

JUDGMENT OF THE COURT OF FIRST INSTANCE (Seventh Chamber)

11 March 2009 (\*)

(Access to documents – Regulation (EC) No 1049/2001 – Documents and sound recordings – Refusal of access – Exception relating to the protection of the privacy and integrity of the individual – Exception relating to the protection of the decision-making process)

In Case T-121/05,

**Borax Europe Ltd**, established in Guildford (United Kingdom), represented by D. Vandermeersch and K. Nordlander, lawyers,

applicant,

v

**Commission of the European Communities**, represented by P. Costa de Oliveira and I. Chatzigiannis, acting as Agents,

defendant,

APPLICATION for annulment of the decision of 17 January 2005 of the Secretary-General of the Commission refusing access to certain documents and sound recordings in connection with the 30th adaptation to technical progress of Council Directive 67/548/EEC of 27 June 1967 on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ, English Special Edition 1967(I), p. 234),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Seventh Chamber),  
composed of N.J. Forwood, President, D. Šváby and L. Truchot (Rapporteur), Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 3 April 2008,

gives the following

## Judgment

### Facts

- 1 Borax Europe Ltd ('Borax' or 'the applicant') mines, manufactures and distributes borates and boric acid.
- 2 Those two substances were examined by the Commission's Working Group on the Classification and Labelling of Dangerous Substances in connection, originally, with the 29th adaptation to technical progress of Council Directive 67/548/EEC of 27 June 1967 on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ, English Special Edition 1967(I), p. 234; 'the directive'), provided for by Commission Directive 2004/73/EC of 29 April 2004 (OJ 2004 L 152, p. 1).
- 3 In the course of the first six months of 2003, the Working Group proposed the inclusion of borates and boric acid in Annex I to the directive. That annex contains a list of dangerous substances, as well as specifications for the classification and labelling for each substance, regularly amended for the purpose

of its adaptation to technical progress. The decision to add a substance to Annex I is adopted as a result of the procedure provided for in Article 29 of the directive, as amended by Council Regulation (EC) No 807/2003 of 14 April 2003 adapting to Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in Council instruments adopted in accordance with the consultation procedure (unanimity) (OJ 2003 L 122, p. 36).

- 4 Under Article 29 of the directive, the Commission is assisted in the preparation of the proposal for the adaptation to technical progress by the Technical Committee on Classification and Labelling of Dangerous Substances, composed of representatives of the Member States and chaired by a representative of the Commission. The Commission submits draft proposals to that committee, which gives an opinion. The Commission's Working Group on the Classification and Labelling of Dangerous Substances assists the committee in its work.
- 5 Where carcinogenic or mutagenic substances or substances which are toxic for reproduction are examined and their evaluation gives rise to complex scientific debate, the committee or the Commission may convene a meeting of experts, under Annex VI to the directive. The experts are designated by the Member States, but they participate in those meetings in their capacity as experts and not as representatives of the Member States. That type of meeting is organised by the European Chemicals Bureau, one of the units of the Institute for Health and Consumer Protection, which is part of the Joint Research Centre ('the JRC').
- 6 After taking cognisance of the proposal, issued by the Commission's Working Group on the Classification and Labelling of Dangerous Substances, to include borates and boric acid in Annex I to the directive, the Environment Directorate-General decided to consult a group of experts in the field of reproductive toxicity, in order to determine whether the current scientific data justified the inclusion of those substances in Annex I to the directive because of their effects on development and fertility and, if so, to specify under which category they fell.
- 7 The experts met on 5 and 6 October 2004 in Ispra (Italy), at the European Chemicals Bureau. Borax participated in the first part of the meeting. Then, the representatives of the industrial sector, including Borax, withdrew and the experts deliberated in closed session. Their proceedings were recorded in order to establish the summary record of the meeting. On 7 October 2004, the Commission published, on the European Chemicals Bureau's internet site, the experts' final conclusions, recommending that boric acid and borates be classified among the substances toxic for reproduction in Category 2, a classification which entails an obligation to affix a label to the packaging of those substances containing the statement 'May impair fertility' or 'May cause harm to the unborn child'. On 22 November 2004, the summary record of the Ispra meeting was published on the same website.
- 8 Since it considered that that record did not reproduce either accurately or fully the experts' statements, comments or conclusions, Borax requested, by letter of 8 October 2004, pursuant to 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), access to all the documents, and more particularly to the entire transcript, unabridged minutes and sound recordings of the Ispra meeting. By letter of 3 November 2004, the Director-General of the JRC stated that the documents relating to the meeting in question were the sound recordings of the meeting, the preparatory documents and studies, the conclusions and the detailed summary record. He added that copies of the preparatory documents would be sent to Borax, but that the request for access to the sound recordings was refused.
- 9 Borax submitted a confirmatory application, under Article 7(2) of Regulation No 1049/2001, stating that it would accept partial access to the recordings in the form of written transcripts, from which the names of persons and countries were deleted. By Decision of 17 January 2005 ('the contested decision'), the Secretary-General of the Commission confirmed the refusal to disclose the sound recordings of the Ispra meeting, even in an expurgated version, relying on the undermining of the privacy and integrity of the individual which would be caused thereby, under Article 4(1)(b) of Regulation No 1049/2001, and, under Article 4(3) of that regulation, on the serious undermining of the institution's decision-making process, which no overriding public interest would justify.

