

JUDGMENT OF THE COURT OF FIRST INSTANCE (Seventh Chamber)

11 March 2009 (*)

(Access to documents – Regulation (EC) No 1049/2001 – Documents and sound recordings – Refusal of access – Exception relating to the protection of the privacy and integrity of the individual – Exception relating to the protection of the decision-making process)

In Case T-166/05,

Borax Europe Ltd, established in Guildford (United Kingdom), represented by D. Vandermeersch and K. Nordlander, lawyers,

applicant,

v

Commission of the European Communities, represented by P. Costa de Oliveira and I. Chatzigiannis, acting as Agents,

defendant,

APPLICATION for annulment of the decision of 21 February 2005 of the Secretary-General of the Commission refusing access to certain documents and sound recordings in connection with the 30th adaptation to technical progress of Council Directive 67/548/EEC of 27 June 1967 on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ, English Special Edition 1967(I), p. 234),

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

composed of N.J. Forwood, President, D. Šváby and L. Truchot (Rapporteur), Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 3 April 2008,

gives the following

Judgment

Facts

- 1 Borax Europe Ltd ('Borax' or 'the applicant') mines, manufactures and distributes borates and boric acid.
- 2 Those two substances were examined by the Commission's Working Group on the Classification and Labelling of Dangerous Substances in connection, originally, with the 29th adaptation to technical progress of Council Directive 67/548/EEC of 27 June 1967 on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ, English Special Edition 1967(I), p. 234; 'the directive'), provided for by Commission Directive 2004/73/EC of 29 April 2004 (OJ 2004 L 152, p. 1).
- 3 In the course of the first six months of 2003, the Working Group proposed the inclusion of borates and boric acid in Annex I to the directive. That annex contains a list of dangerous substances, as well as specifications for the classification and labelling for each substance, regularly amended for the purpose of its adaptation to technical progress. The decision to add a substance to Annex I is adopted as a result of the procedure provided for in Article 29 of the directive, as amended by Council Regulation (EC) No 807/2003 of 14 April 2003 adapting to Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in Council instruments

adopted in accordance with the consultation procedure (unanimity) (OJ 2003 L 122, p. 36).

- 4 Under Article 29 of the directive, the Commission is assisted in the preparation of the proposal for the adaptation to technical progress by the Technical Committee on Classification and Labelling of Dangerous Substances, composed of representatives of the Member States and chaired by a representative of the Commission. The Commission submits draft proposals to that committee, which gives an opinion. The Commission's Working Group on the Classification and Labelling of Dangerous Substances assists the committee in its work.
- 5 Where carcinogenic or mutagenic substances or substances which are toxic for reproduction are examined and their evaluation gives rise to complex scientific debate, the committee or the Commission may convene a meeting of experts, under Annex VI to the directive. The experts are designated by the Member States, but they participate in those meetings in their capacity as experts and not as representatives of the Member States. That type of meeting is organised by the European Chemicals Bureau, one of the units of the Institute for Health and Consumer Protection, which is part of the Joint Research Centre ('the JRC').
- 6 After taking cognisance of the proposal, issued by the Commission's Working Group on the Classification and Labelling of Dangerous Substances, to include borates and boric acid in Annex I to the directive, the Environment Directorate-General decided, however, to reject that proposal and to consult a group of experts in the field of reproductive toxicity, in order to determine whether the current scientific data justified the inclusion of those substances in Annex I to the directive because of their effects on development and fertility and, if so, to specify under which category they fell.
- 7 The experts met on 5 and 6 October 2004 in Ispra (Italy), at the European Chemicals Bureau. Borax participated in the first part of the meeting. Then, the representatives of the industrial sector, including Borax, withdrew and the experts deliberated in closed session. Their proceedings were recorded in order to establish the summary record of the meeting. On 7 October 2004, the Commission published, on the European Chemicals Bureau's internet site, the experts' final conclusions, recommending that boric acid and borates be classified among the substances toxic for reproduction in Category 2, a classification which entails an obligation to affix a label to the packaging of those substances containing the statement 'May impair fertility' or 'May cause harm to the unborn child'. On 22 November 2004, the summary record of the Ispra meeting was published on the same website.
- 8 Since it considered that that record did not reproduce either accurately or fully the experts' statements, comments or conclusions, Borax requested, by letter of 30 November 2004, pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), access to any comments from the experts on the draft summary record of the Ispra meeting and to any documents relating to the classification of perborates. By letter of 10 December 2004, the Director-General of the JRC replied that the documents covered by Borax's application were 13 comments from the experts, the sound recordings of the meeting, the preparatory documents for the meeting and the summary record of the meeting. He stated that the detailed summary record was available on the European Chemicals Bureau's internet site and that the industry representatives had already had access to the preparatory documents but that the request for access to the comments and sound recordings was refused, on the ground that their disclosure would seriously undermine the experts' integrity and the Commission's decision-making process.
- 9 The JRC's Director-General also stated that the documents and studies used for the preparation of the meeting and the summary record of the meeting, which includes the experts' conclusions, also corresponded to Borax's request. As an industry representative, Borax could already have consulted the preparatory documents which were available with a password on the JCR's internet site. The summary record and the experts' conclusions had already been published on the same website.
- 10 Borax made a confirmatory application, pursuant to Article 7(2) of Regulation No 1049/2001, stating that it would accept partial access to the comments in the form of translations into a single language and to the recordings in the form of written transcripts, from which the names of persons and countries were deleted to avoid the identification of the experts. By decision of 21 February 2005 ('the contested decision'), the Secretary-General of the Commission replied that Borax's confirmatory application concerned:
 - (i) the audio tapes from the meeting;
 - (ii) 2 preliminary drafts of the Summary Records;
 - (iii) 13 comments from the members of the Commission Working Group of Specialised Experts in the field of Reprotoxicity on the draft Summary Record of the meeting;
 - (iv) 2 comments received from representatives of industry and, finally,

(v) one document that was submitted too late by the Danish rapporteur to be distributed before the meeting’.

