (see paragraph 14 above).
- 48 In the present case, it is apparent from the working group's mandate communicated to the applicant as an annex to the first decision (see paragraph 42 above) that the authors were requested to put forward their views, even critical ones, on the administrative procedure followed at the time the *Airtours*/First Choice concentration was examined and to comment freely on the *Airtours* judgment in the context of a possible appeal against it. That work of analysis, reflection and criticism was carried out for internal purposes and was not intended to be brought to the attention of the public, because it was designed to be submitted for discussion purposes to the Member of the Commission responsible for competition matters. It is therefore in the light of that report that the latter was able to reach a decision on issues, such as the decision to bring an appeal or the decision to propose possible improvements to the administrative procedure applying to the control of concentrations or to other areas in the field of competition law, which fall within his jurisdiction or that of the Commission and not that of the working group.
- 49 Furthermore, unlike the position where the Community institutions act as legislators, where wider access to documents will be authorised pursuant to recital 6 to Regulation No 1049/2001, the report falls within the purely administrative functions of the Commission. Those who were primarily concerned by the appeal proceedings that were considered and by the improvements discussed in the report were the undertakings affected by the *Airtours*/First Choice concentration and by concentrations in general. Consequently, the interest of the public in obtaining access to a document

pursuant to the principle of transparency, which seeks to ensure greater participation of citizens in the decision-making process and to guarantee that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system, does not carry the same weight in the case of a document drawn up in an administrative procedure intended to apply rules governing the control of concentrations or competition law in general, as in the case of a document relating to a procedure in which the Community institution acts in its capacity as legislator.

- 50 In those circumstances, the Commission is correct to conclude that disclosure of the report to the public would seriously undermine the right of one of its Members to the frankly-expressed and complete views of its own services as to the steps to be taken in response to the *Airtours* judgment.
- 51 Disclosure of that document in this case would carry the risk not only that the possibly critical opinions of Commission officials might be made public, but also that the content of the report – which is a preparatory document containing the views and recommendations of the working group – could be compared with the decisions ultimately taken on those points by the Member of the Commission responsible for competition matters or within the Commission and, accordingly, that that institution's internal discussions would be disclosed. That would risk seriously undermining the decision-making freedom of the Commission, which adopts its decisions on the basis of the principle of collegiality and whose Members must, in the general interest of the Community, be completely independent in the performance of their duties.
- 52 Furthermore, if that report were to be disclosed, it would mean that the authors of a report of such a kind would take that risk of disclosure into account in the future, to the point when they might be led to practise self-censorship and to cease putting forward any views that might involve the addressee of the report being exposed to risk. The result would be that the Commission could no longer benefit from the frankly-expressed and complete views required of its agents and officials and would be deprived of a constructive form of internal criticism, given free of all external constraints and pressures and designed to facilitate the taking of decisions as regards whether an appeal should be brought against a judgment of the Court of First Instance or the improvement of its administrative procedures relating to the control of concentrations or, more broadly, competition law.
- 53 In the present case, it is also important to note that the Member of the Commission responsible for competition, as addressee of the report, must be able freely to assess the views put forward in the report, taking into account factors that may go beyond the scope of the rules in force, as interpreted by the Commission services and the Community judicature. This means that it may not be possible to implement a proposal for reasons connected with the political priorities of the Commission or with the availability of resources.
- 54 The Court also holds that the risk of the decision-making process being seriously undermined in the present case, were the report to be disclosed, is reasonably foreseeable and not purely hypothetical. If it were to be accepted that such reports should not be confidential as regards the public and having regard to the risk of their being disclosed, it appears logical and probable that the Member of the Commission responsible for competition would be induced to cease making requests for the written, and potentially critical, views of his

advisers on issues falling within his jurisdiction or that of the Commission, including as to whether an appeal should be brought against a judgment of the Court of First Instance annulling a decision of the Commission relating to the control of concentrations. Merely to hold oral and informal discussions, which would not require the drawing up of a 'document' within the meaning of Article 3(a) of Regulation No 1049/2001, would cause significant damage to the effectiveness of the Commission's internal decision-making process, especially in areas in which it is required to carry out complex legal, factual and economic assessments and to examine particularly large amounts of documents, as in the case of the control of concentrations. It follows that it is essential that there be a written analysis, by the services responsible, of the administrative file and the proposals for a decision to be submitted, in order to ensure that the issues are considered and that a decision is taken in full awareness of all the essential elements and in the proper form, first of all, by the Member of the Commission responsible for competition matters and, thereafter, on the basis of consultation between the different services affected within the Commission. Therefore, in accordance with recital 11 to Regulation No 1049/2001, the Community institutions must be allowed to protect their internal consultations and deliberations where, as in the present case, it is necessary in the public interest in order to safeguard their ability to carry out their tasks, in particular when they are exercising their administrative decision-making powers, as in the case of the control of concentrations.

55 Consequently, the applicant's complaint that disclosure of the whole of the report would not seriously undermine the Commission's decision-making process must be rejected.

– The extent of undermining of the decision-making process by disclosure of working papers 4 to 14 and 16 to 19

56 As regards the working papers in respect of which access was refused in whole or in part by the Commission in the first decision on the basis of the exception relating to the protection of the decision-making process, it must be observed that the applicant simply indicates that the arguments put forward in relation to the report are also applicable to the documents used by the working group.

57 In that regard, the inventory which forms the annex to the first decision shows that the documents in respect of which the exception laid down by the second subparagraph of Article 4(3) of Regulation No 1049/2001 was invoked are as follows:

– documents 4 and 5, which comprise a revised report and a note of analysis prepared by the sub-group responsible for the analysis and assessment of the *Airtours* judgment, including any possible points of disagreement with the judgment, and of the appropriateness of bringing an appeal;

– documents 6, 7 and 8, which comprise notes of analysis of the *Airtours* judgment prepared by an official of the legal service, an official of DG Competition and a hearing officer, respectively, each of whom was a member of the sub-group concerned;

- document 9, which comprises a discussion paper on the internal organisation and possible improvements, prepared by the sub-groups responsible for examining any weaknesses on the Commission's part and the appraisal of proposals for improvement;
- document 10, which comprises an interim report prepared by one of those sub-groups, and documents 11 to 13, which are annexes to that report (partial access was granted to document 13);
- document 14, which sets out the questions for the interviews carried out with the Airtours team;
- document 16 (to which partial access was granted), which comprises a background document used by one of the sub-groups;
- document 17, which comprises proposals for improvement and the provisional report of 25 June 2002 prepared by one of the sub-groups;
- document 18, which comprises a note entitled 'Lessons for other activity areas' prepared by the sub-group responsible for considering the implications for other areas of competition policy;
- document 19, which comprises a provisional report of 26 June 2002, prepared by the sub-group responsible for the identification of substantive policy questions.

58 The Commission also stated in the first decision that the working papers were drawn up in order to prepare the report and that the provisional reports of the different sub-groups were often reproduced in it word-for-word. In addition, the Commission mentioned in the first decision that each of the working papers had been examined individually.

59 As a result, the Court considers that, since the report is protected under the second subparagraph of Article 4(3) of Regulation No 1049/2001, the documents which enabled it to be produced and which comprise preparatory assessments or provisional conclusions for internal use, as is shown by the inventory, also come within that exception. The Commission was accordingly well founded in relying on that exception in the first decision in order to reach the view that total or partial access to working papers 4 to 14 and 16 to 19 would seriously undermine its decision-making process.

- Whether an overriding public interest exists

60 Regulation No 1049/2001 provides that both the exceptions laid down by Article 4(2) and the exceptions laid down by Article 4(3) are not to apply where disclosure of the document in question is justified by an 'overriding public interest'.

61 In the present case, the applicant puts forward the same arguments in relation to the first decision and the second decision, without making any distinction between the different categories of documents concerned and the exception invoked. Essentially, it claims that the need to understand what took place and what was done by the Commission, as well as the need to ensure the sound

administration of justice constitute overriding public interests justifying disclosure of those of the documents requested to which access was refused.

- 62 However, those arguments do not allow the overriding public interest required by Regulation No 1049/2001 to be established to the requisite legal standard, nor do they allow it to be ascertained whether, on setting that alleged overriding public interest against the interest in maintaining the confidentiality of the documents as regards the public under the exceptions examined above, the Commission ought to have reached the conclusion that those documents should none the less be disclosed.
- 63 As regards the need to understand what took place, the applicant does not explain either the reasons for which it takes the view that that alleged need constitutes an overriding public interest within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001, or in what way that alleged interest should mean that the Commission had, after setting that interest against the general interest in protecting the confidentiality of the documents in question, to disclose those documents.
- 64 As regards the need to understand what the Commission did after the *Airtours* judgment, it must be pointed out that in the first decision and the second decision the Commission gave the reasons for which it took the view that it was entitled to rely on the exception laid down by the second subparagraph of Article 4(3) of Regulation No 1049/2001 in order to object to disclosure of the report, of certain working papers and of the other internal documents. The applicant has not explained the reasons for which its own interest, which bears on its individual position in the dispute in Case T-212/03, in understanding what the Commission did subsequent to the *Airtours* judgment could give rise to such an overriding public interest. In any event, even if it were to be assumed that such an interest were to exist, the applicant has neither explained nor established in what way that interest was capable of prevailing over the general interest in the protection of the confidentiality of the documents in question in any weighing up of those two interests.
- 65 As regards the need to obtain disclosure of the documents requested under the overriding interest in the sound administration of justice, it must be pointed out that that argument seeks, in substance, to assert that those documents would allow the applicant to argue its case better in the action for damages. That objective does not, however, of itself, constitute an overriding public interest in disclosure which is capable of prevailing over the protection of confidentiality provided for in the second subparagraph of Article 4(3) of Regulation No 1049/2001. Having regard to the general principle of access to documents laid down by Article 255 EC and recitals 1 and 2 to the regulation, that interest must be objective and general in nature and must not be indistinguishable from individual or private interests, such as those relating to the pursuit of an action brought against the Community institutions, since such individual or private interests do not constitute an element which is relevant to the weighing up of interests provided for by the second subparagraph of Article 4(3) of the regulation.
- 66 Under Article 2(1) of Regulation No 1049/2001, the beneficiaries of the right of access to the documents of the institutions comprise 'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State'. That provision makes it clear that the purpose of the regulation

is to guarantee access for everyone to public documents and not just access for the requesting party to documents concerning it (Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429, paragraph 50). Consequently, the individual interest which a party may invoke when requesting access to documents of personal concern to it cannot generally be decisive for the purposes both of the assessment of the existence of an overriding public interest and of the weighing up of interests under the second subparagraph of Article 4(3) of Regulation No 1049/2001.

- 67 Thus, it is clear from settled case-law that even if those documents prove necessary for the applicant's defence in the action for damages – a question which falls to be considered in that case – that circumstance is irrelevant for the purpose of assessing the balance of the public interest (see, to that effect and by way of analogy, *Sison v Council*, cited in paragraph 66 above, at paragraph 55, and order of 8 June 2005 in Case T-287/03 *SIMSA v Commission*, not published in the European Court Reports, paragraph 34).
- 68 Consequently, the applicant's complaint that there is an overriding public interest in disclosure of the report and working papers 4 to 14 and 16 to 19 under the second subparagraph of Article 4(3) of Regulation No 1049/2001 will be rejected. The same applies to the question as to whether an overriding public exists under Article 4(2) *in fine* of the regulation, in respect of which the applicant puts forward the same arguments as those analysed above.

### 3. *The second decision, relating to the other internal documents*

- 82 In the second decision, the Commission relied on three exceptions laid down in Regulation No 1049/2001 as the basis for its refusal to grant access to certain internal documents (see paragraphs 21 to 22 above). These comprised the exception relating to the protection of the decision-making process, the exception relating to the protection of investigations and audits and the exception relating to the protection of legal advice.

#### *The exception relating to the protection of the decision-making process*

- 83 This exception falls to be examined by reference to the different categories of documents identified by the Commission in the second decision.

The extent of undermining of the decision-making process by disclosure of the draft texts, the notes to the Commissioner, the notes to the other services and the notes in reply from the services other than the legal service

#### – Arguments of the parties

- 84 The applicant challenges the Commission's application in the second decision of the second subparagraph of Article 4(3) of Regulation No 1049/2001 as a basis for its refusal to communicate the whole or certain parts of the internal documents requested. The need to ensure 'space to think' for its services, which is invoked by the Commission, is abstract and incompatible with the general objective of transparency pursued by Regulation No 1049/2001 and with the limited scope of the exceptions to that principle. The Commission's services do not require to implement the competition rules in secret and the control of concentrations does not justify any particular difference in treatment compared with the other areas in which that institution intervenes. Moreover,

the embarrassment or inconvenience which disclosure of the documents requested might entail does not, of itself, have the result that the application of the exception at issue can be justified. In addition, the applicant submits that the argument based on the risk of inhibiting the control of future and similar concentrations has no basis. Since the Airtours decision has been annulled, the disclosure of internal documents relating to it could not undermine the Commission's ability to take another decision or even to determine the contents of such a decision. The Commission's analysis in the field of concentrations must be undertaken in the light of the circumstances of the particular case, without regard to media or political pressure.

- 85 The Commission states that, even if the internal documents fall within the scope of Regulation No 1049/2001, Article 17(3) of Commission Regulation No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2004 L 133, p. 1), which replaced Article 17(1) of Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time-limits and hearings provided for in Regulation No 4064/89 (OJ 1998 L 61, p. 1), excludes internal documents in the administrative file from the regime governing access to the applicable file. Thus, the fact that the parties to a concentration do not have a right of access to those documents reinforces the notion that their disclosure to the public would seriously undermine the Commission's decision-making process in the area. The Commission also argues that the exception at issue was not applied in the abstract, because each document was scrutinised individually and partial access was granted where that was possible. The purpose of that exception is, however, to safeguard the Commission's decision-making process in general, having regard in particular to future circumstances or to matters relating to the same question, and not merely to the proceedings in question. According to the Commission, the ability of its services to set out their opinions is essential to the decision-making process and that ability would be curtailed if they were to have to draft their opinions in taking into account the possibility that those opinions might be disclosed to the public, even after the case has been closed.

– Findings of the Court

- 86 The first point to be noted is that it is clear that there is no provision of Regulation No 1049/2001 which states that the existence of a right of access by the public to the documents of the Commission may be dependent on the fact that the person requesting those documents is an undertaking which is a party to a concentration, which has, under Article 17(3) of Regulation No 802/2004 (or Article 17(1) of Regulation No 447/98, which preceded it), no right of access to the internal documents in the Commission's administrative file.
- 87 On the contrary, Article 2(1) of Regulation No 1049/2001 gives a very wide right of access to the documents of the Commission, because that right is available to any citizen of the Union and any natural or legal person residing or having its registered office in a Member State, without any other conditions being imposed. It is also apparent from Article 2(3) of that regulation that the provisions relating to public access to the documents of the Commission apply to all documents held by that institution, that is to say, all documents drawn up or received by it and in its possession, in all areas of activity of the European Union.

