Pleading Egan & Hackett (T-190/10)

General Court - 9 November 2011

Mr. President, honourable members of the Court.

[Today and during the written procedure, the Defendant has raised a lot of objections to the claim of the Applicants which should not distract us from what is actually at stake.]

The question before your Court [today] is whether the decision of 12 February 2010 should be annulled. In substance, the case is quite straightforward. If we look at the contested decision it is clear that:

1) the Defendant dealt with the request under Regulation 1049;
2) the Defendant refused to disclose the two names of the natural persons engaged by Liam Hyland and Jim Fitzsimons in the periods indicated and to disclose the lists of names of MEP's assistants for the same period;
3) this refusal is based on the exception contained in Article 4(1)(b) of Regulation 1049.

The reasoning of the Defendant in the contested decision, as summarised in paragraph 8 and 9 of the Report for the Hearing, clearly shows that the Defendant has erred in law.

The Defendant stated that:

"by virtue of Regulation 45 and Regulation 1049 documents containing personal data of former MEP assistants <u>are not subject to public disclosure</u>" [end of quote]. The names of the assistants "constitute personal data, disclosure of which would infringe the privacy interests of the individuals concerned, under the terms of Regulation 45 and Article 4(1)(b) of Regulation 1049" [end of quote].

What the Defendant did here, was to apply Article 4(1)(b) of Regulation 1049 as a *categorical* exception to the right of public access to documents. This is contrary to the text of Article 4(1)(b) and to the way in which this provision has been interpreted by the EU Courts. And more generally, it is contrary to one of the basic principles underlying Regulation 1049, namely that every request should be followed by a concrete and individual examination.

The Defendant has failed to make a further analysis under the provisions of Regulation 45 on data protection, which, as we have explained in our Statement in Intervention, should in principle have led to a positive decision on disclosure.

I will now first elaborate our views on the failure of the Defendant to make a further analysis under the provisions of Regulation 45. After that, I will deal with this analysis in substance.

In the leading judgment on this issue, the *Bavarian Lager* ruling, the Court of Justice explained the meaning of Article 4(1)(b) of Regulation 1049. It considered in paragraph 63 of that ruling that:

"where a request based on Regulation 1049 seeks to obtain access to documents including personal data, the provisions of Regulation 45/2001 become applicable in their entirety, including Article 8 and 18 thereof."

In paragraph 74 of the same ruling, the Court referred in this respect to the 'specific regime' of the two regulations, and put particular emphasis on Article 8(b) of Regulation 45. This provision allows disclosure of personal data if certain conditions are met, one of which being a balancing of the various interests concerned. I will return to this provision in greater detail.

In the contested decision, as just quoted, the Defendant only referred to Regulation 45 in a general manner and did not make a substantive analysis. It thereby ignored the 'specific regime' referred to by the Court of Justice. Article 8(b) of Regulation 45, to which the Court of Justice in *Bavarian Lager* drew particular attention, is not referred to at all. Nor is any substantive analysis made in that direction.

The simple fact that Article 8(b) is disregarded in this case renders the refusal on the basis of Article 4(1)(b) of Regulation 1049 illegal. This follows clearly from paragraphs 63 and 64 of the *Bavarian Lager* judgment. It has recently also been confirmed by your Court in the *Valero Jordana* ruling of 7 July 2011 (Case T-161/05). In this case a comparable decision was annulled, in which access to personal data in a document was categorically refused under Article 4(1)(b) of Regulation 1049. I refer in particular to paragraph 95 of this ruling.

Therefore, we believe the refusal should be annulled. This is not a new plea in law, as the Defendant asserts, it represents the third plea in law of the Applicants: the Defendant has erred in its assessment of the exception provided for in Article 4(1)(b) of Regulation 1049.

This brings me to another issue raised by the Defendant with regard to our Intervention. The Defendant indicated that it found it unclear whether the EDPS argued that Article 8(b) of Regulation 45 should have been applied with or without reference to Regulation 1049.

In the present case Article 8(b) should indeed be applied with reference to Regulation 1049. Again, Article 8(b) is the particular provision within the specific regime of *both* regulations. If a person, like in the present case, asks for access to a document containing personal data on the basis of Regulation 1049, the institution concerned should as part of the assessment also consider the matter under Regulation 45.

I now come to the substantive analysis the Defendant should have made under Regulation 45 and Article 8(b) in particular.

As said, in the present case this analysis should in principle have led to a positive decision on disclosure. This makes the failure to assess the matter under Article 8(b) of Regulation 45 even more striking.

The analysis under Article 8(b) should furthermore have been triggered by the fact that, unlike the situation in *Bavarian Lager* in which the Applicant refused to give *any*

justification or *any* argument, the Applicants in the present case *did* provide reasons which could qualify as express and legitimate justification for having access to the data under Article 8(b). This difference in facts between the present case and the case of Bavarian Lager is of great importance, considering the weight the Court of Justice has put on the absence of such reasons in *Bavarian Lager*. I refer to paragraph 78 of the *Bavarian Lager* ruling in particular.

The reasons provided by the Applicants are cited in paragraph 3 of the Report for the Hearing. Briefly put, the Applicants sought access to the names for use in legal proceedings.

As we have explained in Part III.2 of our Statement in Intervention, private interests may and should be taken into account in the analysis under the 'specific regime' of both Regulations. Moreover, the private interests of the Applicants, as referred to in paragraph 40 of the Report for the Hearing, can clearly be linked to a broader public interest: the detection of fraud.

It follows from paragraph 78 of the *Bavarian Lager* ruling that after an Applicant has provided an express and legitimate justification for the disclosure, which the Applicants in the present case did, the institution concerned should balance the various interests at stake and assess whether the legitimate interests of the data subjects would be prejudiced by the disclosure. This requires a careful analysis of the specific circumstances of the case.

In point 38 and further of our Statement in Intervention, we elaborate the view that the balance of the various interests concerned favours disclosure of the names to the Applicants in the present case. Public disclosure of only the name of an MEP assistant would, in principle, not prejudice the legitimate interests of these assistants. With a view to the principle of proportionality, we have emphasised in point 37 of our Statement, that it would be sufficient to provide access only to the names of the assistants paid by mr. Hyland and mr. Fitzsimons.

The Defendant has argued that the disclosure of the name of an MEP assistant reveals the political opinion of that assistant and should therefore be considered as sensitive

data protected under Article 10 of Regulation 45. It should be noted that this argument has not been raised in the contested decision. As we have explained in pt. 43 and 44 our Statement in Intervention, even if the applicability of Article 10 is assumed, the provision does not stand in the way of revealing who worked as an assistant to an MEP. The Defendant should agree to this, as it already actively discloses such information to the public.

There might be specific circumstances which would lead to a balance of the various interests in favour of non-disclosure. However, the Defendant did not provide any such circumstances.

In the absence of specific circumstances, we believe the data should have been disclosed to the Applicants. An important safeguard for the data subjects involved would have been to inform them about the disclosure in advance in order to enable them to object to the disclosure on compelling legitimate grounds (Article 18 of Regulation 45). We have explained this procedure extensively in our Background Paper on the consequences of the *Bavarian Lager* case of 24 March of this year.

I now come to the conclusion.

By not considering the matter under Regulation 45/2001, and Article 8(b) in particular, the Defendant has, indeed, erred in its assessment of the exception provided for in Article 4(1)(b) of Regulation 1049/2001.

Therefore, we support the form of order sought by the Applicants and respectfully request your Court to annul the Defendant's decision of 12 February 2010.

I thank you for your attention.