

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 8 September 2009¹

I – Introduction

1. The issue in the present case is whether the Commission's file on a State aid investigation is confidential in the course of the procedure.

2. Access to such a file has been discussed in the past solely in the context of the right of access to a file under the law of the procedure. Only the parties to the procedure have a right of access to the file. In procedures for reviewing State aid under Article 88 EC and Regulation (EC) No 659/1999,² that status is afforded exclusively to the Member State concerned.

3. Whilst other interested parties might have a right to lodge a complaint against an aid decision if they are directly and individually concerned, they do not thereby become parties to the State aid procedure, and the Commission can therefore deny them access to the file.

4. Regulation (EC) No 1049/2001³ nevertheless affords *everyone* a right of access to all documents that are in the possession of the Commission. Technische Glaswerke Ilmenau GmbH ('TGI') is relying on that right. It is demanding access to the documents before the Commission in relation to the State aids concerning it.

5. The Commission contends that as TGI does not have a right of access to the file there is also an exception to the right of access to documents. It is relying in this respect on protection of the purpose of investigations under the third indent of Article 4(2) of Regulation No 1049/2001.

6. The Commission's attitude is based, at least in part, on the considerable practical difficulties associated with the grant of access to documents in procedural files. These files are often very long and contain much information that might have to be treated in confidence for reasons other than protection of

¹ — Original language: German.

² — Council regulation of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [88 EC] (OJ 1999 L 83, p. 1).

³ — Regulation of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

the purpose of an investigation (for example, trade secrets or internal documents). It could therefore take a great deal of time to individually check through every single document, especially where a considerable burden has already been placed on the competent services in the investigation of State aid. Similar problems are encountered in other investigation procedures under competition law.

9. Article 255(1) and (2) EC provide:

‘1. 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 European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

II – Legal framework

7. The legal framework of this case consists of the second paragraph of Article 1 EU and Article 255 EC, together with Regulation No 1049/2001.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.’

8. The second paragraph of Article 1 EU states:

10. Article 42 of the Charter of Fundamental Rights of the European Union⁴ proclaimed in Nice on 7 December 2000 (‘Charter of Fundamental Rights’) also acknowledges this right:

‘This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.’

‘Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.’

⁴ — OJ 2000 C 364, p. 1. With amendments inserted by the Proclamation of 12 December 2007, OJ 2007 C 303, p. 1.

11. The Council adopted Regulation No 1049/2001 based on Article 255(2) EC. Recitals 2, 4, 10 and 11 in the preamble to the regulation read as follows:

‘(2) Openness 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. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

...

(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.

...

(10) In order to bring about greater openness in the work of the institutions,

access to documents should be granted by the European Parliament, the Council and the Commission not only to documents drawn up by the institutions, but also to documents received by them. In this context, it is recalled that Declaration No 35 attached to the Final Act of the Treaty of Amsterdam provides that a Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement.

(11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. ...’

12. According to Article 1(a) of Regulation No 1049/2001 the purpose of the regulation is ‘to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission ... documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents.’

13. Article 2(1) of the regulation grants any citizen of the Union, and any natural or legal person residing or having its registered office

in a Member State, a right of access to documents of the institutions, ‘subject to the principles, conditions and limits defined in this Regulation.’

— court proceedings and legal advice,

— the purpose of inspections, investigations and audits,

14. Article 2(3) states that this regulation is to apply to all documents held by an institution, ‘that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.’

unless there is an overriding public interest in disclosure.’

17. Article 6 of the regulation governs applications made by Union citizens:

15. Article 3(a) defines ‘document’ as meaning ‘any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility’.

‘1. Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 314 of the EC Treaty and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.

16. Article 4 of the regulation (‘Exceptions’) provides:

2. If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.

‘(2) The institutions shall refuse access to a document where disclosure would undermine the protection of:

3. In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.

— commercial interests of a natural or legal person, including intellectual property,

4. The institutions shall provide information and assistance to citizens on how and where applications for access to documents can be made.'

III – Facts and procedure

18. Regulation No 659/1999 governs the investigation procedure for State aid. Article 20 governs the rights of interested parties:

A – Background

'1. Any interested party may submit comments pursuant to Article 6 following a Commission decision to initiate the formal investigation procedure. Any interested party which has submitted such comments and any beneficiary of individual aid shall be sent a copy of the decision taken by the Commission pursuant to Article 7.

1. Aid procedure C 19/2000

2. Any interested party may inform the Commission of any alleged unlawful aid and any alleged misuse of aid. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for taking a view on the case, it shall inform the interested party thereof. Where the Commission takes a decision on a case concerning the subject-matter of the information supplied, it shall send a copy of that decision to the interested party.

19. TGI is a German company with its registered office in Ilmenau in the *Land* of Thuringia. It is a manufacturer of special glass. In 1997, the Bundesanstalt für vereinigungsbedingte Sonderaufgaben, the *Land* of Thuringia and a private investor adopted a concerted action plan for the financial support of TGI.

20. Germany notified the Commission of the measures under the concerted action plan in a letter of 1 December 1998. By letter dated 4 April 2000, the Commission initiated a formal investigation procedure under Article 88(2) EC, the procedure being given reference C 19/2000.⁵

3. At its request, any interested party shall obtain a copy of any decision pursuant to Articles 4 and 7, Article 10(3) and Article 11.'

5 — Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, concerning aid measure C 19/2000 (ex NN 147/98) – Aid in favour of Technische Glaswerke Ilmenau GmbH, Germany (OJ 2000 C 217, p. 10).

21. Schott Glas, a competitor of TGI, was a particularly interested party to the aid procedure, having submitted written comments.

22. On 12 June 2001, the Commission adopted Decision 2002/185/EC⁶ in this procedure. It ruled that a price reduction of DEM 4 million in the investor's favour was incompatible with the common market. Three other measures under the concerted action plan were separated from that aid procedure and reserved to a second formal investigation procedure. The Court of First Instance dismissed the action brought by TGI against that decision in a judgment of 8 July 2004.⁷ The appeal lodged by TGI against that judgment was unsuccessful.⁸

covering the measures separated from aid procedure C 19/2000.⁹

24. The Commission concluded that procedure on 2 October 2002 with Decision 2003/383/EC, in which it declared two of the concerted action plan measures investigated to be incompatible with the common market.¹⁰ TGI also challenged that decision but those proceedings were brought to an end following the dismissal of the appeal in the procedure relating to the first decision.¹¹

B – The present proceedings regarding access to the file

2. Aid procedure C 44/2001

23. By letter dated 3 July 2001, the Commission initiated a second formal investigation procedure under Article 88(2) EC, the procedure being given reference C 44/2001 and

1. Administrative procedure

25. On 24 October 2001, in the course of its observations on the second formal investigation procedure C 44/2001, TGI requested the

6 — Commission decision of 12 June 2001 on State aid implemented by Germany for Technische Glaswerke Ilmenau GmbH, Germany, notified under document number C(2001) 1549 (OJ 2002 L 62, p. 30).

7 — Case T-198/01 *Technische Glaswerke Ilmenau v Commission* [2004] ECR II-2717.

8 — Judgment of 11 January 2007 in Case C-404/04P *Technische Glaswerke Ilmenau v Commission*.

9 — Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, concerning aid measure C 44/2001 (ex NN 147/98) – Aid in favour of Technische Glaswerke Ilmenau GmbH, Germany (OJ 2001 C 272, p. 2).

10 — Commission Decision 2003/383/EC of 2 October 2002 on State aid measure C 44/01 (ex NN 147/98) implemented by Germany for Technische Glaswerke Ilmenau GmbH, notified under document number C(2002) 2147 (OJ 2003 L 140, p. 30).

11 — Order of the Court of First Instance of 16 May 2007 in Case T-378/02 *Technische Glaswerke Ilmenau v Commission*, notified in OJ 2007 C 183, p. 41.

