Médiateur européen

Décision dans l'affaire 355/2007/(TN)FOR - Refus d'autoriser l'accès du public à des documents

Décision
Affaire 355/2007/(TN)FOR - **Ouvert le** 21/02/2007 - **Recommandation le** 29/06/2009 - **Décision le** 08/12/2010

Le plaignant, le Bureau européen de l'environnement (BEE), est une fédération d'organisations environnementales. En juillet 2006, le BEE a demandé à la Commission l'accès à une série de documents concernant la décision de la Commission jugeant le projet de construction d'un port industriel à Granadilla (Tenerife) conforme à la réglementation de l'UE sur l'environnement. La Commission a refusé de divulguer certains des documents demandés. Elle a allégué que la communication de certains documents internes porterait préjudice au processus décisionnel de la Commission. Elle a également fait valoir que l'Espagne lui avait demandé de ne pas divulguer les documents en sa possession émanant de ce pays.

Le Médiateur n'a trouvé aucune preuve que la divulgation de la plupart des documents internes porterait préjudice au processus décisionnel de la Commission. Toutefois, le Médiateur est convenu avec la Commission que l'un des documents litigieux ne devait pas être divulgué. Il a également conclu qu'en ce qui concerne les documents émanant de l'Espagne, la Commission devait engager un dialogue avec les autorités espagnoles pour s'assurer qu'il existait effectivement des motifs valables justifiant la non-divulgation. En l'absence de tels motifs, le Médiateur a déclaré que la Commission devrait communiquer les documents. Le Médiateur a ensuite formulé un projet de recommandation fondé sur cette motivation.

La Commission a souscrit à l'aspect du projet de recommandation relatif à ses documents internes. Elle a dès lors rendu les documents publics. Cependant, s'agissant des documents émanant de l'Espagne, le Médiateur a conclu que cette partie de son projet de recommandation avait été rejetée. En tirant cette conclusion, il a relevé que l'évaluation par la Commission des motifs invoqués par l'Espagne pour refuser la divulgation était d'un niveau trop bas.

Le Médiateur a donc clos l'affaire en formulant une remarque critique sur le refus d'accorder l'accès aux documents émanant de l'Espagne.

The background to the complaint

1. The complaint concerns a refusal by the European Commission to grant a request for public access to documents held by the Commission.

2. On 18 July 2006, the European Environmental Bureau (EEB) submitted to the Commission an application for access to documents under Regulation 1049/2001. Regulation 1049/2001 [1] establishes the rules concerning public access to documents held by the European Parliament, the Council of the European Union or the European Commission. The request for access related to documents the Commission had used to formulate an opinion under Article 6(4) of the Habitats Directive [2] relating to the construction of a port in Granadilla (Tenerife, Spain).

3. By letter dated 1 September 2006, the Commission refused the request for public access to certain of the documents. In respect of the other documents requested by EEB, it deferred its decision on the grounds that these documents had been provided to it by the Spanish authorities and it was still consulting with them as regards the request for access to these documents.

4. The EEB then made a confirmatory application for access on 15 September 2006. The Commission replied by letter dated 15 December 2006. The letter identified 19 documents (which it listed in an annex from 1-19). Access was granted to seven of these documents (namely, documents 1, 2, 15, 16, 17, 18 and 19). However, the Commission informed the EEB that, in accordance with Article 4(5) of Regulation 1049/2001, it was consulting with the Spanish authorities as regards granting access to those documents that originated from the Spanish authorities (namely, documents 12, 13 and 14). It stated that it would decide on the potential disclosure of those documents as soon as it received a reply from the Spanish authorities. The Commission also stated that the analysis of the remaining documents (namely, documents 3, 4, 5, 6, 7, 8, 9, 10 and 11) had not yet been finalised and that it would inform the EEB of the results of this analysis as soon as possible. The complainant then turned to the Ombudsman.

The subject matter of the inquiry

5. On 30 January 2007, EEB, through its representative, submitted a complaint to the Ombudsman. It alleged that the Commission had:
- wrongly refused access to documents 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14;
- failed to comply with the deadlines set out in Regulation 1049/2001; and
- unreasonably delayed the registration of the initial application for access.

The complainant claimed that:
- the Commission should grant access to all the documents requested;
- if it were not possible to grant access to the documents originating from the Spanish authorities, the Commission should inform the EEB in writing of the main arguments and points put forward by the Spanish authorities;
- the Commission should, in future, respect the deadlines as regards access to documents, in particular when a decision in relation to the subjects discussed in those documents is imminent and the applicant needs the documents in order to respond to arguments raised in relation to

the imminent decision.

6. By letter dated 10 April 2007, the Commission sent its second reply to the complainant's confirmatory application. The Commission granted full access to 4 of the 12 documents covered by the complainant's request for access to documents (namely, documents 3, 4, 5 and 7), granted partial access to 3 documents (namely, documents 6, 8, 9) and refused any access to five documents (namely, documents 10, 11, 12, 13 and 14). The present inquiry therefore only concerns access to documents 6, 8, 9, 10, 11, 12, 13 and 14. [3]

The inquiry

7. The complaint was forwarded to the Commission. Having been granted an extension of the deadline, the Commission submitted its opinion, which was forwarded to the complainant. The complainant also asked for an extension of the deadline, following which she submitted EEB's observations. On 16 May 2008, the Ombudsman made a proposal for a friendly solution to the Commission concerning the complainant's first allegation. Having been granted two extensions of the deadline, the Commission submitted its reply on 21 November 2008. The complainant submitted EEB's observations on 12 February 2009. The Ombudsman's services conducted an inspection of the documents concerned in May 2009. On 29 June 2009, having concluded that a friendly solution was not possible and that the appropriate next step was a draft recommendation, the Ombudsman issued a draft recommendation to the Commission and asked it to send a detailed opinion by 31 October 2009. The Commission requested extensions of the deadline granted by the Ombudsman and finally sent its detailed opinion on 14 July 2010, which was forwarded to the complainant for possible observations. The complainant also requested extensions of the deadline and finally sent its observations on 30 September 2010.

The Ombudsman's analysis and conclusions

A. The allegation and the related claim that the Commission wrongly refused (full) access to documents

Arguments presented to the Ombudsman

8. In its opinion, the Commission referred to its letter dated 10 April 2007, which contained the final and full reply to the complainant's confirmatory application of 15 September 2006. In its letter dated 10 April 2007, the Commission provided the following arguments for not providing full access to the documents covered by the request for access.

9. As regards documents 12, 13 and 14, given that the Spanish authorities did not agree to the disclosure of these documents, the Commission refused access thereto on the basis of Article 4(5) of Regulation 1049/2001. In doing so, it referred to paragraphs 57 and 58 of the judgment

of the Court of First Instance in Case T-168/02. [4]

10. As regards documents 6, 8 and 9, the Commission relied on the exception set out in Article 4(3), first subparagraph, of Regulation 1049/2001, which states that access to a document which is drawn up by an institution for internal use, and which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure. It argued that the documents were essential for its decision on Spain's request for EU co-financing of the Granadilla project. In its view, disclosure, at this early stage of the Commission's decision-making process, would seriously undermine this decision-making process. Specifically, it argued that the Commission and its services would be exposed to undue external pressure, which would put at risk the objectivity of their analysis. It stated that, as is the case with any other public administration, the Commission needed a certain " *space to think* " with a view to ensuring its ability to carry out its tasks, in the public interest, free from undue external influences. In addition, the documents in question contained assessments of the information provided by the Member State concerned and referred in several parts to the contents of the documents which the Spanish authorities did not agree to release when they were consulted by the Commission.

