

## EU Regulatory Watch

May 20, 2009

### Borax Case – Access to Documents

#### *An evolution towards the recognition of a general principle of transparency?*<sup>1</sup>

On March 11, 2009, both the European Parliament and the Court of First Instance (the “CFI”) called for more transparency – the Parliament by asserting that no legislative document may be kept secret on the ground of the protection of the decision-making process of the institutions, and the CFI by annulling, in two similar judgments, the European Commission’s (the “Commission”) refusal to disclose the minutes of a scientific experts’ meeting.<sup>2</sup> The CFI’s judgments in the *Borax* case are of particular interest and importance as regards the right of access to the institutions’ documents, more specifically the exceptions thereto.

This right is protected by Regulation (EC) 1049/2001.<sup>3</sup> The rule is that EU citizens and legal persons have a right of access to the institutions’ documents.<sup>4</sup> The institutions shall refuse to disclose the documents only on an exceptional basis, in particular where disclosure would undermine the protection of the privacy and the integrity of individuals,<sup>5</sup> or where disclosure would undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.<sup>6</sup>

The *Borax* case was brought by an operator manufacturing borates and boric acid. These two substances were examined by the Commission, assisted by a technical committee and a working group, to determine whether they might be classified as toxic for reproduction under Directive 67/548/EEC on dangerous substances.<sup>7</sup> Since carcinogenic, mutagenic or substances toxic for reproduction were at stake and their evaluation gave rise to a complex scientific debate, the Commission decided to organize a meeting of national experts. The representatives of the industrial sector were admitted during the first part of the meeting, but were excluded from the second part, during which the experts deliberated in closed session. The experts recommended the two substances to be classified among the substances toxic for reproduction in Category 2. Only the conclusion of the experts and the summary record of the meetings were published on the European Chemical Bureau (ECB) website. Consequently, the applicant requested access to the sound recording of the experts’ meeting, to the experts’ comments on the draft summary record and to all the other documents relating to the classification of the substances. The Commission refused to disclose these documents, even in an expurgated version, i.e. a version from which the names of persons and Member States were deleted.

The Commission argued, first, that disclosure of the documents requested would undermine the privacy and the integrity of the experts, even if the names of the experts were not revealed, since the experts would in any case be easily recognized in the sound recording because of their accent. According to the Commission, the disclosure of the documents would lead to the risk that the experts would be exposed to undue external pressure because of the economic interests at stake (Article 4(1)b) of Regulation 1049/2001).

Secondly, the Commission relied on Article 4(3) of Regulation 1049/2001, arguing that disclosure of the documents would jeopardize the decision-making process. According to the Commission, disclosure of the documents would facilitate external pressure on the experts, who would then become reluctant to express their opinion freely and independently.

The CFI annulled the Commission’s decision in two similar judgments consistent with the recent line of case-law evolving towards an increasing access to the institutions’ documents.

- *The right of access to the institutions’ documents, a right “as wide as possible”*

In a first part, the CFI recalled that the right of access to the institutions’ documents shall be “as wide as possible”, and that the exceptions to the documents’ disclosure shall be strictly interpreted, i.e. the institution having to demonstrate that there is a foreseeable risk (i.e. not purely hypothetical) that disclosure of the document may “specifically and effectively” undermine the protected interest. The fact that the documents concern a protected interest is not sufficient to justify a refusal of access.<sup>8</sup>

- *A strict interpretation of the exception relating to the protection of the integrity and the privacy of the individuals*

#### CONTACT

If you would like more information, please contact the following McKenna Long & Aldridge LLP attorney:

**Ursula Schliessner**

+32.2.278.1224

[uschliessner@mckennalong.com](mailto:uschliessner@mckennalong.com)

In the *Borax* case, the CFI confirmed its strict interpretation of the exception relating to the protection of the integrity and the privacy of the individuals.<sup>9</sup> The CFI rejected the Commission's argument, according to which disclosure of the documents requested would undermine the integrity and the privacy of the experts since it would expose them to undue external pressure. Indeed, such an argument might be applied to any experts' meetings organized by the Commission, whatever the nature of the decision to be adopted, or the sector might be.<sup>10</sup> The CFI required the Commission to prove the existence of a foreseeable risk that for this specific meeting disclosure of documents would effectively impair the protection of the individuals. This ruling, consistent with the ruling adopted in the *Pablo Muniz* case, has as a consequence that the scope of Article 4(1)(b) of Regulation 1049/2001 would in the future be extremely limited.