- 10 In a later application, Borax requested access to the experts' comments on the draft summary record and to every document relating to the classification of perborates. The documents covered by that application were 13 comments from the experts, two comments from the industry representatives, two drafts of the summary record, a document submitted by the Danish Rapporteur too late to be distributed before the meeting, and the sound recordings of the meeting. The Commission's further refusal of access forms the subject-matter of Case T-166/05.

### **Procedure and forms of order sought by the parties**

- 11 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 15 March 2005.
- 12 The applicant claims that the Court should:
- annul the contested decision;
  - order the Commission to pay the costs.
- 13 The Commission contends that the Court should:
- dismiss the action as unfounded;
  - order the applicant to pay the costs.

### **Substance**

- 14 In support of its action, the applicant relies on three pleas in law. It alleges that the Commission infringed, first, Article 4(1)(b) of Regulation No 1049/2001, by refusing to grant it access to the documents in question, and, second, Article 4(3) of the regulation. Finally, by refusing partial access to the sound recordings, the Commission failed to comply with the principle of proportionality and Article 4(6) of Regulation No 1049/2001.

*The infringement of Article 4(1)(b) of Regulation No 1049/2001, relating to the protection of the privacy and integrity of the individual*

#### **Arguments of the parties**

- 15 The applicant submits that the exception under Article 4(1)(b) of Regulation No 1049/2001 based on the undermining of the privacy and integrity of the individual cannot justify a total refusal of access to the documents sought.
- 16 The applicant argues, first, that the experts invited to take part in the Commission's consultations cannot expect their identities to remain confidential, when they have voluntarily chosen to participate in a legislative process where it is clear that the Commission will rely on their advice in adopting legislation. It adds that it became aware of the identities of the experts concerned during the first part of the Ispra meeting.
- 17 It explains, next, that partial access to the document may be granted by rendering the recording of the meeting anonymous and states that it would accept access to an 'anonymised' version of that recording or its transcription, which would then comply with Community legislation regarding the protection of personal data.
- 18 The applicant challenges, finally, the assertion that disclosure of the recordings would expose the experts to outside pressure and undermine their integrity. First, the Commission has not indicated to what pressure the experts would be exposed if their arguments were made public. Second, the experts have already delivered their final conclusions.