Commission to give it access to a non-confidential version of the file. The Commission rejected that request on 23 November 2001.

the various parties to express themselves freely. That is why the disclosure of that document could undermine the conduct of the examination of that complaint by compromising that dialogue.

26. By letter of 1 March 2002, TGI applied to the Commission for access to documents 'in all the aid cases concerning [it] and in particular in aid case C 44/2001'.¹² It based its application on Regulation No 1049/2001. The Commission rejected that application on 27 March 2002 by reference to the third indent of Article 4(2) of Regulation No 1049/2001. It said that the documents requested by TGI formed 'part of the current formal investigation procedure C 44/2001'.

...

In addition, we have examined the possibility of making accessible the parts of the requested documents which are not covered by those exceptions. It is, however, clear that those documents [could] not be divided into confidential and non-confidential parts.

27. On 15 April 2002, TGI sent a confirmatory application to the Secretary-General of the Commission pursuant to Article 7(2) of the regulation. The Secretary-General of the Commission refused that application in the decision at issue dated 28 May 2002. The refusal was also based on the third indent of Article 4(2) of the regulation, as quoted in paragraph 12 of the judgment at issue:

Furthermore, there is no overriding public interest which would, in this case, justify the disclosure of the documents in question ...'

'... In the context of the current investigations into the compatibility of State aid with the single market, cooperation in good faith and mutual confidence between the Commission, the Member State and the undertakings concerned are indispensable in order to enable

2. Procedure before the Court of First Instance

28. TGI lodged an application with the Court of First Instance against that decision on 8 August 2002. It was supported by the Kingdom of Sweden and the Republic of Finland. The Commission contended that the action should be dismissed. It was supported by Schott Glas.

¹² — TGI also requested access to all documents concerning the State aid for its competitor Schott Glas. That application does not form part of the appeal however. There is therefore no need to go any further into whether Schott's interests in those documents merit protection.

29. By judgment of 14 December 2006, the Court of First Instance annulled the Commission decision of 28 May 2002 in so far as it refused access to the documents relating to the investigation procedures in respect of aid granted to TGI.¹³

— order the Commission to pay the costs, including the costs of the respondent in the appeal.

3. Appeal procedure

30. By a notice of appeal lodged at the Court Registry by e-mail on 28 February 2007, the original of which was received by post on 8 March 2007, the Commission claims that the Court should:

— set aside the judgment at issue which annuls the decision of the Commission of 28 May 2002 in so far as it refuses access to documents relating to the investigation procedures in respect of aid granted to TGI, and

— order TGI to pay the costs.

32. The Kingdom of Sweden is also applying for the action to be dismissed but is not asking for costs.

33. By order of the President of the Court of Justice of 4 March 2008, the Kingdom of Denmark was given leave to intervene in support of the forms of order sought by TGI.

34. The action was the subject of a written procedure before the Court, followed by a hearing on 16 June 2009.

31. TGI and the Republic of Finland contend that the Court should:

— dismiss the appeal, and

IV – Legal analysis

35. Under Article 2(1) of Regulation No 1049/2001, anybody may require the Commission, Council or Parliament to provide access to documents in their possession without having to prove an interest. Access may not be denied unless one of the exceptions under Article 4(1) to (3) applies.

¹³ — Judgment in Case T-237/02 *Technische Glaswerke Ilmenau v Commission* [2006] ECR II-5131 ('the judgment at issue').

36. The exception of relevance to the present case is that stated in the third indent of Article 4(2) of Regulation No 1049/2001. The Commission did not hand over the documents requested because their disclosure would undermine the protection of the purpose of the investigation of a State aid. The Court of First Instance annulled that decision because the Commission had not examined whether the exception actually applied to each individual document.

37. The Commission is challenging the judgment at issue based on a total of five grounds of appeal, which can be summarised as follows:

- The criterion set out in paragraph 77 of the judgment at issue with regard to the application of an exception, that is to say the undermining of a protected interest, is vitiated by an error of law (fourth ground of appeal).
- The interpretation in paragraphs 78 and 85 of the judgment at issue, according to which the exceptions stated in Article 4(1) to (3) refer to a single document and not to a category of documents, is vitiated by an error of law (third ground of appeal).
- The interpretation in paragraphs 85 to 89 and 93 of the judgment at issue is vitiated by an error of law as all the documents in a current State aid procedure are manifestly covered in their entirety

by the grounds for an exception in the third indent of Article 4(2) of Regulation No 1049/2001 (first and second grounds of appeal and first part of the fifth ground of appeal).

- The Court of First Instance failed to provide the protection for internal documents afforded under Article 4(3) of the regulation (second part of the fifth ground of appeal).

A – Admissibility of the appeal

38. TGI is disputing the admissibility of the appeal in its entirety, arguing that the Commission is basing the appeal on a plea that the Court of First Instance has already dismissed as inadmissible.

39. According to Article 113(2) of the Rules of Procedure of the Court of Justice the subject-matter of the proceedings before the Court of First Instance may not be changed in the appeal. In an appeal, the Court's jurisdiction is thus confined to examining the assessment by the Court of First Instance of the pleas argued before it.¹⁴ In an appeal, the appellant may not therefore rely on grounds declared inadmissible by the Court of First

¹⁴ — Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraph 165.

Instance, where the finding that they are inadmissible is not itself contested.¹⁵ In other words, if the Court of First Instance has dismissed a plea in law as inadmissible, then although such dismissal can be the subject of an objection on appeal the question whether the plea dismissed could have succeeded is initially irrelevant.

40. In the opinion of TGI, the issue of law raised by the Commission does not pertain to the alleged erroneous application of Article 4(2) of Regulation No 1049/2001 by the Court of First Instance. The objective of the Commission's grounds of appeal is in fact the legal question as to whether Regulation No 659/1999 constitutes a *lex specialis* vis-à-vis Regulation No 1049/2001. A corresponding plea by the intervener, Schott Glas, was nevertheless dismissed as inadmissible by the Court of First Instance in paragraph 41 of the judgment at issue without the Commission challenging such dismissal.

41. I do not find this admissibility objection by TGI to be convincing because it wrongly confuses pleas in law with arguments. The Commission is admittedly essentially relying on the special nature of State aid review procedure. However, it is not pleading that Regulation No 659/1999 is a *lex specialis* vis-à-vis Regulation No 1049/2001. As correctly established by the Court of First Instance, to do so would unsettle its own procedural position as the decision challenged would have been based on the wrong legal grounds

and would therefore be unlawful. The Commission in fact takes the view that the rules in Regulation No 659/1999 have to be taken into account when interpreting the third indent of Article 4(2) of Regulation No 1049/2001. It says that the Court of First Instance did not do so to a sufficient extent. However, the Commission is not thereby directly raising the legal question of the relationship between the two pieces of secondary legislation.

42. The second part of the fifth ground of appeal does indeed exceed the subject-matter of the proceedings. In that plea, the Commission is arguing that the Court of First Instance failed to provide the protection for internal documents afforded under Article 4(3) of Regulation No 1049/2001. The Commission did not base the decision at issue on that provision, however. The issue was always, in fact, whether the Commission was entitled to deny access to the documents under the third indent of Article 4(2). That plea did not form part of the subject-matter of the proceedings and is therefore inadmissible.

B – Substance of the appeal

43. The admissible grounds of appeal essentially relate to two areas. The Commission objects, first, to the fundamental methodological hypotheses expressed by the Court of First Instance. The Commission contends that an exception under Article 4(2) of

¹⁵ — Case C-354/92 P *Eppe v Commission* [1993] ECR I-7027, paragraph 13, and Case C-202/07 P *France Télécom v Commission* [2009] ECR I-2369, paragraph 93.

