16 Gunpowder for Court Battles: Access to Institution Documents in the Administrative Procedure, under Regulation 1049/2001, before the EU Courts and National Courts

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16.1 Introduction

Gaining access to documents held by the institutions of the European Union (hereinafter 'EU') is essential for successful litigation in a variety of situations. It is clearly indispensable to obtain at least some of the documents on the basis of which the institution adopted a decision adverse to a natural or legal person when the latter challenges that decision before the General Court. There are other instances where institution documents constitute important material used in the context of civil or criminal proceedings before national courts.

Access to institution documents may be obtained under various regimes. First, institutions are required to grant access to certain documents already in the framework of the administrative procedure. This is done either under specific rules governing the relevant procedure or by virtue of the general principle of respect for the rights of the defence. However, as a rule, only the main party in the administrative procedure is entitled to gain access to documents under this regime, that is, the party whose legal position is directly affected by the act adopted at the end of the procedure. It follows that parties not participating in the administrative procedure or not being its main subject often need to resort to other avenues. Therefore, the second possibility is to seek public access to documents under Regulation 1049/2001,[1] either for the purposes of a case brought before the EU

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1 EP regulation of 30 May 2001, OJ L145/43, No. 1049/2001, regarding public access to European Parliament, Council and Commission documents.

Courts or for the purposes of proceedings before national courts. Thirdly, it is also possible to obtain certain documents in proceedings before the EU Courts, that is, by way of proposing that the latter invite or order an institution to submit copies of documents relating to the case.[2] Fourthly, a similar possibility may exist in proceedings before national courts. The latter may request the production of institution documents by virtue of the principle of sincere cooperation.

The primary purpose of this article is to examine each of those regimes and compare possible outcomes in a number of situations. For (prospective) litigants seeking access to documents, such an overview might be helpful in finding the most effective way of obtaining access, which makes it possible to avoid multiple applications or to challenge a refusal decision adopted under Regulation 1049/2001 where broader access could have been obtained under another regime. This, in turn, might sometimes spare the institutions the effort of justifying refusal decisions and defending them before the General Court.

Although the detailed presentation of the vast case law on access to the file and on the application of Regulation 1049/2001 is clearly beyond the scope of this article, it does examine most cases related to the specific situation where documents are requested for the purposes of Court proceedings and, in particular, those judgments which shed some light on the interaction between the various regimes governing access. Finally, the analysis below is put into the context of the ongoing review of Regulation 1049/2001 and some suggestions are provided as to how the rules governing access could be streamlined to the benefit of all parties involved through some minor legislative changes.

16.2 Access to Documents in the Administrative Procedure

In most procedures, institutions have an obligation to disclose some or all the documents in the administrative file, or at least provide the information contained therein prior to the adoption of the final act closing the procedure. Such access is normally granted to the party who is the main subject of the administrative procedure. This is especially true in proceedings that may result in sanctions or pecuniary measures adversely affecting that party. Although the initial purpose of making information available to the party in the administrative procedure is to enable it to defend itself in that procedure, such information is obviously widely relied on before the EU Courts, should the party decide to challenge the act in question.

2 Art. 45 of the Rules of Procedure of the Court of Justice (hereinafter 'CJEU RoP'); Arts. 64 to 66 of the Rules of Procedure of the General Court (hereinafter GCEU RoP).

16.2.1 Rules Governing Particular Procedures

The extent of the access that may be obtained and the applicable rules vary depending on the procedure concerned. For instance, the broadest access is arguably granted in antitrust proceedings, where access to all the documents in the case file – except for the business secrets of other undertakings – is automatically granted, that is, without any request being necessary (access to the file).[3] More limited access is given in the context of antidumping proceedings. There is no automatic access to the file, although the parties concerned may request disclosure of the details underlying the essential facts and considerations on the basis of which the institutions intend to impose antidumping duties (disclosure).[4] Applicants often argue that the principles governing access to documents developed in a given field should be generally applicable. The Court of Justice and the General Court (hereinafter 'the Courts' or the 'EU Courts') do sometimes consider that field-specific case law can be transposed to another type of procedure (*see, i.e. Eyckeler and Malt v. Commission*,[5] where case law relating to antitrust proceedings was applied to customs proceedings). Nonetheless, the General Court refused to consider that rules on access to the file in antitrust proceedings may be applied, by analogy, to OLAF investigations[6] or to the procedure for reviewing state aid.[7]

16.2.2 General Principles – The Rights of the Defence and the Right to Be Heard

Despite the divergence in rules governing access to documents in particular procedures, the underlying rationale is the same in all fields. Namely, the lack of information concerning the documents which serve as a basis for the intended act would clearly impair the party's ability to defend itself effectively in the procedure before the institution in question.

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3 Art. 27(2) of Council Regulation 1/2003, OJ L1/1 on the implementation of the rules on competition laid down in Arts. [101] and [102] of the Treaty. *See also* N. Coutrelis & V. Giacobbo, 'La pratique de l'accès au dossier en droit communautaire de la concurrence: Entre droit de la défense et confidentialité', 2 *Concurrences*, 2006, pp. 66-78.

4 Art. 20 of Council Regulation 384/96, OJ L56/1 on protection against dumped imports from countries not members of the European Community.

5 Case T-42/96, *Eyckeler & Malt v. Commission* [1998] ECR II-401.

6 Case T-259/03, *Nikolaou v. Commission*, not published in the ECR, paras 122 and 252. For a detailed comparison of legislation and the case law relating to antitrust and OLAF proceedings, *see* S. White, 'Rights of the defence in administrative investigations: access to the file in EC investigations', 2 *Review of European Administrative Law* 1, 2009, pp. 57-69.

7 Case T-198/01, *Technische Glaswerke Ilmenau v. Commission* [2004] ECR II-2717, paras 193-194, not annulled on these points on appeal.

Therefore, the right to have access to documents in the administrative procedure has been construed by the Courts as part of the rights of the defence, as a right necessary for the proper exercise of the right to be heard.[8, 9] Furthermore, insofar as respect for the rights of the defence is a general principle of EU law, the subjects of an administrative procedure are entitled to obtain access to documents on which the act adversely affecting their legal position is based. The latter holds true even where there are no particular provisions governing the procedure in question or where there are no particular provisions foreseeing access to documents in that field.[10] However, the general principle of the protection of the rights of the defence does not imply that the institution in question is required to grant spontaneously access to the documents in its file. It is only upon the request of the party concerned that the institution is required to provide access to all non-confidential official documents concerning the measure at issue.[11]

The identity of the economic operator considered to be the main subject of the procedure (or that of the person against whom the procedure is conducted) is of crucial importance, insofar as it is only that person who is entitled to obtain documents during the administrative procedure on the basis of the protection of the rights of the defence. That point is exceptionally well illustrated by state aid proceedings, where only the member state granting aid is entitled to obtain access to the case file in the context of the administrative procedure. Under Article 6(2) of Regulation 659/1999,[12] the Commission cannot, without infringing the rights of the defence, use in its final decision information on which that member state was not afforded an opportunity to comment. However, none of the provisions governing the procedure for reviewing state aid reserves among the parties concerned a special role for the recipient of aid – notwithstanding its obligation to reimburse non-authorised aid, should it eventually be qualified by the Commission as incompatible with the common market. The Courts have held that the right to access the case file

8 *See* cartel Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others v. Commission* [1992] ECR II-2667, para. 38; 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, para. 68 and the case law cited.

9 For a detailed analysis of the right to be heard in procedures involving both EU and national authorities, *see* C. Eckes & J. Mendes, 'The right to be heard in composite administrative procedures: lost in between protection?', 5 *European Law Review*, 2011, pp. 651-670.

10 For application in a customs case, *see* Case T-42/96, *Eyckeler & Malt v. Commission* [1998] II-401, paras 78-80 and in the context of fund freezing measures *see* Case T-390/08, *Bank Melli Iran v. Council* [2009] ECR II-3967, para. 91.

11 Case T-205/99, *Hyper v. Commission* [2002] ECR II-3141, paras 63 to 65; T-390/08 *Bank Melli Iran v. Council* [2009] ECR II-03967, para. 97.

12 Council Regulation 659/1999 of 22 March 1999, OJ L83/1, laying down detailed rules for the application of Art. [88] of the EC Treaty.

claimed by the recipient of aid could not be deduced from the rights of the defence, since the procedure for reviewing state aid is not a procedure initiated 'against' the recipient, thereby implying that the recipient cannot rely on those rights.[13]

The general rule is that access to documents must be granted before the adoption of the act adversely affecting the position of the main subject of the procedure. Thus, the latter is able to express his views on the documents taken into account by the institution. Failure to observe that requirement on the part of the institution may lead to the annulment of the act in question, for instance, on the ground that the institution breached essential procedural requirements.[14] However, there are certain procedures where the element of surprise is of great importance for the effectiveness of the pecuniary measures. Such is the case in procedures leading up to acts prescribing the freezing of funds of natural or legal persons with a view to combating terrorism or nuclear proliferation.[15] The Courts have ruled in this context that the institutions are not required to disclose the evidence adduced against the entity concerned before the adoption of the initial decision to freeze funds, because prior disclosure could jeopardize the effectiveness of the measure. The rights of the defence are respected if the evidence is notified to them either concomitantly with or as soon as possible after the adoption of the initial decision to freeze funds,[16] as such disclosure still allows the entity concerned to rely on the documents when requesting the Council to reconsider its decision or when challenging the initial decision before the General Court. Penalties for non-disclosure were an interesting issue as, clearly, subsequent communication of the evidence does not form part of the adopted act. Interestingly, in *Kadi and Al Barakaat v. Council*, the Court of Justice held that the lack of disclosure of the evidence after the adoption of the initial fund-freezing measure could still affect the validity of that measure and subsequently annulled it in respect of the applicants. It allowed, however, three months for the Council to remedy the breach of the rights of the defence, by maintaining the effect of the act during that period.[17] As regards acts maintaining the effect of the initial fund-freezing measure, where urgency is not established, observance of the right to a fair hearing requires that new evidence justifying the prolongation of the

13 Case C-74/00 P and C-75/00 P, *Falck and Acciaierie di Bolzano v. Commission* [2002] ECR I-7869, paras 81-83; Case T-198/01, *Technische Glaswerke Ilmenau v. Commission* [2004] ECR II-2717, paras 193-194, not annulled on these points on appeal.

