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P. NIKIFOROS DIAMANDOUROS

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PAYS BAS

Strasbourg, 16 -07- 2007

**Decision on complaint 3269/2005/TN against the European Commission**

Dear Mr Hoedeman,

On 11 October 2005, with supporting documents submitted on 11 November 2005, you made a complaint to the European Ombudsman on behalf of Corporate Europe Observatory. Your complaint concerned the European Commission's blanking out of the names of industry lobbyists in documents to which access had been provided under Regulation 1049/2001.

On 16 November 2005, I forwarded the complaint to the President of the Commission. By letter of the same date, I also forwarded, for information, a copy of your complaint to the European Data Protection Supervisor ("EDPS"). The Commission sent its opinion on 4 April 2006. I forwarded it to you with an invitation to make observations, which you sent on 30 May 2006.

On 10 October 2006, I wrote to the EDPS, asking for his comments on the case. By letter of 6 November 2006, the EDPS informed me that he would like to await the judgment by the Court of First Instance in Case T-194/04 *Bavarian Lager v Commission*, before examining the details of your case. The EDPS explained that a judgment could be expected soon. You were informed accordingly by letter of 15 December 2006.

In May 2007, you contacted my services to ask about the progress of your case. Taking into account that the Court of First Instance had not yet delivered a decision in Case T-194/04 *Bavarian Lager v Commission* and the duration of my inquiry into your complaint, my services sent you an e-mail on 21 June 2007, informing you that I had decided to examine your case without waiting for the Court's judgment and the EDPS's comments.

I am writing now to let you know the results of the inquiries that have been made.

## THE COMPLAINT

The complaint concerned the Commission's blanking out of the names of industry lobbyists in documents to which access had been provided under Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents<sup>1</sup> ("Regulation 1049/2001"). On the basis of the Commission's letter rejecting the complainant's confirmatory application, the following could be deduced:

The complainant made a request for access to Commission documents under Regulation 1049/2001. The documents to which access was requested were, in summary, reports (including minutes and notes) and correspondence (including e-mails) between the Commission's Directorate-General for Trade ("DG Trade") and certain business associations. The request was partly refused and the complainant made a confirmatory application, in which he, among other things, opposed the Commission's practice of blanking out the names of industry lobbyists with which DG Trade had corresponded. In its reply of 29 June 2006, the Commission referred to Community legislation for the protection of personal data, namely, Article 4(1)(b) of Regulation 1049/2001 as well as Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 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<sup>2</sup> ("Regulation 45/2001"). The Commission argued that, under this legislation, it is obliged to protect the privacy and integrity of the individual when processing personal data. According to the Commission, this applies irrespective of whether the person in question acted in a private capacity or as an employed lobbyist for a business association. Consequently, the names of the persons acting on behalf of the Transatlantic Business Dialogue ("TABD") and the European Services Forum ("ESF") could not be made public. The Commission further argued that, according to Article 8(b) of Regulation 45/2001, personal data shall only be transferred if the recipient establishes the necessity of having data transferred and if the Commission can assume that the data subject's legitimate interests will not be prejudiced. In its reply to the complainant's confirmatory application, the Commission took the position that the complainant had not established the necessity of transferring the concerned data to him.

In his complaint to the Ombudsman, the complainant again opposed the Commission's refusal to disclose the names of the industry lobbyists in the documents to which access was given, arguing as follows:

The ESF and TABD representatives communicated with the Commission as employed lobbyists for corporations and industry lobby groupings and not in a private capacity. These contacts are official and should be subject to public scrutiny. The

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<sup>1</sup> OJ 2001 L 145, p. 43.

<sup>2</sup> OJ 2001 L 8, p. 1.

Commission's reference to the need to protect the "integrity of the individual" is therefore awkward.

The Ombudsman should clarify that the practice of systematically blanking out names of lobbyists is wrong. This practice is clearly a move towards a more restrictive interpretation of Regulation 1049/2001 since in similar cases a few years ago, no names were blanked out.

Disclosure of the names in question would not in any way "*undermine the protection of the privacy and the integrity of the individual*" as provided for in Article 4(1)(b) of Regulation 1049/2001. The Commission has not even made the effort to explain in what way it considers this to be the case. As regards the Commission's reference to Article 8(b) of Regulation 45/2001, the argument for not blanking out names of lobbyists is based on the public interest in visibility vis-à-vis the Commission's decision making. This public interest should overrule any potential wish for secrecy by the lobby groups and their representatives. Secrecy is clearly not a legitimate interest for those engaging in influencing the EU decision making.

The complainant alleged that the Commission had failed to comply with its duty, under Regulation 1049/2001, to provide proper access to documents.

In support of the above allegation, the complainant argued that the Commission (i) wrongly blanked out the names of industry lobbyists in documents to which access was provided under Regulation 1049/2001; (ii) failed to explain how the disclosure of the names in question would "*undermine the protection of the privacy and the integrity of the individual*" as stipulated in Article 4(1)(b) of Regulation 1049/2001; and (iii) wrongly relied on Article 8(b) of Regulation 45/2001 when blanking out the names, despite the fact that the complainant had established the necessity of transferring the concerned data to him.

