

# Case T-194/04

**The Bavarian Lager Co. Ltd**

**v**

**Commission of the European Communities**

(Access to documents — Regulation (EC) No 1049/2001 — Documents relating to proceedings for failure to fulfil obligations — Decision refusing access — Protection of physical persons in relation to processing of personal data — Regulation (EC) No 45/2001 — Concept of private life)

Judgment of the Court of First Instance (Third Chamber), 8 November 2007 II - 4532

## Summary of the Judgment

1. *Actions for annulment — Jurisdiction of the Community judicature (Art. 230 EC)*
2. *Actions for annulment — Actionable measures (EC Treaty, Art. 169 (now Art. 226 EC))*

3. *Approximation of laws — Protection of physical persons in relation to processing of personal data — Processing of such data by Community institutions and bodies — Regulation No 45/2001*  
(*European Parliament and Council Regulations Nos 45/2001, Art. 5(a) and (b), and 1049/2001*)
  
4. *European Communities — Institutions — Right of public access to documents — Regulation No 1049/2001*  
(*European Parliament and Council Regulations Nos 45/2001, Art. 8(b), and 1049/2001, Arts 2 and 6(1)*)
  
5. *European Communities — Institutions — Right of public access to documents — Regulation No 1049/2001*  
(*European Parliament and Council Regulations Nos 45/2001, Art. 8(b), and 1049/2001, Art. 4(1)(b)*)
  
6. *Approximation of laws — Protection of physical persons in relation to processing of personal data — Processing of such data by Community institutions and bodies — Regulation No 45/2001*  
(*European Parliament and Council Regulations Nos 45/2001, Arts 5(b) and 18, and 1049/2001, Art. 4(1)(b)*)
  
7. *Approximation of laws — Protection of physical persons in relation to processing of personal data — Processing of such data by Community institutions and bodies — Regulation No 45/2001*  
(*Art. 6(2) EU; European Parliament and Council Regulation No 45/2001*)
  
8. *European Communities — Institutions — Right of public access to documents — Regulation No 1049/2001*  
(*Art. 6(2) EU; European Parliament and Council Regulations Nos 45/2001, Art. 10, and 1049/2001, Art. 4(1)(b); European Parliament and Council Directive 95/46*)

9. *Approximation of laws — Protection of physical persons in relation to processing of personal data — Processing of such data by Community institutions and bodies — Regulation No 45/2001*  
(EC Treaty, Art. 169 (now Art. 226 EC); European Parliament and Council Regulations Nos 45/2001, Art. 2(a), and 1049/2001, Art. 4(1)(b))
10. *European Communities — Institutions — Right of public access to documents — Regulation No 1049/2001*  
(European Parliament and Council Regulation No 1049/2001, Art. 4(2), third indent)
11. *European Communities — Institutions — Right of public access to documents — Regulation No 1049/2001*  
(European Parliament and Council Regulation No 1049/2001)

1. Claims submitted in an annulment action seeking that the Commission be ordered to adopt specific measures are inadmissible. The Community judicature is not entitled, when exercising judicial review of legality, to issue directions to the institutions or to assume the role assigned to them. That limitation of the scope of judicial review applies to all types of contentious matters that might be brought before it, including those concerning access to documents.

(see paras 47, 48)

Commission to institute proceedings against a Member State for failure to fulfil its obligations is inadmissible.

Under Article 169 of the Treaty (now Article 226 EC), the Commission is not bound to bring proceedings for failure to fulfil obligations, but has a discretionary power precluding the right of individuals to require it to adopt a particular position or to bring an action for annulment against its refusal to take action.

