Public hearing in Case C-28/08P (16 June 2009)

Pleadings of the EDPS

1. The background of the EDPS intervention

Mr. President of the Court, Members of the Court, Mrs. Advocate General,

At the start of my pleadings I would like to summarize in a few words why the EDPS intervened in the case before the Court of First Instance and as a logical consequence in the appeal before your court.

As we know, the case is about finding a balance between the right to public access and the right to data protection. A balance means the acknowledgment that both rights have an equal status and that they both protect fully justified interests of individuals.

Such a balance would not be achieved by an approach which would lead to the non disclosure of personal data in public documents, even in situations where the persons whose data are included in a document (the data subjects) do not have a specific and justified interest in keeping their names secret. Such an approach would be counterproductive for the transparency of the institutions. On top of that, it would not enhance the protection of personal data. To the contrary, such an approach could be interpreted as a misuse, or even an abuse of data protection, in order to minimise transparency of the institutions.

As the CFI rightly pointed out, the approach of the Commission resulted in keeping secret the names of participants to the famous meeting of 11 October 1996 and therefore misinterprets the need for balance. It also misinterprets the text of Article 4 (1) (b) of Regulation 1049/2001 which calls for balancing the right to public access and the right to data protection.

In particular, in the reasoning of the Commission, information can only be disclosed after consent has been given by the data subject or if the applicant proves the necessity of the disclosure. This consent, or in other words a right to a veto unless it is overruled by a specific and individual interest of the applicant, would be contrary to Article 4 (1) (b). It is not foreseen in the data protection regulation either. Any interpretation of the legal framework which would require the applicant to prove the necessity of the disclosure would deprive Regulation 1049 of its main content.

These are the reasons why the EDPS intervened in the case before the Court of First Instance, in line with his general consultative task under Article 41 of Regulation 45/2001. And, that is also why the EDPS welcomed the judgement of the CFI. This judgement annuls the decision of the Commission on the basis of a reasoning that fully reflects Community law because it gives a correct balance between the two rights involved.

In these pleadings I would like to highlight a few points from our written submissions, as a reaction on the latest submission of the Commission and to take into account a few new developments in the case law and, as an illustration, in the legislative context.

2. Article 4 (1) (b) of Regulation 1049

Although this case is in substance about the relationship between two regulations, all parties agree that the crucial provision is laid down in Regulation 1049, namely Article 4 (1) (b). This is unavoidable: the underlying request made by Bavarian Lager is a request for access to documents.

This point of departure has four consequences:

1. Article 4 (1) (b) is an exception to the right to public access and must under the case law of your Court be interpreted and applied strictly. I refer to the Turco-judgement of your Court, par 36. Exceptions must be explicitly foreseen, and not merely based on interpretations of other instruments of community law, such as in the present case Regulation 45/2001.
2. The institution must explain how access to a document could specifically and effectively undermine the interest protected by an exception. This is emphasised by your Court in par 49 of Turco, in connection with Article 4 (2) of Regulation 1049 and by the CFI in Par 120 of the present case.
3. From the same Turco-judgement (precisely, par 37) a third consequence can be deducted. The examination to be undertaken by the Commission must be carried out in three stages, corresponding to the three criteria in Article 4 (1) (b). The three criteria are that the privacy must be at stake, it must be seriously affected (''undermined) and disclosure must not be contrary to the data protection regulation. The Turco-judgement specifies the term 'undermining' as reasonably foreseeable and not purely hypothetical.

4. Article 4 (1)(b) must be interpreted in the context of Regulation 1049. Article 6 of this regulation underlines that the applicant is not obliged to state reasons for the application. Any interpretation of Article 8 of Regulation 45/2001 according to which a justification should be given by the applicant would undermine the effectiveness of one of the core provisions of Regulation 1049. As the CFI rightly stated in Par 107, this would be contrary to the objective of Regulation 1049. Even clearer, it is the other way round: a specific interest of the applicant does not give him a stronger right to access under Regulation 1049 than any other member of the public. This is the interpretation the Court gave in Sison (C-266/05P). In this judgement the Court reaffirmed that Regulation 1049 explicitly does not protect specific interests of individuals. It refused in that case access to information on terrorist's lists, based on a request for access by someone who was listed and who therefore had a specific interest in this information.

3. The judgement of 11 March 2009 of the CFI in Borax (T-121/05)

After the closure of the written procedure in the present case, the CFI gave a judgement in Borax, which not only confirmed (again) the point of view of the EDPS, but also provided some additional arguments. The facts of Borax are comparable to the present case. An expert meeting was organised by the Commission, a request was made under Regulation 1049 for access to the audiotapes of an expert meeting, but the Commission refused disclosure.