The complainant claimed that the Commission should stop its practice of blanking out, in documents to which public access is provided, the names of lobbyists with whom it engages in information exchange and co-operation through correspondence or meetings.

## **THE INQUIRY**

### **The Commission's opinion**

In its opinion, the Commission made, in summary, the following comments:

#### **Background**

On 22 February 2005, the complainant requested access to the following documents:

- (1) all Commission reports, including minutes and notes, of meetings between Commissioner Mandelson, members of his cabinet and other DG Trade staff and representatives of business associations, including UNICE, the European Service Forum, the European Roundtable of the Industrialists and the Transatlantic Business Dialogue;
- (2) all reports, including minutes and notes, of conferences and other meetings hosted by business associations, including UNICE, the European Service Forum, the European Roundtable of the Industrialists and the Transatlantic Business Dialogue, that were attended by Commissioner Mandelson and/or other DG Trade officials; and
- (3) all correspondence, including e-mail, between Commissioner Mandelson, members of his cabinet and other DG Trade staff and representatives of business associations, including UNICE, the European Service Forum, the European Roundtable of the Industrialists and the Transatlantic Business Dialogue.

On 12 April 2005, DG Trade granted partial access to 30 documents identified as corresponding to the request. However, some paragraphs of the disclosed documents, as well as the names of the individuals working for the private entities, had been blanked out. The rationale underlying the blanking out was based on the following considerations:

- (1) The public interest as regards international relations, which comes under the exception in Article 4(1)(a), third indent, of Regulation 1049/2001.
- (2) The protection of the Commission's decision-making process, which comes under the exception in Article 4(3) of Regulation 1049/2001.
- (3) As regards in particular the names of individuals, the protection of their privacy and integrity in accordance with data protection legislation, which comes under the exception in Article 4(1)(b) of Regulation 1049/2001.

On 13 May 2005, the complainant made a confirmatory application, arguing that the Commission had made too narrow an interpretation of his request and that it had been too restrictive in only granting partial access. On 29 June 2005, after having extended the deadline for responding, the Commission's Secretary-General decided to grant wider access to the requested documents. The identification of the requested documents was explained and the refusal further reasoned with regard to each document concerned.

The refusal to disclose the names of individuals acting on behalf of private entities was confirmed. In this regard, the Commission explained that, under Community legislation on the protection of personal data, namely, Regulation 45/2001, it was obliged to protect the privacy of individuals while processing personal data. This applies irrespective of whether the person is acting in private capacity or as

a lobbyist employed by a business association. Consequently, the names of the persons acting on behalf of TABD and ESF could not be made public. Furthermore, according to Article 8(b) of Regulation 45/2001, personal data shall only be transferred if the recipient establishes the necessity of having the data transferred and if the Commission can assume that the data subject's legitimate interests will not be prejudiced. It was considered that such necessity had not been established in the case concerned.

### The Commission's opinion on the complaint

The Commission considers that the disclosure of the names of the individuals concerned could interfere with their right to privacy. The right to privacy is protected by Community legislation regarding the protection of personal data. The fact that the individuals concerned were acting in their professional capacity does not prevent the application of the data protection legislation, which is intended to apply also to persons at work<sup>3</sup>.

The Commission considers that the position it has adopted in the decision contested by the complainant is in line with the interpretation proposed by the European Data Protection Supervisor ("EDPS") in his background paper on public access to documents and data protection. The understanding proposed by the EDPS as regards the interaction between Regulation 1049/2001 and Regulation 45/2001 is most satisfactory for the Commission. However, given that the Commission has not been involved in the preparation of the background paper, it is currently engaged in an open discussion with the office of the EDPS with a view to arriving at a common understanding of certain specific legal issues. Furthermore, the relationship between Regulation 1049/2001 and Regulation 45/2001 is under review before the Court of First Instance<sup>4</sup>. The Commission is therefore awaiting the Court's interpretation before reconsidering its current practices as regards the disclosure of personal data under Regulation 1049/2001.

The complainant argued that the privacy and integrity of ESF and TABD representatives could not be undermined by disclosing their names because they were acting in the professional sphere, as employed lobbyists, and not in a private capacity. The Commission considers, however, that although the requested personal data appear in the professional context, their disclosure can still undermine the protection of the privacy of the persons concerned. This understanding of the data protection rules is based on the legislation itself<sup>5</sup> and is supported by a judgment in which the Court of Justice recognised the wide interpretation of the notion of private life given by the European Court of Human Rights. In this judgment, the Court of Justice has held that "*there is no reason of principle to justify excluding activities of a professional (...)*

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<sup>3</sup> Cf. recital 72 of Directive 95/46/EC and recital 7 of Regulation 45/2001.

<sup>4</sup> Case T-170/03 *BAT v Commission*, action brought on 14 May 2003; Case T-161/04 *Valero Jordana v Commission*, action brought on 26 April 2004; and Case T-194/04 *Bavarian Lager v Commission*, action brought on 27 May 2004.

