

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

14 December 2006 \*

In Case T-237/02,

**Technische Glaswerke Ilmenau GmbH**, established in Ilmenau (Germany),  
represented initially by G. Schohe and C. Arhold, and subsequently by C. Arhold  
and N. Wimmer, lawyers,

applicant,

supported by

**Kingdom of Sweden**, represented by A. Kruse and K. Wistrand, acting as Agents,

and by

**Republic of Finland**, represented by T. Pynnä, acting as Agent,

interveners,

\* Language of the case: German.

v

**Commission of the European Communities**, represented by V. Kreuzschitz,  
V. Di Bucci and P. Aalto, acting as Agents,

defendant,

supported by

**Schott Glas**, established in Mainz (Germany), represented by U. Soltész, lawyer,

intervener,

APPLICATION for annulment of the Commission's decision of 28 May 2002  
refusing the applicant access to documents relating to procedures for controlling  
State aid,

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of M. Vilaras, President, F. Dehousse and D. Šváby, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 15 June 2006,

gives the following

## Judgment

### Facts and procedure

- 1 Technische Glaswerke Ilmenau GmbH is a German company with its registered office in Ilmenau in the Freistaat Thüringen ('Land of Thuringia'). It was formed in 1994 with the aim of taking over 4 of the 12 glass production lines (furnaces) of the former Ilmenauer Glaswerke GmbH, a company which had been wound up by the Treuhandanstalt (a public trust management company, which subsequently became the Bundesanstalt für vereinigungsbedingte Sonderaufgaben, 'the BvS').
  
- 2 By letter of 1 December 1998, the Federal Republic of Germany notified the Commission of various measures designed to consolidate the applicant's financial position, including a partial waiver, accorded by the BvS, of payment of the purchase price of the furnaces and a loan granted by the Land of Thuringia, through its own bank, the Thüringer Aufbaubank ('the TAB').
  
- 3 By letter SG (2000) D/102831, of 4 April 2000, the Commission initiated the formal investigation procedure under Article 88(2) EC concerning the payment waiver and the TAB loan, which procedure was given the reference C 19/2000.

- 4 In the course of the formal investigation procedure, the Commission received additional information from the Federal Republic of Germany as well as observations from Schott Glas, a competitor undertaking of the applicant.
  
- 5 On 12 June 2001, the Commission adopted Decision 2002/185/EC on State aid implemented by Germany for Technische Glaswerke Ilmenau GmbH (OJ 2002 L 62, p. 30), in which it confined its determination to the payment waiver alone. It concluded that the payment waiver was inconsistent with the conduct of a private investor and constituted State aid incompatible with the common market.
  
- 6 By letter of 3 July 2001, the Commission opened a second formal investigation procedure pursuant to Article 88(2) EC, to which it gave reference C 44/2001. The subject-matter of that procedure was an examination of the deferment of the date for payment of the balance of the purchase price of the furnaces, the rearrangement of the bank guarantee for that payment and the TAB loan.
  
- 7 By application lodged at the Registry of the Court of First Instance on 28 August 2001, the applicant brought an action for the annulment of the Commission Decision of 12 June 2001 (Case T-198/01).
  
- 8 By letter of 24 October 2001, the applicant submitted its observations in respect of the second formal investigation procedure and requested the Commission to give it access to a non-confidential version of the file and the opportunity to submit, subsequently, further observations. That request was rejected by the Commission by letter of 23 November 2001.

- 9 By letter of 1 March 2002, the applicant applied, on the basis of 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), for access to:
- ‘all the documents in the Commission’s files in all the aid cases concerning [it] and in particular in aid case C 44/2001;
  
  - all the documents in the Commission’s files concerning the State aid for the undertaking Schott Glas, Jena, Germany, owned by: Carl-Zeiss-Stiftung, Hessenweg 18, D-89522 Heidenheim a.d. Brenz

save for business secrets relating to other undertakings’.

- 10 By letter of 27 March 2002, the Commission rejected the application for access stating, in particular, that the documents sought were covered by the exception in Article 4(2) of Regulation No 1049/2001, which provides, in particular, that access to a document is to be refused where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure. The Commission also stated that ‘the documents concerning [the applicant] are documents which form part of the current formal investigation procedure C 44/2001’.
- 11 By letter of 15 April 2002, the applicant sent the Secretary General of the Commission a confirmatory application for access pursuant to Article 7(2) of Regulation No 1049/2001.

<sup>12</sup> By letter of 28 May 2002 (hereinafter referred to as ‘the Decision’), the Secretary General of the Commission refused that application in the following terms:

‘Dear Dr SCHOHE,

Thank you for your letter of 15 April 2002, registered on that date, by which you asked me to reconsider your application for access to the following documents:

- the documents concerning the State aid granted to Technische Glaswerke Ilmenau ... ;
  
- the documents relating to the State aid possibly granted to Schott Glas.

As regards the first part of your application, it covers the letters exchanged between the German authorities and the ‘Competition’ [Directorate General (DG)] of the Commission and the comments emanating from the recipient of the aid, [Technische Glaswerke Ilmenau], and from a competitor, Schott Glas.

As to the second part of your application, it covers a pre-notification in the multisectoral framework for Schott Glas’s substantial new investment projects in the east of Germany.