2. An annulment action brought by an individual against a refusal by the

(see paras 54, 55)

3. Pursuant to Article 5(a) or (b) of Regulation No 45/2001 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, according to which the processing must be necessary for the performance of a task carried out in the public interest or for compliance with a legal obligation to which the controller is subject, the processing must be lawful. The right of access to documents of the institutions to which citizens of the European Union and any natural or legal person residing in or having its registered office in a Member State are entitled, laid down by Article 2 of Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents, constitutes a legal obligation for the purposes of Article 5(b) of Regulation No 45/2001. Therefore, if Regulation No 1049/2001 requires the communication of data, which constitutes 'processing' within the meaning of Article 2(b) of Regulation No 45/2001, Article 5 of that same regulation makes such communication lawful in that respect.

(see para. 106)

Council and Commission documents. According to Article 6(1) of the latter, a person requesting access is not required to justify his request and therefore does not have to demonstrate any interest in having access to the documents requested. Therefore, where personal data are transferred in order to give effect to Article 2 of Regulation No 1049/2001, laying down the right of access to documents for all citizens of the Union, the situation falls within the application of that regulation and, therefore, the applicant does not need to prove the necessity of disclosure for the purposes of Article 8(b) of Regulation No 45/2001 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. If one were to require the applicant to demonstrate the necessity of having the data transferred, as an additional condition imposed in Regulation No 45/2001, that requirement would be contrary to the objective of Regulation No 1049/2001, namely the widest possible public access to documents held by the institutions.

(see para. 107)

4. Access to documents containing personal data falls within the application of Regulation No 1049/2001 regarding public access to European Parliament,

5. Given that access to a document will be refused under Article 4(1)(b) of Regulation No 1049/2001 regarding public access to European Parliament, Council

and Commission documents where disclosure would undermine protection of the privacy and the integrity of the individual, a transfer of personal data that does not fall under that exception cannot, in principle, prejudice the legitimate interests of the person concerned within the meaning of Article 8(b) of Regulation No 45/2001 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.

No 45/2001, the data subject does not, in principle, have a right to object. However, since Article 4(1)(b) of Regulation No 1049/2001 lays down an exception to that legal obligation, it is necessary to take into account, on that basis, the impact of the disclosure of data concerning the data subject. In that regard, if communication of those data would not undermine protection of the privacy and the integrity of the individual concerned, as required by Article 4(1)(b) of Regulation No 1049/2001, that person's objection cannot prevent such communication.

(see para. 108)

(see paras 109, 110)

6. Article 18 of Regulation No 45/2001 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 provides that the data subject has the right to object at any time, on compelling legitimate grounds relating to his or her particular situation, to the processing of data relating to him or her, except in cases covered by, in particular, Article 5(b) of that regulation. Therefore, given that the processing envisaged by Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents constitutes a legal obligation for the purposes of Article 5(b) of Regulation
7. The provisions of Regulation No 45/2001 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, in so far as they govern the processing of personal data capable of affecting fundamental freedoms, and the right to privacy in particular, must

necessarily be interpreted in the light of fundamental rights which form an integral part of the general principles of law with which the Court of First Instance ensures compliance and have been expressly included in Article 6(2) EU as general principles of Community law.

only personal data that are capable of actually and specifically undermining the protection of privacy and the integrity of the individual.

(see paras 111, 112)

The fact that the concept of ‘private life’ is a broad one, in accordance with the case-law of the European Court of Human Rights, and that the right to the protection of personal data may constitute one of the aspects of the right to respect for private life does not mean that all personal data necessarily fall within the concept of ‘private life’.

8. Any decision taken pursuant to Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents must comply with Article 8 of the European Convention on Human Rights, in accordance with Article 6(2) EU. Regulation No 1049/2001 determines the general principles and the limits which, for reasons of public or private interest, govern the exercise of the right of access to documents, in accordance with Article 255(2) EC. Therefore, Article 4(1)(b) of that regulation provides an exception designed to ensure protection of the privacy and integrity of the individual. Since exceptions to the principle of access to documents must be interpreted restrictively, that exception concerns