<sup>5</sup> Cf. recital 72 of Directive 95/46/EC and recital 7 of Regulation 45/2001.

*nature from the notion of 'private life'*<sup>6</sup>. The Commission has therefore lawfully considered that the privacy and integrity of the individuals concerned was indeed at stake, even though they were acting in a professional sphere. Given the context of the request, the Commission is of the opinion that disclosure of the names of the individuals concerned could interfere with their private life, undermining their privacy and integrity and expose them to undue external pressure.

Having established that disclosure could undermine the privacy and integrity of individuals concerned in the meaning of Article 4(1)(b) of Regulation 1049/2001, the Commission continued its analysis based on 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. Pursuant to Article 2(a) of Regulation 45/2001, names of individuals constitute personal data. According to Article 2(b), the disclosure of such data qualifies under Regulation 45/2001 in the same way as the processing of personal data. In the case at issue, disclosure was requested under Regulation 1049/2001. Under this procedure, the documents that are disclosed, including those containing personal data, enter into the public domain and are subsequently accessible upon request to any other person. This includes the possibility of disclosure to recipients in third countries. Such a situation may qualify under Regulation 45/2001 as (i) a transfer of personal data to "*entities other than Community institutions and bodies, subject to Directive 95/46/EC*", which is provided for in Article 8, or (ii) a "*transfer to recipients other than Community institutions and bodies, which are not subject to Directive 95/46/EC*", which is provided for in Article 9. In both cases, such a transfer of personal data requires, according to Article 8(2)(b)<sup>7</sup> and Article 9(6)(d), that the necessity of the operation be established by the applicant.

The complainant submitted that the right of public scrutiny of official contacts between the Commission and professional lobbyists constitutes such necessity. The Commission is fully committed to developing and implementing due standards of transparency with regard to lobbying activities. The question of transparency and ethics in lobbying is one of the questions to be reviewed under the European Transparency Initiative. The Commission considers that transparency should in particular cover two aspects of the lobbying activity, that is: (i) who lobbies and what interests are represented by the lobbying activity; and (ii) how it acts and to what extent its position is taken into account by the decisions of the European institutions.

As regards the present case, the names of the lobbying organisations have been disclosed, as has also a substantial part of the documents exchanged with these entities. However, the complainant used the argument of transparency with regard to the disclosure of the names of individuals and not with regard to the names of the lobbying entities. The Commission takes the view that there is no added value from a transparency point of view in disclosing the names of these individuals. Therefore, the

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<sup>6</sup> Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, paragraph 73.

<sup>7</sup> The Ombudsman understands the Commission to refer to Article 8(b) of Regulation 45/2001.

necessity for disclosing the names of the individuals in the sense of Article 8(2)(b)<sup>8</sup> of Regulation 45/2001 has not been established.

### **The complainant's observations**

In his observations, the complainant made, in summary, the following remarks:

The arguments put forward by the Commission contradict the spirit and the letter of the Green Paper on the European Transparency Initiative, which states, on page 5, that persons carrying out "*activities with the objective of influencing the policy formulation and decision-making process of the European institutions*" must be open to public scrutiny. It would be deeply problematic if the data protection legislation is interpreted in a way that prevents such democratic scrutiny.

The Commission further took the view that there is no added value from a transparency point of view in disclosing the names of these individuals. The reality is, however, that there is a very significant added value in disclosing the names of individual lobbyists, both in general and in this specific case. The blanking out of the names of the industry lobbyists from the documents to which access was requested on 22 February 2005 effectively precludes the scrutiny of the role of the representatives of individual corporations lobbying the EU institutions. Both ESF and TABD are large coalitions of firms, with a small number of secretariat staff and most of their lobbying work is carried out by staff employed by individual member companies. It is highly relevant to know which individual lobbyist from which of these companies is lobbying on behalf of these industry coalitions. Companies would otherwise be able to hide behind faceless industry associations and effectively exclude from public scrutiny, for instance, the question whether their lobbying efforts are in line with the commitment to corporate social responsibility expressed by the companies. Disclosure of names of individual lobbyists is essential in order to enable any serious assessment of lobbying activity on particular issues.

Furthermore, disclosure of names of individual lobbyists is common practice in the European Parliament's on-line register of accredited lobbyists. All lobbyists with a permanent access pass need to state the pass holder's name, the name of the firm for which the holder is working, and the organisation that the holder represents. The register of accredited lobbyists is published on Parliament's website and facilitates access of the Members of the European Parliament to at least some information about who lobbies Parliament and on whose behalf. According to the Commission's logic, the obligation to put one's name on Parliament's register could be seen as violating the data protection legislation. In addition, the practice of blanking out names is a fairly new and indeed dangerous trend which, if endorsed, would mean a serious step backwards as regards transparency surrounding the role of lobbyists in EU decision making.

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<sup>8</sup> The Ombudsman understands the Commission to refer to Article 8(b) of Regulation 45/2001.