- 88 Furthermore, the second subparagraph of Article 4(3) of Regulation No 1049/2001 specifies expressly the circumstances in which access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned can be refused, even after the decision has been taken, by stipulating that in such a case disclosure of the document must seriously undermine the decision-making process of the institution concerned. That provision is of general application and is not dependent on the Commission's areas of activity or the rules applying to the proceedings which relate to them.
- 89 Consequently, the fact that an undertaking which is party to a concentration does not have the right of access to the internal documents in the administrative file by virtue of Article 17(3) of Regulation No 802/2004 does not mean that it can be ruled out that any person, whoever it may be, may have a right of access to those documents on the basis of the principles laid down in Regulation No 1049/2001 (see, to that effect and by way of analogy, *Interporc v Commission*, cited in paragraph 15 above, at paragraphs 44 and 46).
- 90 The Commission does not, moreover, deny that the internal documents at issue do indeed fall within the scope of application of Regulation No 1049/2001. In addition, the argument it now makes, based on the application of Article 17(3) of Regulation No 802/2004, is not mentioned in the second decision as a justification relied on in invoking the exception laid down by the second subparagraph of Article 4(3) of Regulation No 1049/2001.
- 91 It is thus by having regard, first, to the fact that the applicant is a legal person having its registered office in a Member State and requests, in that capacity, to have a right of access to certain documents held by the Commission, and, secondly, to the reasoning set out in the second decision, that the Court should review the lawfulness of the decision.
- 92 In the present case, in the second decision the Commission relies on the exception laid down in the second subparagraph of Article 4(3) of Regulation No 1049/2001 as regards four categories of documents: the draft texts, the notes to the Commissioner, the notes to the other services and the notes in reply from the services other than the legal service (see paragraph 21 above). Even if that examination was undertaken on a specific and individual basis, document by document, the reason invoked by the Commission in order to justify the exception referred to above remains essentially the same. It is, moreover, for that reason that the parties refer to those documents together, rather than individually, in their written pleadings, in the light of the explanations set out in the second decision as regards each of the four categories mentioned above.
- 93 At the hearing, the applicant indicated that it was not interested in the communication of the draft texts, that is to say, the drafts of the decision taken under Article 6(1)(c) of Regulation No 4064/89, the statement of objections and the final decision in the *Airtours/First Choice* case and in reply to a question from the Court on that point, it stated that it withdrew its request for access to those documents. There is therefore no longer any need for the Court to examine the question of the lawfulness of the second decision in that regard.
- 94 With respect to the notes to the Commissioner, the notes to the other services and the notes in reply from the services other than the legal service, the

Commission is right to submit that the partial or total disclosure, as the case may be, of those documents would reduce the ability of its services to express their point of view and would seriously undermine its decision-making process in the field of the control of concentrations.

- 95 In the control of concentrations, it is the final decision which is important, together with the outcome of the various procedural stages laid down under Regulation No 4064/89 in order to reach that decision (such as the decision adopted under Article 6(1)(c) of Regulation No 4064/89 or the statement of objections). In that context, the notes to the Commissioner, the notes to the other services and the notes in reply from the services other than the legal service were exchanged within the Commission in order to allow the documents formalising the views adopted by the administration to be drawn up.
- 96 As the Commission contends in the second decision, the disclosure of such documents to the public is liable seriously to undermine its decision-making process, whether this involves the proceedings relating to the concentration in question or future similar concentration proceedings, between the same parties, or which concern principles applied in the disputed proceedings, in so far as those documents do no more than record a point in the proceedings that has not yet been formalised in a definitive document. Those preparatory documents may indicate the opinions, the doubts or the changes of mind of the Commission services, which – at the end of the decision-making process in question – may no longer appear in the final versions of the decisions.
- 97 As was held in relation to the report (see paragraph 52 above), disclosure of the documents in respect of which access was refused would mean that their authors would take that risk of disclosure into account in the future, to the point where they might be led to practise self-censorship and to cease putting forward any views that might involve the addressee of the document in question being exposed to risk. The result would be that communication between the Commission's services would no longer be as frankly expressed and complete as it has to be in order to allow for the drawing up of the decisions and statements of objection required in proceedings for the control of concentrations.
- 98 The applicant's arguments do not put that analysis in question. The Commission did not simply invoke the need to protect the time to reflect which it seeks in a general and abstract manner, but did so on a document-by-document basis, in an individual and specific way. Thus, certain documents were disclosed in part. What is more, that analysis is not put in question by the mere fact that the proceedings in question have ended, given that the second subparagraph of Article 4(3) of Regulation No 1049/2001 continues to apply even after the decision has been taken and the Commission explained in the second decision that disclosure of the documents at issue risked undermining its assessment of similar concentrations which might arise between the parties concerned or in the same sector.
- 99 It is significant in that regard that the Commission illustrated that proposition in the second decision by reference both to cases in the same sector or between the same parties and to cases involving the concept of a collective dominant position. It referred specifically to the EMI/Time Warner case, in which it refused a request for access under Regulation No 1049/2001 to the statement

of objections in order to protect the deliberations of its services in the BMG/Sony case, which concerned the same sector of activities.

100 The Court also holds that the risk in the present case of the decision-making process being seriously undermined in the event of the internal and preparatory documents drawn up in the Airtours/First Choice case being disclosed, is reasonably foreseeable and not purely hypothetical. It thus appears reasonable to believe, as the Commission states in the second decision, that such documents could be used – even though they do not necessarily represent the Commission’s definitive position – to influence the position of its services, which are entitled to be kept free and independent from all external pressures, in the examination of similar cases involving the same sector of activities or the same economic concepts. It is therefore necessary to allow the Commission to protect the internal consultations and deliberations of those services where, as in the present case, to do so is necessary in order to preserve the Commission’s ability to undertake its duties in the control of concentrations.

101 Consequently, the applicant’s complaint that disclosure of the documents referred to above would not seriously undermine the Commission’s decision-making process will be rejected.

The extent of undermining of the decision-making process by disclosure of the Hearing Officer’s report

– Arguments of the parties

102 The applicant claims that the report of the Hearing Officer cannot benefit from the exception laid down in the second subparagraph of Article 4(3) of Regulation No 1049/2001, since, under the terms of his mandate, the Hearing Officer was, at the time at which he prepared his report in 1999, part of DG Competition and was attached to the Director-General, to whom he reported. In those circumstances, the independence of hearing officers is fully protected in accordance with the mandate under which they operate and they have no reason to fear the disclosure of their reports to the public.

103 The Commission states that the mandate of the hearing officer is irrelevant when it takes a decision on disclosure to the public of a document containing the opinions of the hearing officer in a given case. Since he gives his opinion on the substance and the procedural aspects of the case, his report forms part of the internal deliberations of the Commission before the adoption of the final decision.

– Findings of the Court

104 As with the other internal documents drawn up by the different services involved in the preparation of the Airtours decision (see paragraph 94 above), the Commission is correct to consider that disclosure of the report of the Hearing Officer would, in the present case, seriously undermine its decision-making process in the area of the control of concentrations.

105 It is apparent from the second decision that it is not merely the fact that the document at issue contained an opinion intended for internal use which was invoked by the Commission as a basis for its application of the exception, but the fact that in that document the Hearing Officer gave his opinion of the

substance and the procedural aspects of the Airtours/First Choice case (point II.7 of the second decision).

106 In the second decision, the Commission also, correctly, stated that the Hearing Officer's freedom to express his views would be jeopardised if he had to take into account the possibility that his report could be disclosed to the public and that such disclosure would seriously undermine the decision-making process in the area of concentrations, since it could no longer rely in the future on the frankly-expressed and complete opinions of hearing officers (point II.7 of the second decision).

107 Consequently, the applicant's complaint that the disclosure of the Hearing Officer's report would not seriously undermine the Commission's decision-making process must be rejected.

The extent of undermining of the decision-making process by disclosure of the note from DG Competition to the Advisory Committee

– Arguments of the parties

108 The applicant claims that the second subparagraph of Article 4(3) of Regulation No 1049/2001 cannot apply to the note from DG Competition to the Advisory Committee, because that committee is composed of representatives of the Member States and thus the procedure involving that committee does not form part of deliberations or preliminary consultations 'within the institution concerned'.

109 The Commission argues that that consultation is a necessary step in the preparation of the final decision and must therefore be considered as taking place within that institution.

– Findings of the Court

110 As with the other internal documents drawn up by the different services involved in the preparation of the Airtours decision (see paragraph 94 above), the Commission is correct to consider that disclosure of the note from DG to the Advisory Committee (document 7.7) would, in the present case, seriously undermine its decision-making process in the area of the control of concentrations (point II.4 of the second decision).

111 As is stated in the second decision, consultation with the Advisory Committee also forms part of the internal decision-making process in the control of concentrations. Even though the Advisory Committee is composed of representatives of the Member States, and is therefore separate from the Commission for that reason, the fact of being obliged to transmit internal documents to the Advisory Committee under Article 19 of Regulation No 4064/89 in order that that committee may reach a view in accordance with a procedure which requires its intervention permits the inference that the documents at issue are documents which are internal to the Commission for the purposes of the application of Article 4(3) of Regulation No 1049/2001.

112 Consequently, the applicant's complaint that disclosure of the note from DG Competition to the Advisory Committee would not seriously undermine the Commission's decision-making process must be rejected.

The extent of undermining of the decision-making process by disclosure of a part of the note to file relating to a site visit to First Choice

– Arguments of the parties

113 The applicant denies that a note of that kind could constitute an ‘opinion for internal use’ within the meaning of Article 4(3) of Regulation No 1049/2001. According to the applicant, oral submissions made by First Choice are analogous to written observations and there is no policy reason to prevent access to those observations.

114 The Commission replies that the parts of the disputed note in respect of which access was refused contain the personal views of the official who drew up that note.

– Findings of the Court

115 As with the other internal documents drawn up by the different services involved in the preparation of the Airtours decision (see paragraph 94 above), the Commission is right to consider that disclosure of a part of the note to file relating to a site visit to First Choice (document 7.2) would, in the present case, seriously undermine its decision-making process in the area of the control of concentrations (point II.8.a of the second decision).

116 It is apparent from the second decision that it is not merely the fact that the document at issue contained an opinion intended for internal use which was invoked by the Commission in order to justify the application of the exception, but the fact that, for certain parties, that document reflected the views of the officials of DG Competition during the visit. The Commission is therefore correct to consider that that document contained deliberations internal to DG Competition concerning the enquiry and that its disclosure would, in the present case, seriously undermine its decision-making process.

117 Consequently, the applicant’s complaint that disclosure of certain parts of the note to file relating to a site visit to First Choice would not seriously undermine the Commission’s decision-making process must be rejected.

Whether an overriding public interest exists

118 As regards the existence of an overriding public interest which, were it to be established, would require disclosure of those documents, reference should be made to paragraphs 38 and 60 to 66 above, inasmuch as the applicant puts forward the same line of argument in relation to the first decision as in relation to the second decision.

119 Consequently, the applicant’s complaint that there is an overriding public interest in disclosure of the internal documents covered by the exception relating to the protection of the decision-making process must be rejected.

## 2) Consultation of third parties (Article 4(4))

*Co-Frutta* judgment:

- 90 It is settled case-law that the Commission can combine consultation of Member States with reliance upon one of the exceptions provided for in Article 4 of Regulation No 1049/2001 (Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, paragraph 61; Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289, paragraph 114; and Case T-20/99 *Denkavit Nederland v Commission* [2000] ECR II-3011, paragraph 40).
- 91 The Court of Justice held in its judgment in *IFAW* that, even where Member States oppose disclosure of a document, the Commission must, in order to refuse access to the documents requested, invoke on its own initiative one of the exceptions provided for in Article 4(1) to (3) of Regulation No 1049/2001 (the judgment of the Court of Justice in *IFAW*, paragraphs 68 and 99).
- 92 Even if it were to be assumed that the consultation of the Member States by the Commission was unlawful, that circumstance is without relevance to the question whether reliance on the exception relating to protection of the commercial interests of third parties – which is, moreover, the subject of the third plea – is well founded.
- 93 Accordingly, the two reasons put forward by the Commission cannot be held to be contradictory and the second part of this plea must be held to be unfounded.

*Terezakis* judgment:

- 53 The applicant claims, first of all, that the Commission infringed Article 4(4) of Regulation No 1049/2001 and Article 5(3) of Decision 2001/937 by failing to consider disclosing the main contract without consulting the third party from which that document originates.
- 54 In that respect, it must be borne in mind that, under Article 4(4) of Regulation No 1049/2001, in the case of documents originating from a third party, the institution is to consult that third party with a view to assessing whether an exception in Article 4(1) or (2) is applicable, unless it is clear that the document is or is not to be disclosed. It follows that the institutions are under no obligation to consult the third party concerned if it is clearly apparent whether the document should or should not be disclosed. In all other cases, the institutions must consult the relevant third party. Accordingly, consultation of the third party is, as a general rule, a precondition for determining whether the exceptions to the right of access provided for in Article 4(1) and (2) of Regulation No 1049/2001 are applicable in the case of third-party documents (*IFAW Internationaler Tierschutz-Fonds v Commission*, cited in paragraph 43 above, paragraph 55).
- 55 Similarly, Article 5(3) of Decision 2001/937 provides that the Directorate-General or department holding the document is to grant the application without consulting the third-party author where the document requested has already been disclosed either by its author or under the regulation or similar provisions, or where the disclosure, or partial disclosure, of its contents would not obviously affect one of the interests referred to in Article 4 of Regulation

No 1049/2001. According to Article 4(4), in all the other cases, the third-party author of the document is to be consulted.

- 56 In the present case, it is apparent from the documents before the Court that the main contract had not already been disclosed, and consequently it is necessary to consider only the second of the two situations in which it is envisaged in Decision 2001/937 that the institution grants access to a document originating from a third party without consulting that third party, namely when the document's disclosure does not obviously affect one of the interests referred to in Article 4 of Regulation No 1049/2001.
- 57 The document to which the applicant has requested access is a contract of evident breadth concerning the project, concluded between Athens International Airport and the Hochtief consortium. By its nature, such a document is likely to contain confidential information concerning both the companies in question and their business relations. Such information can, in certain circumstances, be covered by the exception to the right of access provided for in Article 4(2), first indent, of Regulation No 1049/2001 relating to the protection of commercial interests of a natural or legal person. It follows that it cannot be held that the main contract was obviously not covered by any of the exceptions provided for by Regulation No 1049/2001 and that, therefore, it was clear that that document should be disclosed.
- 58 Consequently, the Commission did not err in law in consulting the contracting parties in accordance with the general rule in Article 4(4) of Regulation No 1049/2001 and Article 5(4) of Decision 2001/937. The applicant is therefore not justified in criticising the Commission for failing to consider disclosing the main contract without consulting the contracting parties beforehand, and his complaint in that regard must therefore be rejected.
- 59 Second, the applicant claims, in essence, that the Commission failed to exercise its discretion as to the justification for the position taken by the third-party author of the document and based its decision solely on the grounds put forward by that third party, thus conferring on it, in fact, a power of veto, contrary to Article 4(4) of Regulation No 1049/2001.
- 60 It must be borne in mind that, unlike a request from a Member State pursuant to Article 4(5) of Regulation No 1049/2001 not to disclose a document of which it is the author, the consultation of a third party other than a Member State that is provided for in Article 4(4) of the regulation is not binding on the institution but is to enable it to assess whether an exception provided for under Article 4(1) or (2) is applicable.
- 61 It follows that, in the present case, while the Commission correctly consulted the parties to the main contract since it was not clear that disclosure had to be made or that it had to be refused, the fact remains that the view expressed by those parties was not overriding and the Commission was still obliged to assess the justification for that view and the applicability of one of the exceptions provided for under Article 4(1) or (2) of Regulation No 1049/2001.
- 62 Contrary to the applicant's claims, it is apparent from the contested decision that the Commission did indeed exercise the discretion thus defined.