Regulation No 1049/2001 does not just apply where the risk of undermining a protected interest is reasonably foreseeable and not purely hypothetical (fourth ground of appeal, see below under 1), and that each document requested does not have to be examined to establish whether it falls within an exception to the right of access (third ground of appeal, see below under 2).

44. Secondly, it takes the view that protection of the purpose of investigations, that is to say the exception under the third indent of Article 4(2) of Regulation No 1049/2001, covers in each case all documents affected as they are included in the procedural file relating to a current procedure reviewing State aid (first and second grounds of appeal and first part of the fifth ground of appeal, see below under 3).

1. Undermining of a protected interest (fourth ground of appeal)

45. In the fourth ground of appeal, the Commission takes issue with the criterion applied by the Court of First Instance concerning the undermining of an interest protected by an exception. The Court of First Instance stated

in paragraph 77, with reference to its own case-law:

‘However, the mere fact that a document 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 Regulation No 1049/2001, 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’

(a) Relationship between principle and exception as regards access to documents

46. The Commission contends that the Court of First Instance wrongly assumed that access to documents was the principle and that

refusal, being the exception, should therefore be strictly interpreted.

47. Quite apart from the fact that this assumption is, at most, inferred from the judgment at issue, it is nevertheless consistent with established case-law not only of the Court of First Instance¹⁶ but also of the Court of Justice.¹⁷ Like Sweden, Finland and TGI, I see no reason to question this. According to the second paragraph of Article 1 EU decisions are to be taken as openly as possible in the European Union. Article 255 EC thus provides for a right of access to documents, which is also acknowledged in Article 42 of

the Charter of Fundamental Rights.¹⁸ Hence, the purpose of Regulation No 1049/2001, according to its Article 1(a) and recital 4 in the preamble, is to ensure the widest possible access to documents; it states in recital 11 in the preamble that, in principle, all documents of the institutions should be accessible to the public. Exceptions to access must therefore be interpreted as strictly as possible.

48. In the light of the foregoing, it is necessary to consider whether the Court of First Instance based its assessment on the correct criterion for the application of the exception under the third indent of Article 4(2) of Regulation No 1049/2001.

(b) The necessary probability of the undermining of a protected interest

49. Since the Commission is objecting to the failure by the Court of First Instance to refer in its argument to the wording of Regulation

16 — Case T-84/03 *Turco v Council* [2004] ECR II-4061, paragraph 34; judgment of 11 March 2009 in Case T-121/05 *Borax Europe v Commission*, paragraph 35; and judgment of 11 March 2009 in Case T-166/05 *Borax Europe v Commission*, paragraph 42. See the judgments based on the legal position prior to the adoption of Regulation No 1049/2001 in Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, paragraph 56, and Case T-92/98 *Interporc v Commission* [1999] ECR II-3521, paragraph 40.

17 — Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 63; Case C-64/05 P *Sweden v Commission* [2007] ECR I-11389, paragraph 66; and Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 36. See the judgments based on the legal position prior to the adoption of Regulation No 1049/2001 in Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal v Commission* [2000] ECR I-1, paragraph 27, and Case C-41/00 P *Interporc v Commission* [2003] ECR I-2125, paragraph 48, both on Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58), and Case C-353/99 P *Council v Hautala* [2001] ECR I-9565, paragraph 25, on Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43).

18 — The case-law of the European Court of Human Rights now also indicates that freedom of expression under Article 10 of the European Convention for Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 includes a right of access to information: ECHR, Second Section, *Társaság a Szabadságjogokért v. Hungary*, judgment of 14 April 2009, no. 37374/05 (not yet published in the *Reports of Judgments and Decisions*), § 28, and *Kenedi v. Hungary*, judgment of 26 May 2009, no. 31475/05 (not yet published in the *Reports of Judgments and Decisions*), § 43, where such information is essential to the expression of an opinion. Such an interpretation of Article 10 was still denied by the European Court of Human Rights, however, in its judgments in *Leander v. Sweden* of 26 March 1987, Series A no. 116, p. 29, § 74, *Gaskin v. the United Kingdom* of 7 July 1989, Series A no. 160, p. 21, § 52, *Guerra and Others v. Italy* of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 226, § 53, and *Roche v. the United Kingdom* of 19 October 2005, no. 32555/96, ECHR 2005-X, § 172.

No 1049/2001, it is necessary, first of all, to refer to the wording of the exceptions under Article 4(1) to (3): an exception to the right of access to documents always requires the protection of a specific interest to be *undermined*. It is therefore necessary to make a prognosis. It is necessary to clarify the degree of probability of a protected interest being undermined by the disclosure of a document.

and criticised by the Commission, has nevertheless set the threshold for the application of exceptions at a lower level. In the context of protection of legal advice under the second indent of Article 4(2) of Regulation No 1049/2001, it is sufficient for the risk of that interest being undermined to be reasonably foreseeable and not purely hypothetical.²⁰

50. The mere use of the term ‘undermine’ shows that the exceptions do not apply where a protected interest is simply affected. This is clear from the differences between the wording of Article 4 of Regulation No 1049/2001 and the rules that applied before the regulation was adopted. Under those rules, the mere possibility of infringement of a protected interest was sufficient to refuse access.¹⁹ It must therefore be concluded that the legislature was aiming to apply the exceptions in a more restrictive manner than under the earlier rules.

51. It would therefore be conceivable that, in order for an exception to apply, it would be necessary for it to be certain, or at least beyond reasonable doubt, that disclosure of the document would undermine the protected interest.

53. This is a balanced compromise, which should also be applied to the protection of investigations under the third indent of Article 4(2) of Regulation No 1049/2001. Certainty or the absence of reasonable doubt in relation to the undermining of a protected interest would only seldom be capable of proof *ex ante*. In many instances, therefore, detriment would be caused. If a purely hypothetical risk to a protected interest were to suffice, on the other hand, not only would the limits of the wording of the exception be exceeded, but the objective of greatest possible access would be deprived of all meaning. The exceptions to a right of access would be maximised instead. Hypotheses of detriment can almost always be developed.

52. The Court of Justice, in accordance with the view taken by the Court of First Instance

54. The Court of First Instance therefore applied the correct criterion to its examination of the application of an exception.

¹⁹ — See Article 4 of Council Decision 93/731 and the rules on exceptions in the Code of Conduct applicable to the Commission.

²⁰ — *Sweden and Turco v Council*, cited in footnote 17, paragraph 43.

(c) The overriding public interest counter-exception

(d) Application of the right of access to administrative procedures

55. It should also be noted with regard to the exceptions under Article 4(2) and (3) of Regulation No 1049/2001 that they do not apply if there is an overriding public interest in the disclosure of the document. It is therefore also necessary to examine whether there might be such an interest, which would justify disclosure despite the undermining of a protected interest.

56. It is necessary to balance the particular interest that is to be protected by non-disclosure of the document concerned against, *inter alia*, the public interest in the document being made accessible. Account must be taken, as noted in recital 2 in the preamble to Regulation No 1049/2001, of the advantages stemming from increased openness, in that this 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.²¹

57. The Commission nevertheless takes the view that, according to recital 6 in the preamble to and Article 12(2) of Regulation No 1049/2001, that regulation is aimed, in particular, at legislative documents, that is to say documents relating to law-making. Consequently, Article 13 of Regulation No 1049/2001 does not provide for documents relating to State aid investigations to be published in the Official Journal.

58. I must agree with the Commission that it is the specific intention of Regulation No 1049/2001 to promote the accessibility of certain types of documents. These are particularly documents relating to law-making and to the development of policies or strategies. These documents are of particular interest to the general public, as is also confirmed by the second subparagraph of Article 207(3) EC in relation to the Council's legislative activities.

59. In putting forward that argument, however, the Commission ignores the fact that whilst Regulation No 1049/2001 is intended to achieve greater openness in these areas²² it also expressly provides in Article 2(3) for access to documents in *all* areas of activity of the

21 — *Sweden and Turco v Council*, cited in footnote 17, paragraph 45.