14 *See e.g.*, the annulment of a customs decision in Case T-42/96, *Eyckeler & Malt v. Commission* [1998] ECR II-401, paras 80-88.

15 *See e.g.*, Council Common Position 2001/930/CFSP [2001] OJ L344/90 on combating terrorism; Council Common Position 2007/140/CFSP of 27 February 2007 [2007] OJ L61/49 concerning restrictive measures against Iran.

16 Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council* [2006] ECR II-4665, para. 129; C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council* [2008] ECR I-6351, paras 336-339.

17 Case C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council* [2008] ECR I-6351, para. 375.

effect be communicated to the person concerned and a hearing be held prior to the adoption of that act.[18]

16.3 Public Access to Documents under Regulation 1049/2001

Unlike rules governing access to documents in the administrative procedure, which usually benefit only the main subject of the procedure, provisions relating to public access to institution documents apply equally to all natural or legal persons, that is, irrespective of the actual participation or role in the procedure before the institution and, importantly, of the intended use of the documents. Rules on public access are not specifically designed to allow parties concerned to obtain documents useful for litigation (although they are often used to this effect), but rather reflect the more general ambition of rendering EU legislation and decision-making more transparent.[19] They consist of both primary and secondary Union law provisions. First, Article 15(3) of the Treaty on the Functioning of the European Union (hereinafter "TFEU") and Articles 42 and 52 of the Charter of the Fundamental Rights of the EU provide in essence that 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 documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to certain limitations in order to protect other freedoms. Second, Regulation 1049/2001 on public access to European Parliament, Council and Commission documents was adopted in order to flesh out the general rule contained in Article 255 of the Treaty establishing the European Community (hereinafter 'TEC') (now Art. 15(3) TFEU). In 2008, the Commission submitted a legislative proposal to recast the Regulation.[20] The proposed amendment which would grant a role to field-specific procedural rules as regards the application of the Regulation will be extensively discussed below.[21]

In many cases, parties concerned request documents in order to be better placed to represent their interests in a procedure conducted by an institution or in order to rely on those documents when challenging the final act. In any event, requesting access to documents under Regulation 1049/2001 is a procedure entirely dissociated from the main administrative procedure conducted by the institution, even if the party concerned

18 T-228/02 *Organisation des Modjahedines du peuple d'Iran v. Council* [2006] ECR II-4665, para. 137.

19 Recitals 2-3 of Regulation 1049/2001. *See also,* C-64/05, *Sweden v. Commission* [2007] ECR I-11389, paras 54-55.

20 COM(2008) 229 final. It must be noted that negotiations on the Commission proposal have been shelved since 2009 by reason of diverging concepts of review supported by various groups of member states. For a brief description of the current situation, *see* P. Leino, 'Just a little sunshine in the rain: The 2010 case law of the European Court of Justice on access to documents', 48 *CML Rev*, 2011, pp. 1215-1252.

21 Other aspects of the Commission proposal are largely covered by Leino 2011 and I. Harden 'The revision of Regulation 1049/2001 on public access to documents', *European Public Law*, 2, 2009, pp. 239-256.

participates in it. Therefore, the decision refusing access on the basis of Regulation 1049/2001 is a separate reviewable act under Article 267 TFEU.

16.3.1 Basic Principles of Regulation 1049/2001

The regulation provides that any document held by an institution[22] – whether drawn up by the institution or received by and in its possession – is public, unless at least one of the exceptions set out in Article 4 of that regulation applies.[23]

Importantly, Article 6(1) of Regulation 1049/2001 provides that a person requesting access is not required to justify his request and therefore does not have to demonstrate any interest in disclosure. A regrettable consequence of that rule is that different kinds of justification which do not qualify as a 'public interest' (*see* Section 16.3.2.3) may not be taken into account when deciding on the extent of the access granted. This implies that a request of documents for journalistic purposes[24] is theoretically treated in the same way as a request with a view to obtaining documents necessary for litigation, accompanied by the applicant's undertaking to handle the documents confidentially.[25] It was only in two – rather specific and isolated – cases where considerations based on the particular interest of the applicant were still let in 'through the backdoor'. In *Verein für Konsumenteninformation v. Commission*, the Commission refused access by referring to the unbearable workload caused by the examination of the requested documents constituting an extremely voluminous cartel file. The General Court annulled the Commission decision to a large extent on the ground that the Commission did not explore affordable ways of granting access to at least some documents from its case file which could have increased the applicant's chances of obtaining damages from cartel members before a national court.[26] The other case where the Court of Justice hinted at the relevance of the particular interest of the applicant in obtaining institution documents is *Bavarian Lager v. Commission*,[27] examined below in Section 16.3.2.1.

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22 Art. 1(a) of Regulation 1049/2001 provides that under the term 'institution' only the European Parliament, the Commission and the Council are to be understood. However, due to the entry into force of the Lisbon Treaty, and Art. 15(3) TFEU supplanting Art. 255 TEC, the Commission proposed (COM(2011) 137 final) to define the term "institution" as covering also all bodies, offices and agencies of the European Union, including the European External Action Service. Moreover, according to the proposal, the regulation will also apply to documents of the Court of Justice, the European Central Bank and the European Investment Bank as far as they concern the administrative tasks of these institutions.

23 For an overview of the system set up by Regulation 1049/2001, *see* B. Driessen, 'Public access to EU institution documents: An introduction', 3 *Global Trade and Customs Journal*, 2008, pp. 329-335 and D. Adamski, "How wide is 'the widest possible'? Judicial interpretation of the exceptions to the right of access to official documents revisited", 46 *CML Rev*, 2009, pp. 521-549.

24 *See e.g.*, Case T-36/04, *Association de la presse internationale (API) v. Commission* [2007] ECR II-3201.

25 Case T-2/03, *Verein für Konsumenteninformation v. Commission* [2005] ECR II-1121.

26 *Ibid*., paras 114, 126 and 129.

27 Case C-28/08 P *Bavarian Lager v. Commission* [2010] not yet published.

16.3.2 Legality of the Refusal to Grant Access

Regulation 1049/2001 foresees two types of obstacles to disclosure. First, Article 4(1) sets out the mandatory exceptions to the rule that all institution documents are public. In these cases, the institutions are required to refuse access if disclosure would undermine the interests protected by that provision. Second, Article 4(2) and (3) contains a set of discretionary exceptions,[28] that is to say, exceptions which prevent access only where there is no overriding public interest justifying disclosure. The three main grounds for total or partial refusals, accounting for more than two thirds of negative decisions, are discretionary exceptions, concerning the protection: (1) of the purpose of inspections, investigations, audits; (2) of the institutions' decision-making process; and (3) of commercial interests of third parties.[29]

The Courts have established a set of general rules which the institutions need to comply with when refusing access to requested documents on the basis of the exceptions set out in Article 4 of Regulation 1049/2001. It is settled case law that in view of the objectives pursued by Regulation 1049/2001, in particular the aim of guaranteeing the widest possible access to institution documents, the exceptions laid down in Article 4 of that regulation must be interpreted and applied strictly.[30]

The Courts have also drawn up the basic requirements for what is considered to constitute sufficient reasoning in the decision refusing access. First, it must be apparent from the decision that the institution in question assessed whether the requested documents came within the scope of the exception concerned. Secondly, the institution has to show that the disclosure might specifically and actually undermine the interest protected by that exception. The risk of the protected interest being harmed must be reasonably foreseeable and not purely hypothetical. Thirdly, the institution is also required to examine whether the need for protection applies to the requested documents in their entirety.[31] Consequently, the institution has to carry out a concrete, individual examination of each document, also because only such an examination can enable the institution to assess the possibility of granting the applicant partial access.[32]

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28 *See* J. Heliskoski & P. Leino, 'Darkness at the break of noon: the case law on regulation No. 1049/2001 on access to documents', 43 *CML Rev*, 2006, pp. 735-781 at p. 765.

29 COM(2010)351 final, Report from the Commission on the application in 2009 of Regulation (EC) No. 1049/2001.

30 Joined Cases C-39/05 P and C-52/05 P*, Sweden and Turco v. Council* [2008] ECR I-4723, para. 36; Joined cases T-391/03 and T-70/04, *Franchet and Byk v. Commission* [2006] ECR II-2023, para. 84.

31 Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v. Council* [2008] ECR I-4723, para. 49; Case T-380/04 *Terezakis v. Commission* [2008] not published in the ECR, para. 88.

32 Joined Cases T-391/03 and T-70/04*, Franchet and Byk v. Commission* [2006] ECR II-2023, paras 115-117.

16.3.2.1 Mandatory Exceptions

Under Article 4(1) of Regulation 1049/2001 institutions are obliged to refuse disclosure if it would undermine the protection of:

(a) the public interest as regards:
- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the [Union] or a member state;

(b) privacy and the integrity of the individual, in particular in accordance with [EU] legislation regarding the protection of personal data.