11. As regards documents 10 and 11, [5] the Commission invoked the exception set out in Article 4(3), second subparagraph, of Regulation 1049/2001, which states that access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken, if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure. The Commission noted that these documents reflected, respectively, the discussions between DG Energy and Transport and other Commission departments with regard to the opinion to be adopted on the basis of the Habitats Directive and recapitulated the positions and opinions of other Commission Directorate-Generals. These views were gathered in order to present them to the Commissioner in charge of the case. The Commission's decision-making procedure required maintaining, within its services, a spirit of confidence and open debate, so as to ensure a coherent approach in the case at hand. The opinions contained in these documents had been drafted specifically for internal use. The authors, when they drafted the documents, never took into account the possibility that they would be disclosed to the public. Hence, disclosure of these opinions would lead to a situation where the Commission's services would be reluctant to express their views freely, thus depriving the Commission of the opportunity to be fully and frankly informed of all aspects of the case and of the consequences of the different options available. Putting these documents in the public domain would, therefore, be seriously detrimental to the decision-making process in other similar cases, since it would seriously affect the independent expression of opinions on the matter and endanger the quality and the solidity of the eventual decision.

12. Finally, the Commission considered that there was no overriding public interest in disclosure. It admitted that in environmental issues there was often a strong public interest in being informed of the facts on the basis of which a decision was taken. It also admitted that

such a strong public interest existed with respect to the present case concerning the harbour project, the application of the Habitats Directive, and the opinion adopted by the Commission pursuant to this Directive. However, it rejected the argument that the interest of third parties to assess whether the Commission adopted its opinion on the basis of correct and complete information would amount to a public interest which would justify disregarding the harm that would be caused to the protection of its decision-making process. Access to the documents concerned would not have been decisive as regards the means and possibilities of interested third parties to make their views on the subject-matter known to the Commission. The complainant had had the opportunity to explain to the Commission its positions and views on the project.

13. The complainant pointed out that the exception in Regulation 1049/2001 for internal documents is not absolute. The Commission is required to demonstrate how the disclosure of the documents concerned would seriously undermine its decision-making process. Furthermore, the Commission failed to consider seriously whether the public interest in disclosure overrides its interest in protecting its decision-making process.

14. According to the complainant, the Court of Justice ruled [6] that opinions from "autonomous bodies" cannot be withheld by the institution with the argument that a final decision has not yet been taken. The complainant also considered that the position of Commission Directorate-Generals should have been immediately communicated to the EEB. It argued that, if the Commission's arguments were accepted, no Commission document could ever be released before the final decision has been taken, since all Commission services are part of the Commission. The complainant also stated that it was confident that the recent judgment by the Court of Justice in Case C-64/05 P, [7] where the Court of Justice annulled the ruling of the Court of First Instance in Case T-168/02 (which the Commission had relied upon in its decision refusing access), [8] supported the EEB's request for access.

15. The complainant did not understand how the Commission could argue, in its confirmatory reply of 15 December 2006, that the analysis as regards the Habitats Directive had not yet been finalised, when the decision on the project was taken on 6 November 2006.

16. Furthermore, in its reply to the request for access, the Commission completely ignored the fact that the European Community ratified the Aarhus Convention on access to information, participation in decision-making and access to justice in environmental matters. Since the Aarhus Convention binds the Member States *and* the EU institutions, it prevails over secondary EU law. The Aarhus Convention does not, in contrast to Article 4(5) of Regulation 1049/2001, give a Member State the right to object completely to access to documents.

17. The complainant also argues, with regard to third party documents, that even if Article 4(5) of Regulation 1049/2001 allows a Member State to request that a document not be disclosed, the Member States are not given a veto. It is for the Commission to make its own, independent evaluation as to whether any of the exceptions in Regulation 1049/2001 apply. In addition, in the complainant's view, the Commission could not accept Spain's opposition as regards public access to the requested documents without weighing the different interests against each other.

Under the Aarhus Convention and Directive 2003/4, Spain would have been obliged to grant access to documents such as the environmental impact assessment, studies, examination of alternative ports et cetera, had the EEB made a request for access directly to the Spanish authorities. Accordingly, in the complainant's view, it cannot be correct to interpret Regulation 1049/2001 as giving Spain the right to veto public access to any document that Spain submitted to the Commission.

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

18. The Ombudsman noted that Regulation 1049/2001 establishes the principle of public access to all documents held by the European Commission, the Council or Parliament, unless the institution to which a request for access is submitted can show that one of the exceptions set out in Articles 4(1) to (3) of the Regulation applies to the request for public access. The scope of Regulation 1049/2001 covers documents held by these institutions even if the documents originate from third parties, including from a Member State.

19. As regards third-party documents, the Ombudsman noted that Article 4(4) of Regulation 1049/2001 provides that the institution shall consult the third party with a view to assessing whether an exception in paragraph 4(1) or 4(2) is applicable, unless it is clear that the document shall or shall not be disclosed.

20. He also noted that Article 4(5) of Regulation 1049/2001 provides that a Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

Documents originating from Spain

21. As regards the request for documents originating from Spain, the Ombudsman noted that Spain has informed the Commission that it does not wish the Commission to grant access to documents in its possession which originated from Spain. In this context, the Commission relied on the ruling of the Court of First Instance in Case T-168/02 [9] to refuse access to the documents originating from Spain. In that case, the Court of First Instance had stated that a request made by a Member State under Article 4(5) of Regulation 1049/2001 constitutes an instruction to the institution not to disclose the document in question. However, the Ombudsman noted that the European Court of Justice had, in Case C-64/05 P, [10] overruled, in part, the Court of First Instance's ruling in Case T-168/02. The Court of Justice held that a Member State's prerogative, under Article 4(5) of Regulation 1049/2001, to request that a document not be disclosed, is delimited by the substantive exceptions set out in Articles 4(1) to (3) of Regulation 1049/2001. The Member State is merely given, in this respect, a power to take part in the Community decision as regards access. Understood in this way, the " *prior agreement* " of the Member State referred to in Article 4(5) of Regulation 1049/2001 is not a discretionary right of veto as regards access, but rather a form of assent whereby the Member State confirms

that none of the exceptions set out in Articles 4(1) to (3) apply. [11] The Ombudsman noted that the Member State's intervention does not affect the Community nature of the decision as regards access. [12]

22. The Ombudsman noted that, when a request is made to an institution for access to a document originating from a Member State, the institution and the Member State concerned are obliged to cooperate in such a way that the relevant rules under Regulation 1049/2001 are effectively applied. In particular, they are obliged to commence, without delay, a *genuine dialogue* concerning the potential application of the exception laid down in Article 4(1) to (3) of Regulation 1049/2001, while paying attention to the need to respect the time-limits for a decision provided for in Articles 7 and 8 of the Regulation. [13]

23. The Ombudsman noted that if, following such *genuine dialogue* , the Member State concerned objects to the disclosure of the document in question, it is obliged to state reasons for that objection with reference to the exceptions laid down in Article 4(1) to (3) of Regulation 1049/2001. [14]

24. The Ombudsman noted that the institution cannot accept a Member State's objection to disclosure of a document originating from that State if: (i) the objection is not reasoned; and (ii) the reasons are not put forward in terms of the exceptions listed in Article 4(1) to (3) of Regulation 1049/2001. Where, despite an express request by the institution to the Member State to that effect, the Member State still fails to provide the institution with such reasons, the institution must, in the event that it considers that none of those exceptions applies, give access to the document that has been asked for. [15]

25. In the event that the Member State gives a reasoned refusal to allow access to the document in question, the Ombudsman noted that the institution is consequently obliged to refuse the request for access. [16]

26. On the basis of Articles 7 and 8 of Regulation 1049/2001, the Ombudsman noted that the institution is itself obliged to give reasons for a decision to refuse a request for access to a document. This obligation implies that the institution must, in its decision, not merely record the fact that the Member State concerned has objected to disclosure of the document asked for, but also set out the reasons relied on by that Member State to show that one of the exceptions to the right of access in Article 4(1) to (3) of the Regulation applies. [17]

27. In light of the above, the Ombudsman considered that the Commission's refusal to grant access no longer seemed to be justified given that it relied upon the Spanish authorities' objection to the disclosure of the documents, without referring to, and giving adequate reasons for, the application of any one of the exceptions laid down in Article 4(1) to (3) of Regulation 1049/2001.