- 11 The Secretary-General granted partial access to two of the documents referred to in the contested decision under (iii), and to one of the documents referred to in the contested decision under (iv), then confirmed the initial decision of the Director-General of the JRC for certain parts of those documents and for all the other documents. He justified the refusal to disclose the sound recordings of the Ispra meeting, the two drafts of the summary record and all or part of the comments made by the experts and industry representatives, on grounds of, first, under Article 4(1)(b) of Regulation No 1049/2001, the undermining of the privacy and integrity of the individual which would thereby be caused and, second, under Article 4(3) of Regulation No 1049/2001, the serious undermining of the decision-making process of the institution, which no overriding public interest justified. He refused partial access to anonymised versions of the recordings and comments. The refusal to disclose the document submitted by the Danish Rapporteur was based on the institution’s decision-making process being thereby seriously undermined.
- 12 In an earlier application, Borax had requested access to the sound recordings of the meeting. The Commission’s refusal of that request forms the subject-matter of Case T-121/05.

Procedure and forms of order sought by the parties

- 13 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 29 April 2005.
- 14 The applicant claims that the Court should:
- annul the contested decision;
 - order the Commission to pay the costs.
- 15 The Commission contends that the Court should:
- dismiss the action as unfounded;
 - order the applicant to pay the costs.

Substance

- 16 In support of its action, the applicant relies on three pleas in law. It alleges that the Commission infringed, first, Article 4(1)(b) of Regulation No 1049/2001, by refusing to grant it access to the documents in question, and, second, Article 4(3) of the regulation. Finally, by refusing partial access to those documents, the Commission failed to comply with the principle of proportionality and Article 4(6) of Regulation No 1049/2001.

The infringement of Article 4(1)(b) of Regulation No 1049/2001, relating to the protection of the privacy and integrity of the individual

Arguments of the parties

- 17 The applicant submits that the exception under Article 4(1)(b) of Regulation No 1049/2001 based on the undermining of the privacy and integrity of the individual cannot justify a total refusal of access to the documents sought.
- 18 It maintains, first, that the contested decision fails to explain why the disclosure of the drafts of the summary record and of the industry representatives’ comments would undermine the privacy and integrity of the individual.
- 19 It then submits that the experts invited to take part in the Commission’s consultations cannot expect their identities to remain confidential, when they have voluntarily chosen to participate in a legislative process where it is clear that the Commission will rely on their advice in adopting legislation. It adds that it became aware of the identities of the experts concerned during the first part of the Ispra meeting.
- 20 It also explains that partial access to the documents may be granted by rendering the comments from the experts and industry representatives and the recording of the meeting anonymous. It would accept access to anonymised versions of the experts’ and industry representatives’ comments, possibly in the form of a translation into a single language, as well as an anonymised version or the transcript of the recording. The deletion of the experts’ names and countries of origin would make those documents comply with

Community legislation regarding the protection of personal data.

- 21 The applicant challenges, finally, the assertion that disclosure of the sound recordings and experts' comments would expose the experts to outside pressure and undermine their integrity. First, the Commission has not indicated to what pressure the experts would be exposed if their arguments were made public. Second, the experts have already delivered their final conclusions.
- 22 Borax explains that it wishes, primarily, to reconstruct the scientific debate, which the summary record does not enable it to do. It submits that the contested decision does not specify how the integrity of the individual would be undermined by the disclosure of the comments from the experts or of the original or anonymised recordings.
- 23 The Commission contends that it correctly applied the exception for the protection of the privacy and integrity of the individual.
- 24 It submits that it applied, in the context of that exception, 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 (OJ 2001 L 8, p. 1). The experts agreed to be recorded during the meeting, then to make comments on the draft summary record, only in order to facilitate the preparation of the final summary record and they were assured, as the summary record of the meeting shows, that their identities would not be revealed. Disclosure of those recordings and comments on the draft summary record would constitute processing of personal data incompatible with that purpose and would therefore infringe Article 4(1)(b) of Regulation No 45/2001.
- 25 The Commission also argues that, since an individual can be identified by his or her language, accent or references to national context, merely removing their names would not be sufficient to make the experts and industry representative unidentifiable, in accordance with Article 2(a) of Regulation No 45/2001, and that therefore partial access could not be granted to the sound recordings or to the comments from the experts and industry representative.
- 26 The Commission makes clear that it did not apply the exception under Article 4(1)(b) of Regulation No 1049/2001 to the drafts of the summary record.
- 27 By contrast, it explains that the industry representative's comment, disclosure of which, even partial, was refused, is of like nature to the experts' comments. The exception based on the protection of the integrity of the individual would therefore apply to that document on the same grounds as those invoked concerning the protection of the experts' integrity.
- 28 It contends that the experts may legitimately expect their identity to be protected. In addition, participation in the decision-making process of an institution cannot deprive a person of the protection of the personal data concerning him, guaranteed by Regulation No 45/2001 and confirmed by Article 4(1)(b) of Regulation No 1049/2001. There is no exception to the application of the rules of protection of personal data for individuals carrying out a function in relation to their professional activities.
- 29 The Commission states that the disclosure of information enabling the experts to be identified would undermine their integrity, because there is a risk that they would be exposed to external pressure because of the economic interests at stake.
- 30 Concerning the translation of the experts' and industry representative's comments and the transcription of the recording, the Commission submits that such exercises would entail the creation of new documents, whereas Article 10(3) of Regulation No 1049/2001 provides for access only to existing documents.
- 31 The Commission adds that the exception under Article 4(3) of Regulation No 1049/2001 would still be applicable to the experts' and industry representative's comments, even if they were anonymised and translated into a single language.
- 32 The applicant replies that the translation of the experts' comments and the transcription of the recordings would only be new forms of existing documents and argues that the right of access to documents concerns the elements of information contained in them and not only the documents as such.
- 33 It submits that the reference to Regulation No 45/2001 is irrelevant, because it did not apply for access to personal data but to the arguments and scientific evidence advanced in the course of the discussions.
- 34 It claims that the Commission's refusal cannot be based on the fact that the experts received an assurance that their names and opinions would not be disclosed. By adopting such a position, the Commission and the experts would negate the legislation allowing public access to documents.

