

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

30 January 2008 (☆)

(Access to documents – Regulation (EC) No 1049/2001 – Documents relating to the construction of the new Athens International Airport at Spata – Refusal of access – Exception relating to the protection of commercial interests – Exception relating to the protection of the purpose of audits – Partial access)

In Case T-380/04,

**Ioannis Terezakis**, residing in Brussels (Belgium), represented initially by L. Defalque, G. Xanthoulis, A. Tsamis, A. Georgiadis, E. Stefanakis, É. Koeune and G. Stylianakis, lawyers, and subsequently by G. Stylianakis, B. Keane, Solicitor, and P. Koutsoukos, lawyer,

applicant,

v

**Commission of the European Communities**, represented by L. Flynn and P. Aalto, acting as Agents,

defendant,

APPLICATION for annulment of the Commission's decision of 12 July 2004 refusing the applicant access to certain documents relating to the construction of the new Athens International Airport at Spata,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of M. Jaeger, President, J. Azizi and E. Cremona, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 30 March 2006,

gives the following

### Judgment

#### Legal context

- 1 Article 10(3) of Council Regulation (EC) No 1164/94 of 16 May 1994 establishing a Cohesion Fund (OJ 1994 L 130, p. 1) provides, inter alia:  
  
'Applications for assistance for projects under Article 3(1) shall be submitted by the beneficiary Member State.'
- 2 Article 10(4) of that regulation requires that applications contain information concerning, inter alia, the body responsible for implementation of the project to be financed.
- 3 According to Article 10(6) of Regulation No 1164/94:

'Subject to Article 6 and to the availability of commitment appropriations, the Commission shall decide on the grant of assistance from the [Cohesion] Fund provided that the requirements of this Article are fulfilled, as a general rule within three months of receipt of the application. Commission decisions approving projects, stages of projects or groups of related projects shall determine the amount of financial support and lay down a financing plan together with all the provisions and conditions necessary for the implementation of the projects.'

- 4 Article D(1) of Annex II to Regulation No 1164/94 provides, inter alia:

'Payments of financial assistance shall be made in accordance with the corresponding budget commitments, to the authority or body designated for the purpose in the application submitted by the beneficiary Member State concerned.'

- 5 Article 1(a) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) is worded as follows:

'The purpose of this Regulation is:

- (a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to ... Parliament, Council and Commission ... documents provided for in Article 255 ... EC in such a way as to ensure the widest possible access to documents,

...'

- 6 Article 3 of Regulation No 1049/2001 provides:

'For the purpose of this Regulation:

- (a) "document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, [to the] activities and [to the] decisions falling within the institution's sphere of responsibility;
- (b) "third party" shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.'

- 7 Article 4 of Regulation No 1049/2001, which defines the exceptions to the right of access referred to above, provides as follows:

'1. The institutions [(Parliament, Council and Commission)] shall refuse access to a document where disclosure would undermine the protection of:

- (a) the public interest as regards:

- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the Community or a Member State;

- (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

...

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

...'

- 8 Article 5, headed 'Consultations', of the detailed rules for the application of Regulation No 1049/2001, the text of which is contained in the annex to Commission Decision 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure (OJ 2001 L 345, p. 94), provides:

'1. Where the Commission receives an application for access to a document which it holds but which originates from a third party, the Directorate-General or department holding the document shall check whether one of the exceptions provided for by Article 4 of Regulation ... No 1049/2001 applies. If the document requested is classified under the Commission's security rules, Article 6 of these Rules shall apply.

2. If, after that examination, the Directorate-General or department holding the document considers that access to it must be refused under one of the exceptions provided for by Article 4 of Regulation ... No 1049/2001, the negative answer shall be sent to the applicant without consultation of the third-party author.

3. The Directorate-General or department holding the document shall grant the application without consulting the third-party author where:

- (a) the document requested has already been disclosed either by its author or under the Regulation or similar provisions;
- (b) the disclosure, or partial disclosure, of its contents would not obviously affect one of the interests referred to in Article 4 of Regulation ... No 1049/2001.

4. In all the other cases, the third-party author shall be consulted. In particular, if the application for access concerns a document originating from a Member State, the Directorate-General or department holding the document shall consult the originating authority where:

- (a) the document was forwarded to the Commission before the date from which Regulation ... No 1049/2001 applies;
- (b) the Member State has asked the Commission not to disclose the document without its prior agreement, in accordance with Article 4(5) of Regulation ... No 1049/2001.

5. The third-party author consulted shall have a deadline for reply which shall be no shorter than five working days but must enable the Commission to abide by its own deadlines for reply. In the absence of an answer within the prescribed period, or if the third party is untraceable or not identifiable, the Commission shall decide in accordance with the

rules on exceptions in Article 4 of Regulation ... No 1049/2001, taking into account the legitimate interests of the third party on the basis of the information at its disposal.

6. If the Commission intends to give access to a document against the explicit opinion of the author, it shall inform the author of its intention to disclose the document after a ten-working-day period and shall draw his attention to the remedies available to him to oppose disclosure.

7. Where a Member State receives an application for access to a document originating from the Commission, it may, for the purposes of consultation, contact the Secretariat-General, which shall be responsible for determining the Directorate-General or department responsible for the document within the Commission. The issuing Directorate-General or department of the document reply to the application after consulting the Secretariat-General.'

## Facts

- 9 The 'New Athens International Airport at Spata' project ('the project') received financial support from the Cohesion Fund on the basis of Commission Decision E (96) 1356 of 23 May 1996 concerning the grant of assistance from the Cohesion Fund to the new Athens International Airport. The project was approved in order to support the construction of a new airport in Athens by a consortium which would be responsible for the various items of works. The Decision provided that the Cohesion Fund would co-finance 35 items of the airport's construction works, and the maximum amount of assistance allotted to the project was fixed at ECU 250 000 000.
- 10 By letter of 5 April 2004, the applicant requested access to certain documents relating to the project, namely:
- the contract of 14 June 1996 signed between Athens International Airport SA and a consortium of companies led by Hochtief AG ('the main contract');
  - the contracts signed between the consortium of companies led by Hochtief and the subcontractors which participated in the construction of the airport ('the subcontracts');
  - the presentation by the consortium of companies led by Hochtief of the works items for the construction costs of EUR 1 824 000 000 ('the costs of the construction items');
  - the invoices issued by that consortium of companies ('the invoices');
  - the final report on the completion of the airport ('the final report').
- 11 By letter of 29 April 2004, the Commission's Directorate-General (DG) for Regional Policy replied to the applicant. First, it refused to grant him access to the main contract on the basis of Article 4(2), first indent, of Regulation No 1049/2001. It explained that, having consulted the third party concerned, it had come to the conclusion that disclosure would jeopardise the commercial interests of Athens International Airport, and that there was no public interest in disclosure outweighing the harm that would be caused to the contracting parties' commercial interests. Second, the Commission informed the applicant that it was not in possession of the subcontracts. Third, as regards the costs of the construction items, the Commission informed the applicant that the information requested on the costs breakdown in the application by the Hellenic Republic for Cohesion Fund assistance had already been sent to him by letter of 5 February 2004. It added that more information could be provided to him when the audit being carried out by the Commission was completed. Fourth, as regards the invoices, the Commission informed the applicant that it did not have these, only a list of all the invoices and copies of a sample of them. It stated that those documents constituted a key element of the ongoing audit and refused to give access to them, in reliance on Article 4(2), third indent, of Regulation No 1049/2001. Finally, fifth, the Commission refused access to the final report on the basis of the same provision, maintaining that the parties involved in

the audit were entitled to expect the Commission to preserve the confidentiality of those documents until completion of the process.