- 19 Borax explains that it wishes, primarily, to reconstruct the scientific debate, which the summary record does not enable it to do. It submits that the contested decision does not specify how the integrity of the individual would be undermined by the disclosure of the original or anonymised recording.
- 20 The Commission contends that it correctly applied the exception for the protection of the privacy and integrity of the individual.
- 21 Its submits that it applied, in the context of that exception, Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1). The experts accepted that their exchanges would be recorded only in order to facilitate the preparation of the final summary record and they were assured, as the summary record of the meeting shows, that their identities would not be revealed. Disclosure of those recordings would constitute processing of personal data incompatible with that purpose and would therefore infringe Article 4(1)(b) of Regulation No 45/2001.
- 22 The Commission also argues that, since an individual can be identified by his or her language, accent or references to the national context, merely removing their names would not be sufficient to make the experts unidentifiable, in accordance with Article 2(a) of Regulation No 45/2001, and that partial access to the document could not therefore be granted.
- 23 It contends that the experts may legitimately expect their identity to be protected. In addition, participation in the decision-making process of an institution cannot deprive a person of the protection of the personal data concerning him, guaranteed by Regulation No 45/2001 and confirmed by Article 4(1)(b) of Regulation No 1049/2001. There is no exception to the application of the rules of protection of personal data for individuals carrying out a function in relation to their professional activities.
- 24 The Commission states that the disclosure of information enabling the experts to be identified would undermine their integrity, since there is a risk that they would be exposed to external pressure because of the economic interests at stake.
- 25 Concerning the transcription of the recording, the Commission submits that such an exercise would entail the creation of a new document, whereas Article 10(3) of Regulation No 1049/2001 provides for access only to existing documents.
- 26 The applicant replies that the transcription of the recordings would only be a new form of the existing document and argues that the right of access to documents concerns the elements of information contained in them and not only the documents as such.
- 27 It submits that the reference to Regulation No 45/2001 is irrelevant, because it did not apply for access to personal data but to the arguments and scientific evidence advanced in the course of the discussions.
- 28 It claims that the Commission's refusal cannot be based on the fact that the experts had received an assurance that their names and opinions would not be disclosed. By adopting such a position, the Commission and the experts would negate the legislation allowing public access to documents.
- 29 The Commission contends that Regulation No 45/2001 had to be applied, since Article 4(1)(b) of Regulation No 1049/2001 must be examined 'in accordance with Community legislation regarding the protection of personal data'. Under Article 8(b) of Regulation No 45/2001, the applicant had to demonstrate the necessity of disclosing the data relating to the experts in order to obtain the processing of that data, whereas the Commission had to ensure that there was no reason to assume that such processing could prejudice the legitimate interests of the persons concerned.
- 30 It submits that Borax's criticisms as regards the experts' qualifications in a letter addressed to the Commission show that the pressures are not hypothetical.