Arguably, the specific importance of Borax lies in the fact that in that case the Commission had given explicit assurances to the experts that their opinions in relation

to their identity would not be disclosed. Such assurances were not given in the present case. In any case, according to the CFI judgement, these assurances do not necessarily prevent disclosure. The confidentiality undertakings can not be relied upon toward third persons who claim a right to access to documents (Para 34)!

The Borax case confirms that even an explicit assurance to a data subject cannot by itself shift the balance! Even if an expert participates in a meeting on the basis of an explicit assurance by the Commission that his name and his views will stay confidential, this does not have any automatic effect on the application of Article 4 (1) (b). His personal data can nevertheless be disclosed without his consent, if his privacy is not effectively undermined by such disclosure.

Furthermore, in Borax the CFI dismissed the arguments of the Commission that identification of the individuals and their opinions would expose them to undue external pressure. Such reasoning should be supported by specific evidence (para 39 + 44). This confirms the case law of your Court - like Turco discussed before - that Article 4 (1) (b) as an exception to the right of access needs to be interpreted strictly.

3. The balance between the two rights

Much has been said in this procedure about the balance or unbalance between the two rights. The essence of the contested judgement of the CFI - and fully supported by the EDPS - is that disclosure can only be refused if the privacy of an individual is seriously affected. The submissions of the Commission and the Council contain

several misunderstandings concerning this interpretation. I will try to counter those misunderstandings.

1. This interpretation does not mean that the CFI or the EDPS fail to analyse Article 4 (1) (b) in its entirety but only the 'privacy half' of this provision. This is a central point in the reasoning of the Commission. In this context it is appropriate to recall the exact meaning of the other half - the data protection half - of 4 (1) (b), as the EDPS explained in points 33-35 of the response. According to the EDPS, the provisions of Regulation 45/2001 would only become relevant to the extent a concrete harm to privacy is shown. It is good to emphasise in this context that this interpretation the CFI does not ignore the "data protection half' of Art 4 (1) (b) since Article 5 of the data protection regulation explicitly allows disclosure, in cases where there is no harm to privacy. I will come back to that.
2. This interpretation does also not mean that protection is granted to the individual only in case 'sensitive data' are at stake or in cases of harassment or threat, as stated by the Commission in Obs 17. According to the EDPS, it is not necessarily decisive which data are at stake, but it is the effect of a disclosure on the data subject that needs to be assessed in its full extent. This is not a new approach but it reflects precisely how your Court interpreted Directive 95/46 in Österreichischer Rundfunk. In that judgement your Court declared that 'the collection of data by name relating to an individual's professional income, with a view to communicating it to third parties, falls within the scope of Article 8 [ECHR]'. Data themselves are not sensitive but the context makes them privacy-relevant. Rundfunk is a good illustration: the Court distinguishes

the mere recording of names and income of persons and the subsequent publication of that information. Only the latter activity could actually harm the privacy.

3. The interpretation of the CFI and the EDPS also does not mean that the data subject is not protected against direct marketing, as stated by the Commission in Obs 9. The recipient of a document under Regulation 1049 is not allowed to use the data for every purpose since he is bound by data protection law when he wishes to further process the personal data. I will come back to this point since it has to do with the issue of access *erga omnes.*

4. The interpretation of the CFI and the EDPS furthermore does not mean that disclosure would not respect the necessity test as recently applied in Huber (C-524/06). Indeed, as the Commission rightfully stated in Obs 15, according to Article 5 of Regulation 45/2001 data processing is only allowed if it is necessary for a specific purpose. Article 5 does not allow data processing for the simple reason that the processing would be innocuous vis a vis the data subject. Under the fundamental right of data protection, data are protected under all circumstances, even without proof of specific harm to the data subject. However, here stops the common understanding with the Commission. In the present case, Article 5 of Regulation 45 specifically allows the processing, since the processing is necessary for a specific purpose, namely the interest of transparency and public access to documents. Disclosure is needed to comply with a legal obligation. Each member of the public is entitled to have access to all documents held by institutions.

5. It does equally not mean that a general derogation is given from the application of Regulation 45/2001, analogous to the derogation discussed by your Court in Satakunnan (C-73/07), the exception for journalistic purposes. In Satakunnan the Court states that derogations and limitations of the right to data protection must only apply as far as is strictly necessary. In our view, Satakunnan does not shed an additional light on this case. The present case is not about a derogation from the protection afforded by Regulation 45, but about processing of personal data which is explicitly allowed under its Article 5. I mentioned this before.
6. It finally does not mean either that access to documents would be an absolute right that prevails over data protection, as the Council interprets the CFI-Judgement.

