

## **The Bavarian Lager and TGI Cases: Transparency v Privacy and Investigations**

**By Ciaran Ward**

Two recent cases in the EU's highest court, the European Court of Justice (ECJ), Bavarian Lager (C-28/08 P) and Technische Glaswerke Ilmenau (C-139/07 P) have sparked controversy and debate concerning transparency and access to documents.

In both cases access to information was refused, but for quite different reasons. In the Bavarian Lager case the reasons were related to data protection, whereas in Glaswerke it was ruled that disclosure would have the effect of undermining inspections and investigations. Both decisions hint towards a stricter interpretation of the laws concerning access to information weighted against disclosure.

### **TGI – the exemption for investigations**

In 2002 the Commission had refused a request from Technische Glaswerke Ilmenau (TGI), a German glassmaker for access to documents on procedures for reviewing state aid which had been granted to it on the basis that disclosure would undermine investigations under Article of 4(2) of the Access to Documents Regulation (1049/2001). The Commission ruled that disclosure of the documents relating to current investigations into the compatibility of state aid with the single market would have undermined “the conduct of the examination of [the] complaint by compromising that dialogue”.

On appeal in 2006 the Court of First Instance (CFI) overturned the Commission's decision citing that it had taken too general an approach and had not undertaken a concrete, individual assessment of the content of the documents which applied to the exceptions in article 4 (paragraphs 1-3) of Regulation 1045/2001.

The Commission then successfully appealed to the ECJ. The Court of Justice confirmed that the documents concerned did fall under the category of “investigations” within the meaning of the Access to Documents Regulation, article 4(2).

The court then asserted that procedures for aid were only available to the member state responsible for granting the aid and not to any other interested parties (i.e. TGI).

The decision rested on a general presumption “that disclosure of documents in the [Commission's] administrative file in principle undermines protection of the objectives of investigation activities”. The ECJ asserted that granting access to the documents would have called into question the system for review of state aid.

The decision in TGI is in marked contrast to that of Sweden & Turbo v Commission which concerned an application for access to documents on legal advice relating to asylum seekers. The ECJ made a distinction between the two situations. In Sweden and Turco it was held that the Community institutions were acting as a legislature and therefore wider

access to the documents could be permitted under recital 6 of Regulation 1049/2001 which states that:

“Wider access should be granted to documents...where the institutions are acting in their legislative capacity... Such documents should be made directly accessible to the greatest possible extent”.

### **Bavarian Lager – the undermining of privacy**

Bavarian Lager is a classic case of the opposing values of access to information and data protection laws coming into direct conflict with each other. The regulations in question were 1049/2001 (access to documents) and 45/2001 (protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data).

The applicant Bavaria had requested access to documents from the European Commission on a brewing industry meeting. The documents were released, but with the names of five individuals present blanked out as this was deemed to be personal data. These individuals had either objected to their names being released or could not be contacted. The applicant then claimed the right to see the names of those present under the Access to Documents provisions of the EC Treaty and brought an action before the CFI seeking annulment of the Commission’s decision. The CFI annulled the decision in a 2007 judgment, citing that mere release of the names themselves would not constitute a threat to the privacy of the individuals concerned.

In a subsequent appeal in June 2010 the ECJ overturned the CFI’s decision and decided that the names of the individuals should not be released.

The decision rested on Article 8 of Regulation 45/2001 (on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data), which provides that data can be transferred to recipients...

- (a) “if the recipient establishes that data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, or
- (b) if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject’s legitimate interests might be prejudiced”

As neither condition was in the ECJ’s opinion fulfilled by Bavaria the court decided not to release the information. The decision was backed up by article 18 of Regulation 45/2001 which gives the data subject the right to object to the processing of his/her personal data.

The ECJ ruled that release of the names alone could constitute a threat to the privacy or integrity of the individuals concerned. The assertion that the Data Protection Regulation comes into play in all instances where access to documents is requested contrasts with the CFI’s previous ruling. The CFI had concluded that it only applies where this a threat to

the individual's privacy as enshrined in Article 8 of the European Convention on Human Rights which guarantees an individual's the right to respect for his private and family life, his home and his correspondence."

The case is an interesting development in terms of European access to information and data protection laws, particularly with regard to balancing the conflicting values of transparency of public decision-making (Regulation 1049/2001 on public access to European Parliament, Council and Commission documents) and the individual's right to privacy (Regulation 45/2001 referred to above).

The Bavarian Lager decision contrasts with the Court of First Instance's ruling in the Borax case of 2009. In Borax the court overruled the Commission's decision to withhold information in the form of sound recordings relating to a group of scientific experts specialising in the toxic effects of chemicals on human reproduction. The CFI held that identification of the individuals via their voices on the sound recording would not in itself constitute a threat to their privacy or integrity and in any case the Commission had not provided sufficient explanation as to how their personal privacy or integrity would be undermined. The CFI disagreed with the Commission's assertion that revealing the identities of the experts concerned would pose the risk of undermining their integrity by exposing them to external pressures. It was ultimately held that the reasons for refusal of the information were too general as the Commission had failed to provide evidence to prove the likelihood of such a risk. The fact that these individuals had attended a meeting in their professional capacity would not, according to the CFI infringe their right to privacy.

In Borax the court had in effect placed the onus on the data controller (in this case the Commission) to justify how releasing the recordings would undermine the privacy and integrity of the individuals concerned.

In Bavaria however it was held that the Commission had sufficiently complied with duty of openness by releasing minutes of the meeting with names of participants blanked out. The applicant had in the ECJ's opinion no convincing argument for access to the names and no express or legitimate purpose in demanding access to the names had apparently been established.

Although Article 6(1) of Regulation 1049/2001 confirms that requests for access to documents are purpose blind ("[t]he applicant is not obliged to state reasons for the application") this principle is seemingly contradicted in 45/2001 Article 8 which places the onus on the applicant to justify access to personal data. The ECJ cited the exception to communication in Article 4(1)(b) of the Regulation 1049/2001 (where disclosure of documents could undermine the protection of privacy and the integrity of an individual) as a means of trumping Article 6(1) of the same regulation. It would thus seem that if there is a conflict of interests between the rights of the data subject and the requestor, the right of access to documents is no longer purpose blind as the requestor must justify reasons for access.

The ECJ asserted that the Commission in the original decision had complied with provisions of Article 8(b) of Regulation 45/2001 – by requiring Bavaria to establish necessity for the personal data to be transferred. Taking a cautious approach the court

seems to have reached the conclusion that in the presence of any doubt the information requested should not be released, invoking articles 8 (the need for applicant to establish necessity) and 18 the (right of data subject to object to personal data being processed) of the Data Protection Regulation.

### Conclusion

Both cases demonstrate reluctance on the part of the Court of Justice to grant access to documents where any doubt exists. The end result is a lack of transparency concerning the decision-making procedures of the EU institutions.

It was significant that both Bavaria and TGI were supported by three member states, Denmark, Finland and Sweden. Furthermore the European Data Protection Supervisor intervened in the BL case in support of the applicant, claiming that harm to privacy should be the deciding factor as to whether names should be withheld.

One could theorise that this refusal stems from a fear of opening the floodgates. It would therefore appear that the ECJ in both cases erred on the side of caution.

The concept contained in the Bavarian Lager ruling that release of names alone represents a breach of privacy is not in keeping with the public right to transparency and accountability. It would appear therefore that the fact that two regulations (access to documents and data protection) came into play with one overriding the other marks the clear need for clarification of the legislation.

### Ciaran Ward is Information Officer for Lee Valley Regional Park Authority

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