- 35 The applicant submits, finally, that the exception relating to the protection of the Commission's decision-making process does not apply to the experts' and sector representative's comments, in their anonymised and translated versions, on the ground that those documents were received for the purpose of the summary record's publication and not for internal use.
- 36 The Commission contends that Regulation No 45/2001 had to be applied, since Article 4(1)(b) of Regulation No 1049/2001 must be examined 'in accordance with Community legislation regarding the protection of personal data'. Under Article 8(b) of Regulation No 45/2001, the applicant had to demonstrate the necessity of disclosing the data relating to the experts and industry representative in order to obtain the processing of that data, whereas the Commission had to ensure that there was no reason to assume that such processing could prejudice the legitimate interests of the persons concerned.
- 37 It submits that Borax's criticisms as regards the experts' qualifications in a letter addressed to the Commission show that the pressures are not hypothetical.

Findings of the Court

- 38 The purpose of Regulation No 1049/2001, as indicated by recital 4 in its preamble and by its Article 1, is to give the public a right of access to the institutions' documents which is as wide as possible.
- 39 As appears from recital 1 in the preamble, that regulation reflects the intention expressed in the second subparagraph of Article 1 EU to mark a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. As recital 2 in the preamble to that regulation notes, the right of public access to the institutions' documents is related to the democratic nature of those institutions.
- 40 When the Commission is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to the institutions' documents set out in Article 4 of Regulation No 1049/2001 (see, to that effect, *Joined Cases C-39/05 P and C-52/05 P Sweden and Turco v Council* [2008] ECR I-0000, paragraph 35).
- 41 In that respect, the Commission cannot, in this case, base its refusal on the assurance which it contends it gave the experts that they could express themselves personally and that their identities and opinions would not be disclosed. First, the contested decision does not refer to that undertaking and the Commission cannot therefore rely upon it. Secondly, even if it could be invoked in this case, in spite of the contested decision's silence on the matter, the confidentiality undertaking, which the Commission argues binds it to the experts, was concluded between them and that institution and cannot therefore be relied upon against Borax, whose rights of access to the documents are guaranteed subject to the conditions and within the limits laid down by Regulation No 1049/2001. Finally, a refusal of access to the documents can be based only on the exceptions laid down in Article 4 of Regulation No 1049/2001, with the result that the institution in question cannot make such a refusal in reliance on an undertaking to the participants at the meeting if that undertaking cannot be justified by reference to one of those exceptions. It is therefore within the framework of those exceptions alone that the grounds relied upon in support of the refusal must be examined.
- 42 In view of the objectives pursued by Regulation No 1049/2001, the exceptions set out in Article 4 of that regulation must be interpreted and applied strictly (*Case C-64/05 P Sweden v Commission* [2007] ECR I-11389, paragraph 66, and *Sweden and Turco v Council*, paragraph 36).
- 43 It is clear from Article 4(1)(b) of Regulation No 1049/2001 that the institutions are to refuse access to a document if its disclosure would undermine the protection of the privacy or integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.
- 44 According to the case-law, the reasons for any decision of an institution in respect of the exceptions set out in Article 4 of Regulation No 1049/2001 must be stated. If an institution decides to refuse access to a document which it has been asked to disclose, it must explain how access to that document could specifically and effectively undermine the interest protected by an exception laid down in Article 4 of Regulation No 1049/2001 relied on by that institution (see, to that effect, *Sweden and Turco v Council*, paragraphs 48 and 49). It is for the Court to ensure compliance with the obligation to state reasons, raising, of its own motion, any issue of breach of that obligation (*Case 18/57 Nold v High Authority* [1959] ECR 41, 52, and *Case C-367/95 P Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67).
- 45 In the contested decision, the Commission cites Article 4(1)(b) of Regulation No 1049/2001, invoking the protection of the privacy and integrity of the individual, without however pleading specific grounds pertaining to the risk of undermining the protection of privacy or for the infringement of the provisions of Regulation No 45/2001, to which it nevertheless refers before the Court of First Instance.