After examining your application, I regret to have to confirm the refusal communicated to you by the [“Competition”] DG, on the ground that the disclosure of those various documents is likely to undermine the protection of the purpose of inspections and [of] investigations. The [third] indent of Article 4[(2)] of Regulation [No] 1049/2001 expressly provides for that exception to the right of access.

In the context of the current investigations into the compatibility of State aid with the single market, cooperation in good faith and mutual confidence between the Commission, the Member State and the undertakings concerned are indispensable in order to enable the various parties to express themselves freely. That is why the disclosure of that document could undermine the conduct of the examination of that complaint by compromising that dialogue.

Moreover, since the pre-notification covering Schott Glas’s project contains a detailed description of the project, to give access to that document would be likely seriously to harm the commercial interests of that company. That interest is expressly protected by an exception to the right of access, laid down in Article 4[(2)] of the above-cited regulation.

In addition, we have examined the possibility of making accessible the parts of the requested documents which are not covered by those exceptions. It is, however, clear that those documents [could] not be divided into confidential and non-confidential parts.

Furthermore, there is no overriding public interest which would, in this case, justify the disclosure of the documents in question ...’

- 13 The applicant brought this action by application lodged at the Registry of the Court of First Instance on 8 August 2002. By separate document dated the same day, the applicant, on the basis of Article 76a of the Rules of Procedure of the Court of First Instance, made an application for the expedited procedure, which was rejected by decision of 12 September 2002.
- 14 By document lodged at the Court Registry on 25 October 2002, Schott Glas applied for leave to intervene in this case in support of the form of order sought by the defendant. By order of 16 January 2003, the President of the Fourth Chamber of the Court of First Instance granted that leave to intervene. Schott Glas lodged its statement in intervention on 19 February 2003.
- 15 By documents lodged at the Court Registry, on 8 and 15 November 2002 respectively, the Kingdom of Sweden and the Republic of Finland applied for leave to intervene in this case in support of the form of order sought by the applicant. By orders of 16 January 2003, the President of the Fourth Chamber of the Court of First Instance granted those applications. The Kingdom of Sweden lodged its statement in intervention on 3 March 2003. The Republic of Finland waived its right to lodge a statement in intervention.
- 16 By application lodged at the Court Registry on 17 December 2002, the applicant brought an action for the annulment of Commission Decision C(2002) 2147 final, adopted on 2 October 2002 at the conclusion of the formal investigation procedure C 44/2001, concerning the State aid granted by the Federal Republic of Germany to the applicant (Case T-378/02). In that decision, the Commission concluded that the TAB loan and the rearrangement of the bank guarantee constituted State aid incompatible with the common market (see paragraph 2 above).
- 17 By judgment of 8 July 2004 in Case T-198/01 *Technische Glaswerke Ilmenau v Commission* [2004] ECR II-2717, the Court of First Instance (Fifth Chamber, Extended Composition) dismissed the applicant's action in Case T-198/01.



18 After the composition of the Chambers of the Court of First Instance was changed from 13 September 2004, the Judge-Rapporteur was appointed, as President, to the Fifth Chamber, to which this case was, as a result, assigned.

19 On 14 December 2004, the Court invited the applicant to make observations as to the subject-matter of the action in these proceedings in the light, particularly, of its having obtained, in the course of the proceedings in Cases T-198/01 and T-378/02, various documents relating to the aid investigation procedures C 19/2000 and C 44/2001.

20 In its reply received at the Court Registry on 20 January 2005, the applicant confirmed having had access, in the course of Cases T-198/01 and T-378/02, to certain documents relating to the abovementioned aid procedures and emanating from the Federal Republic of Germany and Schott Glas, including the latter's observations dated 23 January 2001 relating to formal investigation procedure C 19/2000. The applicant stated, however, that it was convinced that it had not been made aware of all the documents in the defendant's possession relating to those procedures. Its interest in obtaining access to those documents was unchanged.

21 By letter received at the Court Registry on 13 April 2005 and at the Court's invitation, the Commission stated that there were still documents in its possession, to which the applicant had been refused access and which had not been communicated to it in the course of Cases T-198/01 and T-378/02.

22 Meanwhile, by order of 3 March 2005, the President of the Fourth Chamber (Extended Composition) stayed the proceedings in Case T-378/02 until delivery of the judgment of the Court of Justice in Case C-404/04 P, which is the applicant's appeal against the judgment in *Technische Glaswerke Ilmenau v Commission*, cited in paragraph 17 above.

- 23 By letter received at the Court Registry on 31 May 2006 and at the Court's invitation, the Commission produced, at the hearing, a complete list of the documents comprising the administrative files relating to the investigation procedures in respect of the aid granted to the applicant.
- 24 The parties presented their arguments and their replies to the questions raised by the Court at the hearing on 15 June 2006. The Commission was, thus, invited to submit its observations on the effects, for the purposes of this case, of the judgment of the Court of First Instance in Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121 (hereinafter 'the VKI judgment').

### **Forms of order sought**

- 25 The applicant, supported by the Kingdom of Sweden and by the Republic of Finland, claims that the Court should:
- annul the Decision, save in so far as access is refused to documents directly connected with the current aid investigation procedure concerning Schott Glas;
  - order the Commission to pay the costs.
- 26 The Commission, supported by Schott Glas, contends that the Court should:
- dismiss the action as being without foundation;
  - order the applicant to pay the costs.

