

Rights of the Defence in Administrative Investigations: Access to the File in EC Investigations

Simone White

*European Anti Fraud Office and Research Fellow at the
Institute of Advanced Legal Studies in London*

Abstract

The right of access to the file forms part of defence rights in EC law: that much is easy to assert, however variations still exist in the way defence rights are implemented within the framework of EC investigations. Two divergent approaches are discussed here, in the areas of competition and protection of the financial interests of the European Union. The author observes certain incongruities in present practice and argues for a common approach at EC level.

Introduction

To what extent does the right of access to the file apply in the context of EC investigations? The question is not anodyne for one who the subject of an EC competition investigation, or of an investigation by OLAF,¹ the European Anti-Fraud Office.

Both Directorates General of the European Commission, DG COMP² and DG OLAF carry out administrative investigations. This is because the European Commission has no power to impose criminal sanctions, although it can refer matters to criminal law prosecuting authorities in the EU Member States. In addition, OLAF has no power to force entry, seize documents or to compel answers to questions. This does not mean, however, that the European Commission is toothless in these matters. In the competition area, the European Commission can impose (heavy) fines³ and in the other domain that concerns us here, the protection of the financial interests of the EU, the

¹ The mission of the European Anti-Fraud Office (OLAF) is to protect the financial interests of the European Union, to fight fraud, corruption and any other irregular activity, including misconduct within the European Institutions. See http://ec.europa.eu/anti_fraud/index_fr.html.

² The mission of the Directorate General for Competition is to enforce the competition rules of the Community Treaties, in order to ensure that competition in the EU market is not distorted and that markets operate as efficiently as possible, thereby contributing to the welfare of consumers and to the competitiveness of the European economy. See http://ec.europa.eu/competition/index_en.html.

³ See Press release of 27.2.2008; Antitrust: Commission imposes € 899 million penalty on Microsoft for non-compliance with March 2004 Decision. See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/318&format=HTML&aged=0&language=EN&guiLanguage=en>.

European Commission can debar an economic operator or curtail an existing entitlement to EU funds.⁴ The European Commission can also impose disciplinary sanctions on EC officials.⁵

The ECtHR acknowledged that there is a need for criminal investigations to be conducted efficiently. This may imply that part of the information collected during investigations is to be kept secret, in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence.⁶ The broad principle of access to the case file, based on the rights of the defence is well established in the context of criminal law. Access to the file is an aspect of the right to be heard, in accordance with Article 41(2) of the Charter of Human Rights and Article 6(1) ECHR.

This raises this issue of knowing to what extent this principle extends to administrative investigations or proceedings conducted by the European Commission (1 and 2 below). A secondary issue concerns the interaction between access to the file and access to documents, which is dealt with in 3 below. The article concludes with the benefits of convergence at EC level, in line with the situation in the EU Member States: a recent study found that all EU Member States granted access to the file in administrative proceedings.⁷

⁴ See Articles 93 to 96 of Council Regulation 1605/2002 Financial Regulation applicable to the general budget of the European Communities and Article 133 of Commission Regulation 2342/2002, Implementing rules. Proposals for a new EU debarment policy have also been discussed, see Transparency International's Recommendations for the Development and Implementation of an effective Debarment System in the EU., 28.3.2006, Transparency International Secretariat, Berlin.

⁵ See Annex IX of Regulation 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ P 45, 14.6.1962, p. 1385. These Staff Regulations are reviewed annually and were last consolidated in 2004.

⁶ European Court of Human Rights, Case of *Shiskov v. Bulgaria* application no 38822/97 judgment of 9 January 2003, p. 17.

⁷ O. Jansen and P.M. Langbroek (eds) (2007) *Defence rights during administrative investigations*, Intesentia, Antwerpen/Oxford, p. 110. This study was financed by OLAF.