Internal documents of the Commission

28. As regards the Commission's refusal to grant access to its internal documents, the Ombudsman could not accept the Commission's arguments put forward in support of its reliance on the exception of Article 4(3), first or second subparagraph, of Regulation 1049/2001(about the need for a certain " *space to think* " or for free internal debates). The Ombudsman had already emphasised that upholding such arguments would effectively lead to the conclusion that the institution could, in general, refuse disclosure of *any document drawn up for internal use* , on the grounds that disclosure would adversely affect its interest in having " *free* " internal discussions and deliberations. [18] This broad approach clearly could not be reconciled with the principle of a strict interpretation and application of the exceptions laid down in Article 4 of the Regulation. [19] Further, such a strict interpretation and application applied to the exception provided for in Article 4(3), second subparagraph, which was also explicitly declared by the Community legislator to apply to requests for access to environmental information. [20] In fact, an endorsement of the Commission's approach would amount to little less than a broad license for non-disclosure of all such documents, in obvious disregard of the intent of the Community legislator which adopted Regulation 1049/2001. Hence, the Commission did not appear to have given adequate grounds for applying the exceptions contained in Article 4(3) of Regulation 1049/2001.

29. The Ombudsman also noted that, as indicated by the Commission, in cases like the present, there is a strong public interest in transparency as regards the elements on the basis of which it makes its assessment. Even under the very terms of Article 6(4) of the Habitats Directive, [21] the Commission had to give an opinion on whether, in view of the project's negative impact on priority species and/or a priority natural habitat type, there were " *imperative reasons of overriding public interest* " justifying its implementation. Hence, in this kind of case, there is, in any event, a public interest in disclosure weighing heavily in favour of transparency. Independently of the remarks made in paragraph 28 above, the Commission appeared to have failed to balance this interest properly.

30. In light of the above, the Ombudsman made the friendly solution proposal that the Commission could reconsider its refusal to grant access. To the extent that this refusal concerned documents originating from the Spanish authorities, or Commission documents referring to the content of these documents originating from a Member State, this reconsideration presupposed a consultation with the competent Spanish authorities, under the terms of the Court of Justice's judgment in Case C-64/05 P.

The arguments presented to the Ombudsman after his friendly solution proposal

31. The Commission considered that its decision in relation to the EEB's confirmatory application was legally correct at the time it was taken. It accepted, however, the Ombudsman's proposal for it to reconsider, on the basis of the Court of Justice's judgment in Case C-64/05 P, the refusal to grant access to documents originating from the Member State (documents 12-14). Therefore, the Commission again consulted the Spanish authorities. The Spanish authorities informed the Commission about ongoing court proceedings in the *Tribunal Superior de Justicia*

de Canarias . According to the Spanish authorities, disclosure of the documents would undermine the protection of these court proceedings. Therefore, the request for access fell under the exception provided for in Article 4(2), second indent, of Regulation 1049/2001, namely, the exception that disclosure would undermine the protection of court proceedings and legal advice. Since the Spanish authorities opposed disclosure and provided reasons put forward in the terms of the exceptions of Regulation 1049/2001, the Commission took the view that it had no discretion. Therefore, once more, it refused to disclose the documents. [22]

32. The Commission also agreed to reconsider its refusal to provide access to documents 6, 8 and 9, given that the decision concerning the co-financing of the Port of Granadilla under the next programming period of the Structural Funds (period 2007-2013) had been adopted. These documents, partial access to which had already been granted, were exchanged between the Commission services in the context of drafting the Commission's opinion in relation to the compliance of the Granadilla port project with the Habitats Directive. The documents also served the Commission during the negotiations with the Spanish authorities concerning the financing of the Granadilla port project through the Structural Funds. The documents in question contain assessments and analysis of the arguments presented by the Member State authorities, as well as opinions and considerations that had to be taken into account in the Commission's decisions. The Commission considered that if such internal preparatory documents were to be disclosed, it would mean that the authors of this kind of notes would, in the future, take the risk of disclosure into account. Such an eventuality would limit their willingness to put forward any critical or controversial views. As a result, the Commission would no longer benefit from the frankly expressed and complete views of its agents and officials and would be deprived of a constructive form of internal criticism, given free of all external constraints and pressures. This would, the Commission argued, clearly undermine the Commission's decision-making process. Furthermore, disclosure of documents 6, 8 and 9 would create a risk not only that possibly critical opinions of Commission officials might be made public, but also that these opinions could be compared with the final decisions taken by the Commission. If this were done, the institution's internal discussions would be disclosed. That "would risk seriously undermining the decision-making freedom of the Commission, which adopts its decisions on the basis of the principle of collegiality and whose Members must, in the general interest of the Community, be completely independent in the performance of their duties". [23]

33. In addition, to the extent that documents 6, 8 and 9 rely on the documentation provided by the Spanish authorities, the Commission argued that it would be practically impossible to disclose the parts containing the views of the Commission services without disclosing the information originating from the Member State.

34. As regards the existence of an overriding public interest in disclosure, the Commission pointed out that the purpose of the principle of openness is to " *enable citizens to participate more closely in the decision-making process* ". [24] According to the Commission, the EEB and the wider public actively participated in the discussions concerning the construction of the Port of Granadilla and made their views known in that context. The disclosure of documents 6, 8 and 9 would hardly have an effect on their ability to put their position forward. At the same time, disclosure of documents 6, 8 and 9 would seriously undermine the Commission's

decision-making process. The Commission therefore considered that Article 4(3), second subparagraph, of Regulation 1049/2001 prevented further disclosure of documents 6, 8 and 9.

35. As regards documents 10 and 11, the Commission did not consider that any new circumstances warranting the reassessment of its decision had emerged. Contrary to what the Ombudsman suggested in his proposal for a friendly solution, the Commission carried out a concrete harm test and balanced the protected interest against the public interest in disclosure.

36. On the basis of the above, the Commission considered that it could not provide any more access than it had already been granted in its replies of 15 December 2006 and 10 April 2007.

37. The complainant, in response to the Commission's opinion, took the view that the Commission had made an erroneous interpretation, as regards documents 12-14, based on the judgment of the Court of Justice in Case C-64/05 P. That judgment states that " *Article 4(5) of Regulation 1049/2001 cannot be interpreted as conferring on the Member State a general and unconditional right of veto, so that it could in a discretionary manner oppose the disclosure of documents originating from it and held by an institution, with the effect that access to such documents would cease to be governed by the provisions of that regulation and would depend only on the provision of national law* ". Furthermore, according to the Court of Justice, " *the prior agreement of the Member State referred to in Article 4(5) resembles not a discretionary right to veto but a form of assent confirming that none of the grounds of exception under Article 4(1) to (3) is present.* " [25] Further, it stated that " *the mere fact that a document concerns an interest protected by an exception cannot of itself justify application of that exception; the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical* ". [26]

38. The complainant took the view that there was not a reasonably foreseeable risk. Indeed, the complainant did not consider that disclosure of documents 12-14 could, even hypothetically, damage the court proceedings in question. On the contrary, the information contained in those documents would help the *Tribunal Superior de Justicia de Canarias* to make the right decision.

39. As regards the other documents drawn up by the Commission services, the complainant considered that the Commission merely cited parts of the judgment of the Court of First Instance in Case T-403/05 [27] without explaining how these conditions apply to the documents in the present case. The complainant took the view that the Commission tried to apply doctrine relating to competition law, and in particular to merger control, to the present case which concerns an environmental issue. The complainant pointed out that, in environmental matters, the public interest is very high and the access to information principle should be applied in the " *broadest and strongest way* ".

The Ombudsman's assessment after his friendly solution proposal

40. The Ombudsman first welcomed the fact that the Commission had taken steps to reconsider the request for access to documents 12, 13 and 14 on the basis of the Court of Justice's judgment in Case C-64/05 P. [28] The Ombudsman, however, was not convinced that the Commission had correctly applied the Court of Justice's interpretation of Article 4(5) of Regulation 1049/2001, as set out in Case C-64/05 P.