- 63 It should be noted that, in order to justify its refusal to grant access to the main contract, the Commission stated at the outset that the contract contained detailed information about the contracting parties, their business relations and specific cost components related to the project, concluding that the disclosure of that document to third parties other than the shareholders of the contracting parties would undoubtedly affect their commercial interests.
- 64 The Commission thus clearly set out the reasons which, in its view, justified not granting access to the main contract. The contracting parties' opposition is not among the reasons referred to above, and consequently that fact alone is sufficient for the finding that the Commission cannot be regarded as having surrendered the discretion which it is to exercise in determining the applicability of the exceptions to access to documents provided for by Regulation No 1049/2001.
- 65 Although the Commission went on to mention the fact that it had consulted the contracting parties in accordance with Article 4(4) of Regulation No 1049/2001, it does not follow from the contested decision that the Commission considered itself to be bound by their views.
- 66 In fact, in the contested decision, the Commission states that, on the basis of the contracting parties' reply, the Commission concluded that disclosure would indeed be harmful to their commercial interests. It follows from that wording that the Commission examined the reply submitted by the contracting parties and took the view, thereby exercising its discretion, that it had to be concluded from the information in that reply that disclosure of the main contract would be harmful to their commercial interests.
- 67 It follows that the applicant's complaint that the Commission infringed Article 4(4) of Regulation No 1049/2001 by failing to exercise its discretion as to the justification for the position taken by the contracting parties must be rejected as unfounded.

### **3) Member State veto (Article 4(5))**

*Sweden v Commission (IFAW) judgment:*

- 43 As the Court of First Instance rightly observed in paragraph 58 of the judgment under appeal, Article 4(5) of Regulation No 1049/2001 places the Member States in a position that is different from that of other third parties, by providing that, unlike them, any Member State has the possibility of requesting the institution not to disclose a document originating from that State without its prior agreement.
- 44 The Court of First Instance was also right to find, also in paragraph 58, that the requirement in that provision of 'prior agreement' of the Member State would risk becoming a dead letter if, despite a Member State's objection to disclosure of a document originating from it, the institution were nevertheless free to disclose the document in question, even without any 'agreement' of that Member State. It is clear that such a requirement would have no useful effect, and indeed would be meaningless, if the need to obtain such 'prior agreement' to disclosure of the document ultimately depended on the discretion of the institution in possession of the document.

- 45 Since an 'agreement' is legally different from a mere 'opinion', the very wording of Article 4(5) of Regulation No 1049/2001 precludes an interpretation to the effect that the provision merely confers on a Member State making use of the possibility given by that provision the right to be consulted by the institution before the institution decides, possibly despite the opposition of the Member State in question, to allow access to the document concerned.
- 46 Moreover, such a right to be consulted is already possessed by the Member States to a great extent by virtue of Article 4(4) of the regulation, which lays down an obligation to 'consult the third party' unless it is clear that the document shall or shall not be disclosed.
- 47 The fact that Article 4(5) of Regulation No 1049/2001 uses different terms from those of Article 9(3) of the regulation, a provision which also refers to the need to obtain the consent of the originator, has no bearing on the interpretation set out in paragraphs 44 and 45 above. In contrast to Article 9(3), Article 4(5) does not make the prior agreement of the Member State an absolute condition of the disclosure of a document, but makes the possible need for such agreement subject to a prior expression of will by the Member State concerned. In those circumstances the use of the expression 'may request' simply emphasises that that provision gives the Member State an option, and only the actual exercise of that option in a particular case has the consequence of making the prior agreement of the Member State a necessary condition of the future disclosure of the document in question.
- 48 Nor is it possible to accept the argument that Article 4(5) of Regulation No 1049/2001 should be interpreted by reference to Article 5 of the regulation, in order to ensure a balance between the treatment given to documents originating from the institutions in the possession of the Member States and that given to documents originating from the Member States in the possession of the institutions.
- 49 That is shown by the simple fact that the Community legislature expressed itself in very different terms with respect to those two classes of documents, by laying down in the first paragraph of Article 5 of Regulation No 1049/2001 merely an obligation on the Member States to 'consult' the institutions when access is sought to a document originating from them.
- 50 It follows from the above that, where a Member State has made use of the option given to it by Article 4(5) of Regulation No 1049/2001 to request that a specific document originating from that State should not be disclosed without its prior agreement, disclosure of that document by the institution requires, as the Court of First Instance correctly held in paragraph 58 of the contested decision, the prior agreement of that Member State to be obtained.
- 51 On the other hand, the judgment under appeal is vitiated by errors of law as regards the scope of such prior agreement.

The scope of the prior agreement which must be sought under Article 4(5) of Regulation No 1049/2001

- 52 As the Kingdom of Denmark in particular has pointed out, it is apparent from Article 255(2) EC that the limits governing the exercise of the right of access to documents guaranteed by Article 255(1) EC, which are to be determined by the

Council acting in accordance with the procedure referred to in Article 251 EC, must be necessary 'on grounds of public or private interest'.

- 53 Reflecting that provision of the Treaty, which it implements, Regulation No 1049/2001, as may be seen from recital 4 in the preamble and Article 1(a), has the purpose of defining the principles, conditions and limits on grounds of public or private interest concerning the right of public access to documents, so as to give the fullest possible effect to that right.
- 54 Moreover, recitals 2 and 3 in the preamble to that regulation show that its aim is to improve the transparency of the Community decision-making process, since such openness *inter alia* guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.
- 55 As recital 10 in the preamble to Regulation No 1049/2001 emphasises, it is precisely the concern to improve the transparency of the Community decision-making process that explains that, as provided by Article 2(3) of the regulation, the right of access to documents held by the Parliament, the Council and the Commission extends not only to documents drawn up by those institutions but also to documents received from third parties, including the Member States, as expressly stated by Article 3(b) of the regulation.
- 56 By so providing, the Community legislature, as the Court of First Instance observed in paragraphs 53 and 54 of the judgment under appeal, abolished the authorship rule that had applied previously. As may be seen from Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43), Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58) and European Parliament Decision 97/632/EC, ECSC, Euratom of 10 July 1997 on public access to European Parliament documents (OJ 1997 L 263, p. 27), such a rule meant that, where the author of a document held by an institution was a natural or legal person, a Member State, another Community institution or body, or any other national or international organisation, the request for access to the document had to be made directly to the author of the document.
- 57 The provisions of Article 4(1) to (3) of Regulation No 1049/2001, which provide for various substantive exceptions, and of Articles 2(5) and 9, which lay down special rules for sensitive documents, thus take care to define the objective limits of public or private interest that are capable of justifying a refusal to disclose documents held by the institutions, whether they were drawn up by them or received by them, and in the latter case whether they originate from Member States or other third parties.
- 58 In such a context, it is clear that to interpret Article 4(5) of Regulation No 1049/2001 as conferring on the Member State a general and unconditional right of veto, so that it can oppose, in an entirely discretionary manner and without having to give reasons for its decision, the disclosure of any document held by a Community institution simply because it originates from that Member State, is not compatible with the objectives mentioned in paragraphs 53 to 56 above.

- 59 On this point, it must be stated, in the first place, that the interpretation thus adopted by the Court of First Instance would, as submitted by the Kingdom of Sweden in particular and as observed by the Advocate General in point 44 of his Opinion, bring with it the risk of reintroducing in the case of the Member States, at least in part, the authorship rule which the Community legislature has however abolished.
- 60 Beside that reintroduction of the authorship rule, that interpretation would bring with it, in the second place, the risk of approving, in disregard of the objectives pursued by Regulation No 1049/2001, a potentially considerable reduction in the degree of openness of the Community decision-making process.
- 61 Far from referring only to documents of which the Member States are the 'authors' or which have been 'drawn up' by them, Article 4(5) of Regulation No 1049/2001 potentially concerns every document 'originating' from a Member State, in other words, as the Commission rightly submits and as was agreed at the hearing by IFAW and all the Member States which are parties to this appeal, the entirety of the documents, whoever their author may be, that a Member State transmits to an institution. In this case the only relevant criterion is the origin of the document and the handing over by the Member State concerned of a document previously in its possession.
- 62 It must be stressed in this respect that, as the Kingdom of Sweden submitted at the hearing and the Advocate General observed in point 42 of his Opinion, the creation of a discretionary right of veto for the Member States would in those circumstances have the potential effect of excluding from the provisions of Regulation No 1049/2001 an especially important class of documents that could form the basis of the Community decision-making process and cast light on it.
- 63 As IFAW in particular points out, both in their capacity as members of the Council and as participants in many committees set up by the Council or the Commission, the Member States constitute an important source of information and documentation intended to contribute to the Community decision-making process.
- 64 It follows that the right of public access would potentially be frustrated, to that extent, without any objective reason. The effectiveness of that right would thereby be substantially reduced (see, by analogy, Case C-353/99 P *Council v Hautala* [2001] ECR I-9565, paragraph 26).
- 65 In the third place, there is nothing in Regulation No 1049/2001 to support the Court of First Instance's conclusion that the Community legislature intended by Article 4(5) of that regulation to enact a sort of conflict-of-laws rule for the purpose of preserving the application of national rules, or even, as suggested by the Commission, the policies of the Member States, concerning access to documents originating from the Member States, at the expense of the specific rules laid down in that field by the regulation.
- 66 On this point, it should be recalled, first, that in view of the objectives pursued by Regulation No 1049/2001, in particular the fact noted in recital 2 in the preamble that the public right of access to the documents of the institutions is connected with the democratic nature of those institutions and the fact that, as stated in recital 4 in the preamble and in Article 1, the purpose of the regulation

is to give the public the widest possible right of access, the exceptions to that right set out in Article 4 of the regulation must be interpreted and applied strictly (see, to that effect, in relation to the legislation prior to Regulation No 1049/2001, Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal v Commission* [2000] ECR I-1, paragraph 27; *Council v Hautala*, paragraphs 24 and 25; and, with reference to Regulation No 1049/2001, Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 63).

- 67 Second, as has already been stated in paragraphs 55 and 56 above, it is clear from recital 10 in the preamble to and Article 2(3) of Regulation No 1049/2001 that all documents held by the institutions are within the scope of the regulation, including those originating from the Member States, so that access to such documents is in principle governed by the provisions of the regulation, including those which lay down substantive exceptions to the right of access.
- 68 Thus, for instance, according to Article 4(4) of Regulation No 1049/2001, if the institution concerned considers that it is clear that access to a document originating from a Member State should be refused on the basis of the exceptions in Article 4(1) or (2), it will refuse the request for access without even having to consult the Member State from which the document originates, whether or not that Member State has previously made a request under Article 4(5) of the regulation. In such a case it is thus obvious that the decision on the request for access is taken by the institution, having regard solely to the exceptions that derive directly from the rules of Community law.
- 69 Third, it is evident that Article 4(5) of Regulation No 1049/2001, like Article 4(1) to (4), does not contain any reference to the national law of the Member State.
- 70 Fourth, as regards the fact that recital 15 in the preamble to Regulation No 1049/2001 states that it is not the object or the effect of the regulation to amend national legislation on access to documents, that – contrary to the view taken by the Court of First Instance in paragraph 57 of the judgment under appeal – is not capable of affecting the scope to be given to Article 4(5) of the regulation. Read as a whole and in conjunction with Article 5 of the regulation, to which it relates, that recital is intended solely to recall that requests for access to documents held by the national authorities, including documents that originate from Community institutions, remain governed by the national rules applicable to those authorities, without the provisions of Regulation No 1049/2001 taking the place of those rules, subject to the requirements laid down by Article 5 imposed by the obligation of loyal cooperation under Article 10 EC.
- 71 Moreover, documents which a Member State transmits to a third party do not remain subject exclusively to the legal order of that State. As the Kingdom of Sweden rightly submits, a Community institution, as an external authority distinct from the Member States, is part of a legal order with rules of its own as regards access to the documents in its possession. It follows in particular that the rules governing such access cannot have the effect of amending national law, which, as the Advocate General observes in point 47 of his Opinion, governs the conditions of access to a document held by a national authority.
- 72 Fifth, as IFAW notes, the interpretation adopted by the Court of First Instance has the consequence that access to documents of the same kind and of the same importance for shedding light on the Community decision-making

process could be granted or refused depending solely on the origin of the document.

- 73 With reference to the particular circumstances of the present case, it would follow that documents of the same kind, likely to have played a decisive part in the Commission's decision to release an opinion favourable to the carrying out of an industrial project in an area protected under the Habitats Directive, would sometime be accessible to the public and sometimes inaccessible, depending on the rules or the policy on access to documents of the Member State in which such a project was to be carried out.
- 74 Sixth, as regards the principle of subsidiarity, it suffices to state that, although they relied on that principle in support of their common arguments, neither the Kingdom of Spain nor the United Kingdom and the Commission have demonstrated, or even attempted to explain, why that principle should prevent the disclosure of documents originating from the Member States and held by the Community institutions in connection with the exercise of their own decision-making powers from being covered by the Community provisions relating to access to documents, or why it should require such disclosure to be outside those provisions and covered by the national rules alone.
- 75 It follows from the foregoing that Article 4(5) of Regulation No 1049/2001 cannot be interpreted as conferring on the Member State a general and unconditional right of veto, so that it could in a discretionary manner oppose the disclosure of documents originating from it and held by an institution, with the effect that access to such documents would cease to be governed by the provisions of that regulation and would depend only on the provisions of national law.
- 76 On the contrary, several factors militate in favour of an interpretation of Article 4(5) to the effect that the exercise of the power conferred by that provision on the Member State concerned is delimited by the substantive exceptions set out in Article 4(1) to (3), with the Member State merely being given in this respect a power to take part in the Community decision. Seen in that way, the prior agreement of the Member State referred to in Article 4(5) resembles not a discretionary right of veto but a form of assent confirming that none of the grounds of exception under Article 4(1) to (3) is present.
- 77 Beside the fact that such an interpretation is compatible both with the objectives pursued by Regulation No 1049/2001, as set out in paragraphs 53 to 56 above, and with the need, noted in paragraph 66 above, to interpret Article 4 of the regulation strictly, it can also be justified by the more immediate legislative context of Article 4(5) of the regulation.
- 78 It should be observed that, while Article 4(1) to (3) of Regulation No 1049/2001 clearly lists substantive exceptions that may justify, or as the case may be require, a refusal to communicate the document that has been asked for, Article 4(5) confines itself to requiring the prior agreement of the Member State concerned where that State has made a specific request to that effect.
- 79 Moreover, Article 4(5) follows a provision, namely Article 4(4), which lays down a procedural rule, imposing an obligation to consult third parties in the circumstances it describes.

- 80 Finally, Article 4(7), which lays down rules concerning the period during which the various exceptions to the right of public access to documents are to apply, refers expressly only to the exceptions laid down in Article 4(1) to (3) and makes no reference to the provisions of Article 4(5).
- 81 Both the position of paragraph 5 within the article of which it forms part and the content of that article therefore allow the conclusion, in the light of the objectives pursued by Regulation No 1049/2001, that Article 4(5) of that regulation is a provision dealing with the process of adoption of the Community decision.
- 82 As to the discussion between the parties on the legal effects of Declaration No 35, it suffices to state that the interpretation adopted in paragraph 76 above does not in any event contradict that declaration. Although the declaration shows that the Member States, while adopting Article 255(1) EC, intended to reserve the possibility of retaining a certain control over decisions to disclose documents originating from them, it does not on the other hand give any details as to the substantive grounds on which such control might be exercised.
- 83 It remains to point out that, while the decision-making process thus established by Article 4(5) of Regulation No 1049/2001 requires the institution and the Member State involved to confine themselves to the substantive exceptions laid down in Article 4(1) to (3) of the regulation, it is none the less possible for the legitimate interests of the Member States to be protected on the basis of those exceptions and by virtue of the special rules for sensitive documents laid down in Article 9 of the regulation.
- 84 In particular, there is nothing to exclude the possibility that compliance with certain rules of national law protecting a public or private interest, opposing disclosure of a document and relied on by the Member State for that purpose, could be regarded as an interest deserving of protection on the basis of the exceptions laid down by that regulation (see, with respect to the legislation prior to Regulation No 1049/2001, *Netherlands and van der Wal v Commission*, paragraph 26).