1 Access to the File in EC Competition Law

In EC competition matters, it is settled case-law that access to the file is closely bound up with the principle of respect for the rights of the defence. It is one of the procedural guarantees intended to protect the right to be heard.⁸ This mirrors practice in the EU Member States.⁹

→ An early viewpoint, ~~however~~, was that a right of access to the file did not exist, in view of 'the administrative nature of Commission proceedings'.¹⁰ However, the Commission had to respect the rights of the defence and inform undertakings of all the essential facts of the case in order for them to submit their observations. It was not necessary that the entire record be made known to them.¹¹

Although regard for the rights of the defence requires that the undertaking concerned shall have been enabled to make known effectively its point of view on the documents relied upon by the Commission in making the findings on which its decision is based, there are no provisions which require the Commission to divulge the contents of its files to the parties concerned.¹²

In practice, this meant that until the early 1980s, in competition procedure, the person under investigation only had access to the essential information held against him by the European Commission. In the 1980s, the European Commission indicated a willingness to give access to the file in competition proceedings – that is to say all the documents in the possession of the Commission that were collected during the investigation. According to a Commission notice, the defendant undertaking must, in order to express his views on the conclusions reached by the Commission in its statement of objections, have access to all of the documents taking up the file, with the exception of documents relating to business secrets, confidential information and internal Commission documents.¹³ This includes information for and against the interested party.¹⁴

Ruling on an access to the file in Customs matters the Court¹⁵ considered that, in order for the right to be heard to be exercised effectively, the

⁸ Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others v. Commission* [1992] ECR II-2667, para. 38, and T-36/91 *ICI v. Commission* [1995] ECR II-1847, para. 69.

⁹ *Ibid.*

¹⁰ Cases 56 and 58/64 *Consten and Grunding v. Commission* [1966] ECR 299.

¹¹ *Ibid.*, see also Case C-85/76 *Hoffmann La Roche and Co AG v. Commission* [1979] ECR 461.

¹² Case 43 and 63/82 *Dutch Books* [1984] ECR 19 and Case 62/86 *AKZO* [1991] ECR I-3359.

¹³ Case T-92/98 *Interporc m und Export GmbH v. Commission et al* [1999] ECR II-3521, para. 44.

¹⁴ Case T-410/03 *Hoechst v. Commission* [2008] ECR II-881, points 136-137, 581-582.

¹⁵ Case T-42/96 *Eyckeler AG v. Commission* [1998] ECR II-401, para. 81.

Commission must provide access to all non-confidential official documents concerning the contested decision, if requested to do so. Indeed, documents which the Commission does not consider to be relevant may well be of interest to the applicant. If the Commission could unilaterally exclude from the administrative procedure those documents which might be detrimental to it, which could constitute a serious breach of the rights of the defence.

This seems to be in line with *Aalborg*,¹⁶ where the Court ruled that the Commission must give the undertaking concerned the opportunity to examine all the documents in the investigation which may be relevant for its defence,¹⁷ including incriminating and exculpatory evidence.¹⁸

Following the *Hercules*¹⁹ judgment, the European Commission adopted a procedure involving the withdrawing of certain documents from a file before access is granted. Business secrets, certain categories of confidential information and internal Commission documents can be withdrawn from the file by the European Commission before granting access. There is no precise definition of a business secret, although this is held to include information as to business activities, internal price calculations and technical know-how.²⁰ *Elhermann* and *Drijber* have argued that 'the conflict between respecting the rights of the defence and preserving confidentiality is probably the most delicate of all conflicting legal obligations'.²¹

One important issue is of knowing when access should be granted, that is to say at what stage of an investigation or contradictory procedure. The ECJ stated in 1972 that the statement of objection,²² rather than the opening of an investigation constituted the determining act of procedure.²³ The Court of First Instance clarified that:

¹⁶ See note 16.

¹⁷ Cases C-204-203, 211, 217, and 219/00 P *Aalborg Portland* [2004] ECR I-123, para. 68.

¹⁸ P. Craig (2006) *EU Administrative Law*, p. 368.

¹⁹ Case T-7/89 *SA Hercules Chemicals BV v. Commission* [1991] ECR II-1711, paras. 53-54.

²⁰ C.D. Ehlermann and B.J. Drijber (1996) *Legal Protection of enterprises: administrative procedures, in particular access to files and confidentiality*, p. 382.

²¹ *Ibid.*, p. 376.

²² According to the European Commission, a statement of objection is 'a written communication which the Commission has to address to persons or undertakings before adopting a decision that negatively affects their rights. This obligation of the Commission flows from the addressee's rights of defence which require that they be given the opportunity to make their point of view known on any objection the Commission may wish to make in a decision. The SO must contain all objections on which the Commission intends to rely upon in its final decision. The SO is an important procedural step foreseen in all competition procedures in which the Commission has the right to adopt negative decisions.'

²³ Case 57/69 *ACNA v. Commission* [1972] ECR 933.

