

## Case T-237/02

**Technische Glaswerke Ilmenau GmbH**

**v**

**Commission of the European Communities**

(Access to documents — Regulation (EC) No 1049/2001 — Procedure for controlling State aid — Exception relating to the protection of the purpose of inspections, investigations and audits — Implied refusal — Obligation to carry out a concrete, individual examination — Intervention — Intervener's claims, pleas and arguments)

Judgment of the Court of First Instance (Fifth Chamber), 14 December 2006 II - 5134

### Summary of the Judgment

1. *Procedure — Intervention — Arguments different from those of the party supported*  
(Statute of the Court of Justice, Art. 40, fourth para., Rules of Procedure of the Court of First Instance, Art. 116(3))
2. *European Communities — Institutions — Right of public access to documents — Regulation No 1049/2001*  
(European Parliament and Council Regulation No 1049/2001, Art. 4)

1. Although the fourth paragraph of Article 40 of the Statute of the Court of Justice, which applies to the Court of First Instance by virtue of Article 53 of that Statute, and Article 116(3) of the Rules of Procedure of the Court of First Instance do not preclude an intervener from using arguments different from those used by the party it is supporting, that is nevertheless on the condition that they do not alter the framework of the dispute and that the intervention is still intended to support the form of order sought by that party.

(see para. 40)

2. The mere fact that a document referred to in an application for access under Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents 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, firstly, whether 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 that regulation, whether there was no overriding public interest in disclosure. In addition, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. Consequently, the

examination which the institution must, in principle, 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. Furthermore, it follows from that regulation that all the exceptions in paragraphs 1 to 3 of Article 4 thereof are stated as having to apply 'to a document'. That concrete examination must, therefore, be carried out in respect of each document covered by the application.

Moreover, only a concrete, individual examination, as opposed to an abstract, overall examination, can enable the institution to assess the possibility of granting the applicant partial access under Article 4(6) of that regulation and, as regards the application on a temporal basis of the exceptions to the right of access, Article 4(7) of that regulation provides that the exceptions as laid down by 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'.

The obligation for an institution to undertake a concrete, individual assessment of the content of the documents covered in the application for access is thus an approach to be adopted as a matter of principle, which applies to all the exceptions in paragraphs 1 to 3 of

Article 4 of that regulation, whatever may be the field to which the documents sought relate, and which concerns, in particular, that of cartels or the control of public subsidies. However, such an examination may 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. Only in exceptional cases and only where the administrative burden entailed by a concrete, individual examination of the documents proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required, may a derogation from the obligation to examine the documents be permissible.

(see paras 77-79, 85, 86, 94)