European Ombudsman

Decision of the European Ombudsman closing his inquiry into complaint 1972/2009/ANA against the European Commission

Decision
Case 1972/2009/ANA - **Opened on** 07/09/2009 - **Recommendation on** 24/01/2012 - **Decision on** 11/12/2012

The TBT Directive requires Member States to communicate draft technical regulations to the European Commission. The complainant is a Greek internet services company that complained about the Commission's refusal to give access to a revised draft technical regulation on recreational games which Greece communicated to it. The European Ombudsman carried out an inquiry into the complainant's allegations that the Commission infringed the procedural and substantive rules of Regulation 1049/2001 on public access to documents and the claim that the Commission should grant access to the requested document.

As regards the procedural allegation, the Ombudsman made a draft recommendation that the Commission should acknowledge the unjustifiable delay that occurred in the handling of the complainant's confirmatory application and provide an undertaking that such delays will not occur in future. The Commission accepted the Ombudsman's draft recommendation.

Regarding the substantive allegation and the related claim, the Commission defended its refusal to give access on the ground that it had to protect the dialogue it had entered into with the Greek authorities in order to bring into conformity with EU law the Greek legislation on recreational games, which the Court of Justice had found to infringe that law.

In his preliminary assessment, the Ombudsman found that, because the case at hand concerned closed infringement proceedings, the Commission's reliance on the relevant exception in Regulation 1049/2001 in the context of the notification procedure under the TBT Directive was not convincing. The Ombudsman proposed, as a friendly solution, that the Commission could consider granting access to the revised draft technical regulation.

The Commission subsequently granted access to the document and thus settled the complainant's claim, but disagreed with the Ombudsman's reasoning. The Ombudsman therefore made a draft recommendation that, in principle, the Commission should give public access to revised draft technical regulations communicated under the TBT Directive, unless a MemberState expressly asks for confidentiality and supports such a request with reasons that would be capable of rebutting the presumption of accessibility.

The Commission did not accept the Ombudsman's draft recommendation. Considering, however, that the Commission published both the original draft technical regulation communicated by Greece and the latest draft, the Ombudsman found that the Commission's conduct does not constitute a general practice. He therefore closed the case with a critical remark.

The background to the complaint

1. The present complaint concerns a request for access to documents held by the European Commission. The background to the complaint may be summarised as follows. Greek law No 3037/2002 (hereinafter, 'the Greek recreational games legislation'), which applied at the time the complaint was lodged, imposed an absolute prohibition on the installation and operation of all electrical, electromechanical and electronic games, including technical recreational games and all computer games, on all public or private premises apart from casinos). By its judgment of 26 October 2006 [1] , the Court of Justice declared that the Greek recreational games legislation infringed certain Treaty provisions and Article 8(1) of Directive 98/34 (hereinafter, 'the TBT Directive') [2] . By judgment of 4 June 2009, the Court of Justice declared that Greece had failed to comply with its earlier judgment and imposed a lump sum payment and a periodic penalty payment on the country [3] .

2. The complainant is an IT and Internet services company, registered in Greece, and is represented in the present inquiry by a solicitor. On 8 April 2009, the complainant sent an e-mail to the Commission asking to be informed whether, as was widely reported by the Greek media, Greece had, in accordance with the TBT Directive, communicated to the Commission a new draft technical regulation amending its recreational games legislation [4] . If this were the case, the complainant requested access to the document.

3. In its reply of 29 April 2009, the Commission confirmed that Greece had indeed communicated a new draft technical regulation to it. The Commission gave itself a 15-day deadline within which to consult the Greek authorities before deciding on the request for access to the document.

4. By e-mail of 13 May 2009, the Commission refused access to the document on the basis of Article 4(2), third indent of Regulation 1049/2001, which allows the institutions to refuse access if " *disclosure would undermine the protection of: ... the purpose of inspections, investigations and audits* " [5] . In support of this argument, the Commission drew a parallel between the Commission's role under the TBT Directive and its role under Article 226 of the EC Treaty, now Article 258 of the Treaty on the Functioning of the European Union (TFEU). The Commission argued in this regard that when a Member State communicates a draft technical regulation to it, the Commission, acting within the framework of the TBT Directive, embarks on a dialogue with that Member State with the objective of ensuring compliance with Union law. In the interest of a spirit of good cooperation and mutual trust, this dialogue is best kept outside the public sphere.

The Commission advanced that, by analogy with the Court of Justice's case-law on access to documents in infringement proceedings, " *access to reasoned opinions submitted in accordance with the Directive 98/34* " may also be denied. As long as the dialogue with Greece continued, the document would not be made accessible because its disclosure would negatively affect the objective of preventive control which the Commission pursues under the TBT Directive. The Commission advised the complainant of the possibility to make a confirmatory application.

5. On 15 May 2009, the complainant made a confirmatory application in which it argued that it did not ask for the " *reasoned opinions* " submitted by the Commission or any other Member State under Article 9(2) of the TBT Directive but for the draft technical regulation itself. Accordingly, its request could not fall within the scope of Article 4(2), third indent of Regulation 1049/2001. It further argued that the draft communicated by Greece did not constitute a follow-up to the reasoned opinion and comments made by the Commission on the earlier draft regulation on the same topic [6] . Rather, it constituted a new notification to the Commission of a new piece of technical legislation.

6. In any event, the complainant contested the application of the exception laid down in Article 4(2), third indent of Regulation 1049/2001 also on the ground that that exception only applies to documents which were drafted during an investigation and not those which were available before [7] .

7. The complainant argued that should the Commission's refusal fall within the scope of Article 4(2), third indent of Regulation 1049/2001, there was an overriding public interest in disclosure which was premised on two sets of principles: the principle of non-discrimination, on the one hand, and the principles of effectiveness of the procedure enshrined in the TBT Directive and of transparency, on the other. In the complainant's view, the principle of non-discrimination would be infringed if the Commission singled out the draft regulation in question and prevented public access to it, contrary to its established practice regarding all other technical regulations communicated to it. The principles of effectiveness and transparency would be infringed if economic operators whom Union law aimed to engage in this procedure were excluded from it.

8. Finally, the complainant considered that the overriding public interest found additional support in the financial impact the Greek recreational games legislation had on the sector. The complainant emphasised that the Greek recreational games legislation was maintained in force despite the persistent infringement of Union law recognised by the Court of Justice.

9. On 1 July 2009, the Commission informed the complainant that it was handling its confirmatory application, but that it had not yet been able to carry out a complete analysis of all elements of the request and could not take a final decision. Consequently, the Commission stated that it would not be able to reply within the deadline of 2 July 2009. The Commission invoked Article 8(2) of Regulation 1049/2001 and extended the time limit to 24 July 2009.

10. On 28 July 2009, the complainant sent a reminder to the Commission. In its reply of 30 July 2009, the Commission apologised for the fact that it had not been able to decide on the matter before the expiry of the deadline. It added that the assessment of the relevant request was

about to be completed and that the complainant would receive a reply shortly. The Commission further explained that the delay was due to the fact that it had carried out a very detailed analysis of the requested document. It added that the reduced number of Commission staff present during the summer holidays could also have caused some delay in the handling of confirmatory requests. Finally, the Commission pointed out that " *at this stage, it is not excluded that a consultation with the Greek authorities might be needed* ".

11. On 3 August 2009, the complainant submitted the present complaint to the European Ombudsman.

The subject matter of the inquiry

12. The Ombudsman opened an inquiry into the following allegations and claim:

Allegations:

(1) The Commission infringed the relevant procedural rules applicable under Regulation 1049/2001.

(2) The Commission infringed Article 4(2), third indent of Regulation 1049/2001.

Claim:

The Commission should grant the complainant access to the document requested.

The inquiry

13. On 7 September 2009, the Ombudsman sent a request for an opinion to the Commission, indicating that he would be grateful if the Commission could send its opinion by 30 November 2009.

14. Beginning on 27 November 2009, the Commission informed the Ombudsman of delays in the submission of its opinion on four occasions.

15. On 7 July 2010, the Commission sent its opinion which was forwarded to the complainant for observations. On 4 August 2010, the Ombudsman received the complainant's observations.

16. On 31 January 2011, the Ombudsman made a proposal for a friendly solution. On 4 May 2011, the Commission sent its reply which was forwarded to the complainant. The complainant sent its observations on the Commission's reply on 1 June 2011.

17. On 24 January 2012, the Ombudsman addressed draft recommendations to the Commission. On 18 July 2012, the Commission sent its detailed opinion on the Ombudsman's

draft recommendations. On 6 August 2012, the complainant submitted its observations on the Commission's opinion.

The Ombudsman's analysis and conclusions

Preliminary remarks

18. The complainant's first allegation, which focuses on the issue of delay in responding to the complainant's confirmatory application, will be analysed in detail below. However, an additional delay-related issue has arisen within the framework of the Ombudsman's inquiry. Specifically, the complainant argued that the Commission pursued delaying tactics in responding to the Ombudsman's request for an opinion.