- 12 By letter of 26 May 2004, the applicant sent a confirmatory application to the Secretary General of the Commission.
- 13 The Secretary General replied by letter of 12 July 2004 ('the contested decision').
- 14 In the contested decision, the Commission confirmed its refusal to disclose the main contract. In addition to the matters referred to in the letter of 29 April 2004, it stated that it had taken into consideration the ruling of the Polimeles Protodikio Athinon (Court of First Instance of Athens, Greece) and the judgment of the Efetio Athinon (Court of Appeal of Athens, Greece), from which it was apparent that Athens International Airport did not need to disclose that contract. The Commission added that the possibility of granting partial access had been considered, but that the parts of the contract that could be disclosed could be found in the Greek authorities' application for financial assistance, a copy of which had already been provided to the applicant. The Commission observed that a great deal of information on the airport's construction had already been made public, including the construction cost, and concluded that the disclosure of the contract was unlikely to shed any additional light on the issue of whether the airport's charges were justified in relation to the construction cost.
- 15 In relation to the subcontracts, the Commission reaffirmed that these were not in its possession.
- 16 In relation to the costs of the construction items, the Commission concluded that the applicant's request was not an application for access to documents under Regulation No 1049/2001, but a request for information. The Commission stated, moreover, that the Regional Policy DG had provided the applicant with the breakdown of costs as mentioned in the application of the Greek authorities for financial assistance, which referred to the entire project.
- 17 In relation to the invoices, the Commission reaffirmed that it did not hold copies of all the invoices, merely a list of them and copies of a sample. It added that those documents were being examined in the context of an audit which was still incomplete, and refused access in reliance on the exception in Article 4(2), third indent, of Regulation No 1049/2001 on the ground that disclosure would put into the public domain information which was still subject to investigation and verification. Furthermore, the nature of the documents did not allow for partial disclosure. Finally, it stated that the need to protect the ongoing audit from external pressure precluded the waiver of that exception due to an overriding public interest.
- 18 Lastly, as regards the final report, the Commission confirmed its refusal of access on the basis of Article 4(2), third indent, of Regulation No 1049/2001. It stated that that document could not be disclosed until completion of the audit, in order to avoid any interference with the investigation and with the exchange of views between the Commission and the Greek authorities. The partial disclosure of the final report was also refused on the ground that, since all parts of the document were interrelated, none of them could be disclosed without the audit being affected. Finally, having regard to the public interest in safeguarding its ability to carry out the audit free from external pressure, the Commission took the view that the public interest in the disclosure of the final report did not outweigh the need to protect the investigation in progress.

### **Procedure**

- 19 By application lodged on 22 September 2004, the applicant brought the present action.
- 20 Upon hearing the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure of the Court of First Instance, invited the Commission to answer a written question. The Commission complied with that request within the prescribed period.

- 21 By order of 6 February 2006, in accordance with Article 65(b), Article 66(1), and the third subparagraph of Article 67(3) of the Rules of Procedure, the Court ordered the Commission to produce the main contract, but provided that that document should not be communicated to the applicant in the present proceedings. That request was complied with.
- 22 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 30 March 2006.

#### **Forms of order sought by the parties**

- 23 The applicant claims that the Court should:
- annul the contested decision;
  - order the Commission to pay the costs.
- 24 The Commission contends that the Court should:
- dismiss the action as unfounded;
  - order the applicant to pay the costs.

#### **Law**

- 25 In support of his action for annulment, the applicant relies on a number of pleas in law relating to access (1) to the main contract; (2) to the invoices and to the final report; (3) to the costs of the construction items; and (4) to the subcontracts.

##### *1. Access to the main contract*

- 26 The applicant advances, in essence, two pleas in law alleging, first, an error of law and a manifest error of assessment in the definition of the status of the author of the document, an error of law in the application of Article 4(4) of Regulation No 1049/2001 and of Article 5(3) of Decision 2001/937 and, second, an infringement of Article 1(a) and of Article 4(2) and (6) of Regulation No 1049/2001, and of the principle of proportionality.

*First plea in law, alleging, first, an error of law and manifest error of assessment in the definition of the status of the author of the document, and, second, an error of law in the application of Article 4(4) of Regulation No 1049/2001 and of Article 5(3) and (4) of Decision 2001/937*

First part: error of law and manifest error of assessment in the definition of the status of the author of the document

- Arguments of the parties
- 27 The applicant observes that, in the contested decision, the Commission did not define whether Athens International Airport was a third party (other than a Member State) or an authority as stipulated in the Greek application for financial assistance. By designating Athens International Airport in Decision E (96) 1356 as the authority responsible for implementing the project, the Commission should have treated the airport as an authority and not as a third party under Regulation No 1049/2001. The Commission therefore erred in law in applying Article 4(4) of Regulation No 1049/2001, which refers to third parties other than the Member States.
- 28 The applicant notes in that regard that Article 12.2.6 of Greek Law No 2338/1995 ratifying the airport development agreement, provides:

'The Airport Company [Athens International Airport] will be managed and operated as a commercial, profit-making company in the private sector and the Board of Directors will

make its decisions and the Airport Company's business plans and budgets will be established and its activities conducted on that basis.'

- 29 He further submits that Article 10(4) of Regulation No 1164/94 provides that applications must, inter alia, contain information concerning the body responsible for implementation of the project. Moreover, the Greek application for financial assistance refers to the organisation responsible for project implementation, and the English translation of the authentic Greek text of Decision E (96) 1356 refers, in turn, to the authority responsible for the implementation of the project. In the applicant's view, the terms 'body', 'organisation' and 'authority' imply that the implementation at national level of projects co-financed by the Cohesion Fund must be entrusted to entities serving the public interest. By applying Article 4(4) of Regulation No 1049/2001, the Commission may therefore have infringed Article 10(4) of Regulation No 1164/94.
- 30 He therefore requests that the Commission adopt a clear position on the status of Athens International Airport in the light of the provisions of Greek Law No 2338/1995 and the recitals to Decision E (96) 1356, in order to establish whether the applicant's request for access to the main contract is dealt with pursuant to Article 4(5) or Article 4(4) of Regulation No 1049/2001.
- 31 The applicant maintains that, whether it belongs to the public or private sector, the body designated to implement the project must serve the public interest. He submits that Article 27(1) of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1) provides that '[w]here implementation or management of part of assistance has been entrusted to intermediaries ..., such intermediaries must provide guarantees ..., must have several years' experience in the relevant field, operate in the public interest and adequately involve the socio-economic interests'. The applicant takes the view that Article 10(4) of Regulation No 1164/94 requires the body responsible for implementing the project to operate in the public interest, as is the case in Regulation No 1260/1999.
- 32 He submits a letter of 12 May 2003 from the Regional Policy DG in which the Commission reiterates that Athens International Airport is an authority. At the bottom of the first page is the following statement:
- '[T]he Commission shall consult the third party concerned. In this case, [the Regional Policy] DG ... has consulted the Athens Airport Authority (AIA).'
- 33 Further, the Commission contradicts itself when it treats Athens International Airport both as a company with commercial interests for the purposes of Regulation No 1049/2001 and as an authority serving the public interest for the purposes of Commission Decision E (96) 1356.
- 34 Finally, the applicant submits that Decision E (96) 1356 may have infringed Article 10(4) of Regulation No 1164/94. The Commission may have committed a criminal infringement, first, by consciously retaining the fraudulent prices of the works items in order to calculate the Cohesion Fund assistance and, second, by entrusting the management of that assistance and the entire project budget of EUR 2 188 607 000 to a false authority whose address is a hotel in Athens. Furthermore, by adopting Decision E (96) 1356, the Commission enabled the consortium of companies led by Hochtief ('the Hochtief consortium') to put itself in a position of a clear conflict of interests by acting simultaneously as employer, constructor and the authority responsible for implementing the project.
- 35 The Commission contends that the applicant's argument as to the Commission's failure to define whether Athens International Airport is a third party other than a Member State or whether it is an authority is manifestly unfounded. Regulation No 1164/94 makes a clear distinction between the Member State, on the one hand, and the body responsible for implementing the project and the authority or body designated to receive payment of financial assistance, on the other. Furthermore, there is no provision in Regulation No 1164/94 for the body designated to implement the project to be required to belong to the public sector, nor indeed any provision under which Athens International Airport could be treated in the same way as a Member State within the meaning of the legislation invoked by the applicant.