## Law

### *The application of Regulation No 1049/2001*

#### Arguments of the parties

27 The applicant asserts that the right of access to documents in the Commission's possession, defined by Article 2(1) of Regulation No 1049/2001, is not an ordinary secondary right but is, on the contrary, in view of 'the democratic principle', a fundamental right, derogation from which must be construed strictly.

28 It states that the question of the determination of its rights under Regulation No 1049/2001 must be distinguished from that concerning the rights of the 'parties' in the context of State aid procedures. The applicant submits that the fact that the case-law does not allow it, as a party concerned by the aid investigation procedure, the right to inspect the original contents of the file, cannot affect its rights as a citizen of the Union.

29 The Kingdom of Sweden maintains that Regulation No 1049/2001 is an instrument of general application designed to safeguard the public's right to inform itself about the Union's activities. It follows from the clear and precise definition of the beneficiaries of the right of access, in Article 2(1) of Regulation No 1049/2001, that the applicant is indisputably one and that it can legitimately claim that its application be examined in accordance with the provisions of that regulation.

- 30 The Commission argues that access to the administrative file by a recipient of aid, on the one hand, and access to documents under Regulation No 1049/2001, on the other, are two totally different matters. It is clear from the applicant's pleadings that it has resorted to that regulation only in order to circumvent the procedural rules in respect of State aid and to make good a lack of procedural rights. Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1) provides for no right of access to the documents and files and according to the case-law the procedural rights of aid recipients are observed if they have been invited to lodge observations in the course of the administrative procedure (Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* [2002] ECR I-7869, and Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others v Commission* [2002] ECR II-1275), which was the case with the applicant here.
- 31 Schott Glas contends that the applicant wishes to use Regulation No 1049/2001 as a device to gain knowledge of data internal to its undertaking and to circumvent the settled case-law of the Community judicature on the rights of the parties to obtain access to the file in administrative procedures of the Commission. It is a move clearly contrary to the policy objective of Regulation No 1049/2001, namely to give Community citizens the fullest possible insight into the decision-making processes of Community organs. Schott Glas adds that Regulation No 1049/2001 did not exist at the time of formal investigation procedure C 58/91 (NN 144/91) relating to the privatisation of the undertaking, Jenaer Glaswerk, and that it could not, therefore, have anticipated that a competitor could, later, want access to the documents relating to that procedure.
- 32 It states that the provisions of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1) concerning access to the file show that that regulation is the 'special statute' compared to Regulation No 1049/2001. Were it otherwise, the parties to the procedure and other third parties could circumvent the limits to the right of access to the file fixed by Article 27 of Regulation No 1/2003 by

simply invoking Regulation No 1049/2001. The same would apply to State aid procedures, in which the limits to third parties' participation stem, first, from Regulation No 659/1999 and, second, from the case-law.

33 It follows, moreover, from Regulation No 1049/2001 that 'access to the file' and 'access to a document' are not equivalent concepts and that the right of access to a document presupposes an application describing the document sought so that it can be identified. That regulation does not create a right for citizens enabling them to inspect the files of the organ concerned in order to find therein documents of possible interest to them, an even more inevitable conclusion if applications for access to documents are not supported by reasons. In this case, the applicant has confined itself to claiming, tersely, access to 'all the documents' concerning the alleged State aid procedure cited, which is not surprising, since the applicant itself admits that it is seeking documents hitherto unknown to it.

34 Schott Glas concludes that the applicant is wrongly relying on Regulation No 1049/2001 and that its application for access, whatever its subject-matter may be, must be determined not under the provisions of that regulation but under the rules on granting access to the file in aid procedures.

### Findings of the Court

35 It is common ground that the applicant submitted an application for access to documents based on Regulation No 1049/2001 and that the Commission, in the Decision, refused access to the documents sought referring expressly to Article 4(2) of that regulation which lays down the exceptions to the right of access, based on the protection of the purpose of inspections, investigations and audits, first, and of the commercial interests of a legal person, second.

36 Questioned at the hearing on the effect of its argument that ‘the applicant’s application does not appear ... to come within the scope of the protection of Regulation No 1049/2001’, to which the applicant had resorted only in order to circumvent the procedural rules in respect of State aid, the Commission clearly stated that that measure was fully applicable in this case, but that the exception in Article 4(2) of Regulation No 1049/2001 allowed it to refuse access to the documents relating to current aid procedures, like those sought by the applicant.

37 The question raised by these proceedings is therefore whether the Commission correctly applied the exception in Article 4(2) of Regulation No 1049/2001 to the right of access.

38 In its statement in intervention, Schott Glas contends, in essence, that Regulation No 1049/2001 applies only to documents produced during the Community legislative process, that the application for access should have been determined not under the provisions of that regulation but under the rules for granting access to the file in aid procedures and, finally, that the regulation cannot apply to documents which came into the institutions’ possession prior to its entry into effect, that is 3 December 2001. That argument is intended thus to demonstrate either that Regulation No 1049/2001 was not applicable to this case or that it is an unlawful legal basis for the Decision.

39 Consequently, assuming that that argument could be upheld by the Court, it could find that the Decision is illegal. In that respect, it is appropriate to point out that Schott Glas was given leave to intervene in this case in support of the form of order sought by the Commission, which seeks the dismissal of the action for annulment.