4. The right to anonymity

Another issue in the procedure before the CFI and before your court, is the right to anonymity. The EDPS has constantly emphasised that there is no right to participate anonymously in meetings like the one held in October 1996. This point of view is now clearly supported in Borax. Even explicit assurances of anonymity provided by an institution are not enough.

As a further illustration, I mention a recent case of the European Court of Human Rights, (TÁRSASÁG A SZABADSÁGJOGOKÉRT v. HUNGARY, 14 April 2009, pt 37). This case was on the balance between the freedom of expression and data protection. The Court "considers that it would be fatal for freedom of expression [..] if public figures could censor the press and public debate in the

name of their personality rights, alleging that their opinions on public matters are related to their person and therefore constitute private data which cannot be disclosed without consent."

The same reasoning could be applied to the present case on the access to documents: It would be fatal for public access if persons acting in public decision-making could censor the public debate in the name of their personality rights, *of course* in the absence of a harm to privacy.

5. Access erga omnes

The issue of access erga omnes - including publication on the internet - of documents under Regulation 1049 was extensively discussed in our observations on the intervention of the Council. The EDPS stated that this practice is a choice of the institutions, not a legal obligation.

At this point, I would like to emphasise the following. Certain personal data may be disclosed and then published on publicly available public sources, such as the internet. However, this does not entail, as the Commission suggests, that their subsequent processing falls outside the scope of Regulation 45 or of national data protection laws implementing Directive 95/46.

Personal data will still be protected by applicable data protection provisions in the same way as for instance the publication on the internet of copyrighted material does not deprive its author of all rights and actions stemming from applicable copyright law. Publication would as such not allow indiscriminate and unlawful copying, reproduction or further selling of the material.

The protection of personal in those cases is also confirmed by the Commission practice. Personal data relating to EU officials are published by the Commission on the website Europa. In its privacy notice the Commission highlights that this information published on the internet is subject to data protection guarantees stemming from Regulation 45/2001. The privacy statement states: "*no-one is allowed to provide outside persons and organisations with paper or electronic lists containing even the public details of officials. In particular Regulation (EC) No 45/2001 imposes on the Institutions an obligation to take all necessary measures to prevent directories from being used for direct marketing purposes*". Furthermore, in case of use of this directory for unsolicited messages ("spam"), "*legal action will also be taken under the provisions of Directive 2002/58/EC (Directive on privacy and electronic communications)*".

6. The context of the case

The interpretation of the CFI on the right balance between transparency and data protection is also confirmed by the practice of the institutions. As said, the Commission publishes on the internet a directory in which all Commission officials can be found, without their individual consent. In November 2005, the Commission launched the so-called Transparency Initiative in which several ideas were set out to improve accountability of individuals through the public disclosure of their identity in relation to the involvement in the European decision making process (the register of lobbyists), or the spending of EU funds (the beneficiaries of agricultural EU funds). These initiatives have (to a certain extent) already been implemented through legislation or in practice.

Also part of this Transparency Initiative was the Commission proposal on the recast of Regulation 1049, adopted in April 2008. The reconciliation with the rules on data protection constituted one of the main topics. In its proposal the Commission already tried to incorporate the judgement of the CFI in the current affair, by formulating a category of data which does not stand in the way of public disclosure of a document. The European Parliament took the newly formulated exception somewhat further in the direction of transparency, thereby better reflecting the judgement of the CFI in the current case.

This week, the new Council of Europe Convention on Access to Official Documents, will be opened for signature. It goes in the same direction, foreseeing the possibility of refusing access to official documents for 'the protection of privacy or other legitimate interests' (Article 3(1)(f)).

Of course, internal legal instruments and the discussion on the recast of the Regulation on access to documents are legally speaking not relevant today. However, we are convinced that the current discussion on the recast of Regulation 1049 provides more evidence that the judgement of the Court of First Instance on the correct balance between transparency and data protection reflects a position which is generally supported at EU level.

7. Conclusion

Mr. President, Members of the Court, Mrs. Advocate General,

I would like to point you once more at our written observations in which the EDPS clearly demonstrated that the judgement of the CFI should be upheld. This judgement balances public access and data protection in a correct way. We deal with two fundamental rights recognised in the EU Charter. Neither one of them should be deprived of its essential content. With these pleading I have tried to demonstrate that the arguments presented by the Commission and Council are not convincing and would lead to a considerable step back in the protection. I have also underlined that the judgement of the CFI fully reflects the jurisprudence in the recent years, relating to access to documents.

Thank you.

Hielke HIJMANS

Agent of the European Data Protection Supervisor