Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

28 June 2012*

(Appeal — Access to documents of the institutions — Regulation (EC) No 1049/2001 — Documents relating to merger control proceedings — Regulation (EC) No 139/2004 — Refusal of access — Exceptions relating to the protection of the purpose of investigations, commercial interests, legal advice and the decision-making process of the institutions)

In Case C-477/10 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 23 September 2010,

European Commission, represented by B. Smulders, P. Costa de Oliveira and V. Bottka, acting as Agents, with an address for service in Luxembourg,

applicant,

the other parties to the proceedings being:

Agrofert Holding a.s., established in Prague (Czech Republic), represented by R. Pokorný and D. Šalek, advokáti,

applicant at first instance,

Polski Koncern Naftowy Orlen SA, established in Płock (Pologne), represented by S. Sołtysiński, K. Michałowska and A. Krasowska Skowrońska, lawyers,

Kingdom of Denmark, represented by S. Juul Jørgensen, acting as Agent,

Republic of Finland,

Kingdom of Sweden, represented by K. Petkovska and S. Johannesson, acting as Agents,

Polski Koncern Naftowy Orlen SA, established in Płock (Poland), represented by S. Sołtysiński, K. Michałowska and A. Krasowska-Skowrońska, lawyers,

interveners at first instance,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász (Rapporteur), G. Arestis, T. von Danwitz and D. Šváby, Judges,

* Language of the case: English.

Advocate General: P. Cruz Villalón,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 8 September 2011,

after hearing the Opinion of the Advocate General at the sitting on 8 December 2011,

gives the following

Judgment

1 By its appeal, the European Commission seeks to have set aside the judgment of the General Court of the European Union of 7 July 2010 in Case T-111/07 *Agrofert Holding* v *Commission* ('the judgment under appeal'), annulling Commission Decision D (2007) 1360 of 13 February 2007 ('the contested decision') refusing access to the documents in Case COMP/M.3543 concerning the merger between the Polish company Polski Koncern Naftowy Orlen SA ('PKN Orlen') and the Czech company Unipetrol, pursuant to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the EC Merger Regulation') (OJ 2004 L 24, p. 1).

Legal context

2 Based in particular on Article 255(2) EC (now, after amendment, Article 15 TFEU), 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) lays down the principles, conditions and limits on the right of access to documents of those institutions.

3 Article 4 of that regulation, entitled 'Exceptions', is worded as follows:

'…

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

— commercial interests of a natural or legal person, including intellectual property,

— court proceedings and legal advice,

— the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. 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, shall 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.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall 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.

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

...

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

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.'

4 Article 17 of Regulation No 139/2004, headed 'Professional secrecy', reads as follows:

'1. Information acquired as a result of the application of this Regulation shall be used only for the purposes of the relevant request, investigation or hearing.

2. Without prejudice to Article 4(3), Articles 18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.

…'

5 Article 18(3) of that regulation provides:

'The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.'

6 Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 (OJ 2004 L 133, p. 1) was adopted under the power conferred by Article 23(1) of the latter regulation. Article 17 of Regulation No 802/2004, entitled 'Access to the file and use of documents', provides:

'1. If so requested, the Commission shall grant access to the file to the parties to whom it has addressed a statement of objections, for the purpose of enabling them to exercise their rights of defence. Access shall be granted after the notification of the statement of objections.

2. The Commission shall, upon request, also give the other involved parties who have been informed of the objections access to the file in so far as this is necessary for the purposes of preparing their comments.

3. The right of access to the file shall not extend to confidential information, or to internal documents of the Commission or of the competent authorities of the Member States. The right of access to the file shall equally not extend to correspondence between the Commission and the competent authorities of the Member States or between the latter.

4. Documents obtained through access to the file pursuant to this Article may only be used for the purposes of the relevant proceeding pursuant to Regulation (EC) No 139/2004.'

Background to the dispute and the decision refusing access to the documents

7 The judgment under appeal contains the following findings:

'1 By decision of 20 April 2005, the Commission … authorised, pursuant to Article 6(1)(b) [of Regulation No 139/2004], the planned acquisition, by way of purchase of shares, of the Czech company Unipetrol by the Polish company [PKN Orlen], which had been notified to the Commission on 11 March 2005.

2 By letter of 28 June 2006, the applicant, Agrofert Holding a.s. ("Agrofert"), requested the Commission to grant it access to all unpublished documents concerning the notification and pre-notification procedure in respect of the acquisition of Unipetrol by PKN Orlen, on the basis of Regulation No 1049/2001.

...

4 By letter of 2 August 2006, … the Commission's Directorate General (DG) "Competition" refused to grant the request for access to the documents. After pointing out that the request was general in nature, it expressed the view that the documents in question were covered by the exceptions laid down in Article 4(2) and (3) of Regulation No 1049/2001. It added that disclosure of documents originating from the notifying parties and from third parties would be contrary to the obligation of professional secrecy laid down in Article [339 TFEU] and Article 17(1) and (2) of [Regulation No 139/2004]. It also stated that partial access to the documents was not possible and that no argument capable of establishing the existence of an overriding public interest in disclosure had been adduced.