22 — *Sweden and Turco v Council*, cited in footnote 17, paragraph 46.

European Union. Files on State aid investigation procedures are not exempted from this. Exceptions can only be based on Article 4 and under that article it is necessary for the protected interests stated to be undermined.

60. Furthermore, the public interest in the reviewing of State aid is not necessarily less than the public interest in legislative procedure. There are admittedly many administrative procedures that are of very limited public interest but the reviewing of aid is often, quite rightly, of great interest. It affects the economic development of the Member States and, in particular, measures relating to the creation or safeguarding of jobs.

(e) The practical difficulties of applying the right of access

61. The Commission also complains that it is scarcely possible to subject all documents in a large procedural file reviewing aid to an examination within the relatively short period given for deciding an application for access to documents. This is also made more difficult by the fact that comments are often received in different languages.

62. The Commission fears that the reviewing of aid will also suffer if the competent services are forced to spend too much time dealing with applications for access. It says that it cannot be the objective of Regulation No 1049/2001 to hinder the Commission in the performance of its real tasks. The legislature was indeed clearly envisaging much less extensive applications for access to individual documents.

63. A similar argument regarding the Commission's workload put forward by the intervenor at first instance, Schott Glas, was dismissed by the Court of First Instance as inadmissible in paragraph 96 of the judgment at issue. In the absence of any such objection by the Commission, there is no need to examine any further whether this constitutes a pertinent error of law. In any event, the Commission is not prevented from pleading its workload as an *argument* for the interpretation of Regulation No 1049/2001.

64. From the point of view of the substance of the case, however, this plea cannot be upheld. Prejudicial effects on performance of the traditional principal tasks of the competent services cannot justify an across-the-board limit on the right of access. Indeed, the second paragraph of Article 1 EU, Article 255 EC, Article 42 of the Charter of Fundamental Rights and Regulation No 1049/2001 have allocated the institutions a new additional task. They must be in a position to hand over requested documents to a citizen unless contrary to interests deserving of protection. However, there is no provision stating that

certain services of the Commission are to be exempt from this task.

to the marking of sensitive documents or sections and to the structuring of documents or files into confidential and non-confidential sections.

65. The burdens resulting from that new task must be minimised by appropriate measures. Article 6(3) of Regulation No 1049/2001 provides in this context that where applications relate to a very large number of documents the institution concerned may confer with the applicant informally, with a view to finding a fair solution.²³

66. Internally speaking, the competent services must especially reconsider the extent to which their need for confidentiality can continue in the light of Regulation No 1049/2001. It generally takes less time to hand over documents than it does to give reasons for refusal in borderline areas of exceptions or beyond. Applications may also be refused with less effort, however, if the competent services have specifically identified the reasons for the confidential handling of documents. The competent officials can be trained accordingly and the handling of documents can be optimised from the start as regards any request for access. Consideration might be given, along with electronic recording to facilitate the search for documents and their reproduction,

67. As Regulation No 1049/2001 has to be applied in the light of the principle of proportionality,²⁴ it is not beyond the bounds of possibility, in exceptional cases and in the interests of the proper performance of other more urgent administrative duties, to refrain from taking a due decision on an application for access.²⁵ Particular consideration is to be given in this case to the phase before the commencement of the formal aid review procedure. Under Article 4 of Regulation No 659/1999, a decision to initiate the procedure must be taken within two months of complete notification of the aid as otherwise the aid will be deemed to have been authorised. The acceptance of an exception nevertheless requires, alongside the collapse of an amicable agreement with the applicant, the essential ability of the Commission to duly process applications for access in the aid review sector in normal fashion – and in not particularly complex cases even during the preliminary procedure.

68. As the Court of First Instance stated in paragraph 95 of the judgment at issue, the Commission did not rely on a surfeit of work when it refused the application for access.

23 — The judgment of the Court of First Instance of 10 September 2008 in Case T-42/05 *Williams v Commission*, paragraphs 14 and 15, documents a possible solution, namely an agreement on staggered access in the case of a wide-ranging application.

24 — See *Council v Hautala*, cited in footnote 17, paragraph 27 et seq.

25 — *Council v Hautala*, cited in footnote 17, paragraph 30, and Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraph 102 et seq.

Hence, it is not necessary to pursue any further the concept of refusal on account of other urgent tasks.

falls within the exceptions to the right of public access to documents of the institutions set out in Article 4 of Regulation No 1049/2001.²⁶

69. Since no error of law can be established with regard to the criterion for the undermining of a protected interest defined in paragraph 77 of the judgment at issue, the fourth ground of appeal must be dismissed.

2. The individual examination of documents (third ground of appeal)

70. In the third ground of appeal, the Commission objects to the finding of the Court of First Instance in paragraphs 78 and 85 of the judgment at issue. It said that the exceptions stated in Article 4(1) to (3) refer to the individual document and not to a category of documents.

71. The Commission contends, however, that it is entitled to refuse access to the file in an aid review procedure without conducting an individual examination of individual documents.

72. The Court of Justice has already ruled, however, that the Community institution asked to disclose a document must assess, in each individual case, whether that document

73. The assessment of individual documents is consistent with the rules on exceptions to the right of access in Article 4 of Regulation No 1049/2001. Under Article 4(1), (2) and (3), the institutions are to refuse access to a document where the exceptions apply. The safeguarding of third-party interests under subparagraphs 4 and 5, the assessment of partial access under subparagraph 6 and the rule on the lapse of exceptions due to the passage of time in subparagraph 7 also refer to the individual document.

74. This regulatory technique is the consistent consequence of exceptions that are directly based on the undermining of certain interests by the disclosure of documents. Undermining of this nature can only be established by an individual appraisal of the information contained in the document in question.

75. The Commission cannot successfully argue against this that according to the definition in Article 3(a) of Regulation No 1049/2001 a document can contain a pluralised content. It construes this as meaning that the different information has to be collectively examined and apparently concludes from this that a pluralised content could be

²⁶ — *Sweden and Turco v Council*, cited in footnote 17, paragraph 35.

collectively assessed even if it is contained in several documents.

76. As pleaded by Finland, however, the contrary is true: if only certain content, that is to say parts of the requested document, is covered by any of the exceptions, the remaining parts of the document are to be released under Article 4(6) of Regulation No 1049/2001. In principle, therefore, all the content of a document, that is to say all information contained in it, has to be examined to determine whether disclosure undermines a protected interest.

77. The Commission also takes the view that as a request has been made for access to a file in the procedure it should also be possible to restrict an assessment to the file in the procedure as a whole without appraising individual documents. It bases this view on Article 6(1) of Regulation No 1049/2001, which regulates the form and content of ‘applications for access to a document’. As – in the language of the proceedings in the present case (German) – mention is made of ‘a document’, that term in Article 6 should be interpreted in the same way as in Article 4. It argues that where a request is made for a large number of documents the Commission is also entitled to appraise that request in global fashion, at least where the documents requested are of the same kind.

78. In most of the language versions of Article 6 of Regulation No 1049/2001, including the German and English versions, the term used is admittedly ‘document’ in the singular. However, other versions, particularly the French and Finnish versions, use the plural.

79. The different language versions of a Community text must be given a uniform interpretation and hence, in the case of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part,²⁷ and, where applicable, on the basis of the real intention of its author.²⁸

80. Whilst, in some language versions, Articles 4 and 6 of Regulation No 1049/2001 use the same terms, they pursue quite different aims. Article 6 concerns the substance of applications. The principal purpose of the provision is to ensure that the requested documents are identified and make it clear that reasons need not be stated. As is apparent from Article 6(3), an application may cover multiple documents and even a ‘very large

27 — Case 19/67 *van der Vecht* [1967] ECR 345, 354; Case 30/77 *Bouchereau* [1977] ECR 1999, paragraphs 13 and 14; Case C-56/06 *Euro Tex* [2007] ECR I-4859, paragraph 27; and Case C-426/05 *Tele2 Telecommunication* [2008] ECR I-685, paragraph 25.

