

OPINION OF ADVOCATE GENERAL

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delivered on 1 October 2009¹

1. To what extent do the principles of transparency of judicial proceedings and publicity of trial require members of the public to be allowed access to the written submissions filed with the Court by the parties to a case? This is the essence of the issue raised in the present appeals brought by the Kingdom of Sweden, an association of journalists and the European Commission respectively against a judgment of the Court of First Instance.

I — Factual background and the judgment of the Court of First Instance

2. The appeals relate to a dispute between the Association de la presse internationale ASBL (API) and the Commission of the European Communities regarding access to certain written submissions lodged by the Commission in proceedings before the Court of First Instance and the Court of Justice.

3. API, a non-profit organisation of journalists, the aim of which is to assist its members in reporting about the European Union in their home countries, requested by letter of 1 August 2003 that the Commission give it access to those submissions, pursuant to Article 6 of Regulation No 1049/2001.² By decision of 20 November 2003, the Commission refused that request.

4. According to the Commission, the documents at issue fell into several categories. With regard to documents which had been filed in three cases that were still pending,³ the Commission concluded that their disclosure would adversely affect its position as the defending party by exposing it to the possibility of outside pressure, in particular from members of the public. Accordingly, the documents fell under the exception provided for in Regulation No 1049/2001 in respect of disclosures that ‘would undermine the protection of ... court proceedings and legal advice.’⁴ For the

1 — Original language: English.

2 — 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 (OJ 2001 L 145, p.43).

3 — Case T-209/01 *Honeywell v Commission* [2005] ECR II-5527; Case T-210/01 *General Electric v Commission* [2005] ECR II-5575 and Case C-203/03 *Commission v Austria* [2005] ECR I-935.

4 — See Article 4(2) of Regulation No 1049/2001.

same reason, the Commission also denied access to submissions in a fourth case, which, although closed, was closely connected to an open case.⁵

put forward any argument showing such an interest. Finally, it considered and rejected the possibility of partial access to the documents.

5. With regard to infringement proceedings, the Commission further concluded that the disclosure of its submissions would ‘undermine the protection of ... the purpose of ... investigations’ within the meaning of Article 4(2) of Regulation No 1049/2001, that purpose being to reach an amicable resolution of the dispute. The Commission applied this reasoning both to cases where the infringement proceedings were open,⁶ and to cases where the proceedings were closed but the Member States had not yet complied with the judgment.⁷

7. API challenged the Commission’s decision by application lodged at the Registry of the Court of First Instance on 2 February 2004. The Court of First Instance referred the case to the Grand Chamber, which delivered the judgment under appeal on 12 September 2007.

6. The Commission acknowledged that, under Regulation No 1049/2001, an overriding public interest in disclosure would outweigh its interest in keeping the submissions confidential. However, it found that API had not

8. In its judgment, the Court of First Instance stressed that the purpose of Regulation No 1049/2001 was to provide broad access, and that the exceptions should be narrowly construed. Nevertheless, it held that the Commission could deny access to written pleadings in all cases where oral argument had not yet been presented, because its interest in litigating free from all external influences was sufficient to cover all submissions until a case reaches the stage of the hearing. However, where the denial of access was based on the connection between a closed case and a second case which remained pending, the Commission could not refuse access without giving specific reasons as to why disclosure would undermine the proceedings in the open case. As to infringement proceedings, the Court of First Instance held that the interest in reaching a settlement with the

5 — Case T-342/99 *Airtours v Commission* [2002] ECR II-2585.

6 — Case C-203/03 *Commission v Austria*.

7 — Case C-466/98 *Commission v United Kingdom* [2002] ECR I-9427; Case C-467/98 *Commission v Denmark* [2002] ECR I-9519; Case C-468/98 *Commission v Sweden* [2002] ECR I-9575; Case C-469/98 *Commission v Finland* [2002] ECR I-9627; Case C-471/98 *Commission v Belgium* [2002] ECR I-9681; Case C-472/98 *Commission v Luxembourg* [2002] ECR I-9741; Case C-475/98 *Commission v Austria* [2002] ECR I-9797; and Case C-476/98 *Commission v Germany* [2002] ECR I-9855.