40 Under the fourth paragraph of Article 40 of the Statute of the Court of Justice, which applies to the Court of First Instance by virtue of Article 53 of that Statute, an application to intervene must be limited to supporting the form of order sought by one of the parties. In addition, under Article 116(3) of the Rules of Procedure of the Court of First Instance, the intervener must accept the case as it finds it at the time of its intervention. Although those provisions do not preclude an intervener from using arguments different from those used by the party it is supporting, that is nevertheless on the condition that they do not alter the framework of the dispute and that the intervention is still intended to support the form of order sought by that party (see *VKI*, cited in paragraph 24 above, paragraph 52 and the case-law there cited).

41 In this case, since, on the one hand, assuming it is well founded, Schott Glas's argument would permit a finding that the Decision is unlawful and, since, on the other hand, the form of order sought by the Commission is the dismissal of the action for annulment and is not supported by arguments seeking a declaration that the Decision is unlawful, it is clear that consideration of that argument would have the effect of altering the framework of the dispute as defined in the application and the defence. That argument must therefore be rejected as inadmissible (see, to that effect, *VKI*, cited in paragraph 24 above, paragraphs 53 and 54).

### *The subject-matter of the action*

#### Arguments of the parties

42 The applicant makes clear that it claimed access to the documents relating to 'all' the aid procedures concerning it, namely procedures C 19/2000 and C 44/2001, and to those concerning Schott Glas, including the procedure relating to its privatisation.

43 The Decision involves, accordingly, a refusal of access to four distinct groups of documents, relating to:

- the concluded aid procedure C 19/2000;
  
- the current aid procedure C 44/2001;
  
- the concluded aid procedure or procedures in connection with the privatisation of Jenaer Schott Glas;
  
- the current aid procedure relating to Schott Glas's new investment in the Land of Thuringia.

44 The applicant states that, if the Decision had to be interpreted as concerning only the documents relating to the current procedure C 44/2001 and those relating to the current aid investigation procedure relating to Schott Glas, Article 8(3) of Regulation No 1049/2001 must apply. Thus, the Commission's failure to reply to the application for access to the other documents sought amounts to a challengeable decision of refusal. The applicant states also that this action seeks the annulment of the refusals of access concerning only the first three groups of documents mentioned in the preceding paragraph.



45 It challenges the Commission's argument that the application for access to the documents relating to the State aid granted to the undertaking 'Schott Glas Jena' was formulated too imprecisely and that it could not therefore cover the documents concerning the grant of State aid in connection with the privatisation of Jenaer Glaswerke in 1992. The applicant submits that it should have been obvious to the Commission that the application for access extended also to those documents, even if the aid procedure in question had not been conducted under the title 'Schott Glas Jena'. That is shown by the fact that the Commission, at least in its defence, had no difficulty in identifying the procedure in question.

46 The Commission maintains that it has no documents in its possession relating to State aid accorded to the company 'Schott Glas, Jena', the designation expressly used in the applications for access, but that it has a file relating to the investigation procedure in respect of aid granted to Schott Lithotec AG. It states that it assumed that the applicant had given the latter undertaking the name of 'Schott Glas' and that it therefore refused the application for access in view of the current aid procedure concerning Schott Lithotec AG. Those considerations are, moreover, irrelevant in the light of the definition of the subject-matter of the action given in the application.

47 The defendant also argues that it has no file concerning a concluded aid procedure 'in connection with the privatisation of Jenaer Schott Glas', in the formulation used in the application, explaining that the undertaking Schott Glas has been part of the private sector for 50 years and that it has not therefore been privatised. It points out that Schott Glas participated in the privatisation of the undertaking Jenaer Glaswerk by acquiring a part of its capital for one German mark, a transaction which was not regarded as involving any element of aid at the conclusion of the formal investigation procedure C 58/91 (NN 144/91) carried out in January 1992.

48 The fact that the applicant intended also to apply for access to the file of the abovementioned procedure was not even mentioned in the application for access and appeared for the first time in the application. Under those circumstances, the

Commission correctly found that the applicant's application's sole object was access to the file of the investigation procedure relating to aid granted to Schott Lithotec AG.

## Findings of the Court

<sup>49</sup> It follows from a combined reading of the Decision and the defendant's pleadings that, first, the Commission refused access to the documents concerning State aid granted to the applicant, those documents being those relating to the procedures under references C 19/2000 and C 44/2001. The Commission states, indeed, that it was impossible for it to deal separately with the documents of the two procedures, since they concerned the same restructuring measures and were based on the same documents.

<sup>50</sup> The Commission, secondly, took the view that the application for access to 'all the documents in the Commission's files concerning the State aid for the undertaking Schott Glas, Jena' covered a 'pre-notification in the multisectoral framework for Schott Glas's substantial new investment projects in the east of Germany'. It refused that application on the basis of the exceptions to the right of access in Article 4(2) of Regulation No 1049/2001 relating, first, to the protection of the purpose of inspections, investigations and audits and, second, to the protection of the commercial interests of a legal person.

<sup>51</sup> In its application, the applicant has stated that its application for access concerning Schott Glas had a double meaning, since it covered documents relating to:

(a) the concluded aid procedure or procedures in connection with the privatisation of Jenaer Schott Glas;

(b) the current aid procedure relating to Schott Glas's new investment in the Land of Thuringia.