28 — Case 29/69 *Stauder* [1969] ECR 419, paragraph 3; Case 55/87 *Moksel Import und Export* [1988] ECR 3845, paragraph 15; Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 47; and Case C-188/03 *Junk* [2005] ECR I-885, paragraph 33.

number of documents.' It has already been stated, however, that each individual document, and even all the content, must be the subject-matter of an assessment of an application. Hence, the purpose and scheme of the rules support the differences of interpretation of the term 'document' used in Articles 4 and 6 of Regulation No 1049/2001.

81. A general dispensation regarding the individual examination of documents (and content) would require the exceptions to be couched in different terms. The Commission has therefore proposed amending Regulation No 1049/2001 in such a way that documents forming part of the administrative file of an investigation or of proceedings concerning an act of individual scope should not be accessible to the public until the investigation has been closed or the act has become definitive. Furthermore, documents containing information gathered or obtained from natural or legal persons by an institution in the framework of such investigations should not be accessible to the public at all.²⁹ However, an exception couched in these terms is not the subject of assessment in the present case.

82. Just like the applicant, however, the Commission can couch its statements in summarised form. An application and the grant of access can both relate to multiple documents provided that they can be clearly identified. In refusing access, the Commission can at

least base its decisions 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. However, it is incumbent on the Commission to establish in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose.³⁰

83. Corresponding findings by the Court of First Instance in paragraphs 78, 85 and 86 of the judgment at issue are not vitiated by an error of law. The third ground of appeal must therefore be dismissed. It is now necessary to consider whether the Commission, in refusing the request for access, established the categories correctly.

3. Protection of the purpose of investigations

84. The first and second grounds of appeal and the first part of the fifth ground of appeal relate to the scope of the exception under the third indent of Article 4(2) of Regulation

29 — Article 2(6) of the proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (COM(2008) 229 final). The Parliament nevertheless rejected that proposed amendment on its first reading on 11 March 2009 (Parliament document P6_TA-PROV(2009)0114, see also Council document 7394/09).

30 — *Sweden and Turco v Council*, cited in footnote 17, paragraph 50.

No 1049/2001, that is to say protection of the purpose of investigations.

85. In paragraph 88 of the judgment at issue, the Court of First Instance quotes the reasons given in the Commission's decision as follows:

'In the context of current investigations into the compatibility of State aid with the single market, cooperation in good faith and mutual confidence between the Commission, the Member State and the undertakings concerned are indispensable in order to enable the different parties to express themselves freely. The disclosure of documents relating to those investigations could undermine the conduct of the examination of [the] complaint by compromising that dialogue.'

86. According to paragraph 89 of the judgment at issue that reasoning did not convince the Court of First Instance that all the documents in the file pertaining to the aid review procedure manifestly fell within the exception for investigations. The Commission considers this finding to be vitiated by an error of law.

87. The Commission is here principally relying in the judicial proceedings on the argument that in the aid review procedure parties other than the Member State concerned are

not granted a right of access to the file (see below under (a)). It is nevertheless of more relevance to pursue the considerations expressed in the statement of reasons for the Commission decision, the extent to which communication with the Member State concerned merits protection (see below under (b)) and whether that protected interest particularly permits the omission of an individual assessment of the documents required (see below under (c)). The same assessment should be undertaken with regard to communication with other interested parties (see below under (d)).

(a) The status of the aid recipient in aid review procedure

88. The Commission bases the manifest nature of the need for protection in the first part of the first ground of appeal and in the second ground of appeal on the argument that in aid review procedure parties other than the Member State concerned cannot assert a right of access to the file.

89. The Commission is here indirectly referring to the specific nature of file access under aid procedure as compared with Regulation No 1049/2001. Unlike TGI, the Commission does not construe the right of access

to a file as a technical *lex specialis*, which would preclude the application of Regulation No 1049/2001,³¹ but uses it to interpret an exception to the right of access to documents.

Regulation No 659/1999 does not therefore make provision for those interested parties to have a right of access to the file.

90. The right of access to the file is a corollary of the rights of the defence.³² It is therefore linked, in principle, to the status of a party to proceedings. The procedure for reviewing State aid is a procedure initiated in respect of the Member State responsible for granting the aid.³³

91. Persons, undertakings and associations of undertakings whose interests might be undermined by the grant of aid, such as the aid recipient, for example, are not parties to the aid procedure. They have in essence the role of an information source.³⁴ Article 20 of

92. The Commission apparently construes this as meaning that anyone other than the Member State concerned is even *prohibited* from having access to the file in the procedure. As correctly argued by Sweden, Finland and TGI, however, no such prohibition can be construed from either Regulation No 659/1999 or from case-law. On the contrary, recent judgments even make it seem possible that there is a right of access to the file in exceptional instances: although the parties concerned cannot rely on the rights of the defence for that procedure, they do, however, have the right to be associated with it in an adequate manner taking into account the circumstances of the case at issue.³⁵ However, there is no need to decide that here.

93. In any event, the status of those other parties interested in the aid procedure does not enable conclusions to be drawn as to the scope of the right of access to documents. It does not bear reference to the application of an exception under Article 4 of Regulation No 1049/2001, especially not to the exception applied here regarding protection of the purpose of investigations. It is apparent, in fact, that the reason for refusing access to the file

31 — See above, point 38 et seq. The Commission proposal regarding Regulation No 1049/2001 (COM(2000) 30 final/2) continued to provide in the second sentence of Article 2(2) that special rules on access to documents should preclude the application of the regulation. Although that rule was not incorporated in the regulation, the Court of First Instance has ruled in Case T-376/03 *Hendricks v Council* [2005] ECR-SC I-A-83 and II-379, paragraph 55 et seq., that rules on the confidential nature of the selection procedure for civil servants precluded the application of the regulation.

32 — Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 68.

33 — Case 234/84 *Belgium v Commission* [1986] ECR 2263, paragraph 29, and Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* [2002] ECR I-7869, paragraph 81.

34 — Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 45, and Case C-276/03 P *Scott v Commission* [2005] ECR I-8437, paragraph 34.

35 — Judgment of 8 May 2008 in Case C-49/05 P *Ferriere Nord v Commission*, paragraph 69, and Case C-521/06 P *Athinaiki Techniki v Commission* [2008] ECR I-5829, paragraph 38.

has nothing to do with the fact that the information in the file should not be disclosed. The decisive factor is just the procedural consideration that the other interested parties do not have any rights of defence.

of participating in that procedure, the refusal to allow access to the file cannot be separately challenged – as claimed by TGI.³⁸ As an error of procedure, however, it can call into question the validity of the aid decision as a whole.³⁹

94. Where a party affected by a procedure is given access to the file that interested party is able to examine the documents in an investigation file, which might possibly be material to its defence. This right of access to the file has been acknowledged by the Court of Justice in the case of undertakings affected by cartel proceedings.³⁶ Documents that are not made available to a party directly concerned cannot be used against it.³⁷ As the other interested parties were not parties to the aid procedure, the Commission cannot use against them any documents to which they should have been granted access.

96. In contrast to the right of access to the file, the right of access to documents under Regulation No 1049/2001 does not have any legal significance in the procedure for reviewing aid. This regulation does not state how citizens can participate in such procedure. In particular, access to documents does not, in principle, facilitate the right to submit comments in the aid procedure. A dispute as to access to documents in an aid file does not affect the validity of the decision on the aid.