'Access to the file is [...] one of the procedural guarantees intended to protect the rights of the defence and to ensure, in particular that the right to be heard [...] can be exercised effectively. It follows that the right of access to the file compiled by the Commission is justified by the need to ensure that the undertakings in question are able to defend themselves against the objections made against them in the statement of objection.²⁴

The CFI also underlined that the European Commission runs the risk of having its final decision overturned if it does not ensure that proper access to its files is given.²⁵ Only documents cited or mentioned at the time of giving access to the file can be used as evidence.²⁶ Access to the file was subsequently codified in Regulation 1/2003.²⁷ Professional secrecy applies without prejudice to provisions on access to the file. Article 27(2) of Regulation 1/2003²⁸ states as follows:

'The rights of defence of the parties shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file subject to the legitimate interests of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States.'

In competition procedure, therefore, the right of access to the file has evolved roughly in three stages: firstly, the right of a person under investigation to gain access to information held against him as part of an investigation process was granted. Secondly, the contents of the file that can be transmitted to a person under investigation were defined. Thirdly, these rights have been codified or are in the process of being codified.

The European Courts of Justice have ruled that a statement of objection in competition proceedings has binding legal effects and triggers a right of access to the file. However, Wills has argued²⁹ that a right of access to the file would also be useful in relation to commitment decisions taken in accordance with Article 9 of Regulation 1/2003.³⁰ These decisions have an adverse

²⁴ Joined Cases T-10/92 and others *Cimenteries CBR SA and Others v. Commission* [1992] ECR II-2667.

²⁵ *Ibid.*, para. 47.

²⁶ Case T-44/02 OP *Dresdner Bank v. Commission* [2006] ECR II-3567, 155-157.

²⁷ Council Regulation 1/2003 on the implementation of the rules of competition laid down in Articles 81 and 82 of the treaty OJ 2003 L 1/1. See Article 28 for professional secrecy.

²⁸ *Ibid.*

²⁹ W.P.J. Wils (2008) *Efficiency and justice in European anti-trust enforcement*, Hart Publishing, p. 34-38.

³⁰ See note 27 above.

effect on the undertaking concerned, as they expose them to the risk of fines and periodic payments in case of failure to comply. However, the European Courts of Justice have hitherto relied on the formal nature of the accusation, rather than its contents.

2 Access to the File in OLAF Investigations

In the competition field, access to the file has been codified and that the statement of objection acts as a trigger for access to the case file. EC rights of the defence, including the right of access to the file, have evolved over a period of time, especially in competition procedure, where over forty years of experience and jurisprudential developments have borne fruit. OLAF was only created in 1999³¹ and EC jurisprudence concerning OLAF's investigations has evolved over a shorter period.

OLAF carries out external investigations³² in the EU Member States and in third countries, which include on the spot checks. OLAF also carries out (internal) investigations³³ within the institutions, bodies, offices and agencies of the European Union. It investigates serious matters relating to the discharge of professional duties such as to constitute a dereliction of the obligations of officials and other servants of the Communities liable to result in disciplinary or, as the case may be, criminal proceedings, or an equivalent failure to discharge obligations on the part of members of institutions and bodies, heads of offices and agencies or members of the staff of institutions, bodies, offices or agencies that are not subject to the Staff Regulations.

No right of access to the file has hitherto been recognised, although a right to be informed that OLAF has opened an investigation and a right to be heard exists in internal investigations. An official may however exercise his right of access to the file during a subsequent disciplinary or a judicial procedure.

Jansen and Langbroek have argued that the right to be heard does not apply to OLAF investigations, because of their preliminary nature: 'It is not certain that a person under investigation should be heard under the OLAF investigation, especially because OLAF cannot impose sanctions. The moment of hearing is up to the decision-making authority if OLAF did not hear the person that will be charged eventually'.³⁴ Their comments may

³¹ Commission Decision 1999/352 establishing the European anti-Fraud Office (OLAF) OJ 1999 L 136/20; Regulation 1073/99 of the European Parliament and of the Council concerning investigations conducted by the European Anti-Fraud Office (OLAF) OJ L 136/1.

³² Article 3 of Regulation 1073/99 OJ 1999 L 136/1 concerning investigations conducted by the European Anti-Fraud Office (OLAF).

³³ Internal investigations are defined in Article 4 of Regulation 1073/99 OJ 1999 L 136/1 concerning investigations conducted by the European Anti-Fraud Office (OLAF).