19. In addressing this issue, the Ombudsman points out that, in his letter opening the present inquiry, he requested the Commission to submit an opinion on the complainant's allegations and claim by 30 November 2009. By letter dated 27 November 2009, the Commission informed the Ombudsman of the need for an extension of the deadline to 31 January 2010 on the ground that the matter required careful reflection and input from other services prior to starting inter-service consultation. By letter dated 27 January 2010, the Commission informed the Ombudsman that the opinion would be delayed for the same reasons until 31 March 2010. By letter dated 29 March 2010, the Commission informed the Ombudsman that it would be unable to meet the deadline of 31 March 2010 on the ground that the relevant Directorate-General was working on the draft reply, but that more time would be required. By letter dated 27 May 2010, the Commission informed the Ombudsman about a further extension of the deadline on the grounds that more time would be needed to cover all the horizontal issues that had to be discussed internally. The Commission submitted its opinion on 7 July 2010, that is, ten full months after the Ombudsman opened an inquiry into the complaint at hand.

20. It must be pointed out that, in accordance with established practice, the Commission is normally given three full months to provide an opinion on a complaint. When the subject matter of the complaint concerns public access to documents, as in the case here concerned, the relevant deadline is two months. Obviously, this practice encapsulates, on the one hand, the Ombudsman's objective to reach a speedy conclusion to his inquiry on the alleged maladministration while at the same time ensuring that the institution is given sufficient time to follow its internal procedures, examine the complaint thoroughly and give a useful opinion that will facilitate the Ombudsman's inquiry. The Ombudsman is aware that there can be cases in which an institution may require additional time before being able to provide its opinion. In such cases, however, the institution requesting an extension of the deadline must be in a position to provide valid reasons for its requests.

21. In the case at hand, the complainant argued that the Commission pursued delaying tactics. The complainant would thus appear to suggest that the Commission's delay in providing an opinion was intentional. The Ombudsman considers, however, that there is nothing to indicate

that this was the case here.

22. That having been said, as mentioned above, the present complaint deals with the issue of public access to documents. Public access to documents is governed by Regulation 1049/2001, which sets very short deadlines for the handling of relevant requests. The Ombudsman therefore considers that complaints concerning the way in which such requests have been handled should also be examined promptly. This requirement for promptness is evidenced by the period of two months granted to the Commission for providing an opinion in such cases.

23. In determining whether the subsequent extensions required by the Commission in the present case can be justified, the Ombudsman notes that the grounds put forward by the Commission concern internal procedures (inter-service consultations, work on the draft reply and horizontal issues) which are expected to be carried out within the standard two-month deadline [8] . In any event, these internal procedures could not, in the absence of exceptional circumstances, justify four extensions in one and the same case.

24. In light of this, the Ombudsman finds that the Commission's delay in providing an opinion in the present inquiry should be considered excessive and that the explanations the Commission put forward in this context are unconvincing. The Ombudsman trusts that the Commission will take the necessary measures to ensure that such delays will not occur again in future.

A. Alleged infringement of the relevant procedural rules applicable under Regulation 1049/2001

Arguments presented to the Ombudsman

25. In support of its allegation that the Commission infringed the relevant procedural rules applicable under Regulation 1049/2001, the complainant argued that, while it submitted a confirmatory application on 15 May 2009, it had still not received a reply from the Commission at the time the present complaint was lodged with the Ombudsman. The complainant argued that the reasons invoked by the Commission for the delay (" *very detailed analysis of the requested documents* " and " *reduced Commission staff during the summer holidays* ") failed to satisfy the strict requirements in Article 8(2) of Regulation 1049/2001. Moreover, although the complainant addressed the Commission in Greek, its replies from 1 July 2009 onwards were drafted in English.

26. In its opinion, the Commission stated that, in its letters of 1 July 2009 and 30 July 2009, it had explained the reasons for the delay in the handling of the complainant's application and apologised for the possible inconvenience this caused. The Commission considered that the reasons invoked were sufficiently detailed, as required by Article 8(2) of Regulation 1049/2001, to allow an applicant to ascertain whether they objectively justified the need to extend the time limit. As regards the language of communication, the Commission stated that it did not dispute the complainant's right to communicate in Greek and regretted the fact that the letters in

question were drafted in English. The Commission apologised for " *this administrative oversight* ".

27. In its observations, the complainant reiterated its argument that the Commission had failed to comply with the procedural requirements laid down in Regulation 1049/2001.

The Ombudsman's assessment leading to a draft recommendation

28. The present allegation is two-pronged: on the one hand, the complainant complains that the Commission unjustifiably delayed the handling of its confirmatory application, and on the other hand, the complainant is dissatisfied that the Commission replied in English to the correspondence which the complainant sent in Greek.

29. As regards the delay in the handling of the complainant's application, the complainant made its confirmatory application on 15 May 2009. By letter dated 1 July 2009, the Commission extended the time limit for its reply until 24 July 2009. The Commission provided its reply to the complainant's confirmatory application on 29 October 2009.

30. The Ombudsman drew attention to Article 8 of Regulation 1049/2001 which provides:

" *1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal...*

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given. "

31. As a first remark, it should be pointed out that, even if the exceptional conditions to which Article 8(2) refers are present, the Commission would be entitled to extend the time limit for its reply by no more than 15 working days. This is, in fact, what the Commission did by setting a deadline for itself of 24 July 2009. The Commission, however, only provided its reply on 29 October 2009, that is, more than five months after the submission of the complainant's confirmatory application and more than three months following the expiry of the Commission's self-imposed, extended deadline. In view of the extent of the Commission's delay, the Ombudsman did not consider it necessary to proceed to a detailed assessment of the compatibility of the grounds invoked by the Commission with Article 8 of Regulation 1049/2001. Suffice it to say that the Commission's explanations did not suggest, let alone establish, that the complainant's confirmatory application should be considered an " *exceptional case* " within the meaning of Article 8(2) of Regulation 1049/2001.

32. Given that the prompt handling of confirmatory applications constitutes the procedural means to achieve the objective " *to give the fullest possible effect to the right of public access to documents* " [9] , the Ombudsman took the view that, in the present case, the Commission clearly failed to act at the level of diligence expected from a Union institution, office, body or agency. This constituted maladministration. The Ombudsman noted that the Commission has apologised for the inconvenience caused by the delay. However, it did not apologise for its failure to comply with the relevant procedural rules set out in Regulation 1049/2001.

33. The Ombudsman therefore made a draft recommendation that the Commission should acknowledge the unjustifiable delay that occurred in its handling of the complainant's confirmatory application in the present case and provide an undertaking that it will take the necessary measures to ensure that such delays will not occur again in future.

34. As regards the Commission's reply in a language other than the one used by the complainant, the Ombudsman noted that Article 20(2) TFEU provides:

" *Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:*

[…]

(d) the right ... to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language. "

35. Moreover, Article 41(4) of the Charter of Fundamental Rights of the European Union provides:

" *Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.* "

36. The right to receive a reply in the same language as the one in which the citizen addresses the institutions is a constituent element of the right to good administration and a fundamental right recognised in two sources of primary Union law. The peremptory language of both Article 41(4) of the Charter (" *must have an answer* ") and Article 20(2)(d) TFEU (" *the right ... to obtain a reply in the same language* ") underlines the importance of this principle.

37. The Ombudsman found that, in failing to provide a reply in the language in which the complainant addressed it, the Commission committed an instance of maladministration. However, the Ombudsman noted that, in its opinion, the Commission acknowledged its obligation under the Treaties, apologised to the complainant and attributed its reply to an administrative oversight. In light of the Commission's position, no further inquiries were justified in relation to this part of the allegation.

The arguments presented to the Ombudsman after his draft

recommendation

38. In its detailed opinion, the Commission acknowledged that the time taken to handle the complainant's confirmatory application was excessive, even taking into account the specificity of the case, the lengthy consultations with the Greek authorities and the time needed for translating the communications between the complainant and the Commission. The Commission pointed out that it makes every effort to handle applications for access as quickly as possible and that, in the vast majority of cases, applications are handled within " *reasonable* " time limits. Where it is not possible to handle an application within the statutory time limits, the Commission enters into a dialogue with the applicant with a view to finding a fair solution, in accordance with Article 6(3) of Regulation 1049/2001.

39. In its observations, the complainant did not comment on this aspect of the Commission's detailed opinion.

The Ombudsman's assessment after his draft recommendation

40. The Ombudsman considers that the Commission acknowledged that the delay was excessive and gave reassurances that this delay constituted an exception to its normal practice. The Ombudsman takes note of the Commission's reassurances and considers that it has thus accepted his first draft recommendation.

B. Alleged infringement of Article 4(2), third indent of Regulation 1049/2001

Arguments presented to the Ombudsman

41. The complainant alleged that the Commission erred in its analysis of Article 4(2), third indent of Regulation 1049/2001. To this end, the complainant argued that the document to which it requested access did not fall within the scope of the exception concerning " *inspections, investigations or audits* ".