- 31 The purpose of Regulation No 1049/2001, as indicated by recital 4 in its preamble and by its Article 1, is to give the public a right of access to the institutions' documents which is as wide as possible.
- 32 As appears from recital 1 in the preamble, that regulation reflects the intention expressed in the second subparagraph of Article 1 EU to mark a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. As recital 2 in the preamble to that regulation notes, the right of public access to the institutions' documents is related to the democratic nature of those institutions.
- 33 When the Commission is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to the institutions' documents set out in Article 4 of Regulation No 1049/2001 (see, to that effect, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-0000, paragraph 35).
- 34 In that respect, the Commission cannot, in this case, base its refusal on the assurance which it contends it gave the experts that they could express themselves personally and that their identities and opinions would not be disclosed. First, the contested decision does not refer to that undertaking and the Commission cannot therefore rely upon it. Secondly, even if it could be invoked in this case, in spite of the contested decision's silence on the matter, the confidentiality undertaking, which the Commission argues binds it to the experts, was concluded between them and that institution and cannot therefore be relied upon against Borax, whose rights of access to the documents are guaranteed subject to the conditions and within the limits laid down by Regulation No 1049/2001. Finally, a refusal of access to the documents can be based only on the exceptions laid down in Article 4 of Regulation No 1049/2001, with the result that the institution in question cannot make such a refusal in reliance on an undertaking to the participants at the meeting if that undertaking cannot be justified by reference to one of those exceptions. It is therefore within the framework of those exceptions alone that the grounds relied upon in support of the refusal must be examined.
- 35 In view of the objectives pursued by Regulation No 1049/2001, the exceptions set out in Article 4 of that regulation must be interpreted and applied strictly (Case C-64/05 P *Sweden v Commission* [2007] ECR I-11389, paragraph 66, and *Sweden and Turco v Council*, paragraph 36).
- 36 It is clear from Article 4(1)(b) of Regulation No 1049/2001 that the institutions are to refuse access to a document if its disclosure would undermine the protection of the privacy or integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.
- 37 According to the case-law, the reasons for any decision of an institution in respect of the exceptions set out in Article 4 of Regulation No 1049/2001 must be stated. If an institution decides to refuse access to a document which it has been asked to disclose, it must explain how access to that document could specifically and effectively undermine the interest protected by an exception laid down in Article 4 of Regulation No 1049/2001 relied on by that institution (see, to that effect, *Sweden and Turco v Council*, paragraphs 48 and 49). It is for the Court to ensure compliance with the obligation to state reasons, raising, of its own motion, any issue of breach of that obligation (Case 18/57 *Nold v High Authority* [1959] ECR 41, 52, and Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67).
- 38 In the contested decision, the Commission cites Article 4(1)(b) of Regulation No 1049/2001, invoking the protection of the privacy and integrity of the individual, without however pleading specific grounds pertaining to the risk of undermining the protection of privacy or for the infringement of the provisions of Regulation No 45/2001, to which it nevertheless refers before the Court of First Instance.
- 39 In the contested decision, it indeed explains that the meetings of experts organised by the European Chemicals Bureau are held as closed sessions, with the industry's representatives participating at the beginning of meetings so that the relevant industrial sector's point of view is presented and the experts can put any questions they may have. The meeting of 5 and 6 October 2004 was held in the usual way and the Borax representatives participated in it before the closed session. Next, the Commission states that it is necessary to conduct the meetings as closed sessions in order to enable the experts to deliberate and to express themselves freely and independently without being exposed to undue external

pressure. It explains that the sound recordings enable each expert who makes a contribution at the meeting to be identified. It states that the disclosure of their identities associated with the expression of their opinions would clearly undermine the experts' integrity by exposing them to that type of pressure. In that part of the contested decision dealing with the application for partial access to the documents at issue, the Commission confines itself to stating that even if their names were deleted, the experts would still be easily identifiable by the language they speak, their accents and the references they make to national context.

- 40 It is only in the proceedings before the Court of First Instance that the Commission has set forth the grounds on which it considers that the disclosure applied for would undermine the experts' privacy and infringe Regulation No 45/2001. As regards the latter exception, regarding the protection of personal data, the contested decision refers to it only in the section dealing with the examination of whether there is an overriding public interest which would justify the disclosure of the documents in question, by stating that such protection 'is not subject to a public interest test'.
- 41 Since the only references to the experts' identities are either associated with the undermining of their integrity, or are devoid of any grounds explaining how the identification of the experts would undermine their privacy or infringe Regulation No 45/2001, the contested decision cannot, as regards the two latter categories of protected interests, be held to contain a sufficient statement of reasons.
- 42 The Commission, in the contested decision, also justifies its refusal to grant access to the documents sought by relying on the undermining of the experts' integrity, within the meaning of Article 4(1)(b) of Regulation No 1049/2001.
- 43 It is settled case-law that the examination required for the purpose of processing an application for access to documents must be specific in nature. The mere fact that a document concerns an interest protected by an exception is not sufficient to justify application of that exception (Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraph 69; see also, to that effect, Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429, paragraph 75). Such application may, as a rule, be justified only if the institution has previously assessed whether access to the document could specifically and effectively undermine the protected interest. In addition, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical (see, to that effect, *Sweden and Turco v Council*, paragraph 43).
- 44 By stating, in the contested decision, that disclosure of the experts' identities and of the opinions they expressed in the course of the meeting would clearly undermine their integrity by exposing them to undue external pressure, the Commission made its decision on the basis of general grounds which are incapable of substantiating the existence of such a risk. It appears, in fact, that such justification is not supported by the allegation of any fact, relevant to this case, which would corroborate the existence of pressure or a risk of pressure on the participants in the meeting at issue, particularly on the part of Borax or on its initiative. The same reasoning unsupported by evidence, were it to be accepted, could be applied to all the meetings organised by the Commission for the purpose of obtaining the opinion of experts prior to the adoption of decisions of any nature having effects on the activities of economic operators in the sector concerned by those decisions, whatever that sector might be. Such an interpretation of the scope of Article 4(1)(b) of Regulation No 1049/2001 would be contrary to the strict interpretation of the exception, which requires it to be established that the interest protected would be specifically and effectively undermined.
- 45 The hypothetical nature of the risk of the experts' integrity being undermined is confirmed by the Commission's statements at the hearing. Questioned on the point whether there were, in the present case, any indications giving rise to the assumption that pressure could have been exerted on the experts participating in the meeting, the Commission replied that it had no precise information on that point, but that it was clear from the evidence of persons participating in that type of meeting that, when significant interests were at stake, as in this case, pressure was exerted and the experts were approached or criticised. Those matters, by virtue of their general nature, confirm that the Commission had no detailed information leading to the assumption that there was a risk of the experts' integrity being undermined.

