

Joined Cases T-109/05 and T-444/05

Navigazione Libera del Golfo Srl (NLG)

v

European Commission

(Access to documents — Regulation (EC) No 1049/2001 — Documents concerning elements of costs arising from public service obligations in State aid matters — Refusal of access — Exception relating to the protection of commercial interests of a third party — Professional secrecy — Duty to state reasons — Equal treatment — Documents emanating from a Member State)

Judgment of the General Court (Fourth Chamber), 24 May 2011 II - 2487

Summary of the Judgment

1. *Actions for annulment — Interest in bringing proceedings — Applicant challenging a decision refusing access to documents of an institution*
(Art. 230 EC)
2. *European Union — Institutions — Right of public access to documents — Regulation No 1049/2001 — Exceptions to the right of access to documents — Duty to state reasons — Scope*
(Art. 253 EC; European Parliament and Council Regulation No 1049/2001)

3. *Actions for annulment — Actionable measures — Concept — Measures producing binding legal effects — Preparatory measures — Not included*
(Art. 230 EC; European Parliament and Council Regulation No 1049/2001)

4. *European Union — Institutions — Right of public access to documents — Regulation No 1049/2001 — Exceptions to the right of access to documents — Strict interpretation and application*
(European Parliament and Council Regulation No 1049/2001, Art. 4(2) and (3))

5. *European Union — Institutions — Right of public access to documents — Regulation No 1049/2001 — Exceptions to the right of access to documents — Protection of the commercial interests of a third party — Whether decisions may be based on general presumptions applying to certain categories of documents*
(Art. 255 EC; European Parliament and Council Regulation No 1049/2001, Art. 4(2), first indent; Council Regulation No 659/1999)

6. *European Union — Institutions — Right of public access to documents — Regulation No 1049/2001 — Exceptions to the right of access to documents — Protection of the commercial interests of a third party — Concept of business confidentiality*
(Art. 287 EC; European Parliament and Council Regulation No 1049/2001, Art. 4(2), first indent)

7. *European Union — Institutions — Right of public access to documents — Regulation No 1049/2001 — Exceptions to the right of access to documents — Overriding public interest justifying the disclosure of documents*
(European Parliament and Council Regulation No 1049/2001, Art. 4(2) and (3))

8. *European Union — Institutions — Right of public access to documents — Regulation No 1049/2001 — Exceptions to the right of access to documents — Documents emanating from a Member State*
(European Parliament and Council Regulation No 1049/2001, Art. 4(5))

9. *European Union — Institutions — Right of public access to documents — Regulation No 1049/2001 — Exceptions to the right of access to documents — Documents emanating*

from a Member State — Power of the Member State to request the institution not to disclose documents

(Art. 10 EC; European Parliament and Council Regulation No 1049/2001, Arts 4(1) to (3) and 5, 7 and 8)

10. *Acts of the institutions — Statement of reasons — Obligation — Scope — Correction of an error of reasoning during the proceedings before the Court — Not permissible*

(Art. 253 EC)

1. Any person may request access to any Commission document and is not required to give a reason for the request. It follows that a person who is refused access to a document or to part of a document has, by virtue of that very fact, established an interest in the annulment of the decision refusing access. The fact that the decision which motivated the request for access to documents has been annulled does not prevent the person concerned from retaining a legal interest in bringing proceedings against a decision refusing access to documents, where the documents requested have not been disclosed and that decision is still in force.

(see paras 62-63)

2. 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, regarding public access to European Parliament, Council and Commission documents. 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 essential purpose.

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. Accordingly the statement of reasons for refusing access to documents must contain, for each category of documents concerned at least,

the specific reasons why the institution in question considered that disclosure of the documents requested falls within the scope of one of the exceptions laid down by Regulation No 1049/2001.

Consequently, only the measure adopted by the Secretary-General of the Commission, which is a decision and which entirely replaces the previous statement of position, is capable of producing legal effects such as to affect the interests of the applicant and, in consequence, capable of being the subject of an action for annulment. Accordingly, the response to the initial request does not produce legal effects and cannot be held to constitute an actionable measure.