The blanking out of names also contradicts the Commission's proposal in the Green Paper on the European Transparency Initiative for a web-based registration system "*for all interest groups and lobbyists who wish to be consulted on EU initiatives*". There is currently a period of consultation taking place in order to determine how best to shape such a system. The Commission's argument that disclosing names of lobbyists would interfere with the right to privacy seriously undermines the Green Paper's objective of creating a registration system that would render possible the "*the external scrutiny of lobbying*".

### **Further inquiries**

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary.

The Ombudsman therefore wrote to the EDPS, asking him to comment on the position taken by the Commission in its reply to the complainant's confirmatory application, as well as in its opinion, in particular on the applicability of Regulation 45/2001 to the present case.

### The EDPS's response

In reply to the Ombudsman's request, the EDPS explained that he wanted to await the Court of First Instance's judgment in Case T-194/04 *Bavarian Lager v Commission*, before examining the present case. The EDPS stated that the Court had held a hearing on 13 September 2006 and that a judgment could be expected soon. The EDPS also indicated in his letter that he had intervened in three cases before the Court of First Instance in support of the applicants, because in his view, the position of the Commission did not lead to a satisfying outcome.<sup>9</sup>

The complainant was informed accordingly.

In May 2007, the complainant contacted the Ombudsman services to ask about the progress of his case. By e-mail of 21 June 2007, the complainant was informed that the Ombudsman had decided to examine the case without waiting for the Court's judgment and the EDPS's comments.

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<sup>9</sup> The EDPS Annual report for the year 2006 mentioned in point 3.4, page 48, that "[i]n March 2006, the EDPS decided to intervene, in support of the conclusions of appellants, in three cases before the Court of First Instance on the relationship between public access to documents and data protection". The three cases are Case T-170/03 *BAT v Commission*, action brought on 14 May 2003; Case T-161/04 *Valero Jordana v Commission*, action brought on 26 April 2004; and Case T-194/04 *Bavarian Lager v Commission*, action brought on 27 May 2004.

## THE DECISION

### **1 The alleged failure by the Commission to comply with its duty to provide proper access to documents under Regulation 1049/2001 and the related claim**

- 1.1 The complaint concerned the Commission's blanking out of the names of industry lobbyists in documents to which access had been provided under Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents<sup>10</sup> ("Regulation 1049/2001"). The complainant made a request for access, under Regulation 1049/2001, to reports, including minutes and notes, as well as correspondence, including e-mails, between the Commission's Directorate-General for Trade ("DG Trade") and certain business associations. The request was partly refused and the complainant made a confirmatory application, in which he, among other things, opposed the Commission's practice of blanking out the names of industry lobbyists with whom DG Trade had corresponded. In reply of 29 June 2006, the Commission referred to Community legislation for the protection of personal data, namely, Article 4(1)(b) of Regulation 1049/2001 as well as Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 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<sup>11</sup> ("Regulation 45/2001"). The Commission argued that, under this Community legislation, it is obliged to protect the privacy and integrity of the individual while processing personal data. According to the Commission, this applies irrespective of whether the person in question acted in a private capacity or as a lobbyist employed by a business association. Consequently, the names of the persons acting on behalf of the Transatlantic Business Dialogue ("TABD") and the European Services Forum ("ESF") could not be made public. The Commission further argued that, according to Article 8(b) of Regulation 45/2001, personal data shall only be transferred if the recipient establishes the necessity of having data transferred and if the Commission can assume that the data subject's legitimate interests will not be prejudiced. In its reply to the complainant's confirmatory application, the Commission took the position that the complainant had not established the necessity for transferring the concerned data to him.
- 1.2 In his complaint to the Ombudsman, the complainant again opposed the Commission's refusal to disclose the names of the industry lobbyists in the documents to which access was given, arguing that the ESF and TABD representatives communicated with the Commission as employed lobbyists for corporations and industry lobby groupings and not in a private capacity.

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<sup>10</sup> OJ 2001 L 145, p. 43.

<sup>11</sup> OJ 2001 L 8, p. 1.

According to the complainant, these contacts are official and should be subject to public scrutiny. In his view, the Commission's reference to the need to protect the "integrity of the individual" is therefore awkward.

The complainant considered that the Ombudsman should clarify that the practice of systematically blanking out names of lobbyists is wrong. This practice is clearly a move towards a more restrictive interpretation of Regulation 1049/2001 since in similar cases a few years ago, no names were blanked out. Disclosure of the names in question would not in any way "*undermine the protection of the privacy and the integrity of the individual*" as provided for in Article 4(1)(b) of Regulation 1049/2001. The Commission has not even made the effort to explain in what way it considers this to be the case. As regards the Commission's reference to Article 8(b) of Regulation 45/2001, the argument for not blanking out names of lobbyists is based on the public interest in visibility vis-à-vis the Commission's decision making. This public interest should overrule any potential wish for secrecy by the lobby groups and their representatives. Secrecy is clearly not a legitimate interest for those engaging in influencing EU decision making.

