

# Joined Cases T-391/03 and T-70/04

**Yves Franchet and Daniel Byk**

**v**

**Commission of the European Communities**

(Access to documents — Regulation (EC) No 1049/2001 — Investigations of the European Anti-Fraud Office (OLAF) — Eurostat — Refusal of access — Inspections and investigations — Court proceedings — Rights of the defence)

Judgment of the Court of First Instance (Third Chamber), 6 July 2006 . . . II - 2028

## Summary of the Judgment

1. *Actions for annulment — Actionable measures — Concept — Measures producing binding legal effects*  
(Art. 230 EC; European Parliament and Council Regulation No 1049/2001, Art. 8; Commission Decision 2001/937, Annex, Arts 3 and 4)

2. *European Communities — Institutions — Right of public access to documents — Regulation No 1049/2001*  
(*European Parliament and Council Regulations Nos 1073/1999, Art. 9(2), and 1049/2001, Art. 4(2)*)
3. *European Communities — Institutions — Right of public access to documents — Regulation No 1049/2001*  
(*European Parliament and Council Regulation No 1049/2001, Art. 4(2)*)
4. *European Communities — Institutions — Right of public access to documents — Regulation No 1049/2001*  
(*European Parliament and Council Regulation No 1049/2001, Art. 4*)
5. *European Communities — Institutions — Right of public access to documents — Regulation No 1049/2001*  
(*European Parliament and Council Regulation No 1049/2001, Arts 2(1) and 4(2)*)

1. Only a measure the legal effects of which are binding on and capable of affecting the interests of an applicant by bringing about a distinct change in his legal position is an act against which an action for annulment may be brought under Article 230 EC. In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is, in principle, open to review only if it is a measure definitively laying down the position of the institution at the end of that procedure, and not a provisional measure intended to pave the way for the final decision.

In proceedings relating to public access to documents concerning the activities of the European Anti-Fraud Office (OLAF), it is clear from the combined effect of Articles 3 and 4 of the annex to Decision 2001/937 amending the Commission's rules of procedure and Article 8 of Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents that a response to the initial application for access constitutes only an initial statement of position, conferring on the applicants the right to request the Secretary-General of the Commission or the Director of OLAF to reconsider the position in question. Consequently,

only the measure adopted by the latter, which is a decision and which entirely replaces the previous statement of position, is capable of producing legal effects such as to affect the interests of the applicant and, therefore, of being the subject of an action for annulment under Article 230 EC.

cerned and the Legal Service or a lawyers' office. However, the exception based on the protection of court proceedings cannot enable the institution to escape from its obligation to disclose documents which were drawn up in connection with a purely administrative matter.

(see paras 46-48)

2. The exceptions provided for by Article 4 of Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents must be construed and applied restrictively so as not to defeat the general principle of access to documents enshrined in that regulation.

With regard to the exception based on the protection of court proceedings and legal opinions, the expression 'court proceedings' must be interpreted as meaning that the protection of the public interest precludes the disclosure of the content of documents drawn up solely for the purposes of specific court proceedings, namely pleadings or other documents lodged, internal documents concerning the investigation of the case, and correspondence concerning the case between the Directorate-General con-

In that regard, to find that the various documents sent by OLAF to the national authorities, pursuant to Article 10(1) and (2) of Regulation No 1073/1999 concerning investigations conducted by OLAF, or to an institution, pursuant to Article 10(3) of that regulation, were drawn up solely for the purposes of court proceedings, runs counter to the obligation to construe and apply the exceptions restrictively. In accordance with Article 9(2) of Regulation No 1073/1999, OLAF's reports constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary. The action taken by the national competent authorities or the institutions in response to the reports and information forwarded by OLAF is however within their sole and entire responsibility.

Moreover, compliance with national procedural rules is sufficiently safeguarded if the institution ensures that

disclosure of the documents does not constitute an infringement of national law. Therefore, in the event of doubt, OLAF must consult the national court or authority and must refuse access only if that court has objected to disclosure of the documents.

(see paras 84, 88, 90, 91, 94, 95, 97, 98)

Nevertheless, to allow that the various documents relating to inspections, investigations or audits are covered by the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001 until the follow-up action to be taken has been decided would make access to those documents dependent on an uncertain, future and possibly distant event, depending on the speed and diligence of the various authorities.

(see paras 109-111)

3. The third indent of Article 4(2) of Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents must be interpreted in such a way that that provision, the aim of which is to protect 'the purpose of inspections, investigations and audits', applies only if disclosure of the documents in question may endanger the completion of inspections, investigations or audits.

The various acts of investigation or inspection may remain covered by the exception based on the protection of inspections, investigations and audits as long as the investigations or inspections continue, even if the particular investigation or inspection which gave rise to the report to which access is sought is completed.

4. The examination required for the purpose of processing a request for access to documents made under the procedure provided for by Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents must be specific in nature. First, the mere fact that a document concerns an interest protected by an exception under that regulation cannot justify application of that exception. Second, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. Consequently, the examination which the institution must undertake in order to apply an exception must be carried out in a concrete manner and must be apparent from the reasons for the decision.

A concrete, individual examination of each document is also necessary where, even if it is clear that a request for access refers to documents covered by an exception, only such an examination can enable the institution to assess the possibility of granting the applicant partial access under Article 4(6) of Regulation No 1049/2001. It is therefore for the institution to assess, first, whether the document requested falls within one of the exceptions provided for by Article 4 of that regulation, second, if so, whether the need for protection relating to the exception concerned is genuine and, third, whether it applies to the whole document.

5. The purpose of Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents is to guarantee access for everyone to public documents and not merely access for the requesting party to documents concerning him. Consequently, the particular interest which may be asserted by a requesting party in obtaining access to a document concerning him personally cannot be taken into account in order to justify the disclosure for the purposes of Article 4(2) of the regulation.

In that regard, the rights of the defence are manifested by the applicants' individual interest in defending themselves and thus do not imply a general, but rather a private, interest. Consequently, those rights are not an overriding public interest within the meaning of Article 4(2) of the regulation justifying disclosure of the requested documents.

(see paras 115, 117, 118)

(see paras 136-139)