- 46 The Commission added, admittedly, that the personal inquiries carried out by the applicant, in the past, and the criticisms which it made in respect of the experts' qualifications could be regarded as evidence of undue external pressure exerted on them. It stated that it had provided the Court with tangible evidence of the pressure exerted on the experts.
- 47 In support of that statement, the Commission produced a letter of 17 January 2005 which Borax had sent it, in which Borax explained that, in view of the fact that the summary record did not reveal the qualifications of the experts who had participated in the meeting, it made some inquiries which had clearly shown that certain experts had no qualifications in respect of reproductive toxicity.
- 48 However, in the context of an application for annulment under Article 230 EC, the legality of the contested measure is to be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (Joined Cases 15/76 and 16/76 *France v Commission* [1979] ECR 321, paragraph 7, and Case T-115/94 *Opel Austria v Council* [1997] ECR II-39, paragraph 87). The Commission adduced no evidence that the letter, which carries the same date as the contested decision but is not mentioned in that decision, constitutes one of the elements on which it is based. That document cannot therefore be taken into consideration for the purposes of the examination of the present action.
- 49 In any event, it cannot be inferred from the letter of 17 January 2005, in which Borax challenges the Commission's statement that the persons designated for the purposes of the meeting are experts of standing in the relevant field, that any pressure was exerted in fact on one or more of those experts or that there was even any intention to employ such pressure or any other tactic which could undermine their integrity.
- 50 Nor, for the same reasons pertaining to the purely hypothetical nature of the risk relied upon, can the Court accept the Commission's argument, put forward at the hearing, that an expert's reputation or career could be affected by the revelation of an opinion contrary to a company's interests.
- 51 The Commission's refusal of Borax's application is even less justified since Borax amended its initial request by accepting that the information sought be limited to transcripts of the recordings, from which the experts' names and countries of origin would be omitted. Although the application was apt to remove any possible risk of undermining the protection of the experts' privacy and integrity, it was not accepted.
- 52 It follows from the foregoing that, by refusing to disclose the recordings applied for, on the ground that the protection of the integrity of the individual would thereby be undermined, the Commission infringed Article 4(1)(b) of Regulation No 1049/2001.