42. In this regard, the complainant argued that the analogy between Article 258 TFEU proceedings and the TBT Directive, on which the Commission relied to justify its refusal, was impermissible. The reason for this was that the TBT Directive expressly intends to engage economic operators and enhance transparency in the process of examination and approval of draft technical regulations. In order to fulfil the objectives of the TBT Directive, the Commission consistently publishes on its database all draft technical regulations communicated to it [10] .

43. The complainant contended that, were the analogy with Article 258 TFEU proceedings to be relevant, it should still be noted that the complainant did not, in fact, request access to the Commission's " *reasoned opinion* " or any correspondence exchanged between the

Commission and Greece, but instead to the revised draft technical regulation itself.

44. In any event, the scope of the exception in Article 4(2), third indent is limited to documents which are drafted in the course of the " *investigations* " and does not cover documents which were available before an investigation commenced.

45. The complainant went on to state that, in the alternative, should its request fall within the scope of the exception of Article 4(2), third indent of Regulation 1049/2001, there would be an overriding public interest in disclosure which was premised on: (a) the principle of non-discrimination; (b) the principles of effectiveness of the procedure enshrined in Directive 98/34 and of transparency; and (c) the nature and impact of the Greek legislation at issue.

46. The complainant argued that the principle of non-discrimination would be infringed if the Commission singled out the Greek draft legislation at issue and, contrary to its established practice regarding all other technical regulations communicated to it, prevented the public from having access thereto. The principles of effectiveness and transparency would be infringed if economic operators whom Union law aimed to engage in this procedure were excluded from it. Finally, despite the Court of Justice's rulings on the Greek recreational games legislation, Greece had failed to bring its legislation into conformity with Union law. The only possibility available to affected economic operators to defend their interests was to exercise their rights under the TBT Directive.

47. In its opinion, the Commission reiterated that the Court of Justice held that certain provisions of the Greek recreational games legislation were contrary to EU law and that Greece failed to fulfil its obligations under the Treaty as well as Article 8 of the TBT Directive. The draft technical legislation communicated to it pursuant to the TBT Directive under reference number 2008/184/GR, which was made publicly available and on which the complainant had an opportunity to comment, was submitted following the above judgment.

48. On the basis of comments received and following its own analysis, the Commission considered the Greek draft technical regulation inadequate and engaged in a dialogue with the Greek authorities in order to ensure the correct implementation of the relevant provisions of EU law. As it explained in its decision of 29 October 2009 on the complainant's confirmatory application, the Commission felt that the Court of Justice clearly stated that, within the framework of the procedure under the TBT Directive, the Commission does not simply exercise an informative role. On the contrary, the Commission argued that, in its capacity as the 'guardian of the Treaties', it exercises investigative powers in order to induce Member States to bring national legislation in conformity with Union law. Consequently, all exchanges with the MemberState in the framework of Notification 2008/184/GR and its assessment qualify as an investigative activity of the Commission.

49. The Commission referred to the Court of Justice's judgment in Case C¤109/08 *Commission v Greece* [11] , in which the Court declared that, by failing to take all the measures necessary to comply with its previous judgment of 26 October 2006, Greece failed to fulfil its obligations under Article 260 TFEU. Consequently, the Commission's assessment of the compliance of the

revised draft legislation was carried out also within its role following the latest judgment of the Court of Justice under Article 260 TFEU. The Commission argued that this assessment equally qualifies as an investigative activity since its purpose is to ensure that Greece fulfils its obligations under the Treaty which, in accordance with settled case-law [12] , is covered by confidentiality. Therefore, the Commission took the view that the complainant's allegation that the requested document does not fall under the scope of Article 4(2), third indent was unfounded.

50. As regards the complainant's assertion that the effectiveness and transparency of the procedure under Directive 98/34 are compromised by non-disclosure, the Commission pointed out that Regulation 1049/2001 itself is premised on the principle of transparency and participation. Nevertheless, it contains a balanced system of not only obligations to grant access but also obligations to protect legitimate interests by way of limits to the right of access to documents.

51. Therefore, the Commission took the view that the public interest in this case was better served by protecting the climate of mutual trust between the Commission and the Greek authorities in order to achieve compliance by Greece with the relevant Union legislation. Finally, the Commission characterised the interest asserted by the complainant, namely, the need to defend the interests of the affected economic operators, as being of a private nature.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

52. The Ombudsman summarised the arguments presented to him as follows. The complainant argued that the document in question does not fall within the scope of Article 4(2), third indent of Regulation 1049/2001. Should the document fall within the scope of the said provision, the Commission incorrectly interpreted and applied the relevant exception. Moreover, the Commission's interpretation undermines the effectiveness and transparency requirements of the TBT Directive. The Commission, on the other hand, argued that the document in question falls within the said exception and that it applied the exception consistently with the Court of Justice's settled case-law. Moreover, in relation to the impact of the TBT Directive on its handling of the complainant's access to documents request, the Commission explained that, whereas Regulation 1049/2001 is also premised on the principle of transparency, it provides a balanced system which recognises limitations in favour of legitimate interests.

53. In view of the above, the Ombudsman considered it useful to point out that Article 42 of the Charter [13] provides: " *Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.* "

54. The fundamental right of access to documents, which embodies the quest for transparency, legitimacy and accountability of the European Union institutions, is ensured in the Union legal order by Regulation 1049/2001 [14] . The Court of Justice has recognised that the right of public

access to documents established therein is related to the democratic nature of the institutions [15] .

55. The Court of Justice has also stated on several occasions that, if the right of access to documents exists in principle, that right is nonetheless subject to certain limitations based on grounds of public or private interest [16] . A decision to refuse access is valid only if it is based on one of the exceptions laid down in Article 4 of Regulation 1049/2001 [17] . In view of the objectives pursued by Regulation 1049/2001, in particular the aim of ensuring the widest possible access to documents held by the institutions, any exceptions to this principle have to be interpreted strictly [18] .

56. The application of the exception may be justified only if the institution has previously assessed: (i) whether access to the document would specifically and actually undermine the protected interest [19] ; and (ii) if the reply is in the affirmative, whether, in the circumstances referred to in Article 4(2) and 4(3) of Regulation 1049/2001, there was no overriding public interest in disclosure. However, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. The above assessment must be apparent from the decision [20] .

57. As regards the present case and the exception in relation to the protection of the Commission's powers of investigation, within the context of infringement proceedings against a Member State, the Court of Justice has recognised that the Commission may validly rely on the said exception in order to refuse access to documents relating to investigations into a possible breach of Union law, leading potentially to the opening of proceedings under Article 258 TFEU [21] . Refusal of access was considered justified because Member States are entitled to expect the Commission to observe confidentiality as regards investigations which may lead to an infringement proceeding, even where a period of time has elapsed since the closure of those investigations [22] and the matter has been brought before the Court of Justice [23] . That requirement may continue to apply during the court proceedings and up to the delivery of the judgment [24] .

58. Following the delivery of the Court of Justice's judgment, an infringement of Union law is established and an amicable settlement is no longer possible [25] . In a procedure which ultimately leads to the delivery of a judgment on the basis of Article 258 TFEU, the disclosure of documents which were obtained in that context would not undermine investigations which could lead to proceedings being brought under Article 260 TFEU, the latter being narrower in scope [26] .

59. In applying the Court of Justice's analysis of the legal principles to the case at hand, the Ombudsman sought to determine whether the Commission correctly invoked the exception enshrined in Article 4(2), third indent of Regulation 1049/2001. The Ombudsman noted that the revised draft technical legislation in question was communicated to the Commission in April 2009. In its letter of 13 May 2009, the Commission argued that the Article 4(2), third indent exception applies by analogy when the Commission carries out its obligations under the TBT Directive. On 4 June 2009, the Court of Justice delivered its judgment under Article 260 TFEU.

In its opinion, the Commission no longer sustained the argument that the Article 4(2), third indent exception in question applies by analogy to the exchanges between the Commission and a MemberState within the framework of the TBT Directive. On the contrary, the Commission directly invoked the exception and argued that it applies within the context of its role under Article 260 TFEU.

60. In order to accept the Commission's arguments in support of its decision not to disclose the draft technical legislation in question, the Ombudsman would have needed to perform a leap of faith. In the first place, the Ombudsman would have had to accept that the draft technical legislation in question is a document produced in the course of investigations which are ongoing and concerns the exchange of correspondence between the Commission and Greece which ought to take place within a framework of confidentiality in order to preserve mutual trust. However, as the complainant pointed out in its complaint, this was hardly the case. The draft technical legislation at issue was communicated to the Commission after the Court of Justice established that the Greek recreational games legislation infringed certain Treaty provisions. The exception therefore could not be relied upon by the Commission because the proceedings against Greece under Article 258 TFEU were concluded by then.

61. The Ombudsman noted that the original draft technical legislation was communicated to the Commission on 7 May 2008 and was published on the Commission's website. On 9 May 2008, that is, two days later, the Commission brought Article 260 TFEU proceedings against Greece. It could be inferred from this that the Commission was not satisfied by the draft technical regulation, while Greece communicated a new technical legislation to replace the one in notification 2008/184/GR. The delivery of the judgment by the Court of Justice which established that Greece had not complied with the earlier ruling left no doubt that any ongoing investigations against Greece in relation to its recreational games legislation could not enable the Commission to rely on the Article 4(2), third indent exception.