41. The Court of Justice underlined, in its judgment in Case C-64/05 P, that Article 4(5) of Regulation 1049/2001 does not aim to establish a division between two powers, one national and the other of the Community, with different purposes. Article 4(5) gives the Member State the power to take part in the Community decision. However, the sole purpose of the decision-making procedure under Article 4(5) is to determine whether access to a document should be refused under one of the substantive exceptions set out in Article 4(1) to 4(3). [29] In the Ombudsman's view, the fact that a Member State is involved in this decision-making procedure through Article 4(5) should not alter the purpose of the decision-making procedure. By extension, the fact that a Member State is involved in this decision-making procedure through Article 4(5) should not alter the quality of the eventual decision taken as regards public access under Regulation 1049/2001. In sum, the justification provided by the institution holding a document with a view to showing that an exception under Article 4(1) to (3) applies should not be any way less extensive or less convincing when the document in question is a document originating from a Member State and the Member State has requested that public access to the document be denied. This is supported by the Court of Justice's ruling that the Member State is obliged, in accordance with the duty of loyal cooperation, to act and cooperate in such a way that Regulation 1049/2001, and, specifically, Article 4(1) to (3), are *effectively applied* . [30]

42. The Court of Justice further underlined that a Member State's intervention in the context of a request for access to documents does not affect the Community nature of the decision that is subsequently taken by the institution [31] . Nor does a Member State's intervention affect the institution's obligation to provide reasons for its decision to refuse access. [32] It followed, in the Ombudsman's view, that the responsibility of the institution refusing public access to a document in its possession to provide reasons for its decision remains the same regardless of whether the institution has based its decision on a request pursuant to Article 4(5) or if the institution's decision is based solely on its own analysis. This is also understood from the Court of Justice's statement that " *the institution must, in its decision, not merely record the fact that the Member State concerned has objected to disclosure of the document asked for, but also set out the reasons relied on by that Member State* **to show** [33] *that one of the exceptions to the right of access in Article 4(1) to (3) of the regulation applies.* " [34]

43. It followed from paragraphs 41-42 above that the institution refusing access to a document originating from a Member State has an obligation to *verify that the reasons* for applying Article 4(1) to (3), put forward by that Member State and was used by the institution to reason its decision, *meet the required standard* . This was also supported by the fact that the Court stated that Article 4(5) requires the institution referring to a Member State's reasons when refusing access to a document also *to make sure that those reasons exist* . [35]

44. As regards the required standard of reasons for applying Article 4(1) to (3), the judgment in Case C-64/05 P provides that these reasons should allow the person who has asked for the document to understand the origin and grounds for the refusal of his request and the competent court to exercise, if need be, its power of review. [36] The Ombudsman notes that the case-law of the EU Courts has already set out the details of the examination to be undertaken (and thereby also the reasons to be provided) by the institution in this regard. As regards the exception to access to documents relating to court proceedings, the Ombudsman considers it appropriate to apply the three-stage examination set out by the Court of Justice in relation to legal advice. The examination should be carried out in three stages. First, the institution must satisfy itself that the document which it is asked to disclose does indeed relate to court proceedings and, if so, decide which parts of the documents are actually concerned. Second, the institution must examine whether disclosure of the parts of the document in question which have been identified as relating to court proceedings " *would undermine the protection* " of those proceedings. The risk of that interest being undermined must be reasonably foreseeable and not purely hypothetical. Third, if the institution takes the view that disclosure of the document would undermine the protection of court proceedings, it is incumbent on it to ascertain whether there is any overriding public interest justifying disclosure. [37]

45. In the present case, the Spanish authorities argued that disclosure of documents 12-14 would undermine the protection of ongoing court proceedings. The Ombudsman noted, however, that the Spanish authorities did not appear to have provided, to an extent sufficient to meet the standards established by the Court of Justice (as summarised above in paragraph 44), reasons to show that the exception set out in Article 4(2), second indent actually applied. For its part, the Commission failed to fulfil its obligations under Article 4(5) by not having verified, through a genuine dialogue [38] with the Spanish authorities, that adequate reasons existed for applying Article 4(2), second indent. Accordingly, the Commission wrongly refused access to the documents in question. This was an instance of maladministration.

Internal documents 6, 8 and 9 of the Commission

46. The Ombudsman first welcomed the fact that the Commission also reconsidered its refusal to provide access to documents 6, 8 and 9. He also recalled that the Commission's refusal to grant access to documents 6, 8 and 9 was originally based on Article 4(3), first subparagraph (whilst its refusal to grant access to documents 10 and 11 was based on Article 4(3), second subparagraph). After taking into account the fact that the decision concerning the co-financing of the Port of Granadilla under the programming period 2007-2013 of the Structural Funds had now been adopted, the Commission then refused access to all the internal documents concerned - Documents 6, 8, 9, 10 and 11 - on the basis of Article 4(3), second subparagraph. [39] The Commission based its analysis on an interpretation of the ruling of the Court of First Instance in Case T-403/05 (hereinafter referred to as the *MyTravel* case). [40] The Ombudsman did not find the Commission's interpretation convincing for the following reasons.

47. The Ombudsman first recalled that Article 4(3) is intended to protect the internal

decision-making process of the institutions. The Commission used the term " *space to think* " to describe the protected interest. In certain circumstances, the institution's decision-making ability may be compromised if documents which are to be used immediately and directly by the institution in order to adopt a future decision were to come into the public domain *before* that decision is taken. Such an eventuality could materialise by virtue of the fact that such premature disclosure of documents may lead to undue external pressure being exerted on the institution and/or its services (Article 4(3), first subparagraph). [41] An institution's decision-making ability may also be compromised if internal documents are made public *after* a decision has been taken (Article 4(3), second subparagraph). However, the danger that an institution's decision-making ability will be compromised is greatly reduced once a decision has been taken. In such circumstances, there is only a limited danger that undue external pressure will be effectively exerted on the institution or its services as a result of public disclosure of the documents. This view is in fact confirmed by the *MyTravel* case, which, in the Ombudsman's view, must be interpreted as implying that the protection of the decision-making ability after the decision has been taken is limited to certain particular situations.

48. The first particular situation which was taken into consideration in the *MyTravel* case was that the documents to which access was requested were very exceptional documents. The documents were reports drawn up by an *ad hoc* working group established by the Commission in the aftermath of the ground breaking judgment by the Court of First Instance in Case T-342/99 (hereinafter referred to as the *Airtours/First Choice* case). [42] The mandate of the *ad hoc* working group was to analyse the different stages in the administrative and judicial procedures in the *Airtours/First Choice* case and to propose appropriate conclusions. In accordance with its mandate, the working group was required to examine a number of questions arising in relation to the *Airtours/First Choice* case and indicate any possible points of disagreement with the ruling of the Court of First Instance. The questions were:

"(1) Is an appeal against the Airtours judgment appropriate?

(2) Which weaknesses has the judgment revealed, in particular in the administrative procedure leading to the decision?

(3) Which conclusions can be drawn from this case with respect to internal procedures?

(4) Can lessons be learned from any other activity areas of DG Competition?

(5) Which aspects of substantive competition policy addressed in the Airtours judgment deserve further examination in ongoing or future reviews?

(6) Are there implications on other competition cases pending before the Court?"

The mandate of the working group also stated that the report was to be submitted for discussion with the Member of the Commission responsible for competition matters before the expiry of the period for bringing an appeal. [43] Access was also refused to working papers drawn up in order to prepare the report, and to the provisional reports of different sub-groups, which were

often reproduced in the report word-for-word.

49. The Ombudsman noted that the internal documents at issue in the *MyTravel* case contained analysis and criticism by a Commission working group in relation to the actions and policies of the Commission in the context of the exercise of the Commission's prerogatives in the area of merger control. Specifically, the internal documents in question sought to identify errors and weaknesses in the Commission's own policies and procedures in the area of merger control. In the *MyTravel* case, the Court of First Instance took the view that this process of self-reflection and self-criticism, which the Commission working group was asked to undertake, would be negatively affected by the prospect of those self-reflections and self-criticisms being made public. In addition to self-critical views, the Ombudsman did not exclude that, in line with the *MyTravel* case-law, a risk to an institution's decision-making ability may arise if the institution were to disclose documents containing speculative or controversial views.

50. The second particular situation which was taken into consideration in the *MyTravel* case was the fact that the documents to which access was requested could be used by DG Competition in the examination of similar merger cases in the future, involving the same sector of activities or the same economic concepts. [44] In this context, the Court of First Instance accepted that there was a reasonably foreseeable risk that the Commission's decision-making process in respect of merger control in general would be seriously undermined if the documents in question were released.