Member States could justify a blanket refusal to disclose documents only so long as the judgment had not yet been delivered. Once a judgment was handed down, the Member States were obliged to comply and the matter was no longer negotiable.

The Commission maintains that the judgment under appeal will weaken its ability to enforce Community law and to ensure that Member States respect their obligations. Accordingly, the Commission asks that this Court set aside the judgment under appeal in so far as it annulled the Commission's decision refusing access.

9. Appeals against the judgment of the Court of First Instance were filed by the Commission (C-532/07), API (C-528/07), and the Kingdom of Sweden (C-514/07). The United Kingdom, the Kingdom of Denmark, and the Republic of Finland later intervened.

10. In its appeal to this Court, the Commission argues that the Court of First Instance erred in law by holding that, where access to written pleadings is sought after the hearing, consideration of the request must be made on a case-by-case basis. According to the Commission, the Court of First Instance had proceeded on the basis of inconsistent reasoning and had erred in failing to take account of the interests of justice, the interests of other parties concerned by the procedure, and the rights of the Commission. The Commission also argues that the Court of First Instance erred in requiring the case-by-case assessment of requests for access to written pleadings in infringement proceedings under Article 226 EC after the judgment has been delivered and in all proceedings that have been decided but are connected to pending

11. API, in contrast, requests that this Court set aside the judgment under appeal to the extent that it upheld the Commission's right not to disclose its submissions prior to the oral hearing, and either annul the Commission's decision of 20 November 2003 or refer the case back to the Court of First Instance for a fresh decision. API argues that the exception provided for in Regulation No 1049/2001 in respect of court proceedings requires a case-by-case examination and challenges the Court of First Instance's conclusion to the contrary on the following grounds: (i) it runs counter to well-established principles relating to the interpretation of this exception; (ii) it is predicated on a non-existent right of the Commission to defend its interests free from all external influences; (iii) the Court of First Instance erred in its application of the equality of arms principle; (iv) that court failed to give adequate weight to the practice of other jurisdictions; and (v) that court erred in relying on the need to protect *in camera* procedures. API also argues that the Court of First Instance misconstrued the phrase

‘overriding public interest’ in the context of Article 4(2) of Regulation No 1049/2001.

in Regulation No 1049/2001⁸ for obtaining pleadings filed in pending cases, API went to the Commission with a request that it should have made to the Court.

12. Like API, the Kingdom of Sweden asks this Court to set aside the judgment under appeal to the extent that it dismissed API’s action and to annul the Commission’s decision of 20 November 2003. Sweden argues that exceptions to the disclosure requirements must be construed narrowly and that there is no justification for a general refusal of public access.

II — Analysis

A — *Preliminary remarks*

13. In asking for the documents at issue in this case, API has brought to the fore important questions about transparency in the European Union. API’s problem lies, not necessarily in the answers to these questions, but in the procedure through which it raised them. In following the procedure laid down

14. While litigation is ongoing, it should be for the Court, not the Commission, to decide whether the public should have access to the documents in a particular case. This was the approach taken in the Treaty of Amsterdam, when the Member States chose not to mention the judiciary in Article 255. Such a decision rests with the Court not because, as the Commission seems to think, values of transparency do not apply to the judiciary; rather, it is because, during the course of litigation, the Court is master of the case. Only the Court is in a position to weigh the competing interests and to determine whether the release of documents would cause irreparable harm to either party or undermine the fairness of the judicial process. If the decision to release documents is left to the parties, they may be too cautious in releasing documents

8 — The Regulation sets forth a process for the public to use when requesting documents from institutions of the European Union, excluding the Court, ‘in such a way as to ensure the widest possible access to documents’ (Article 1(a)). The principle of access established by the regulation is subject to several exceptions. Those relevant to this case are set out in Article 4(2), which provides:
 ‘The institutions shall refuse access to a document where disclosure would undermine the protection of:
 — commercial interests of a natural or legal person, including intellectual property,
 — court proceedings and legal advice,
 — the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.’

where they fear damage to their own interests and too ready to release documents that might cause harm to their adversaries.

allow access. On the contrary, it may be under a duty to assess requests for access in the light of the principles of fairness and transparency, taking carefully into account all the interests at stake. Put differently, justice should be administered in a fair and transparent way, and it is for the Court to ensure that this requirement is satisfied in all cases.