- 1.3 The complainant alleged that the Commission had failed to comply with its duty to provide proper access to documents under Regulation 1049/2001.

In support of the above allegation, the complainant argued that the Commission (i) wrongly blanked out the names of industry lobbyists in documents to which access was provided under Regulation 1049/2001; (ii) failed to explain how the disclosure of the names in question would "*undermine the protection of the privacy and the integrity of the individual*" as stipulated in Article 4(1)(b) of Regulation 1049/2001; and (iii) wrongly relied on Article 8(b) of Regulation 45/2001 when blanking out the names, despite the fact that the complainant had established the necessity for transferring the concerned data to him.

The complainant claimed that the Commission should stop its practice of blanking out, in documents to which public access is provided, the names of lobbyists with whom it engages in information exchange and co-operation through correspondence or meetings.

- 1.4 In its opinion, the Commission acknowledged that, following the complainant's confirmatory application, the refusal to disclose the names of individuals acting on behalf of private entities was confirmed. In this regard, the Commission explained that under Community legislation on the protection of personal data, namely, Regulation 45/2001, it was obliged to protect the privacy of individuals while processing personal data. This applies irrespective of whether the person acts in private capacity or as a lobbyist employed by a business association. Consequently, the names of the persons acting on behalf of TABD and ESF could not be made public. Furthermore, according to Article 8(b) of regulation 45/2001, personal data shall only be transferred if the recipient establishes the necessity of having the data transferred and if the Commission can assume that

the data subject's legitimate interests will not be prejudiced. It was considered that such necessity had not been established in the case concerned.

- 1.5 In response to the complaint to the Ombudsman, the Commission further clarified that it considers that the disclosure of the names of the individuals concerned could interfere with their right to privacy. The right to privacy is protected by Community legislation regarding the protection of personal data. The fact that the individuals concerned were acting in their professional capacity does not prevent the application of the data protection legislation, which is intended to also apply to persons at work.<sup>12</sup> The Commission considers that the position it has adopted in the decision contested by the complainant is in line with the interpretation proposed by the European Data Protection Supervisor ("EDPS") in his background paper on public access to documents and data protection. The understanding proposed by the EDPS as regards the interaction between Regulation 1049/2001 and Regulation 45/2001 is most satisfactory for the Commission. Furthermore, the interaction between Regulation 1049/2001 and Regulation 45/2001 is under review in certain cases pending before the Court of First Instance.<sup>13</sup> The Commission is therefore awaiting the Court's interpretation before reconsidering its current practices as regards the disclosure of personal data under Regulation 1049/2001.
- 1.6 In its opinion, the Commission also noted the complainant's argument that the privacy and integrity of ESF and TABD representatives could not be undermined by disclosing their names because they were acting in a professional capacity, as employed lobbyists, and not in a private capacity. The Commission considers, however, that although the requested personal data appear in the professional context, their disclosure could still undermine the protection of the privacy of the persons concerned. This understanding of the data protection rules is based on the legislation itself<sup>14</sup> and is supported by a judgment in which the Court of Justice recognised the wide interpretation given to the notion of private life by the European Court of Human Rights. In this judgment, the Court of Justice held that "*there is no reason of principle to justify excluding activities of a professional (...) nature from the notion of 'private life'*".<sup>15</sup> The Commission has therefore lawfully considered that the privacy and integrity of the individuals concerned was indeed at stake, even though they were acting in a professional sphere. Given the context of the request, the Commission is of the opinion that disclosure of the names of the

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<sup>12</sup> Cf. recital 72 of Directive 95/46/EC and recital 7 of Regulation 45/2001.

<sup>13</sup> Case T-170/03 *BAT v Commission*, action brought on 14 May 2003; Case T-161/04 *Valero Jordana v Commission*, action brought on 26 April 2004; and Case T-194/04 *Bavarian Lager v Commission*, action brought on 27 May 2004.

<sup>14</sup> Cf. recital 72 of Directive 95/46/EC and recital 7 of Regulation 45/2001.

<sup>15</sup> Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, paragraph 73.

individuals concerned could interfere with their private life, undermine their privacy and integrity and expose them to undue external pressure.

- 1.7 Having established that disclosure could undermine the privacy and integrity of individuals concerned within the meaning of Article 4(1)(b) of Regulation 1049/2001, the Commission continued its analysis based on 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. Pursuant to Article 2(a) of Regulation 45/2001, names of individuals constitute personal data. According to Article 2(b), the disclosure of such data qualifies under Regulation 45/2001 in the same way as the processing of personal data. In the case at issue, disclosure was requested under Regulation 1049/2001. Under this procedure, the documents that are disclosed, including those containing personal data, enter into the public domain and are subsequently accessible upon request to any other person. This includes the possibility of disclosure to recipients in third countries. Such a situation may qualify under Regulation 45/2001 as (i) a transfer of personal data to "*entities other than Community institutions and bodies, subject to Directive 95/46/EC*", which is provided for in Article 8, or (ii) a "*transfer to recipients other than Community institutions and bodies, which are not subject to Directive 95/46/EC*", which is provided for in Article 9. In both cases, such a transfer of personal data requires, according to Article 8(2)(b)<sup>16</sup> and Article 9(6)(d), that the necessity of the operation be established by the applicant.