51. The Ombudsman was of the view that, in order for the *MyTravel* case-law to be applied to the documents under consideration in the present case, it would be necessary to provide convincing arguments as to why these documents relate to situations which are analogous to the particular situations which arose in the *MyTravel* case.

52. The Ombudsman also considered it necessary to draw the Commission's attention to Case T-121/05 (hereinafter referred to as the *Borax* case), [45] which concerned a request for access to various scientific opinions drawn up for the purpose of preparing legislation. In that case, the Court of First Instance noted that there is always a *certain* risk associated with all instances of access to documents containing opinions intended for internal use as part of consultations and preliminary deliberations. In sum, as the Court of First Instance noted, there is a risk of deterrence inherent in *all* instances of access to documents containing opinions intended for internal use as part of consultations and preliminary deliberations. However, according to the Court of First Instance, it cannot be inferred, from the mere existence of a risk, that disclosure of a document will actually have a deterrent effect as regards its author. An interpretation which would imply the automatic application of Article 4(3), second subparagraph, of Regulation 1049/2001 every time a risk of deterrence exists would clearly run counter to the purpose and meaning of that Article.

53. As such, the exception in Article 4(3), second subparagraph, should only apply if it is shown that the risk which exists is such as to undermine seriously the institution's decision-making process. [46] The Court of First Instance also concluded that an argument that there is a risk that opinions will not be expressed freely and frankly cannot be based on mere assertions, but

has to be properly reasoned. [47] It was thus clear that the institution holding the document must make a concrete examination of the content of the document in order to evaluate if the nature and intensity of the risk which arises as a result of the public disclosure of the document is sufficient in order to undermine seriously the institution's decision-making process.

54. The Ombudsman considered that, when carrying out such an analysis, the institution should bear in mind that divergent views are not the same as critical, speculative or controversial views. The fact that divergent views may be expressed within an institution during a decision-making process is a completely normal, and, indeed, an expected state of affairs. This normal state of affairs was known when it was laid down in the Treaty that decisions should be taken as openly as possible and when the preamble to Regulation 1049/2001 was formulated to state that openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy. The fact that disclosure of certain documents would reveal that divergent views existed during the decision-making process, and that these views could be compared with the decision ultimately taken cannot, therefore, alone be used to prove that the public disclosure of those documents would seriously undermine the institution's decision-making process. On the contrary, rather than undermining the quality and integrity of an institution's decision-making process, it was likely that the public disclosure of documents which might contain divergent views would improve the Commission's decision-making process since the prospect of such inter-service consultation documents coming under public scrutiny should work as an incentive to provide better arguments in support of the positions taken.

55. On the basis of the above, and having inspected the documents concerned, the Ombudsman made the following analysis of documents 6, 8 and 9.

Document 6

56. The Ombudsman concluded that document 6 mainly contained facts and arguments in relation to the Granadilla port project. Document 6 did not contain any (self-) critical, controversial or speculative views, disclosure of which could limit the willingness of its officials to put forward such views. Furthermore, the argument that document 6 could be used in the examination of similar cases involving the same sector of activities, as provided for in the *MyTravel* case, was clearly not applicable, given that document 6 concerned a unique set of facts, that is, facts concerning a specific project (the Granadilla harbour project) and its impact on a particular Natura 2000 site.

Document 8

57. The Ombudsman concluded that document 8 mainly set out the questions that will be answered in document 9. Document 8 did not contain any (self-) critical, controversial or speculative views, disclosure of which could limit the willingness of its officials to put forward such views in the future. Furthermore, the argument that document 8 could be used in the

examination of similar cases involving the same sector of activities, as provided for in the *MyTravel* case, was clearly not applicable, given that document 8 concerned a unique set of facts, that is, facts concerning a specific project (the Granadilla harbour project) and its impact on a particular Natura 2000 site.

Document 9

58. The Ombudsman concluded that document 9 mainly set out technical aspects of the Granadilla port project. Document 9 did not contain any (self-) critical, controversial or speculative views, disclosure of which could limit the willingness of its officials to put forward such views in the future. Furthermore, the argument that document 9 could be used in the examination of similar cases involving the same sector of activities, as provided for in the *MyTravel* case, was clearly not applicable, given that document 9 concerned a unique set of facts, that is, facts concerning a specific project (the Granadilla harbour project) and its impact on a particular Natura 2000 site.

59. On the basis of the above, the Ombudsman did not consider that the exception to public access set out in Article 4(3), second subparagraph, of Regulation 1049/2001 applied to documents 6, 8 and 9. Accordingly, the Ombudsman concluded that the Commission wrongly refused access to the documents in question, thereby committing an instance of maladministration.

60. As regards the Commission's argument that it would be practically impossible to disclose the views of the Commission's services without disclosing the information originating from the Member State, the Ombudsman noted that the fact that a Commission document refers to information obtained from a Member State is not in itself a ground for exception to access under Regulation 1049/2001. Rather, the Commission would have to justify specifically why such documents should not be disclosed on the basis of the exceptions set out in Article 4(1) to 4(3) of Regulation 1049/2001.

61. Finally, and notwithstanding the above analysis under Regulation 1049/2001, having examined the documents in question, the Ombudsman considered that the public disclosure of document 6, 8 and 9 would be likely to improve the Commission's decision-making process (see paragraph 54 above).

Internal documents 10 and 11 of the Commission

62. The Ombudsman noted that the Commission did not consider that there were any new circumstances warranting the reassessment of its decision to refuse access to documents 10 and 11. In this regard, the Ombudsman pointed out, first, that his proposal for a friendly solution, which was that the Commission should reconsider its refusal to provide access to the documents concerned, was made on the basis of a finding that the Commission had not given adequate grounds for invoking the exceptions contained in Article 4(3). Accordingly, the

reassessment of its decision to refuse access to documents 10 and 11 should have been made regardless of any new circumstances.

63. The Ombudsman drew the Commission's attention to a new circumstance, which arose subsequent to the Commission's response to the friendly solution proposal, in relation to the interpretation of Article 4(3), second subparagraph, of Regulation 1049/2001. This new circumstance was the judgment of the Court of First Instance in the *Borax* case. [48]

64. Recalling the above analysis of Article 4(3), second subparagraph, (paragraphs 48-53), and having inspected the documents concerned, the Ombudsman made the following analysis of documents 10 and 11.

Document 10

65. The Ombudsman considered that document 10 did indeed contain views which fell within the framework established by the *MyTravel* case (namely, the views expressed could be classified as either critical, controversial or speculative). The Ombudsman agreed that public disclosure of such views, even after a decision has been taken, could potentially lead to a situation where the Commission's services would be reluctant to express such views freely. This could deprive the Commission of the opportunity to be fully and frankly informed of all aspects of a case and of the consequences of the different options available.

66. As regards whether public disclosure of document 10 would *seriously* undermine the decision-making process, the Ombudsman found that the nature and intensity of the expressed views were such that the Commission's argument, that disclosure would seriously undermine the independent expression of opinions on the matter and endanger the quality and the solidity of the eventual decision, must be sustained as regards document 10.

67. The Ombudsman therefore found that the Commission was entitled to refuse access to document 10 on the basis of Article 4(3), second subparagraph, of Regulation 1049/2001.

68. The Ombudsman then carefully examined whether there was an overriding public interest in disclosing document 10. The task involved balancing the public interest in disclosure with the damage which may have been caused to the Commission's decision-making process by the public disclosure of the document. The Ombudsman noted that, while document 10 contains important observations, the views expressed in document 10 do not add elements of a substantive nature which were not already in the public domain. As such, and in light of the reasonably foreseeable risk that the disclosure of document 10 would seriously undermine the Commission's decision-making process, the Ombudsman took the view that there was no overriding public interest in disclosure in relation to document 10.