15. Once it is understood that questions of access to documents filed with the Court are for the Court to decide, the principal dangers that the litigants believe to be lurking in the present case fade away. The Court need not worry that the Commission will release documents that will lead to a disruption of its deliberations. Its ability to hold proceedings *in camera* will not be jeopardised, as the Court is able to decide whether the release of certain documents would be at odds with the need for secrecy in a particular case. Nor should the principle of equality of arms cause concern, since, unlike the Commission and the regime established in Regulation No 1049/2001, the Court has the power to control access to documents filed by any of the parties and is surely able to devise conditions for access that do not substantially disadvantage a particular party. Accordingly, I believe that the best conclusion in the present case would be to find that all documents submitted by parties in pending cases fall outside the scope of Regulation No 1049/2001. Once submitted to the Court, they become elements of the judicial process, the administration of which lies within the exclusive competence of the Court. This does not mean that the Court itself is not subject to constraints when deciding whether to

16. My position is in tension with the Order of the Court in *Germany v Parliament and Council*.⁹ If it were true that, as the Court stated in that Order, the parties are, in principle, free to disclose their own written submissions,¹⁰ the Court would be unable to control access to the documents in the case file. Furthermore, if, as that Order indicates, a party's voluntary release of its own submissions is not to be viewed as undermining the integrity of the judicial process, there would be no basis for the Commission's blanket refusal to release submissions in pending cases. Whether documents are released willingly or because it is required by regulation, the potential for the release to generate public pressure affecting the integrity of judicial proceedings

⁹ — Case C-376/98 [2000] ECR I-2247.

¹⁰ — *Ibid.*, paragraph 10.

or disadvantaging one of the parties would be the same. Actually, the Order in *Germany v Parliament and Council* is slightly contradictory in the following sense: while recognising that the parties are, in principle, free to disclose their written submissions, the Court also notes that in exceptional circumstances disclosure might adversely affect the proper administration of justice. What follows, logically, is that the question of disclosure in those exceptional cases where the proper administration of justice is at stake cannot be left to the parties but should be decided by the Court. But who is going to assess whether a specific case is sufficiently exceptional to merit the Court's attention? The answer is obvious: only the Court itself can make such an assessment. It is equally obvious that the Court's intervention is meaningful only if it takes place *before* any disclosure by one of the parties. If a party releases a document which should have remained secret and, as a result, the integrity of the judicial process is threatened, no later action by the Court can remedy the damage.

equality of arms. How could the Court either leave this matter in the hands of the parties or impose on certain parties (for example, the Community institutions), on the basis of the Regulation, an obligation for disclosure without, at the same time, placing the other parties (including Member States) under the same obligation to disclose their pleadings? Suppose, for instance, that the Commission – either of its own volition, or because it is compelled to comply with the Regulation – were to allow access to its written pleadings in a particular case: it is reasonable to expect that the same obligation would have to apply to all the other parties as well, since it would be extremely odd for the Court to refuse access to their pleadings on the grounds that such disclosure would affect the integrity of the judicial process. Thus, the Court's own decisions about access would end up being significantly affected (if not determined) by the disclosure policy of the other institutions or by the criteria established by the Regulation – which was not, however, meant to be applicable to the Court.