The Courts examined the exceptions based on public security and international relations in the leading *Sison v. Council* case, that is, in the context of fund-freezing measures adopted with a view to combating terrorism.[33] They rejected the applicant's argument based on the rights of the defence, that is, on the alleged right to be informed in detail of the accusations made against him which formed the basis of the fund-freezing measure. According to the Courts, such a right to be informed could not be exercised by having recourse to the mechanisms for public access to documents implemented by Regulation 1049/2001. They held that no public interest could be balanced against a public interest defended by a mandatory exception, let alone the applicant's particular interest in being informed of the accusations against him.[34]

The exception concerning the privacy and the integrity of the individual protects fundamental rights recognized in Article 8 of the European Convention on Human Rights and Articles 7 and 8 of the Charter of Fundamental Rights of the EU. In *Bavarian Lager v. Commission*,[35] the Court of Justice also ruled that Regulation 1049/2001 must be interpreted in accordance with Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the institutions,[36] reflecting the equilibrium between the two regulations that the EU legislature intended to establish.[37] An intriguing consequence of this ruling is the application of Article 8(b) of Regulation 45/2001, which provides that the requesting party may only receive personal data if it establishes

33 Case T-110/03, T-150/03 and T-405/03, *Sison v. Council* [2005] ECR II-1429, paras 61-62, upheld by the Court of Justice in Case C-266/05 P *Sison v. Council* [2007] ECR I-1233, paras 82-83.

34 Case C-266/05 P *Sison v. Council* [2007] ECR I-1233, paras 46-48.

35 Case C-28/08 P *Bavarian Lager v. Commission* [2010] not yet published.

36 EP Regulation of 18 December 2000, 45/2001 [2001] OJ L8/1, on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

37 Case C-28/08 P *Bavarian Lager v. Commission* [2010] not yet published, para. 65.

the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. On this basis, the Court took into consideration that Bavarian Lager had not provided any express and legitimate justification in order to demonstrate the necessity for the requested personal data to be transferred. Therefore, it considered that the Commission had not been able to weigh up the various interests of the parties concerned and to verify whether there was any reason to assume that the data subjects' legitimate interests might be prejudiced.[38] This wording suggests that the Commission should have weighed up the 'various interests of the parties' if Bavarian Lager had shown its legitimate interest in obtaining the documents. It is unclear how this can be reconciled with the statement in *Sison v. Council* that no public or private interest could be balanced against a public interest defended by a mandatory exception. It also creates a major exception from the rule that the particular interest of the applicant in disclosure is irrelevant in the context of Regulation 1049/2001[39] (*see also,* section 3.2.3.). In any case, in *Umbach v. Commission*, the General Court held that the privacy and integrity of the individual was an imperative public interest against which no particular interest of the applicant (in the case at issue, his right to defend himself effectively before a national court) could be relied on.[40]

16.3.2.2 Discretionary Exceptions

By virtue of Article 4(2) of Regulation 1049/2001:

> 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.

Moreover, Article 4(3) protects the secrecy of the institutions' decision-making process:

> Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would

38 Case C-28/08 P *Bavarian Lager v. Commission* [2010] not yet published, para. 78.

39 Case T-391/03 and T-70/04 *Franchet and Byk v. Commission* [2006] ECR II-2023, paras 138-139; Case T-110/03, T-150/03 and T-405/03 *Sison v. Council* [2005] ECR II-1429, para. 50.

40 Case T-474/08, *Umbach v. Commission* [2010] not published in the ECR, paras 70-71.

> seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.
> Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

When applying the provisions relating to discretionary exceptions, the institutions not only need to consider the content of the requested documents, but also have to weigh up the public or private interest protected by these exceptions as well as the possible overriding public interest in disclosure.[41]

The exception based on the protection of commercial interests of a natural or legal person is in line with Article 337 TFEU, which provides that members and staff of the EU institutions and bodies shall not disclose information of the kind covered by the obligation of professional secrecy. This applies, in particular, to information about undertakings, their business relations or their costs. As confidential business information is typically gathered in competition law proceedings, secondary legislation concerning such proceedings provides detailed rules on professional secrecy.[42] However, as the General Court ruled in *Agrofert v. Commission*, the provisions governing competition law procedure cannot deprive Regulation 1049/2001 of its effective application. Agrofert, a competitor of two companies whose merger was authorised by the Commission, requested access to the merger file under Regulation 1049/2001. The Commission argued that it could not disclose any document, as it was obliged, under Article 17(1) of the Merger Regulation,[43] to use any information acquired via the merger procedure only for the purposes of the relevant request, investigation or hearing. The General Court dismissed that argument, and considered that the latter provision concerns the manner in which the Commission may use the information supplied and does not govern the access to documents guaranteed by Regulation 1049/2001.[44] The assessment as to the confidentiality of a piece of information requires that the individual legitimate interests opposing disclosure be weighed against the public interest in ensuring the most possible openness of the institutions' activity.[45] Therefore, the General Court held that the obligation of respecting professional secrecy

41 Case C-266/05 P, *Sison v. Council* [2007] ECR I-1233, para. 46.

42 Art. 17 of Council Regulation 139/2004 of 20 January 2004 [2004] OJ L24/1, on the control of concentrations between undertakings; Arts. 27 and 28 of Regulation 1/2003.

43 Regulation 139/2004.

44 Case T-111/07, *Agrofert v. Commission* [2010] not published in the ECR, para. 88.

45 Case T-111/07 *Agrofert v. Commission* [2010] not published in the ECR, para. 69; citing by analogy Case T-198/03, *Bank Austria Creditanstalt v. Commission* [2006] ECR II-1429, para. 71, and Case T-474/04, *Pergan Hilfsstoffe fürindustrielle Prozesse v. Commission* [2007] ECR II-4225, paras 63 to 66.

under competition rules could not justify a general and abstract refusal of access to documents, and did not dispense the Commission from its duty to carry out a concrete, individual assessment of each document requested under Regulation 1049/2001.[46] While the *Agrofert* Judgment contains to this day the clearest indication as regards the separation of the conditions of application of Regulation 1049/2001, on one hand, and of the field-specific rules governing the administrative procedure, on the other hand, it remains to be seen if this approach is confirmed by the Court of Justice on appeal.[47]

As regards the exceptions based on the protection of court proceedings, the General Court ruled in *Franchet and Byk v. Commission*, in line with its general approach that exceptions should be interpreted narrowly, that the protection of the public interest only precludes the disclosure of the content of documents drawn up "solely for the purposes of specific court proceedings". The latter concept covers pleadings or other documents lodged with the courts, internal documents concerning the investigation of the case before the court, and – as regards Commission documents – correspondence concerning the court case between the Directorate-General concerned and the Legal Service or an external legal counsel.[48] The purpose of this definition of the scope of the exception is to ensure both the protection of work done within the Commission as well as the confidentiality and safeguarding of professional privilege for lawyers.

As far as the exception regarding protection of legal advice is concerned, in *Sweden and Turco v. Council*, the Court of Justice drew a distinction between legal advice delivered in legislative and administrative matters. It considered that there was no general need for confidentiality in respect of advice (or opinion) from the Council's legal service relating to legislative matters. Even if the legal service's opinion was negative as regards a legislative proposal, refusal of access could not be justified by the fear that it could lead to doubts as to the lawfulness of the legislation adopted in spite of the legal service's opinion. On the contrary, according to the judgment, it is openness in this regard that confers greater legitimacy on the institutions in the eyes of European citizens.[49]

In the T-403/05 *MyTravel v. Commission* case,[50] the General Court was called on to examine if the exception relating to legal advice applied to notes of the Commission's legal service in which it expressed a negative opinion concerning draft texts prepared by DG Competition during the procedure leading up to the decision to block the Airtours/Fist Choice merger. The broader context of the request of documents was that the merger decision

46 Case T-111/07, *Agrofert v. Commission* [2010] not published in the ECR, para. 70.

47 Case C-477/10 P *Commission v. Agrofert*, pending.

48 Case T-92/98, *Interporc v. Commission (Interporc II)* [1999] ECR II-3521, paras 40-41; Case T-391/03 and T-70/04, *Franchet and Byk .v. Commission* [2006] ECR II-2023, paras 40-41.

49 Case C-39/05 and C-52/05 P, *Sweden and Turco v. Council* [2008] ECR I-4723, paras 57 and 59. *See also,* Harden, 2009, *supra* note 21, at p. 248.

50 Case T-403/05, *MyTravel v. Commission* [2008] ECR II-2027.

had been annulled in 2002 by the *Airtours v. Commission* judgment,[51] and MyTravel, formerly Airtours, submitted that it needed access to the said notes in order to rely on them in the T-212/03 *MyTravel v. Commission* case, in which it sought the reparation of the damages caused by the illegal merger decision.[52] In the T-403/05 access to documents case, the General Court considered that disclosure of the said notes had to be refused because it could have put the Commission in a difficult position insofar as its legal service might be required to defend a position before the EU Courts which differs from the one it had argued for internally. On appeal, the Court of Justice dismissed this argument stating that the request for access was brought after the annulment of the merger decision by the General Court at a time when no further action concerning the legality of that decision was possible.[53] As a consequence, it partially set aside the T-403/05 Judgment. It is noteworthy that the Court of Justice did not mention the T-212/03 damages case against the Commission pending at the time when the Commission adopted its decision refusing access (*see also*, below in Section 16.6.2). This may suggest that the exception protecting legal advice may be more relevant while the Commission is still defending the validity of its decision before the Courts than at a time when the illegality of the decision has already been established by the Courts and the applicant is seeking reparation of damages caused by the decision.

