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Press and Information

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Judgment of the Court of First Instance in Case T-36/04

Association de la presse internationale a.s.b.l. v Commission of the European Communities

THE COURT OF FIRST INSTANCE CLARIFIES THE RULES RELATING TO ACCESS TO DOCUMENTS OF THE INSTITUTIONS CONCERNING CASES PENDING BEFORE THE COMMUNITY COURTS

Under the Community regulation on public access to documents¹, any citizen of the Union, and any natural or legal person residing in a Member State has a right of access to documents of the institutions. The regulation provides for exceptions to that general principle, in particular where disclosure of a document would undermine the protection of court proceedings or the purpose of investigations, unless there is an overriding public interest in disclosure.

On 1 August 2003, the Association de la presse internationale (API), an organisation of foreign journalists based in Belgium, applied to the Commission for access to all the written submissions made by the Commission to the Court of First Instance or the Court of Justice of the European Communities in a number of cases².

The Commission granted access to its observations in Cases C-224/01 and C-280/00, which concerned references for a preliminary ruling. In contrast, by decision of 20 November 2003, the Commission refused access to the pleadings relating to the direct actions.

In its decision, the Commission explained that disclosure of the documents in Cases T-209/01, T-210/01 and C-203/03 would adversely affect the pending court proceedings, harming inter alia its position as a party and the serenity of the debate. As regards access to the documents in Case T-342/99, the Commission stated that, even though that case was closed, it had been followed by an action for damages (Case T-212/03) and that disclosure of its pleadings would adversely affect those proceedings, which were still pending. Regarding the ‘Open Skies’ cases, the Commission explained that, even though those cases had been closed by judgments of the Court of Justice finding that the Member States concerned had failed to fulfil their obligations, those Member States had not yet complied with the judgments, so negotiations were still in progress to

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

² Case T-209/01 *Honeywell International v Commission*, Case T-210/01 *General Electric v Commission*, Case T-212/03 *MyTravel v Commission*, Case T-342/99 *Airtours v Commission*, Case C-203/03 *Commission v Austria*, Case C-466/98 and the other ‘Open Skies’ cases, Case C-224/01 *Köbler* and Case C-280/00 *Altmark Trans*.

ensure that they put an end to the infringement found. For that reason, disclosure of the pleadings would undermine the protection of the purpose of the investigations concerning those infringements.

API has asked the Court of First Instance to annul that decision.

Cases T-209/01 Honeywell, T-210/01 General Electric and C-203/03 Commission v Austria

The Court points out that the Commission is required to carry out a concrete examination of the content of each document to which access is requested. The Court finds that the Commission did not carry out such an examination, but merely drew a distinction based on the nature of the proceedings and the stage reached in those proceedings, maintaining that in references for a preliminary ruling access may be granted if the hearing has already taken place, whereas in direct actions access must be refused until delivery of the final judgment and, in the case of connected pending cases, until the connected case has been closed. By following that approach, the Commission therefore took the view that all the pleadings in the cases to which it is a party and which are pending are automatically and as a whole to be regarded as covered by the exception.

The Court points out that it is possible not to carry out an examination of the content of the documents requested only if it is clear that the exception invoked applies to all the information contained in those documents. The Court recognises, in that respect, that parties have the right to defend their interests free from all external influences and that the guarantee of an exchange of information and opinion free from all external influences may require, in the interests of the proper course of justice, that public access to pleadings of the institutions be refused so long as their content has not been debated before the court. The Court therefore concludes that, when the court proceedings relate to a case in which the hearing has not yet taken place, the Commission may refuse to disclose its pleadings without carrying out a concrete examination of their content.

On the other hand, after the hearing has been held, the Commission is under an obligation to carry out a concrete assessment of each document requested in order to ascertain, having regard to the content of that document, whether it may be disclosed or whether its disclosure would undermine the court proceedings to which it relates.

In that context, the Court holds that the Commission did not err in law by not carrying out a concrete assessment of the pleadings relating to Cases T-209/01, T-210/01 and C-203/03, since the hearings in those cases had not been held at the time of the decision.