- 36 Furthermore, the applicant's assertion that Commission Decision E (96) 1356 may be contrary to Article 10(4) of Regulation No 1164/94 is irrelevant as far as the legality of the contested decision is concerned. The applicant's argument should be rejected as being inadmissible, since any challenge to the legality of Decision E (96) 1356 should be based on Article 230 EC and the applicant is neither directly nor individually concerned by that decision.
- 37 As regards the applicant's assertion that the Commission may have committed a criminal infringement, the Commission again observes that the present proceedings concern the access to documents requested by the applicant, not the background to the adoption of Decision E (96) 1356. The applicant's views on that point are entirely alien to the issue before the Court.
- Findings of the Court
- 38 The right of access to documents of the Parliament, Council and Commission ('the institutions') provided for in Article 2 of Regulation No 1049/2001 covers, according to Article 2(3), all documents held by the institutions, whether drawn up or received by them. Accordingly, the institutions may be required, in appropriate cases, to communicate documents originating from third parties, including, in particular, the Member States, in accordance with the definition of third party in Article 3(b) of Regulation No 1049/2001.
- 39 Under Article 4(4) of Regulation No 1049/2001, in the case of documents originating from a third party, the institution is to consult the third party with a view to assessing whether an exception in Article 4(1) or (2) is applicable, unless it is clear that the document is or is not to be disclosed. However, it follows from Article 4(5) that, among third parties, the Member States are given special treatment. That provision confers on the Member State the power to request the institution not to disclose documents originating from that State without its prior agreement. In those circumstances, the institution is bound by that request (Case T-187/03 *Scippacercola v Commission* [2005] ECR II-1029, paragraph 62).
- 40 It should be borne in mind that the Commission states in the contested decision that, following earlier requests for access to the main contract, it consulted the contracting parties in accordance with Article 4(4) of Regulation No 1049/2001 and that, on the basis of their replies, access to the document sought was refused pursuant to Article 4(2), first indent, of the regulation, since disclosure would undermine the protection of their commercial interests.
- 41 In applying Article 4(4) of Regulation No 1049/2001, the Commission therefore implicitly but necessarily took the view that Athens International Airport and the Hochtief consortium were third parties other than the Member States. It follows that the applicant's complaint about the lack of definition of the status of the author of the document is unfounded.
- 42 The applicant claims, furthermore, that, in applying Article 4(2) and Article 4(4) of Regulation No 1049/2001, the Commission erred in law in that it follows from the Greek application for financial assistance, Decision E (96) 1356, Article 12.2.6 of Greek Law No 2338/1995 and Article 10(4) of Regulation No 1164/94 that Athens International Airport should have been treated as an authority serving the public interest, and accordingly the Commission should have applied Article 4(5) of Regulation No 1049/2001.
- 43 Suffice it to note in that respect that, should the applicant's argument be accepted, it would have to be inferred that, under Article 4(5) of Regulation No 1049/2001, the Commission was in fact bound by Athens International Airport's objection to disclosure of the contract, since a request made by a Member State – which is what Athens International Airport should allegedly have been treated as under that provision – constitutes an instruction to the institution not to disclose the document in question (see, to that effect, Case T-168/02 *IFAW Internationaler Tierschutz-Fonds v Commission* [2004] ECR II-4135, paragraph 58).
- 44 The applicant's argument cannot therefore support his conclusion that the Commission wrongly refused him access to the main contract and must therefore be rejected as being irrelevant.



45 Finally, as regards the applicant's argument that Decision E (96) 1356 may have infringed Article 10(4) of Regulation No 1164/94, it must be noted that that argument too is manifestly irrelevant, since the alleged illegality of Decision E (96) 1356 has no effect on the legality of the Commission's refusal to grant the applicant access to the main contract.

46 It follows that the first part of the first plea in law must be rejected.

Second part: error of law in the application of Article 4(4) of Regulation No 1049/2001 and of Article 5(3) and (4) of Decision 2001/937

– Arguments of the parties

47 The applicant claims, first of all, that the two letters which the Commission sent to him informing him that it had consulted a third party did not include any evidence that it had taken into account Article 4(4) of Regulation No 1049/2001 and Article 5(3) of Decision 2001/937 in order to consider granting access to the document requested without consulting the third party concerned.

48 He maintains, second, that it is impossible to interpret Article 4(4) and (5) of Regulation No 1049/2001 and Article 5(4) of Decision 2001/937 as meaning that third parties and Member States have a power of veto over the release of a document originating from them. He takes the view that decisions on the release of documents held by the institutions can only be taken by those institutions and that the refusal of disclosure should be justified by the institution by reference to Article 4(1) to (3) of Regulation No 1049/2001.

49 However, in the two letters sent to the applicant, the Commission refers to the consultation of the third party concerned on the matter of the disclosure of the document requested and informs the applicant very succinctly that it has come to the conclusion that the disclosure of the document would harm the commercial interests of the contracting parties. Thus, there is nothing to suggest that the Commission assessed the grounds put forward by the third party concerned. Similarly, in the contested decision, the Commission merely reiterates that it had concluded, on the basis of the third party's reply, that disclosure of the main contract would indeed be harmful to the contracting parties' commercial interests.

50 By failing to assess the grounds advanced by the third party concerned and to set out the elements of that assessment in the letters which it sent to the applicant, the Commission in fact conferred on the third party concerned a power of veto, contrary to the terms and logic of Article 4(4) of Regulation No 1049/2001 and Article 5(3) of Decision 2001/937.

51 Furthermore, according to the applicant, that failure constitutes a breach of the duty to state reasons, contrary to Article 253 EC.

52 The Commission contends that, in view of the explanations given by the contracting parties, and taking into account the two rulings by the national courts, it took the view in the contested decision that disclosure would harm the commercial interests of the parties to the contract. There is nothing here to suggest that it surrendered its discretion to the third party consulted. As regards the decision to consult the third party concerned, thereby not availing itself of the possibility of proceeding without obtaining its opinion, the Commission observes that, in the case of a contract between two commercial partners, it is not clear that the document should be disclosed. It was therefore correct to consult the contracting parties in order to assess whether disclosure would affect their commercial interests. In any event, it did not have to justify the fact that it consulted the third party from which a document originates.

– Findings of the Court

53 The applicant claims, first of all, that the Commission infringed Article 4(4) of Regulation No 1049/2001 and Article 5(3) of Decision 2001/937 by failing to consider disclosing the main contract without consulting the third party from which that document originates.

54 In that respect, it must be borne in mind that, under Article 4(4) of Regulation No 1049/2001, in the case of documents originating from a third party, the institution is to

consult that third party with a view to assessing whether an exception in Article 4(1) or (2) is applicable, unless it is clear that the document is or is not to be disclosed. It follows that the institutions are under no obligation to consult the third party concerned if it is clearly apparent whether the document should or should not be disclosed. In all other cases, the institutions must consult the relevant third party. Accordingly, consultation of the third party is, as a general rule, a precondition for determining whether the exceptions to the right of access provided for in Article 4(1) and (2) of Regulation No 1049/2001 are applicable in the case of third-party documents (*IFAW Internationaler Tierschutz-Fonds v Commission*, cited in paragraph 43 above, paragraph 55).

- 55 Similarly, Article 5(3) of Decision 2001/937 provides that the Directorate-General or department holding the document is to grant the application without consulting the third-party author where the document requested has already been disclosed either by its author or under the regulation or similar provisions, or where the disclosure, or partial disclosure, of its contents would not obviously affect one of the interests referred to in Article 4 of Regulation No 1049/2001. According to Article 4(4), in all the other cases, the third-party author of the document is to be consulted.
- 56 In the present case, it is apparent from the documents before the Court that the main contract had not already been disclosed, and consequently it is necessary to consider only the second of the two situations in which it is envisaged in Decision 2001/937 that the institution grants access to a document originating from a third party without consulting that third party, namely when the document's disclosure does not obviously affect one of the interests referred to in Article 4 of Regulation No 1049/2001.
- 57 The document to which the applicant has requested access is a contract of evident breadth concerning the project, concluded between Athens International Airport and the Hochtief consortium. By its nature, such a document is likely to contain confidential information concerning both the companies in question and their business relations. Such information can, in certain circumstances, be covered by the exception to the right of access provided for in Article 4(2), first indent, of Regulation No 1049/2001 relating to the protection of commercial interests of a natural or legal person. It follows that it cannot be held that the main contract was obviously not covered by any of the exceptions provided for by Regulation No 1049/2001 and that, therefore, it was clear that that document should be disclosed.
- 58 Consequently, the Commission did not err in law in consulting the contracting parties in accordance with the general rule in Article 4(4) of Regulation No 1049/2001 and Article 5(4) of Decision 2001/937. The applicant is therefore not justified in criticising the Commission for failing to consider disclosing the main contract without consulting the contracting parties beforehand, and his complaint in that regard must therefore be rejected.
- 59 Second, the applicant claims, in essence, that the Commission failed to exercise its discretion as to the justification for the position taken by the third-party author of the document and based its decision solely on the grounds put forward by that third party, thus conferring on it, in fact, a power of veto, contrary to Article 4(4) of Regulation No 1049/2001.
- 60 It must be borne in mind that, unlike a request from a Member State pursuant to Article 4(5) of Regulation No 1049/2001 not to disclose a document of which it is the author, the consultation of a third party other than a Member State that is provided for in Article 4(4) of the regulation is not binding on the institution but is to enable it to assess whether an exception provided for under Article 4(1) or (2) is applicable.
- 61 It follows that, in the present case, while the Commission correctly consulted the parties to the main contract since it was not clear that disclosure had to be made or that it had to be refused, the fact remains that the view expressed by those parties was not overriding and the Commission was still obliged to assess the justification for that view and the applicability of one of the exceptions provided for under Article 4(1) or (2) of Regulation No 1049/2001.
- 62 Contrary to the applicant's claims, it is apparent from the contested decision that the Commission did indeed exercise the discretion thus defined.