³⁴ O. Jansen and P. Lanbroek (eds), p. 30-31, see note 7.

be correct with respect to the external investigations³⁵ carried out by OLAF, where EC legislation does not expressly provide for a right to be heard. However, with respect to internal investigations, they would appear to overlook Article 4 of Commission Decision 1999/396,³⁶ which states:

'Where the possible implication of a Member, official or servant of the Commission emerges, the interested party³⁷ shall be informed rapidly as long as this would not be harmful to the investigation. In any event, conclusions referring by name to a Member, official or servant of the Commission may not be drawn once the investigation has been completed without the interested party's having been enabled to express his views on all the facts which concern him.

In cases necessitating the maintenance of absolute secrecy for the purposes of the investigation and requiring the use of investigative procedures falling within the remit of a national judicial authority, compliance with the obligation to invite the Member, official or servant of the Commission to give his views may be deferred in agreement with the President of the Commission or its Secretary-General respectively.'

This rule extends to all institutions, bodies offices and agencies of the EC, through the Inter-institutional Agreement of 25 May 1999.³⁸ But does this constitute sufficient protection for the rights of the defence?

In *Nikolaou v. Commission*, the applicant argued that in its internal investigation, OLAF should have given access to the file, in accordance with competition jurisprudence on the right of access to the file, in particular *Hercules Chemicals*.³⁹ However the Court ruled that this rule did not extend to OLAF investigations.⁴⁰ The CFI stated in *Nikolaou* that Article 4 of Commission Decision 1999/396 offered sufficient protection for the rights of the defence.⁴¹ Inasmuch as an investigation procedure does not lead to an act with binding legal effects, a failure to follow a contradictory procedure at this stage does not harm the interested party.⁴²

³⁵ Article 3 of Regulation 1073/99 OJ 1999 L 136/1. OLAF carries out on-the-spot checks in the EU Member States and in third countries, in accordance with the relevant third country agreements in force.

³⁶ Commission Decision 1999/396 OJ 1999 L 149/57 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests.

³⁷ This refers to the person under investigation.

³⁸ OJ 1999 L 136/15. Inter-institutional Agreement between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF).

³⁹ Case T-7/89 *Hercules Chemicals v. Commission* [1991] ECR II-1711, para. 56.

⁴⁰ Case T-259/03 *Kalliopi Nikolaou v. Commission* [2007] ECR II-99.

⁴¹ *Ibid*, *Nikolaou v. Commission*, para. 245.

⁴² Case T-259/03 *Kalliopi Nikolaou v. Commission*, see note 40, para. 246.

The European Courts of Justice also ruled in *Gomez Reino*⁴³ and *Nikolaou*⁴⁴ that the conclusions of an OLAF (internal) investigation contained in a final report had no binding legal effects.⁴⁵ Only a measure which produces binding legal effects, such as to affect the interests of an applicant by bringing a distinct change in his legal position is an act or decision which may be the subject of an action for annulment.⁴⁶

In *Tillack*,⁴⁷ the applicant argued that he should have a right to an effective judicial protection against OLAF's decision to request assistance from the Belgian authorities in order to identify his source of information and he applied for OLAF's decision to be annulled. He argued that the actions of the Belgian authorities flowed directly from the decision of OLAF to 'file a complaint against him'. He observed that OLAF was a most important organ whose activities enjoy the firm support of the Member States. Not to have given effect to a request by OLAF to seize 'evidence' could therefore have seemed to be a breach by the Kingdom of Belgium of the duty of loyal cooperation set forth in Article 10 EC. The Court confirmed the ruling of the CFI⁴⁸ and the application for annulment was found to be inadmissible. Investigation reports drawn up by OLAF do not produce binding legal effects. They are only recommendations and it is entirely up to the national authorities, or to the institution, to decide whether a judicial procedure or a disciplinary procedure should be opened.

However, some learned commentators have argued that the wide latitude ascribed by the ECJ to national authorities in deciding whether to act on information received by OLAF perhaps overstates the capacity for independent action actually available to them.⁴⁹ Cases F-5/05 and F-7/05, *Violetti and Schmit v. Commission*,⁵⁰ if confirmed on appeal, may well herald a change. The EC Civil Service Tribunal annulled a decision by OLAF to send information to the Italian judicial authorities, following a breach of Article 4 of Decision 1999/396, recognising its binding legal effects. The presence of

⁴³ Case T-215/02 *Santiago Gomez Reino v. Commission* [2003] ECR II-1685, para. 50 et seq.