As regards the exception protecting the purpose of inspections, investigations and audits, the Court of Justice made clear in *Commission v. Technische Glaswerke Ilmenau* that this exception must be applied in line with the provisions governing the relevant procedure. In particular, it held that the fact that by virtue of Regulation 659/1999 governing the procedure for reviewing state aid parties concerned other than the member state concerned – including the aid recipient – do not have the right to consult the documents in the Commission's administrative file, there is a general presumption that disclosure of documents in the administrative file in principle undermines protection of the objectives of investigation activities. The existence of such a general presumption discharges the Commission from the duty of carrying out a concrete and individual examination in respect of each document requested and allows the treatment of documents by categories, since similar considerations are likely to apply to documents of the same nature. To attenuate the rigour of this ruling, the Court of Justice added that access must be granted to a given document if the party concerned demonstrates that it is not covered by that presumption, or that there is an overriding public interest justifying the disclosure.[54] The judgment clearly raises

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

52 Case T-212/03, *MyTravel v. Commission* [2008] ECR II-1967.

53 Case C-506/08 P, *Sweden v. Commission ('MyTravel')* [2011] not yet published, paras 113-117.

54 Case C-139/07 P, *Commission v. Technische Glaswerke Ilmenau* [2010] not yet published, paras 54, 61 and 62; applied also in Case T-494/08 to T-500/08 and T-509/08, *Ryanair v. Commission* [2011] not yet published, para. 70 *et seq*.

the question whether the General Court can keep on applying its *Agrofert* precedent – separating the conditions of access under Regulation 1049/2001 from those under field-specific rules governing the administrative procedure – in the future (the conflict between these judgments will be addressed in Section 16.6.1).

The last exception protects the decision-making process of the institutions. In line with the *Sweden and Turco v. Council* precedent concerning the exception protecting legal advice,[55] the Courts have drawn a distinction between requests concerning documents used in legislative proposals and those which are part of an administrative file also in the context of the application of the exception protecting the decision-making process. In the context of legislative documents, it was repeated in *Access Info Europe v. Council* that the interest of the public in obtaining more ample access to such documents was justified by the principle of transparency, which seeks to ensure greater participation of citizens in the decision-making process and to guarantee that the administration enjoys greater legitimacy.[56] On the other hand, it was emphasised by the Court of Justice in *Commission v. Technische Glaswerke Ilmenau* and by the General Court in *MyTravel v. Commission* that such interests do not carry the same weight in the case of documents drawn up in administrative procedures concerning the control of concentrations or competition law in general[57] and those governing the procedure for reviewing state aid.[58] The latter rulings gave rise to considerable worries as they were regarded as all but eliminating transparency in administrative matters.[59] However, in the recent *Sweden v. Commission (Mytravel)* Judgment, which partially set aside the General Court's judgment in *MyTravel v. Commission*, the Court of Justice made clear that institutions are not allowed to reduce transparency excessively by simply referring to the different extent of access to documents belonging to administrative and legislative files. It stressed that the mere fact that the requested documents concern an administrative procedure does not alleviate the obligation of the institution concerned to provide sufficiently detailed and specific reasons for justifying the refusal. Moreover, it highlighted the importance of whether the request of documents is made before or after the termination of the administrative procedure, by referring to the different extent of access allowed under the first and the second subparagraphs of Article 4(3) of Regulation 1049/2001. Then it went on to examine the "opinions for internal use as part of deliberations and preliminary consultations within the institution concerned", which, by virtue of the second subparagraph of Article 4(3), are protected even after the closure of the procedure. It held that the reasons

55 Case C-39/05 and C-52/05 P, *Sweden and Turco v. Council* [2008] ECR I-4723, paras 57 and 59.

56 Case T-233/09, *Access Info Europe v. Council* [2011] not yet published, paras 56 and 57.

57 Case T-403/05, *MyTravel v. Commission* [2008] ECR II-2027, para. 49.

58 *See* by analogy, Case C-139/07 P, *Commission v. Technische Glaswerke Ilmenau* [2010] not yet published, para. 60.

59 *See e.g.,* Leino 2011, pp. 1218, 1247, 1251; G. Muguet-Poulennec, 'Vers la fin de la transparence dans les procédures administratives?', *Revue Lamy de la Concurrence* 25, 2010, pp. 51-55.

capable of justifying refusal of access to such documents before the closure of the procedure might not be sufficient after the adoption of the decision, and that the General Court should have required the Commission to indicate why access to a report containing opinions of internal use was still refused after the closure of the procedure.[60]

16.3.2.3 Overriding Public Interest

As already mentioned, discretionary exceptions only justify refusal of access if there is no overriding public interest in disclosure. The question has arisen whether the interest in obtaining documents for use in court proceedings could be qualified as an overriding public interest.

In *Franchet and Byk v. Commission*, the applicants sought access to OLAF documents, sent to national courts, which were liable to result in criminal proceedings. The General Court did recognize that the applicants had an interest in obtaining a copy of the said documents, but promptly pointed out that this qualified as a particular interest, whereas under Regulation 1049/2001 only a public interest could be relevant. Nor could the applicants rely on the concept of the right to a fair hearing. The General Court held that although the protection of that right was in itself a general interest, the right was manifested in that particular case by the applicants' individual interest in defending themselves, which was private in nature. In these circumstances, the right to a fair hearing could not be considered as a public interest overriding the need to protect court proceedings and the purpose of inspections, investigations and audits.[61] This solution was again adopted by the General Court in a wider context in *Umbach v. Commission*. In that case the applicant argued that he needed Commission documents in proceedings before a national court opposing him to the Commission which claimed the reimbursement of a certain sum allotted to the applicant within the framework of the TACIS programme. The General Court considered that the applicant could not rely on his rights of defence, insofar as his particular interest in defending himself effectively before the national court did not qualify as a public interest overriding any of the interests protected by the discretionary exceptions.[62]

These judgments clearly show that Regulation 1049/2001, in its present form, is not particularly suitable for those litigants who seek access to institution documents for the purposes of national or EU court proceedings. The individual interest in obtaining the documents – the utility of the information for the applicant – is, however, one of the most important criteria considered by the EU Courts when deciding whether to order the production of the documents in proceedings before them (*see,* section 4) and might also be taken into account by the national courts (*see,* section 5).

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60 Case C-506/08 P, *Sweden v. Commission* [2001] not yet published, paras 78 *et seq.*

61 Case T-391/03 and T-70/04, *Franchet and Byk v. Commission* [2006] ECR II-2023, paras 138-139; *see also,* Case T-110/03, T-150/03 and T-405/03, *Sison v. Council* [2005] ECR II-1429, para. 50.

62 Case T-474/08, *Umbach v. Commission* [2010] not published in the ECR, paras 55-59.

16.4 Obtaining Documents in the Procedure before the EU Courts

Aside from the possibility of requesting documents in the administrative procedure from the institution concerned or the possibility of doing so under Regulation 1049/2001 on public access to institution documents, parties concerned may also obtain access to documents needed for litigation before the EU Courts through the latter.

16.4.1 Procedure

Article 24 of the Statute of the Court of Justice provides that the Courts may require the parties to produce all documents and to supply all information which the Court considers desirable. Such a request can also be made to member states and institutions, bodies, offices and agencies which are not parties to the case. The Rules of Procedure of the General Court explicitly foresee the possibility for the parties to ask the Court to invite the other party (or an institution, other EU body or a member state) to produce certain documents or information.[63] Although no comparable provision exists in the Rules of Procedure of the Court of Justice – possibly because the cases which require the facts to be established are in principle heard by the General Court – there is nothing which would prevent the parties from making such a proposal in the procedure before the Court of Justice.

The Courts have two possibilities to obtain documents. First, they may issue an invitation to submit relevant documents within the framework of the measures of organization of procedure (General Court)[64] or as a preparatory measure (Court of Justice).[65] Such an invitation is not required to be made by an order; it is notified to the addressee by a letter from the Registrar. Secondly, the Courts may also request the production of documents by formal order as a measure of inquiry.[66]

As a general rule, it is the applicant that seeks to obtain certain documents, in particular, in proceedings brought before the General Court against Commission or Council acts, where the verification of the set of facts as established by the institutions is crucial. The party may ask – either in its written pleadings or in a separate document – the General Court to invite or order the other party to produce certain documents. For reasons of procedural economy, the General Court normally tries first to obtain the document by way of an invitation addressed to the other party. Article 64(4) of the Rules of Procedure of the General Court provides that before the adoption of such a measure of organization of procedure, the other parties shall be heard before the measure is prescribed. However,

63 GCEU RoP Art. 64(3)(d) and (4).
64 GCEU RoP Art. 64(3)(d).
65 CJEU RoP Art. 54a.
66 CJEU RoP Art. 45(2)(b); GCEU RoP 65(b).

in practice, the General Court invites the other party right away to submit the requested documents, without asking for its prior opinion. If the other party considers that the requested documents cannot be communicated to the requesting party, it may oppose the invitation and set out the reasons justifying non-disclosure. Partial access granted by the defendant institution or the production of a non-confidential version of the requested document is often satisfactory for the applicant. This procedure also applies *mutatis mutandis* to proceedings before the Court of Justice.

