Pleading Dennekamp

Mr. President, members of the Court.

Is the participation of MEPs in an additional pension scheme information which can be disclosed to the applicant? In other words, does the citizens' right of access to documents stretch out to cover such personal data about MEPs?

After careful analysis of the two relevant regulations and after a balance of the various interests involved, the EDPS believes the answer to this question is: yes.

This position has been defended by the EDPS in the present case. And this position is still valid, even after the *Bavarian Lager* ruling of the ECJ which was issued after the termination of the written procedure.

In this pleading I will explain in greater detail how the EDPS comes to the conclusion that the decision to refuse access should be annulled. I will mainly discuss the relevant provisions of the two regulations which need further explanation after the *Bavarian Lager* ruling.

I will start with the ground for exception in Regulation 1049:

Article 4(1)(b) of Regulation 1049/2001

The ECJ, in its ruling in *Bavarian Lager*, made clear in paragraph 63 that Article 4(1)(b) of Regulation 1049/2001 implies that 'where a request based on Regulation [...] 1049/2001 seeks to obtain access to documents including personal data, the provisions of [Regulation 45/2001] become applicable in their entirety'.

The applicant requested access to documents, which reveal which MEPs participated in the additional pension scheme. Disclosure of such information would without doubt constitute the processing of personal data to which the provisions of Regulation 45/2001 apply.

It should be underlined that Regulation 45/2001 is applicable to processing of data relating to natural persons, regardless of whether the data relates to the professional or private activities of a person.

This distinction, between the professional and private nature of the data, played a prominent role in the written procedure and has also been referred to in the pleading of the Applicant.

After the *Bavarian Lager* ruling of the ECJ, as just quoted, it seems that this distinction is no longer relevant for determining the *applicability* of Regulation 45/2001. However, the arguments about the nature of the data and the public position of the persons involved are still relevant when *balancing the various interests at stake* under Regulation 45/2001.

I will now turn to an assessment of the matter under the relevant provisions of Regulation 45/2001. If disclosure is allowed under those provisions, access cannot be denied on the basis of Article 4(1)(b) of Regulation 1049/2001.

The relevant provisions of Regulation (EC) No 45/2001

The Defendant argues that disclosure of the requested data would be incompatible with Articles 5, 6, 8, 11 and 18 of the Regulation. Articles 6 and 11 have been dealt with in our Statement in Intervention and our position on those two articles has not changed. I will now focus on Articles 5, 8 and 18, as these need some further explanation after the *Bavarian Lager* ruling.

Article 5 and 18

For a data processing activity to be lawful, it must rely on one of the legal bases provided for in Article 5.

The Defendant argued that disclosure of the personal data could only be based on the consent of the persons involved, *i.e.* on the approval of the MEPs. This is the ground for processing laid down in Article 5(d) of Regulation 45/2001. The Applicant, on the

contrary, argued that 5(b) should have been used as a legal basis. This is the ground for processing if it is necessary for compliance with a legal obligation.

After the *Bavarian Lager* ruling of the ECJ, it is less obvious to base the disclosure on a legal obligation in the sense of Article 5(b) of Regulation 45/2001. This, however, does not mean that *consent* is the only basis left for disclosure of the data.

The EDPS takes the view that disclosure could also have been based on Article 5(a). This provision allows for processing of data if necessary for the performance of institutions tasks carried out in the public interest. Openness allows for the public control of expenditure of public money and is an inherent part of the performance of such tasks.

We are not arguing that the MEPs have no say at all on whether their personal data can be disclosed or not. Disclosure based on Article 5(a) still allows MEPs to object to the disclosure for 'compelling legitimate grounds', as provided for by Article 18 of Regulation 45/2001. This, of course, implies that MEPs should be informed about the envisaged disclosure before it actually takes place. The position taken by the MEPs when invoking their right to object should be taken into account when assessing the matter under Article 8(b) of Regulation 45/2001.

Article 8(b)

In our view, the analysis under Article 8(b) constitutes the core of the matter. This provision has been further clarified by the ECJ in *Bavarian Lager*. Three conditions can be distinguished in para 78:

> Step 1: an applicant has to provide an express and legitimate justification or a convincing argument in order to demonstrate the necessity for those personal data to be transferred.

This, according to the ECJ, enables the institution:

> Step 2) to 'weigh up the various interests of the parties concerned' and
>
> Step 3) to verify whether there is any reason to assume that the data subject's legitimate interests might be prejudiced.

Since the applicant in *Bavarian Lager* had not given *any* justification or *any* argument, the ECJ found the refusal to grant access justified. However, in the present case the situation is totally different.

I will now deal with these three steps.

First, the applicant has to provide an express and legitimate justification or a convincing argument in order to demonstrate the necessity for those personal data to be transferred.

In pt. 28 of the Defence, the Defendant argued that the applicant had not established the necessity of having the data transferred. However, in his initial application for access, he *did* provide relevant justification.

He pointed to the fact that 'The Pension Scheme is set up by Parliament and to a large extent financed by public funds', that 'MEPs can use their mandate to influence the future and financing of the Scheme', and that '[i]n the past the Parliament has several times voted to make up for shortfalls in the Pension Scheme'. He indicated that '[i]t [wa]s therefore relevant to know who has a personal interest in this Scheme.' He furthermore indicated that the requested data was 'of public interest'.