95. Because the information given when granting access to a file is primarily a means

97. Nor is the independence of Regulation No 1049/2001 from the procedure for reviewing State aid called into question by recital 2 in its preamble. This states that openness ‘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

36 — Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraphs 13 and 14; Case 322/81 *Nederlandsche Banden-Industrie Michelin v Commission* [1983] ECR 3461, paragraphs 7 and 8; Case C-51/92 P *Hercules Chemicals v Commission* [1999] ECR I-4235, paragraphs 75 and 76; and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, paragraph 315 et seq. Compare, with regard to the entitlement to information on the part of EU officials, Articles 26 and 26a of the Staff Regulations and the judgment in Case T-48/05 *Franchet and Byk v Commission* [2008] ECR I-1585, paragraph 126 et seq.

37 — *Falck and Acciaierie di Bolzano v Commission*, cited in footnote 33, paragraph 81.

38 — Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 10.

39 — See the judgments on cartel law cited in footnote 36: *Hercules Chemicals v Commission*, paragraph 77, and *Limburgse Vinyl Maatschappij and Others v Commission*, paragraph 317.

accountable to the citizen in a democratic system.' This could be construed as an indication of the right of the general public to participate in proceedings. However, the right of citizens to participate in the decision-making process and the administration's accountability to them are not to be construed in the context of procedural law; they are political by nature. As a result of openness citizens are to receive information enabling them to properly assess and, if necessary, criticise the workings of the administration. They are not, however, primarily intended to be afforded influence on the outcome of individual proceedings.

99. Nor is there any discrepancy in the fact that the Commission may refuse access to the file on relatively brief grounds, whereas there can be a relatively substantial requirement to state reasons when access to documents is denied. This difference is explained by the fact that access to the file can be denied by simply referring to the absence of rights of defence, whilst the refusal of access to documents requires exceptions to be stated. However, it is almost always easier to show that a right does not exist at all than to state the reasons for exceptions to a right that exists in principle.

100. Contrary to the Commission's view, that independence of both legal rights from each other is confirmed by the judgment in *Sison v Council*. In that case, the Court of Justice concluded from the legislative history of Regulation No 1049/2001 that the scope of the right of access afforded thereunder does not depend on whether the applicant requires the information to assert his legal position.⁴¹

98. The right of access to documents is therefore an independent right distinct from the procedure for reviewing State aid. Hence, access to documents and the right of access to the file lead only to a de facto comparable situation with regard to information and not – as argued by the Commission – to the same position in law. It also follows from this that the absence of a right of access to the file on the part of other parties interested in the aid procedure does not entirely preclude the application of Regulation No 1049/2001 as a *lex specialis*, as pleaded by Schott Glas at first instance.⁴⁰

101. This means, on the one hand, that applicants with legally protected interests do not have more extensive rights of access to documents under Regulation No 1049/2001 than others. On the other hand, nor is the right held by such applicants more limited than the rights held by any other third parties. The issue of whether some applicants require a document in order to assert other rights can

40 — See above, points 40 and 41.

41 — *Sison v Council*, cited in footnote 17, paragraphs 45 to 48.

neither strengthen nor weaken their rights under Regulation No 1049/2001.⁴²

be compromised by the disclosure of procedural documents.

102. Hence, the fact that other parties interested in the aid procedure are precluded from gaining access to the file gives no grounds for an exception to the right of access to documents, so that the first part of the first ground of appeal and the second ground of appeal cannot succeed.

104. In paragraph 89 of the judgment at issue, the Court of First Instance dismissed that reason as being too general. In particular, it did not establish that all the documents refused were covered in their entirety by the exception.

(b) Confidentiality of communication with the Member State concerned

105. It is not, in fact, directly apparent that protection of the purpose of an investigation under the third indent of Article 4(2) of Regulation No 1049/2001 also extends to a relationship of confidence with the Member State concerned. As pleaded by Sweden, it is more likely that protection is afforded to investigation strategies⁴³ and sources.⁴⁴

103. As stated by the Commission in the second part of the first ground of appeal, it refused access so as not to compromise the conduct of the procedure reviewing the State aid. In that procedure, cooperation in good faith and mutual confidence between the Commission, the Member State and the undertakings concerned are indispensable in order to enable the various parties to express themselves freely. This relationship of confidence would

106. Established case-law of the Court of First Instance similarly considers that the Member States are entitled to expect the Commission to observe confidentiality as

42 — Conversely, there is reason to examine procedural law where the right of access under Regulation No 1049/2001 is more extensive than the procedural rights of parties with legally protected interests. Procedural law should, in principle, take account of those same interests and allow interested parties more information than the general public.

43 — See in this vein Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2006] ECR II-2023, paragraph 122.

44 — See Case 145/83 *Adams v Commission* [1985] ECR 3539 regarding protection of informants.

regards investigations which may lead to an infringement proceeding.⁴⁵

with the requirements of the Treaty or, if appropriate, to justify its position.⁴⁶ It should also be noted that the Commission has a wide discretion when pursuing infringements.⁴⁷

107. At first sight this approach also appears somewhat strange. Why should the Commission and the Member States be granted protection shielded from public view for 'negotiations' on compliance with Community law? Within the scope of application of Treaty infringement proceedings, the law is not, in principle, negotiable, but by its very nature mandatory.

108. Indeed, compliance with Community law usually depends upon the formulation of national measures, for example legislation transposing directives. Discussions between the Commission and the Member State on transposition or application measures could therefore be likened to a negotiating procedure. In that regard, the purpose of the pre-litigation procedure is, in particular, to enable the Member State to comply of its own accord

109. Thus construed, protection of the purpose of investigations also extends to the freedom to hold smooth discussions of a complaint alleging infringement of Community law. Such freedom is useful to enable the Member State concerned, as well as the Commission, to seek an amicable agreement without excessive public pressure. If every step in a controversial Treaty infringement procedure were to be made public, it would be difficult for the political decision-makers to relinquish a position already taken. This might possibly even bar the way to a sensible resolution of a dispute under the law. It is ultimately the objective of the procedure to find a solution of this kind; the clarification and establishment of an infringement are just the means of achieving that objective.

110. During the course of negotiations between the Commission and the Member State concerned, the disclosure of documents

45 — See, with regard to Decision 94/90, *WWF UK v Commission*, cited in footnote 16, paragraph 63, Case T-309/97 *Bavarian Lager v Commission* [1999] ECR II-3217, paragraph 46, and Case T-191/99 *Petrie and Others v Commission* [2001] ECR II-3677, paragraph 68; and, with regard to Regulation No 1049/2001, Case T-36/04 *API v Commission* [2007] ECR II-3201, paragraph 120. See, with regard to other inspection activities, Case T-20/99 *Denkavit Nederland v Commission* [2000] ECR II-3011, paragraph 43 et seq., based on Decision 94/90.

46 — Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, paragraph 60; Case C-158/94 *Commission v Italy* [1997] ECR I-5789, paragraph 56; Case C-159/94 *Commission v France* [1997] ECR I-5815, paragraph 103; and Case C-191/95 *Commission v Germany* [1998] ECR I-5449, paragraph 44.

47 — Case 247/87 *Star Fruit v Commission* [1989] ECR 291, paragraph 11.

relating to the investigation stage could therefore compromise the proper conduct of the infringement proceeding.⁴⁸

of its discretion when pursuing infringements to remain hidden from the public. The procedure should therefore be open, at least retrospectively, when the conduct of the negotiating parties can be assessed in the light of the result achieved.

111. Contrary to what has already been stated by the Court of First Instance, it is not just the confidence of the Member State that is relevant in this context. If that were to be the deciding factor, the Commission would have to basically consult it before refusing an application for access and hand over the documents if the Member State were in agreement. However, the Commission has an interest of its own in treating communication with the Member State in confidence and that interest also merits protection. Its actions are also influenced by public opinion; if its position becomes known during the course of discussions with the Member State, this can make it more difficult to critically reassess its own view or achieve an accommodation.