Document 11

69. The Ombudsman concluded that document 11 contained conclusions made on the basis of inter-service consultations. Document 11 did not contain any (self) critical, controversial or speculative views, disclosure of which could limit the willingness of its officials to put forward such views in the future. Furthermore, the argument that document 11 could be used in the examination of similar cases involving the same sector of activities, as provided for in the *MyTravel* case, was clearly not applicable to document 11, given that it concerned a unique set of facts, that is, facts concerning a specific project (the Granadilla harbour project) and its impact on a particular Natura 2000 site.

70. On the basis of the above, the Ombudsman did not consider that the Commission provided arguments to show that the exception to access set out in Article 4(3), second subparagraph, of Regulation 1049/2001 applied to document 11. Accordingly, the Ombudsman took the view that the Commission wrongly refused access to document 11, thereby committing an instance of maladministration.

71. As was the case with documents 6, 8 and 9, the Ombudsman considered that disclosure of document 11 was likely to *improve* the Commission's decision-making process (see paragraph 54 above).

72. On the basis of the above, the Ombudsman concluded that the Commission wrongly refused access to the documents 6, 8, 9, 11, 12, 13 and 14 for the following reasons:

• As regards documents 6, 8, 9 and 11, the Commission had failed to give adequate grounds for invoking the exceptions contained in Article 4(3), second subparagraph, of Regulation 1049/2001.

• As regards documents 12-14, the Commission had failed to verify that the Spanish authorities provided reasons, to the required standard, for applying Article 4(2), second indent of Regulation 1049/2001.

These constituted instances of maladministration. The Ombudsman therefore made the following draft recommendation, in accordance with Article 3(6) of the Statute of the European Ombudsman, to the Commission:

"The Commission should provide access to documents 6, 8, 9 and 11.

As regards documents 12-14, the Commission should enter into a genuine dialogue with the Spanish authorities in relation to the request for access with a view to ascertaining, to the required standard, if valid reasons for applying Article 4(2), second indent, exist. If the Commission cannot ascertain that valid reasons for denying access exist, the Commission should grant access to documents 12-14."

73. Given that the Commission could not, at that stage of the inquiry, have fully taken into account the Court of Justice's interpretation of Article 4(5) of Regulation 1049/2001 in Case C-64/05 P, the draft recommendation allowed the Commission the opportunity to pursue a

genuine dialogue with the Spanish authorities in relation to the request for access to documents 12-14. The Ombudsman therefore considered that it would have been premature to deal, at that stage of the inquiry, with the complainant's claim that the Commission should inform the EEB in writing of the main arguments and points put forward by the Spanish authorities in documents 12-14.

74. The Ombudsman finally pointed out that his conclusions in respect of document 10 showed that there do exist situations in which the institutions are justified to refuse a request for access to documents. However, in order to be legitimate, any such refusal has to be accompanied by a detailed account of the reasons for applying an exception in Article 4 of Regulation 1049/2001.

The arguments presented to the Ombudsman after his draft recommendation

75. In its opinion in response to the draft recommendation, the Commission first apologised for the fact that its reply to the draft recommendation had taken a considerable period of time, namely, from June 2009, when the Ombudsman sent his draft recommendation, to July 2010, when the Commission sent its reply. The delay was explained by the fact that it was the first case where the Ombudsman considered that the Commission had not assessed the adequacy of the reasons given by a Member State for objecting to the disclosure of documents originating from it.

76. The Commission agreed with the Ombudsman's draft recommendation to reconsider its refusal to provide access to its internal documents 6, 8, 9 and 11. Consequently, in light of this reconsideration, the Commission released these documents to the complainant. In doing so, it took the view that full disclosure of the documents would no longer affect its decision-making process.

77. The Commission pointed out, as regards the documents originating from the Spanish authorities, that its decision of 10 April 2007 not to disclose was in compliance with the case-law of the Court of First Instance because this case law was only reversed by the Court in its judgment of 18 December 2007. [49]

78. As regards the Ombudsman's view that that the reasoning now provided by the Spanish authorities did not meet the standards set by the Court of Justice in Case C-64/05 P, and the Ombudsman's view that the Commission failed to verify, through a genuine dialogue with the Spanish authorities, that adequate reasons existed for applying the exception laid down in Article 4(2) second indent of Regulation 1049/2001, the Commission did not share the Ombudsman's view. The Commission noted that the Court of Justice [50] has confirmed that Article 4(5) of Regulation 1049/2001 puts Member States in a position that is different from that of other third parties as regards disclosure of documents originating from them. The Commission took the view that when a Member State has stated reasons for its objection to the disclosure of documents originating from it, and those reasons are put forward in terms of the substantive exceptions laid down in Article 4, paragraphs 1 to 3 of Regulation 1049/2001, the

Commission is, in principle, obliged to refuse access to the requested documents [51] . However, the Commission could disclose these documents where a Member State, despite their objection, at the end of a genuine dialogue:
- failed to provide reasons for its objections;
- based its objections on reasoning which does not relate to the substantive exceptions laid down in Article 4 (1) to (3) of Regulation 1049/2001;
- invoked one of these exceptions or provided reasons which manifestly do not apply to the documents concerned.

In such cases, the Member State has the right to request the annulment of that decision by the General Court and to ask for interim measures preventing disclosure until the Court has delivered its judgment [52] . A similar case is currently pending before the Court [53] .

79. The Commission noted that, in the present case, it again asked the Spanish authorities whether the reasons for their objections were still valid, taking into account the passage of time. The Commission stated that, as soon as the Spanish authorities lift their objections, it would disclose documents 12, 13 and 14.

80. The complainant, in its observations in relation to the Commission's opinion, considered, first, that it was very disappointing that it took the Commission more than a year to reply to the Ombudsman's Draft Recommendation. The complainant also considered it very disappointing that the Commission still refused to disclose the documents originating from Spain. In the complainant's view, the Commission has not respected the requirements set out in the Treaty of Lisbon and Article 15 TFEU. The complainant wished to reiterate its observations presented on 12 February 2010, after the Commission's opinion to the friendly solution proposal, and stated that it would still like access to the documents held by the Commission.

The Ombudsman's assessment after his draft recommendation

81. The Ombudsman recalls that the first part of his draft recommendation was based on the consideration that the Commission failed to give adequate grounds for invoking the exceptions laid down in Article 4(3), second subparagraph, of Regulation 1049/2001. On that basis, he called upon the Commission to reconsider, taking into account his findings, the decision to disclose partial access to its internal documents 6, 8, 9 and 11.

82. In its detailed opinion dated 14 July 2010, the Commission pointed out that it had re-examined its internal documents on the basis of the Ombudsman's draft recommendation. Subsequently, it released these internal documents in full. The Ombudsman considers that the Commission has thus accepted the first part of the draft recommendation. He therefore considers that the complainant's claim that the Commission should disclose its internal documents in full has been settled by the Commission. No further action by the Ombudsman is therefore necessary as regards this aspect of the complaint.

83. As regards the second part of the draft recommendation, in which the Ombudsman stated

that the Commission had failed to verify that the Spanish authorities had provided reasons, to the required standard, for applying Article 4(2), second indent of Regulation 1049/2001, the Ombudsman first acknowledges and welcomes the Commission's attempts to enter into a dialogue with the Spanish authorities as regards the application of Article 4(1) to 4(3) of Regulation 1049/2001 to the documents in question.

84. The Ombudsman notes that the Commission is of the view that, when a Member State has informed the Commission of the reasons for its objection to the public disclosure of documents originating from it, and those reasons are put forward in terms of the substantive exceptions laid down in Article 4(1) to (3) of Regulation 1049/2001, the Commission is, in principle, obliged to refuse access to the requested documents. The Commission can, it argues, only disclose the documents where the Member State:
- fails to provide any reasons for its objections; *or*
- bases its objections on reasoning which does not relate to the substantive exceptions laid down in Article 4 (1) to (3) of Regulation 1049/2001; *or*
- invokes one of the exceptions laid down in Article 4 (1) to (3) of Regulation 1049/2001, or provides reasons relating to the exceptions laid down in Article 4 (1) to (3) of Regulation 1049/2001, which manifestly do not apply to the documents concerned.