- 63 It should be noted that, in order to justify its refusal to grant access to the main contract, the Commission stated at the outset that the contract contained detailed information about the contracting parties, their business relations and specific cost components related to the project, concluding that the disclosure of that document to third parties other than the shareholders of the contracting parties would undoubtedly affect their commercial interests.
- 64 The Commission thus clearly set out the reasons which, in its view, justified not granting access to the main contract. The contracting parties' opposition is not among the reasons referred to above, and consequently that fact alone is sufficient for the finding that the Commission cannot be regarded as having surrendered the discretion which it is to exercise in determining the applicability of the exceptions to access to documents provided for by Regulation No 1049/2001.
- 65 Although the Commission went on to mention the fact that it had consulted the contracting parties in accordance with Article 4(4) of Regulation No 1049/2001, it does not follow from the contested decision that the Commission considered itself to be bound by their views.
- 66 In fact, in the contested decision, the Commission states that, on the basis of the contracting parties' reply, the Commission concluded that disclosure would indeed be harmful to their commercial interests. It follows from that wording that the Commission examined the reply submitted by the contracting parties and took the view, thereby exercising its discretion, that it had to be concluded from the information in that reply that disclosure of the main contract would be harmful to their commercial interests.
- 67 It follows that the applicant's complaint that the Commission infringed Article 4(4) of Regulation No 1049/2001 by failing to exercise its discretion as to the justification for the position taken by the contracting parties must be rejected as unfounded.
- 68 Finally, the applicant's third submission is that, by failing to assess the grounds advanced by the contracting parties and confining itself to informing the applicant of the reasons relied on by those parties in order to justify its decision, the Commission was in breach of its duty to state reasons under Article 253 EC.
- 69 It follows from the considerations set out in paragraph 63 above that the Commission based its conclusion that the exception provided for in Article 4(2), first indent, of Regulation No 1049/2001 was applicable to the main contract particularly on the consideration that that contract contains detailed information about the contracting parties, their business relations and specific cost components related to the project. In the contested decision, the Commission states, moreover, that it gave due consideration to the rulings of the Polimeles Protodikio Athinon and the Efetio Athinon, in which the need to protect the commercial interests of the contracting parties was recognised. The applicant's premiss that the Commission's reasons for its decision were based solely on the grounds put forward by the contracting parties is thus incorrect. As to the complaint concerning the Commission's failure to assess the merits of those grounds, not only must it be rejected as unfounded, as set out in paragraphs 65 to 67 above, but it must also be held that it relates to the legality of the merits of the contested decision, not to the reasons for it.
- 70 Furthermore, the Court observes that it has consistently been held that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case C-41/00 P *Interporc v Commission* [2003] ECR I-2125, paragraph 55, and the case-law cited).
- 71 In the case of a request for access to documents, where the institution in question refuses such access, it must demonstrate in each individual case, on the basis of the information at its disposal, that the documents to which access is sought do indeed fall within the exceptions listed in Regulation No 1049/2001. However, it may be impossible to give reasons justifying the need for confidentiality in respect of each individual document without

disclosing the content of the document and, thereby, depriving the exception of its very purpose (see Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429, paragraph 60, and the case-law cited).

72 In the present case, the Commission indicated clearly the exception upon which its refusal was based by referring to Article 4(2), first indent, of Regulation No 1049/2001. It explained in what respect it had taken the view that that exception was applicable to the main contract by referring to the harm that would be caused to the commercial interests of the contracting parties by the disclosure of detailed information in the main contract about the parties, their business relations and the specific cost components related to the project. It added that it had considered the contracting parties' reply to the consultation undertaken in accordance with Article 4(4) of Regulation No 1049/2001 and that it had duly taken into consideration the rulings of the Athens courts, which had recognised the need to protect the parties' commercial interests.

73 It follows that the applicant was fully in a position to understand the reasons for the refusal which were given to him, and the Court was likewise in a position to carry out its review. Therefore, the contested decision is not vitiated by non-compliance with the obligation to state reasons.

74 The second part of the first plea in law must therefore be rejected. Accordingly, the first plea is rejected in its entirety.

*Second plea in law, alleging infringement of Article 1(a) and Article 4(2) and (6) of Regulation No 1049/2001, and of the principle of proportionality*

#### Arguments of the parties

75 The applicant takes the view, first of all, that the expression 'protection of commercial interests' used in Article 4(2) of Regulation No 1049/2001 must be narrowly interpreted in accordance with the case-law of the Court of First Instance and of the Court of Justice according to which any exception to the rule on access to documents must be interpreted and applied strictly (Case C-353/99 P *Council v Hautala* [2001] ECR I-9565, paragraph 25) and must comply with the principle of proportionality.

76 The applicant submits that it is common practice for contracts involving natural or legal persons to include detailed information about their names, addresses, business registration and also the cost of works and services to be provided, terms of payment and guarantees. If the Commission's argument were to be accepted, it should and could refuse access to any commercial contract. In the present case, the Commission did not provide certain reasons in the contested decision – such as, in particular, specific designs for airport use by military planes, construction of sensitive installations, prototype products, etc. – which could possibly have justified the rejection of the applicant's request.

77 The applicant takes the view, on the contrary, that the disclosure of the main contract would not harm the commercial interests of the parties involved. The new airport, run by a monopoly company until 2026, is an essential piece of transport infrastructure upon which more than four million inhabitants depend. In his view, the contracting parties have not provided any evidence and have not substantiated any adverse effects to be caused to them as a result of the disclosure of the document. Therefore, he considers that the Commission has wrongly decided that the disclosure of the main contract would undermine the ability of Athens International Airport and the Hochtief consortium to carry out their commercial and business activities.

78 Second, the applicant takes the view that the Commission infringed Article 4(6) of Regulation No 1049/2001 by failing to examine whether partial access should be granted to the information contained in the document requested. In particular, the Commission did not examine the possibility of giving access to information about the items of construction works costing EUR 1 824 000 000 in total, which were mentioned by the Commission in its reply of 13 February 2003 to question H-0059/03 from the Parliament.

79 He notes that the Commission provided him with the Greek application for assistance of 15 March 1996, which contained 35 items of construction works costing EUR 973 304 000,

whereas the construction cost of the airport mentioned on another page of the application was EUR 1 772 759 000. The full list of items of construction works should normally form part of the document requested. The Commission failed to assess those parts of the document in question concerning the items of construction works with a view possibly to granting partial access to the document. The applicant explains that the document requested is the main contract for the construction of Athens airport signed on 14 June 1996 for a price of EUR 1 824 000 000, as mentioned by the Commission in its reply to question H-0059/03 from the Parliament.

- 80 The Commission contends that it has not interpreted the exception laid down in Article 4(2), first indent, of Regulation No 1049/2001 excessively widely, and that, on the contrary, it is the applicant's proposed interpretation that is overly narrow, since it refers to military use, sensitive installations and prototype products. According to the Commission, commercial interests must be understood to mean the ability of natural or legal persons to carry out their commercial and business activities.
- 81 It takes the view that the fact that the airport was largely financed by public subsidies and that it operates as a monopoly is not relevant to the commercial interest which has been recognised as a legitimate interest by Article 4(2) of Regulation No 1049/2001. As regards the applicant's assertion that the contracting parties have provided no evidence of the adverse effects which disclosure of the document might entail as far as they are concerned, the Commission submits that it is the Commission's task to assess the possible risk for the commercial interests, when deciding on access to documents, since the Regulation does not require the parties to indicate the 'concrete adverse effects' which the applicant submits they should demonstrate.
- 82 The Commission observes that the applicant's position is based partly on the assumption that disclosure of the main contract would not harm the commercial interests of the parties concerned because construction of the airport has been completed. However, the contract also includes provisions on exploitation rights which were relevant on 12 July 2004 when the contested decision was adopted, and which remain so today. The possibility that business secrets about the structure and organisation of the companies might be revealed by disclosing the contract cannot be ruled out. In any event, the exception laid down in Article 4(2), first indent, of Regulation No 1049/2001 does not, in principle, cease to exist after completion of the project.
- 83 The Commission claims that the plea is entirely unfounded. It stated in the contested decision that it had considered the possibility of granting partial access and concluded that those parts of the contract which could be disclosed were contained in the application of the Greek authorities for financial assistance, a copy of which had already been provided to the applicant.
- 84 The Commission maintains that, in reality, the applicant is challenging the Commission's failure to provide him with a list detailing the costs of the construction items amounting in total to EUR 1 824 000 000, which is the subject of a further request on his part. However, according to the Commission, in so far as he claims that the full list of the construction items forms part of the main contract, his claim is unfounded.