The procedural implications of the decision-making process established by Article 4(5) of Regulation No 1049/2001

- 85 As to the procedural implications of Article 4(5) of Regulation No 1049/2001 so interpreted, it should be noted, in the first place, that where the implementation of rules of Community law is thus entrusted jointly to the institution and the Member State which has made use of the possibility granted by that provision, and such implementation consequently depends on the dialogue to be carried on between them, they are obliged in accordance with the duty of loyal cooperation set out in Article 10 EC to act and cooperate in such a way that those rules are effectively applied.
- 86 It follows, first, that an institution which receives a request for access to a document originating from a Member State and that Member State must, once that request has been notified by the institution to the Member State, commence without delay a genuine dialogue concerning the possible application of the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001, while paying attention in particular to the need to enable the

institution to adopt a position within the time-limits within which Articles 7 and 8 of the regulation require it to decide on the request for access.

- 87 Next, if the Member State concerned, following such dialogue, objects to disclosure of the document in question, it is obliged, contrary to what the Court of First Instance held in paragraph 59 of the judgment under appeal, to state reasons for that objection with reference to those exceptions.
- 88 The institution cannot accept a Member State's objection to disclosure of a document originating from that State if the objection gives no reasons at all or if the reasons are not put forward in terms of the exceptions listed in Article 4(1) to (3) of Regulation No 1049/2001. Where, despite an express request by the institution to the Member State to that effect, the State still fails to provide the institution with such reasons, the institution must, if for its part it considers that none of those exceptions applies, give access to the document that has been asked for.
- 89 Finally, as is apparent in particular from Articles 7 and 8 of the regulation, the institution is itself obliged to give reasons for a decision to refuse a request for access to a document. Such an obligation means that the institution must, in its decision, not merely record the fact that the Member State concerned has objected to disclosure of the document asked for, but also set out the reasons relied on by that Member State to show that one of the exceptions to the right of access in Article 4(1) to (3) of the regulation applies. That information will allow the person who has asked for the document to understand the origin and grounds of the refusal of his request and the competent court to exercise, if need be, its power of review.
- 90 In the second place, it must be pointed out, regarding the last point, that if the Member State gives a reasoned refusal to allow access to the document in question and the institution is consequently obliged to refuse the request for access, the person who has made that request enjoys judicial protection, contrary to the fears expressed by IFAW in particular.
- 91 It is true that, according to settled case-law, in an action brought under Article 230 EC the Court has no jurisdiction to rule on the lawfulness of a measure adopted by a national authority (see, *inter alia*, Case C-97/91 *Oleificio Borelli v Commission* [1992] ECR I-6313, paragraph 9).
- 92 It is also settled case-law that that position cannot be altered by the fact that the measure in question forms part of a Community decision-making procedure, where it is clear from the division of powers in the field in question between the national authorities and the Community institutions that the measure adopted by the national authority is binding on the Community decision-taking authority and therefore determines the terms of the Community decision to be adopted (*Oleificio Borelli v Commission*, paragraph 10).
- 93 In the present case, however, it must be noted that Article 4(5) of Regulation No 1049/2001 – unlike other Community legislation on which the Court has ruled (see, *inter alia*, Case C-269/99 *Carl Kühne and Others* [2001] ECR I-9517, paragraphs 50 to 54) – did not aim to establish a division between two powers, one national and the other of the Community, with different purposes. As pointed out in paragraph 76 above, that provision creates a decision-making procedure the sole object of which is to determine whether access to a

document should be refused under one of the substantive exceptions listed in Article 4(1) to (3) of the regulation, a decision-making procedure in which both the Community institution and the Member State concerned play a part, in the terms stated in paragraph 76.

- 94 In such a case it is within the jurisdiction of the Community judicature to review, on application by a person to whom the institution has refused to grant access, whether that refusal was validly based on those exceptions, regardless of whether the refusal results from an assessment of those exceptions by the institution itself or by the relevant Member State. From the point of view of the person concerned, the Member State's intervention does not affect the Community nature of the decision that is subsequently addressed to him by the institution in reply to the request he has made for access to a document in its possession.

*Scippercercola judgment [on the issue of the scope of the Art. 4(5) rule]*

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In this case, it is important to note that the document at issue was received by the defendant in connection with an application for financing from the Cohesion Fund. In that regard, it must be pointed out that, under Article 10(3) of Council Regulation (EC) No 1164/94 of 16 May 1994 establishing a Cohesion Fund (OJ 1994 L 130, p. 1), as amended by Council Regulation (EC) No 1264/1999 of 21 June 1999 (OJ 1999 L 161, p. 57) and by Council Regulation (EC) No 1265/1999 of 21 June 1999 (OJ 1999 L 161, p. 62), applications for assistance for projects from that Fund are to be submitted by the beneficiary Member State. In accordance with Article 10(4), applications for assistance must contain, inter alia, a cost-benefit analysis.

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It follows that, in the context of the Cohesion Fund, firstly, applications for assistance are to be submitted only by the beneficiary Member State and, secondly, a cost-benefit analysis report necessarily forms part of the information which such an application must contain.

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In this case, the cost-benefit analysis was carried out by a bank on behalf of the Greek national authorities. That document forms part of the information which an application submitted for assistance from the Cohesion Fund must contain.

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Consequently, without there being any need to determine whether documents simply forwarded (and not drafted) by Member States are covered by Article 4(5) of Regulation No 1049/2001, it is sufficient to note that the document in question, which was created by a bank on behalf of the Greek national authorities, was drawn up on behalf of a Member State.

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In those circumstances, it must be concluded that the defendant did not err by considering that the document originated from a Member State.

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Moreover, the applicant's argument that any third party could circumvent its obligations under Regulation No 1049/2001 simply by asking a Member State to forward the document to the defendant is completely irrelevant in this case. It has already been pointed out that the document in question was received by the defendant in connection with an application for assistance from the Cohesion Fund. In the context of the Cohesion Fund, the beneficiary Member State is the sole interlocutor of the Commission. Applications for assistance

for projects are submitted only by the beneficiary Member State and, consequently, the document received by the defendant would not have been received by it if the Greek authorities had not submitted their application for financial assistance from the Cohesion Fund.

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It follows from those considerations that the first plea in law must be rejected.

### **5) Partial access (Article 4(6))**

*Ryanair* judgment:

87 As already noted in paragraph 70 above, there is a general presumption that disclosure of the documents in the Commission's administrative file concerning a procedure for reviewing State aid would, in principle, undermine protection of the purpose of investigations.

88 However, in its confirmatory applications, the applicant confined itself to stating, for categories of documents, that they necessarily contained passages which it would be possible to disclose without harming the protection of the purpose of investigations.

89 The applicant has not therefore shown, for given documents, that parts of those documents were not covered by the general presumption (see, to that effect, *Commission v Technische Glaswerke Ilmenau*, paragraph 70).

90 It follows that the documents are covered in their entirety by the general presumption and that, consequently, the argument alleging infringement of the principle of proportionality is immaterial.

*Agrofert Holdings* judgment:

108 In accordance with Article 4(6) of Regulation No 1049/2001, if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document are to be released.

109 As the Commission points out, that provision does not require partial access to be made possible in all cases.

110 However, it does imply a concrete, individual examination of the contents of each document. As has already been pointed out (see paragraph 60 above), such an examination of each document alone can enable the institution to assess the possibility of granting the applicant partial access. An assessment of documents by reference to categories rather than on the basis of the actual information contained in those documents is insufficient, since the examination required of an institution must enable it to assess specifically whether an exception invoked actually applies to all the information contained in those documents (see, to that effect, *Franchet and Byk v Commission*, cited in paragraph 33 above, paragraph 117 and the case-law cited).

111 In the present case, such an examination of the documents exchanged between the Commission and the notifying parties and third parties is not apparent from the grounds of the decision of 13 February 2007, as has already been established (see paragraphs 89 and 104 above).

- 112 In particular, the decision of 13 February 2007 refers to Article 4(6) of Regulation No 1049/2001 and refuses partial access on the ground that, in so far as the purpose of the Commission's investigation was to carry out an examination of the market conditions surrounding the intended merger and its anticipated impact on the market, the information required from and supplied by the parties was of necessity liable to cause harm to their commercial interests and to the purpose of the Commission's investigation. From this the Commission infers that it would therefore not be possible to identify the parts of the documents exchanged between it and the relevant parties 'that do not contain non-commercial information or are not investigation-related and the reading of which in itself would make sense'.
- 113 By so doing, the Commission thus appears to presume on the whole that disclosure, even partial, of all the documents requested would adversely affect the interests protected.
- 114 In consequence, it has not been shown to the requisite legal standard that the exceptions based on the protection of commercial interests and the objectives of investigations applied to the entirety of the documents exchanged between the Commission and the notifying parties and third parties.
- 115 Finally, the Commission submits that publication of the merger decision of itself constitutes partial access to the documents requested. Such an argument must, however, be rejected. The applicant is requesting access to the documents which led to the adoption of that decision and not access to the information contained in that published decision. Moreover, the fact that a published decision exists indicates that certain documents, or at the very least certain parts of the documents requested, could be disclosed and, as a consequence, that partial access ought to have been granted.
- 116 It follows from all of the foregoing that the decision of 13 February 2007 must be annulled in so far as it refuses access, including partial access, to the documents exchanged, on the one hand, between the Commission and the notifying parties and, on the other, between the Commission and third parties, since the Commission has failed to demonstrate to the requisite legal standard that disclosure of all of the documents in question would cause concrete and actual harm to the interests protected.

*Editions Jacob* judgment:

- 167 L'article 4, paragraphe 6, du règlement n° 1049/2001 dispose que, « si une partie seulement du document demandé est concernée par une ou plusieurs des exceptions susvisées, les autres parties du document sont divulguées ».
- 168 L'article 4, paragraphe 6, du règlement n° 1049/2001 implique un examen concret et individuel du contenu de chaque document. En effet, seul un tel examen peut permettre à l'institution d'apprécier la possibilité d'accorder un accès partiel au demandeur. Une appréciation qui serait réalisée par catégories plutôt que par rapport aux éléments d'informations concrets contenus dans ces documents s'avère en principe insuffisante, dès lors que l'examen requis de la part de l'institution doit lui permettre d'apprécier concrètement si une exception invoquée s'applique réellement à l'ensemble des informations contenues dans lesdits documents (voir, en ce sens, arrêt

Franchet et Byk/Commission, point 41 supra, point 117, et la jurisprudence citée).

- 169 En l'espèce, un tel examen des documents demandés ne ressort pas des motifs de la décision attaquée. La Commission a en effet estimé que cet examen engendrerait une charge administrative disproportionnée par rapport à l'intérêt du public à accéder aux parties fragmentaires qui résulteraient d'un tel exercice.
- 170 Selon la jurisprudence, c'est à titre exceptionnel et uniquement lorsque la charge administrative provoquée par l'examen concret et individuel des documents se révélerait particulièrement lourde, dépassant ainsi les limites de ce qui peut être raisonnablement exigé, qu'une dérogation à l'obligation d'examen peut être admise (arrêt VKI, point 41 supra, point 112).
- 171 En outre, dans la mesure où le droit à l'accès aux documents détenus par les institutions constitue une solution de principe, c'est sur l'institution qui se prévaut d'une exception liée au caractère déraisonnable de la tâche requise par la demande que repose la charge de la preuve de son ampleur (arrêt VKI, point 41 supra, point 113, et arrêt du Tribunal du 10 septembre 2008, Williams/Commission, T-42/05, non publié au Recueil, point 86).
- 172 Enfin, lorsque l'institution a apporté la preuve du caractère déraisonnable de la charge administrative requise par l'examen concret et individuel des documents visés dans la demande, elle est dans l'obligation d'essayer de se concerter avec le demandeur afin, d'une part, de prendre connaissance ou de lui faire préciser son intérêt à l'obtention des documents en cause et, d'autre part, d'envisager concrètement les options qui se présentent à elle pour l'adoption d'une mesure moins contraignante qu'un examen concret et individuel des documents. Dès lors que le droit d'accès aux documents représente le principe, l'institution reste néanmoins tenue, dans ce contexte, de privilégier l'option qui, tout en ne constituant pas elle-même une tâche dépassant les limites de ce qui peut être raisonnablement exigé, reste la plus favorable au droit d'accès du demandeur (arrêt VKI, point 41 supra, point 114).
- 173 Il en résulte que l'institution ne peut se dispenser de tout examen concret et individuel qu'après avoir réellement étudié toutes les autres options envisageables et expliqué de façon circonstanciée, dans sa décision, les raisons pour lesquelles ces diverses options impliquent, elles aussi, une charge de travail déraisonnable (arrêt VKI, point 41 supra, point 115).
- 174 En l'espèce, il convient de constater que la décision attaquée, qui refuse globalement tout accès partiel à la requérante, ne pourrait être légale que dans l'hypothèse où la Commission aurait préalablement expliqué, de façon concrète, les raisons pour lesquelles les solutions alternatives à un examen concret et individuel de chacun des documents visés constituaient, également, une charge de travail déraisonnable.
- 175 Or, il ne ressort pas des motifs de la décision attaquée que la Commission ait envisagé de façon concrète et exhaustive les diverses options qui s'offraient à elle afin d'entreprendre des démarches qui ne lui imposeraient pas une charge de travail déraisonnable, mais augmenteraient en revanche les chances que la requérante puisse bénéficier, au moins pour une partie de la demande d'accès, d'une communication partielle des documents demandés. Il ne ressort pas, en

particulier, de la décision attaquée, que la Commission ait étudié concrètement l'option consistant à demander aux entreprises ayant communiqué certains des documents demandés si une version non confidentielle de ces documents pourrait être communiquée à la requérante.

- 176 Il résulte de ce qui précède que la décision attaquée doit être annulée, en ce qu'elle refuse l'accès partiel à l'ensemble des documents demandés, sans qu'il ressorte des motifs de la décision attaquée qu'un examen concret et individuel de chacun de ces documents a été opéré et sans que la Commission ait expliqué, de façon concrète, les raisons pour lesquelles les solutions autres qu'un examen concret et individuel de chacun des documents visés représentaient une charge de travail déraisonnable.

*Terezakis judgment:*

- 126 The applicant claims, in essence, that the Commission infringed Article 4(6) of Regulation No 1049/2001 by refusing to grant partial access to the final report and to the invoices.
- 127 Under Article 4(6) of Regulation No 1049/2001, if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document are to be released.
- 128 It must be borne in mind that, according to the contested decision, access to the final report was refused on the ground that it was a key element of the audit being carried out. The final report could not be disclosed until completion of that audit, to avoid interference with the investigation and with the exchange of views between the Commission and the Greek authorities. Furthermore, since all parts of the final report were interrelated and no section of the report could be disclosed without affecting the audit, partial access to that document was not possible.
- 129 The Commission has stated that, when the contested decision was adopted, the Regional Policy DG had carried out an audit on the basis of Article 12(4) of Regulation No 1164/94 in which, inter alia, the final report and the invoices to which the applicant requests access were examined. That too had been brought to the applicant's attention in the letter of 5 February 2004 from the Director-General of the Regional Policy DG, as described in paragraph 118 above.
- 130 The applicant does not dispute that statement but maintains that partial access should have been granted to those parts of the final report which would not undermine the audit, namely those concerning the entity which submitted the final report to the Commission, the company responsible for properly executing the construction of the airport, the defects liability certificates issued by the main contractor to the subcontractors, and other relevant information.
- 131 In that respect, it must be noted that the final report to which the applicant seeks access is a document relating to the completion of the project, which was submitted to the Commission for the purpose of closing the financial assistance from the Cohesion Fund.
- 132 As the Commission has correctly pointed out, that document therefore constitutes an essential element of the audit which was underway in respect of

the Cohesion Fund's financing of the project, the disclosure of which, even partial, might have damaged the Commission's investigation and its discussions with the Greek authorities responsible for the project.