If the other party opposes the Courts' invitation, and the requesting party has filed or confirmed its application for production of documents in a separate pleading, the application will be treated as a preliminary issue,[67] and the Courts are required to adopt a formal decision on it. These decisions may be 1) an order obliging the other party to produce the requested documents, which is a measure of inquiry, having a binding nature as opposed to the invitation within the framework of the measures of organization of procedure.[68] The Courts may also 2) reject the request by way of an order.[69] It is also possible that the Courts can only decide after the hearing if those documents are indeed relevant to the outcome of the case. In such a case the Courts 3) reserve their decision on the request.[70] If consultation of the documents turns out to be necessary, the Courts may not close the oral procedure at the end of the hearing, adjourn the hearing[71] or even reopen the oral procedure[72] and 3a) order the production of the documents. If, on the contrary, the Courts consider that the documents are not necessary for the outcome of the case, they may 3b) reject the request relating to the production of documents in the final judgment.[73]

16.4.2 The Courts' Criteria Applied in the Context of Deciding on the Request

In order to obtain documents in proceedings before the Courts, the requesting party must identify the desired documents and provide the Courts with at least minimum information indicating the utility of those documents for the purposes of the proceedings, in order to enable the Courts to determine whether ordering the production of certain documents is appropriate.[74] The mere fact that the applicant had directly requested the defendant to give access to the desired documents in the administrative procedure or upon the adoption of

67 CJEU RoP Art. 91; GCEU RoP Art. 114(1) *see* "other preliminary plea not going to the substance of the case".
68 *E.g.*, order of 21 September 1999, Case C-204/97, *Portugal v. Commission*, not reported.
69 Order of 18 November 1997, Case T-367/94, *British Coal v. Commission* [1997] ECR II-2103.
70 CJEU RoP Art. 91(4); GCEU RoP Art. 114(4).
71 Order of 18 April 1989, 213/87, *VIA v. Commission*, not reported.
72 Order of 11 June 2010, T-113/07, *Toshiba v. Commission*, not reported.
73 GECU T-411/06, *Sogelma v. EAR* [2008] ECR II-2771, paras 152-158.
74 Case C-185/95, P *Baustahlgewebe v. Commission* [1998] ECR I-8417, para. 93; *see also* Case T-411/06, *Sogelma v. EAR* [2008] ECR II-2771, para. 152.

the contested act, and that its request was refused, is not in itself capable of demonstrating the utility of those documents for the purposes of the proceedings.[75] An application for access to documents under Regulation 1049/2001 prior to instituting the Court proceedings is also immaterial when assessing the utility of the documents.[76] The party asking for production of documents has to show that they are relevant to the subject matter of the case.[77] In *Zenab v. Commission*, the General Court essentially based its decision to reject the request in relation to the complete text of several documents on the ground that the content of those documents went largely beyond the subject matter of the case and, therefore, the refusal to give access could not be an obstacle to the exercise of the rights of the defence.[78] *Sogelma v. EAR* is another judgment which shows that a well-targeted request pinpointing relevant parts of a limited number of documents may bring more results than a broadly formulated one. The General Court rejected the applicant's request for the production of all the documents relating to the award procedure conducted by the European Agency for Reconstruction (hereinafter 'EAR'), in which it participated without success. The General Court ruled that the examination by the EU judicature of the complete internal file of an EU body with a view to verifying whether that body's decision had been influenced by factors other than those indicated in the statement of the reasons was an exceptional measure of inquiry. Such a measure presupposes the presence of serious doubts as to the real reasons and in particular, to suspicions that those reasons were extraneous to the objectives of EU law and hence amounted to a misuse of powers.[79]

The most frequent reason relied on by the institutions opposing the production of documents is that they contain confidential information, typically business secrets of other undertakings, whose disclosure to the applicant could harm the interests of third parties. The General Court often faces situations where it transpires that certain documents would indeed be important for the applicant for the proper exercise of its rights of defence – or simply for the purposes of resolving the case – but, at the same time, the defendant institution puts forward valid arguments suggesting that granting the applicant access to these documents would be detrimental to third parties. The General Court cannot, however, order the production of the documents and retain them for its own use, as Article 67(3) of the Rules of Procedure provides that it shall take into consideration only those documents which have been made available to the parties and on which they have been given an opportunity to express their views (bar the situation described above in Section 16.3.4 where the subject matter of the case before the General Court is the legality of a decision refusing access to documents). Therefore, in such situations, as a first step,

75 Case T-411/06, *Sogelma v. EAR* [2008] ECR II-2771, para. 154.
76 Case T-33/06, *Zenab v. Commission* [2009] not published in the ECR, para. 40.
77 Case T-367/94, *British Coal v. Commission* [1997] ECR II-2103, para. 24.
78 Case T-33/06, *Zenab v. Commission* [2009] not published in the ECR, para. 38.
79 Case T-411/06, *Sogelma v. EAR* [2008] ECR II-2771, para. 157.

the General Court orders the production of the requested documents in order to verify their confidential nature, without, however, communicating them to the other parties.[80] It might conclude that those documents are unrelated to the subject matter of the litigation. In such a case the Court does not add them to the file and rejects the request for access. If the documents are relevant, the Court weighs up the public or private interest in keeping the documents confidential and the need to accord the applicant a sufficient measure of procedural justice. To that effect, the Court may also oblige the defendant to substantiate its claim regarding the confidentiality of each individual document.[81]

A particularly intricate situation arose in the *People's Mojahedin Organization of Iran v. Council* case where the Council objected to the General Court's order to produce information essential for the judicial review of its decision to maintain the effect of fund-freezing measures as regards the applicant. The Council argued that the document containing the text in issue had been drawn up by the French authorities and therefore it was bound by the latter's request for confidentiality, so that it could not provide the information to the General Court even on a confidential basis. The General Court ruled that without that information it was unable to review the lawfulness of the contested decision, so that it had to be annulled.[82] France appealed against the General Court's judgment[83] and argued that the very reason why it decided not to waive the confidentiality of the information at issue even as regards the General Court – whereas it communicated it to other members states and the Council – was that by virtue of Article 67(3) of the Rules of Procedure of that Court the latter shall take into consideration only those documents which have been made available to the parties and on which they can express their views. France apparently feared that once the Council submitted the information to the General Court, it would only depend on that Court's appraisal of the indispensable nature of the information for the review of the legality whether it takes it into account, in which case it also has to disclose it to the applicant. Account taken of all these factors, the Advocate General suggested that the Rules of Procedure of the General Court be amended to allow for a special handling of closed evidence which is not to be communicated to the other party ('closed evidence').[84]

While it remains for the Court of Justice to give guidance as regards the possibility and the necessity of amending the General Court's Rules of Procedure, it is interesting to examine what solutions the latter has developed for similar situations under the existing procedural rules. Cartel cases present some similarity, as documents gathered by the Commission

80 GCEU RoP Art. 67(3).

81 Order of 26 September 2008, Case T-284/08, *People's Mojahedin Organization of Iran v. Council*, not reported, based on Case C-402/05 P and C-415/05 P *Kadi and Al Barakaat v. Council* [2008] ECR I-6351, para. 344 and ECoHR *Chahal v. United Kingdom* [1996] RJD 1996-V, para. 131.

82 Case T-284/08, *People's Mojahedin Organization of Iran v. Council* [2008] ECR II-3487, paras 58 and 76.

83 Case C-27/09 P, *France v. People's Mojahedin Organization of Iran*, pending.

84 Opinion of AG Sharpston of 14 July 2011 in Case C-27/09 P, *France v. People's Mojahedin Organization of Iran*, paras 186 *et seq.*

within the framework of its leniency programme often constitute important evidence against the applicant, whereas their disclosure in Court proceedings could endanger the interests of third parties that have supplied those documents voluntarily,[85] and, ultimately, the efficiency of the Commission's entire leniency policy. It is well understood that the Commission does not submit such documents unless it is reassured that – even if those documents are indispensable for solving the case – they will not be communicated to the applicant. Therefore, the General Court may specify in its order obliging the Commission to submit such documents that they will not be communicated to the applicant and that the applicant's lawyers may not make a copy of them. 'Making available' these documents to the applicant therefore only means that his lawyers may consult them at the Registry[86] and take manual notes. Another solution was devised in *Impala,* where the General Court allowed the Commission to submit certain confidential information by communicating it solely to the applicant's lawyers, to the exclusion of the applicant itself.[87]

It is nonetheless questionable if such solutions can also be applied in cases involving the review of legality of fund-freezing measures. The need to grant the applicant a sufficient level of procedural justice is weighed not against the interest of keeping business secrets confidential or the Commission's leniency programme work but against interests relating to national security or even to the physical safety of individuals who have supplied evidence. Therefore it is unclear whether the Council (or the member states which have supplied the information) would consider it a sufficient guarantee that the information is only communicated to the applicant's counsel, who would commit not to disclose it even to his own client. It is nonetheless imaginable that in certain future cases, such a handling of closed evidence would make it possible to grant access to more confidential information, which may just make it possible to reach the 'sufficient' level of procedural justice, that is, allow the General Court to carry out its review in observance of the rights of the defence and the right to a fair trial.

In any event, when the review of legality requires that even the most sensitive sort of information be relied on by the EU Courts, security must probably be further increased. The Opinion of the Advocate General in *France v. People's Mojahedin Organization of Iran* mentions the system featuring 'special advocates' entitled to deal with secret evidence which has been put in place in the United Kingdom.[88] Resorting to such a solution probably does not require amendment of the General Court's Rules of Procedure, as disclosure

85 As such documents could be used as evidence in proceedings for damages before third country jurisdictions or contain important business secrets.

86 Order of 11 June 2010, Case T-113/07*, Toshiba v. Commission*, not reported; order of 30 March 2011, Case T-103/08*, Polimeri Europa and Eni v. Commission*, not reported.

87 Case T-464/04*, Impala v. Commission* [2006] ECR II-2289, paras 18-19.

88 Opinion of AG Sharpston in Case C-27/09 P, *France v. People's Mojahedin Organization of Iran*, para. 244; *See also,* Report on the operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006 by D. Anderson, July 2001, at p. 31 and 39.

limited to the counsel is already current practice. However, if that Court is expected to found its judgments on evidence which has not been made available even to the applicant's lawyers, amending the Rules of Procedure would appear to be inevitable.