62. Moreover, it was neither legally nor logically possible to argue that the Commission was pondering a new infringement proceeding against Greece to establish that the revised draft technical regulation at issue was incompatible with the internal markets rules. This was so because the Court of Justice had definitively established that the Greek legislation in force at the time infringed EU internal market rules while the draft technical legislation had not yet been adopted by Greece.

63. Finally, an analogous interpretation of the role the Commission carries out under the TBT Directive with the one in infringement proceedings could not be accepted. This was because the exceptions to the rules on public access must be interpreted strictly. Construing the principle of protection of the " *investigations* " carried out by the Commission in such wide terms would place a large part of the Commission's exchanges with the Member States outside the public domain.

64. The Ombudsman considered that, even if one were to assume that the non-disclosure of the draft technical regulation in question was, in principle, justified under the Article 4(2), third indent exception, the Commission failed to explain how the protected interest on this occasion

might be specifically and actually undermined. In this respect, the Ombudsman pointed out that regard should be had to the fact that the Commission had already published the draft technical regulation on recreational games, which was communicated to it under reference 2008/184/GR.

65. In view of the above, the Ombudsman found that the Commission handled the complainant's application for access to the draft technical regulation in question in a manner which was incompatible with Article 4(2), third indent of Regulation 1049/2001. He thus made a preliminary finding of maladministration concerning the Commission's decision to refuse public access to the requested document.

66. Notwithstanding the above finding, the Ombudsman considered it necessary to complete the analysis of the complainant's allegation in order to clarify the rules and principles governing public access to documents and to assess the impact of the specific rules enshrined in the TBT Directive on the analysis of those rules. In this regard, the Ombudsman noted that the TBT Directive emphasises the importance of transparency in establishing technical standards or regulations on the national level for the smooth functioning of the internal market [27] . In order to enable the economic operators to give their assessment of the impact of national technical regulations proposed by other Member States, the Directive provides for the regular publication of the titles of drafts that have been communicated [28] . Moreover, as set out in Article 8(4) of the TBT Directive, the information provided is not confidential unless a MemberState expressly so requests and supports such a request with valid reasons.

67. The Ombudsman took the view that the rules enshrined in the TBT Directive should be construed as having an impact on the manner in which the exceptions under Article 4 of Regulation 1049/2001 ought to be interpreted in relation to access requests falling within the scope of the TBT Directive. In this regard, the Ombudsman pointed out that the Court of Justice recognised that an institution may base its decisions on disclosure on general presumptions which apply to certain categories of documents, since considerations of a generally similar kind are likely to apply to applications for disclosure which relate to documents of the same nature [29] . The Ombudsman has held that a case-by-case examination may not be necessary where, owing to the particular circumstances of the individual case, it is obvious that access must be granted or that it must be refused [30] . The Ombudsman expressed the view that the principle recognised by the Court of Justice in *Technische Glaswerke* and *API* , that is, the presumption of disclosure, must apply to all draft technical regulations communicated under the TBT Directive. Rather than removing the exchange of correspondence between the Commission and individual MemberStates from the public domain, as the Commission appeared to be advocating in the context of the present complaint, a presumption of disclosure should be upheld. In this sense, a specific examination of an individual document need only be carried out in exceptional circumstances and in accordance with any specific rules applicable under the TBT Directive.

68. Moreover, the manner in which the Commission had so far carried out its obligations under the TBT Directive was not without significance. In this respect, the Commission's Directorate-General for Enterprise had implemented the TBT Directive by establishing the Technical Regulations Information System (TRIS) database [31] . The TRIS database contains a search engine for notifications, which is updated on a daily basis, as well as information on

the procedure under the TBT Directive and the contact points in all Member States. The TRIS website is interactive with the industry, enables its users to leave feedback and make comments and provides a free subscription mailing list for communications relevant to a specific sector.

69. It appeared, in the course of the Ombudsman's inquiry, that the Commission carries out its obligations under the TBT Directive with a laudable focus on the rules and principles of good administration. The Commission appeared to go beyond the minimum required by the Directive, namely, the publication of the titles of the communicated draft technical regulations, and to provide full text access in all official languages of the European Union. Moreover, the Commission had taken a proactive role to engage stakeholders and disseminate the available information. It followed that the Commission had established a consistent administrative practice in relation to communications of draft legislation under the TBT Directive, which appeared compatible with the culture of service that the Ombudsman seeks to promote in the Union institutions, bodies, offices and agencies.

70. In accordance with the Code of Good Administrative Behaviour for Staff of the European Commission in their relations with the public [32] , which is annexed to the Commission's Rules of Procedure, the Commission is obliged to be consistent in its administrative behaviour and must follow its normal practice. Any exceptions to this principle must be duly justified.

71. While the Ombudsman applauded the Commission's practice in relation to the TBT Directive, he expressed his regret that the Commission appeared to have departed from that practice on this specific occasion without providing a convincing justification.

72. In light of the above, the Ombudsman made the preliminary finding that the Commission's handling of the complainant's confirmatory application infringed the substantive rules of Regulation 1049/2001, which amounted to maladministration. In accordance with Article 3(5) of his Statute, the Ombudsman made the following proposal for a friendly solution:

" *Taking into account the Ombudsman's findings, the Commission could consider granting the complainant full access to the requested document.* "

The arguments presented to the Ombudsman after his friendly solution proposal

73. In its reply, the Commission pointed out that it disagreed with the Ombudsman and expressed its conviction that the exception in Article 4(2), third indent may apply both " *to investigations into possible non-compliance with the Union law under Article 258 TFEU (ex 226 EC) until the delivery of the judgement by the Court, but also to exchanges with the Member State authorities under Directive 98/34.* " The Commission went on to identify the objectives of the TBT Directive and the Commission's role with regard to it and noted that, in the framework of the procedure established by the TBT Directive, it does not simply exercise the role of receiving information from the Member States. On the contrary, in its capacity as the guardian of the Treaties, it exercises " *its investigative powers* " in order to help Member States to bring national

legislation in conformity with EU law. Indeed, according to Article 9(2) of the TBT Directive, the Commission may address to a Member State concerned a " *reasoned opinion* ", which would temporarily suspend the entry into effect of the draft technical legislation communicated to it.

74. With regard to Notification 2008/184/GR, the Commission stated that it had addressed such a " *reasoned opinion* " with regard to the draft submitted by the Greek authorities in May 2008. It was therefore " *correct to draw an analogy between the investigations under Article 258 TFEU and Directive 98/34 as the purpose of both procedures is to ensure the compatibility between national legislation and EU law through a dialogue between the Commission and the Member State authorities.* "

75. The Commission reiterated that " *the complainant requested access not to the initial notification by the Greek authorities, which was made public in line with the transparency policy, but to a subsequent draft, produced after the Commission submitted its reasoned opinion to the Member State authorities, drawing attention to the potential problems as concerns the first draft. It must be taken into account that the exchanges have been taking place also in the context of the pending Article 260 TFEU proceedings before the Court and, later, discussions on the most appropriate way to implement it.* " Consequently, in line with the judgment in *Petrie* [33] , the MemberState in question was entitled to expect the Commission to guarantee confidentiality as long as the discussions were ongoing.

76. Without prejudice to its arguments outlined above, the Commission agreed with the Ombudsman's proposal to grant the complainant full access to the requested document, taking into account " *that the Greek authorities have launched a public consultation on a new draft law in January 2011 and, therefore, the disclosure of the draft submitted in 2009 would no longer harm the ongoing discussions with the Member State authorities.* "

77. In its observations, the complainant noted that although the Commission agreed with the conclusion of the Ombudsman's proposal for a friendly solution, it clearly disagreed with the Ombudsman's reasoning. Specifically, the Commission insisted on drawing an analogy between the procedure under the TBT Directive and the one under Article 258 TFEU. The complainant submitted that that analogy was not legitimate and that it reflected the rationale of the rejection of its confirmatory application. In fact, in its effort to give its refusal to provide public access some pretext of legality, the Commission proceeded to a blatant distortion of the existing legal framework and referred to the " *reasoned opinion* " it delivered to Greece under Article 9(2) of the TBT Directive while the Directive only provides for a " *detailed opinion* " on a draft technical regulation submitted by a Member State.

78. The complainant emphasised that, on a general level, the Commission continues to reject requests for access to documents which concern draft technical regulations or " *detailed opinions* ". In the complainant's view, by doing so, the Commission circumvents the very purpose of the TBT Directive which provides in recital 3 that " *in order to promote the smooth functioning of the internal market, as much transparency as possible should be ensured as regards national initiatives for the establishment of technical standards or regulations* " [34] and, in recital 7, that " *the aim of the internal market is to create an environment that is*

conducive to the competitiveness of undertakings; … increased provision of information is one way of helping undertakings to make more of the advantages inherent in this market; … it is therefore necessary to enable economic operators to give their assessment of the impact of the national technical regulations proposed by other Member States, by providing for the regular publication of the titles of notified drafts and by means of the provisions relating to the confidentiality of such drafts " [35] . The complainant wondered how the aim of the Directive could be achieved if economic operators, such as itself, who are supposed to give their assessment of the impact of national technical regulations, are refused access to these technical regulations by the Commission, the institution entrusted with the implementation of the procedure established in the TBT Directive.