- *A strict interpretation of the exception relating to the protection of the decision-making process*

Most importantly, however, the *Borax* case also confirms the willingness of the CFI to strengthen the right of access to documents and to limit the possibility to rely on the decision-making process exception in order to justify a refusal of access. The CFI rejected the Commission's arguments relating to the protection of the decision-making process and upheld the applicant's plea: it considered that the Commission was wrong in stating that the refusal fell within the scope of Article 4(3) of Regulation 1049/2001.

First, the CFI rejected the argument according to which documents could not be disclosed because they contained an opinion expressed for internal purposes in a preliminary phase of the final decision.<sup>11</sup> Secondly, it rejected the argument according to which the refusal would be justified by the necessity of protecting the experts from external pressure in order to preserve a climate of confidence favorable to free and frank discussion.<sup>12</sup> Thirdly, and very remarkably, the CFI highlighted the fact that in the present case, the documents were relating to scientific advice, and that, while Regulation 1049/2001 provided for a specific exception for legal advice, it had not done the same for other advice, such as scientific advice. The CFI added that since there was no general rule for confidentiality of legal advice, but a specific exception had been laid down for such advice, *a fortiori*, the principle of transparency should apply to scientific advice, not covered by any specific exception.<sup>13</sup>

Finally, in a general statement, the CFI ruled that scientific opinions obtained by an institution for the purpose of the adoption of a future decision should, *as a rule*, be disclosed, even if they might give rise to controversy and deter the experts from contributing to the decision making-process. It added that this risk was inherent in the rule which laid down the right of access to the institutions' documents. Finally, it considered that even if it was shown that the existence of such a risk would have a deterrent effect as regards the experts, it could not be inferred from the existence of this risk that it would seriously undermine the institutions' decision-making process as it would be the case if that institution would find it impossible to consult other experts.<sup>14</sup>

These judgments confirm the general trend in the recent case-law relating to disclosure of documents concerning legal advice and leave the door open to a wider access to scientific advice. However, their consequences should not be overestimated: the evolution towards an increasing access to the institutions' documents seems to be currently limited to the documents issued in the framework of a legislative procedure, as opposed to documents drawn up in the framework of an internal administrative procedure.

On the one hand, the *Borax* case is consistent with the recent case-law of the European Court of Justice (the "ECJ") relating to legal advice and with the recent evolution towards an increasing access to the institutions' documents, namely with the recent *Turco* case. In this case, the ECJ had indeed set aside a judgment of the CFI upholding the Council's refusal to grant access to an opinion of the Legal Service concerning a legislative proposal.<sup>15</sup> The ECJ overruled the CFI's previous judgment by considering that submitting in a general way that disclosure of legal advice relating to the legislative process may give rise to doubts regarding the lawfulness of legislative acts does not suffice.<sup>16</sup> The ECJ added that, in any event, disclosure of the document would be justified by an overriding public interest: the principle of transparency. Contrary to the CFI, the ECJ considered that this principle could be invoked as an overriding public interest justifying disclosure of documents, even though this principle is the basis of the whole Regulation on access to documents. By considering that the principle of transparency could be relied on to override the refusal to disclose a document, the ECJ thus opened the door to an unrestricted access to documents, since the principle of transparency, guiding principle of Regulation 1049/2001, may always be invoked by the applicants. The consequence of this judgment is that no documents relating to the legislative process may be kept secret anymore.

On the other hand, the *Borax* and the *Turco* cases contrast with the *MyTravel* case.<sup>17</sup> This latter case concerns the Commission's refusal to grant access to reports of a Commission working group meeting to determine whether it was appropriate for the Commission to appeal the *Airtours* judgment relating to mergers and collective dominance.<sup>18</sup> In this case, the CFI upheld the Commission's arguments relating to the protection of the decision-making process. The CFI considered that the refusal of access was justified in order to allow the participants to the working group to express their views freely. The CFI emphasized the fact that the work of analysis was carried out for an internal purpose and fell within the purely administrative functions of the Commission, by contrast to situations where the institutions acted as legislators. The interest of the public in getting access to these documents did not carry the same weight in the case of documents drawn up in an administrative procedure intended to apply rules governing competition law.