- 46 In the contested decision, it indeed explains that the meetings of experts organised by the European Chemicals Bureau are held as closed sessions, with the industry's representatives participating at the beginning of meetings so that the relevant industrial sector's point of view is presented and the experts can put any questions they may have. Next, the Commission states that it is necessary to conduct the meetings as closed sessions in order to enable the experts to deliberate and to express themselves freely and independently without being exposed to undue external pressure. It explains that the sound recordings and comments from the experts as well as those made by the industry representative enable each expert who makes a contribution at the meeting to be identified such that the disclosure of their identities associated with the expression of their opinions would clearly undermine the experts' integrity by exposing them to that type of pressure. In that part of the contested decision dealing with the application for partial access to the documents at issue, the Commission confines itself to stating that even if their names were deleted, the experts would still be easily identifiable by the language they speak, their accents and the references they make to context.
- 47 It is only in the proceedings before the Court of First Instance that the Commission has set forth the grounds on which it considers that the disclosure applied for would undermine the experts' privacy and infringe Regulation No 45/2001. As regards the latter exception, regarding the protection of personal data, the contested decision refers to it only in the section dealing with the examination of whether there is an overriding public interest which would justify the disclosure of the documents in question, by stating that such protection 'is not subject to a public interest test'.
- 48 Since the only references to the experts' identities are either associated with the undermining of their integrity, or are unsupported by any reasoning explaining how the identification of the experts would undermine their privacy or infringe Regulation No 45/2001, the contested decision cannot, as regards the two latter categories of protected interests, be held to contain a sufficient statement of reasons.
- 49 The Commission, in the contested decision, also justifies its refusal to grant access to the documents sought by relying on the undermining of the experts' integrity, within the meaning of Article 4(1)(b) of Regulation No 1049/2001.
- 50 It is settled case-law that the examination required for the purpose of processing an application for access to documents must be specific in nature. The mere fact that a document concerns an interest protected by an exception is not sufficient to justify application of that exception (Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraph 69; see also, to that effect, Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429, paragraph 75). Such application may, as a rule, be justified only if the institution has previously assessed whether access to the document could specifically and effectively undermine the protected interest. In addition, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical (see, to that effect, *Sweden and Turco v Council*, paragraph 43).
- 51 By stating, in the contested decision, that disclosure of the experts' identities and of the opinions they expressed in the course of the meeting would clearly undermine their integrity by exposing them to undue external pressure, the Commission made its decision on the basis of general grounds which are incapable of substantiating the existence of such a risk. It appears, in fact, that such justification is not supported by the allegation of any fact, relevant to this case, which would corroborate the existence of pressure or a risk of pressure on the participants in the meeting at issue on the part of Borax or on its initiative. The same reasoning unsupported by evidence, were it to be accepted, could be applied to all the meetings organised by the Commission for the purpose of obtaining the opinion of experts prior to the adoption of decisions of any nature having effects on the activities of economic operators in the sector concerned by those decisions, whatever that sector might be. Such an interpretation of the scope of Article 4(1)(b) of Regulation No 1049/2001 would be contrary to the strict interpretation of the exception, which requires it to be established that the interest protected would be specifically and effectively undermined.
- 52 The Commission submits, before the Court, that disclosure of the comments made by the industry representative on the drafts of the summary record would undermine that individual's integrity, whereas, in the contested decision, it states that the documents enable the experts to be identified, without stating that the integrity of the industry representative is also concerned. Its decision to refuse access to the documents at issue cannot, consequently, be regarded as being based on that aspect of the exception relied upon.
- 53 The hypothetical nature of the risk of the experts' integrity being undermined is confirmed by the Commission's statements at the hearing. Questioned as to the point whether there were, in the present case, any indications suggesting that pressure could have been exerted on the experts participating in the meeting, the Commission replied that it had no precise information on that point, but that it was clear from the evidence of persons participating in that type of meeting that, when significant interests were at stake, as in this case, pressure was exerted and the experts were approached or criticised. Those matters, by virtue of their general nature, confirm that the Commission had no detailed information which might lead it to believe that there was a risk of the experts' integrity being undermined.

- 54 The Commission added, admittedly, that the personal inquiries carried out by the applicant, in the past, and the criticisms which it made in respect of the experts' qualifications could be regarded as evidence of undue external pressure exerted on them. It stated that it had provided the Court with tangible evidence of the pressure exerted on the experts.
- 55 In support of that statement, the Commission produced a letter of 17 January 2005 which Borax had sent it, in which Borax explained that, in view of the fact that the summary record did not reveal the qualifications of the experts who had participated in the meeting, it made some inquiries which had clearly shown that certain experts had no qualifications in respect of reproductive toxicity.
- 56 It cannot be inferred from that letter, in which Borax challenges the Commission's statement that the persons designated for the purposes of the meeting are experts of calibre in the relevant field, that any pressure was exerted in fact on one or more of those experts or that there was even any intention to employ such pressure or any other tactic which could undermine their integrity.
- 57 Nor, for the same reasons pertaining to the purely hypothetical nature of the risk relied upon, can the Court accept the Commission's argument, put forward at the hearing, that an expert's reputation or career could be affected by the revelation of an opinion contrary to a company's interests.
- 58 The Commission's refusal of Borax's application is even less justified since Borax amended its initial request by accepting that the information sought be limited to transcripts of the recordings and to translations of the comments into a single language, from which the experts' names and countries of origin would be omitted. Although the application was apt to remove any possible risk of undermining the protection of the experts' privacy and integrity, it was not accepted.
- 59 It follows from the foregoing that, by refusing to disclose the drafts of the summary record, the experts' and industry representatives' comments and the recordings, for which Borax applied, on the ground that the protection of the integrity of the individual would thereby be undermined, the Commission infringed Article 4(1)(b) of Regulation No 1049/2001.