5 By letter of 18 August 2006, the applicant submitted a confirmatory application to the Commission ... It challenged the Commission's refusal, claiming, inter alia, that it should have been granted partial access to the requested documents. In addition, it asserted that there was an overriding public interest justifying disclosure of the documents in question, consisting in the damage which it and the minority shareholders of Unipetrol had suffered.

...

9 By [the contested decision], the Secretariat-General of the Commission confirmed the refusal to grant access to the documents in respect of the four categories of documents identified.

10 Firstly, the Commission takes the view that the documents exchanged between it and the notifying parties contain commercially sensitive information relating to the commercial strategies of the notifying parties, their sales volumes, their market shares or customer relations. Accordingly, the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001, concerning the protection of commercial interests, applies … It also refers to Article 17 of Regulation [No 139/2004] with regard to the obligation of professional secrecy … The Commission adds that, since the objective of the merger investigation procedures is to ascertain whether a notified operation does or does not give the notifying parties market power which is likely to have a significant effect on competition, all documents supplied by the notifying parties in the context of such a procedure necessarily relate to commercially sensitive information.

11 The Commission also takes the view that the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001, which concerns in particular the protection of investigations, is applicable here. According to the Commission, the parties involved in merger proceedings must be entitled to a legitimate expectation that sensitive information contained in the documents which they have provided will not be disclosed. The Commission takes the view that disclosure of the documents in question would undermine the climate of mutual trust between it and undertakings …

12 Secondly, the Commission is of the opinion that the documents exchanged between it and third parties come within the exceptions set out in the first and third indents of Article 4(2) of Regulation No 1049/2001 for the same reasons as those advanced in relation to the documents exchanged between it and the notifying parties.

…

14 Fourthly, the Commission identifies the following internal documents:

— … (Document 1);

— an inter-service consultation note enclosing a draft decision on the notification (Document 2);

— a reply from the Legal Service relating to the above consultation note (Document 3);

— an exchange of e-mails between the competent Commission service and the Legal Service on the draft decision (Document 4);

— replies to the above consultation note from the other Commission services concerned (Document 5);

— … (Document 6);

— … (Document 7).

15 [Documents 1, 6 and 7 were not the subject of the proceedings.]

16 With regard to Documents 2 to 5, the Commission takes the view that their disclosure would seriously undermine its decision-making process, within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001. It points to the collegiate nature of that decision-making process and emphasises the need to maintain trust within its services. According to the Commission, those documents reflect freely-expressed opinions and discussions within the services. Their disclosure in the present case would seriously jeopardise independent expression of opinions … In addition, it would reduce the willingness to cooperate on the part … of the undertakings affected by the notification and third parties.

17 The Commission is of the opinion that Documents 3 and 4 are also covered by the exception based on the protection of legal advice, laid down in the second indent of Article 4(2) of Regulation No 1049/2001 …

18 Finally, the Commission adds that there is no overriding public interest which could justify the disclosure of the documents requested in the present case and that it was also not possible to grant partial access. In that regard, it points out that, as the purpose of the Commission's investigation was to examine the market conditions surrounding the proposed merger … it was therefore not possible to identify the parts of the documents exchanged between it and the parties concerned "that do not contain non-commercial information or are not investigation-related and the reading of which in itself would make sense" … Finally, it refers to the fact that the published version of the decision on the merger in question contains, by definition, the information that could be disclosed and constitutes a partial access to the parts of the documents requested which are not covered by the applicable exceptions.'

The judgment under appeal

8 By application lodged on 13 April 2007, Agrofert requested the General Court to annul the contested decision and to order the Commission to provide it with the documents requested.

9 In paragraphs 39 to 41 of the judgment under appeal, the General Court rejected that second request as inadmissible, since, when it annuls an act of an institution, that institution is required, under Article 266 TFEU, to take the measures necessary to comply with the judgment.

10 The application for annulment of the contested decision was based principally on the plea in law alleging infringement of Regulation No 1049/2001. In support of that plea, Agrofert submitted that the application of the exceptions set out in Article 4(2) and (3) of that regulation to the documents in question was incorrect. The General Court examined each category of those documents in the light of each of the exceptions on which the contested decision was based.

The refusal of access to the documents exchanged between the Commission and the notifying parties and the Commission and third parties

The exception concerning the protection of commercial interests, laid down in the first indent of Article 4(2) of Regulation No 1049/2001

11 The General Court noted, firstly, in paragraphs 54 and 55 of the judgment under appeal, that the documents exchanged between the Commission and the notifying parties and between the Commission and third parties were likely to contain commercially sensitive information which could, where appropriate, be covered by the exception concerning the protection of commercial interests, laid down in the first indent of Article 4(2) of Regulation No 1049/2001.