113. In this case, however, there is no need to state the precise limits of the protection of investigations which could lead to a Treaty infringement proceeding.⁴⁹ There is no need, in particular, to clarify the circumstances in which the compromising of the negotiating process in Treaty infringement proceedings is reasonably foreseeable and not purely hypothetical.⁵⁰ This is not a case of Treaty infringement proceedings – which is also conceivable under the law on State aid. It is concerned with the protection of investigations in the course of reviewing State aid as such.

112. It is not possible to guarantee unlimited freedom, however. Compliance with Community law by the Member States and its enforcement by the Commission are legitimate subjects of public interest. A Member State cannot expect a breach of Community law or acceptance of a particular interpretation to remain permanently confidential. Nor can the Commission require its enforcement practice and, in particular, the exercise

114. The Commission correctly pleads that the State aid review procedure is very similar to Treaty infringement proceedings. This particularly applies to the pre-litigation phase of Treaty infringement proceedings and the preparation of a decision on aid. It is obvious

48 — See *Bavarian Lager v Commission*, paragraph 46, and *API v Commission*, paragraph 121, both cited in footnote 45.

49 — This question might further arise in Joined Cases C-514/07 P *Sweden v API and Commission*, C-528/07 P *API v Commission* and C-532/07 P *Commission v API*, notified in OJ 2008 C 22, p. 36, and OJ 2008 C 51, pp. 32 and 37.

50 — Hence, the mere non-transposition of directives or failure to submit reports on time are commonly not really disputed or the subject of 'negotiations'.

that the Commission and the Member State should discuss the form that the aid is to take in order for it to be compatible with Community law. What is more, although the Commission does not have discretion as to whether it pursues unlawful aid,⁵¹ it does have wide discretion when assessing whether aid is justified.⁵² There is thus room for discussions which are sensitive to continuous public right of access.

negotiations was therefore reasonably foreseeable and not purely hypothetical.

(c) Dispensing with individual examination of documents

115. The exception of protection of the purpose of investigations only applies, however, if the risk of those negotiations being compromised is reasonably foreseeable and not purely hypothetical.⁵³

116. This is not a problem in the present case: the formal investigation of an aid presupposes a conflict between the Commission and the Member State concerned. The Member State would like to pay out the aid, whereas the Commission considers that 'doubts are raised' (Article 4(4) of Regulation No 659/1999). Furthermore, TGI also knew that Germany and the Commission were negotiating on the aids. The risk to those

117. It is also necessary to consider whether the Commission was entitled, without conducting an individual examination, to proceed on the basis that disclosure of all the documents requested would trigger such a risk. It is admittedly the case, in principle, that each individual document has to be examined to determine whether there are grounds for refusal of access.⁵⁴ The Commission may, however, at least base its decisions 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.⁵⁵

118. First, as far as correspondence with the Member State is concerned, it must be assumed that in a controversial aid procedure this does, in principle, merit protection in its entirety. It would generally be difficult to distinguish between procedure-related documents and other documents. Even

51 — See *Commission v Sytraval and Brink's France*, cited in footnote 34, paragraph 47, and *Athinaiki Techniki v Commission*, cited in footnote 35, paragraph 40.

52 — Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 36 et seq. and the case-law cited.

53 — See above, point 52 et seq.

54 — See above, point 72 et seq.

55 — See above, point 82.

information that is general knowledge, such as information on markets, prices or technologies, for example, could be deserving of protection if it were to be disclosed during the course of negotiations. The fact that it is produced permits speculation about the negotiations. Such speculation, whether or not it is true, might prejudice the negotiations.

119. Secondly, for the same reasons, the Commission's internal documents identified in paragraph 83 of the judgment at issue (correspondence between various services of the Commission, memoranda for the responsible Member of the Commission and internal notes of the Directorate-General for Competition) are, in principle, covered by protection of the purpose of an investigation. They will in fact contain information on the negotiations with the Member State concerned.

120. In these cases likewise it is not necessary, in principle, for an examination as to whether there is an overriding public interest in disclosure to be carried out in respect of each individual document. Regard is to be had in this context to the aid review procedure as a whole and, in particular, to the subject-matter of the aid. No such interest is raised in the present case, however.

121. The Commission was therefore, in principle, entitled to proceed on the basis that both the correspondence with the Member State and its internal documents relating to the aid review procedure on the measures for the benefit of TGI fell within the exception of protection of the purpose of investigations.

122. It is doubtful, however, whether the confidential handling of the investigation was still justified as a whole at the time that the request for access was refused.

123. The approach that the Commission takes in the first part of the fifth ground of appeal is correct, in principle, namely that the protected interest in smooth negotiations with the Member State concerned basically continues up to their finalisation, that is to say for the duration of an investigation into aid.

124. The Commission claims on this basis that aid procedure continues until such time as the final decision is no longer open to challenge in the courts, because if a decision were to be set aside the aid would have to be reconsidered. It argues that the Court of First Instance failed to appreciate this when it referred, in paragraph 93 of the judgment at issue, to the conclusion of aid procedure C 19/2000.

125. One cannot rule out the possibility of any resumption of an aid investigation being impeded by disclosure of the procedural file after a decision has been reached on that aid. However, a decision does, at least initially, bring an end to any negotiations with the Member State. It is published and can be challenged through the courts. If, in that situation, the Commission were to proceed on the basis that resumption of the aid investigation, that is to say of the protected negotiations, would be foreseeable, it would be conceding that its decision is vitiated by errors of law. This cannot be imputed to the Commission here. Hence, the risk of resumption of the investigation here is hypothetical. The risk of hypothetical negotiations on an aid being impeded is therefore certainly not reasonably foreseeable and cannot justify the refusal of access.

126. In as much as the Commission refers in its reply to the exception of protection of court proceedings under the second indent of Article 4(2) of Regulation No 1049/2001, it must be said that this exception – like the protection of internal documents under Article 4(3)⁵⁶ – is not the subject of the present proceedings. The Commission cannot base its refusal of access on a different exception at a later date.⁵⁷ There is therefore no need to decide whether it is imperative to restrict the protection of court proceedings – as argued

by Sweden – to those documents specifically drawn up for those proceedings.⁵⁸

127. The Commission also refers to the substantive connection between procedure C 19/2000 and procedure C 44/2001, as the latter relates to measures that it also investigated in the course of the former procedure. It argues that access cannot therefore be granted until both have been concluded.

128. However, a counter-argument to this would be that the Commission, in its decision in procedure C 19/2000, hived off and concluded a partial issue. The negotiations on that issue were therefore concluded and no longer necessarily deserved protection as a whole. A refusal of access would only have been possible in so far as information relating to procedure C 44/2001, which was still pending, was handed over in connection with those negotiations. Consequently, the Commission could no longer assume without individual examination that the documents requested in relation to procedure C 19/2000 fell in their entirety within the scope of protection of investigations in procedure C 44/2001.

⁵⁶ — See above, point 42.

⁵⁷ — Case C-353/01 P *Matilla v Council and Commission* [2004] ECR I-1073, paragraph 32.

⁵⁸ — See in this vein *Interporc v Commission*, cited in footnote 16, paragraph 40, and *API v Commission*, cited in footnote 45, paragraph 60.

129. The Court of First Instance therefore rightly refused to extend the protection of investigation of aid to the whole correspondence with the Member State regarding procedure C 19/2000 and the corresponding internal documents.

130. It should also be noted that even the documents in procedure C 44/2001 no longer merited protection in their entirety at the relevant date. The Commission had in fact already initiated the formal investigation procedure in a published decision that gave information on the aid.

131. In this context, the Commission takes a view that such publication and the publication of the decision itself guaranteed sufficient openness in the aid review procedure until such time as the latter decision assumed a definitive nature.