A fortiori, not all personal data are by their nature capable of undermining the private life of the person concerned. In recital 33 of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, reference is made to data which are capable by their nature of infringing fundamental freedoms or privacy and which should not be processed unless the data subject gives his explicit consent, which implies that not all data are of that nature. Such sensitive data may be included in those referred to by Article 10 of Regulation No 45/2001 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, concerning processing relating to particular categories of data, such as those revealing racial or ethnic origin, religious or philosophical beliefs, or data concerning health or sex life.

to European Parliament, Council and Commission documents contains personal data does not necessarily mean that the privacy or integrity of the persons concerned is affected, even though professional activities are not, in principle, excluded from the concept of 'private life' within the meaning of Article 8 of the European Convention on Human Rights.

(see paras 116-119)

9. A list of participants at a meeting held in the context of proceedings for failure to fulfil obligations under Article 169 of the Treaty (now Article 226 EC), appearing in the minutes of that meeting and classified by reference to the bodies in the name of which and on behalf of which those persons attended, described by their title, the initial of their forename, their surname and, where relevant, the service, department or association to which they belong within those bodies, contains personal data for the purposes of Article 2(a) of Regulation No 45/2001 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, since the persons who participated in that meeting can be identified in them. However, the mere fact that a document referred to in a request for access under Regulation No 1049/2001 regarding public access

The fact that the minutes contain the names of those representatives does not affect the private life of the persons in question, given that they participated in the meeting as representatives of the bodies to which they belonged. Moreover, the minutes do not contain any individual opinions attributable to those persons, but positions attributable to the bodies which those persons represented. In any event, disclosure of the names of the representatives is not capable of actually and specifically affecting the protection of the privacy and integrity of the persons concerned. The mere presence of the name of the person concerned in a list of participants at a meeting, on behalf of the body which that person represented, does not constitute such an interference, and the protection of the privacy and integrity of the persons concerned (under Article

4(1)(b) of Regulation No 1049/2001) is not compromised.

(see paras 121-123, 125, 126)

10. The third indent of Article 4(2) of Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents, which is designed to protect 'the purpose of inspections, investigations and audits', applies only where disclosure of the documents in question risks jeopardising the completion of the inspections, investigations or audits. That exception, from the way in which it is formulated, is designed not to protect investigations as such but the purpose of those investigations, which consists, in the case of proceedings for failure to fulfil obligations, in causing the Member State concerned to comply with Community law.

Where the Commission has already closed infringement proceedings against a Member State six years before the request for access to documents, that Member State having amended the legislation at issue, the purpose of the investigations has been achieved. Thus, at the time the Commission decision refusing access to the minutes of a meeting held in the context of proceed-

ings for failure to fulfil obligations was adopted, no investigation whose purpose could have been jeopardised by disclosure of the minutes containing the names of certain representatives of bodies which participated in the meeting was in progress, with the result that the exception under the third indent of Article 4(2) of Regulation No 1049/2001 cannot be applied.

(see paras 148, 149)

11. The assessment required for processing an application for access to documents under Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents must be of a concrete nature. First, the mere fact that a document concerns an interest protected by an exception is not sufficient to justify that exception being applied. Secondly, the risk of a protected interest being affected must be reasonably foreseeable and not merely hypothetical. Therefore, the assessment which the institution must undertake in order to apply an exception must be carried out in a concrete way and be apparent from the grounds of the decision.

Thus, whilst the need to preserve the anonymity of persons providing the

Commission with information on possible infringements of Community law constitutes a legitimate objective capable of justifying the Commission in not granting complete, or even partial, access to certain documents, the fact remains that, in this case, the Commission ruled in the abstract on the effect which disclosure of the document concerned with names might have on its investigative activity, without demonstrating to a sufficient legal standard that disclosure of that document would

actually and specifically undermine protection of the purposes of investigations. Thus it has not been shown in this case that the purpose of investigations was actually and specifically jeopardised by the disclosure of data requested six years after the closure of those investigations.

(see paras 151, 152)