79. The complainant also criticised the Commission's agreement with the Ombudsman's proposal to grant access to the requested document as being non-genuine. In fact, the complainant perceived the Commission's gesture as an attempt to legitimise two and a half years of delays concerning a request for public access to a revised draft technical regulation. Moreover, the complainant disputed the Commission's premise for justifying its decision to grant access to the document, that is, the fact that a public consultation on a new draft was launched by the Greek government in January 2011. In the complainant's view, the notification of the new draft to the Commission and its publication on the TRIS database (Notification 2011/166/GR) cast doubt on whether public access to an earlier draft would harm the discussions with the MemberState in question.

80. The complainant drew the Ombudsman's attention to the fact that neither the Court of Justice's case-law nor the Ombudsman's decisions specifically address the issues covered in the present inquiry and asked the Ombudsman to issue a draft recommendation to the Commission so as to make it change its " *illegal administrative practice* " regarding Member State communications of draft technical regulations under the TBT Directive.

The Ombudsman's assessment after his friendly solution proposal

81. The Ombudsman deemed it essential to repeat that his proposal for a friendly solution read as follows:

" *Taking into account the Ombudsman's findings, the Commission could consider granting the complainant full access to the requested document.* "

82. This proposal therefore had two elements: (a) the Commission could consider granting the complainant full access to the requested document; and (b) the Commission could do so while taking into account the Ombudsman's findings.

83. While the Ombudsman recognised that the Commission granted access to the document in question and therefore settled the complainant's claim, it remained to be established whether access to that document qualifies as a successful friendly solution within the meaning of Article

6 of the Ombudsman's Implementing Provisions [36] . In this regard, the Ombudsman noted that the Commission granted access to the document in question while maintaining its original reasoning. That reasoning runs counter to the Ombudsman's reasoning in his preliminary assessment. Moreover, while access to the document was granted, it clearly emerged from the complainant's observations that the Commission's answer was not such as " *to satisfy the complainant* ". Consequently, in light of the above considerations, the Ombudsman found that his search for a friendly solution has not been entirely successful.

84. In accordance with Article 6(3) of his Implementing Provisions, "[i] *f the Ombudsman considers that a friendly solution is not possible, or that the search for a friendly solution has been unsuccessful, he either closes the case with a reasoned decision that may include a critical remark or makes a report with draft recommendations.* "

85. From this starting point, the Ombudsman pointed out that the present case raises important issues regarding the application of Article 4(2), third indent of Regulation 1049/2001. More specifically, the case concerns the interpretation of the term " *investigations* " in the said Article in the context of: (a) an infringement proceeding against a MemberState; and (b) the procedure established under the TBT Directive.

86. For the reasons set out in detail in points 52-72 above, the Ombudsman made a preliminary finding in his proposal for a friendly solution that the exception of Article 4(2), third indent of Regulation 1049/2001 was incorrectly invoked to justify the Commission's refusal to grant access to the requested document, which concerns a revised draft technical regulation communicated to the Commission by Greece under the procedure established by the TBT Directive.

87. In its reply to the Ombudsman's proposal for a friendly solution, the Commission disagreed with the Ombudsman's preliminary finding and contended that the Article 4(2), third indent exception applies to the procedure under the TBT Directive by analogy with the infringement proceedings under Article 258 TFEU.

88. The Ombudsman took the view that the Commission's interpretation was not convincing as regards the present case or in general.

89. Admittedly, the case at hand is quite specific in that it concerns a notification under the TBT Directive of a revised draft technical regulation communicated by Greece in the aftermath of the Court of Justice's judgment in Case C-65/05 *Commission v Greece* , which found that the Greek recreational games legislation was incompatible with the internal market provisions of the Treaty. It should be pointed out that, in accordance with the Court's case-law, following that date, "*... the continuation of negotiations between that Member State and the Commission is no longer designed to establish the existence of the infringement* ..." [37] while "*... an amicable settlement is no longer possible in the case of that infringement* " [38] .

90. In this regard, it should be noted that the infringement proceedings against Greece both under Articles 258 and 260 TFEU were concluded by the time the Commission responded to the

complainant's confirmatory application. It followed that the public interest considerations applicable to documents drawn up or obtained in connection with infringement proceedings recognised by the Court of Justice in *Petrie* no longer applied [39] . Consequently, it could no longer be presumed that the disclosure of the document at issue in the present case would undermine investigations which could lead to proceedings being brought under Article 258 TFEU [40] .

91. In fact, if one were to accept the Commission's view that the special considerations applicable to infringement proceedings are relevant in the present case, either by analogy or directly, this would have the paradoxical result that access to the relevant document would be denied in order to protect an " *investigation* " that had long been completed. The fact that the infringement proceeding had been closed in the present case, therefore, rendered the Commission's interpretation implausible.

92. That said, as regards the Commission's role under the TBT Directive in more general terms, namely, in the absence of a closed infringement proceeding, the Commission's argument was not without merit. In this regard, after having considered the arguments put forward by both the Commission and the complainant, the Ombudsman accepted that the information provided in accordance with the procedure under Article 8 of the TBT Directive could fall within the scope of an " *investigation* " within the meaning of Article 4(2), third indent of Regulation 1049/2001 [41] .

93. However, the Ombudsman went on to state that this does not mean that, in the context of the TBT Directive, the relevant exception had to be interpreted in the same way as in infringement proceedings. The Ombudsman considered that there were cases where the Commission's interpretation would appear to make good sense, for instance, where a Member State fails to notify a draft technical regulation and thus infringes its obligations under Article 8 of the TBT Directive, as, in fact, was the case in Case C-65/05 *Commission v Greece* , or, where it does not respect the standstill deadlines provided under Article 9 of the TBT Directive. In such cases, the Commission in effect initiates infringement proceedings.

94. However, the same logic does not apply as regards the analysis of draft technical regulations submitted under Article 8 of the TBT Directive. In fact, at this stage, there is no infringement of EU law that could possibly be pursued. The TBT Directive pursues the aim of allowing the Commission to check the relevant rules while they are still at the drafting stage precisely to prevent Member States from adopting rules that would not be compatible with EU law. An infringement procedure, on the other hand, is only opened when the Commission has already formed the view that there is, or might be, an infringement of EU law. In the Ombudsman's view, the Commission's argument that the examination of draft technical rules under the TBT Directive should be considered as being akin to an investigation under Article 258 TFEU was therefore not convincing.

95. The Ombudsman furthermore considered that the need to distinguish between an examination of draft technical regulations under the TBT Directive and an investigation under Article 258 TFEU is also confirmed by the Directive itself. On the one hand, according to the

case-law of the Union Courts, Member States are entitled to expect, as a general rule and subject to exceptions, that the Commission treats infringement proceedings as confidential. The TBT Directive, on the other hand, makes it clear that it aims to achieve a high level of transparency, as its preamble [42] and its Article 8(4) [43] notably confirm. As regards draft technical regulations, Article 8(4) explicitly states that transparency is the rule and that confidentiality is the exception. The Ombudsman saw no logical reason to argue that this should only hold true for the original draft technical regulations, but not any revised drafts that a Member state might submit to the Commission. In fact, the TBT Directive, subject to the conditions enshrined in the third subparagraph of Article 8(1) thereof [44] , assimilates revised draft technical regulations to original draft technical regulations.

96. It should further be noted that the law of the EU has developed since the adoption of the TBT Directive. As already mentioned, Regulation 1049/2001 is based on the principle of the widest possible access to documents in the possession of EU institutions and bodies. Article 42 of the Charter has elevated the right of access to documents to the rank of a fundamental right. In these circumstances, the Ombudsman considered that the Commission's restrictive approach to the issue of access to revised draft technical regulations submitted under the TBT Directive was neither justified nor appropriate.

97. The Ombudsman was pleased to note that the Commission had developed a practice according to which it publishes, as a general rule, the original and final draft technical regulations communicated by Member States under the TBT Directive. In his view, it would therefore only be logical if the same approach was adopted as regards revised draft technical regulations submitted by Member States.

98. In light of the above, the Ombudsman considered that there is a general presumption that access can be granted to revised draft technical regulations communicated by Member States under the TBT Directive, unless a Member State expressly asks for confidentiality and supports such request with reasons that would be capable of rebutting such presumption [45] .

99. On the basis of the preceding analysis, the Ombudsman made the draft recommendation that the Commission should review its position concerning public access to revised draft technical regulations and ensure that, alongside the original draft technical regulations and the final technical regulations, which are consistently published on the TRIS database, it also makes accessible the revised draft technical regulations, unless a Member State expressly asks for confidentiality and supports such request with reasons that would be capable of rebutting the presumption of accessibility.