17. A further issue which would arise if the question of access to court pleadings were to be left to the initiative of the parties or wholly governed by Regulation No 1049/2001 is

18. Thus, the time has come for the Court to reconsider its statement in *Germany v Parliament and Council* and to make clear that the Court, not the parties, must control access to documents in pending cases. Although the Court 'has always shown itself to be circumspect with regard to reversing an interpretation of the law given in earlier judgments' in order to protect the important

values of stability, uniformity, cohesion and legal certainty,¹¹ it has been willing to reconsider its past decisions in exceptional circumstances. This seems to me to be one of those situations in which reconsideration is justified. When the Order was made, its full effect on the issue of access to judicial documents was not clear. As a result of requests for access under Regulation No 1049/2001, the consequences of the Court's broad statement in that Order are more fully apparent today.¹²

document affect the integrity of the judicial proceedings?

20. Therefore, it is in that context that I shall address the legal grounds for challenging the interpretation made at first instance of the Regulation's requirements to disclose pleadings. In doing so, I shall address the balance between the serenity of the judicial process and the interests implicated by the right to a public hearing. I shall also distinguish between cases that are pending before the Court and those in which the final judgment has been delivered.

19. Should the Court agree with my conclusion on this point, the issues raised in the appeal with respect to pending cases become academic. However, in case the Court decides not to reassess the Order in *Germany v Parliament and Council*, I shall analyse the circumstances in which the Commission can be required to release documents. In any event, the question to be answered is identical to that which would have to be answered by the Court when deciding whether to release documents itself: would release of the

B — Pending cases

21. In determining whether protection of the integrity of the judicial process requires that pleadings lodged by the parties remain confidential, it is appropriate to examine the common traditions of the Member States and the practice of the European Court of Human Rights.

11 — See my Opinion in Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, point 28.

12 — Cf. Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 14.

22. In the case of the Strasbourg Court, the relevant provision is Rule 33 of the Rules of Court¹³ which provides as follows:

the parties or of any person concerned so require, or to the extent strictly necessary in the opinion of the President of the Chamber in special circumstances where publicity would prejudice the interests of justice.

‘Rule 33

(Public character of documents)

3. Any request for confidentiality made under paragraph 1 of this Rule must include reasons and specify whether it is requested that all or part of the documents be inaccessible to the public.

1. All documents deposited with the Registry by the parties or by any third party in connection with an application, except those deposited within the framework of friendly settlement negotiations as provided for in Rule 62, shall be accessible to the public in accordance with arrangements determined by the Registrar, unless the President of the Chamber, for the reasons set out in paragraph 2 of this Rule, decides otherwise, either of his or her own motion or at the request of a party or any other person concerned.

4. Decisions and judgments given by a Chamber shall be accessible to the public. The Court shall periodically make accessible to the public general information about decisions taken by Committees under Rule 53 § 2.’

2. Public access to a document or to any part of it may be restricted in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of

23. The principle established here is that all documents filed in relation to an application by the parties or by a third party (such as an intervener) are public, with the exception of documents related to a friendly settlement; there is no distinction between pending and closed cases. At the same time, Rule 33 provides for restrictions on access where considerations related to morals, public order, national security, protection of juveniles, privacy and the interests of justice so require. Those considerations act as limits on the right of members of the public to access documents contained in the case file: while publicity is the general rule, secrecy is ensured if this is necessary in a particular case. Also,

13 — Article 40 of the European Convention on Human Rights is also relevant: ‘Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.’

it is worth noting that the control of access to judicial documents is placed in the hands of the Strasbourg Court. This is reflected in Section 1 of Rule 33, which provides that the President of the Chamber may restrict access, not only following a request from the parties or a third party, but also on his or her own motion, if he or she considers that such restriction is necessary for any of the reasons listed in Section 2.

24. As for the Member States, no general requirement of confidentiality prohibiting disclosure of party submissions is to be found in their laws. In fact, most national legal systems appear to have moved from a position where access was very limited to one where some form of publicity is guaranteed. Thus, the great majority of Member States nowadays allow access to judicial documents in some circumstances.¹⁴

25. Although the Court has not expressly considered this question, the case-law does not suggest a need for a general requirement of confidentiality. This is true of the Order in *Germany v Parliament and Council*,

discussed above, which stated that 'disclosure of a document might adversely affect the proper administration of justice' only in 'exceptional cases'.¹⁵ However, the Court's *dicta* on this question are not confined to that order. When considering the issue of access to opinions from the Council's legal service, the Court discussed and dismissed concerns relating to public pressure in that context. The Court, in fact, went further than the more cautious approach I had advocated in my Opinion with respect to this particular issue.¹⁶ It concluded that 'even if the members of that legal service were subjected to improper pressure to that end, it would be that pressure, and not the possibility of the disclosure of legal opinions, which would compromise that institution's interest ... and it would clearly be incumbent on the Council to take the necessary measures to put a stop to it'.¹⁷ That conclusion is no less valid in the context of improper pressure on the judiciary and the parties to judicial proceedings.