The Commission noted that the complainant submitted that the right to public scrutiny of official contacts between the Commission and professional lobbyists constitutes such necessity. The Commission argued that it is fully committed to developing and implementing due standards of transparency with regard to lobbying activities. The question of transparency and ethics in lobbying is one of the questions to be reviewed under the European Transparency Initiative. The Commission considers that transparency should in particular cover two aspects of the lobbying activity, that is: (i) who lobbies and what interests are represented by the lobbying activity; and (ii) how it acts and to what extent its position is taken into account by the decisions of the European institutions.

As regards the present case, the Commission noted that the names of the lobbying organisations have been disclosed, and so has also a substantial part of the documents exchanged with these entities. However, the complainant used the argument of transparency with regard to the disclosure of the names of individuals and not with regard to the names of the lobbying entities. The Commission takes the view that there is no added value from a transparency point of view in disclosing the names of these individuals. Therefore, the

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<sup>16</sup>

The Ombudsman understands the Commission to refer to Article 8(b) of Regulation 45/2001.

necessity of disclosing the names of the individuals in the sense of Article 8(2)(b)<sup>17</sup> of Regulation 45/2001 has not been established.

- 1.8 In his observations, the complainant argued that the arguments put forward by the Commission contradict the spirit and the letter of the Green Paper on the European Transparency Initiative, which states, on page 5, that persons carrying out "*activities with the objective of influencing the policy formulation and decision-making process of the European institutions*" must be open to public scrutiny. It would be deeply problematic if the data protection legislation is interpreted in a way that prevents such democratic scrutiny. The blanking out of names also contradicts the Commission's proposal in the Green Paper on the European Transparency Initiative for a web-based registration system "*for all interest groups and lobbyists who wish to be consulted on EU initiatives*".
- 1.9 The complainant further noted that the Commission also took the view that there is no added value from a transparency point of view in disclosing the names of these individuals. The complainant argued, however, that the reality is that there is a very significant added value in disclosing the names of individual lobbyists, both in general and in this specific case. The blanking out of the names of the industry lobbyists from the documents to which access was requested on 22 February 2005 effectively precludes scrutiny of the role of the representatives of individual corporations lobbying the EU institutions. Both ESF and TABD are large coalitions of firms, with a small number of secretariat staff and most of their lobbying work is carried out by staff employed by individual member companies. It is highly relevant to know which individual lobbyist from which of these companies is lobbying on behalf of these industry coalitions. Companies would otherwise be able to hide behind faceless industry associations and effectively exclude from public scrutiny, for instance, the question whether their lobbying efforts are in line with the commitment to corporate social responsibility expressed by the companies. Disclosure of names of individual lobbyists is essential in order to enable any serious assessment of lobbying activity on particular issues.
- 1.10 The complainant also pointed out that disclosure of names of individual lobbyists is common practice in the European Parliament's on-line register of accredited lobbyists. All lobbyists with a permanent access pass need to state the pass holder's name, the name of the firm for which the holder is working, and the organisation that the holder represents. The register of accredited lobbyists is published on Parliament's website and facilitates access of the Members of the European Parliament to at least some information about who lobbies Parliament and on whose behalf. According to the Commission's logic, the obligation to put one's name on Parliament's register could be seen as violating the data protection legislation. In addition, the practice of blanking out names is a fairly new and indeed dangerous trend which, if endorsed, would

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<sup>17</sup> The Ombudsman understands the Commission to refer to Article 8(b) of Regulation 45/2001.

mean a serious step backwards as regards transparency surrounding the role of lobbyists in EU decision making.

- 1.11 After careful consideration of the Commission's opinion and the complainant's observations, the Ombudsman wrote to the EDPS, asking him to comment on the position taken by the Commission in its reply to the complainant's confirmatory application, as well as in its opinion, in particular on the applicability of Regulation 45/2001 to the present case.

In reply to the Ombudsman's request, the EDPS explained that he wanted to await the Court of First Instance's judgment in Case T-194/04 *Bavarian Lager v Commission*, before examining the present case. The EDPS stated that the Court had held a hearing on 13 September 2006 and that a judgment could be expected soon. The complainant was informed accordingly.

- 1.12 In May 2007, the complainant contacted the Ombudsman services to ask about the progress of his case. By e-mail of 21 June 2007, the complainant was informed that the Ombudsman had decided to examine the case without waiting for the Court's judgment and the EDPS's comments.