⁴⁴ Case T-259/03 *Kalliopi Nikolaou v. Commission*, see note 40, para. 246.

⁴⁵ See also Case T-29/03 [2004] ECR II-2923, para. 32 et seq; Case T-193/04 *Tillack v. Commission* [2004] ECR II-3575, paras. 38 to 47, confirmed in appeal Case C-521/04 PR [2005] ECR I-3103, paras. 28 to 34.

⁴⁶ Cases C-476/93 P *Nutral v. Commission* [1995] ECR I-4125, paras. 28 and 30; Case T-54/96 *Oleifici Italiani and Fratelli Rubino v. Commission* [1998] ECR II-3377, para. 48; Joined Cases T-127/97 *Coca Cola v. Commission* [2000] ECR II-1733, para. 77; Case T-193/04 R *Tillack v. Commission* [2004] ECR II-3575, para. 38.

⁴⁷ Case T-193/04 R *Tillack v. Commission* [2004] ECR II-3575, para. 35.

⁴⁸ Case C-521/04 PR *Tillack v. Commission* [2005] ECR I-3103, para. 32.

⁴⁹ See for example J. Wakefield (2008) Case T-193/04 *Hans Martin Tillack v. Commission* [2006] ECR II-3995, and CMLRev 45: 199-121, 2008.

⁵⁰ Cases F-5/05 and F-7/05 *Antonello Viletti and Nadine Schmitt v. Commission*, judgment of 28 April 2008.

the Court, the procedure in Article 11(7) of Regulation 1073/99⁵⁸ is intended to ensure a protection of the rights of persons investigated by OLAF.⁵⁹ The CFI therefore showed that it placed some importance on mechanisms needed to ensure the respect for fundamental rights, even if it did not consider access to documents to be an integral part of the rights of the defence in internal investigations carried out by OLAF, a directorate-General of the European Commission.

The lack of formal accusation means that there is no access to the file at any stage during an OLAF investigation. Within the context of internal investigations, the legislator has made provision for a person under investigation to be informed that he is being investigated and for him to be heard before OLAF reaches conclusions. This must be contrasted with the situation under Regulation 1/2003, described earlier, where access to the file is granted. This leaves open the possibility that a person under investigation might gain access to documents in the file under Regulation 1049/2001, which regulates public access to European Parliament, Council and Commission documents.⁶⁰

3 Access to the File *v.* Access to Documents

Access to the file should not be confused with the right of access to documents under Regulation 1049/2001,⁶¹ which is addressed to any citizen of the European Union, and any natural or legal person residing or having its registered office in a Member State. Unlike the right of access to documents, the right of access to a file only exists in the context of a contradictory procedure. However, there is an interaction between access to the file and access to documents.

In *VKI*,⁶² the Court clearly delineated between access to the file, which creates a privileged right of access for interested parties, and access by third parties. Third parties can exercise their right of access through Regulation 1049/2001 without having to show a particular interest. This is because this Regulation defines access widely.

⁵⁸ 'The Director shall inform the Committee of cases requiring information to be forwarded to the judicial authorities of a Member State.' OLAF has given a wide interpretation of this requirement by informing the Supervisory Committee of all cases (not just investigation cases) to be transmitted either to national authorities or institutions.

⁵⁹ *Ibid.*, 168.

⁶⁰ Regulation 1049/2001 OJ 2001 L 145/43 of the European Parliament and the Council, of 30 May 2001, regarding public access to European Parliament, Council and Commission documents.

⁶¹ *Ibid.*

⁶² Case T-2/03 *Verein für Konsumenteninformation v. Commission* [2005] ECR II-1121.

a legally binding act in turn attracts specific rights of the defence, such as access to the file.

A later application by Mr Tillack to the ECtHR against Belgium⁵¹ led to Belgium being found to have breached Article 10 ECHR, after Mr Tillack's home was searched by the Belgian authorities, who also asked him to identify his sources in respect of the afore mentioned OLAF matter. The ECtHR held that the right of a journalist to protect his or her sources falls under Article 10 of the European Convention on Human Rights on freedom of expression. According to the Court, the right to protect sources is not a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources. Rather the right to protect sources is part and parcel of the right to information – which should have been treated with the utmost caution in the case of *Tillack*, who had been under suspicion because of vague, uncorroborated rumours, as subsequently confirmed by the fact that he had not been charged.⁵² One interesting aspect of this case is that the applicant managed to get redress from the ECtHR against Belgium.