16.5 Obtaining Institution Documents Through National Courts

Institution documents can also prove to be vital in proceedings before national courts. Examples include actions for damages initiated by consumers against cartel members, where the published non-confidential version of the Commission decision might not provide sufficient evidence for such actions,[89] or litigation between an institution and a private party before a national court.[90]

It is therefore of great importance to ensure that national judges can request institution documents for the purposes of hearing the legal dispute before them – also with a view to supplying those documents to litigants who need such evidence for arguing their case. The first step was made in *Zwartfeld*, where a national court conducting proceedings on the infringement of EU rules sought production of information by the Commission concerning the existence of the facts constituting those infringements. The Court of Justice recalled that the principle of sincere cooperation (now Art. 4(3) of the TEU) imposes mutual duties on the member states and the EU institutions in carrying out tasks flowing from the Treaties. It then inferred from this that every institution has to give its active assistance to such national legal proceedings, by producing documents to the national court.[91]

In *Umbach*,[92] the applicant was opposed to the Commission in proceedings before a national court. The Commission claimed the reimbursement of a certain sum allotted to the applicant within the framework of the TACIS programme. The applicant applied for access to Commission documents under Regulation 1049/2001 and also by relying on Article 6 of the European Convention of Human Rights (hereinafter 'ECHR').[93] He argued that the requested documents were necessary for arguing his case before the national court, where he was the defendant. The Commission refused to grant access under Regulation 1049/2001 without mentioning the ECHR. The General Court only examined – and upheld – the refusal under Regulation 1049/2001 by considering that the silence of the

89 *See* the references to national court proceedings in Case T-2/03, *Verein für Konsumenteninformation v. Commission* [2005] ECR II-1121.

90 *See* the references to national court proceedings in T-474/08, *Umbach v. Commission* [2010] not published in the ECR.

91 Order of 13 July 1990, Case C-2/88 IMM, *Zwartfeld and Others* [1990] ECR I-3365, paras 17 and 22.

92 Case T-474/08, *Umbach v. Commission* [2010] not published in the ECR.

93 Art. 6 of the ECHR provides: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Commission on the other ground put forward by the applicant cannot be considered as an implicit refusal. It ruled, however, in an *obiter dictum* that by virtue of the principle of sincere cooperation, the national court could request the Commission to produce all documents which it deems necessary for deciding the case before it. If the Commission refused to grant the request without any objective reasons, the national court could ask the Court of Justice to deliver a preliminary ruling on the lawfulness of the refusal, as it is competent for ensuring compliance with the principle of sincere cooperation.[94]

However, several aspects still remain unclear after the *Umbach* Judgment was handed down: under what rules can a private party obtain access to the documents submitted by the institution to the national court? Does it have any means of challenging a decision of the national judge not to request the institution document or not to communicate it to that party? Apart from national procedural codes, Article 41 of the Charter of the Fundamental Rights of the EU might be relevant in this respect. It provides that every person must be granted access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrets. It is also possible to rely on the rights of the defence and the right to a fair trial before the national court, by referring to the principle that the court should weigh up the public or private interest in keeping the documents confidential and the need to accord the applicant a sufficient measure of procedural justice, as the General Court held in *People's Mojahedin Organization of Iran v. Council*.[95]

Another interesting question is whether the recent judgment in *Pfleiderer*[96] could have a bearing on the rules relating to the disclosure of documents held by the institutions when access is requested by a litigant before a national court. In the main proceedings, the Bundeskartellamt (the German competition authority) refused access, requested by the applicant, to documents it obtained within the framework of its leniency programme. The national court referred a question for a preliminary ruling to the Court of Justice as to whether it could order the Bundeskartellamt to grant Pfleiderer access to the file without undermining the effective enforcement of EU competition law and the proper functioning of the European Competition Network. The Court of Justice ruled that EU competition law provisions did not preclude a claimant for damages from being granted access to documents relating to a leniency procedure, and it was for the national courts, on the basis of their national law, to determine the conditions under which such access had to be permitted or refused by weighing the interests protected by EU law.

As regards the consequences for the Commission – worried about the efficiency of its leniency programme if self-incriminating evidence voluntarily submitted by cartel members could be disclosed to claimants for damages before national courts – it must

94 Case T-474/08, *Umbach v. Commission* [2010] not published in the ECR, paras 44-46.

95 *See* case law cited at *supra* note 81.

96 Case C-360/09, *Pfleiderer* [2011] not yet published.

be pointed out that, unlike national competition authorities, it cannot be ordered by a national court to grant access to its documents. A national court may only request the Commission to provide documents by virtue of the principle of sincere cooperation and then, if transmitted, possibly furnish them to the litigant or make them available at least to the latter's lawyers. If the Commission does not accede to the request, the national court may refer, as was held in *Umbach*, a question for a preliminary ruling to the Court of Justice as to the lawfulness of the refusal. Therefore, in such a case, it would not be the national court weighing up the opposing interests as regards disclosure but the Court of Justice.

It is, however, still an outstanding question how the Commission could prevent national competition authorities from being ordered to disclose sensitive information previously obtained from the Commission. If the *Pfeiderer* Judgment applied to such a situation, the Commission might become wary of transmitting such kind of information to national competition authorities, which may in turn jeopardize the effective functioning of the European Competition Network. It is arguable that the principle of sincere cooperation prevents national courts from ordering the national competition authorities to produce documents previously obtained from the Commission if the latter objects to the disclosure (or, *a fortiori,* if the Commission was not even given an occasion to express its views). The same logic could also apply to cases where the damage claimant asks the national court to order the defendant cartel member to communicate the self-incriminating evidence it submitted within the framework of the Commission's leniency programme.[97] If the national court is convinced that the documents are indeed vital for solving the case or for allowing the applicant to substantiate its argumentation, it could first ask the Commission to state its position on disclosure. If the Commission objects to disclosure, and the national court is not convinced by its arguments, the latter could refer a question for preliminary ruling as to the lawfulness of the objection. In the long run, however, it seems to be important that either the Court of Justice or the Commission – by means of legislation regarding damages claims in cartel cases[98] – gives more specific guidance, possibly by identifying categories of documents the production of which can be ordered by national courts and by establishing principles governing the national courts' appraisal.

97 Such a situation arose in a before a UK court where National Grid, the damage claimant, asked the court to order the production, by participants of the switchgear cartel, of sensitive documents they had submitted voluntarily to the Commission, *see* <www.mlex.com/EU/Content.aspx?ID=150833>.

98 The Commission has made the first step in this respect. The White Paper on damages actions for breach of the EC antitrust rules (COM(2008) 165 final) addresses the issue and sets out a few principles, such as the appraisal of the plausibility of the claim and of the proportionality of the disclosure request, *see* section 2.2.

16.6 Requests for Documents under Different Regimes May Bring Different Results

As was shown in Section 16.2, the main subjects of the procedure (that is, the person against whom the procedure is conducted) often obtain sufficient access to the documents on which the institution intends to base its act already in the administrative procedure. This is rarely the case, however, for the other parties concerned, which have limited or no access to documents under field-specific procedural rules and which, as opposed to the main parties, may not rely on the rights of the defence.[99]

16.6.1 Comparing the Extent of Access in the Administrative Procedure and Under Regulation 1049/2001

The fact that the main subject of the administrative procedure has more chance of obtaining the necessary documents under field-specific procedural rules or by virtue of the protection of the rights of the defence is well illustrated, in the specific context of fund-freezing measures, by *Kadi and Al Barakaat v. Council*[100] and *Sison v. Council,*[101] where no evidence was communicated to the applicants even after the adoption of the measure in question. Mr. Kadi and the Al Barakaat International Foundation successfully invoked the breach of the right to be heard and, as a consequence, the contested measure was annulled and the Council was given, in essence, a three- month deadline to remedy the breach of that right by communicating to the applicants the evidence underlying the application of the measure in their respect. In contrast, in *Sison v. Council*, the Court of Justice held that the right to be informed – even for the purposes of arguing a case before the Courts – was immaterial in the context of the application of Regulation 1049/2001.

As to the extent of the right of third parties (that is, parties which were not the main parties in the administrative procedure) to obtain documents in the administrative procedure and under Regulation 1049/2001, *Agrofert* suggests that the two regimes are largely independent of each other. Therefore, the applicant may receive documents following its request under that regulation, at least after the adoption of the institution's act in question, which it could not otherwise obtain during the administrative procedure under the relevant procedural rules. The General Court ruled that the Commission could not validly argue that – in view of the fact that under Article 17(1) of the Merger Regulation the Commission has to use any information acquired under the merger procedure only for the purposes of the relevant request, investigation or hearing – it had to reject the request

99 Case T-494/08 to T-500/08 and T-509/08, *Ryanair v. Commission* [2011] not yet published, para. 81.
100 Case C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council* [2008] ECR I-6351.
101 Case C-266/05 P, *Sison v. Council* [2007] ECR I-1233, paras 46-48.

for documents by a competitor of the merging parties on the basis of the exceptions relating to the protection of commercial interests and that of the purpose of investigations. According to that judgment, the Commission is not allowed to refuse access by referring to general reasons applying to categories of documents, but has to carry out a concrete and individual examination of each requested document in application of the provisions of Regulation 1049/2001. The General Court also added that the exception relating to the protection of the purpose of investigations only applies if disclosure of the documents in question may endanger the completion of the investigation at issue. However, that could not be the case as far as Agrofert's request was concerned, given that the Commission's decision refusing access was adopted two years after the completion of the merger procedure.[102] The status of the applicant in the administrative procedure (and the extent of his right to access the file under the relevant procedural rules) was also found irrelevant from the point of view of the extent of public access under Regulation 1049/2001 in *Éditions Odile Jacob v. Commission.*[103]

On the other hand, the regime of access to documents applicable to a particular procedure and the one under Regulation 1049/2001 were linked in *Commission v. Technische Glaswerke Ilmenau* and *Ryanair v. Commission.* In both cases, access to documents under the Regulation had been requested by the recipient of the purported aid before the adoption of the final decision on the legality of the state measure. The Courts ruled that when interpreting the exception relating to the protection of the purpose of inspections, investigations and audits, account had to be taken of the fact that under Regulation 659/1999,[104] parties other than the member state concerned do not have the right to consult the documents in the Commission's administrative file. Therefore, the Courts acknowledged the existence of a general presumption that disclosure of documents in the administrative file in principle undermines protection of the objectives of investigation activities. The presumption implies that the institution is not obliged to carry out a concrete and individual examination of each document requested, while the applicant still maintains the right to demonstrate that an individual document is not covered by the presumption or that an overriding public interest in disclosure exists.[105]

One possible way of reconciling *Agrofert* and *Éditions Odile Jacob*, on the one hand, and *Technische Glaswerke Ilmenau* and *Ryanair*, on the other, is to select the completion of the administrative procedure as the criterion for deciding if the field-specific rules governing access in the administrative procedure should have a bearing on the application of Regulation

102 Case T-111/07, *Agrofert v. Commission* [2010] not published in the ECR, paras 77, 97-99, *see also, Franchet and Byk v. Commission,* para. 109.