- 1.13 The Ombudsman notes that the Commission has relied on Article 4(1)(b) of Regulation 1049/2001 as well as on Regulation 45/2001 when deciding to blank out the names of industry lobbyists in the documents to which access had been provided under Regulation 1049/2001. The Ombudsman recalls that, in its opinion, the Commission stated that the decision it had adopted in this case was in line with the interpretation proposed by the EDPS in his Background Paper and that it considers the understanding proposed by the EDPS as regards the relationship between Regulation 1049/2001 and Regulation 45/2001 to be most satisfactory. Noting that Article 1(2) of Regulation 45/2001 stipulates that the EDPS shall monitor the application of the provisions in that regulation to all processing operations carried out by a Community institution or body, the Ombudsman considers that it would have been desirable to have the EDPS's comments on the present case before making a decision on the complaint. However, in the absence of such comments, and taking into account the above statement made by the Commission in its opinion, the Ombudsman considers it appropriate to analyse the present case in light of the guidelines and conclusions made by the EDPS in his Background Paper no 1, July 2005, on public access to documents and data protection (hereafter "the Background Paper").<sup>18</sup> This approach to the analysis of the present case is in line with the *Memorandum of Understanding* between the Ombudsman and the EDPS, in which the two institutions undertake to adopt a consistent approach to legal and administrative aspects of data protection.<sup>19</sup>

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<sup>18</sup> The Background Paper No 1, July 2005, is available on the EDPS's website (<http://www.edps.europa.eu>) under "Publications"/"Papers".

<sup>19</sup> OJ 2007 C 27, p. 21.

1.14 The Ombudsman notes that, according to point 4.3.2. of the Background Paper, three conditions must be fulfilled in order for Article 4(1)(b) of Regulation 1049/2001 to apply to a document to which access has been requested:

- (1) the privacy of the data subject must be at stake;
- (2) public access must substantially affect the data subject; and
- (3) public access is not allowed by the data protection legislation.

1.15 As regards the first condition, that is, that the privacy of the data subject must be at stake, the Ombudsman notes that the EDPS gives the following guidance on the basis of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter "the ECHR"): There must be a qualified interest of a person involved, which means that the document must contain details about a person that are normally regarded as "personal" or "private". The fact that a document contains personal data of a general character, like the name of a person, should (in general) not hinder disclosure. The notion of private life does not exclude activities of a professional or business nature, but the interests involved may have a different character. Disclosure of data would normally fall within the scope of protection if sensitive data are involved, such as data concerning health, or if the honour and reputation of a person is involved, a person could be placed in a false light, embarrassing facts would be disclosed or information given or received by the individual confidentially would be disclosed.

The Ombudsman thus considers the Commission to be correct in its conclusion that personal data appearing in the professional context could possibly undermine the protection of the privacy of the persons concerned. The Ombudsman would like to underline, however, that also in a professional context it has to be explained in *what way* the privacy of the data subject would be at stake if access to a particular document was granted.

The Ombudsman notes in this regard that the Commission considers that, in the present case, it has established that disclosure of the names of the industry lobbyists could undermine the privacy and integrity of the individuals concerned. However, the Ombudsman does not consider that the Commission has explained in *what way* disclosure of the names of the industry lobbyists could undermine the privacy and integrity of the individuals concerned. The only developed argument provided by the Commission in this regard is that disclosure of the names could "*expose [the individuals concerned] to undue external pressure*". However, in the Ombudsman's view, the possibility of the persons in question being exposed to external pressure following the disclosure of their names does not constitute evidence that the documents in question contain details about the persons involved which are normally regarded as "personal" or "private". The Ombudsman does not, therefore, consider the Commission to have established that the first condition for applying Article 4(1)(b) of Regulation 1049/2001 has been fulfilled.

- 1.16 As regards the second condition, that is, that public access must substantially affect the data subject, the Ombudsman notes the EDPS's statement in point 4.3.4. of the Background Paper that this condition is closely linked to the first condition, but that there is an essential difference. The EDPS considers the first condition to require an examination of whether the information contained in a document falls within the scope of Article 8 of the ECHR. However, under the second condition, it has to be examined whether, *in the specific case*, disclosure would undermine or, in other words, substantially affect the privacy of the data subject. Accordingly, it has to be examined if the consequences for the privacy of the data subject are not merely theoretical.

The Ombudsman considers in this regard that since the Commission has not even established that disclosure of the names would have *theoretical* consequences for the privacy of the industry lobbyists (see point 1.15 above), it has not established that there would be consequences for privacy in the specific case, as required by the second condition for Article 4(1)(b) of Regulation 1049/2001 to apply.

- 1.17 The third condition for Article 4(1)(b) of Regulation 1049/2001 to apply is that public access must not be allowed by the data protection legislation. According to the EDPS, this means that the exception of Article 4(1)(b) of Regulation 1049/2001 may be applied only insofar as Regulation 45/2001 explicitly prohibits the disclosure of data. The Ombudsman notes in this regard that, when refusing to disclose the names of the individual industry lobbyists, the Commission relied on Article 8(b) of Regulation 45/2001, arguing that the complainant had not established the necessity of having the data transferred to him.