In such cases, if the Commission decides to release the documents despite the request from the Member State, the Member State has the right to bring an action for annulment in relation to that decision before the General Court. It also has the right to ask the General Court for interim measures preventing disclosure until the Court has delivered its judgment. [54]

85. The Ombudsman has reservations as regards the Commission's understanding of the basis of its dialogue with the Spanish authorities. The Ombudsman recalls that the Court of Justice has underlined, in its judgment in *Sweden v Commission* , that Article 4(5) of Regulation 1049/2001 does not aim to establish a division between two powers, one at national level and the other at EU level, with different purposes. Article 4(5) gives the Member State the power to take part in the decision by the EU institution. However, the sole purpose of the decision-making procedure under Article 4(5) is to determine whether access to a document should be refused under one of the substantive exceptions set out in Article 4(1) to 4(3). [55] In the Ombudsman's view, the fact that a Member State is involved in this decision-making procedure through Article 4(5) should not alter the purpose of the decision-making procedure. By extension, the fact that a Member State is involved in this decision-making procedure through Article 4(5) should not alter the nature or the quality of the eventual decision taken as regards public access under Regulation 1049/2001. The justification provided by the institution holding a document with a view to showing that an exception under Article 4(1) to (3) applies should not be less extensive or less convincing when the document in question is a document originating from a Member State and the Member State has requested that public access to the document be denied. This is supported by the Court of Justice's ruling that the Member State is obliged, in accordance with the duty of loyal cooperation, to act and cooperate in such a way that Regulation 1049/2001, and, specifically, Article 4(1) to (3), are effectively applied. [56]

86. The Court of Justice has further underlined that a Member State's intervention in the

context of a request for access to documents does not affect the EU nature of the decision that is subsequently taken by the institution. [57] Nor does a Member State's intervention affect the institution's obligation to provide reasons for its decision to refuse access. [58] It follows, in the Ombudsman's view, that the responsibility of the institution refusing public access to a document in its possession to provide reasons for its decision remains the same regardless of whether the institution has based its decision on a request pursuant to Article 4(5) or if the institution's decision is based solely on its own analysis. This is also supported by the Court of Justice's statement that " *the institution must, in its decision, not merely record the fact that the Member State concerned has objected to disclosure of the document asked for, but also set out the reasons relied on by that Member State* **to show** *that one of the exceptions to the right of access in Article 4(1) to (3) of the regulation applies.* " [59] It follows that the institution refusing access to a document originating from a Member State has an obligation to verify that the reasons for applying Article 4(1) to (3), put forward by that Member State and used by the institution to reason its decision, meet the required standard. This is also supported by the fact that the Court of Justice stated that Article 4(5) requires the institution referring to a Member State's reasons when refusing access to a document also to make sure that those reasons exist. [60]

87. As regards the required standard of reasons for applying Article 4(1) to (3), the judgment in *Sweden v Commission* provides that these reasons should allow the person who has asked for the document to understand the origin and grounds of the refusal of his request and the competent court to exercise, if need be, its power of review. [61] The Ombudsman notes that the case-law of the EU Courts has already set out the details of the examination to be undertaken (and thereby also the reasons to be provided) by the institution in this regard. The Ombudsman therefore does not agree that the Commission should limit itself to determining whether the exceptions or reasons put forward by the Member State manifestly do not apply to the documents concerned [62] since such a test would not ensure that the Commission adopts a sufficiently reasoned decision. Rather, the Ombudsman is of the view that the Commission should verify that the exceptions or reasons put forward by the Member State do actually apply to the documents concerned. Such a test would permit the Commission to adopt a decision which would be no less extensive and no less convincing than any other sufficiently reasoned decision adopted by the Commission in relation to the application of Regulation 1049/2001.

88. It follows that if the Member State concerned does not give reasons which are sufficient to show that the exceptions set out in Regulation 1049/2001 do actually apply, the Commission should not, in any decision refusing access, rely solely on the reasons put forward by the Member State. [63]

89. As regards the exception to public access as regards documents relating to court proceedings, the Ombudsman considers it appropriate to apply the three-stage examination set out by the Court of Justice in relation to legal advice, since these two categories of documents are both covered by Article 4(2), second indent. First, the institution must satisfy itself that the document which it is asked to disclose does indeed relate to court proceedings and, if so, decide which parts of the documents are actually concerned. Second, the institution must examine whether disclosure of the parts of the document in question, which have been

identified as relating to court proceedings, " *would undermine the protection* " of those proceedings. The risk of that interest being undermined must be reasonably foreseeable and not purely hypothetical. Third, if the institution takes the view that disclosure of the document would undermine the protection of court proceedings, it is incumbent on it to ascertain whether there is any overriding public interest justifying disclosure. [64] If the views of the Member State are being sought, the reason provided by the Member State to deny public access should follow the same methodology. In the present case, the Spanish authorities argued that disclosure of documents 12-14 would undermine the protection of ongoing court proceedings. The Ombudsman notes, however, that the Spanish authorities do not appear to have provided, to an extent sufficient to meet the standards established by the Court of Justice (as summarised above), reasons to show that the exception set out in Article 4(2), second indent actually applies. The Commission has also failed to inform the Spanish authorities of the proper extent of the reasoning required of Spain.

90. In light of the above, the Ombudsman takes the view that the Commission has failed to fulfil its obligations under Article 4(5) by not having verified, through a " *genuine dialogue* " [65] with the Spanish authorities, that adequate reasons exist for applying Article 4(2), second indent to the documents in question. This is an instance of maladministration. The Ombudsman expects that the Commission will take this critical remark into account in the context of its ongoing dialogue with the Spanish authorities. In these circumstances, the Ombudsman considers that it would not be useful to make a special report to the European Parliament.

91. The Ombudsman will also consider launching an own-initiative inquiry with the Commission, the Council and the Parliament as regards how, in similar cases, these institutions have carried out the dialogue with Member States in relation to the application of Regulation 1049/2001 to documents originating from Member States and in the possession of the institution.

B. The allegations that the Commission failed to comply with the deadlines set out in Regulation 1049/2001

92. The Commission expressed its regret for the delay in handling the complainant's application for access to documents, which was, it states, due to the scope of the request and to the complexity of the case. It will do its outmost to respect the stipulated deadlines in future cases. The Commission also deeply regrets the delay in registering the request for access, which was due to the number of requests for access to documents received and the limited resources available to treat them at that point in time.

93. The complainant argued that late registration and late answers to requests are relatively common occurrences within the Commission. In the complainant's view, the reason for this appears to be the imperfect organisation of its work, which in itself constitutes a case of maladministration. The Commission's "deep regrets" are not helpful in this regard. According to the jurisprudence of the Court of Justice, an administration may not invoke the lack of staff or other internal difficulties in order to justify non-compliance with existing binding legal provisions.

The Ombudsman's assessment

94. The Ombudsman notes that the Commission admits that there was a delay in the registering and handling the complainant's application for access. Such delays constitute maladministration. The Ombudsman also notes, however, that the Commission has expressed its regret for the delays and has committed to do its outmost to respect the stipulated deadlines in future cases. The Ombudsman therefore finds no grounds to pursue further this issue at present.

95. The Ombudsman has taken note of the complainant's argument that late registration and late answers to requests are relatively common occurrences within by the Commission. The Ombudsman addressed, in the past, the problem of the belated registration and handling of requests for access to documents by the Commission. [66] The Ombudsman will continue to monitor, on the basis of complaints submitted to him, the Commission's commitment to respect the deadlines stipulated in Regulation 1049/2001. If provided with indications of a systemic problem within the Commission services in this regard, the Ombudsman will consider opening an own-initiative inquiry into the matter.

C. Conclusions

On the basis of his inquiries into this complaint, the Ombudsman closes it with the following conclusions:

The Commission has accepted the Ombudsman's draft recommendation in relation to documents 6, 8, 9, 11.

As regards documents 12, 13, 14, the Commission has failed to fulfil its obligations under Article 4(5) by not having verified, through a genuine dialogue with the Spanish authorities, that adequate reasons exist for applying Article 4(2), second indent to the documents.

As regards the complainant's second and third allegations, no further inquiries are justified.

