

it is addressed by bringing about a distinct change in his legal position. Such is the case with regard to an information injunction, since failure to comply with it entails sanctions, as can be seen from the fact that Member States are precluded from relying on the proposition that the factual basis of the case is incomplete and the Commission is permitted to take a decision on the basis of the documents in the file. Moreover, it entails a lowering of the standard of proof by reference to which the Commission can assume that the facts asserted by it have been proved. This represents a procedural advantage for the Commission and an associated worsening of the relevant Member State's position in the main investigation procedure. As a result of the information injunction, the appellant was faced with the choice of not complying with its obligations — while being precluded from invoking the proposition that the factual basis of the case is incomplete and the Commission's standard of proof is lowered — or being *de facto* compelled to supply a disproportionate amount of information in order to protect its rights of defence. The latter, in addition to the legal disadvantage suffered, invariably entails an extraordinary amount of time and expense for which no compensation is provided. Beyond the scope of the main proceedings also, the information injunction can produce legal effects with regard to the Member State concerned, in so far as non-compliance could lead to infringement proceedings under Article 258 TFEU and, in extreme cases, to penalty payment proceedings under Article 260 TFEU.

Fourth, the General Court's decision is contrary to the rule of law and the requirement of legal certainty in that it deems the only protection against an excessive information injunction to be non-compliance. Such an approach is unreasonable and infringes the principles referred to above. Legal protection against unlawful information injunctions cannot be dependent on a Member State's non-compliance with such an injunction. The possibility of challenging an information injunction represents the only means of preventing the Member State's duty of loyalty from being exposed to the Commission's unfettered discretion and, in turn, allows the Commission to comply with its duty of sincere cooperation with the Member States.

Finally, the General Court erred in its assessment of responsibilities in State aid cases in so far as it determined that protection against excessive information injunctions is afforded by Member States' refusal to supply information which, in their view, is not required for the purposes of ascertaining the facts. That entails the transfer to the Member States of the duty to ascertain the facts and to determine the subject-matter of the procedure, a transfer which is alien to the division of responsibilities under State aid law. The transfer of responsibilities indicated by the General Court is incompatible with the division of competences provided for in Articles 107 TFEU and 108 TFEU, exposes the Member States to the risk of an error of assessment and absolves the Commission to the extent indicated above from the duty to undertake a careful examination of the facts in administrative proceedings.

**Reference for a preliminary ruling from the Unabhängiger Verwaltungssenat des Landes Vorarlberg (Austria) lodged on 1 October 2010 — 'projektart' Errichtungsges mbH, Eva Maria Pepic and Herbert Hilbe v Grundverkehrs-Landeskommission Vorarlberg**

(Case C-476/10)

(2010/C 328/38)

*Language of the case: German*

**Referring court**

Unabhängiger Verwaltungssenat des Landes Vorarlberg

**Parties to the main proceedings**

*Applicants:* 'projektart' Errichtungsges mbH, Eva Pepic and Herbert Hilbe

*Defendant:* Grundverkehrs-Landeskommission Vorarlberg

**Questions referred**

1. Is Article 6(4) of Directive 88/361/EEC <sup>(1)</sup> of 24 June 1988 for the implementation of Article 67 of the Treaty, according to which existing national legislation regulating purchases of secondary residences may be upheld, still applicable to the purchase of secondary residences situated in a Member State of the EU by a national of the Principality of Liechtenstein, which forms part of the EEA?
2. Does national legislation which, on the basis of Article 6(4) of Council Directive 88/361/EEC of 24 June 1988, prohibits a national of the Principality of Liechtenstein from purchasing a secondary residence situated in a Member State of the EU conflict with the provisions of the EEA Agreement concerning the free movement of capital, so that a national authority must disregard such national legislation?

<sup>(1)</sup> OJ 1988 L 178, p. 5.