The application of Article 8(b) of Regulation 45/2001 in relation to Regulation 1049/2001 is addressed in point 3.4.3. of the Background Paper. The EDPS points out that Article 8(b) of Regulation 45/2001 is an illustration of the tension between the data protection regulation and the public access regulation, and moreover between the different objectives of the two regulations. According to the EDPS, a literal interpretation of the text in Article 8(b) of Regulation 45/2001 would lead to a result which seriously impairs the effectiveness of Regulation 1049/2001. Such a result could not have been envisaged by the Community legislature. Article 8(b) of Regulation 45/2001 presupposes that the recipient of a document containing personal data establishes why he needs access to it. However, access to documents is given to enable citizens to participate more closely in the democratic process. In the EDPS's view, it is essential to this objective that, as has been confirmed by the case-law of the Court of First Instance, citizens do not have to establish any specific interest in disclosure of a document to the person so requesting.

In point 3.4.3. of the Background Paper the EDPS goes on to state that Article 8(b) of Regulation 45/2001 should be interpreted in the light of the objectives of the relevant provisions of both Regulation 45/2001 and Regulation

1049/2001. On the one hand, Article 2 of Regulation 1049/2001 gives the citizens of the EU a legally enforceable right to access to documents, for the purposes mentioned in the above paragraph. On the other hand, Article 8(b) of Regulation 45/2001 merely envisages the protection of the data subject, in cases when disclosure of the data is in itself allowed according to the provisions of Community law on data processing. The EDPS states that in such cases, the transfer of the data in itself would normally not prejudice the legitimate interests of the data subject. In other words, if the transfer of personal data is allowed by the other provisions of Regulation 45/2001, Article 8(b) cannot restrict disclosure.

The above considerations lead the EDPS to the following interpretation: in cases where data are transferred to give effect to Article 2 of Regulation 1049/2001 and provided that the disclosure of the data is allowed according to the provisions of Community law on data processing, the necessity of having the data transferred is by definition established.

The Ombudsman notes in this regard that the Commission has not argued that the transfer of the data concerned would be prohibited on the basis of any provision in Regulation 45/2001 other than Article 8(b). Following the EDPS's interpretation of Regulation 45/2001 and Regulation 1049/2001 read together, the necessity of having the data transferred has therefore, by definition, been established by the complainant. Accordingly, the third condition for applying Article 4(1)(b) of Regulation 1049/2001 has not been fulfilled.

- 1.18 In view of the conclusions made in points 1.15 to 1.17 above, the Ombudsman considers that the Commission has failed to comply with its duty to provide proper access to document under Regulation 1049/2001 by (i) wrongly blanking out the names of industry lobbyists in documents to which access was provided under Regulation 1049/2001; (ii) failing to explain how the disclosure of the names in question would *"undermine the protection of the privacy and the integrity of the individual"* as stipulated in Article 4(1)(b) of Regulation 1049/2001; and (iii) wrongly relying on Article 8(b) of Regulation 45/2001 when blanking out the names. For these reasons the Ombudsman concludes that the complainant's allegation that the Commission failed to comply with its duty to provide proper access to documents under regulation 1049/2001 appears to be founded. This would constitute an instance of maladministration by the Commission. In such a situation and in accordance with Article 3(5) of the Statute of the Ombudsman, the Ombudsman normally seeks to find a friendly solution in relation to the complaint. .
- 1.19 However, the Ombudsman recalls that the Court of Justice of the European Communities is the highest authority when it comes to the interpretation of Community law. As regards the legal provisions interpreted by the Ombudsman in this particular case, the Ombudsman also notes that the issue of invoking the need to protect personal data and thereby blanking out, in documents to which access has been granted under Regulation 1049/2001, the names of persons

with whom the Commission has been in contact when performing its tasks is under review by the Court of First Instance in Case T-194/04 *Bavarian Lager v Commission*. The Ombudsman also notes that the EDPS has intervened in this case. The Ombudsman therefore concludes that it is not useful, at this stage, to address a proposal for a friendly solution to the Commission on the basis of the finding of maladministration in point 1.18 above, since the Commission would not be likely to take any action before the Court has delivered its judgment in Case T-194/04 *Bavarian Lager v Commission*.

- 1.20 In view of the above, the Ombudsman considers that there appear to be no grounds to further pursue his inquiry into the complainant's allegation. For the same reasons, the Ombudsman considers that there is no need further to pursue his inquiry into the complainant's claim that the Commission should stop its practice of blanking out, in documents to which public access is provided, the names of lobbyists with whom it engages in information exchange and co-operation through correspondence or meetings.
- 1.21 Once the Court has handed down its decision in Case T-194/04 *Bavarian Lager v Commission* and the Commission has acted thereon, the complainant may consider presenting a new complaint to the Ombudsman.

## 2 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, and for the reasons expressed in points 1.19 and 1.20 above, the Ombudsman considers that there are no grounds for pursuing the matter any further. The Ombudsman therefore closes the case.

The President of the Commission will also be informed of this decision.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'P. Nikiforos Diamandouros', with a long horizontal line extending to the right.

P. Nikiforos DIAMANDOUROS