- 133 Similarly, the disclosure of information which the applicant believes should have been subject to partial access entails a reasonably foreseeable likelihood that the Commission or the auditors would be subject to external pressure, with the result that the Commission was entitled to take the view, without committing a manifest error of assessment, that access to the final report as a whole should not be granted to the applicant as long as the audit was ongoing.
- 134 It is relevant, in that regard, to note that the Commission indicated in its letter of 29 April 2004 that the applicant would be informed of the conclusions of the audit when these were available. It follows that the Commission cannot be criticised for having infringed the principle of proportionality; on the contrary, its attitude demonstrates a willingness to protect the audit only in so far as it was still ongoing.
- 135 As to the list of invoices and the sample invoices drawn up by the Hochtief consortium and Hochtief Hellas, which the Commission obtained during the audit carried out by the Regional Policy DG, their disclosure must be regarded similarly as entailing a risk of the Commission or its auditors being subject to external pressure to the detriment of their ongoing activities. Furthermore, as the Commission has essentially pointed out, those documents, which contain only a limited amount of similar information, do not, by their nature, lend themselves to partial access.
- 136 It follows from the foregoing that the Commission did not infringe Article 4(6) of Regulation No 1049/2001 by refusing access to the final report or to the invoices. The second plea in law must therefore be rejected.

*Williams judgment:*

- 121 It is very clear from the contested decision that point 3 relates to all '[d]ocuments to which access is being denied'. All those documents, as the Commission states at point 3.1 of that decision, are covered by the exception relating to the protection of the decision-making process provided for under the second subparagraph of Article 4(3) of Regulation No 1049/2001, and indirectly by that relating to the protection of international relations provided for under the third indent of Article 4(1)(a) of Regulation No 1049/2001. At the end of that same point 3.1, the Commission states that 'the harm caused to the decision-making process would also weaken [its] position as regards the issues pending before the WTO panel, thus putting at risk its relations with its trading partners', and that '[t]herefore, disclosure of these documents would indirectly affect the Commission's international relations, which are protected under Article 4(1)(a), third indent of Regulation No 1049/2001'.
- 122 By the statements it makes at point 3.1 of the contested decision, the Commission is therefore stating clearly that the exception on which the refusal of access is based is that relating to the protection of the decision-making process. The harm caused to international relations is only an indirect corollary of the harm to the decision-making process, which means that that exception, as referred to at the end of point 3.1 of the contested decision with regard to the 23 documents to which access was denied, does not amount to an

autonomous justification for the denial of access. In fact, the justification is purely secondary, as is equally apparent from the fact that the Commission itself attaches no legal consequence to it, since it does not refer to it in maintaining that there is no overriding public interest to justify disclosure of the documents in question.

- 123 Where it also justified its refusal on the basis of other exceptions, the Commission took care to identify the documents concerned. Some of the documents referred to at point 3.1 are identified at point 3.2 of the contested decision, namely documents Nos 36, 41, 45 and 47, which were produced specifically to prepare for meetings of the Commissioner with trading partners of the European Union, and which, for the reasons explained, are also covered – according to the Commission – by the exception relating to the protection of international relations provided for under the third indent of Article 4(1)(a) of Regulation No 1049/2001. Similarly, documents Nos 27, 32, 33 and 34 are specifically identified at point 3.3 of the contested decision, and the Commission claims that those documents contain information the disclosure of which would affect the commercial interests of the companies concerned, and that the parts of those documents which contain that information therefore fall under the exception relating to the protection of commercial interests provided for under the first indent of Article 4(2) of Regulation No 1049/2001.
- 124 It follows from the foregoing that, with regard to the 23 documents to which access was denied, the Commission took the view that they were all covered by the exception relating to the protection of the decision-making process, and that some of them – those identified at points 3.2 and 3.3 of the contested decision – also fell within the scope of the exceptions relating to the protection of international relations or of commercial interests. The assertion at point 3.4 of the contested decision that no partial access could be granted to any of these documents, since their full content fell under one or more of the exceptions to the right of access, can therefore only be understood as meaning that, in addition to the exception relating to the protection of the decision-making process, some of the documents referred to at point 3.1 of the contested decision – namely those identified at points 3.2 and 3.3 of the decision – are wholly or partly covered additionally by the exceptions relating to the protection of international relations and commercial interests respectively.
- 125 As regards documents Nos 27, 32, 33 and 34, while it is true therefore, as the applicant claims, that the exception relating to the protection of commercial interests covers only parts of those documents – those parts concerning information the disclosure of which would affect the commercial interests of the companies concerned – the fact remains that these are documents which, according to the Commission, are covered by the exception relating to the protection of the decision-making process. It follows that the allegation of an infringement of the principle of proportionality is unfounded, given that the parts of those documents which are not covered by the exception relating to the protection of commercial interests are covered – as attested by point 3.1 of the contested decision – by the exception relating to the protection of the decision-making process.
- 126 Finally, it is not possible to identify any contradiction between point 3.1 and point 3.4, since a single document may fall within the scope of one or more exceptions. The Court held in relation to the 1993 code of conduct that the Commission was entitled to invoke jointly more than one exception in order to

refuse access to documents which it holds, since there is no provision of that code that precludes it from doing so (Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, paragraph 61). That conclusion applies equally to Regulation No 1049/2001, since it does not prohibit the application of several exceptions either. Furthermore, the Court has already implicitly confirmed in a judgment relating to that regulation that the institution concerned may base the denial of access on more than one exception (Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2006] ECR II-2023, paragraphs 102 and 103).

- 127 It follows from all the foregoing that the application for annulment of the contested decision must be dismissed in so far as it concerns the total refusal of access to documents Nos 27, 32, 33 and 34.

*WWF* judgment:

- 50 It is clear from the wording itself 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 documents requested and to confine any refusal to information covered by the relevant exceptions. The institution must grant partial access if the aim pursued by that institution in refusing access to a document may be achieved where all that is required of the institution is to blank out the passages which might harm the public interest to be protected (see, to that effect, Case C-353/99 P *Council v Hautala* [2001] ECR I-9565, paragraph 29).
- 51 In the present case, it is apparent from the contested decision and was confirmed at the hearing that the Council considered the possibility of a partial disclosure of the note and also consulted the Commission on this question pursuant to Article 4(4) of Regulation No 1049/2001. As a result of this, the Council concluded that such partial disclosure under Article 4(6) of Regulation No 1049/2001 was not possible since the exceptions in Article 4(1) of Regulation No 1049/2001 applied to the note in its entirety. The Commission, the framer of the note, also came to that conclusion in its correspondence with the Council, in particular in its letter of 1 June 2004.
- 52 The Council justifies its refusal to grant partial access to the note on the ground that it consists entirely of elements of analysis and observations on the positions of a number of the Community's partners in negotiations within the WTO and on negotiating options open to Community negotiators, the disclosure of which would have seriously undermined the conduct of the ongoing negotiations. It also stated that the note had been designed to provide experts, such as the Members of the Committee, with information.
- 53 It is therefore apparent from the contested decision that, in view of the fact that the first item on the agenda of the meeting of the Committee was concerned with an analysis of the status of negotiations within the WTO and the fact that the note had been previously distributed to the Members of the Committee for that purpose, the whole content of the note had to be regarded as sensitive and, accordingly, was covered in its entirety by the public interest as regards the Community's international relations and economic policy, which is protected by the exception laid down in the third and fourth indents of Article 4(1)(a) of Regulation No 1049/2001.

54 It follows that, in refusing the applicant partial access to the note, the Council did not apply Article 4(6) of Regulation No 1049/2001 incorrectly.

## 5) Sensitive documents

*Sison* judgment:

100 As regards the first part of the fifth ground of appeal, it must be pointed out immediately that, as is clear from paragraphs 97 and 98 of the judgment under appeal, it was not disputed before the Court of First Instance, which took it as established, a finding not challenged in the appeal, first, that the documents covered by the first decision refusing access are sensitive documents within the terms of Article 9 of Regulation No 1049/2001 and, second, that the refusal to disclose the identity of the States in which those documents originated was based on Article 9(3), regard being had to the fact that the States concerned were opposed to the disclosure of such information.

101 In view of the special nature of sensitive documents, Article 9(3) of Regulation No 1049/2001 requires the consent of the originating authority before such documents are recorded in the register or released. As the Court of First Instance correctly held in paragraph 95 of the judgment under appeal, it is clear from those provisions that the originating authority of a sensitive document is empowered to oppose disclosure not only of that document's content but even of its existence.

102 That originating authority is thus entitled to require secrecy as regards even the existence of a sensitive document and, in that regard, as the Council contends before the Court, the Court of First Instance acted correctly in law when it concluded, in paragraph 96 of the judgment under appeal, that such authority also has the power to prevent disclosure of its own identity in the event that the existence of that document should become known.

103 That conclusion, which is thus inevitable in the light of the wording of Article 9(3) of Regulation No 1049/2001, is explicable in the light of the special nature of the documents covered by Article 9(1), the highly sensitive content of which justifies, as stated in the ninth recital in the preamble to that regulation, the requirement that they be given special treatment. That conclusion cannot therefore be held to be disproportionate on the ground that it may give rise, for an applicant refused access to a sensitive document, to additional difficulty, or indeed practical impossibility, in identifying the State of origin of that document.

104 As the legal analysis and findings of fact thus made by the Court of First Instance in paragraphs 95 to 97 of the judgment under appeal are also sufficient in themselves to support the conclusion which that Court reached in paragraph 99 of that judgment, namely that the Council was entitled to refuse to disclose the identity of the States concerned, it is unnecessary to examine the complaint alleging misconstruction of Article 4(5) of Regulation No 1049/2001, since such an examination cannot, in any event, cast doubt on that conclusion or, therefore, on the operative part of the judgment under appeal.

105 As to the second part of the fifth ground of appeal, it must be held that, contrary to the appellant's submission, his argument that the Council wrongly

failed to state the grounds upon which disclosure of the identity of the States concerned could have harmed the public interest as regards public security and international relations was indeed considered by the Court of First Instance.

- 106 In that regard, it must be observed that, in paragraphs 64 and 65 of the judgment under appeal, the Court of First Instance held that, by citing Article 9(3) of Regulation No 1049/2001 in the first decision refusing access, which necessarily intimated that the documents in question were sensitive documents, and by referring to the opposition of the States concerned to having their identity disclosed, the Council had placed the appellant in a position to understand the grounds of that decision and enabled the Court of First Instance to carry out its review thereof.
- 107 In paragraph 64, the Court of First Instance expressly noted that the two criteria for the application of Article 9(3) of Regulation No 1049/2001 were, first, the fact that the document in question is a sensitive document and, second, the fact that the originating authority opposed disclosure of the information requested. By so doing, the Court of First Instance indicated, in an implicit but nonetheless certain manner, its view that such opposition was sufficient to justify the refusal by the Council of access to that information, without the Council having to carry out an assessment of the grounds for that opposition or, therefore, to state whether, and in what way, disclosure of that identity would undermine the interests protected by Article 4(1)(a) of that regulation.

## **7) Procedural issues**

### *a) failure to state reasons*

*Sison* judgment:

- 80 As is clear from settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, in particular, *Interporc v Commission*, paragraph 55 and the case-law there cited).
- 81 In the present case, the Court of First Instance correctly applied those principles and did not err in law in deciding that, brief though it may be, as regards both the total refusal of access and the refusal of partial access to the documents in respect of which disclosure was sought, the reasoning of the first decision refusing access was still adequate in the light of the context of the case and sufficient to enable the appellant to ascertain the reasons for the

refusal and the Court of First Instance to carry out the review of legality incumbent upon it.

- 82 As the Court of First Instance correctly held in paragraphs 62 and 63 of the judgment under appeal, and as the Council contends before this Court, such brevity is justified, in particular, by the need not to undermine the sensitive interests protected by the exceptions to the right of access established by the first and third indents of Article 4(1)(a) of Regulation No 1049/2001 through disclosure of the very information which those exceptions are designed to protect.
- 83 The need for the institutions to abstain from referring to matters which would thus indirectly undermine the interests which those exceptions are specifically designed to protect is emphasised in particular by Articles 9(4) and 11(2) of Regulation No 1049/2001. The first of those provisions states that an institution which decides to refuse access to a sensitive document must give the reasons for its decision in a manner which does not harm the interests protected in Article 4 of Regulation No 1049/2001. Article 11(2), for its part, provides in particular that, if a document is the subject of a reference in the register of an institution, such reference must be made in a manner which does not undermine the protection of the interests in Article 4.
- 84 The fact that, in the course of examining the substance of the dispute, the Court of First Instance took account of matters which do not appear explicitly in the statement of reasons for the first decision refusing access, including those set out in paragraphs 77, 80 and 81 of the judgment under appeal, cannot invalidate the foregoing analysis.
- 85 As regards the statement of reasons relied upon by the Council in the first decision refusing access in so far as it refuses to disclose the identity of the States which sent documents to the Council, it is appropriate to observe that the Court of First Instance's confusion between Member States and non-member countries did not affect the reasoning followed by that Court, in paragraphs 64 and 65 of the judgment under appeal, for the purpose of determining whether that statement of reasons meets the requirements of Article 253 EC and of deciding that there was no breach of that provision.
- 86 The Court of First Instance referred in that regard, in paragraph 64, to the fact that the statement of reasons for the first decision refusing access suggests, first, that the documents concerned are sensitive documents within the meaning of Article 9 of Regulation No 1049/2001 and, second, that the originators of those documents opposed, under Article 9(3), disclosure of the information requested. It is common ground, in that regard, that the identity of the authorities concerned and, in particular, the question whether they are authorities of Member States or non-member countries are irrelevant.

*Ryanair* judgment:

- 98 In this case, the Commission, in the express decisions, identified the number of documents covered by the applicant's applications and divided them into categories.
- 99 The Commission granted the applicant access to certain documents and, in order to justify the refusal of access to other documents, claimed, in particular,

that, since they dealt with procedures for reviewing State aid, they were covered by the exception provided for in the third indent of Article 4(2) of Regulation No 1049/2001. The Commission stated that disclosure of the documents might harm the climate of mutual confidence between Member States and third parties, thereby jeopardising ongoing investigations.

- 100 It is clear therefore from the express decisions that the Commission, first, placed the applicant in a position to understand which were the documents covered by the exception and the reason for which that exception was being applied in the particular case and, second, enabled the General Court to exercise its power of review.
- 101 In addition, the applicant's arguments concerning the absence of a concrete, individual examination of the documents relate to the soundness of the express decisions and were therefore examined in the context of the first plea in law seeking the annulment of those decisions.
- 102 The plea in law alleging breach of the obligation to state reasons must therefore be rejected, without it being necessary to adjudicate on the applicant's arguments relating to the statement of reasons concerning the other exceptions relied upon, since the exception under the third indent of Article 4(2) of Regulation No 1049/2001 covers all of the documents disclosure of which was refused and is sufficient to justify the refusal.

*Co-Frutta* judgment:

- 99 According to settled case-law, the statement of reasons required under Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution responsible for authorship of the measure, in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review (judgment of 30 January 2008 in Case T-380/04 *Terezakis v Commission* (not published in the ECR), paragraph 70).
- 100 It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case C-41/00 P *Interporc v Commission* [2003] ECR I-2125, paragraph 55 and the case-law cited, and *Terezakis v Commission*, paragraph 70).
- 101 In the case of a request for access to documents, where the institution in question refuses such access, it must demonstrate in each individual case, on the basis of the information at its disposal, that the documents to which access is sought do indeed fall within the exceptions listed in Regulation No 1049/2001. However, it may be impossible to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and thereby defeating the very purpose of the exception (*Terezakis v Commission*, paragraph 71).
- 102 In the present case, the Commission clearly indicated that, independently of the position of the Member States, the exception upon which the Commission based its refusal is that provided for in the first indent of Article 4(2) of

Regulation No 1049/2001. That is in accordance with the judgment of the Court of Justice in *IFAW* (paragraphs 68 and 99).