#### Findings of the Court

- 85 It has consistently been held that the exceptions to document access must be interpreted and applied strictly so as not to frustrate application of the general principle of giving the public the widest possible access to documents held by the institutions (see, by analogy in relation to Decision 94/90, Case T-309/97 *Bavarian Lager v Commission* [1999] ECR II-3217, paragraph 39, and Case T-191/99 *Petrie and Others v Commission* [2001] ECR II-3677, paragraph 66). Moreover, the principle of proportionality requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view (*Council v Hautala*, cited in paragraph 75 above, paragraph 28).
- 86 Furthermore, the examination required for the purpose of processing a request for access to documents must be specific. First, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception (see, to that effect, Case T-20/99 *Denkavit Nederland v Commission* [2000] ECR II-3011, paragraph 45). Such

application may, in principle, be justified only if the institution has previously determined (i) that access to the document would specifically and actually undermine the protected interest and (ii) in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, that there is no overriding public interest in disclosure. Second, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical (see, to that effect, Case T-211/00 *Kuijter v Council* [2002] ECR II-485, paragraph 56). Consequently, the examination which the institution must undertake in order to apply an exception must be carried out in a specific manner and must be apparent from the reasons for the decision (see, to that effect, Case T-14/98 *Hautala v Council* [1999] ECR II-2489, paragraph 67; Case T-188/98 *Kuijter v Council* [2000] ECR II-1959, paragraph 38; and Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraph 69).

- 87 A specific, individual examination of each document is also necessary where, even if it is clear that a request for access refers to documents covered by an exception, only such an examination can enable the institution to assess the possibility of granting the applicant partial access under Article 4(6) of Regulation No 1049/2001. In the context of applying the Code of conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41), the Court has moreover already considered an assessment of documents by reference to categories rather than on the basis of the actual information contained in those documents to be insufficient, since the examination required of an institution must enable it to assess specifically whether an exception invoked actually applies to all the information contained in those documents (Case T-123/99 *JT's Corporation v Commission* [2000] ECR II-3269, paragraph 46; *Verein für Konsumenteninformation v Commission*, cited in paragraph 86 above, paragraph 73; and Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2006] ECR II-2023, paragraph 117).
- 88 It is therefore for the institution to assess, first, whether the document to which the request for access relates falls within the scope of one of the exceptions provided for by Article 4 of Regulation No 1049/2001, second, whether the disclosure of that document would specifically and actually undermine the protected interest and, third, if so, whether the need for protection applies to the whole of the document.
- 89 It is in the light of those principles that it is necessary to examine the Commission's application of the exception provided for by Article 4(2), first indent, of Regulation No 1049/2001 in refusing access to the main contract.
- 90 According to that provision, the institutions are to refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, unless there is an overriding public interest in disclosure.
- 91 First, as has been set out in paragraph 57 above, a contract such as that at issue in the present case is likely to contain confidential information concerning the contracting companies and their business relations and must therefore be regarded as falling within the scope of the exception laid down by Article 4(2), first indent, of Regulation No 1049/2001.
- 92 Second, as to whether the Commission duly undertook a specific, individual examination of the content of the main contract, which the applicant disputes by reference to the general terms of the reasoning put forward in the contested decision, it must be borne in mind that the Commission stated, first, that the contract contains detailed information about the contracting parties, their business relations and specific cost components related to the project, and concluded that the disclosure of that document to third parties other than the shareholders of the contracting parties would undoubtedly affect their commercial interests. The Commission then stated that it had concluded on the basis of the contracting parties' reply that disclosure would indeed be harmful to their commercial interests and, moreover, that it had duly taken into consideration the rulings of the Polimeles Protodikio Athinon and the Efetio Athinon, in which the need to protect the commercial interests of the contracting parties had been recognised.
- 93 As the applicant submits, the reasons on which the Commission relies – concerning the fact that the main contract contains detailed information about the contracting parties and their business relations – are general and abstract in nature and applicable per se to any commercial contract and do not show that the Commission undertook a specific, individual

examination of the content of the main contract. Furthermore, if all information relating to a company and its business relations were regarded as being covered by the protection which must be given to commercial interests in accordance with Article 4(2), first indent, of Regulation No 1049/2001, effect would not be given to the general principle of giving the public the widest possible access to documents held by the institutions.

- 94 Similarly, the consideration taken of the rulings of the Polimeles Protodikio Athinon and the Efetio Athinon, is not covered by any of the exceptions to the right of access provided for by Regulation No 1049/2001 and, moreover, does not relate to the content of the document or to the possible effect of disclosure of the main contract on the protection of the contracting parties' commercial interests. It is not therefore capable of establishing that the Commission duly undertook a specific, individual examination of the main contract in order to assess whether its disclosure would specifically and actually undermine the commercial interests of the contracting parties. The same applies to the examination of the response of those parties to the consultation carried out by the Commission pursuant to Article 4(4) of Regulation No 1049/2001.
- 95 Finally, as regards the reason given in the contested decision to the effect that the contract contains information on the specific cost components related to the project, it must be held that, in principle, precise information relating to the cost structure of an undertaking constitutes business secrets, the disclosure of which to third parties is likely to undermine its commercial interests. Moreover, Article 287 EC expressly provides that the members of the institutions, the members of committees, and the officials and servants of the Community are required, even after their duties have ceased, not to disclose information about the cost components of undertakings.
- 96 However, in the present case, following the Commission's production of the main contract in accordance with Article 65(b), Article 66(1) and the third subparagraph of Article 67(3) of the Rules of Procedure, the Court found that while that document in fact contained precise amounts in respect of the various works items provided for in it, and not, strictly speaking, in respect of the cost components of the contracting parties, substantial passages in the contract clearly did not in any event concern the 'specific cost components related to the project' to which the Commission refers in the contested decision.
- 97 Furthermore, while it clearly cannot be denied that those passages contain information about the contracting parties and their business relations, that finding is not, as has already been stated, sufficient to conclude that their disclosure would specifically and actually undermine the commercial interests of those parties.
- 98 It follows that the Commission's examination of the parts of the contract other than those concerning the specific cost components related to the project does not enable an assessment to be made specifically as to whether the exception relied on genuinely applies to all the information contained in the main contract. It is evident on reading the main contract, furthermore, that not only does it not seem to be impossible to give reasons justifying the need for confidentiality in respect of the whole of the main contract without disclosing its content and, thereby, depriving the exception of its very purpose (see, to that effect, Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, paragraph 65) – and in fact the Commission does not allege this to be the case – but, moreover, numerous clauses of the contract are drafted in general and standard terms which manifestly do not touch on the contracting parties' commercial interests, with the result that partial access to information about them would not undermine those interests. That applies, for example, to the clauses relating to the definitions of terms used in the contract, the settlement of disputes, and the majority of the clauses in Part A of the main contract, which, as regards precise details of the implementation of the contract, refer to the annexes thereto.
- 99 As to 'specific cost components related to the project', assuming that their disclosure to third parties might be genuinely harmful to the contracting parties' commercial interests, it must be noted that there is nothing to prevent the Commission, when giving partial access, from obscuring passages of the main contract which refer to them.
- 100 In that respect, it must be borne in mind that, in refusing partial access to the main contract, the Commission merely stated that those parts of the contract which could be disclosed were also contained in the Greek authorities' application for financial assistance

from the Cohesion Fund, a copy of which had already been provided to the applicant by the Commission.