103 Case T-237/05, *Éditions Odile Jacob v. Commission* [2010] not published in the ECR, para. 86.

104 *See in particular,* Art. 6(2) of Regulation 659/1999.

105 Case C-139/07 P, *Commission v. Technische Glaswerke Ilmenau* [2010] not yet published, paras 54, 61 and 62; Case T-494/08 to T-500/08 and T-509/08, *Ryanair v. Commission* [2011] not yet published, para. 70 *et seq.*

1049/2001. It is noteworthy that in the first two judgments, the request for access was made after the closure of the administrative procedure, whereas in *Technische Glaswerke Ilmenau* and *Ryanair* the request for access was made when the procedure for reviewing state aid was still ongoing. However, it must be pointed out that the Courts made no reference to this criterion in *Technische Glaswerke Ilmenau* and *Ryanair*. Although in the recent *Sweden v. Commission (MyTravel)* Judgment the Court took into account the fact that the request for access was made after the completion of the administrative procedure, it did so in the context of Article 4(3) of Regulation 1049/2001 (protecting the institutions' decision-making process), which, unlike the exception protecting the purpose of inspections, investigations and audits, differentiates between the periods preceding and following the adoption of the final act.[106] Also, MyTravel (formerly Airtours) was one of the merging parties which could obtain access to documents under the relevant procedural rules and by virtue of the principle of respect for the rights of the defence. It thus had a substantially different position in the Commission procedure than Agrofert, Editions Odile Jacob, Technische Glaswerke Ilmenau and Ryanair, which were all third parties whose access to Commission documents was not foreseen by the relevant procedural rules. Therefore it is questionable if *Sweden v. Commission (MyTravel)* may provide any guidance as to whether the extent of access under Regulation 1049/2001 should be brought in line with the extent of the access available under the relevant procedural rules in the event where the request for documents is mad after the completion of the administrative procedure. On the other hand, the upcoming judgment in the pending *Agrofert* and *Éditions Odile Jacob* appeal cases[107] will most probably clarify the question whether the presumption established in *Technische Glaswerke Ilmenau* applies even to requests made after the closure of the administrative procedure.

The Commission's proposal for recasting Regulation 1049/2001[108] appears in relation to third parties, which are not entitled to obtain documents in the administrative procedure, to be even more restrictive than the solution adopted in *Commission v. Technische Glaswerke Ilmenau* and subsequently in *Ryanair v. Commission*. According to the proposed amendment, access to documents relating to the exercise of the investigative powers of an institution, having an individual scope, should be excluded until the relevant decision can no longer be challenged by an action for annulment or the investigation is closed. During this investigation phase, only the specific rules in this field would remain applicable.[109]

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106 Case C-506/08 P, *Sweden v. Commission ('MyTravel')* [2011] not yet published, paras 78 *et seq*.

107 Case C-477/10 P, *Commission v. Agrofert,* pending; Case C-404/10 P, *Commission v. Éditions Odile Jacob*, pending.

108 COM(2008) 229 final, proposed new Art. 2(6).

109 As field-specific rules, the Commission proposal mentions "Articles 27, 28 and 30 of Regulation 1/2003 (competition) Articles 6(7) and 14(2) of Regulation(EC) No. 384/96 (antidumping), Articles 11(7) and 24(2) of Regulation (EC) No. 2026/97 (anti-subsidy), Article 6(2) of Regulation (EC) No. 3285/94 (safeguards) and Article 5(2) of Regulation (EC) No519/94 (safeguards against non-WTO members)".

Therefore, not only a presumption on the applicability of the exception concerning the protection of the purpose of inspections and investigations would exist (as held in the said two judgments), allowing the applicant to demonstrate that the presumption is not applicable, but documents forming part of such administrative file could not be disclosed under any circumstances to interested third parties, that is, those parties which are not the main subject of the proceedings. This also implies that the approach taken in *Agrofert v. Commission* would no longer apply, that is to say interested third parties would not have access to such documents after the completion of the administrative procedure, until the deadline for an action for annulment lapses or the Court procedure ends. This would leave in a difficult situation those third parties which are unable to obtain access to documents in the administrative file either under field-specific rules or by virtue of the protection of the rights of the defence (such as, for instance, recipients of state aid or competitors of merging parties whose merger was cleared), not least because access would become impossible under Regulation 1049/2001, as well. Such an amendment would mean that their only possibility of receiving documents in the administrative file would be to ask the General Court to invite or order the institution to submit such documents, meaning that the applicants would not be able to rely on these materials when drafting their application.

16.6.2 Public Access under Regulation 1049/2001 and Access to Documents before EU and National Courts

Documents considered useful for challenging an institution act may be requested by parties concerned under Regulation 1049/2001 before the start of the proceedings before the EU Courts[110] or after the filing of the application.[111] The administrative procedure before the institution concerning the request for public access under Regulation 1049/2001 is entirely dissociated from the Court proceedings concerning the review of the contested act or the action for damages arising from an allegedly illegal institution act. Likewise, if the institution refuses to grant access under Regulation 1049/2001 and the applicant decides to challenge that refusal before the General Court, this action will constitute an action distinct from the main Court proceedings for annulment or damages. Parallel requests for documents under Regulation 1049/2001 and under the Rules of Procedure of the Courts[112] in the main case are possible; a request for access to documents under Regulation 1049/2001 has no bearing on a request to obtain the documents via a measure of organization of procedure adopted by the Courts.

110 Case T-391/03, and T-70/04, *Franchet and Byk v. Commission* [2006] ECR II-2023.
111 Case T-237/05, *Éditions Odile Jacob v. Commission* [2010] not published in the ECR.
112 CJEU RoP Art. 45(2)(b) and 54a; GCEU RoP 64(3)(d) and 65(b).

Such parallel requests were made in the *Éditions Odile Jacob v. Commission* cases, where in Case *T-279/04* the applicant sought annulment of the Commission decision declaring the Lagardère/Natexis/VUP merger compatible with the common market,[113] and in *T-452/04,* Odile Jacob challenged the Commission decision concerning the implementation of Lagardère's commitments.[114] In January 2005, the applicant requested public access under Regulation 1049/2001 to Commission documents which it considered important for its arguments in the pending merger cases (the main cases). The Commission refused access in April 2005 inter alia on the basis of the exceptions protecting the purpose of inspections, investigations and audits. It also considered that the applicant cold not rely on any overriding public interest, as its interest in obtaining documents needed for arguing its cases before the General Court was private in nature.[115] This decision was challenged in the ancillary case T-237/05. Interestingly, some of the documents whose disclosure had been refused by the Commission under Regulation 1049/2001 were voluntarily submitted by it in the main Court cases, some on its own initiative and others in reply to the applicant's request submitted to the General Court, asking it to invite the Commission to produce the same documents as a measure of organization of procedure. The Commission considered that the applicant had to be granted broader access in the Court proceedings than under Regulation 1049/2001, given that communication of a document under the Regulation is equivalent to publication, whereas the document submitted to the Courts and transmitted to the applicant can only be used for the purposes of the Court proceedings.[116] On the other hand, the judgment in the ancillary case delivered on 9 June 2010 in which the General Court annulled the Commission decision refusing access to documents under Regulation 1049/2001 was not helpful for the applicant's case. Although the latter requested the General Court to stay the proceedings in the main cases until it received the documents from the Commission, the General Court did not accede to that request and delivered its judgments on the main cases on 13 September 2010, considering that it could decide the main cases on the basis of the written and oral pleadings of the parties, and ruled partially in favour of the applicant.

Another example of parallel requests can be found in the *MyTravel v. Commission* cases. In the main T-212/03 case, the applicant sought compensation for the damages[117] it incurred by reason of the Commission decision blocking the Airtours/Fist Choice merger, which was found illegal and was annulled by the General Court in 2002 (*see*, also section 3.2.2.).[118] In the ancillary T-403/05 case,[119] the applicant sought annulment of the Commission decision

113 Case T-279/04, *Éditions Odile Jacob v. Commission* [2010] not yet published.
114 Case T-452/04, *Éditions Odile Jacob v. Commission* [2010] not yet published.
115 Case T-237/05, *Éditions Odile Jacob v. Commission* [2010] not published in the ECR, paras 8-14.
116 *Ibid.*, paras 16-17.
117 Case T-212/03, *MyTravel v. Commission* [2008] ECR II-1967.
118 Case T-342/99, *Airtours v. Commission* [2002] ECR II-2585.
119 Case T-403/05, *MyTravel v. Commission* [2008] ECR II-2027.

refusing access to the documents it had asked for under Regulation 1049/2001 in order to rely on those documents in the main case. The applicant also tried a parallel avenue of obtaining the same documents by proposing to the General Court in the main case to invite the Commission to submit them as a measure of organization of procedure. The General Court did order the Commission to produce certain documents in the main case,[120] whereas it only annulled the Commission decision adopted under Regulation 1049/2001 in respect of one document. However, the annulment was not helpful for the applicant in the main case, because the two judgments were delivered on the same day.[121]

It is arguable, account taken of the applicable rules and of *Odile Jacob v. Commission* and *MyTravel v. Commission* discussed above, that the applicant has a far better chance of obtaining access to documents by way of asking for access in the Court proceedings. Under Regulation 1049/2001, the interest of the party in obtaining access with a view to arguing its case before the Courts cannot be taken into account by the institution as an overriding public interest. In contrast, when deciding on a proposal of inviting or ordering the institution to submit documents, the Courts take into account the relevance of the documents to the case and their utility for the party filing the proposal. Moreover, where it transpires that the party indeed needs those documents for arguing its case, the Courts weigh up the public or private interest in keeping the documents confidential and the need to accord the applicant a sufficient measure of procedural justice.[122] Although requesting the documents from the institution under Regulation 1049/2001 may still prove useful in some situations, existing precedents discussed above show that challenging a decision which refused public access before the General Court could not be helpful for the applicants in the main cases. In fact, even where the decision refusing public access was annulled, that judgment was handed down too late to allow the applicants to use the documents in the main procedure. Besides, as was pointed out in Section 16.3.4 above, the mere fact that the General Court annuls the decision refusing access does not automatically mean that access will be granted in the next decision. At any rate, it is hard to conceive how an applicant could obtain broader access under Regulation 1049/2001 than the access available in the Court proceedings, since it is only in the latter case that its particular procedural interest can be taken into account.