26. Moreover, the practice of international tribunals suggests that there is no reason to fear that disclosure of such documents will undermine the judicial process. The International Criminal Tribunal for Rwanda, for example, in spite of its pressing need to

14 — For the different solutions adopted by Member States see below paragraph 29.

15 — Case C-376/98 *Germany v Parliament and Council*, paragraph 10.

16 — See point 40 of my Opinion in Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* where I explain that all legal opinions of the legal services of the institutions may in principle benefit from confidentiality.

17 — *Ibid.*, paragraph 64.

maintain secrecy for witness protection, derives from its rule favouring public trials a requirement that all submissions be public unless there are exceptional reasons for keeping them confidential, in which case the parties are required to file public, redacted versions of their confidential briefs.¹⁸ The International Criminal Court has adopted a similar approach, making the parties' submissions available on its website unless non-disclosure is ordered by the Court or necessary to protect sensitive personal data.¹⁹ In this respect, the tendency seems to be that the more remote the judicial body, the greater its concern with the transparency of its judicial proceedings.²⁰

co-exist with public access to documents.²¹ United States law presumes access to documents. It specifies only a few limits to access to documents in order to protect confidential information²² and allows courts to seal other documents if necessary. The Federal Rules of Civil Procedure, for example, provide that:

'For good cause, the court may by order in a case:

- (1) require redaction of additional information; or
- (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.'²³

27. The practice in the United States further indicates that a fair judicial process can

28. In the absence of such an order, those documents are readily available. Federal courts provide access to case-files, including

18 — Nchamihigo, Decision on Prosecution Motion on the Filing of the Defence Notice of Appeal, 30 March 2009, ICTR-2001-63-A.

19 — ICC Rules of Procedure and Evidence ICC-ASP/1/3, Article 15; <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases/>.

20 — It is worth noting that in the WTO dispute settlement system while the written submissions of the parties are confidential (Article 18(2) of the Dispute Settlement Understanding), Panel and Appellate Body Reports provide a very detailed description of the parties' submissions and very often simply annex or reproduce them. Parties are however free to disclose their submissions to the public if they wish to do so. See Davey, W., 'Proposals for Improving the Working Procedures of WTO Dispute Settlement Panels' in *The WTO Dispute Settlement System 1995-2003*, F. Ortino & E.U. Petersmann (eds.), Vol. 18, Studies in Transnational Economic Law, Kluwer (2004), p. 20

21 — The late Chief Justice of the United States Supreme Court William H. Rehnquist, 'Constitutional Law and Public Opinion', (1986) 20 Suffolk U.L. Rev. 751 has argued moreover that judges are inevitably impacted by public opinion but that this, in his view, can have a positive effect and create 'great' cases.

22 — See, e.g., Federal Rules of Civil Procedure 5.2 (relating to personal information such as social security numbers and bank account numbers); Federal Rules of Evidence 412(c)(2) (relating to evidence of past sexual behaviour of rape victims).

23 — Federal Rule of Civil Procedure, 5.2(e).

pleadings submitted by the parties, over the internet.²⁴ Many of those materials are also available to the public on judicial databases such as Westlaw, particularly in high profile cases. Indeed, pleadings are often available on Westlaw within a few business days of being filed with a court.

Greece, Austria, France and Cyprus). It is worth noting, again, the decisive role that the court plays in all those national systems in deciding whether access is warranted. Finally, in a minority of Member States (Hungary, Luxembourg and the Netherlands), the practice is to prohibit access to the documents contained in the case-file.