The arguments presented to the Ombudsman after his draft recommendation

100. In its detailed opinion, the Commission argued that its practice regarding publication of draft technical regulations complies with transparency requirements and is in line with the Ombudsman's draft recommendation. Specifically, the Commission argued that, consistently

with the requirements of transparency, draft technical regulations that have been " *re-notified pursuant to Article 8 (1) (3) of the 98/34/EC Directive, referred to as 'revised draft technical regulations' in the draft recommendation* ", are published on the TRIS database, unless the Member State concerned has expressly requested confidentiality.

101. Regarding the specific case at hand, the Commission underlined that it did not depart from the requirements of transparency; it only refused access to an amended draft which formed part of an ongoing discussion between Greece and the Commission on the implementation of the Court of Justice's judgment. The Commission reasoned that Article 4(2), third indent may apply not only to investigations into possible non-compliance with EU law under Article 258 TFEU until the delivery of the judgment by the Court, but also to exchanges with the Member State authorities under the TBT Directive. The Commission stated that the notification procedure under the TBT Directive aims at preventing the emergence of new barriers within the EU internal market. After communicating a draft technical regulation to the Commission, a MemberState is obliged to respect the standstill period and, as far as possible, take into account the comments and detailed opinions made by the Commission or by other Member States. After the expiry of the standstill period, a MemberState can adopt a draft communicated to it, if it has fulfilled its obligations under the TBT Directive. If a MemberState fails to amend the draft technical regulation following comments and/or a detailed opinion by the Commission pursuant to Article 9(2) of the TBT Directive, the Commission may be compelled to launch infringement proceedings.

102. In the Commission's view, there are obvious similarities and connections between the procedure under the TBT Directive and infringement proceedings. The purpose of the notification procedure of the TBT Directive is similar to the purpose of investigations under Articles 258 and 260 TFEU, as both procedures aim to ensure compliance of national legislation with EU law. In both cases, a dialogue is established between the Commission and the MemberStates in order to find a satisfactory solution and it is in the public interest to maintain the confidentiality of this dialogue, in order to guarantee a spirit of mutual trust. Moreover, the arguments used in the Commission's detailed opinion pursuant to Article 9(2) of the TBT Directive can be used, if appropriate, in a letter of formal notice after the legislation is adopted.

103. The Commission specified that, in the case of the Greek recreational games legislation, access to the revised draft technical regulation was exceptionally refused due to the specific circumstances of the case. In that case, the notification under the TBT Directive led to two infringement proceedings, leading to two judgments of the Court of Justice. In the first judgment of 26 October 2006 in Case C-65/05 *Commission v Greece* , the Court established that the Greek recreational games legislation applicable at the time infringed certain Treaty provisions. Since Greece failed to implement that judgment, the Commission launched proceedings under Article 260 TFEU. These led to the second judgment of 4 June 2009 in Case C-109/08 *Commission v Greece* , in which the Court imposed penalties on Greece and, the Commission noted, "[s] *ince Greece has not yet taken the measures required to comply with the first judgment, it is still paying penalties* ".

104. The Commission further stated that " *Greece notified its* **revised** *draft law on 7 May 2008*

after the Commission sent its reasoned opinion in the second infringement proceedings. This **re-notified** *draft was publicly accessible. The Commission considered that this* **amended** *draft law would still violate European Union law. It, therefore, issued a detailed opinion with comments to the Greek authorities. In reply, these authorities submitted amendments to the* **re-notified** *draft. The complainant requested access to these amendments, not to the* **re-notified** *draft. At the time when* [it] *made* [its] *confirmatory application, on 15 May 2009, the Commission was still in discussion with the Greek authorities on the modifications which would remove a potential violation of European Union law and would ensure correct implementation of the first judgment of the Court. In the Commission's view, the re-notified draft failed to fully comply with European Union law as well as with the judgment. Disclosing the proposed changes to the re-notified draft to the public at that time would have hampered the Commission's efforts to ensure that Greece would comply with the judgment of the Court. It would have put in the public domain a text which was subject to delicate negotiations between the Commission and the Greek authorities* " [46] .

105. In its observations, the complainant criticised the Commission's factual account of the complaint, and focused on the infringement proceedings against Greece. According to the complainant, Greece failed to take any action to conform to the Court of Justice's judgment of 26 October 2006. Greece's inaction prompted the Commission to launch the proceedings under Article 260 TFEU and to send a reasoned opinion on 29 June 2007, giving Greece two months to comply with the judgment. Not having received a reply, on 10 March 2008, the Commission brought the case against Greece before the Court of Justice. It was on 7 May 2008, that is, after the Article 260 TFEU proceedings had been launched, that Greece communicated to the Commission its draft technical legislation for the **first time** [47] . However, the complainant argued that the reference date for assessing whether there has been a failure to fulfil obligations under Article 260 TFEU is the date of expiry of the period prescribed in the reasoned opinion which, in the present case, was 29 June 2007 [48] . In this connection, Greece communicated the revised draft technical legislation concerned to the Commission in March 2009 and the complainant made its application for public access in April 2009. On this basis, the complainant questioned the Commission's argument that it was carrying out consultations with the Greek authorities, given that the infringement and the fact that Greece did nothing to comply with the Court of Justice's judgment had been established long before. In light of this factual account, the complainant questioned how the Commission could argue that, in April 2009, it was carrying out consultations with the Greek authorities to ensure that Greece complies with the Court's judgment when the crucial reference date for establishing Greece's failure to comply was the date on which the Commission's reasoned opinion in the Article 260 TFEU proceedings was delivered, that is, 29 April 2007. Moreover, the complainant asked how the Commission's efforts, in April and May 2009, to ensure that Greece complies with the Court of Justice's first judgment could be undermined by allowing public access to the revised draft technical regulation when the Court hearing in the Article 260 TFEU infringement proceedings had taken place in January 2009 [49] .

106. Next, the complainant expressed its disagreement with the Commission's interpretation of its competences within the framework of the TBT Directive. In the complainant's view, the notification procedure established under the Directive aims at the *ex ante* removal of barriers to

the free movement of goods and services. This procedure starts with the communication to the Commission of draft technical regulations in accordance with Article 8(1). Pursuant to Article 9(1), during the standstill period of three months which follows the initial communication, the Commission or a Member State may deliver a detailed opinion which extends the standstill period by another three months. In accordance with the third subparagraph of Article 8(1), Member States must make a new notification if they make substantial changes to the draft technical legislation. The complainant took that view that it follows that, if, in spite of the Commission's disagreement in a detailed opinion, a Member State proceeds to adopt a draft technical regulation, then the Commission may launch infringement proceedings. Consequently, if the Commission issues a detailed opinion, the Member State concerned must abstain from adopting the draft technical regulation and, if it makes substantial changes to the draft law, it must make a new notification of a revised draft technical regulation. The complainant emphasised that this is exactly what happened in the present case. Greece made the first notification in May 2008. The Commission then published the original draft technical legislation on the TRIS database and delivered a detailed opinion on it. In view of the Commission's reaction, Greece withdrew the draft law and, in March 2009, made a new notification of a new draft law which the Commission did not publish. The Commission delivered a detailed opinion on that law as well and the Greek authorities proceeded to withdraw that draft law too. In 2011, Greece communicated a new draft law to the Commission, which the latter " *paradoxically* " published on the TRIS database [50] .

107. Taking into account its above observations, the complainant argued that the Commission put forward that it essentially has full discretion over which draft technical regulations it will publish and, in this regard, drew an analogy with the secrecy which governs infringement proceedings. In the complainant's view, this position of the Commission distorted both the letter and the spirit of the TBT Directive. In fact, the complainant referred to recital 3 of the TBT Directive which requires " *as much transparency as possible* " and to recital 7 which provides that " *the aim of the internal market is to create an environment that is conducive to the competitiveness of undertakings to make more of the advantages inherent in this market* " and " *it is therefore necessary to enable economic operators to give their assessment of the impact of the national technical regulations proposed by other Member States, by providing for the regular publication of the titles of notified drafts ...*". The complainant added that the TRIS database describes the procedure under the TBT Directive as follows: " *The notification procedure laid down by Directive 98/34/EC is a tool for information, prevention and dialogue. It is at the service of the Internal Market, that is to say at your service, because it can enable you to anticipate and prevent the creation of barriers to trade likely to affect your activities, the activities of your customers or those of your members.* " [51] In the complainant's view, rather than signalling the " *differences* " between the Commission and a Member State as is the case in infringement proceedings, the procedure under the TBT Directive aims to bring the draft technical regulations into the public sphere and enable economic operators concerned to make their views known. The Commission achieves this through the TRIS database. In its webpage, which provides information on this database, the Commission states that the reaction of an economic operator to a draft technical regulation that could raise barriers to trade " *may be decisive* " [52] .

108. The complainant concluded its observations by arguing that regard should be had to the

need to ensure transparency for the correct and unhindered operation of the procedure established by the TBT Directive, so that interested commercial operators can be actively involved in this process. It emphasised the absence of relevant case-law of the Court of Justice and the wide-ranging adverse consequences that the Commission's insistence on adhering to the same practice is likely to have. The complainant thus asked the Ombudsman not to close the present case but to make a Special Report to the European Parliament.