The infringement of Article 4(3) of Regulation No 1049/2001, relating to the protection of the decision-making process

Arguments of the parties

- 60 The applicant denies that disclosure of the sound recording of the Ispra meeting, the drafts of the summary record, the experts' and industry representatives' comments or the document submitted by the Danish Rapporteur would seriously undermine the decision-making process. It submits that the Commission has not demonstrated that its decision-making process would be undermined, let alone that it would be seriously undermined.
- 61 Citing the terms of the second subparagraph of Article 4(3) of Regulation No 1049/2001, it maintains that the drafts of the summary record, the industry representatives' comments and the document submitted by the Danish Rapporteur do not contain opinions for internal use as part of the institution's deliberations and that the contested decision does not explain how the exception under that provision applies to those documents.
- 62 Borax adds that nor has the Commission explained how disclosure of the document submitted by the Danish Rapporteur could 'risk creating confusion with regard to what actually was distributed to the experts and subject to debate'.
- 63 When it has to undertake a scientific risk assessment, the Commission should show that it has obtained the necessary advice, in order to provide the economic operators affected by the decision to classify the substances in question with an effective procedural guarantee. The deficiencies of the final conclusions and of the summary record as regards the scientific debate which took place in that respect is not a factor of confusion, but, on the contrary, justifies access to the recordings of the Ispra meeting or their transcripts, to the experts' comments or their translations into a single language and to the drafts of the summary record.
- 64 The applicant submits that the experts' recommendations have, for it, serious and irreparable financial consequences, so that it has a direct interest in obtaining access to the documents in order to ascertain for itself that the principles of the regulation were complied with. In that regard, the Commission should have balanced the interests at stake, in accordance with the case-law.
- 65 Borax submits that the Commission's wish to keep its decision-making process confidential until the final decision infringes the principle of the widest possible access to the institutions' documents and the principle of sound administration, by enabling measures that directly and seriously affect the interests of private parties to be adopted behind closed doors. It is also contrary to the proposition that summary records are

established in order to guarantee the transparency of the decision-making process.

- 66 The Commission replies that its refusal to disclose the drafts and comments, as well as the document submitted by the Danish Rapporteur, is based on the serious undermining which would thereby be caused to its decision-making process, under both subparagraphs of Article 4(3) of Regulation No 1049/2001, and not only the second subparagraph, even though the contested decision did not expressly refer to them.
- 67 It states that the contested decision refers to both subparagraphs. First, in noting that the final proposal for the Technical Progress Committee is still in preparation and that, therefore, the decisions have not yet been taken, the Secretary-General of the Commission was referring to the exception under the first subparagraph of Article 4(3) of Regulation No 1049/2001. Second, in noting that the documents concerned contain opinions for internal use as part of deliberations and preliminary consultations within the institution, since it is of paramount importance to preserve a certain space to think, so that these discussions can be held in a frank and open climate, in order for the Commission to be able correctly to assess the issues at stake, the Secretary-General was also referring to the exception under the second subparagraph of Article 4(3) of Regulation No 1049/2001.
- 68 It submits that the application of both subparagraphs was all the more justified because the word 'decision' can include two distinct stages of the decision-making process: the final decision on any given matter and any intermediate decisions which form an integral stage of the decision-making process.
- 69 As regards the first subparagraph of Article 4(3), the Commission explains that, in this case, at the time the contested decision was adopted no final decision to classify borates, perborates or boric acid had been taken. Disclosure of the drafts, the comments and the document submitted by the Danish Rapporteur, which were created for internal use, would have seriously undermined its decision-making process, by creating confusion as regards its official position which was yet to be taken. In particular, disclosure of the document submitted by the Danish Rapporteur could have created confusion about the discussions that took place during the Ispra meeting. That document had not been considered during the meeting but was yet to be considered by the Technical Committee for Classification and Labelling of Dangerous Substances. Its disclosure at that stage of the decision-making process could have undermined future deliberations.
- 70 As regards the second subparagraph of Article 4(3) of Regulation No 1049/2001, the Commission submits that, even though it had not adopted its final decision, publication of the experts' conclusions marked the end of a part of the procedure. It adds that the sound recordings, the drafts of the summary record and the comments, as well as the document submitted by the Danish Rapporteur contain opinions for internal use as part of deliberations and preliminary consultations within the Commission and that releasing them, even after the experts had reached their conclusions, would seriously undermine its decision-making process.
- 71 By making it possible to identify the experts and by facilitating the exertion of external pressure on them, disclosure of the written documents and sound recordings at issue would infringe the second subparagraph of Article 4(3) of Regulation No 1049/2001. Without a guarantee of confidentiality, the experts would become reluctant to express their opinions freely and independently, or even to participate in the Commission's consultations.
- 72 Produced in a preliminary phase, the drafts of the summary record and the two series of comments made by the experts and the industry representative on those drafts could include imprecise or mistaken comments, which would undoubtedly create confusion with regard to what actually took place at that meeting. Any confusion would also harm future deliberations on the classification of the products in question, given that the Commission's final decision has not been taken.
- 73 In addition, the Commission submits that if it had to give up recording its meetings to avoid the identification of the participants by their languages or accents, the quality of the summary records would thereby suffer. Likewise, if the emails, in which the comments were made, were to be regarded as documents subject to disclosure, officials and others participating in the decision-making process would be less willing to use them and the institution's work would be less efficient.
- 74 The Commission challenges the necessity of balancing the interests at stake for the purposes of Regulation No 1049/2001 and submits that the interest of the party seeking to obtain access to documents cannot be taken into account in deciding whether an exception should be applied.
- 75 The applicant challenges the application of the exception under the first subparagraph of Article 4(3) of Regulation No 1049/2001 to the drafts of the summary record, to the comments and to the document submitted by the Danish Rapporteur, on the ground that they were not created for internal use, but were used for the drafting and publication of the summary record. It adds that the decision subject to that provision should be understood as being the decision to publish the summary record and final conclusions.
- 76 As regards the exception based on the serious undermining of the decision-making process under the