*The infringement of Article 4(3) of Regulation No 1049/2001, relating to the protection of the decision-making process*

#### Arguments of the parties

- 53 The applicant denies that disclosure of the sound recording of the Ispra meeting, which contains opinions for internal use as part of the Commission's deliberations, would seriously undermine the decision-making process. It submits that the Commission has not demonstrated that its decision-making process would be undermined, let alone that it would be seriously undermined.
- 54 When it has to undertake a scientific risk assessment, the Commission should show that it has obtained the necessary advice, in order to provide the economic operators affected by the decision to classify the substances in question with an effective procedural guarantee. The incompleteness of the final conclusions and of the summary record as regards the scientific debate which took place in that respect justifies access to the recordings of the Ispra meeting or to their transcripts.
- 55 The applicant submits that the experts' recommendations have significant economic consequences so far as it is concerned. Its direct interest requires it to satisfy itself that the principles of the regulation were complied with. In that regard, the Commission should have balanced the interests at stake, in accordance with the case-law.

- 56 The Commission contends that disclosure of the recordings would seriously undermine its decision-making process. By making it possible to identify the experts, it would facilitate the exertion of external pressure. Without a guarantee of confidentiality, the experts would become reluctant to express their opinions freely and independently, or even to participate in the Commission's consultations. In addition, if the Commission had to give up recording its meetings to avoid the identification of the participants by their languages or accents, the quality of the summary records would thereby suffer. The contested decision was therefore intended to protect the carrying-out by the Commission of its task in future.
- 57 The Commission challenges the necessity of balancing the interests at stake for the purposes of Regulation No 1049/2001 and submits that the interest of the party seeking to obtain access to documents cannot be taken into account in deciding whether an exception should be applied.
- 58 Borax claims that the Commission's reasoning is based on a poor opinion of the experts. Their deliberations cannot be compared with an exchange of personal or political opinions. Moreover, the calibre of the experts designated by the Member States is such that their reluctance to disclose their scientific opinions is hypothetical.
- 59 As regards the pressure relied upon, Borax refuses to believe that the Commission is alluding to illegal acts committed by private parties.
- 60 In any event, refusing access to the document in question, on the ground that individuals could disagree with some of the opinions expressed, runs counter to the principle of public access to the institutions' documents. In the applicant's submission, it is the refusal to publish the tenor of the scientific debate which is prejudicial to the decision-making process.
- 61 The Commission asserts that the inquiries made by Borax on the experts' qualifications can be regarded as proving that external pressure is not hypothetical. In addition, the experts expressed their personal professional opinions and not the positions of their Member States of origin.

#### Findings of the Court

- 62 Under the second subparagraph of Article 4(3) of Regulation No 1049/2001, access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned is to 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.
- 63 According to the settled case-law referred to in paragraph 43 above, the examination required for the purpose of processing a request for access to documents must be specific in nature. On the one hand, the mere fact that a document concerns an interest protected by an exception is not sufficient to justify application of that exception. Such application may, as a rule, be justified only if the institution has previously assessed whether access to the document would specifically and effectively undermine the protected interest. On the other hand, the risk of a protected interest being undermined must, to be relied upon, be reasonably foreseeable and not purely hypothetical. In the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, the institution must also assess whether there is an overriding public interest in the disclosure of the document concerned (*Sweden and Turco v Council*, paragraphs 44 and 45).
- 64 It must be determined whether, by refusing access to the recordings at issue on the ground that their disclosure would seriously undermine its decision-making process, the Commission infringed the provisions of the second subparagraph of Article 4(3) of Regulation No 1049/2001.
- 65 According to what the Commission stated in the contested decision, disclosure of the recordings would seriously undermine its decision-making process, since the recordings contain individual opinions for internal use as part of deliberations and preliminary consultations within the institution. The Commission also stated, in the contested decision, that it was of paramount importance to preserve a certain space to think, so that the discussions could take place in a frank and open climate in order that it could correctly assess the issues at stake. It continued that, since disclosure of the recordings would



expose the experts to undue external pressure, they would be reluctant to give their opinions freely in future. However, their advice is crucial to the Commission's decision-making process in that area, since it does not have the necessary specialised knowledge available in-house.