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

P. Nikiforos Diamandouros

Done in Strasbourg on 8 December 2010

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

[2] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L 206, p. 7. Article 6(4) reads as follows: " *If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.* "

[3] The documents concerned were numbered differently in the Commission's letter dated 10 April 2007. However, for the sake of consistency, the original numbering provided in the annex to the Commission's letter dated 15 December 2006 will be kept throughout the decision.

[4] See Case T-168/02 *IFAW Internationaler Tierschutz-Fonds v Commission* [2004] ECR II-4135. Paragraphs 57 and 58 read as follows:

" *57. However, it follows from Article 4(5) of the Regulation that the Member States are subject to special treatment. That provision confers on a Member State the power to request the institution not to disclose documents originating from it without its prior agreement …*

58. Article 4(5) of the Regulation places the Member States in a different position from that of other parties and lays down a lex specialis to govern their position. Under that provision, the Member State has the power to request an institution not to disclose a document originating from it without its 'prior agreement'. The obligation imposed on the institution to obtain the Member State's prior agreement, which is clearly laid down in Article 4(5) of the Regulation, would risk becoming a dead letter if the Commission were able to decide to disclose that document despite an explicit request not to do so from the Member State concerned… "

[5] A note from Directorate B in DG ENV dated 10 May 2006 to the Director General of DG ENV; and a note from DG ENV dated 1 June 2006 to Commissioner Dimas.

[6] Case C-321/96 *Mecklenburg v Kreis Pinneberg* [1998] ECR I-3809.

[7] Case C-64/05 P *Sweden v Commission and others* [2007] ECR I-11389.

[8] See paragraph 9 above and footnote 7 above.

[9] Case T-168/02 *IFAW Internationaler Tierschutz-Fonds gGmbH v Commission* [2004] ECR II-4135.

[10] Case C-64/05 P *Sweden v Commission and others* [2007] ECR I-11389.

[11] Idem, at paragraph 76.

[12] Idem, at paragraph 94.

[13] Idem, at paragraphs 85-86.

[14] Idem, at paragraph 87.

[15] Idem, at paragraph 88.

[16] Idem, cf. paragraphs 50 and 90.

[17] Idem, at paragraph 89.

[18] Cf. Ombudsman's decision on complaint 1434/2004/PB, point 1.22.

[19] Case C-64/05 P *Sweden v Commission and others* [2007] ECR I-11389, paragraph 66.

[20] See Article 6(1) of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ 2006 L 264, p. 13.

[21] See footnote 2.

[22] Case C-64/05 P *Sweden v Commission and others* [2007] ECR I-11389, paragraphs 44 to 50 and 89.

[23] Case T-403/05 *MyTravel Group plc. v Commission* [2008] ECR II-2027,paragraph 51.

[24] Recital 2 of Regulation 1049/2001.

[25] Case C-64/05 P *Sweden v Commission and others* [2007] ECR I-11389, paragraphs 75-76.

[26] Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraph 69, and Case T-403/05 *MyTravel Group plc. v Commission* [2008] ECR II-2027, paragraph 33.

[27] Case T-403/05 *MyTravel Group plc. v Commission* [2008] ECR II-2027 paragraphs 51-52.

[28] Case C-64/05 P *Sweden v Commission and others* [2007] ECR I-11389.

[29] Case C-64/05 P *Sweden v Commission and others* [2007] ECR I-11389, paragraphs 76 and 93.

[30] *Idem* , at paragraph 85.

[31] *Idem* , at paragraph 94.

[32] *Idem* , at paragraph 89.

[33] The Ombudsman's emphasis.

[34] Case C-64/05 P *Sweden v Commission and others* [2007] ECR I-11389, paragraph 89.

[35] *Idem* , at paragraph 99.

[36] *Idem* , at paragraph 89.

[37] Joined cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723 paragraphs 37-44.

[38] Case C-64/05 P *Sweden v Commission and others* [2007] ECR I-11389, paragraphs 85-86.

[39] To recall, Article 4(3), first subparagraph, allows the institution to refuse access to a document drawn up for internal use, which relates to a matter where *the decision has not been taken* by the institution, if disclosure of the document would seriously undermine the institution's decision-making process. Article 4(3), second subparagraph, allows the institution to refuse access to documents containing opinions for internal use even *after the decision has been taken* if disclosure of the document would seriously undermine the institution's decision-making process. It is clear from the wording of the first and second subparagraphs of Article 4(3) that the number of documents potentially covered by Article 4(3) second subparagraph is smaller than the number of documents potentially covered by Article 4(3) first subparagraph. (emphasis added by the Ombudsman).

[40] Case T-403/05 *MyTravel Group plc. v Commission* [2008] ECR II-2027, For an account of the Commission arguments in relation to MyTravel, see paragraphs 33 and 34 above.

[41] It is important to underline, that the reality of such external pressure must be established, that is, evidence must be adduced to show that there was a reasonably foreseeable risk that the decision to be taken would be substantially affected owing to such external pressure. See Case T-144/05 *Muñiz v Commission* [2008] ECR II-335, at paragraph 86.

[42] Case T-342/99 *Airtours v Commission* [2002] ECR II-2585. Merger decisions adopted by the European Commission are rarely annulled. In its ruling in Case T-342/99, the Court of First

Instance annulled the Commission's decision declaring a proposed merger incompatible with the common market.

[43] Case T-403/05 *MyTravel Group plc. v Commission* [2008] ECR II-2027, at paragraph 43.

[44] The Commission gave, as an example, the *EMI/Time Warner* case, in which it refused a request for access under Regulation 1049/2001 to the statement of objections in order to protect the deliberations of its services in the *BMG/Sony* case, which concerned the same sector of activities. Case T-403/05 *MyTravel Group plc. v Commission* [2008] ECR II-2027, paragraphs 99-100.

[45] Case T-121/05 Borax Europe Ltd v Commission [2009] ECR II-27....

[46] Case T-121/05 Borax Europe Ltd v Commission [2009] ECR II-27 paragraph 70.

[47] Case T-121/05 *Borax Europe Ltd v Commission* [2009] ECR II-27, paragraph 71.

[48] Case T-121/05 *Borax Europe Ltd v Commission* [2009] ECR II-27...

[49] Case C-64/05 P Sweden v Commission and others [2007] ECR I-11389.

[50] Idem, paragraphs 43-50.

[51] Idem, paragraphs 85-90.

[52] Article 5(6) of the Detailed rules for the application of Regulation (EC) No 1049/2001, annexed to the Commission's Rules of Procedure, Decision 2001/937 of 29 December 2001, OJ 2001 L 345, pp. 94-98.

[53] Case T-59/09, *Federal Republic of Germany v Commission* , still pending.

[54] The Commission states that a similar case, involving documents emanating from Germany that are held by the Commission, is currently pending before the General Court (see action brought on 11 February 2009 *Germany v Commission* in Case T-59/09,(still pending)).

[55] Case C-64/05 P *Sweden v Commission and others* [2007] ECR I-11389, paragraphs 76 and 93.

[56] Idem, at paragraph 85.

[57] Idem, at paragraph 94.

[58] Idem, at paragraph 89.

[59] Case C-64/05 P *Sweden v Commission and others* [2007] ECR I-11389, paragraph 89

(emphasis added).

[60] Idem, at paragraph 99.

[61] Idem, at paragraph 89.

[62] see paragraph 79 above.

[63] The Commission could certainly add additional reasoning of its own with a view to remedying deficiencies it identified in the reasoning provided by the Member State.

[64] Joined cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723 paragraphs 37-44.

[65] Case C-64/05 P *Sweden v Commission and others* [2007] ECR I-11389, paragraphs 85-86.

[66] In his decision in case 3697/2006/PB, the Ombudsman made the following further remark: " *The Ombudsman recalls that, according to Articles 7(1) and 8(1) of Regulation 1049/2001, applications for access to documents and confirmatory applications shall be handled promptly and a reply to an access application or a confirmatory application shall be given within 15 working days as from the date of registration of such an application. The Ombudsman takes the view that the obligation to handle applications promptly implies that the Commission should organise its administrative services so as to ensure that registration normally take places, at the latest, on the first working day following receipt of an application.* "