52 It also stated that this action did not cover the annulment of the refusal of access to the documents covered by (b) of the preceding paragraph and that if the Decision had to be interpreted as concerning only the latter documents and not those mentioned under (a), Article 8(3) of Regulation No 1049/2001 would have to apply. Thus, the Commission's failure to reply in respect of the application for access to the documents mentioned in (a) of the preceding paragraph amounts to an implied refusal of access, challengeable before the Court of First Instance.

53 It is common ground that the Commission adopted an express decision refusing the confirmatory application for access to the documents concerning Schott Glas, at the very least, as the Commission understood it having regard to its wording, that is to say as an application for access to the documents covered by paragraph 51(b) above.

54 As regards the existence of an implied refusal of access to the documents mentioned in paragraph 51(a) above, it must be determined whether the Commission could reasonably understand the double meaning of the confirmatory application for access to the documents concerning Schott Glas, as noted in paragraph 51 above. The administration's silence can be found to constitute a refusal decision only if the administration was in a position to express a proper view and, therefore, to understand what was asked of it.

- 55 In this case, both the initial application and the confirmatory application for access are drafted in general terms and there is no reference in them to the undertaking, Jenaer Glaswerke, to its privatisation or to a given period.
- 56 It is only in the application that the applicant, for the first time, mentioned an application for access to documents relating to an aid procedure concerning the 'privatisation of Schott Glas' or to 'Jenaer Schott Glas'. Even though it states that it should have been 'obvious' to the Commission that the application for access also covered the documents concerning the grant of State aid in connection with the privatisation of Jenaer Glaswerke in 1992, the applicant, in its reply to a question from the Court on the subject-matter of these proceedings, accepted that its application lacked precision by adopting the Kingdom of Sweden's argument about the Commission's breach of its duty, under Article 6(2) of Regulation No 1049/2001, to assist.
- 57 It is clear, furthermore, from the defence that the Commission must have made an interpretation of the application in order to give it a meaning corresponding effectively but only partly to the applicant's expectations. The defendant thus states that the applicant 'did not make clear what it mean[t] by "all the documents in the Commission's files concerning the State aid for the undertaking Schott Glas, Jena"' and 'assumed' that the applicant had used the name of 'Schott Glas' by mistake, whereas the designation of the undertaking which had received the aid, the subject of the formal investigation procedure current at the time of the adoption of the Decision, was 'Schott Lithotec AG'.
- 58 It must be concluded that the formulation of the applicant's application for access was not such as to enable the Commission to understand its double meaning and that it cannot, therefore, be held that the Commission impliedly refused access to the documents covered by paragraph 51(a) above.

- 59 It follows from the foregoing considerations that the Commission, in the Decision, refused access to the documents relating, first, to the investigation procedures in respect of aid granted to the applicant and, second, to the current aid investigation procedure concerning 'Schott Glas's new investment in the Land of Thuringia', it being noted that the second part of the Decision does not form part of the subject-matter of the action for annulment brought by the applicant.
- 60 In those circumstances, the action, in so far as it seeks the annulment of an alleged implied refusal of access to the documents concerning 'the concluded aid procedure in connection with the privatisation of Jenaer Schott Glas', is inadmissible.

*The infringement of Article 4 of Regulation No 1049/2001 concerning the exception to the right of access based on the protection of the purpose of inspections, investigations and audits*

- 61 The applicant, supported by the Kingdom of Sweden, makes several claims in support of the above plea in law for annulment. First, the Commission refused access to the documents sought without undertaking a concrete examination of each of them. Secondly, the defendant relied, wrongly, on case-law solutions relating to the refusal of access to documents concerning proceedings against a Member State for failure to fulfil obligations, which are not comparable to aid investigation procedures. Thirdly, the Commission failed to apply the right to partial access. Fourthly, the balancing of interests required by Article 4(2) of Regulation No 1049/2001 should have led to the disclosure of the documents required.
- 62 The Court considers that it is appropriate to analyse, first of all, the complaint of the lack of a concrete, individual examination of the documents referred to in the application for access.

## Arguments of the parties

- <sup>63</sup> The applicant maintains that the statement of reasons for the Decision shows that, according to the Commission, access can never be allowed, because of their nature, to documents concerning current aid procedures. The applicant states that the defendant therefore refused access to the documents sought regardless of the aid procedure in question and the documents concerned.
- <sup>64</sup> It follows both from the wording of Article 4 of Regulation No 1049/2001 and from the case-law that the Commission must, on the contrary, examine in concrete fashion in each individual case whether access to the document in question is actually likely to undermine the investigation procedure. The applicant points out that 'the fact that the document at issue concerns an inspection cannot in itself justify application of the exception invoked' (Case T-20/99 *Denkavit Nederland v Commission* [2000] ECR II-3011, paragraph 45).
- <sup>65</sup> Nor has the Commission shown that access to the documents could have impeded the aid procedure concerning the applicant, which was already concluded at the time of the application for access. Evidence of that, moreover, would be impossible to produce according to the applicant. It notes that Article 4(7) of Regulation No 1049/2001 provides expressly that the exceptions in paragraph 2 are to apply only for the period during which the purpose of protection is justified. As regards inspections and investigations, it follows from their very nature that any justification for a refusal of access could no longer be considered once the investigation in question is completed.