- 66 The Commission's argument that the recordings cannot be disclosed because they contain individual opinions expressed for internal purposes in a preliminary phase of the final decision conflicts with the very letter of the second subparagraph of Article 4(3) of Regulation No 1049/2001. That provision, in fact, expressly allows access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned.
- 67 Nor can the Commission justify its refusal of access to the recordings at issue by the necessity of protecting experts from any external pressure in order to preserve a climate of confidence favourable to frank discussions and not to deter experts from freely expressing their opinions in future.
- 68 Indeed, while the Community legislature has provided for a specific exception to the right of public access to the documents of the Community institutions as regards legal advice, it has not done the same for other advice, in particular scientific advice, such as that expressed in the recordings at issue. The Court of Justice has ruled that it could not correctly be held that there is a general need for confidentiality in respect of advice from the Council's legal service relating to legislative matters (*Sweden and Turco v Council*, paragraph 57). A fortiori, the same principle must be applied to the advice at issue, for which the Community legislature has not laid down a specific exception and which remains subject to the general rules applicable to the public right of access to documents.
- 69 Furthermore, in the terms of recital 6 in the preamble to Regulation No 1049/2001, wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, while at the same time preserving the effectiveness of the institutions' decision-making process. In this instance, the opinions expressed in the recordings in question were obtained for the purpose of adopting measures classifying the substances concerned.
- 70 It follows that scientific opinions obtained by an institution for the purpose of the preparation of legislation must, as a rule, be disclosed, even if they might give rise to controversy or deter those who expressed them from making their contribution to the decision-making process of that institution. The risk, relied upon by the Commission, that public debate born of the disclosure of their opinions may deter experts from taking further part in its decision-making process is inherent in the rule which recognises the principle of access to documents containing opinions intended for internal use as part of consultations and preliminary deliberations, which obviously include consultations of experts. It cannot, however, be inferred from the existence of such a risk that any disclosure of a scientific opinion with significant consequences, particularly economic or financial, for the economic operator concerned, will have a deterrent effect as regards its author or, even if that were shown, that the risk is such as seriously to undermine the institution's decision-making process, as where that institution would find it impossible to consult other experts.
- 71 In this case, the Commission justifies its refusal in a general and abstract way without specifying how the disclosure of the recordings would concretely and effectively undermine the process by which it decides on the classification of the substances in question. In fact, the risk of external pressure and the reluctance of experts to express their opinions freely and frankly, relied upon by the Commission, are based on mere assertions, unsupported by any properly reasoned argument.
- 72 Since it has not been shown that the Commission's decision-making process would be undermined, the criterion of seriousness of such an undermining has certainly not been met.
- 73 The Commission cannot contend that its work would be less efficient if it were constrained to cease tape recording meetings. That assertion rests on the idea, contrary to Regulation No 1049/2001, that access to the documents sought would force it to forego that type of medium. In fact, the propriety of a refusal of access must be determined in the light of the document itself, that is to say, under Article 3 of Regulation No 1049/2001, of its content and not its medium. It follows that, under Article 4 of Regulation No 1049/2001, access to a sound recording may be refused only if it contains information capable of undermining a protected interest, subject to the conditions laid down by that provision,

whatever may be the medium concerned. The fear evinced by the Commission of having to give up recourse to certain operating methods is therefore unjustified.

74 It follows that the Commission infringed the second subparagraph of Article 4(3) of Regulation No 1049/2001 by refusing, in the contested decision, on the ground that it would seriously undermine its decision-making process, to produce the recordings in question or their transcripts.

75 It follows from all the foregoing that, without its being necessary to examine whether there is an overriding public interest in the disclosure of the recordings or the third plea in law alleging breach of the principle of proportionality, the contested decision must be annulled.

### **Costs**

76 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (Seventh Chamber)

hereby:

- 1. Annuls the decision of 17 January 2005 of the Secretary-General of the Commission refusing access to certain documents and sound recordings in connection with the 30th adaptation to technical progress of Council Directive 67/548/EEC of 27 June 1967 on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances;**
- 2. Orders the Commission to pay the costs.**

Forwood

Šváby

Truchot

Delivered in open court in Luxembourg on 11 March 2009.

[Signatures]