In internal investigation carried out by the European Anti-Fraud Office, the interested party (or his lawyer or other representative) has no right of full access to the OLAF investigation file. This right is provided at a later stage, either during the disciplinary proceeding, when he has a right to 'all documents directly related to allegations made against him' (Article 2 of Annex IX of the Staff Regulations) or during the national judicial proceedings.⁵³ Officials (and others in external investigations) are therefore not acquainted with the contents of an OLAF case file until it is the hands of a national authority.

The letter informing the interested party (i.e. a person under investigation) must contain a summary of the allegations.⁵⁴ Interested parties should normally be given the opportunity to express their views on all the facts which concern them. In this, it appears that interviews are considered by OLAF to have a key role: 'presenting the facts to an interested party during an interview does not usually require disclosure of evidence.'⁵⁵

In *Franchet and Byk*, the CFI took a dim view of the failure to inform an interested party.⁵⁶ It also took the view that the OLAF Supervisory Committee should be consulted (rather than just informed) before investigation information or reports were to be sent to national authorities.⁵⁷ According to

⁵¹ European Court of Human Rights: *Tillack v. Belgium* application 20477/05, judgment of 27 November 2007.

⁵² *Ibid.*

⁵³ OLAF Manual, version of 25 February 2005, p. 121.

⁵⁴ *Ibid.*, page 120.

⁵⁵ OLAF Manual, see note 53 above, p. 96-97.

⁵⁶ Case T-48/05 *Franchet and Byk v. Commission*, judgment of 8 July 2008, paras. 156-176.

⁵⁷ Case T-48/05 *Franchet and Byk v. Commission*, judgment of 8 July 2008, paras. 168-170.

This mirrors the approach taken in some of the Member States. A 2007 study,⁶³ financed by the European Commission, compared legal systems in England and Wales, Germany, Italy, The Netherlands, Romania, Sweden and Switzerland with respect to defence rights during administrative investigations. It found that, in all those systems, the right of access to information and the right of access to the file were closely related. For a person under investigation, the right of access becomes a specific defence right whenever it is invoked by that person.⁶⁴

This means that persons who are the subject of an OLAF investigation and who do not enjoy a right of access to the file retain the option of requesting access through Regulation 1049/2001. Access can however be refused under Article 4 (2) of Regulation 1049/2001. This exception concerns the protection of (a) commercial interests of a natural or legal person, including intellectual property; (b) court proceedings and legal advice and (c) the purpose of inspections, investigations and audits, unless there is overriding public interests in disclosure.

However, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception.⁶⁵ Any exception must be interpreted narrowly.⁶⁶ Such application may, in principle, be justified only if the institution has assessed (i) whether access to the document would specifically and actually undermine the protected interests and (ii) in the circumstances referred to in Article 4(2) and (3) of Regulation 1049/2001, whether there was an overriding public interests in disclosure. In addition, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical.⁶⁷ Consequently, the examination which the institution must, in principle, take in order to apply an exception must be carried out in a concrete manner and must be apparent from the reasons for the decision.⁶⁸

Furthermore, it follows from Regulation 1049/2001 that all exceptions are stated as having to apply 'to a document'. A concrete examination must therefore be carried out in respect of each document covered by the application.⁶⁹ A derogation from the obligation to examine the documents is only

⁶³ O. Jansen and P.M. Langbroek, see note 7.

⁶⁴ O. Jansen and P.M. Langbroek, p. 110, see note 7.

⁶⁵ Case T-20/99 *Denkavit Nederland v. Commission* [2000] ECR II-301, para. 45.

⁶⁶ Case T-211/00 *Kuijter v. Council* [2002] ECR II-485, para. 55; see also Case T-20/99 *Denkavit Nederland v. Commission* [2000] ECR II-3011, para. 45.

⁶⁷ Cases T-211/00 *Kuijter v. Council* [2002] ECR II-485, para. 56; Case T-237/02 *Technische Glaswerke Ilmenau GmbH v. Commission* [2006] ECR II-5131, para. 77.

⁶⁸ Cases T-14/98 *Hautala v. Council* [1999] ECR II-2489, para. 67, Case T-188/98 *Kuijter v. Council* [2000] ECR II-1959, para. 38, Case T-2/03 *Verein für Konsumenteninformation v. Commission* [2005] ECR II-1121, paras. 69 and 74, Case T-237/02 *Technische Glaswerke Ilmenau GmbH v. Commission* [2006] ECR II-5131, para. 79.