- 103 In addition, as the applicant has correctly pointed out, the Commission actually adopted a succinct statement of reasons closely reflecting the words of the first indent of Article 4(2) of Regulation No 1049/2001.
- 104 However, the decision of 10 August 2004, adopted in response to the confirmatory application for access to documents, is a document of five pages which sets out a clear analysis. In point 4 of that decision, the Commission maintains that, in its decisional practice, it has consistently considered that reference quantities and the quantities actually imported by operators constitute information which cannot be disclosed, because its disclosure could undermine the commercial interests of the operators. The Commission states that that information consequently falls under the first indent of Article 4(2) of Regulation No 1049/2001. In point 5 of that decision, the Commission explains that it wished to confirm its analysis by consulting the Member States responsible for authorship of the documents concerned. Since a large majority of those Member States confirmed the Commission's findings concerning the risk of undermining the commercial interests of the operators concerned, the Commission refused access to any of the documents requested which originated in the Member States opposed to disclosure, pursuant to Article 4(5) of Regulation No 1049/2001. The Commission moreover considered, in point 7 of the decision of 10 August 2004, that the applicant's interest in obtaining access to the documents requested could not be regarded as constituting an overriding public interest.
- 105 Since the decision of 10 August 2004 clearly reveals the Commission's reasoning, it would be excessive to require a specific statement of reasons for each of the assessments on which that reasoning is based. It should also be observed that certain information cannot be communicated without jeopardising the effective protection of the commercial interests of other operators (see, by analogy, Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste v UFEX and Others* [2008] ECR I-4777, paragraphs 108 and 109).
- 106 The applicant, a traditional operator on the market for the importation of bananas into the Community, asked for access to very specific documents concerning the import activities of its competitors. As is apparent from the list of operators to which the Commission granted access for the years 1999 and 2000, the applicant requested the disclosure of information concerning the imports of 622 competitor undertakings established in 15 Member States. The Commission stated, in point 4 of the decision of 10 August 2004, that disclosure of the documents concerned could 'undermine the commercial interests of operators, since they would make public the reference quantities attributed to each operator as well as the quantities actually imported by each operator'. It is clear that the quantities imported go to the very heart of the activity of undertakings active on the market in banana imports.
- 107 It follows that the applicant was placed fully in a position to understand the reasons for refusal which were raised against it, as was the Court to exercise its power of review. Accordingly, the decision of 10 August 2004 is not vitiated by breach of the obligation to state reasons.

*Terezakis* judgment:

- 68 Finally, the applicant's third submission is that, by failing to assess the grounds advanced by the contracting parties and confining itself to informing the applicant of the reasons relied on by those parties in order to justify its decision, the Commission was in breach of its duty to state reasons under Article 253 EC.
- 69 It follows from the considerations set out in paragraph 63 above that the Commission based its conclusion that the exception provided for in Article 4(2), first indent, of Regulation No 1049/2001 was applicable to the main contract particularly on the consideration that that contract contains detailed information about the contracting parties, their business relations and specific cost components related to the project. In the contested decision, the Commission states, moreover, that it gave due consideration to the rulings of the Polimeles Protodikio Athinon and the Efetio Athinon, in which the need to protect the commercial interests of the contracting parties was recognised. The applicant's premiss that the Commission's reasons for its decision were based solely on the grounds put forward by the contracting parties is thus incorrect. As to the complaint concerning the Commission's failure to assess the merits of those grounds, not only must it be rejected as unfounded, as set out in paragraphs 65 to 67 above, but it must also be held that it relates to the legality of the merits of the contested decision, not to the reasons for it.
- 70 Furthermore, the Court observes that it has consistently been held that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case C-41/00 P *Interporc v Commission* [2003] ECR I-2125, paragraph 55, and the case-law cited).
- 71 In the case of a request for access to documents, where the institution in question refuses such access, it must demonstrate in each individual case, on the basis of the information at its disposal, that the documents to which access is sought do indeed fall within the exceptions listed in Regulation No 1049/2001. However, it may be impossible to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and, thereby, depriving the exception of its very purpose (see Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429, paragraph 60, and the case-law cited).
- 72 In the present case, the Commission indicated clearly the exception upon which its refusal was based by referring to Article 4(2), first indent, of Regulation No 1049/2001. It explained in what respect it had taken the view that that exception was applicable to the main contract by referring to the harm that would be caused to the commercial interests of the contracting parties by the disclosure of detailed information in the main contract about the parties, their business relations and the specific cost components related to the project. It added that it had considered the contracting parties' reply to the consultation undertaken in accordance with Article 4(4) of Regulation No 1049/2001 and

that it had duly taken into consideration the rulings of the Athens courts, which had recognised the need to protect the parties' commercial interests.

- 73 It follows that the applicant was fully in a position to understand the reasons for the refusal which were given to him, and the Court was likewise in a position to carry out its review. Therefore, the contested decision is not vitiated by non-compliance with the obligation to state reasons.

*b) non-existence of documents*

*Terezakis* judgment:

- 151 The applicant claims, in essence, that the Commission infringed Articles 7 and 8 of Regulation No 1049/2001 by treating his request concerning the costs of the construction items amounting in total to EUR 1 824 000 000 as a request for information and not as an application for access to a document.
- 152 It must be observed that the Commission has maintained, in that respect, that, although it had a fax that was sent by the Greek authorities in connection with the drafting of the reply to question H-0059/03 from the Parliament, which refers to a total amount of EUR 1 824 000 000, the Commission did not have any document containing a breakdown of that amount.
- 153 In that respect, it is necessary to bear in mind the scope of Regulation No 1049/2001 which, according to Article 2(3) of the regulation, applies only to 'documents held by an institution, that is to say, documents drawn up or received by it and in its possession'.
- 154 Furthermore, according to the case-law, the concept of a document must be distinguished from that of information. The public's right of access to the documents of the institutions covers only documents and not information in the wider meaning of the word and does not imply a duty on the part of the institutions to reply to any request for information from an individual (see, by analogy, the order in Case T-106/99 *Meyer v Commission* [1999] ECR II-3273, paragraphs 35 and 36). It is true that it is apparent from the judgment in *Council v Hautala*, cited in paragraph 75 above, that Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43), which preceded Regulation No 1049/2001 covered not only documents held by the institutions as such but also information contained within those documents (paragraph 23 of the judgment). However, access to information – within the meaning of that judgment – may be granted only if that information is contained within documents, which presupposes that such documents exist (Case T-264/04 *WWF European Policy Programme v Council* [2007] ECR II-0000, paragraph 76).
- 155 Furthermore, it has consistently been held that a presumption of legality attaches to any statement of the institutions relating to the nonexistence of documents requested. Consequently, a presumption of veracity also attaches to such a statement. That is, however, a simple presumption which the applicant may rebut in any way by relevant and consistent evidence (see *Sison v Council*, cited in paragraph 71 above, paragraph 29, and the case-law cited).

- 156 In the present case, the applicant has been unable to refer to any evidence of that nature and has made no mention of even the slightest matter that would put that presumption into doubt. He has merely maintained that, if the Commission does not have a document referring to the breakdown of EUR 1 824 000 000, that would amount to maladministration. However, it must be observed that any failure by the Commission in that regard has no bearing on the presumption of veracity attached to the Commission's statement that it does not possess a document describing the breakdown of the total amount and, on the contrary, presupposes that the Commission did not in fact have such a document in its possession.
- 157 In those circumstances, it must be held that the applicant is unable to rebut the presumption of veracity which attaches to the Commission's statement that it does not have a document containing the breakdown of the amount of EUR 1 824 000 000 and, accordingly, it must be concluded that the Commission was entitled to take the view that the applicant's request regarding that breakdown could not be interpreted as an application for access to documents, but was a request for information.
- 158 Finally, as regards the request that the Court order the Commission to present the breakdown of the sum of EUR 1 831 000 000 mentioned in the defence, which results from the audit procedure initiated by the Commission, it must be held that, since the applicant has not made an application to the Commission for access in respect of such a document or in respect of a document containing that information under Regulation No 1049/2001, it is clearly outside the scope of the present proceedings. Furthermore, in the context of its judicial review of the lawfulness of measures, the Community judicature may not issue directions to the Community institutions. Consequently, the applicant's application must be dismissed as inadmissible.
- 159 It follows from the foregoing that the plea must be rejected in its entirety.

#### *4. Access to the subcontracts*

##### *Arguments of the parties*

- 160 In a single plea alleging a manifest lack of good faith on the part of the Commission and infringement of the principle of good administration, the applicant claims that the contested decision demonstrates a manifest lack of good faith on the part of the Commission in that it failed to indicate to him when it would be in possession of the document requested, since the Commission informed him in the contested decision that the subcontracts would be analysed in the framework of a planned audit without explaining to him the proposed timetable or purpose of that audit. In the contested decision, the Commission failed to state whether the planned audit is connected with the audit decided upon by the Regional Policy DG in June 2003 which followed an earlier audit, as mentioned in the note sent to the applicant on 5 February 2004 by the Director-General of the Regional Policy DG. The Secretary General did not provide an indication as to when the results of the analysis of the contracts and subcontracts were expected to be communicated to the European Parliament. The applicant submits that the Commission should have stated whether the analysis of the contracts and subcontracts was in progress, whether the Commission was in possession of the requested documents and when it would examine his request.

- 161 The Commission maintains that it is not in possession of the subcontracts and that there is nothing in the file to demonstrate any bad faith on its part.

*Findings of the Court*

- 162 It must be noted, first of all, that the Commission stated in the contested decision that it was not in possession of the subcontracts. It went on to indicate, in respect of the applicant's argument that that assertion contradicts the letter of 4 July 2003 sent by the Director-General of the Regional Policy DG to three members of the European Parliament, that that letter merely states that an analysis of the contracts and subcontracts would be carried out in the framework of a planned audit.
- 163 According to the case-law cited in paragraph 155 above, a presumption of legality attaches to any statement of the institutions relating to the nonexistence of documents requested. Consequently, a presumption of veracity also attaches to such a statement. That is, however, a simple presumption which the applicant may rebut in any way by relevant and consistent evidence.
- 164 However, it must be held that the applicant has not adduced such relevant and consistent evidence.
- 165 It must be noted, first, that, contrary to the applicant's allegations, the Director-General of the Regional Policy DG does not claim in the letter of 4 July 2003 to be in possession of the subcontracts, but merely announces that he has decided to launch an analysis of the contracts and subcontracts for the construction of Athens airport. Second, in response to the written question put by the Court, the Commission explained that, following the letter of 4 July 2003, an audit procedure was launched in respect of the project, the objectives of which were achieved without the subcontracts having been made available to the auditors. The Commission thus explained that, even without the subcontracts at their disposal, the auditors concluded that the evaluation of the construction costs was carried out correctly by means of the analysis of the actual costs incurred and variations of the original orders.
- 166 It follows that, in the absence of relevant and consistent evidence to the contrary, the Commission's assertion that it was not in possession of the subcontracts must be regarded as being accurate.

*Williams judgment:*

- 65 With regard to the alleged infringement of Article 8(3) of Regulation No 1049/2001, in so far as the Commission impliedly refused access to certain documents relating to the background to the adoption of Directive 2001/18, it must be noted that the Commission adopted an express decision partially rejecting the applicant's confirmatory application (see paragraph 19 above). The question arising therefore is whether the view may be taken that there is an implied refusal of access to the documents referred to in paragraph 64 above.
- 66 To that end it is necessary, in the first place, to determine whether the documents presumed by the applicant to exist – although they are not identified in the contested decision – do actually exist. In the event of a positive response

to that question it must, in the second place, be established whether the first request was sufficiently precise to enable the Commission to understand that the request related to such documents. The conclusion that the administration's silence constitutes a rejection decision can be drawn only if that administration was in fact in a position effectively to decide and, therefore, to understand what was being asked of it. In the third place, it is necessary to address, if appropriate, the issue whether – as the Commission claims – it is not obliged to examine all documents falling within the scope of a request which relates to broad categories of documents and is not expressed sufficiently precisely.

- 67 In the first place, as regards the question of the actual existence of documents which, according to the person requesting access, are presumed to exist but which have not been identified by him, it must be observed that it is apparent from the case-law concerning the application of the Code of Conduct of 6 December 1993 concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41; 'the 1993 code of conduct') that, in accordance with the presumption of legality attaching to Community acts, where the institution concerned asserts that a particular document to which access has been sought does not exist, there is a presumption that it does not. That, however, is a simple presumption which the person requesting access may rebut in any way by relevant and consistent evidence (Case T-311/00 *British American Tobacco (Investments) v Commission* [2002] ECR II-2781, paragraph 35; see also, to that effect, Case T-123/99 *JT's Corporation v Commission* [2000] ECR II-3269, paragraph 58).
- 68 In the present case, the Commission expressly confirmed in response to a written question put by the Court that it held preparatory documents relating to Directive 2001/18 other than the 48 documents identified in the contested decision. Furthermore, the list which it attached to one of the replies to the Court's written questions lists more than 400 preparatory documents drawn up by the Commission, the Council or the Parliament. The Commission states, however, that, contrary to the applicant's allegations, no documents were concealed and all documents which it was possible to identify were specifically addressed. In fact, the difficulties in identifying documents were due to the lack of a single, exhaustive record of documents relating to the adoption of the directive.
- 69 It must be concluded, therefore, that there is a significant number of preparatory documents relating to Directive 2001/18 other than those identified in the contested decision.
- 70 In the second place, as to whether the applicant's request for access was sufficiently precise, it must be noted that both the initial request and the confirmatory application for access are drawn up in general terms, in that the applicant does not request specific documents, but certain types of documents dealing with the background to the adoption of Directive 2001/18, such as briefings to the Commissioners responsible for environmental and trade issues, the Directors General and directors in the Environment and Trade DGs, the Secretariat-General and Legal Service, and all e-mails between desk officers and heads of unit.
- 71 It must be acknowledged in that regard that the Community legislature was conscious of the initial acute difficulty which the identification of documents entails for citizens in search of information who, in most cases, do not know

which documents contain that information, and who have to contact the administration holding the documents and thus the information.

- 72 To make citizens' rights effective, Article 11 of Regulation No 1049/2001 provides for the creation by each institution concerned of an electronically accessible register of documents which is to contain, in respect of each document, a reference number, the subject-matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. It is, therefore, a research tool which is intended to enable citizens to identify the documents which are likely to be of interest to them.
- 73 As the Commission itself has nevertheless explained, since the preparatory documents relating to the circumstances of the adoption of Directive 2001/18 were drawn up before the introduction of the public register, those document references were not accessible by means of that register, which, moreover, contains only certain types of documents, such as legislation, final proposals or other public documents, agendas and minutes. It follows that, in the present case, any research conducted using that tool could not assist the applicant, as it would not have enabled her to identify the documents relating to the adoption of Directive 2001/18.
- 74 Moreover, Article 6(2) of Regulation No 1049/2001 provides that '[i]f an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents'. The wording of that provision, and the use of the verbs 'ask' and 'assist', appears to suggest that if, for whatever reason, the recipient institution finds the request for access to be insufficiently precise, that alone must lead it to contact the applicant in order to define the documents requested as well as possible. The provision is therefore one which, in relation to public access to documents, formally transcribes the principle of good administration, which is one of the guarantees afforded by the Community legal order in administrative procedures (see, to that effect, *VKI*, cited in paragraph 44 above, at paragraph 107). The duty to provide assistance is therefore essential in order to ensure the effectiveness of the right of access established by Regulation No 1049/2001.
- 75 In the present case, the Commission carried out its duty to provide assistance, since it asked the applicant by letter of 12 August 2004 to clarify her request because it was difficult for the Commission accurately to determine which documents would be of interest to her. In the same letter the Commission pointed out, inter alia, that most documents drafted in the course of the preparation of new legislation do not take the form of 'briefings' but can be of different types, and that it was the Commission's understanding that the applicant was interested in the internal exchanges of ideas, consultations and deliberations during the preparation of the Commission's proposals.
- 76 In her reply of 2 September 2004, the applicant confirmed the Commission's understanding, while pointing out that she could not be more specific, as she did not know what was contained in the different types of documents and their titles were not always indicative of their content.
- 77 It follows from the foregoing that, while the Commission did ask the applicant, in accordance with Article 6(2) of Regulation No 1049/2001, to clarify her

request, the fact remains that the Commission did not provide her with any useful information to enable her to clarify the request effectively, in particular to enable her to identify the specific documents relating to the background to the adoption of Directive 2001/18. Furthermore, following the Commission's request for clarification, the applicant confirmed by letter of 2 September 2004 that she was indeed interested in the internal exchanges of ideas, consultations and deliberations during the preparation of the Commission's proposals.