- 101 However, far from being capable of justifying a refusal of partial access to the main contract, that reasoning constitutes, on the contrary, an admission by the Commission that certain parts of the main contract could be disclosed and, consequently, that partial access should be granted.
- 102 Moreover, it follows from an examination of the Greek authorities' application for financial assistance from the Cohesion Fund which is annexed to the applicant's application to this Court and which, according to the Commission, corresponds to those parts of the main contract which are capable of being disclosed, that the Cohesion Fund application contains a detailed summary of the contract price broken down by works item. Therefore, inasmuch as the 'specific cost components related to the project' must be understood to mean, in particular, such a breakdown of the contract price, the decision is vitiated by a clear contradiction since, on the one hand, it rejects the request for full access to the main contract on the ground that the contract contains information on the specific cost components related to the project and, on the other, it rules out the possibility of partial access on the ground that that information appears in the application for financial assistance that was sent to the applicant.
- 103 In that respect, it must be noted that, when called upon by the Court at the hearing to specify the passages of the contract which relate to the contracting parties' commercial interests, within the meaning of Regulation No 1049/2001, not only did the Commission not claim that the whole contract was covered by the protection required to be given to the contracting parties' commercial interests but moreover it included in the various matters which it regarded as being confidential the prices stated in the contract and the whole of appendix 7, which are actually included in the application for financial assistance which the Commission sent to the applicant. On being questioned by the Court in that regard, the Commission merely maintained that the main contract contains clauses relating to the detailed arrangements for determining costs and for the reduction of certain costs, and that it is not only the amounts in question which are relevant, but also the whole of the system set up in respect of those amounts.
- 104 Therefore, neither the contested decision nor the contradictory and imprecise explanations provided by the Commission during the proceedings enable the 'specific cost components related to the project' – the disclosure of which was considered by the Commission to be capable of undermining the commercial interests of the contracting parties – to be specifically identified with the requisite precision.
- 105 It follows from all the foregoing that it cannot be concluded from the reasons given in the contested decision that the disclosure of the main contract would have specifically and actually undermined the contracting parties' commercial interests. Since it is not for the Court to substitute its assessment for that of the Commission, the contested decision must be annulled in so far as it refuses access, even partially, to the main contract.

## *2. Access to the invoices and final report*

*First plea in law, alleging infringement of Article 4(2), third indent, and Article 1(a) of Regulation No 1049/2001, and of Annex V to Decision E (96) 1356*

### Arguments of the parties

- 106 The applicant claims that the Commission infringed Article 4(2) of Regulation No 1049/2001 and committed a manifest error of assessment of the facts in so far as it wrongly took the view that the audit relating to the contract at issue was one that was covered by the exceptions referred to in Regulation No 1049/2001. The Commission also infringed the principle of giving the widest possible access to documents held by the Commission, and Annex V to Decision E (96) 1356.
- 107 The applicant observes that the Secretary General did not respond in the contested decision to the questions which the applicant had raised in respect of the audit. He submits that the external experts carrying out the audit are not financial auditors and that, since he has been



denied information concerning the purpose and duration of the audit, he considers the audit to be a non-specific audit that is not covered by Article 4(2) of Regulation No 1049/2001.

- 108 He claims that, in respect of the inspections, investigations and audits mentioned in Article 4(2) of Regulation No 1049/2001, the European Anti-Fraud Office (OLAF) should also have cooperated in the process. In the present case, the applicant was informed that OLAF had not decided to open an investigation. The College of Commissioners had not taken a decision to open an investigation either.
- 109 He submits that it would be contrary to the purpose of Regulation No 1049/2001 if, in the framework of an audit or investigation carried out at Directorate or Directorate-General level, the Commission had the unrestricted right to refuse public access to documents without a decision from the responsible Commissioner or the College of Commissioners.
- 110 Furthermore, Annex V to Decision E (96) 1356 clearly provides that the Member State concerned is required to ensure open and easy access to relevant information requested by the public. The applicant takes the view that the invoices and the report on the completion of the airport constitute relevant information for the purposes of Annex V. Consequently, by refusing to grant access to those documents, the Commission infringed Decision E (96) 1356.
- 111 The applicant reiterates that the Commission did not provide information about the purpose of the audit and its approximate duration. Consequently, he claims that it is wrongly invoking Article 4(2) of Regulation No 1049/2001 solely in order not to authorise access to the documents requested.
- 112 The Commission considers those complaints to be unfounded.

#### Findings of the Court

- 113 First of all, the applicant submits, in essence, that the audit commissioned by the Regional Policy DG and carried out by external experts is not covered by Article 4(2), third indent, of Regulation No 1049/2001 on the grounds that it was not approved by the College of Commissioners and that OLAF decided not to open an investigation.
- 114 According to Article 4(2), third indent, of Regulation No 1049/2001, the institutions are to refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.
- 115 Regulation No 1049/2001 does not therefore lay down any formal or procedural requirement for audits whose protection may justify a refusal of access. In particular, the applicability of the exception provided for in Article 4(2), third indent, of the regulation does not depend on whether the College of Commissioners has approved the audit in question, whether OLAF has decided to open an investigation, or whether the audit is carried out by external experts.
- 116 Furthermore, according to Article 12(4) of Regulation No 1164/94, without prejudice to checks carried out by Member States in accordance with national laws, regulations and administrative provisions and to the provisions of Article 246 EC or to any inspection arranged on the basis of Article 279(c) EC, the Commission may, through its officials or agents, carry out on-the-spot checks, including sample checks, in respect of projects financed by the Cohesion Fund, and may examine the control arrangements and measures established by the national authorities, which are to inform it of measures taken to that end. It follows that the Commission is empowered to carry out financial checks in respect of projects financed by the Cohesion Fund without being under a prior obligation to obtain a formal decision by OLAF.
- 117 Second, as regards the applicant's assertion that, by refusing to grant access to those documents, the Commission infringed Annex V to Decision E (96) 1356, which provides that the Member State concerned is required to ensure open and easy access to relevant information requested by the public, it is sufficient to note that Decision E (96) 1356 is

addressed to the beneficiary Member State and does not impose any obligation on the Commission as regards informing the public about the co-financed project.

- 118 Third, and finally, as regards the applicant's assertion that the Commission did not provide him with sufficient information about the purpose and duration of the audit, it must be observed that, in his letter of 5 February 2004 to the applicant and produced by the applicant as evidence, the Director-General of the Regional Policy DG stated that the Directorate-General had decided in June 2003 to carry out a supplementary audit of the project in order to 'deepen' the examination undertaken on the occasion of a previous audit mission which lasted from 4 to 8 March 2002. He went on to state that the Regional Policy DG was seeking, in this way, to respond to certain points raised by members of the European Parliament, by European citizens and in press articles. Moreover, in the reply of 29 April 2004 to the applicant's request for access of 5 April 2004, the Commission stated, in conclusion, that he would be informed of the conclusions of the audit when these were available. It follows that the Commission cannot be regarded as having failed to provide the applicant with any information about the audit being carried out.
- 119 In any event, it must be noted that, even on the assumption that the Commission did not provide information about the purpose and duration of the audit, that cannot in itself affect the legality of the contested decision. In the context of a decision refusing access to a document on the basis of Regulation No 1049/2001, the Commission is required to set out the reasons justifying the application to the particular case of one of the exceptions to the right of access provided for by the Regulation, but is nevertheless not required to provide more information than is necessary in order for the person requesting access to understand the reasons for its decision and for the Court to review the legality of that decision. It must be held, however, that the contested decision satisfies those requirements.
- 120 As regards, in particular, the alleged lack of information about the purpose and duration of the audit, there is no dispute about the fact that an audit was underway at the date of the contested decision and that it concerned the project in particular. Nor, moreover, does the applicant allege that the Commission infringed Article 4(7) of Regulation No 1049/2001, according to which the exceptions as laid down in Article 4(1) to (3) only apply for the period during which protection is justified on the basis of the content of the document.
- 121 It follows from the foregoing that the applicant's claim that the absence of that information shows that the Commission wrongly invokes the existence of an ongoing audit solely in order to justify its refusal of access has no valid legal or factual basis and must therefore be rejected as being purely speculative.
- 122 It follows from the foregoing that the first plea in law must be rejected as unfounded.

*Second plea in law, alleging infringement of Article 4(6) of Regulation No 1049/2001*

Arguments of the parties

- 123 The applicant submits that the Commission infringed Article 4(6) of Regulation No 1049/2001 by failing to assess the purpose of the audit and to decide to grant partial access to the parts of the final report which identify the entity that submitted the report to the Commission, the company responsible for properly executing the construction of the airport, the defects liability certificates issued by the main contractor to the subcontractors, and other relevant information. As far as the invoices are concerned, the Commission could have allowed partial access by communicating to the applicant the names of the companies which issued the invoices to Athens International Airport and a brief description of the works carried out. The refusal to disclose the abovementioned parts of the final report and the list of invoices held by the Commission infringes Article 4(6) since that information does not constitute parts of the requested document which are covered by any of the exceptions referred to in Article 4 of Regulation No 1049/2001.
- 124 The applicant observes that he was expecting the Commission to indicate at least the name of the entity which submitted the final report to it, the identity of the entity responsible for properly executing the construction of the airport and the names of the companies which made out the invoices to Athens International Airport. By invoking the fact that its audit was ongoing, the Commission precluded any possibility of the applicant ever having access to the

documents. In his view, the Commission could have completed inspection of the invoices within a few weeks. In view of the time that has passed, he believes the Commission to be on the point of trying to hide the fact that invoice(s) were made out by Hochtief Hellas SA, as he explains in his complaint of 27 November 2003. The applicant requests that the Commission state which are the invoices to Athens International Airport that were drawn up by Hochtief Hellas between 26 July 2000 and 31 December 2001.