It is thus not necessary for the statement of reasons to specify all the relevant matters of fact and law, in so far as the question whether the statement of reasons for a decision meets the requirements of Article 253 EC must be determined not only by reference to its wording, but also to its context and all the legal rules governing the subject in question.

(see paras 101-102)

(see paras 82-84, 88)

4. The exceptions to document access fall to 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.

3. In the context of the procedure for public access to Commission documents, it is clear from Article 8 of Regulation No 1049/2001 that the response to the initial request is only an initial statement of position, conferring on the applicant the right to request the Secretary-General of the Commission to reconsider the position in question.

The examination required for the processing of a request 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. In principle, such an application can be justified only if the institution has previously determined, first, that 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, regarding public access to European Parliament, Council and Commission documents, that there is no overriding public interest justifying disclosure of the document concerned. The risk of undermining a protected interest must be reasonably foreseeable and not purely hypothetical.

The public's right of access to the institutions' documents covers only documents and not information in the wider sense 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 paras 123-125, 129)

may arise from Regulation No 659/1999, laying down detailed rules for the application of Article [88 EC] and from the case-law concerning the right to consult documents on the Commission's administrative file.

However, for the purposes of interpreting the exception under the first indent of Article 4(2) of Regulation No 1049/2001, even if the documents in question form part of the Commission's administrative file in reviewing a State aid, it cannot be presumed that disclosure of all the matters contained in that file would undermine the protection of the commercial interests of the person in question. Such a general presumption would be counter to the Communication on professional secrecy in State aid decisions, paragraph 17 of which states that information regarding the organisation and costs of public services will not normally be considered other confidential information.

5. In making a specific and individual assessment of the content of the documents concerned by a request for access, it is, in principle, open to the institution concerned 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. As regards procedures for reviewing State aid, such general presumptions

(see paras 131-132, 135-136)

6. When assessing a request for access to documents, the Commission is required, under Article 287 EC, not to disclose to

interested parties information of the kind covered by the obligation of professional secrecy, in particular information relating to the internal operations of an undertaking in receipt of State aid.

could result in economic benefits for other undertakings.

(see paras 140, 143-144)

Business secrets are information of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information may seriously harm the latter's interests. However, the interests liable to be harmed by disclosure must, objectively, be worthy of protection. Accordingly, the assessment as to the confidentiality of an item of information requires that the individual legitimate interests opposing disclosure of the information, on the one hand, be weighed against the public interest in ensuring that the activities of the institutions take place as openly as possible, on the other.

7. Regulation No 1049/2001, regarding public access to European Parliament, Council and Commission documents, provides that the exceptions laid down by Article 4(2) and (3) of the regulation do not apply if the disclosure of the documents is justified by an overriding public interest. In that respect, it is for the institution 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 that 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.

Information on the organisation and costs of public services is not normally regarded as confidential information, as is apparent from paragraph 17 of the Communication on professional secrecy in State aid decisions. However, such information may constitute a business secret if it relates to a business which has actual or potential economic value and the disclosure or use of the information

The particular interest that may be claimed by a person requesting access to a document concerning him personally cannot, however, be taken into account as an overriding public interest within

the meaning of Article 4(2) of Regulation No 1049/2001.

(see paras 147-148)

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.

8. 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, 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.

(see paras 188, 191-192)

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 an institution, simply because it originates from that Member State, is not compatible with the objectives of Regulation No 1049/2001.

9. Since the implementation of Article 4(5) of Regulation No 1049/2001 is 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.

A Member State which, following the dialogue with a Community institution concerning the possible application of the exceptions under Article 4(1) to (3) of Regulation No 1049/2001, objects to disclosure of the document in question is obliged to state reasons for that objection with reference to those exceptions. The institution concerned 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 to that effect by the institution concerned to the Member State, the Member 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.

The duty to state reasons which, as is apparent in particular from Articles 7 and 8 of that regulation, is incumbent on the institution, requires that the latter not only place on record in its decision 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.

(see paras 193, 195-196)

10. The reasons for a decision must appear in the actual body of the decision and, save in exceptional circumstances, explanations given *ex post facto* cannot be taken into account. It follows that the decision must be self-sufficient and that the reasons on which it is based may not be stated in written or oral explanations given subsequently when the decision in question is already the subject of proceedings brought before the Union judicature.

(see para. 199)