Given this judgment, one may consider that the open door to a wider access to the institutions' documents is limited to documents drawn up in the framework of a legislative procedure. Nevertheless, even though this judgment may be explained by the fact that the requested documents were issued in the framework of an administrative procedure, one cannot leave aside the fact that, in *MyTravel*, competition concerns were at stake, i.e. a sector in which the Commission has wide powers and a wide margin of discretion. A new judgment would be welcome to determine whether, if competition concerns were not at stake, the CFI would extend the general trend in case-law to a wider access to documents to those issued in the framework of an administrative procedure.

To conclude, the *Borax* case indisputably highlights a sensitive evolution of the case-law towards an increasing access to the institutions' documents, in particular to scientific opinions delivered in the framework of environmental regulations. However, despite the general wording of the *Borax* judgments, their consequences should not be overestimated given the recent *MyTravel* case. One cannot infer from the *Borax* case the recognition of a general principle of transparency. A new judgment of the ECJ would be welcome to determine with certainty the new trend in case-law as to access to the institutions' documents. Finally, it should have to be seen whether the Commission will appeal the CFI's decision in the *Borax* case.

<sup>1</sup> Prepared with the contribution of Natacha Rouam.

<sup>2</sup> Press release of the European Parliament, Access to documents: The European parliament demands more transparency, March 11, 2009, REF.: 20090310IPR51408, available at [http://www.europarl.europa.eu/news/expert/infopress\\_page/019-51409-068-03-11-902-20090310IPR51408-09-03-2009-2009-false/default\\_en.htm](http://www.europarl.europa.eu/news/expert/infopress_page/019-51409-068-03-11-902-20090310IPR51408-09-03-2009-2009-false/default_en.htm); Case T-121/05, *Borax*, [2009] not published yet, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-121/05&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>, and case T-166/05, *Borax*, [2009], not published yet, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-166/05&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>

<sup>3</sup> Regulation (EC) No 1049/2001 of May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L145/43, May 31, 2001, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:145:0043:0048:EN:PDF>, hereby "Regulation 1049/2001"

<sup>4</sup> Regulation 1049/2001, Article 2

<sup>5</sup> *Ibid.*, Article 4(1)b

<sup>6</sup> *Ibid.*, Article 4(3)

<sup>7</sup> Directive 67/548/EEC of June 27, 1967 on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labeling of dangerous substances, OJ 1967(I) p.234

<sup>8</sup> Paragraphs 31 to 43, and paragraphs 38 to 50, of respectively the judgment in case T-121/05 and the judgment in case T-166/05

<sup>9</sup> See for instance case T-144/05, *Pablo Muniz*, [2008]; and case T-194/04, *The Bavarian Lager*, [2007], ECR. II-4523 (appeal pending)

<sup>10</sup> Paragraphs 44 and 51 of respectively the judgment in case T-121/05 and the judgment in case T-166/05

<sup>11</sup> Paragraphs 66 and 101 of respectively the judgment in case T-121/05 and the judgment in case T-166/05; confirms case *Pablo Muniz*, point 85

<sup>12</sup> Paragraphs 67 and 102 of respectively the judgment in case T-121/05 and the judgment in case T-166/05

<sup>13</sup> Paragraphs 68 and 103 of respectively the judgment in case T-121/05 and the judgment in case T-166/05

<sup>14</sup> Paragraphs 68 to 73 and paragraphs 103 to 108 of respectively the judgment in case T-121/05 and the judgment in case T-166/05

<sup>15</sup> Joined cases C-39/05-P and C-52/05-P, *Turco*, [2008]

<sup>16</sup> See case T-610/97-R, *Carlsen*, [1998]; case C-445/00, *Gollnisch and others v. Parliament* [2005], ECR. II-1

<sup>17</sup> Case T-403/05, *My Travel*, [2008]

<sup>18</sup> Case T-342/99, *Airtours v. Commission*, [2002], ECR II-2585

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