

INTERESTING CASES REGARDING ACCESS TO DOCUMENTS AT THE ECJ 2008-2010

COURT OF JUSTICE

C-343/09 (opinion of Advocate General Kokott), 6 May 2010 – interesting question about the nature of documents in possession of a MEP rapporteur

C-362/08 P, *Internationaler Hilfsfonds v. Commission* - 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.

C-28/08 P, *Bavarian Lager* (opinion of advocate general Sharpston) – interesting opinion regarding the delimitation between data protection and access to documents

Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, *API* (opinion of advocate general Maduro) – the court should be the responsible to decide about access to documents in court proceedings; after their end a general principle favouring access should apply

C-39/05 P in C-52/05 P – the disclosure of opinions of legal services issued in the course of legislative procedures can not in general undermine the protection of legal advice

GENERAL COURT (former COURT OF FIRST INSTANCE)

T-560/08 P, *Meierhofer* - follow up regarding transparency in competitions

Joined Cases T-355/04 and T-446/04, *Co-Frutta v. Commission* - replies given by the institutions after the deadline for a confirmatory answer are valid as negative effects for the appellant can be taken into account by a damage claim; an 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, but the institution may decide, independently, that one or more of the exceptions provided for in Article 4(1) to (3) of Regulation No 1049/2001 applies to the documents covered by an application for access.

T-121/05, *Borax Europe Ltd v. Commission* - a refusal of a request for access can not be based on assurances promised to experts and only limitations provided in the Regulation can apply; 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 (analogy with the Turco case).

T-166/05, *Borax v. Commission* - Exception regarding to the decision-making process: neither the purely internal purpose of a document nor its use as a document preparatory to the institution's final decision are therefore, by themselves, grounds for refusing access to the documents applied for; 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 or email 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 methods of communication or operation is therefore unjustified.

T-144/05, *Pablo Muñiz v. Commission*: 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.

T-403/05, *MyTravel Group v. Commission*: the CFI differentiates between two groups of documents when assessing the limitation of access for the protection of the decision-making procedure: legislative documents and purely administrative functions; 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; differentiation between specific interest and general interest of the public when assessing an overriding public interest; it seems that it wants to protect the internal legal advice in concentration proceedings.

T-380/04, *Terezakis v. Commission*: Institutions do not need consult a third party if it is clearly apparent that the document should or should not be disclosed. In all other cases the third party must be consulted; the regulation does not provide any formal or procedural requirement for audits