Another situation is where the applicant needs institution documents for a case before a national court where it may also be the defendant.[123] Again, the principle applies that its

120 Case T-212/03, *MyTravel v. Commission* [2008] ECR II-1967, paras 129 *et seq.*

121 Interestingly, MyTravel did not appeal against the General Court's judgment rejecting its application for damages, whereas it appealed with success against the access to documents judgment in T-403/05 (set aside by the Court of Justice on appeal in the C-506/08 P). It remains to be seen if the applicant obtains more documents after the latter judgment and – if yes – whether it requests a revision under Art. 44 of the Statute of the Court of Justice.

122 *See*, case law cited at *supra* note 81.

123 Case T-391/03 and T-70/04, *Franchet and Byk v. Commission* [2006] ECR II-2023; T-2/03 *Verein für Konsumenteninformation v. Commission* [2005] ECR II-1121.

interest in obtaining the documents for arguing its case before the national court is irrelevant under Regulation 1049/2001.[124] This also holds true where criminal charges are brought against the applicant on the basis of institution documents.[125] As was explained in *Umbach*, by virtue of the principle of sincere cooperation, the national court could request the institution to produce all documents which it deems necessary for the purposes of deciding the case. However, it is still unclear how the litigant could receive these documents from the national court. In particular, national courts may well have a tendency not to disclose institution documents to the parties if the institution itself has refused access under Regulation 1049/2001. In *Franchet* and *Byk*, a French criminal court refused to give the applicant access to documents it received from the Commission. It even requested the General Court not to order their submission in the action for damages pending before the latter, as a measure of inquiry.[126]

16.7 Conclusion

The above analysis shows that parties which are the main subjects of the administrative procedure are well placed to obtain all necessary documents for challenging the final act before the EU Courts. In fact, they are usually entitled to obtain all the important information underlying the contested decision already at the stage of the administrative procedure – either by virtue of field-specific rules or on the basis of the protection of the rights of the defence. In the case of fund-freezing measures, such communication takes place concomitantly with or as swiftly as possible after the adoption of the act. It is reasonable to believe that institutions have a strong incentive to disclose the relevant documents, since the act may be annulled if a failure to comply with the relevant rules is found by the Courts – even if, as was the case in *Kadi and Al Barakaat*, the institution was obliged to communicate the relevant evidence only after the adoption of the act.

Other parties, however, may face serious difficulties when seeking to obtain institution documents, even if they need those documents to bring a case against the institution. For instance, recipients of state aid and competitors of merging parties are not entitled to have access to documents under the relevant procedural rules. In addition, it follows from *Commission v. Technische Glaswerke Ilmenau* that in such a case obtaining access under Regulation 1049/2001 is also problematic, insofar as it is presumed that the exception protecting the purpose of investigations applies. Rebutting this presumption might prove very difficult without knowing the actual content of the document in question. The upcoming *Agrofert* and *Éditions Odile Jacob* Judgments on appeal will most probably clarify whether the presumption only applies to ongoing administrative procedures. However, the Commission's

124 Case T-110/03, T-150/03 and T-405/03, *Sison v. Council* [2005] ECR II-1429, para. 50; Case T-474/08, *Umbach v. Commission* [2010] not published in the ECR.

125 Case T-391/03 and T-70/04, *Franchet and Byk v. Commission* [2006] ECR II-2023, paras 138-139.

126 Order of 6 June 2007, T-391/03 and T-70/04 *Franchet and Byk v. Commission*, not published in the ECR.

legislative proposal for a recast Regulation 1049/2001 even seeks to eliminate the possibility of obtaining access by rebutting the presumption, notwithstanding the termination of the procedure, insofar as the recast Regulation would prohibit disclosure of documents relating to investigative procedures until the end of the Court review procedure or of the deadline open to initiate it. If adopted,[127] the Commission's proposal would mean that third parties not entitled to obtain access under field-specific rules could not receive documents before bringing an action before the General Court, since the only avenue remaining open to them would be access under the Rules of Procedure of the General Court. This would mean that pleas in law and arguments based on such documents could not be put forward at the stage of the application, but at the earliest at the stage of the applicant's reply to the defence.

Although there is case law applied by the General Court which requires the weighing up of the interest in keeping documents confidential, on the one hand, and the need to accord the applicant a sufficient measure of procedural justice, on the other, it still remains unclear how national courts will react to the stricter rules introduced by *Commission v. Technische Glaswerke Ilmenau* and possibly by the amendment of Regulation 1049/2001. There is a risk that national courts would interpret *Technische Glaswerke Ilmenau* as generally levelling out the extent of the access under various regimes and would consider that if the party does not have the right to obtain documents under field-specific rules and/or the institution has refused access under Regulation 1049/2001, the national courts are not entitled to communicate the documents to the other party in the proceedings before them either. It is regrettable that the outcome in the *Umbach* case did not provide further clarification in this respect and the General Court only touched upon the issue of the possibility of requesting documents via national courts.

Another interesting question is whether Regulation 1049/2001 could be amended so as to allow the institutions to take into account the fact that the applicant needs certain documents to argue his case before EU or national courts and that he would pledge to keep them confidential.[128] The applicant's interest in obtaining the documents would appear to have been considered – in very specific contexts – in *Verein für Konsumenteninformation* and in *Bavarian Lager.* However, the leading case law has stated that the interest in obtaining documents for the purposes of court proceedings is under no circumstances an 'overriding public interest' justifying disclosure (*see,* section 3.2.3.). Also, as the Commission rightly

127 The future of this amendment is however uncertain. The European Parliament proposed to delete it in its first reading report (T6-0114/2009) while some member states in the Council supported it, and even proposed to enlarge its scope to materials belonging to infringement procedures.

128 Such a proposal was discussed during the legislative process leading up to the adoption of Regulation 1049/2001. The seventh amendment proposed in the Opinion given by the Committee on Petitions of the European Parliament sought the insertion of a paragraph in Art. 1 of the Commission's Proposal to specify that '[a] petitioner, a complainant, and any other person, natural or legal, whose right, interest or obligation in a matter is concerned (a party) shall also have the right of access to a document which is not accessible to the public, but may influence the consideration of his/her case, as described in this Regulation and in implementing provisions adopted by the institutions'.

pointed out in *Éditions Odile Jacob*, the public nature of access, equivalent to publication, under Regulation 1049/2001 implies that it must be more limited than access in the context of court proceedings. It is arguable that amending Regulation 1049/2001 in order to take on board such considerations – at least for documents pertaining to those administrative procedures which have already been closed – would level out, to a large extent, the scope of access under Regulation 1049/2001 and under the Rules of Procedure of the General Court and simplify the work of all actors involved. The institution would not need to give detailed justification why public access is impossible for documents that it would anyway furnish in the court proceedings – as the Commission did in *Éditions Odile Jacob v Commission*. The applicants would – if they file the request under the Regulation soon after the adoption of the act – obtain all or most documents that they can possibly access in the court proceedings, and would thus be able to rely on them already while drafting the application. Such a solution would also be useful from the point of view of procedural economy, as the General Court would probably receive fewer cases where decisions adopted under Regulation 1049/2001 are challenged, insofar as applicants may often be satisfied with the documents they could receive from the institution upon pledging confidential treatment and indicating that those materials are necessary for court proceedings. Moreover, the General Court's procedure would as a result be shorter in some cases, as no measure of organization of procedure or of inquiry would need to be adopted. Last but not least, in cases where the documents are requested for the purposes of national court proceedings, the institution concerned could directly identify the documents whose disclosure is justified by respect for the applicant's procedural rights before the national court and it could take into account the confidential treatment – as opposed to the current situation where the institution has to examine whether or not the conditions for public access (equivalent to publication) are present. In addition, this would clearly result in a more transparent situation for national judges and litigants and would avoid confusion stemming from the different criteria to be applied under Regulation 1049/2001 and under national rules governing court procedure. Alternatively, an indication in the preamble of the recast Regulation 1049/2001 could send the message to the interested parties that the provisions regulating public access are not the only and arguably not the most suitable avenue for persons seeking access to documents in order to rely on them in court proceedings. If the current concept of public access which excludes taking into account the pledge of confidential treatment and the procedural rights of the applicant remains unchanged, persons seeking access to documents would have far more chance of obtaining them in the court proceedings. In that case, attention could be drawn to the relevant provisions of the Rules of Procedure of the General Court and to the possibility of requesting institution documents in proceedings before national courts – by way of emphasizing that the conditions of such access are independent of the application of Regulation 1049/2001.