- 125 The Commission contends that there is no part of the final report to which the exception relating to the existence of an audit is not pertinent, and that the nature of the list of invoices and the invoices themselves preclude partial disclosure while an audit is underway.

#### Findings of the Court

- 126 The applicant claims, in essence, that the Commission infringed Article 4(6) of Regulation No 1049/2001 by refusing to grant partial access to the final report and to the invoices.
- 127 Under Article 4(6) of Regulation No 1049/2001, if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document are to be released.
- 128 It must be borne in mind that, according to the contested decision, access to the final report was refused on the ground that it was a key element of the audit being carried out. The final report could not be disclosed until completion of that audit, to avoid interference with the investigation and with the exchange of views between the Commission and the Greek authorities. Furthermore, since all parts of the final report were interrelated and no section of the report could be disclosed without affecting the audit, partial access to that document was not possible.
- 129 The Commission has stated that, when the contested decision was adopted, the Regional Policy DG had carried out an audit on the basis of Article 12(4) of Regulation No 1164/94 in which, inter alia, the final report and the invoices to which the applicant requests access were examined. That too had been brought to the applicant's attention in the letter of 5 February 2004 from the Director-General of the Regional Policy DG, as described in paragraph 118 above.
- 130 The applicant does not dispute that statement but maintains that partial access should have been granted to those parts of the final report which would not undermine the audit, namely those concerning the entity which submitted the final report to the Commission, the company responsible for properly executing the construction of the airport, the defects liability certificates issued by the main contractor to the subcontractors, and other relevant information.
- 131 In that respect, it must be noted that the final report to which the applicant seeks access is a document relating to the completion of the project, which was submitted to the Commission for the purpose of closing the financial assistance from the Cohesion Fund.
- 132 As the Commission has correctly pointed out, that document therefore constitutes an essential element of the audit which was underway in respect of the Cohesion Fund's financing of the project, the disclosure of which, even partial, might have damaged the Commission's investigation and its discussions with the Greek authorities responsible for the project.
- 133 Similarly, the disclosure of information which the applicant believes should have been subject to partial access entails a reasonably foreseeable likelihood that the Commission or the auditors would be subject to external pressure, with the result that the Commission was entitled to take the view, without committing a manifest error of assessment, that access to the final report as a whole should not be granted to the applicant as long as the audit was ongoing.
- 134 It is relevant, in that regard, to note that the Commission indicated in its letter of 29 April 2004 that the applicant would be informed of the conclusions of the audit when these were available. It follows that the Commission cannot be criticised for having infringed the

principle of proportionality; on the contrary, its attitude demonstrates a willingness to protect the audit only in so far as it was still ongoing.

- 135 As to the list of invoices and the sample invoices drawn up by the Hochtief consortium and Hochtief Hellas, which the Commission obtained during the audit carried out by the Regional Policy DG, their disclosure must be regarded similarly as entailing a risk of the Commission or its auditors being subject to external pressure to the detriment of their ongoing activities. Furthermore, as the Commission has essentially pointed out, those documents, which contain only a limited amount of similar information, do not, by their nature, lend themselves to partial access.
- 136 It follows from the foregoing that the Commission did not infringe Article 4(6) of Regulation No 1049/2001 by refusing access to the final report or to the invoices. The second plea in law must therefore be rejected.

### *3. Access to the costs of the construction items*

#### *Arguments of the parties*

- 137 In a single plea alleging an error of law, a manifest error of assessment and infringement of Articles 7 and 8 of Regulation No 1049/2001, the applicant claims that the Commission committed an error of law and a manifest error of assessment in so far as it took the view, wrongly, that the applicant's request for access to the costs of the construction items did not constitute an application for access to documents under Regulation No 1049/2001, and that it infringed Articles 7 and 8 of that regulation.
- 138 The applicant observes that, in his initial request for access to documents, he stated clearly that, in accordance with Article 6 of Regulation No 1049/2001, he was applying for access to the document on the presentation of the work items for the amount of construction costs of EUR 1 824 000 000 mentioned by the Commission in its reply to question H-0059/03 from the Parliament.
- 139 The applicant states that, in his confirmatory application of 26 May 2004, he requested information about the audit mentioned by the Regional Policy DG. According to the applicant, that information would have enabled him to assess whether the audit was indeed one that was covered by the exceptions laid down in Article 4(2), third indent, of Regulation No 1049/2001. Therefore, it was not the applicant's intention to limit his interest to simple information and withdraw his initial application. Furthermore, he did not state in his confirmatory application that he was withdrawing his application in that regard.
- 140 The Commission was therefore wrong to conclude in the contested decision that the applicant's request was not an application for access to documents under Regulation No 1049/2001, thereby infringing Articles 7 and 8 of the regulation.
- 141 In addition, the applicant claims that the fact that the Commission does not possess any document containing the breakdown by construction item of the sum of EUR 1 824 000 000 may constitute a clear case of maladministration. Moreover, in so far as the Commission knew of the European Investment Bank (EIB) loan which, together with the private participation, exceeded the total construction cost of EUR 1 347 664 120, the applicant wonders for what purpose the Commission decided to grant EUR 250 000 000 to Athens International Airport, given that the project also received a grant from the Greek State.
- 142 Finally, the applicant requests the Court to order the Commission to present the breakdown of the sum of EUR 1 831 000 000 mentioned in the defence and which results from the audit procedure initiated by the Commission and is in its auditors' possession.
- 143 The Commission takes the view that that line of argument is unfounded.
- 144 It states that the project involved approximately 100 construction items, of which the Cohesion Fund co-financed 35. As it was a project partly co-financed by the Cohesion Fund, the Commission was not required to know the detailed final cost of each item of the airport's construction, but only the final total cost of those 35 parts of the project that were co-

financed by the Cohesion Fund. It does not possess any document providing a breakdown by construction item of the amount of EUR 1 824 000 000. The only document in its possession which refers to that figure is a fax from the Greek authorities which was sent when the Commission was drafting the reply to question H-0059/03 from the Parliament. That document contains a global estimate of the final cost of the airport's construction, but does not contain a breakdown by construction item.

- 145 The Commission further submits that, by contrast, appendix 7 to the application for financial assistance from the Cohesion Fund does contain a breakdown of the estimated cost by construction item for the entire project, that is, not only for the 35 items co-financed by the Cohesion Fund. The applicant has a copy of that application, which was sent to him by the Commission. Furthermore, at the end of the audit procedure, the auditors concluded that the cost of the airport was EUR 1 831 000 000, and the applicant was informed of that by the Commission in its letter of 29 April 2004. The breakdown of that figure was known to the auditors and appeared in the audit report. However, that report cannot be disclosed because the audit procedure has not been completed.
- 146 The Commission concludes that there is no document corresponding to that requested by the applicant when he refers to a list of the cost of construction items amounting in total to EUR 1 824 000 000. Similarly, since no list or breakdown of the cost of construction items amounting in total to EUR 1 824 000 000 appears in the main contract, it is not possible for him to obtain that information through partial access to the main contract. Moreover, in view of the terms in which the applicant requested the costs of the construction items in his letter of 26 May 2004, the Commission correctly took the view in the contested decision that he had requested information about the cost breakdown, rather than access to a document.
- 147 As regards the applicant's assertion that the fact that the Commission does not have a document containing a breakdown by construction item of the amount of EUR 1 824 000 000 may constitute maladministration, the Commission recalls, first, the presumption of veracity which attaches to its statement that the document in question does not exist (*Sison v Council*, cited in paragraph 71 above). It goes on to reject, in any event, the allegation of maladministration. There is no legal provision or administrative guidance requiring the Commission to keep a breakdown of the cost by item of the whole of a construction project where only part of it is co-financed by the Cohesion Fund. Last, even if the Commission were subject to such a requirement, the contested decision could still not be impugned as being unlawful, since the Commission cannot give access to a document which it does not have in its possession.
- 148 As regards the applicant's assertion that the financial assistance granted to the project by the Cohesion Fund was questionable in the light of the levels of national funding, private participation and EIB loans, the Commission observes that the purpose of the present proceedings is to examine the legality of the contested decision refusing access to documents. None of those factors has any bearing on that decision; rather, they relate to a decision granting financial assistance from the Cohesion Fund, the legality of which is not at issue here.
- 149 As regards the applicant's request that the Court order the Commission to present the breakdown of the costs of the construction items and information about the date of completion of the audit, the Commission notes that it has already dealt with the applicant's attempt to subvert the subject-matter of the annulment proceedings in respect of the contested decision so as to transform them into an unlimited information-gathering exercise. Moreover, the Commission claims, first, that it has never denied being required to show that the requisite circumstances do exist for Article 4(2), third indent, of Regulation No 1049/2001 to apply. Next, it submits that the contested decision states that an audit of the project was underway – which has not been disputed by the applicant – and that, as a result, some of the documents which he had requested could not be disclosed. That position is perfectly correct in law. According to the Commission, the purpose of an audit is to allow the auditors to establish a full and accurate picture of what has occurred, and confidentiality is inherent in that process. The duration of the audit is therefore not relevant to establishing whether the refusal to grant access to documents is lawful. What is relevant is whether an audit was underway at that time. Similarly, when the Community judicature is called on to review the legality of a refusal to grant access to those documents, the goal of a particular audit is not relevant to determining whether, at the date on which the Commission replied to

that request, it was possible to grant access to certain documents forming part of the file being audited. Moreover, the question of the duration of the audit or its purpose cannot be transformed from a request for information into a request to obtain a document.