66 The applicant points out that the Commission refused partial access basing that refusal on the general ground that ‘the documents cannot be divided into confidential and non-confidential parts’, starting from the principle that all the documents relating to an aid procedure are exchanged only between the Commission and the Member State and that no one else should have access to them, even after the end of the procedure.

67 The Kingdom of Sweden submits that the Decision and the position adopted by the defendant in these proceedings show that the Commission did not undertake a concrete assessment of the information contained in the documents to which access was requested. The Court of Justice and the Court of First Instance have stated on several occasions, under the previous rules, that every examination of an application for disclosure should cover the information contained in the document requested, a principle which still applies for the purposes of Regulation No 1049/2001. Failing such an examination, it is impossible to determine whether there are interests to be protected which justify the document being kept secret or affect the balance of interests mentioned in Article 4(2) of Regulation No 1049/2001. A concrete assessment is also indispensable to determine whether partial access would be possible. That conclusion is inescapable whatever the exception which applies.

68 The Commission submits that the idea expressed in the judgment in Case T-191/99 *Petrie and Others v Commission* [2001] ECR II-3677, on which the Decision is based, is applicable without restrictions to aid investigation procedures, which are, without any doubt, ‘investigations’ within the meaning of Article 4(2) of Regulation No 1049/2001.

- 69 It states that, as in proceedings for failure to fulfil obligations, there must be, in aid investigation procedures, proper cooperation in good faith between the Commission and the Member State, which excludes third parties having access to documents relating to those procedures before they have been concluded. So long as the aid investigation procedure is not concluded, the public, in the Commission's submission, cannot be allowed access to the documents, while the parties concerned in that procedure, which cannot avail themselves of the rights of the defence, have no such right.
- 70 It asserts that the applicant's application for access covers documents relating to a current aid investigation procedure. The Commission adopted two decisions concerning the two parts of an overall restructuring project, presented as such by the applicant itself in its pleadings. The defendant states that current aid procedure C 44/2001 concerns the same restructuring measures and is based on the same documents as aid procedure C 19/2000 and concludes that it was necessary, therefore, to deal with the applications for access to the file concerning the two procedures in question together.
- 71 The Commission submits that this dispute is different from that which gave rise to the judgment in *VKI*, cited in paragraph 24 above, which concerned a refusal of access to documents relating to an already closed procedure in a cartel case. In this case, as regards an application for access to documents relating to a current State aid investigation procedure, the principles derived from *Petrie and Others v Commission*, cited in paragraph 68 above, enabled, in its submission, an overall reply and it was not therefore necessary to subject the documents covered by that application to a concrete, individual analysis.
- 72 Schott Glas points out that, at the time of the submission by the applicant of the application for access to the documents relating to two aid cases concerning it, procedure C 44/2001 was already in progress. The close material connection



between the two aid procedures C 19/2000 and C 44/2001 had repeatedly been emphasised by the applicant itself. Schott Glas concludes therefrom that the applicant has applied for access to documents while an investigation was current in a procedure in which the Commission had not yet adopted a decision.

73 It submits that the Commission had, in this case, to interpret the exceptions in Regulation No 1049/2001 in accordance with established principles on the rights of participation of third parties in aid procedures and that it therefore decided, lawfully, that the dissemination of the documents sought by the applicant would seriously undermine the purpose of the investigation (third indent of Article 4(2) of Regulation No 1049/2001) and the decision-making process of the Commission in Case C-44/2001 (Article 4(3) of Regulation No 1049/2001).

## Findings of the Court

74 The effect of Articles 2, 4 and 6 to 8 of Regulation No 1049/2001 is that the institution to which an application for access to documents is made under that regulation is obliged to examine and reply to that application and, in particular, to determine whether any of the exceptions referred to in Article 4 of the regulation is applicable to the documents in question (*VKI*, cited in paragraph 24 above, paragraphs 67 and 68).

75 In this case, the Commission refused to disclose documents relating to investigation procedures in respect of State aid granted to the applicant, and did so in reliance on the exception to the right of access in the third indent of Article 4(2) of Regulation No 1049/2001, based on the protection of the purpose of inspections, investigations and audits.

76 It is appropriate to observe, as the Commission points out without contradiction by the applicant or the Kingdom of Sweden, that the documents covered by the application for access effectively dealt with an 'investigation', within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

77 However, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception (see, to that effect, *Denkavit Nederland v Commission*, cited in paragraph 64 above, paragraph 45). Such application may, in principle, be justified only if the institution has previously assessed, firstly, whether access to the document would specifically and actually undermine the protected interest and, secondly, in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, whether there was no overriding public interest in disclosure. In addition, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical (see, to that effect, Case T-211/00 *Kuijjer v Council* [2002] ECR II-485, paragraph 56). Consequently, the examination which the institution must, in principle, 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 (see, to that effect, Case T-14/98 *Hautala v Council* [1999] ECR II-2489, paragraph 67; Case T-188/98 *Kuijjer v Council* [2000] ECR II-1959, paragraph 38; and *VKI*, cited in paragraph 24 above, paragraphs 69 and 74).

78 Furthermore, it follows from Regulation No 1049/2001 that all the exceptions in paragraphs 1 to 3 of Article 4 thereof are stated as having to apply 'to a document'.