In our view, these reasons qualify to demonstrate the necessity for having access to the names of the MEPs that participate in the additional pension scheme.

It must be added, that the defendant was clearly aware of these reasons: in the refusal of the initial application, the defendant referred to the 'potential conflict of interests' alluded to by the applicant. However, the Defendant did not refer to it when analysing the matter under Article 8(b) of Regulation 45/2001.

This brings me to the second step.

Second, the institution should weigh up the various interests of the parties concerned

As required by the ECJ in *Bavarian Lager*, the reasons given by the Applicant were sufficient for the Defendant to 'weigh up the various interests of the parties concerned'.

The interests at stake are, basically, on the one hand, transparency and the public control over expenditure of public money and on the other hand, the privacy of the MEPs.

The EDPS believes that a balance of these interests in the present case should favour disclosure of the information to the applicant. This is based on the following four considerations:

1) The persons involved are politicians which, as repeatedly considered by the ECHR, 'inevitably and knowingly lay themselves open to close scrutiny of the public at large' (*Lingens v. Austria*). This is different from the *Österreichischer Rundfunk* and *Schecke* cases, referred to by the Defendant, which concerned private individuals.

2) The impact on the privacy of the MEPs is limited. The requested information reveals only the *participation* in the additional pension scheme. It does not concern information on pension income or contributions paid by MEPs. This constitutes a second crucial difference with the situation in *Österreichischer Rundfunk* and *Schecke*. These cases concerned the public disclosure of much more detailed information about the income of the Austrian public employees and the German farmers.

3) The request does not go further than is necessary: the applicant only requests data which allows the detection of a possible conflict of interests.

In relation to the necessity, the defendant has argued that control over public expenditure has been assured by internal review mechanisms (see pt. 28 of the Defence). These mechanisms, however, cannot substitute public control. In this respect, the ECJ has stated in the *Schecke* judgment that reinforcing public control contributes to 'the appropriate use of public funds by the administration' (see para 69).

4) The public access request relates to a politically sensitive issue. With reference to the well-known *Von Hannover* ruling of the ECHR, the Applicant argues in pt. 15 of the Reply that the disclosure of the information contributes to 'the current public debate about the Pension Scheme and its operation' which is 'of general interest to the society because the Pension Scheme is funded by public money'.

In pt. 15 of the Rejoinder, the Defendant contests that a public discussion on the pension scheme took place *at the time of the request*. This fact, however, be it true or not, is completely irrelevant. In many cases, a public debate depends on the availability of information held by the administration. The ECtHR has acknowledged that the gathering of information by the media, NGOs and other societal 'watchdogs' is an 'essential preparatory step' in the creation of forums of public debate. This was the ruling of 14 April 2009 in the case of *Tarsasag a Szabadsagjogokert/Hungary* **(37374/05)**, in which the ECtHR acknowledged a right of public access to administrative documents, containing personal data of a politician (!), under Article 10 ECHR.

The requested information could clearly contribute to a debate of general interest. Moreover, the applicant in the present case made no secret of the fact that he is a journalist. Under the provisions of Regulation 1049/2001 the profession of the person requesting access is irrelevant. However, in the context of Article 8(b) of Regulation 45/2001 this *is* a relevant factor. The applicant was representing a public 'watchdog'.

These four considerations justify an outcome of the balance in favour of disclosure.

Disclosure of the information in the present case does not mean that the MEPs involved no longer have 'any privacy at all' as submitted by the defendant in pt. 21 of the Defence. The outcome of the balancing test relies on the specific circumstances of the present case. Moreover, the third step of Article 8(b) should be fulfilled as well.

Third, the institution should verify whether there is any reason to assume that the data subject's legitimate interests might be prejudiced.

The assessment just made under the second step necessarily leads to the *general* conclusion that there is no reason to assume that the data subject's legitimate interests might be prejudiced by disclosure. There might, however, still be specific reasons why information should be withheld.

In pt. 33 of the Defence the Defendant argues that it had to assume that the legitimate interests of the MEPs concerned would be prejudiced by disclosure as it would expose them to 'public criticism'.

For an MEP, who deliberately chose a public function, being free from public criticism cannot constitute a *legitimate* interest which would be prejudiced by public disclosure of the information. Being subject to public criticism is part and parcel of their public function. As the ECHR has stated: 'in choosing their profession, [politicians] laid themselves open to robust criticism and scrutiny; such is the burden which must be accepted by politicians in a democratic society' (*Ukrainian Media Group/Ukraine,* **72713/01**, para 67).

The Defendant relied only on a general argument which applied to all MEPs. There is no sign that the Defendant has been aware of any legitimate interests of a particular MEP which would be prejudiced by the disclosure.

The analysis under the three steps thus leads to the conclusion that disclosure would be in compliance with the conditions set out in Article 8(b) of Regulation 45/2001.

To conclude

The Defendant has not made a correct assessment under the relevant provisions of Regulation 45/2001. As discussed and on the information available, the EDPS believes this assessment should have led to a positive answer to the applicant. The reasoning of the Defendant in the contested decision does not justify reliance on the exception to public access as laid down in Article 4(1)(b) of Regulation 1049/2001. Disclosure of the requested information would not undermine the protection of privacy and data protection under Article 4(1)(b) of Regulation 1049/2001. The EDPS therefore takes the view that the contested decision should be annulled.