The Ombudsman's assessment after his draft recommendation

109. The Ombudsman finds it surprising that, in its detailed opinion, the Commission essentially repeats the same arguments which he rejected in his analysis of the second allegation within the context of his proposal for a friendly solution (points 52-72 above) and his second draft recommendation (points 85-99 above).

110. To restate the problem, the question is whether the Commission may be justified to deny access to a revised draft technical regulation under the exception provided in Article 4(2), third indent of Regulation 1049/2001 which lays down that "[t] *he institutions shall refuse access to a document where disclosure would undermine the protection of: … - the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.* " The Commission's position may be summarised as follows. The Court of Justice has established that investigations under Article 258 TFEU fall within the scope of the " *investigations* " mentioned in Article 4(2), third indent and that, given that a dialogue is established between the Commission and the Member States in order to find a satisfactory solution, it is in the public interest to maintain the confidentiality of this dialogue, in order to guarantee a spirit of mutual trust. In the present case, the Commission's argument is that, because of the need to ensure compliance with the Court's judgment in Case C-65/05, its negotiations with the Greek authorities, which were ongoing, should be kept away from the public sphere. In the alternative, the exchanges under the TBT Directive are, in any event, similar to investigations under Article 258 TFEU as both procedures aim to ensure compliance of national legislation with EU law and this argues in favour of keeping them confidential. The Commission argues that it follows from these considerations that it did not err in refusing access to the revised draft technical regulation in question.

111. The complainant contests the Commission's view that its negotiations with the Greek authorities were ongoing on 15 May 2009, that is, when the complainant made a confirmatory application for access to the revised draft technical regulation concerned. In fact, according to the complainant, Greece's failure to comply with the Court's judgment in Case C-65/05 was established on the date when the Commission delivered its reasoned opinion in the Article 260 TFEU proceedings, that is, 29 June 2007. In addition, the Court hearing in the Article 260 TFEU infringement proceedings had taken place in January 2009.

112. On this point, the Ombudsman considers that the applicable Greek legislation at the time when the complainant made its confirmatory application for public access to documents to the Commission was still Law 3037/2002 which, in Case C-65/05 *Commission v Greece* , the Court

of Justice had found to infringe EU law. Because of that infringement, the Court, by means of its judgment in Case C-109/08 *Commission v Greece* , ordered Greece to pay a lump sum and a periodic penalty for each day of delay in bringing its legislation in line with EU law. It follows that, as the Ombudsman already noted in points 89-91 above, any ongoing discussions between the Commission and Greece aimed at achieving compliance with EU law were not subject to the considerations applicable to documents in connection with ongoing infringement proceedings, recognised by the Court of Justice in the *Petrie* judgment, because the proceedings here concerned had long been concluded and the infringement of EU law by Greece had most definitively been established [53] . As regards the specific facts of the present case, the Ombudsman considers that the Commission's refusal to grant public access to the revised draft technical regulation concerned on the ground that negotiations with the Greek authorities to comply with the Court's judgment in Case C-65/05 were ongoing was thus not justified.

113. Moving on to the general issue, the Ombudsman finds it hard to accept the Commission's argument that a refusal to grant access to revised draft technical regulations is justified on the ground that the considerations governing ongoing infringement proceedings apply by analogy because of the similarity between the procedures under Article 258 TFEU and the TBT Directive. In this regard, it should be noted that infringement proceedings concern either existing legislation or, if applicable national legislation complies with EU law, a general and consistent administrative practice which infringes that law [54] . By contrast, the notification procedure under the TBT Directive concerns draft laws which are not yet in force, and cannot, therefore, be the subject of infringement proceedings. In this connection, the Court of Justice, ruling specifically on this issue (the Court's judgment concerns Council Directive 83/189, the predecessor of Directive 98/34) [55] , rejected an infringement action brought against the Netherlands by reasoning as follows:

" *18. ... in order for a letter of formal notice to be issued, a prior failure by the Member State concerned to fulfil an obligation owed by it must be alleged.*

19. However, it is clear that, at the time when a detailed opinion under Directive 83/189 is delivered, the Member State to which it is addressed cannot have infringed Community law, since the measure exists only in draft form. " [56]

114. It follows that the Commission's argument that "[i] *f a Member State fails to amend the draft technical regulation following comments and/or a detailed opinion, the Commission may be compelled to launch infringement proceedings* " must be rejected. As the Court of Justice has most clearly stated, the Commission cannot launch infringement proceedings unless that draft technical legislation is formally adopted into law (see, in this connection, point 62 of this decision).

115. As regards the Commission's argument that an analogy between Article 258 TFEU and the notification procedure under the TBT Directive is plausible on the ground that they both serve the same purpose, the Ombudsman does not find it entirely convincing. This is because, on the one hand, infringement proceedings aim to ensure that the Member States give effect to the Treaties and the provisions adopted by the institutions thereunder [57] . The Commission

embarks on bilateral discussions with the Member State concerned to ensure that the latter brings its legislation in line with EU law, in the interest of the uniform application of EU law in the EU legal order. On the other hand, the objective of the notification procedure under the TBT Directive goes beyond the purpose of ensuring compliance with EU law. In fact, as the complainant argued in the course of the inquiry, this procedure also aims to ensure that economic operators in the EU can anticipate new technical standards and regulations that might constitute obstacles to the free movement of goods and services and, hence, to promote the smooth operation of the internal market. Far from being a purely bilateral relationship between the Commission and the Member State concerned covered under a shroud of secrecy, a notification under the TBT Directive is characterised by transparency concerning draft technical standards and regulations [58] . In fact, when a draft technical regulation is published on the TRIS database, the Commission and other Member States may deliver a detailed opinion on it, and affected economic operators are invited to make comments on it, which, in the Commission's words, " *may be decisive* ". In view of these considerations, applying the conditions governing infringement proceedings to the notification procedure under the TBT Directive would be neither justified nor appropriate.

116. However, as the complainant pointed out when quoting from the Commission's website, the notification procedure under the TBT Directive is " *a tool for information, prevention and dialogue* ". This implies that, as mentioned above, the procedure is also intended to ensure that Member States comply with EU law. It follows that, as the Ombudsman explained in points 92-93 above, the information provided in accordance with the procedure under Article 8 of the TBT Directive could fall within the scope of an " *investigation* " within the meaning of Article 4(2), third indent of Regulation 1049/2001. However, the above-mentioned considerations (see point 115) show that, in the context of the TBT Directive, the relevant exception should not be interpreted in the same way as in infringement proceedings. In the interest of completeness, it should be noted that the considerations pertaining to infringement proceedings may of course become relevant in case of an infringement of a procedural rule under the TBT Directive, such as the failure to make a notification or to respect the standstill period. In such a case, after the Commission sends a letter of formal notice to the MemberState concerned and thereby launches new infringement proceedings, the Commission's position would make good sense. It is clear, however, that this is not the situation with which the Commission was confronted in the present case.

117. It follows that, in determining its position concerning public access to revised draft technical regulations, the Commission should interpret the exception in Article 4(2), third indent of Regulation 1049/2001 against the background of the specificities of the TBT procedure, and with due regard for the Court's case-law and its own consistent practice. In particular, it follows that, according to the Court of Justice's settled case-law, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception [59] . The risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical [60] . Consequently, the examination which the institution must undertake in order to apply an exception must be carried out in a concrete manner and must be apparent from the reasons for the decision.

118. In this regard, it should be noted that, as the complainant put forward in its observations on the Commission's detailed opinion, the Greek government communicated three drafts of its recreational games legislation: 1) the original draft technical regulation, which was given notification number 2008/184/GR and was published on the TRIS database, 2) the revised draft technical regulation communicated to the Commission in 2009, which is the document covered by the complainant's request for access and which was not published, and 3) a further revised draft technical regulation, which was given notification number 2011/166/GR and was also published on the TRIS database.

119. In the submissions it made in the Ombudsman's inquiry, the Commission did not explain how the refusal of public access to the revised draft technical regulation concerned can be reconciled with its statement in its detailed opinion that revised draft technical regulations are published on the TRIS database. Nor did the Commission put forward any argument in support of the view that the revised draft technical regulation in question fails to meet the conditions set out in the third subparagraph of Article 8(1) of the TBT Directive. For that matter, the reasons for the difference in treatment between the Greek draft legislation communicated to the Commission in 2009, to which access was denied, and the Greek draft legislation communicated to it in 2008 and 2011, both of which were published on the TRIS database, remain obscure. The statement that the Greek authorities " *submitted amendments to the re-notified draft* " and that access was denied to these amendments and not to the re-notified draft, apart from being factually incorrect, as the complainant pointed out in its observations on the Commission's detailed opinion, does not suffice to explain the difference in treatment between the drafts.

120. In light of the above considerations, the Ombudsman expresses his regret that the Commission did not accept his second draft recommendation and maintains his finding that the Commission's position is not in line with Article 4(2), third indent of Regulation 1049/2001.