As regards the possibility that an overriding public interest might justify disclosure, notwithstanding the adverse effect on the court proceedings, the Court states that it is for the institution concerned to strike a balance – in the light, where appropriate, of the arguments put forward by the party requesting access – between the public interest in disclosure and the interest served by refusal to disclose. The Court goes on to state that the overriding public interest must, as a rule, be distinct from the general principles of transparency which underlie the regulation but that the invocation of those same principles may, in the light of the particular circumstances of the case, be so pressing that it overrides the need to protect the documents in question. The Court notes that that is not case here, given that the public's right to information on pending cases is guaranteed by the fact that information on each action is published in the *Official Journal* as soon as it is brought and a Report for the Hearing is made public on the day of the hearing, during which the parties' arguments are debated in public.

The Court therefore holds that the refusal of access to the documents in Cases T-209/01, T-210/01 and C-203/03 was justified.

Case T-342/99 Airtours

The Court notes that the Commission justified the refusal of access to its pleadings relating to Case T-342/99 on the basis that certain arguments put forward in that case would be used and discussed in order to defend its position in the action for damages brought by the same party (T-212/03). The Court holds that such a justification is clearly not capable of establishing that the refusal of access to those pleadings was covered by the exception relating to the protection of court proceedings.

In that regard, the Court states that those pleadings concern a case which has been closed by a judgment of the Court of First Instance and that their content was made public in the Report for the Hearing, debated at a hearing and reproduced in the judgment, which means that the arguments concerned are already in the public domain. Furthermore, the nature of the risk of an adverse effect on the proceedings which are still pending in no way emerges from the mere fact that arguments already submitted before the court in a closed case are likely also to be debated in a similar case. The purported need to protect arguments which will be used in proceedings which are still pending cannot therefore constitute a reason for refusing access to pleadings relating to a case which has already been closed by a judgment of the Court of First Instance.

It follows that the Commission committed an error of assessment by refusing access to the pleadings relating to Case T-342/99 and that the decision refusing access must be annulled.

The 'Open Skies' cases

The Court points out that the possibility of an amicable settlement of the dispute between the Commission and the Member State justifies, in accordance with the exception relating to the protection of the purpose of investigations, refusal of access to documents drawn up in connection with infringement proceedings and that that requirement of confidentiality continues during the proceedings before the Court of Justice. In so far as they refer necessarily to the results of the investigation carried out in order to prove the existence of the contested infringement, pleadings submitted in connection with infringement proceedings may be covered by that exception.

The Court notes that, in the present case, on the date of the adoption of the decision, the Court of Justice had already delivered – approximately one year earlier – the judgments finding the infringements alleged by the Commission against the Member States concerned. It cannot therefore be disputed that, on that date, the investigations to prove the existence of the infringements in question had been completed and had led to the confirmation of those infringements by the Court of Justice.

The Court finds that refusal of access cannot be justified by the fact that the Member States concerned have not yet complied with those judgments, with the result that proceedings before the Commission are still pending, and that it cannot not be ruled out that the matter may be brought before the Court of Justice again. If access to documents were to be refused until the follow-up action to be taken has been decided, even where a fresh investigation leading potentially to the bringing of a second action is necessary, access to those documents would be made dependent on uncertain and future events, which depend on the speed and diligence of the various authorities concerned. Such an approach would be contrary to the objective of guaranteeing the widest possible public access to documents emanating from the institutions.

The Court holds therefore that the Commission committed an error of assessment by refusing to grant access to its pleadings in the *Open Skies* cases. The decision is therefore annulled in that respect.

REMINDER: An appeal, limited to points of law only, may be brought before the Court of Justice of the European Communities against a decision of the Court of First Instance, within two months of its notification.

Unofficial document for media use, not binding on the Court of First Instance.

Languages available: FR, BG, CS, DA, DE, EL, EN, ES, HU, IT, NL, PL, PT, RO, SK, SL

The full text of the judgment may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-36/04>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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Pictures of the delivery of the judgment are available on EbS "Europe by Satellite", a service provided by the European Commission, Directorate-General Press and Communications,

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