



Committee on Legal Affairs
The Chairman

réf. D(2011)10820

Erminia Mazzoni,
Chair, Committee on Petitions
ASP 8F136, Brussels

305116 24.03.2011

Subject: Petition 163/2010 by P.B. (German) on third-party access to documents of the Court of Justice of the European Union

Dear Ms Mazzoni,

The Committee which you chair asked the Committee on Legal Affairs for an opinion on the above petition. The Committee is responsible for the organisation and statute of the Court of Justice of the European Union¹. In accordance with the usual practice, and following an exchange of views with, and a written opinion provided by, the Legal Service, the Committee has decided to send the Committee on Petitions the following opinion in the form of a letter.

After examining the issue at its meeting of 22 March 2011, the Committee on Legal Affairs, unanimously by 22 votes in favour² and no abstentions, recommends that your Committee, as the committee responsible, proceed to examine the above proposal in keeping with its suggestions.

Background

1. In petition 163/2010, the petitioner argues for an opening to interested third parties of the right of access to the case-file of documents submitted to the Court of Justice of the European Union. He argues that such a wider measure of transparency could be useful for academic research and publications, but is also necessary for the protection of fundamental rights.

2. A request for access to such documents by the applicant had been refused by the Court of Justice on 12 November 2009, noting the absence of any rule regulating the matter either in the Statute of the Court of Justice or in its Rules of Procedure, and relying on the "practice of

¹ Rules of Procedure, Annex VII, point XVI(9).

² The following Members were present: Jan Philipp Albrecht, Raffaele Baldassarre, Luigi Berlinguer, Sebastian Valentin Bodu, Françoise Castex, Marielle Gallo, Lidia Joanna Geringer de Oedenberg, Luis de Grandes Pascual, Sajjad Karim, Kurt Lechner, Klaus-Heiner Lehne, Eva Lichtenberger, Antonio Masip Hidalgo, Jiří Maštálka, Alajos Mészáros, Angelika Niebler, Bernhard Rapkay, Evelyn Regner, Dimitar Stoyanov, Alexandra Thein, Cecilia Wikström, Tadeusz Zwiefka.

the Court ... not to grant access to the non-public documents of a case to third parties". The petitioner considers this practice to be "rigid" and calls for an amendment of the Statute of the Court of Justice of the European Union³ in order to grant a right of access to the case-file to interested parties should they be able to demonstrate a legitimate interest.

3. To support his case, the petitioner refers to the general principle of openness (Article 1(2) TEU), a pending case before the Court of Justice on access to Commission documents⁴, the increasingly constitutional nature of the Court of Justice and its role in society, the legal traditions of a majority of Member States and a more limited right granted by the General Court.

4. Prior to the entry into force of the Treaty of Lisbon, Article 255 TEC provided for a right of access to European Parliament, Council and Commission documents only.

5. The fundamental right of access to documents laid down in Article 42 of the Charter of Fundamental Rights is now elaborated on in Article 15(3) TFEU, which provides that:

"Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph. (...)

The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks ..."

The right of access to documents currently applies to the Court of Justice of European Union, since it is an "institution" of the Union under Article 13(1) TEU. However, the fourth subparagraph of Article 15(3) TEU limits this right of access to the Court of Justice's exercise of its administrative tasks.

6. The case-law of the Court of Justice highlights the fact that "the limitations placed on the application of the principle of transparency in relation to judicial activities ... seek to ensure that exercise of the right of access to the documents of the institutions does not undermine the protection of court proceedings". By this, the Court means in particular "that compliance with the principles of equality of arms and the sound administration of justice must be ensured". The Court added:

"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

³ Protocol No 3 annexed to the Treaties.

⁴ The judgment in joined cases 514/07, 528/07 and 532/07 *API* was subsequently handed down on 21 September 2010.

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"⁵.

7. Although the Statute of the Court of Justice provides that the hearing in court is to be public⁶, it restricts those entitled to receive communication of procedural documents to the parties and to the institutions whose decisions are in dispute⁷. 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 defendant⁸.

8. The Treaties, and *a fortiori* any relevant legislation⁹, do not provide for a third party *right* of access to the case-file of a particular case held by the Court of Justice, nor do they prohibit such access.

Suggestions of the Committee on Legal Affairs

9. The Committee on Legal Affairs would first of all note that there is recent case-law under Regulation 1049/2001 (the "Regulation on Access to Documents") on the right of access to Council, Parliament and Commission documents submitted to the Court of Justice of the European Union as part of judicial proceedings¹⁰. However, such a piecemeal means of attempting to access the case-file presents practical difficulties such as the necessity of multiple requests to different institutions, and would in any event be an incomplete solution, since the Court's case-file could contain further documents, for example from Member States, companies or individuals.

10. The Committee notes the systems in place at national level which can lead to disclosure by the courts of elements of the case-file, subject to such conditions as the consent of the parties, the stage of the proceedings, the discretion of the court concerned and the applicant being able to demonstrate a legitimate interest. The Committee would like to highlight the potential advantages of such a measured approach to access to the case-files of the Court of Justice, which would enable a case-by-case analysis of each request. It also notes the existence of such a procedure in the internal instructions of the General Court¹¹.

⁵ *API* cases cited above, at paragraphs 84, 85 and 92.

⁶ Article 31.

⁷ Article 20, second paragraph.

⁸ See *API* case, at paragraph 98.

⁹ See in particular: Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents OJ L 145/43, 31.5.2001.

¹⁰ *API* cases cited above and Cases C-39/05 P and C-52/05 P *Turco v Council* of 1 July 2008. See also by analogy Case C-139/07 P *Technische Glaswerke Ilmenau* handed down on 29 June 2010.

¹¹ Article 5(8) of the Instructions to the Registrar of the General Court of 5 July 2007:

"No third party, private or public, may have access to the case-file or to the procedural documents without the express authorisation of the President of the General Court or, where the case is still pending, of the President of the formation of the Court that is hearing the case, after the parties have been heard. That authorisation may

11. If the Court were to decide to grant third parties access to case-files, certain provisions of primary law would have to be observed, including Article 16 TFEU and Article 8 of the Charter of Fundamental Rights which provide for the protection of personal data, Article 7 of the Charter which protects the right to private and family life and communications and Article 339 TFEU which requires the institutions to respect professional secrecy.

12. Under Article 225 TFEU, Parliament could, if it sees fit, request the Commission to submit a legislative proposal to amend the Statute of the Court of Justice (Article 281 second subparagraph TFEU). It appears from its reply to the Petitions Committee that the Commission would rather let the Court of Justice take the legislative initiative under Article 281 TFEU to propose an amendment to its own Statute. From the above analysis, it is clear that the Court is under no legal obligation to take such an initiative, but that this is instead a question of political opportunity. Another course of action would be for the Court of Justice to apply a third party access procedure by way of internal instructions, as is currently the case before the General Court, it being clear however that such an approach would not establish binding statutory rules.

Yours sincerely,

A handwritten signature in black ink, consisting of a large, sweeping initial 'K' followed by a series of connected loops and a final horizontal stroke.

Klaus-Heiner Lehne

Annex: opinion of the Legal Service