- 150 Finally, as regards the applicant's assertion that the request for a breakdown by construction item constitutes an application for access to documents, not a request for information, the Commission observes that that qualification by the applicant of his request does not mean that the document sought is in the Commission's possession; that a request for access to a document does not mean that it exists; and that, in the present case, the document in question does not exist.

#### *Findings of the Court*

- 151 The applicant claims, in essence, that the Commission infringed Articles 7 and 8 of Regulation No 1049/2001 by treating his request concerning the costs of the construction items amounting in total to EUR 1 824 000 000 as a request for information and not as an application for access to a document.
- 152 It must be observed that the Commission has maintained, in that respect, that, although it had a fax that was sent by the Greek authorities in connection with the drafting of the reply to question H-0059/03 from the Parliament, which refers to a total amount of EUR 1 824 000 000, the Commission did not have any document containing a breakdown of that amount.
- 153 In that respect, it is necessary to bear in mind the scope of Regulation No 1049/2001 which, according to Article 2(3) of the regulation, applies only to 'documents held by an institution, that is to say, documents drawn up or received by it and in its possession'.
- 154 Furthermore, according to the case-law, the concept of a document must be distinguished from that of information. The public's right of access to the documents of the institutions covers only documents and not information in the wider meaning of the word and does not imply a duty on the part of the institutions to reply to any request for information from an individual (see, by analogy, the order in Case T-106/99 *Meyer v Commission* [1999] ECR II-3273, paragraphs 35 and 36). It is true that it is apparent from the judgment in *Council v Hautala*, cited in paragraph 75 above, that Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43), which preceded Regulation No 1049/2001 covered not only documents held by the institutions as such but also information contained within those documents (paragraph 23 of the judgment). However, access to information – within the meaning of that judgment – may be granted only if that information is contained within documents, which presupposes that such documents exist (Case T-264/04 *WWF European Policy Programme v Council* [2007] ECR II-0000, paragraph 76).
- 155 Furthermore, it has consistently been held that a presumption of legality attaches to any statement of the institutions relating to the nonexistence of documents requested. Consequently, a presumption of veracity also attaches to such a statement. That is, however, a simple presumption which the applicant may rebut in any way by relevant and consistent evidence (see *Sison v Council*, cited in paragraph 71 above, paragraph 29, and the case-law cited).
- 156 In the present case, the applicant has been unable to refer to any evidence of that nature and has made no mention of even the slightest matter that would put that presumption into doubt. He has merely maintained that, if the Commission does not have a document referring to the breakdown of EUR 1 824 000 000, that would amount to maladministration. However, it must be observed that any failure by the Commission in that regard has no bearing on the presumption of veracity attached to the Commission's statement that it does not possess a document describing the breakdown of the total amount and, on the contrary, presupposes that the Commission did not in fact have such a document in its possession.
- 157 In those circumstances, it must be held that the applicant is unable to rebut the presumption of veracity which attaches to the Commission's statement that it does not have a document containing the breakdown of the amount of EUR 1 824 000 000 and, accordingly, it must be concluded that the Commission was entitled to take the view that the

applicant's request regarding that breakdown could not be interpreted as an application for access to documents, but was a request for information.

158 Finally, as regards the request that the Court order the Commission to present the breakdown of the sum of EUR 1 831 000 000 mentioned in the defence, which results from the audit procedure initiated by the Commission, it must be held that, since the applicant has not made an application to the Commission for access in respect of such a document or in respect of a document containing that information under Regulation No 1049/2001, it is clearly outside the scope of the present proceedings. Furthermore, in the context of its judicial review of the lawfulness of measures, the Community judicature may not issue directions to the Community institutions. Consequently, the applicant's application must be dismissed as inadmissible.

159 It follows from the foregoing that the plea must be rejected in its entirety.

#### *4. Access to the subcontracts*

##### *Arguments of the parties*

160 In a single plea alleging a manifest lack of good faith on the part of the Commission and infringement of the principle of good administration, the applicant claims that the contested decision demonstrates a manifest lack of good faith on the part of the Commission in that it failed to indicate to him when it would be in possession of the document requested, since the Commission informed him in the contested decision that the subcontracts would be analysed in the framework of a planned audit without explaining to him the proposed timetable or purpose of that audit. In the contested decision, the Commission failed to state whether the planned audit is connected with the audit decided upon by the Regional Policy DG in June 2003 which followed an earlier audit, as mentioned in the note sent to the applicant on 5 February 2004 by the Director-General of the Regional Policy DG. The Secretary General did not provide an indication as to when the results of the analysis of the contracts and subcontracts were expected to be communicated to the European Parliament. The applicant submits that the Commission should have stated whether the analysis of the contracts and subcontracts was in progress, whether the Commission was in possession of the requested documents and when it would examine his request.

161 The Commission maintains that it is not in possession of the subcontracts and that there is nothing in the file to demonstrate any bad faith on its part.

##### *Findings of the Court*

162 It must be noted, first of all, that the Commission stated in the contested decision that it was not in possession of the subcontracts. It went on to indicate, in respect of the applicant's argument that that assertion contradicts the letter of 4 July 2003 sent by the Director-General of the Regional Policy DG to three members of the European Parliament, that that letter merely states that an analysis of the contracts and subcontracts would be carried out in the framework of a planned audit.

163 According to the case-law cited in paragraph 155 above, a presumption of legality attaches to any statement of the institutions relating to the nonexistence of documents requested. Consequently, a presumption of veracity also attaches to such a statement. That is, however, a simple presumption which the applicant may rebut in any way by relevant and consistent evidence.

164 However, it must be held that the applicant has not adduced such relevant and consistent evidence.

165 It must be noted, first, that, contrary to the applicant's allegations, the Director-General of the Regional Policy DG does not claim in the letter of 4 July 2003 to be in possession of the subcontracts, but merely announces that he has decided to launch an analysis of the contracts and subcontracts for the construction of Athens airport. Second, in response to the written question put by the Court, the Commission explained that, following the letter of 4 July 2003, an audit procedure was launched in respect of the project, the objectives of which

were achieved without the subcontracts having been made available to the auditors. The Commission thus explained that, even without the subcontracts at their disposal, the auditors concluded that the evaluation of the construction costs was carried out correctly by means of the analysis of the actual costs incurred and variations of the original orders.

166 It follows that, in the absence of relevant and consistent evidence to the contrary, the Commission's assertion that it was not in possession of the subcontracts must be regarded as being accurate.

167 Accordingly, the plea must be rejected as unfounded.

### Costs

168 Under Article 87(3) of the Rules of Procedure, the Court of First Instance may order that the costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads of claim. As the action has been successful in part, the Court will make an equitable assessment of the case in holding that the applicant is to bear one half of his own costs, and that the Commission is to bear its own costs and pay one half of the costs incurred by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE

hereby:

1. **Annuls the Commission's decision of 12 July 2004 in so far as it concerns the refusal of access to the contract of 14 June 1996 signed between Athens International Airport SA and a consortium of companies led by Hochtief AG;**
2. **Dismisses the remainder of the action;**
3. **Orders Mr Ioannis Terezakis to bear one half of his own costs;**
4. **Orders the Commission to bear its own costs and pay one half of the costs incurred by Mr Terezakis.**

Jaeger

Azizi

Cremona

Delivered in open court in Luxembourg on 30 January 2008.

E. Coulon

M. Jaeger

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