second subparagraph of Article 4(3) of Regulation No 1049/2001, Borax emphasises that it does not want to know who said what but that it wishes to understand the broader context and content of the discussions that eventually led to the publication of the summary record and final conclusions. The imprecise, even mistaken nature of some of the preliminary comments is an additional ground for disclosure, in order to verify that the standards applicable to the classification of the substances in question were complied with. It submits that comments communicated informally are 'documents' within the meaning of Regulation No 1049/2001, but cannot be regarded as exchanges of opinions within the Commission.

- 77 In reply to the Commission's allegation that the experts would be reluctant to take part in the decision-making process in future because of external pressure, Borax claims that the Commission's reasoning is based on a poor opinion of the experts. Their deliberations cannot be compared with an exchange of personal or political opinions. Moreover, the calibre of the experts designated by the Member States is such that their reluctance to disclose their scientific opinions is hypothetical.
- 78 As regards the pressure relied upon, Borax refuses to believe that the Commission is alluding to illegal acts committed by private parties.
- 79 In any event, it submits that refusing access to the document in question, on the ground that individuals could disagree with some of the opinions expressed, runs counter to the principle of public access to the institutions' documents. It adds that it is the refusal to publish the tenor of the scientific debate which is prejudicial to the decision-making process.
- 80 Submitting that both subparagraphs of Article 4(3) of Regulation No 1049/2001 are applicable to the documents referred to in the contested decision under (ii) to (v), the Commission argues that the term 'decision' designates the end-product of any decision-making process and that a decision-making process may itself be composed of several cumulative and self-conclusive processes. It submits that the documents referred to in the contested decision under (ii) to (v) should be regarded as documents drawn up before the adoption of the Commission's final decision on the classification of borates, so that the first subparagraph of Article 4(3) of Regulation No 1049/2001 is applicable. The experts' meeting was part of its internal decision-making process and the documents in question were drawn up (as regards the documents referred to in the contested decision under (ii)) or (as regards the documents referred to in the contested decision under (iii) to (v)) received for internal use. Even if the final document of a meeting is published, the previous and preliminary documents were not therefore drawn up or received for external use.
- 81 As regards the application of the second subparagraph of Article 4(3) of Regulation No 1049/2001, the Commission states that the confidentiality of the experts' deliberations and of their comments is fundamental for it to continue to receive the experts' frank opinions. It maintains that the summary record faithfully reflects the scientific debate and disclosure of the documents referred to in the contested decision under (ii) to (iv), which constitute preliminary stages in the preparation of that document, could only create confusion as to what was actually said or as to the opinions actually expressed during the meeting.
- 82 The Commission accepts that emails may come within the definition of a 'document' in Regulation No 1049/2001, but argues that the disclosure of preliminary and informal exchanges of information would reduce its efficiency, particularly where email is the only efficient means of communication within the institution.
- 83 As regards the sound recordings, to which it applied the exception under the second subparagraph of Article 4(3) of Regulation No 1049/2001, the Commission argues that the experts expressed their personal professional opinions and not the positions of their Member States of origin. It submits that they must be enabled to express, free from external influence and pressure, their honest and reasoned views, including their doubts and qualifications. It submits that the purpose of Regulation No 1049/2001 is not the evaluation of the work of the experts participating in the decision-making process.
- 84 Finally, the Commission contends that Borax, in its confirmatory application, did not invoke the existence of an overriding public interest in the disclosure of all the documents applied for but relied on its own economic interests.