⁶⁹ VKI, para. 70, see note 62 above.

permissible in exceptional cases and only where the administrative burden entailed by a concrete, individual examination of the documents proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required.⁷⁰

This duty to examine documents individually would only apply where the institution needs to assess whether to grant partial access under Article 4(6) of Regulation 1049/2001.⁷¹ Such an examination may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused or on the contrary, granted. Such could be the case, *inter alia*, if certain documents were either manifestly covered in their entirety by an exception to the right of access or, conversely, required individual assessment by the European Commission.⁷²

The Court has ruled that the mere application of Article 28(2) of Regulation 1/2003 does not inhibit the Commission with regard to disclosing the requested document under Regulation 1049/2001, provided that it does not come under the exceptions laid down in Article 4(1) to (5). The Court already confirmed in its *Soda Ash* cases⁷³ that the Commission could not base its refusal on the fact that the undertakings concerned requested confidential treatment of their documents in submitting them, except for certain sensitive information. The exception only applies for the period during which protection is justified on the basis of the content of the document.⁷⁴

Several observations are in order. Firstly, it has been argued that recourse to Regulation 1049/2001 in the context of an investigation had the potential to disturb the balance created by the competition rules between the rights of the defence and the protection of business secrets of the supplying enterprises. The recourse to Article 1049/2001 may also disturb the balance between public access and the confidentiality of investigation in anti-fraud investigations. When dealing with a request for an access to documents from an interested party (a person under investigation), the Commission is not duty-bound to take the rights of the defence into account and this may lead to a refusal under Article 4(2) (the investigation exemption).

Ruling on whether an overriding public interest in disclosure could be invoked in order to secure the rights of the defence,⁷⁵ the Court made clear in *Franchet and Byk*⁷⁶ that Regulation 1049/2001 did not provide for the

⁷⁰ VKI, para. 112, see note 62 above; Case T-237/02 *Technische Glaswerke Ilmenau GmbH v. Commission* [2006] ECR II-5131, para. 94.

⁷¹ Case T-105/95 *WWF UK v. Commission* [1997] ECR II-313, para. 64.

⁷² VKI, para. 75, see note 62 above; Case T-237/02 *Technische Glaswerke Ilmenau GmbH v. Commission* [2006] ECR II-5131, para. 86.

⁷³ This includes four decisions adopted on 19 December 1990 OJ 1990 L 152.

⁷⁴ Case T-237/02 *Technische Glaswerke Ilmenau GmbH v. Commission* [2006] ECR II-5131, para. 77; VKI paras. 73 and 75, see note 62 above.

⁷⁵ Article 4(2) of Regulation 1049/2001, last sentence.

⁷⁶ Case T-391/3 and T-70/04, *Y Franchet and D Byk v. Commission* [2006] ECR II-2023, paras. 135 et seq.

specific aspects of the rights of the defence to be exercised through access to documents. This is because an 'overriding public interest in disclosure' has usually been understood as disclosing information when, for example, the requested data would contribute substantively to a current and strong public debate.⁷⁷ An 'overriding public interest' should not be understood as including defence rights.

It is unclear from the case law whether a request from a person the subject of an OLAF investigation could be refused on the grounds that no access to the file is granted, whilst a request for documents under Regulation 1049/2001 might be granted. It would seem a strange scenario if a person were to be denied access to the file in his defence, but were then to be granted access to documents in the same file under Regulation 1049/2001.

Conclusion

The European Commission does not have a uniform approach to defence rights. Although sectoral differences in EC law are understandable, is it questionable whether this is desirable in the area of fundamental rights.

However, the present application of the principle of access to the file in EC law raises a number of issues. It would appear that access to the file during EC investigations is contingent on a number of factors: a close relationship between investigation and sanctioning, the extent to which acts undertaken during the investigation are binding, the powers relied upon and the presence of a legally binding act such as a statement of objection in competition procedure. One possibility would be for OLAF to align itself with competition law in respect of any information sent to a national authority, which may lead to a criminal investigation and a prosecution.

⁷⁷ See H. Kranenborg (2008) 'Access to documents and data protection in the European Union: on the public nature of personal data' *CMLRev* 45: 1079-1114.