That concrete examination must, therefore, be carried out in respect of each document covered by the application (*VKI*, cited in paragraph 24 above, paragraph 70).

79 It is also important to point out that only a concrete, individual examination, as opposed to an abstract, overall examination, can enable the institution to assess the possibility of granting the applicant partial access under Article 4(6) of Regulation No 1049/2001 (*VKI*, cited in paragraph 24 above, paragraphs 73 and 75) and that, as regards the application on a temporal basis of the exceptions to the right of access, Article 4(7) of Regulation No 1049/2001 provides that the exceptions as laid down by paragraphs 1 to 3 of that article are to apply only for the period during which protection is justified on the basis 'of the content of the document'.

80 In this case, it is not clear from the statement of reasons in the Decision that the Commission undertook a concrete, individual assessment of the content of the documents covered by the application for access. Nor has the Commission alleged, either in its defence, or in its observations of 13 April 2005, or at the hearing, that it carried out such an examination. The text of the Decision reveals that the defendant based it not by reference to the matters of information contained in the documents in question, but on a general analysis by category of documents, distinguishing, first, correspondence exchanged with the Member State concerned and, second, the observations lodged by the parties concerned as part of the formal investigation procedure.

81 Nor is it clear from the Decision that the Commission checked effectively that each document covered by the application was actually included in one of the two identified categories.

82 A conclusion to the contrary can even be drawn from the measure of procedural organisation the purpose of which was to invite the Commission to disclose to the Court of First Instance a complete list of the documents comprising the administrative file relating to the investigation procedures in respect of the aid granted to the applicant.

83 The examination of that list shows, indeed, that several documents in the Commission's possession at the time of the Decision's adoption do not form part either of the correspondence exchanged with the Member State concerned or of the observations of the parties concerned, namely:

- the Commission's letter of 28 December 2000 by which it invited Schott Glas to reply to a series of questions in connection with the formal investigation procedure C 19/2000 (document 39);
  
- the memoranda of the 'Competition' DG requesting information or advice from various services of the Commission on the draft decisions drawn up by it (documents 3, 18, 45 and 54) and the replies of those services (documents 4, 19, 20, 46 to 49);
  
- the 'Competition' DG's memoranda for the responsible Member of the Commission (documents 12, 17, 44 and 79);
  
- the internal notes of the 'Competition' DG on the state of the file (documents 8, 13, 33 and 36).

84 Questioned at the hearing on the non-observance of the obligation to undertake a concrete, individual examination of the documents covered by the applicant's application for access, the Commission noted, in its reply, the difference in the facts between these proceedings and the case which gave rise to the judgment in *VKI*, cited in paragraph 24 above. The defendant submits that, in circumstances where, as in this case, the application for access concerns documents relating to a current aid control procedure, a concrete, individual examination is not necessary and a general reply based on the confidentiality of those documents must be provided for the purpose of applying the exception to the right of access based on the protection of investigations.

85 It must be observed that the obligation for an institution to undertake a concrete, individual assessment of the content of the documents covered in the application for access is an approach to be adopted as a matter of principle (*VKI*, cited in paragraph 24 above, paragraph 75), which applies to all the exceptions in paragraphs 1 to 3 of Article 4 of Regulation No 1049/2001, whatever may be the field to which the documents sought relate, and which concerns, in particular, that of cartels as in the case which gave rise to the judgment in *VKI*, or of that of the control of public subsidies.

86 However, such an examination may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted. Such could be the case, *inter alia*, if certain documents were either, first, manifestly covered in their entirety by an exception to the right of access or, conversely, manifestly accessible in their entirety, or, finally, had already been the subject of a concrete, individual assessment by the Commission in similar circumstances (*VKI*, cited in paragraph 24 above, paragraph 75).

87 It is therefore necessary to examine whether the applicant's application covered documents for which, due to the circumstances of the individual case, it was not necessary to undertake such a concrete, individual examination.

- 88 In the Decision, the Commission justified the application of the exception based on the protection of the purpose of inspections and investigations by maintaining that, in the context of current investigations into the compatibility of State aid with the single market, cooperation in good faith and mutual confidence between the Commission, the Member State and the undertakings concerned are indispensable in order to enable the different 'parties' to express themselves freely and that the disclosure of documents relating to those investigations 'could undermine the conduct of the examination of [the] complaint by compromising that dialogue'.
- 89 The Court considers that so general an assessment, applying to the entire administrative file relating to the investigation procedures in respect of the aid granted to the applicant, does not demonstrate that there were special circumstances of the individual case permitting the conclusion that it was not necessary to undertake a concrete, individual examination of the documents which comprised it. In particular, it does not establish that those documents were manifestly covered in their entirety by an exception to the right of access.
- 90 As has been stated in paragraph 81 above, it is not clear from the Decision that the Commission checked effectively that each document covered by the application was actually included in one of the two categories identified. It follows, on the contrary, from the measure of procedural organisation referred to in paragraph 82 above, that several documents in the Commission's possession do not come within one of those categories and, therefore, that the division of those documents into two categories is not correct. That finding of an incorrect categorisation precludes, in any event, a conclusion that the entirety of the documents referred to in the application is clearly covered by the exception relied upon in the Decision (see, to that effect, *VKI*, cited in paragraph 24 above, paragraph 83).
- 91 It is also appropriate to note, for the sake of completeness, that the considerations set out by the Commission in the Decision, as moreover in its defence, remain vague and general. In the absence of an individual examination, that is to say, document by document, they do not demonstrate with sufficient certainty and detail that the

Commission's argument, even if well founded in principle, applies to all the documents in the administrative file relating to the investigation procedures in respect of the aid granted to the applicant. The fears expressed by the Commission remain mere assertions and are, consequently, utterly hypothetical (*VKI*, cited in paragraph 24 above, paragraph 84).