Findings of the Court

- 85 Article 4(3) of Regulation No 1049/2001 contains two subparagraphs.
- 86 Under the first subparagraph of Article 4(3) of Regulation No 1049/2001, access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, is to be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

- 87 Under the second subparagraph of Article 4(3) of Regulation No 1049/2001, access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned is to be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.
- 88 According to the settled case-law referred to in paragraph 50 above, the examination required for the purpose of processing a request for access to documents must be specific in nature. On the one hand, the mere fact that a document concerns an interest protected by an exception is not sufficient to justify application of that exception. Such application may, as a rule, be justified only if the institution has previously assessed whether access to the document would specifically and effectively undermine the protected interest. On the other hand, the risk of a protected interest being undermined must, to be relied upon, be reasonably foreseeable and not purely hypothetical. In the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, the institution must also assess whether there is an overriding public interest in the disclosure of the document concerned (*Sweden and Turco v Council*, paragraphs 44 and 45).
- 89 It must be determined whether, by refusing access to the documents sought by Borax, on the ground that their disclosure would seriously undermine its decision-making process, the Commission infringed Article 4(3) of Regulation No 1049/2001.
- 90 First, the Commission stated, in the contested decision, that the specialised experts in the field of reproductive toxicity had special qualifications and gave it technical advice and recommendations, as did national experts in normal consultation procedures. With regard to sodium perborates, the Commission stated that the outcome of the specialised experts' meeting had still to be approved by the Technical Committee for Classification and Labelling of Dangerous Substances before it could be sent to the Environment DG for inclusion in an Adaptation to Technical Progress. With regard to borates and boric acid, the Commission stated that the specialised experts' recommendation had been sent to the Environment DG for inclusion in the 30th Adaptation to Technical Progress, but that the final proposal to the Technical Progress Committee was still being prepared. After adding that the decisions had not therefore yet been taken, the Commission stated that, consequently, disclosing the documents applied for at that moment would have seriously undermined its decision-making process.
- 91 That part of the contested decision is based on the notion that, at the date of the application for the documents at issue, the decisions which would be necessary to conclude the procedures for consultation of the experts had not yet been adopted.
- 92 In the contested decision, the Commission concludes that its decision-making process would be seriously undermined on the basis that disclosure of those documents would be made before the adoption of the relevant decisions. That reasoning conflicts with the very wording of the first subparagraph of Article 4(3) of Regulation No 1049/2001, which expressly allows access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, unless disclosure of the document would seriously undermine the institution's decision-making process. It follows from that principle that, in order to refuse the access sought, the institution cannot simply rely on the document's use for internal purposes or the absence of a decision and thus decide that in those circumstances its decision-making process has been seriously undermined, as required by the article cited above.
- 93 Secondly, the Commission adds, in the contested decision, that disclosure of the drafts of the summary record and the comments made thereon by the experts and the industry representative, drawn up at a preliminary stage and which might not be correct, relevant or taken on board, could also create confusion with regard to what actually took place at the meeting, whereas the final version of the published summary record reflects, correctly and in detail, the proceedings at that meeting. Disclosure of the document submitted by the Danish Rapporteur, which was not distributed, but referred to during the meeting, could also create confusion with regard to what was actually distributed to the experts and debated.
- 94 In the contested decision, the Commission did not specify upon which subparagraph of Article 4(3) of Regulation No 1049/2001 it was relying when it decided that disclosure of the documents applied for would give rise to a risk of confusion as to what was actually said during the meeting. However, the Commission stated, before the Court, that those considerations were based on the second subparagraph of Article 4(3) of Regulation No 1049/2001. It added that there was also a risk of confusion as to its official position, relying, on this occasion, on the first subparagraph of Article 4(3). The Commission, finally, invoked the latter provision to justify the refusal of access to the document submitted by the Danish Rapporteur.
- 95 The Commission's refusal of access to Borax cannot be justified by a risk of confusion on the basis either of the first subparagraph of Article 4(3) of Regulation No 1049/2001 or of the second subparagraph of Article 4(3) of that regulation.