132. Where information on negotiations has already been lawfully⁵⁹ placed in the public

domain⁶⁰ there can be no reason to expect that information to be treated in confidence.⁶¹ The further disclosure of that information can no longer undermine the protection of the purpose of the investigation since both it and its connection with the aid investigation are already public knowledge. The question whether or not publication in the Official Journal achieves adequate openness is, however, immaterial in this context.⁶²

133. According to the first sentence of Article 6(1) of Regulation No 659/1999 a decision to initiate the formal investigation procedure under Article 4(4) summarises the relevant issues of fact and law, includes a preliminary assessment of the Commission as to the aid

59 — On the other hand, unauthorised disclosure cannot cause confidentiality to cease. Handover would in fact confirm that those documents were authentic. Consequently, the order of the Court of First Instance of 11 December 2006 in Case T-290/05 *Weber v Commission*, paragraphs 41 and 42, presents a problem in as much as it establishes in the alternative that a request for access is executed by the unauthorised publication of a document.

60 — Consideration should also be given in this respect to the conduct of the Member State concerned. If it makes extensive information on the negotiations known, it cannot expect the Commission to treat it as confidential. This particularly applies to the disclosure of misleading information. However, even the Commission, despite its own interest (see point 111 above), can no longer immediately insist on confidentiality if its negotiating position is already public knowledge.

61 — See, in this context, Joined Cases T-3/00 and T-337/04 *Pitsiorlas v Council and ECB* [2007] ECR II-4779, paragraph 86.

62 — Where the Court of First Instance discussed adequate openness resulting from publication in *API v Commission*, cited in footnote 45, paragraph 98, this was in relation to a different stage of examination, that is to say the counter-exception based on an overriding public interest in disclosure of documents. If the exception does not apply, however, there is no reason to examine the counter-exception.

character of the proposed measure and sets out the doubts as to its compatibility with the common market. Under Article 26(2), the Commission is to publish decisions in the Official Journal.

(d) Communication with other parties interested in the aid review procedure

134. The Commission has therefore made the relevant content of the file public knowledge. Apart from that content, the documents presented up to that date can, in principle, contain only irrelevant information. This therefore puts an end to the general presumption that disclosure of all these documents would compromise communication with the Member State in a reasonably foreseeable manner. In as much as the Commission intends to still base refusal on the confidentiality of the investigation, this can only be the result of individual examination of the documents.

136. It should also be noted that, logically speaking, the protection of negotiations cannot generally extend to the Commission's relationship with other parties interested in the aid investigation. Irrespective of whether they are the aid recipient, its competitors or other interested parties, those third parties, unlike the Member State, are merely sources of information. They are entitled to submit comments under Articles 6 and 20 of Regulation No 659/1999. Hence, there is no question of protecting smooth negotiations between them and the Commission.

135. Such examination cannot be confined to consideration of whether the documents contain information that does not show up in the published decision. Indeed, a specific statement of reasons would be required to show that disclosure of the remaining information, which is irrelevant under the first sentence of Article 6(1) of Regulation No 659/1999, would nevertheless undermine the protection of the purpose of the aid investigation in a manner that is reasonably foreseeable and not purely hypothetical.

137. The Commission nevertheless takes the view that a relationship of confidence exists between it and those third parties. This is true in as much as they are entitled to ask the Commission, under Article 6(2) of Regulation No 659/1999, not to disclose their identity on grounds of potential damage resulting from participation in the procedure. Confidence in protection of sources is justified to this

extent.⁶³ More than the identity of a source – and information that might expose the source⁶⁴ – can scarcely merit protection on this basis however.

make it more difficult for the Commission to obtain information from third parties.

138. There was never any question of protection of identity in the present case, however, as the Commission even expressly named Schott Glas as an interested party in its refusal decision.

140. This possibility must, in principle, be accepted however. There is no entitlement to influence the outcome of the Commission's investigations without having to fear the consequences. Indeed, Sweden rightly pleads that the accessibility of comments submitted by third parties can improve the basis for the Commission's decision. If comments are accessible, the interested parties can monitor each other and correct inaccurate data in time.⁶⁵ Attempts to provide the Commission with erroneous or misleading information are also diminished.

139. However, even if the identity of a source should be known, there might still be an interest in treating the information provided in confidence. That information might cause detriment. Interested parties might use it as an opportunity to take direct action against the source – alleging, for instance, that false information had been disclosed. This could be seen to have a chilling effect, which would

141. A different assessment might be required with regard to whether protection is deserved for comments by known sources in cases in which even the disclosure of correct information could trigger unjustified detriment. It is conceivable, for instance, that such information might be protected as a trade secret in third countries even though it is not protected within the

63 — More extensive even before the introduction of the right of access to documents, see *Adams v Commission*, cited in footnote 44, paragraph 34: a confidentiality condition must always be respected. Compare, in this context, the fourth paragraph of Article 18 of Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control (OJ 2009 L 131, p. 57), according to which the identity of complainants must be treated in confidence irrespective of the threat of detriment.

64 — See *Adams v Commission*, cited in footnote 44, particularly paragraph 40.

65 — TGI did in fact complain in paragraph 6 of its application in relation to the judgment at issue that Schott Glas had given the Commission erroneous details which it had not been possible to correct in time.

Community.⁶⁶ However, nothing of this kind has been pleaded in the present case.

individual examination however. This did not take place here.

142. The content of comments is not therefore expressly afforded protection under Regulation No 659/1999. Even in relation to the protection of professional secrets, provision is made only for consultation with the Member State concerned (Article 25). Other interested parties can also admittedly demand protection for their professional secrets and comparable confidentiality interests under Article 287 EC and Article 24 of Regulation No 659/1999. However, their status in an aid investigation does not permit the general assumption that correspondence with them is basically deserving of protection as a whole. It is necessary to examine in each individual case the extent to which documents have to be withheld in order to protect their identity or for other reasons.

(e) Interim conclusion

144. Overall, it can therefore be established that the Court of First Instance correctly decided that the Commission was not entitled to dismiss TGI's application in its entirety on the basis of the second indent of Article 4(2) of Regulation No 1049/2001 without conducting any examination of the individual documents.

143. Nor does comprehensive protection for communication with third parties arise indirectly from negotiations with the Member State concerned. A simple comment by another interested party does not permit any inference to be drawn with regard to the negotiations. There is no sufficiently close connection with the negotiating procedure unless the Commission demands specific information in order to use it in the context of the negotiations. Refusal of access in that case can only be justified on the basis of an

145. It could admittedly be asked whether the Commission's decision should have been upheld at least with regard to the correspondence with the Member State in relation to aid procedure C 44/2001 in so far as it took place after the formal investigation procedure had been initiated. However, the Commission has not raised any objection to the judgment at issue in that respect. It is also doubtful whether the decision could be split up in this way because it was worded as a single overall

⁶⁶ — Illustrated by the facts in the *Adams v Commission* case, cited in footnote 44.

decision on the application and did not identify individual documents. **V – Costs**

146. The second part of the first ground of appeal and the first part of the fifth ground of appeal must therefore also be dismissed.

148. Under Article 69(2) in conjunction with Articles 118 and 122(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since TGI has applied for such an order for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs of the proceedings.

C – Conclusion of the legal assessment

147. As none of the grounds of appeal raised by the Commission hold out any prospect of success, the appeal must be dismissed in its entirety.

149. Under the first subparagraph of Article 69(4) in conjunction with Articles 118 and 122(1) of the Rules of Procedure, Member States which intervene in the proceedings at first or second instance are, in principle, to bear their own costs.⁶⁷

⁶⁷ — See the order as to costs in *Sweden v Commission*, cited in footnote 17, paragraph 101 et seq. Of the Member States which intervened at first instance, only Sweden was awarded costs relating to the appeal procedure as that Member State lodged the appeal.

VI – Conclusion

150. In the light of the foregoing considerations, I propose that the Court should:

- ‘(1) dismiss the appeal;
- (2) order the Commission of the European Communities to bear the costs of the proceedings;
- (3) order the Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden to bear their own costs relating to the appeal.’