29. However, while the common traditions of the Member States do not require confidentiality, and there seems to be no reason to do so, they also do not support the contrary position, that the right to a fair trial *requires* generalised public access to party documents.²⁵ Only two Member States – Sweden and Finland – recognise a right to access documents in pending cases. By far the most common position taken by the Member States (including Spain, Germany, Estonia, Poland, Portugal, Ireland, the Czech Republic and Slovenia) is that courts have power to grant access but the decision to do so is discretionary or depends on a balance between the various interests in the particular case. In certain Member States which provide for some form of access to judicial documents, the relevant rules and practice differ according to the type of case or the court before which it is pending (for instance, in Denmark, the United Kingdom,

30. Given the competing interests at stake and the current lack of consensus among the Member States, it seems to me that the Court should tread carefully in this area. As each case raises different concerns, the competing justifications must be weighed carefully as applied to each case and an individual determination made. I think that, at least for the time being, it is desirable to avoid imposing a very broad or strict rule either requiring access in all cases or denying the existence of such a right. This is an area where the law should develop incrementally and on a case-by-case basis. The balancing of the competing considerations in each case is best carried out by the Court after consulting with the parties. Over time, should the Member States continue to move towards broad access, the Court's position may evolve in that direction as well. Currently, when access to the file of a pending case is sought by a member of the public, it is, I think, for the Court to examine carefully the

24 — For more information, see <http://pacer.psc.uscourts.gov/pacerdesc.html>.

25 — Research Note 2/126.

interests at stake and assess whether access should be granted.

C — Cases in which the final judgment has been delivered

31. Once a case is closed, however, the question becomes much easier. The answer to the basic question – whether the release of documents will undermine the integrity of the judicial process – is clearly ‘No’. The Court has had the chance to examine the submissions of the parties, to deliberate and to reach its decision; the judicial process is complete and can no longer be affected by the publication of the parties’ pleadings.

32. Moreover, additional concerns relating to publicity of trial and the right to a reasoned judgment militate in favour of releasing such documents. A primary purpose of the right to a reasoned judgment is to enable the public to understand the reasons for the Court’s decision and the process through which it was reached. As Neil McCormick has explained,

legal argumentation performs a justificatory function: not only does the lawyer arguing the case put forward arguments as to why, in the specific circumstances, it is just that his client should prevail, but the judge, too, in providing a reasoned judgment, purports to show that the way he has resolved the dispute is justified.²⁶ It is that justificatory function that characterises the distinct form of accountability to which courts are subject, one that is related to the quality of their deliberative process and the arguments arising from it. Access to the parties’ submissions is critical to this process, as it enables the public to understand both the arguments that the Court was asked to consider and the reasons why it accepted or rejected them. Without access to the case file, following and understanding a case is in danger of becoming merely a theoretical possibility deprived of any practical value, as the public needs access in order to appreciate what the case was about and how the judicial process unfolded. It also helps to ensure that there is symmetry between the actual deliberative process within the Court and the reasons given in the opinion.

33. A further point which is relevant to this special requirement of accountability to which courts are subject is that the ability to

²⁶ — McCormick, N., *Legal Reasoning and Legal Theory*, Clarendon Press Oxford, 1978, p. 14

access a case file may increase the overall confidence of the European public in the judicial system of the Union, sending the message that the judicial process is not conducted in absolute secrecy but is open to public scrutiny,²⁷ not a public scrutiny of a political nature but one which is informed by the legal arguments put forward in a case and the reasoning of the Court in answering them. This is a particularly important consideration for the Court of Justice, which, by its very nature, is not as close to the citizens of Europe as their own national courts, both in terms of geographical distance and on account of the less familiar nature of its procedures. Granting access to the documents in case-files will help reduce the distance between European citizens and the Court by making its processes more accessible and transparent.

that takes place between the parties. It is the taking into account of all the different and opposing views on the law that legitimises the Court's authoritative determination of what the law is. In this respect, access to the parties' submissions and the possibility of contextualising the Court's decision in the light of those submissions assures those who had a different view on the law that, even if their view did not prevail, it was given due consideration in the deliberative process of the Court. This is particularly important in view of the absence of dissenting opinions.²⁸ It is also important to allow for a continued discourse, not only on what the law is, but also on what the law ought to be.