- 96 Indeed, first, the Commission has not shown that there was such a risk in this case and that it would therefore be likely to undermine its decision-making process. It has merely raised the possibility that such a risk existed, deriving it from the impression which the exchanges that took place during the meeting could give, the suggested imperfections in the documents applied for and the fact that the documents might not have been taken on board in the final summary record. The Commission also suggested that there was a risk of confusion stating that the document submitted by the Danish Rapporteur had been mentioned in the course of the discussions without being distributed beforehand. The risk of confusion is therefore invoked purely hypothetically. Moreover, its existence is not supported by any clear evidence and cannot be inferred solely from the Commission's statements, which merely reflect the uncertainties inherent in the current decision-making process.
- 97 In addition, in the absence of specific evidence put forward on that point by the Commission, it is doubtful that the documents and comments relating to a meeting organised at the purely consultative stage of the Commission's decision-making process would cause any confusion, particularly to an applicant for access such as Borax, whose activities are directly linked to the products in question and which participated in the first part of the meeting. Aware, from its activities, of the terms of the scientific debate on the effects of the products at issue and of the possible differences in view which characterise it, it has not been shown that Borax is not in a position to understand the course the discussions took and, if need be, to explain the possible inconsistencies or contradictions which arise from the documents applied for.
- 98 Secondly, confusion as regards the content of the discussions could not be held, by itself, to be likely to undermine the decision-making process. The connection between the possible confusion which would arise from disclosure of the documents at issue and the conduct of the Commission's current decision-making process or the exercise of its decision-making powers in general was not established by the contested decision. Moreover, there is no reason to believe that any difficulty for an applicant for access in understanding how the discussions proceeded during the phase which preceded the decision gives rise to any risk that the competent institution's decision-making process would be undermined.
- 99 That statement is valid for cases where the confusion relied upon would affect the knowledge of the Commission's official position during the decision-making process. The uncertainty which can surround that position is irrelevant in the process leading to the final decision, since, because that process is evolving, the Commission's official position is necessarily provisional.
- 100 Thirdly, according to what the Commission stated in the contested decision, disclosure of the documents at issue would seriously undermine its decision-making process, because they contain individual opinions for internal use as part of deliberations and preliminary consultations within the institution. The Commission also stated, in the contested decision, that it was of paramount importance to preserve a certain space to think, so that discussions could take place in a frank and open climate in order that it could correctly assess the issues at stake. It went on to state that, since disclosure of the recordings would expose the experts to undue external pressure, they would be reluctant to give their opinions freely in future. However, their advice is crucial to the Commission's decision-making process in that area, since it does not have the necessary specialised knowledge available in-house.
- 101 The Commission's argument that the documents sought by Borax cannot be disclosed because they contain individual opinions expressed for internal purposes in a preliminary phase of the procedure leading to a final decision conflicts with the very letter of the second subparagraph of Article 4(3) of Regulation No 1049/2001. That provision, in fact, expressly allows access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned. Neither the purely internal purpose of a document nor its use as a document preparatory to the institution's final decision are therefore, by themselves, grounds for refusing access to the documents applied for.
- 102 Nor can the Commission justify its refusal by reference to the necessity of protecting experts from any external pressure in order to preserve a climate of confidence favourable to frank discussions and not to deter experts from freely expressing their opinions in future.
- 103 Indeed, while the Community legislature has provided for a specific exception to the right of public access to the documents of the Community institutions as regards legal advice, it has not done the same for other advice, in particular scientific advice, such as that expressed in the written documents and sound recordings at issue. The Court of Justice has ruled that it could not correctly be held that there is a general need for confidentiality in respect of advice from the Council's legal service relating to legislative matters (*Sweden and Turco v Council*, paragraph 57). A fortiori, the same principle must be applied to the advice at issue, for which the Community legislature has not laid down a specific exception and which remains subject to the general rules applicable to the public right of access to documents.
- 104 Furthermore, in the terms of recital 6 in the preamble to Regulation No 1049/2001, wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, while at the same time preserving the effectiveness of the institutions' decision-making process. In this instance, the opinions expressed in the written documents and sound recordings in question were obtained for the purpose of adopting measures classifying the substances concerned.

- 105 It follows that scientific opinions obtained by an institution for the purpose of the preparation of legislation must, as a rule, be disclosed, even if they might give rise to controversy or deter those who expressed them from making their contribution to the decision-making process of that institution. The risk, relied upon by the Commission, that public debate born of the disclosure of their opinions may deter experts from taking further part in its decision-making process is inherent in the rule which recognises the principle of access to documents containing opinions intended for internal use as part of consultations and preliminary deliberations, which obviously include consultations of experts. It cannot, however, be inferred from the existence of such a risk that any disclosure of a scientific opinion with significant consequences, particularly economic or financial, for the economic operator concerned, will have a deterrent effect as regards its author or, even if that were shown, that the risk is such as seriously to undermine the institution's decision-making process, as would be the case if that institution were to find it impossible to consult other experts.
- 106 In this case, the Commission justifies its refusal in a general and abstract way without specifying how the disclosure of the written documents and sound recordings would concretely and effectively undermine the process by which it decides on the classification of the substances in question. In fact, the risk of external pressure and the reluctance of experts to express their opinions freely and frankly, relied upon by the Commission, are based on mere assertions, unsupported by any properly reasoned argument.
- 107 Since it has not been shown that the Commission's decision-making process would be undermined, the criterion of seriousness of such an undermining has certainly not been met. The Commission therefore wrongly based its refusal to disclose the documents in question on the exception in the second subparagraph of Article 4(3) of Regulation No 1049/2001.
- 108 The Commission cannot contend that its work would be less efficient if it were constrained to cease tape recording meetings or using email. That assertion rests on the idea, contrary to Regulation No 1049/2001, that access to the documents sought would force it to forego those types of media. In fact, the propriety of a refusal of access must be determined in the light of the document itself, that is to say, under Article 3 of Regulation No 1049/2001, of its content and not its medium. It follows that, under Article 4 of Regulation No 1049/2001, access to a sound recording or email may be refused only if it contains information capable of undermining a protected interest, subject to the conditions laid down by that provision, whatever may be the medium concerned. The fear evinced by the Commission of having to give up recourse to certain methods of communication or operation is therefore unjustified.
- 109 It follows that the Commission infringed Article 4(3) of Regulation No 1049/2001 by refusing, in the contested decision, on the ground that such disclosure would seriously undermine its decision-making process, to produce the written documents in question or their translations and the recordings in question or their transcripts.
- 110 It follows from all the foregoing that, without its being necessary to examine whether there is an overriding public interest in the disclosure of the recordings or the third plea in law alleging breach of the principle of proportionality, the contested decision must be annulled.

Costs

- 111 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (Seventh Chamber)

hereby:

- 1. Annuls the decision of 21 February 2005 of the Secretary-General of the Commission refusing Borax Europe Ltd access to the recordings of the meeting of 5 and 6 October 2004, to two drafts of the summary record of that meeting, to thirteen comments from experts, to two comments from industry representatives and to the document submitted by the Danish Rapporteur;**
- 2. Orders the Commission to pay the costs.**

Delivered in open court in Luxembourg on 11 March 2009.

Truchot

[Signatures]

* Language of the case: English.