**Appeal brought on 27 September 2010 by European Commission against the judgment of the General Court (First Chamber) delivered on 7 July 2010 in Case T-111/07: Agrofert Holding a.s. v European Commission**

(Case C-477/10 P)

(2010/C 328/39)

*Language of the case: English*

**Parties**

*Appellant:* European Commission (represented by: B. Smulders, P. Costa de Oliveira, V. Bottka, Agents)

*Other parties to the proceedings:* Agrofert Holding a.s., Kingdom of Sweden, Republic of Finland, Kingdom of Denmark, Polski Koncern Naftowy Orlen SA

### Form of order sought

The appellant claims that the Court should:

- quash the judgment of the General Court (First Chamber) of 7 July 2010 in Case T-111/07 Agrofert Holding a.s. v. Commission;
- to give final judgment in the matters that are the subject of this Appeal; and
- to order the Applicant in Case T-111/07 to pay the costs of the Commission arising from that case and from the present appeal.

### Pleas in law and main arguments

The present Appeal concerns the interpretation of the exceptions to the right to access to documents relating to (i) the protection of the purpose of inspections, investigations and audits (hereafter 'the investigations exception'), (ii) the protection of the commercial interests of a natural or legal person (hereafter, the 'commercial interests' exception), (iii) the protection of the decision-making process of the Commission (hereafter, the 'decision-making process' exception) and, (iv) the protection of legal advice (hereafter, the 'legal advice' exception). These are laid down, respectively, in Article 4 (2), third indent, in Article 4 (2), first indent, in Article 4 (3), second subparagraph and in Article 4 (2), second indent of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents <sup>(1)</sup> (hereafter 'Regulation 1049/2001').

More precisely, this Appeal covers the application of these exceptions to the documents in a Commission file concerning a merger control procedure in accordance with Council Regulation (EC) No 139/2004 <sup>(2)</sup> (hereafter the 'Merger Regulation').

The Commission considers that in the judgement under appeal the General Court made errors of law in its interpretation of the aforesaid exceptions by failing to take into account the specific features of competition law procedures and guarantees offered by the Merger Regulation to the undertakings participating in the merger proceedings. In particular, the General Court in its judgment did not seek to establish a genuine and harmonious balance between the two applicable legal regimes in this case. Instead it interpreted erroneously the rules on access to documents and, in so doing, it rendered the merger rules inapplicable.

The first question submitted for consideration to the Court is the scope of the professional secrecy obligation, as set out in the Merger Regulation and in Article 339 TFEU, for the purposes of interpreting the exceptions to the right of access, in particular the 'investigations' and the 'commercial interests' exception.

The second question submitted to the Court is the conclusion of the General Court according to which there were no particular circumstances in this case leading to the refusal of access to documents, without it being necessary for the Commission to examine, in a concrete and individual manner, each document requested and to provide a detailed reasoning of the refusal relating to the content of each document requested.

The third question is the restrictive interpretation of the 'investigations' exception, according to which this exception cannot apply after the adoption of the Commission decision terminating the administrative merger control procedure.

The fourth question submitted to the Court concerns the extent of the obligation to state reasons for the purposes of the demonstrating the risk of disclosure in particular for the protection of 'commercial interests', the 'decision-making process' and 'legal advice'.

Finally, the fifth question to the Court concerns the interpretation of the rules relating to partial access. It is the Commission's position that in order for it to effectively conduct its enquiries relating to mergers, it must comply with the obligations imposed on it by the Merger Regulation, in particular those related to professional secrecy, irrespective of the fact that its decision has become definitive. Furthermore, when the procedural rules governing a particular field of activity, as interpreted by the case-law, afford protection to certain documents, such as the internal documents of the Commission, it must be recognised that such documents benefit from a general presumption of non accessibility under Regulation 1049/2001. The judgment of the General Court has cast doubts on the scope of the Commission's ability to conduct its enquiries in this matter as well as on the rights of the parties having submitted documents to it and this Appeal is designed to permit the Court to clarify the correct approach.

The Commission therefore submits this Appeal in order to permit the Court to rule on the fundamental issues raised by the General Court's judgment and to lay down a coherent and harmonious interpretation of the two legal instruments concerned.

<sup>(1)</sup> OJ L 145, p. 43.

<sup>(2)</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings OJ L 24, p. 1.