121. According to Article 3(7) of his Statute, the Ombudsman, after having made a draft recommendation and after having received the detailed opinion of the institution or body concerned, is empowered to send a report to the European Parliament and to the institution or body concerned. In his Annual Report for 1998, the Ombudsman pointed out that the possibility for him to present a special report to the European Parliament is of inestimable value for his work. He added that special reports should therefore not be presented too frequently, but only in relation to important matters where Parliament is able to take action in order to assist the Ombudsman.

122. It is true that the complainant asked the Ombudsman not to close the case and, instead, make a special report to the European Parliament. However, the Ombudsman considers that, although the present inquiry has highlighted a serious instance of maladministration, the facts at stake arose in circumstances which are rather unusual. The complainant identified a risk of an " *illegal administrative practice* " emerging in the manner in which the Commission handles requests for access to documents within the context of the TBT Directive. The instance of maladministration in the present case notwithstanding, the Ombudsman considers that, given that the Commission published the latest revised draft technical regulation on the TRIS

database, the problem does not appear to be one of principle, and that the Commission's conduct does not constitute a general practice. In these circumstances, the Ombudsman takes the view that it would not be fruitful to submit a special report to Parliament. He therefore closes the case and will make a critical remark below.

C. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusions and critical remark:

The Commission acknowledged that the time taken to handle the complainant's confirmatory application was excessive and thereby accepted the Ombudsman's first draft recommendation. No further inquiries are thus necessary as regards the complainant's first allegation.

The Commission did not accept the Ombudsman's second draft recommendation that it should give public access to revised draft technical regulations communicated under the TBT Directive, unless a Member State expressly asks for confidentiality and supports such request with reasons that would be capable of rebutting the presumption of accessibility. The Commission's failure to do so constitutes an instance of maladministration.

The Commission granted access to the requested document. Therefore, no further inquiries are justified as regards the complainant's claim.

The complainant and the Commission will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 11 December 2012

[1] Case C-65/05 *Commission v Greece* [2006] ECR I-10341.

[2] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1998 L 204, p. 37, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, OJ 1998 L 217, p. 18, and as further amended by Council Directive 2006/96/EC of 20 November 2006, OJ 2006 L 363, p. 81.

[3] Case C-109/08 *Commission v Greece* [2009] ECR I-4657.

[4] Greece communicated the original draft technical regulation amending the Greek recreational games legislation on 7 May 2008. The Greek notification was registered as 2008/184/GR and is available on the relevant section (TRIS database) of the Commission's website: http://ec.europa.eu/enterprise/tris/pisa/app/search/index.cfm?fuseaction=pisa_notif_overview&iYear=2008&inum=18 [Link] The complainant made his views about that draft known to the Commission in accordance with the TBT Directive.

[5] Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to the European Parliament, Council and Commission documents, OJ 2001 L145, p. 43.

[6] Notification 2008/184/GR.

[7] The complainant referred to the decisions of the European Ombudsman in complaints 271/2000/(IJH)JMA, 277/2000/(IJH)JMA and 790/2003/GG.

[8] As the Ombudsman has stated in his special report to the European Parliament concerning lack of cooperation by the European Commission in complaint 676/2008/RT " *... the Commission's own deadlines necessarily include the deadline established by the Treaty on the Functioning of the European Union for giving a detailed opinion on a draft recommendation from the Ombudsman.* "

[9] Recital 4 of Regulation 1049/2001.

[10] http://ec.europa.eu/enterprise/tris/index_en.htm [Link]

[11] Cited in footnote 3 above.

[12] Case T-191/99 *Petrie* [2001] ECR II-3677.

[13] Pursuant to Article 6(1) of the Treaty on European Union, the Charter of Fundamental Rights of the European Union has the same legal value as the Treaties.

[14] Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* [2010] ECR I-8533, paragraph 69; Case C-139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885, paragraph 51.

[15] Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* , cited in footnote 14 above, paragraph 68; Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 34.

[16] Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 62; Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* , cited in footnote 14

above, paragraph 70; Case C-139/07 P *Technische Glaswerke* , cited in footnote 14 above, paragraph 53.

[17] Case C-64/05 *Sweden v Commission* [2007] ECR I-11389, paragraph 57; Case C-266/05 P *Sison v Council* , cited in footnote 16 above, paragraph 62.

[18] Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* , cited in footnote 14 above, paragraph 73; Case C-64/05 *Sweden v Commission* , cited in footnote 17 above, paragraph 66; Case C-266/05 P *Sison v Council* , cited in footnote 16 above, paragraph 63.

[19] Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* , cited in footnote 14 above, paragraph 72.

[20] Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraph 69.

[21] Case T-36/04 *API v Commission* [2007] ECR II-3201, paragraph 120; Case T-309/97 *Bavarian Lager v Commission* [1999] ECR II-3217, paragraph 46; Case T-191/99 *Petrie* , cited in footnote 12 above, paragraph 68.

[22] Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, paragraph 63.

[23] Case T-191/99 *Petrie* , cited in footnote 12 above, paragraph 68.

[24] Case T-36/04 *API v Commission* , cited in footnote 21 above, paragraph 121.

[25] Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* , cited in footnote 14 above, paragraph 121.

[26] Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* , cited in footnote 14 above, paragraph 122.

[27] Recital 3 of the TBT Directive.

[28] Recital 7 of the TBT Directive.

[29] Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* , cited in footnote 14 above, paragraph 74; Case C-139/07 P *Technische Glaswerke* , cited in footnote 14 above, paragraph 54.

[30] Decision of the European Ombudsman closing his inquiry into complaint 1039/2008/FOR against the European Commission, paragraph 58.

[31]

http://ec.europa.eu/enterprise/tris/default.htm?CFID=9235488&CFTOKEN=3461434467bc692f-352E4803-EBE0-90 [Link]

[32] http://ec.europa.eu/civil_society/code/_docs/code_en.pdf [Link]

[33] Case T-191/99 *Petrie* , cited in footnote 12 above.

[34] Recital 3 of the TBT Directive.

[35] Recital 7 of the TBT Directive.

[36] http://www.ombudsman.europa.eu/resources/provisions.faces#hl5 [Link]

[37] Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* , cited in footnote 14 above, paragraph 120.

[38] Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* , cited in footnote 14 above, paragraph 121.

[39] Case T-191/99 *Petrie* , cited in footnote 12 above, paragraphs 64-68.

[40] Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* , cited in footnote 14 above, paragraph 122.

[41] Case C-139/07 P *Technische Glaswerke* , cited in footnote 14 above, paragraph 52.

[42] Recital 3 of the TBT Directive provides: " *Whereas in order to promote the smooth functioning of the internal market, as much transparency as possible should be ensured as regards national initiatives for the establishment of technical standards or regulations* ". Moreover, recital 7 of the TBT Directive provides: " *Whereas the aim of the internal market is to create an environment that is conducive to the competitiveness of undertakings; whereas increased provision of information is one way of helping undertakings to make more of the advantages inherent in this market; whereas it is therefore necessary to enable economic operators to give their assessment of the impact of the national technical regulations proposed by other Member States, by providing for the regular publication of the titles of notified drafts and by means of the provisions relating to the confidentiality of such drafts* ".

[43] Article 8(4) of the TBT Directive provides that "[i] *nformation supplied under this Article shall not be confidential except at the express request of the notifying Member State. Any such request shall be supported by reasons.* "

[44] " *Member States shall communicate the draft again under the above conditions if they make changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive.* "

[45] See to this effect, Case C-139/07 P *Technische Glaswerke* , cited in footnote 14 above, paragraph 52.

[46] Emphasis added by the Ombudsman.

[47] Notification 2008/184/GR.

[48] Case C-109/08 *Commission v Greece* , cited in footnote 3 above, paragraphs 14-17.

[49] Case C-109/08 *Commission v Greece* , cited in footnote 3 above, paragraph 29.

[50] Notification 2011/166/GR.

[51] http://ec.europa.eu/enterprise/tris/public_info/index_en.htm [Link]

[52] http://ec.europa.eu/enterprise/tris/public_info/index_en.htm [Link]

[53] See to this effect, Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* , cited in footnote 14 above, paragraph 121 and Case T-59/09 *Germany v Commission* , judgment of 14 February 2012, not yet published in the ECR, paragraphs 73-75.

[54] Case C-489/06 *Commission v Greece* [2009] ECR I-1797, paragraphs 46-53.

[55] Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulation, OJ 1983 L 109, p. 8.

[56] Case C-341/97 *Commission v Netherlands* [2000] ECR I-6611; See also Case C-230/99 *Commission v France* [2001] ECR I-1169 and, in particular, the French government's submissions against the Commission's " *amalgamation* " of the two procedures, paragraphs 18-19.

[57] See, Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-3609, paragraph 29.

[58] The Ombudsman emphasised this both in his proposal for a friendly solution and in his draft recommendations (see points 66 and 95 of the present decision respectively).

[59] Case C-477/10 P *Commission v Agrofert* , judgment of 28 June 2012, not yet published in the ECR, paragraph 57; Joined cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2006] ECR II-2023, paragraph 115 and the case-law cited therein.

[60] Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* , cited in footnote 15 above, paragraph 43.