<sup>92</sup> It may, in that regard, appear paradoxical to say the least to evoke the necessity for a free and direct dialogue between the Commission, the Member State and the 'undertakings concerned', in the context of a climate of cooperation in good faith and mutual confidence, in order, precisely, to refuse one of the 'parties' concerned access to knowledge of any information directly touching the very subject of the discussions.

<sup>93</sup> In addition, as regards the temporal application of the exception relied upon, the Commission refers to documents concerning 'current investigations', a general formulation which does not permit the conclusion with sufficient certainty that all the documents referred to in the application for access were still, on the day of the adoption of the Decision, capable of being covered by that exception, when it is recalled that, on 28 May 2002, aid procedure C 19/2000 was concluded.

<sup>94</sup> It is also appropriate to point out that, only in exceptional cases and only where the administrative burden entailed by a concrete, individual examination of the documents proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required, may a derogation from the obligation to examine the documents be permissible (*VKI*, cited in paragraph 24 above, paragraph 112).

- 95 In this case, it is established that the Commission relied, neither in the Decision, nor in its pleadings, nor at the hearing, on a surfeit of work connected to the examination of the applicant's application for access.
- 96 In those circumstances, Schott Glas's argument that the Commission could not seriously be expected to provide the 'very great administrative effort' which the examination of an entire file of a State aid procedure would involve in order to effect a distinction between confidential and non-confidential information, since the applicant had no right worthy of protection to be able to inspect the documents in question, must be held to be inadmissible.
- 97 It must be recalled, indeed, that the fourth paragraph of Article 40 of the Statute of the Court of Justice and Article 116(4) of the Rules of Procedure of the Court of First Instance give the intervener the right to set out arguments as well as pleas independently, in so far as they support the form of order sought by one of the main parties and are not entirely unconnected with the issues underlying the dispute, as established by the applicant and defendant, as that would otherwise change the subject-matter of the dispute (Case T-171/02 *Regione autonoma della Sardegna v Commission* [2005] ECR II-2123, paragraph 152).
- 98 In this case, as has been explained above, the tenor of the application and of the defence, as well as the applicant's and the Commission's observations in reply to the Court's question on the subject-matter of the action, reveals no problem as regards the burden of work required by dealing with the application for access. In those circumstances, Schott Glas's argument as to 'the very great administrative effort' required to deal with the application for access cannot be regarded as relating to the subject-matter of this action.



99 It must, finally, be observed that, in its statement in intervention, Schott Glas relies on the exception in Article 4(3) of Regulation No 1049/2001. Schott Glas maintains that the Commission correctly came to the conclusion that dissemination of the documents sought by the applicant would have seriously undermined the decision-making process of the institution in procedure C 44/2001. However, since that exception was not relied on by the Commission in the Decision, it is not for the Court to assume the role of that institution and determine whether that exception is actually applicable to the documents referred to by the request (see, to that effect, *VKI*, cited in paragraph 24 above, paragraph 91).

100 It follows from the foregoing considerations that the complaint based on the lack of a concrete, individual examination of the documents referred to in the application for access must be upheld and the Commission's pure and simple refusal of access to the applicant is, consequently, vitiated by an error of law. Therefore, it must be held that the Commission infringed Article 4(2) of Regulation No 1049/2001 and the Decision must, therefore, be annulled, without the need to examine the other pleas for annulment raised by the applicant and the Kingdom of Sweden.

## Costs

101 Under Article 87(3) of its Rules of Procedure, the Court of First Instance may, where each party succeeds on some heads and fails on others, order that the costs be shared or that each party should bear its own costs. In the circumstances of this case, it is appropriate to order the Commission to bear its own costs and three quarters of those incurred by the applicant. The latter is to bear a quarter of its own costs.

102 Under the third subparagraph of Article 87(4), the Court may order an intervener to bear its own costs. In this case, Schott Glas, intervening in support of the Commission, is to bear its own costs.

103 The Kingdom of Sweden and the Republic of Finland must be ordered to bear their own costs in accordance with the first subparagraph of Article 87(4) of the Rules of Procedure.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

- 1. Annuls the Commission Decision of 28 May 2002 in so far as it refuses access to the documents relating to the investigation procedures in respect of aid granted to Technische Glaswerke Ilmenau GmbH;**
  
- 2. Dismisses the remainder of the action;**
  
- 3. Orders the Commission to bear its own costs and to pay three quarters of the costs incurred by Technische Glaswerke Ilmenau. The latter is to bear a quarter of its own costs;**

**4. Orders Schott Glas, the Kingdom of Sweden and the Republic of Finland to bear their own costs.**

Vilaras

Dehousse

Šváby

Delivered in open court in Luxembourg on 14 December 2006.

E. Coulon

M. Vilaras

Registrar

President