- 78 In those circumstances, the Commission cannot maintain that it was not in a position to understand that the applicant's request for access concerned all internal documents relating to the background to the adoption of Directive 2001/18. It follows that, although the request for access did not include a list of specific documents which the applicant wished to obtain, the information she provided, particularly following the dialogue initiated with the Commission, was sufficient to ensure that the latter understood to which documents the request for access related.
- 79 With regard to briefings to the Commissioners responsible for environmental and trade issues, the Directors General and directors in the Environment and Trade DGs, the Secretariat-General and the Legal Service, and all e-mails between desk officers and heads of unit in relation to Directive 2001/18, it is sufficient to note that the applicant clearly stated in her initial request that she wished to have access to that type of documentation, namely all the institution's internal correspondence relating to the preparation of that directive. Further, the term 'briefing' was clarified as between the Commission and the applicant; it must therefore be concluded that the applicant's request cannot be considered imprecise as regards that type of documentation.
- 80 With regard to documents dating from before 2001, since the applicant sought access to documents relating to the background to the adoption of Directive 2001/18, those documents must, in principle, have included documents drawn up before 23 February 1998, the date on which the initial proposal for that directive was adopted, and also those drawn up between that date and the final adoption of the directive. The fact that only 2 of the 48 documents identified in the contested decision satisfy that condition is, according to the applicant, evidence of the fact that other documents must have existed, whereas the Commission, which does not deny the existence of those other documents, contends that the initial request for access did not cover draft proposals for legislation concerning GMOs, and that it was only after the present action was brought that the Commission was in a position to understand that the applicant was also requesting access to draft proposals relating to Directive 2001/18.
- 81 It must be noted in that regard that it is, admittedly, the case that the document types identified by the applicant in her request for access included only the institution's internal correspondence, that is briefings and e-mails. However, following the clarification requested by the Commission, the applicant confirmed to it that she was interested in the exchanges of ideas, consultations and deliberations during the preparation of the Commission's proposals. It goes without saying that deliberations, at least, do not take the form of briefings or e-mails.
- 82 In view of the foregoing, it must therefore be concluded that, save as regards the draft proposals relating to Directive 2001/18 – which, moreover, are normally public documents, as they are published in the *Official Journal of the*

*European Communities* – the Commission was in a position to understand that the request for access covered all the preparatory documents relating to Directive 2001/18. Furthermore, at the hearing, the applicant expressly confirmed that her request for access was not intended to procure any preparatory documents other than internal documents. All public documents, such as published proposals for legislation, were therefore excluded from her request.

- 83 It follows from this that the fact that the Commission did not identify in the contested decision all the internal documents relating to the background to the adoption of Directive 2001/18 amounts to an implied refusal of access under Article 8 of Regulation No 1049/2001, which is actionable before the Court of First Instance.
- 84 In the third place, it is necessary to check whether the Commission's failure to consider the disclosure of documents which were not identified in the contested decision and falling within the scope of the request for access at issue could be justified in the particular circumstances of the case, *inter alia* on the basis that the request for access was, according to the Commission, very wide-ranging and imprecise.
- 85 It must be observed that the Court has already had occasion – in *VKI*, cited in paragraph 44 above – to note that it is necessary to bear in mind that an applicant may make a request for access, under Regulation No 1049/2001, relating to a manifestly unreasonable number of documents, perhaps for trivial reasons, thus imposing a volume of work for processing of his request which could very substantially paralyse the proper working of the institution. The Court also noted in the same judgment that, in such a case, the institution's right to seek a 'fair solution' together with the applicant, pursuant to Article 6(3) of Regulation No 1049/2001, reflects the possibility of account being taken, albeit in a particularly limited way, of the need to reconcile the interests of the applicant with those of good administration. The Court concluded from this that an institution therefore had to retain the right, in particular cases where concrete, individual examination of the documents would entail an unreasonable amount of administrative work, to balance the interest in public access to the documents against the burden of work so caused, in order to safeguard, in those particular cases, the interests of good administration (*VKI*, cited in paragraph 44 above, at paragraphs 101 and 102).
- 86 The Court stated, however, that that possibility was applicable only in exceptional cases, in view, in particular, of the fact that it is not, in principle, appropriate that account should be taken of the amount of work entailed by the exercise of the applicant's right of access and its interest in order to vary the scope of that right (*VKI*, cited in paragraph 44 above, at paragraphs 103 and 108). In addition, in so far as the right of access to documents held by the institutions constitutes an approach to be adopted in principle, the institution relying on the unreasonableness of the task entailed by the request bears the burden of proof of the scale of that task (*VKI*, cited in paragraph 44 above, at paragraph 113).
- 87 In the present case, first of all, it must be noted that the Commission availed itself of the possibility provided by Article 6(3) of Regulation No 1049/2001, which enabled it to divide the applicant's initial request into six. Accordingly, in the contested decision, the Commission replied only to the first of the

applicant's requests – whereby the applicant sought access to preparatory documents relating to Directive 2001/18 – which means that the request cannot be regarded as very wide-ranging. Furthermore, there is nothing in the contested decision to suggest that the handling of that request would entail an unreasonable amount of work, likely to be detrimental to the principle of good administration.

- 88 Second, as is apparent from paragraphs 69 to 82 above, the fact that neither the initial request nor the confirmatory application mentions specific documents cannot be regarded as having prevented the Commission from understanding that the applicant wished to have access to all preparatory documents relating to the legislation on GMOs, including those relating to Directive 2001/18. Nor can the Commission reasonably rely on that fact in support of its contention that the burden of work imposed by the handling of the first request was unreasonable and that, in those circumstances, if it was to observe the principle of good administration, it could not – due to its limited resources – be required, under the principle of transparency, to consider the disclosure of each and every document held by it that could be relevant to such a request.
- 89 In that regard, it is sufficient to note that the Commission confined itself in its written pleadings to maintaining that the first request amounted to an exceptional situation because it was actually not possible, on account of its imprecise and undefined nature, to calculate the number of files and documents liable to fall within its scope. Such an argument cannot be upheld, since the request was clear in referring to access to all preparatory documents relating to Directive 2001/18 and therefore the absence of a list of specific documents could have an impact only on the time-limits for reply – an issue which was resolved by the fair solution – but not on the scope of the request for access.
- 90 Third, it must in any event be noted that the Commission itself states in its written pleadings that, even though the applicant's request amounted to an exceptional situation, as in the case of the request underlying the judgment in *VKI*, cited in paragraph 44 above, the Commission does not intend to rely on such a situation, as is confirmed by the fact that it conducted a concrete, individual examination of all documents considered to be relevant. On that point, however, the Commission's position appears to be contradictory. On the one hand, the Commission states that it does not intend to rely on the burden of work caused by the applicant's request for access, whereas, on the other, it claims that, since the request for access was wide-ranging and imprecise, it sought to find a fair balance between that request and its capacity to respond to it within the limits of the principle of good administration. Furthermore, the Commission pointed out several times in its written pleadings that it examined a large number of documents from which it selected the 48 documents appearing, in its view, to satisfy the request.
- 91 It must therefore be concluded that, while not invoking the burden of work exception which stems from the judgment in *VKI*, cited in paragraph 44 above, the Commission justifies the fact that it did not consider the disclosure of all the documents which were capable of falling within the scope of the request for access, and which were not identified in that request, by relying on the observance of the principle of good administration, as a result of which it sought a fair balance between the request for access at issue and its capacity to respond to it. As the Commission confirmed in response to a written question

of the Court, the Commission takes the view that it has a certain discretion if the applicant for access does not specify the particular documents he wishes to obtain.

- 92 In view of all of the foregoing, in particular the fact that the Court has held the possibility of refusing access on the basis of the amount of work for the institution concerned to be exceptional, and, moreover, the fact that the Commission is not formally relying on such an exception in the present case and there is nothing in the contested decision that refers to the allegedly unreasonable nature of the first request or to any possible problems arising from its allegedly wide-ranging and imprecise nature, it must be held that the Commission has failed to justify its implied refusal – established in paragraph 83 above – to grant access to certain documents relating to the background to the adoption of Directive 2001/18.
- 93 The implied refusal thus established implies also, by definition, an infringement of the obligation to state reasons.
- 94 In that regard, it is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the Community judicature to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 80; Case T-188/98 *Kuijjer v Council* [2000] ECR II-1959, paragraph 36; *JT's Corporation v Commission*, cited in paragraph 67 above, at paragraph 63; and Case T-187/03 *Scippacercola v Commission* [2005] ECR II-1029, paragraph 66).
- 95 In the case of a request for access to documents, where the institution in question refuses such access, it must demonstrate in each individual case, on the basis of the information at its disposal, that the documents to which access is sought do indeed fall within the exceptions listed in Regulation No 1049/2001 (Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429, paragraph 60, and Case T-93/04 *Kallianos v Commission* [2006] ECR II-0000, paragraph 90; see, as regards the 1993 code of conduct, Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal v Commission* [2000] ECR I-1, paragraph 24, and Case C-41/00 P *Interporc v Commission* [2003] ECR I-2125, paragraph 56). Under that case-law, it is therefore for the institution which has refused access to a document to provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the scope of the exception relied on and, second, whether the need for protection relating to that exception is genuine (*Sison v Council*, paragraph 61).

- 96 In the present case, the implied refusal of access established in paragraph 83 above implies, by definition, an absolute failure to state reasons. It follows that, even if the Commission's considerations and assertions on this point before the Community judicature are assumed to be correct, they cannot remedy that failure to state reasons (see, to that effect, Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others v Commission* [1996] ECR I-5151, paragraph 48, and Case T-318/00 *Freistaat Thüringen v Commission* [2005] ECR II-4179, paragraph 127).
- 97 It follows from the whole of the foregoing that the contested decision includes an implied refusal of access to certain documents requested by the applicant, and that this refusal does not satisfy the obligation to state reasons which Article 253 EC imposes on the Community institutions.
- 98 Accordingly, the application for annulment of the contested decision must be allowed as regards that implied refusal of access.

*WWF judgment:*

- 61 It would be contrary to the requirement of transparency which underlies Regulation No 1049/2001 for institutions to rely on the fact that documents do not exist in order to avoid the application of that regulation. In order that the right of access to documents may be exercised effectively, the institutions concerned must, in so far as possible and in a non-arbitrary and predictable manner, draw up and retain documentation relating to their activities.
- 62 It is apparent from the heading of the first item on the agenda of the meeting of 19 December 2003, as was confirmed at the hearing, that the purpose of that item was to provide the Members of the Committee with information on the status of the negotiations within the WTO. The purely informative nature of that item at the meeting and the fact that it did not call for any specific implementing measure explain why it was not considered necessary to minute it and why the item was not recorded in a summary report or other subsequent document of the Committee.
- 63 That being so, it is also not possible to conclude that the Council acted in an arbitrary or unpredictable manner by failing to produce minutes on that item at the meeting. It cannot therefore be concluded that the Council, in claiming that such minutes do not exist, infringed the applicant's right of access to documents conferred by Regulation No 1049/2001.

*c) confirmatory application process*

*Ryanair judgment:*

- 33 At the outset, it is appropriate to note that Article 8 of Regulation No 1049/2001 provides as follows:
- '1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total

or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 [EC] and 195 [EC] respectively.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

3. Failure by the institution to reply within the prescribed time-limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.'

34 As regards, first of all, the validity of the first extension of the time-limit for reply by the Commission, first, eight applications for access to documents were made to the Commission almost simultaneously, representing a total of 377 documents, from the same applicant and covering cases which were connected. The applications related therefore to a large number of documents.

35 Secondly, the Commission sent the first letters extending the time-limit by fax to the applicant on the last day of the initial period.

36 Thirdly, in the first letters extending the time-limit, the Commission explained that the applications were currently being handled, but that it had not been able to gather all the documents necessary to take a final decision. It also noted, in Cases T-494/08 to T-500/08, that the applicant had submitted simultaneously seven confirmatory applications for access to the documents. In those circumstances, the applicant was in a position to understand the particular reasons for the extension in each case. The reasoning is therefore sufficiently detailed.

37 Having regard to all of the foregoing, the Court concludes that the first letters extending the time-limit meet the requirements laid down by Article 8(2) of Regulation No 1049/2001 and validly extended the initial period of 15 working days, with the result that no implied decision arose on the expiry of the initial period.

38 As regards the second letters extending the time-limit, it should be noted that, under Article 8 of Regulation No 1049/2001, the Commission could extend the initial time-limit only once and that, on the expiry of the extended period, an implied decision to refuse access was deemed to have been adopted.

39 In that regard, the time-limit laid down by Article 8(1) of Regulation No 1049/2001 is mandatory (see, to that effect, Joined Cases T-355/04 and T-446/04 *Co-Frutta v Commission* [2010] ECR I-0000, paragraphs 60 and 70) and cannot be extended save in the circumstances provided for in Article 8(2) of Regulation No 1049/2001, without depriving that article of all practical effect, since the applicant could not know precisely the date from which he could bring the action or complaint provided for in Article 8(3) of that regulation (see, by analogy, Case C-186/04 *Housieaux* [2005] ECR I-3299, paragraph 26).

- 40 Therefore, the second letters extending the time-limit could not validly extend the time-limits. In each case, the Commission's failure to reply by the expiry of the extended period must therefore be held to constitute an implied decision to refuse access.
- 41 However, according to settled case-law, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the annulment of the contested measure (see *Co-Frutta v Commission*, paragraph 40 and the case-law cited).
- 42 An applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible (*Co-Frutta v Commission*, paragraph 41).
- 43 Furthermore, the interest in bringing proceedings must continue until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be likely, if successful, to procure an advantage for the party bringing it (see *Co-Frutta v Commission*, paragraph 43 and the case-law cited).
- 44 If the applicant's interest in bringing proceedings disappears in the course of proceedings, a decision of the Court on the merits cannot bring him any benefit (see *Co-Frutta v Commission*, paragraph 44 and the case-law cited).
- 45 In the present cases, as regards, first, the applications for annulment of the implied decisions which arose on the expiry of the extended period, it must be noted that, by adopting the express decisions, the Commission, in fact, withdrew those implied decisions (see, to that effect, *Co-Frutta v Commission*, paragraph 45).
- 46 However, any annulment of the implied decisions on grounds of a procedural defect could do no more than give rise to new decisions, identical in substance to the express decisions. Moreover, consideration of the actions against the implied decisions cannot be justified either by the objective of preventing the alleged unlawfulness from recurring, within the meaning of paragraph 50 of the judgment in Case C-362/05 P *Wunenburger v Commission* [2007] ECR I-4333, or by that of facilitating potential actions for damages, since it is possible to attain both those objectives through consideration of the actions brought against the express decisions (see, to that effect, *Co-Frutta v Commission*, paragraph 46 and the case-law cited).
- 47 It follows that the actions in Cases T-494/08, T-495/08, T-499/08, T-500/08 and T-509/08 are inadmissible in so far as they are directed against the relevant implied decisions referred to in paragraph 40 above, since the applicant had no interest in bringing proceedings against those decisions by reason of the adoption, before those actions were commenced, of the express decisions, annulment of which it seeks in the alternative.
- 48 Likewise, there is no longer any need to adjudicate on the actions in Cases T-496/08, T-497/08 and T-498/08 in so far as they are directed against the relevant implied decisions, since the applicant no longer has any interest in continuing the proceedings against those decisions by reason of the adoption, after the actions were commenced, of the express decisions, annulment of which it seeks in the alternative.