34. Furthermore, while judicial decisions determine (unanimously or not) the right legal answer, they must at the same time acknowledge that that answer is the product of a plurality of competing views as to what the right answer is. Paradoxically, the authority with which a court pronounces the law has its genesis in the – often vigorous – debate

35. Historically, the Court's publication of the Report for the Hearing, which summarises the parties' arguments, fulfilled this purpose by giving the public and the legal community access to much of the necessary information.²⁹ The Court's discontinuation, for understandable reasons, of its practice of publishing those reports provides additional justification for releasing the parties' submissions.

27 — For a related argument regarding the importance of openness in the legislative process, see *Turco*, paragraph 46.

28 — Even if, occasionally, the opinions of Advocate Generals may be representative of a different point of view in the Court.

29 — The Advocate Generals' Opinions do sometimes also provide additional information but they are not meant to (and neither should they) fulfil this function.

36. Of course, there will be cases where access should be denied because of more weighty countervailing considerations, obvious (but not unique) examples being the protection of sensitive personal data and the interests of minors. In some cases, concerns relating to ongoing negotiations with Member States may also justify limiting access to the case-file for some time after a case is closed. While, in principle, once judgment has been handed down access should be the norm, in those cases secrecy should be ensured as an exception to the norm. Again, it should be for the Court of Justice, either acting of its own motion or following a request submitted by an interested party, to decide that certain documents or parts thereof, or even all documents in a specific case-file, should remain confidential even after the case is closed.

37. Thus, once a final judgment has been delivered, the parties' submissions should be available to the public unless exceptional reasons demand that secrecy be maintained in a particular case. However, such reasons cannot be presumed to exist in all cases. Given the weighty reasons militating in favour of making this information public, such exceptions should be limited.

38. Once it has become clear that access should be the norm in closed cases, it follows

that in such cases parties should be allowed also to make public their own written pleadings, or those of another party, if they wish to do so. Considerations related to the integrity of the judicial process or to equality of arms, which militate in favour of secrecy while the case is pending and, more importantly, require the Court to be the sole decision-maker on this issue, fall away once judgment has been given. Again, there may be cases where secrecy should be maintained even after delivery of the judgment. It is the responsibility and prerogative of the Court, either of its own motion or following a request from an interested party, to identify those cases and to impose on the parties specific obligations limiting disclosure or prohibiting it altogether even after the case is closed.

39. To sum up: requests from members of the public for access to written pleadings submitted by the parties to a case while the latter is still pending should be directed to the Court itself. Such pleadings are elements in the judicial process and the Court is the body best placed to assess impartially whether access will disturb the serenity and integrity of the judicial process or undermine other legitimate interests. Even if the Court were to rule that the parties' written pleadings fall within the ambit of Regulation No 1049/2001 and decide the present case by reference to that

regulation, the substantive issue remains the same, namely in what circumstances should access be granted. I think that in pending cases it is necessary to avoid imposing a strict rule at the current stage of development of the law and instead adopt a careful, case-by-case approach. By contrast, in closed cases it is reasonable to adopt a general principle favouring access. This also means that in closed cases a party should be allowed to make public its submissions, or those of another party,

on its own initiative; after judgment has been delivered, it is no longer necessary that they remain within the exclusive realm of the Court. Here Regulation No 1049/2001 does apply, and the Commission should assess each request on a case-by-case basis in the light of the principles discussed earlier in this Opinion. However, it should always be possible for the Court to impose on the parties an obligation of confidentiality if it considers that it is fair and just to do so.

III — Conclusion

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

- set aside the judgment of the Court of First Instance of 12 September 2007 in Case T-36/04;
- annul the Commission's decision of 20 November 2003; and
- order the Commission to reconsider API's request of 1 August 2003 in light of its judgment in the present case.