- 49 As regards, secondly, the alleged non-existence of the express decisions, it must be noted that a finding that a measure is non-existent should be reserved for measures which exhibit particularly serious and manifest defects (Case 15/85 *Consortio Cooperative d'Abruzzo v Commission* [1987] ECR 1005, paragraph 10). The gravity of the consequences attaching to a finding that a measure of an institution is non-existent requires that, for reasons of legal certainty, such a finding be reserved for quite extreme situations (Case C-137/92 P *Commission v BASF and Others* [1994] ECR I-2555, paragraph 50, and Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraph 86).
- 50 However, in the present cases, the mere fact that the contested express decisions were adopted after the expiry of the period laid down in Article 8 of Regulation No 1049/2001 does not have the effect of depriving the Commission of the power to adopt a decision (see, to that effect, *Co-Frutta v Commission*, paragraphs 56 to 59). In addition, it follows from paragraphs 53 to 103 of the present judgment that the express decisions are not vitiated by any defect.
- 51 The claim seeking a declaration that the express decisions are non-existent must therefore be rejected. Likewise, it follows from paragraphs 45 to 50 of the present judgment that the claim seeking a declaration that the express decision in Case T-497/08 does not produce any legal effects must also be rejected.

*Co-Frutta* judgment:

- 55 The Commission is required, during the administrative procedure before it, to observe the procedural guarantees provided for by Community law (Case T-348/94 *Enso Española v Commission* [1998] ECR II-1875, paragraph 56, and Case T-410/03 *Hoechst v Commission* [2008] ECR II-881, paragraph 128).
- 56 The period of 15 working days – which may be extended – within which the institution must reply to the confirmatory application, as laid down in Article 8(1) and (2) of Regulation No 1049/2001, is mandatory. However, the expiry of that period does not have the effect of depriving the institution of the power to adopt a decision.
- 57 If the legislature had intended silence on the part of the institutions to bring about such an effect, specific reference would have been made in the legislation concerned. The Commission rightly relies in that regard on Article 4(3) and (4) and Article 5(6) of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23). Regulation No 1049/2001 contains no such provisions.
- 58 In the field of access to documents, the legislature specified the consequences of failure to comply with the time-limits laid down in Article 8(1) and (2) of Regulation No 1049/2001, by providing, in Article 8(3) thereof, that such failure on the part of the institution is to give the applicant the right to institute judicial proceedings.
- 59 In that context, the consequences which the applicant wishes to attribute to the Commission's failure to comply with the time-limits laid down in Article 8(1) and (2) of Regulation No 1049/2001 must be considered to be disproportionate. There is no legal principle which results in the administration losing its power to

respond to an application, even outside the time-limits laid down for that purpose. The mechanism of an implied refusal decision was established in order to counter the risk that the administration would choose not to reply to an application for access to documents and escape review by the courts, not to render unlawful every decision which is late. On the other hand, the administration is required, in principle, to provide – even late – a reasoned response to every application by a citizen. That approach is consistent with the function of the mechanism of the implied refusal decision, which is to enable citizens to challenge inaction on the part of the administration with a view to obtaining a reasoned response.

60 Contrary to the assertions of the applicant, such an interpretation does not affect the objective pursued by Article 253 EC of protecting the rights of citizens and does not permit the Commission to disregard the mandatory time-limits fixed by Regulation No 1049/2001 and Decision 2001/937. Compensation for any loss occasioned by failure to comply with the time-limits for responding can be sought before the General Court, in the context of an action for damages.

61 In the light of all those considerations, the first part of the first plea must be rejected.

*[The second part of the first plea, re the breach of time limits in the Regulation:]*

70 An institution which receives a request for access to a document originating from a Member State must, once that request has been notified by the institution to the Member State, immediately commence, together with that Member State, a genuine dialogue concerning the possible application of the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001, while paying attention in particular to the need to enable the institution to adopt a position within the time-limits laid down in Articles 7 and 8 of that regulation, under which it is required to decide on the request for access (Case C-64/05 P *Sweden v Commission* [2007] ECR I-11389; ‘the judgment of the Court of Justice in *IFAW*, paragraph 86). Article 8 of Regulation No 1049/2001 therefore requires the Commission to comply with the mandatory time-limit of 15 working days – if appropriate, as extended – even where a third party is consulted.

71 None the less, failure to comply with the time-limit laid down in that provision does not lead automatically to the annulment of the decision adopted after the deadline (see, by analogy, Joined Cases T-44/01, T-119/01 and T-126/01 *Vieira and Others v Commission* [2003] ECR II-1209, paragraphs 167 to 170). The annulment of a decision solely because of failure to comply with the time-limits laid down in Regulation No 1049/2001 and Decision 2001/937 would merely cause the administrative procedure for access to documents to be reopened. In any event, compensation for any loss resulting from the lateness of the Commission’s response may be sought through an action for damages.

72 With regard to the lawfulness of the extension of the period for responding, the second paragraph of Article 2 of the Annex to Decision 2001/937 provides that the period may be extended in the event of a complex application. The number of documents requested and the diversity of their authors – the factual situation in the present case – are factors to be taken into account in the classification of an application for access to documents as complex. In that regard, the Commission informed the applicant of the need to extend the period, in

accordance with the legislation in force. The argument that the extension of the period was unlawful must therefore be rejected.

- 73 In addition, with regard to the argument concerning the second consultation of the Member States by the Commission, the applicant has not submitted any evidence showing that the Commission undertook such a consultation between the refusal of the initial application and the express refusal of the confirmatory application. That argument must therefore be dismissed.

*Williams* judgment:

- 55 It must be noted at the outset that, as the letters of 21 September and 19 October 2004 show, the applicant's initial request seeking access to documents relating to the framework for the adoption of six legal instruments concerning GMOs was divided into six, each relating to one of the legal instruments referred to in that initial request, in accordance with the fair solution agreed pursuant to Article 6(3) of Regulation No 1049/2001.
- 56 It must also be noted that, in accordance with the order of priority proposed by the applicant in her letters of 2 September and 19 October 2004, the contested decision – as the Commission itself states – relates to the first request, that is the request 'to obtain the background documents to Directive 2001/18', and there is nothing in that decision to suggest that, as far as those documents are concerned, the contested decision still had to be supplemented by one or more other decisions. In addition, at point 5 of the contested decision, the Commission expressly set out the remedies available to the applicant for challenging that decision. It is therefore apparent from the terms of the contested decision that it was a final decision as regards access to the documents relating to Directive 2001/18.
- 57 It is true that, after the present proceedings were initiated, the applicant received a second confirmatory decision, the decision of 6 June 2005, by which the Commission granted her access to documents produced by the Trade DG in respect of the six legal instruments referred to in the initial request, including those relating to Directive 2001/18. As a result, the applicant acknowledged, in her reply, that the action had become devoid of purpose as regards the alleged implied refusal to grant her access to documents produced by the Trade DG, while seeking an order that the Commission should pay the costs which she had incurred in that regard as a result of the Commission's conduct.
- 58 Contrary to the Commission's contention, that does not in any way prove, however, that the action should be regarded as premature so far as concerns the documents relating to Directive 2001/18 to which access was impliedly refused, or at least those of them which were produced by the Trade DG. As is apparent from the observations in paragraphs 55 and 56 above, neither the documents in the file nor the contested decision were such that the applicant could have appreciated that the reply to her first request was incomplete or that the contested decision would be followed by a second decision concerning documents produced by the Trade DG.
- 59 Furthermore, the Court rejects the Commission's argument that the request was premature because it had agreed a fair solution with the applicant.

- 60 First of all, the fact that such a fair solution had been agreed with the applicant pursuant to Article 6(3) of Regulation No 1049/2001 does not affect the time-limit for bringing an action against a final decision, such as the contested decision.
- 61 Second, it is apparent from the fair solution agreed by the Commission and the applicant and, in particular, the letters of 21 September and 20 October 2004 that the initial request for access would be divided into six and that the reply to the first request would cover the documents relating to Directive 2001/18. In addition, it is apparent from those letters that, after adopting the contested decision, the Commission would examine the five other requests for access in accordance with the applicant's proposed order of priority.
- 62 It follows that the Commission cannot accuse the applicant of having abandoned the fair solution by claiming that the applicant broke off all dialogue with the Secretariat-General and brought an action before the Court of First Instance instead of allowing the Commission a reasonable period of time to complete the response to her request. Such an argument could be relevant only if the applicant had accused the Commission of not yet having responded to the other five requests. However, that is not the case, since the action is directed only against the refusal of access to certain documents relating to Directive 2001/18.
- 63 It follows from all the foregoing that the adoption of the second confirmatory decision after the present action was brought rendered the action devoid of purpose inasmuch as it sought the annulment of the contested decision on the ground that it was an implied refusal of access to preparatory documents relating to Directive 2001/18 produced by the Trade DG.
- 64 In those circumstances, examination of the merits of the present plea in law will relate only to the alleged implied refusal to grant access to certain types of documents covered by the first request, such as briefings to the Directors General and directors in the Trade and Environment DGs, the Secretariat-General and the Legal Service, all e-mails between desk officers and heads of unit, and documents drawn up before 2001, with the exception of any document relating to Directive 2001/18 produced by the Trade DG.

*d) repeated applications*

*Internationaler Hilfsfonds judgment*

- 51 According to settled case-law, only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment (see, inter alia, Case C-131/03 P *Reynolds Tobacco and Others v Commission* [2006] ECR I-7795, paragraph 54, and the case-law cited).
- 52 It is also apparent from settled case-law concerning the admissibility of actions for annulment that it is necessary to look to the substance of the contested acts, as well as the intention of those who drafted them, to classify those acts. In that regard, it is in principle those measures which definitively determine the position of the Commission upon the conclusion of an administrative procedure, and which are intended to have legal effects capable of affecting the interests of the complainant, which are open to challenge and not intermediate

measures whose purpose is to prepare for the definitive decision, or measures which are mere confirmation of an earlier measure which was not challenged within the prescribed period (see, to that effect, Case C-521/06 P *Athinaiki Techniki v Commission* [2008] ECR I-5829, paragraph 42).

- 53 With regard to Regulation No 1049/2001, it should be pointed out that Articles 7 and 8 of that regulation, by providing for a two-stage procedure, aim to achieve, first, the swift and straightforward processing of applications for access to documents of the institutions concerned and, second, as a priority, a friendly settlement of disputes which may arise. For cases in which such a dispute cannot be resolved by the parties, the abovementioned Article 8(1) provides two remedies, namely the institution of court proceedings or the lodging of a complaint with the Ombudsman.
- 54 That procedure, in so far as it provides for the making of a confirmatory application, enables in particular the institution concerned to re-examine its position before taking a definitive refusal decision which could be the subject of an action before the courts of the Union. Such a procedure makes it possible to process initial applications more promptly and, consequently, more often than not to meet the applicant's expectations, while also enabling the institution to adopt a detailed position before definitively refusing access to the documents sought by the applicant, in particular where the applicant reiterates the request for disclosure of those documents notwithstanding a reasoned refusal by that institution.
- 55 In order to ascertain whether a measure can be the subject of an action under Article 230 EC, it is necessary to look to its substance, rather than to the form in which it is presented (see Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 9).
- 56 It should moreover be noted that Regulation No 1049/2001 confers a very extensive right of access to the documents of the institutions concerned, there being, in accordance with Article 6(1) of the regulation, no requirement to state reasons for the application in order to enjoy that right. In addition, under Article 4(7) of the regulation, the exceptions as laid down in paragraphs 1 to 3 of that article are to apply only for the period during which protection is justified on the basis of the content of the document.
- 57 It follows that a person may make a new demand for access relating to documents to which he has previously been denied access. Such an application requires the institution concerned to examine whether the earlier refusal of access remains justified in the light of a change in the legal or factual situation which has taken place in the meantime.
- 58 It must be held, in that regard, that the contested measure constitutes, in the light both of its content, which refers explicitly to a 'definitive position' of the Commission, and of the context in which it was adopted, a definitive refusal, by the Commission, to disclose all the documents requested by IH. That refusal brought to an end a long series of successive steps taken by IH over approximately three years, referred to in paragraphs 11 to 26 of the present judgment, seeking to obtain access to the documents relating to the contract and including several applications by it to that end.

- 59 As stated in paragraph 57 of the present judgment, it was open to IH to submit new applications for access to those documents without the Commission being able to oppose them on the basis of the earlier refusals to grant access.
- 60 Equally, in circumstances such as those of the present case, the Commission cannot reasonably claim that, once it had received notification of the contested measure, IH should have made a new application and waited until that institution refused its application again before it could be regarded as a definitive measure and, thus, open to challenge. Apart from the fact that the Commission did not, in the contested measure, inform IH of its right to make a confirmatory application, such a step by IH could not have led to the desired result, in the light of the fact that the Commission had, as made clear by the detailed opinion and by the disclosure of five documents in the case instituted before the Ombudsman, examined IH's application for access in detail and had clearly and definitively adopted its position with regard to the refusal of access to the documents sought.
- 61 To require such a step to be taken would moreover have been contrary to the objective of the procedure established by Regulation No 1049/2001, which aims to guarantee swift and straightforward access to the documents of the institutions concerned.
- 62 In the light of all those factors, it must be held that the Court of First Instance was wrong to hold that the contested measure did not constitute a measure open to challenge which could be the subject of an action for annulment under Article 230 EC. It follows from the above considerations that, contrary to what was held by the Court of First Instance, an action against such a measure is admissible.

*e) right to information*

*WWF judgment:*

- 75 First, it is to be noted that the scope of Regulation No 1049/2001, pursuant to Article 2(3) thereof, extends only to 'documents held by an institution, that is to say, documents drawn up or received by it and in its possession'.
- 76 Secondly, case-law provides that the concept of a document must be distinguished from that of information. The public's right of access to the documents of the institutions covers only documents and not information in the wider meaning of the word and does not imply a duty on the part of the institutions to reply to any request for information from an individual (see, by analogy, the order in Case T-106/99 *Meyer v Commission* [1999] ECR II-3273, paragraphs 35 and 36). It is true that it is apparent from the judgment in *Council v Hautala*, cited in paragraph 50 above, that Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43), which preceded Regulation No 1049/2001, covered not only documents held by the institutions as such but also information contained within those documents (paragraph 23 of the judgment). However, access to information – within the meaning of that judgment – may be granted only if that information is contained within documents, which presupposes that such documents exist.

- 77 In the present case, since there are no minutes or other documents relating to the first item on the agenda of the meeting of the Committee of 19 December 2003, the Council was not obliged to provide the applicant with information on the content of that item at the meeting.
- 78 It follows that the Council has not infringed the applicant's right of access to documents conferred by Regulation No 1049/2001 by refusing to provide it with information on the contents of the discussions relating to the first item on the agenda of the meeting of 19 December 2003, since that information did not exist in the form of a document that could be disseminated.
- 79 That finding cannot be altered by the applicant's arguments relating to the Aarhus Convention or the proposal for a regulation on its application in view of the fact that, as the Council rightly pointed out, at the time when the contested decision was adopted, neither the Aarhus Convention nor the regulation implementing it was in force.

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