12 Secondly, the General Court observed, at paragraphs 57 to 60 of the judgment under appeal, that, as the exceptions laid down in Article 4 of Regulation No 1049/2001 must be interpreted and applied strictly, the examination required for the purpose of processing a request for access to documents must be specific in nature and the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception. It follows from Article 4(1) to (3) of that regulation that all the exceptions mentioned therein are specified as being applicable to 'a document'. Consequently, only a concrete, individual examination of each document can enable the institution to assess the possibility of granting the applicants partial access.

13 However, according to paragraphs 61 to 64 of the judgment under appeal, it is not apparent from the grounds of the Commission decision that such an examination was indeed made. That decision states in a general and abstract manner that, given the nature of merger control proceedings, all the documents supplied by the notifying parties necessarily relate to commercially sensitive information. Such assertions are too vague and general and cannot therefore be regarded as demonstrating, to the requisite legal standard, that a concrete and effective examination of each document in question has been carried out in the present case. The General Court considered, at paragraph 65 of the judgment under appeal, that it was entirely possible, in the present case, to draw up a list of the documents exchanged between the Commission and the parties and to describe the content of each document without thereby revealing information which had to remain confidential.

14 In paragraphs 68 to 70 of the judgment under appeal, the General Court rejected the Commission's argument based on the obligation of professional secrecy and the protection of business secrets under Article 339 TFEU and Article 17 of Regulation No 139/2004. It considered that only certain information falls within the scope of business secrets and that the obligation of professional secrecy does not have such a scope that it can justify a general and abstract refusal of access. Since all the information gathered in the context of merger control proceedings are not necessarily covered by professional secrecy, the obligation of professional secrecy and the protection of business secrets, resulting from the above provisions, do not release the Commission from carrying out a concrete examination of each document in question as required by Article 4(2) of Regulation No 1049/2001. Also, according to paragraph 77 of the judgment under appeal, the fact that, in the context of merger control proceedings, the documents are sent by the parties as confidential documents, in accordance with Regulation No 139/2004, does not release the Commission from carrying out a concrete examination of each document in the context of a request for access under Regulation No 1049/2001.

15 The General Court considered, at paragraphs 73 to 76 of the judgment under appeal, that Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR') concerning the right to respect for private life, if it were to be assumed

that it could be invoked in the present case, cannot release the Commission from carrying out a concrete and effective examination of each document in question. In accordance with paragraphs 78 to 80 of the judgment under appeal, nor did the General Court accept, in the light of Article 2(3) of Regulation No 1049/2001, which enshrines public access to all documents held or received by an institution, that the documents provided in the context of merger control proceedings are manifestly covered by the exception laid down in the first indent of Article 4(2) of that regulation.

16 At paragraphs 81 to 89 of the judgment under appeal, the General Court also rejected the argument based on the legitimate expectation of PKN Orlen in the fact that documents provided in the context of merger control proceedings would not be disclosed, in accordance with Article 17 of Regulation No 139/2004. It held that that provision does not establish an absolute right to the confidentiality of all documents supplied by undertakings and held that the grounds relied on in support of the refusal of access to those documents should be examined solely within the framework of the exceptions laid down in Article 4 of Regulation No 1049/2001. It also held that Article 17(1) of Regulation No 139/2004 concerns only the manner in which the Commission may use the information supplied and does not govern the access to documents guaranteed by Regulation No 1049/2001.

The exception concerning the protection of the purpose of investigations, laid down in the third indent of Article 4(2) of Regulation No 1049/2001

17 The General Court accepted, at paragraphs 96 to 99 of the judgment under appeal, that documents lodged in the context of merger control proceedings related to an investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001 and pointed out that that provision must be interpreted as applying only if disclosure of the documents in question would endanger the completion of the investigation. In the present case, however, according to the General Court, the Commission's investigation which gave rise to the decision of 20 April 2005 not to object to the notified merger had already been completed when the contested decision was adopted. Therefore, disclosure of the documents could not jeopardise completion of the investigation. As regards the Commission's argument that disclosure of those documents would undermine the climate of mutual trust between the Commission and the undertakings and would compromise the merger control proceedings, the General Court objected, at paragraphs 100 to 103 of the judgment under appeal, that such considerations are very vague, general and hypothetical and do not support the view that the Commission's argument was valid in effect for each of the documents in question.

The refusal of partial access to the documents exchanged between the Commission and the notifying parties and between the Commission and third parties, based on the exception laid down in Article 4(6) of Regulation No 1049/2001

18 The General Court considered, at paragraphs 107 to 113 of the judgment under appeal, that, while Article 4(6) of Regulation No 1049/2001 does not require partial access to be possible in every case, that provision does, however, imply a concrete, individual examination of the contents of each document. Thus, an assessment of documents by reference to categories rather than on the basis of the actual information contained in those documents is insufficient. Consequently, the Commission's argument that all of the information supplied by the notifying parties and third parties is interlinked so that it was not possible to identify passages to which access could be granted must be rejected in so far as the Commission thus appears to presume on the whole, and without carrying out a concrete, individual examination of the contents of each document, that disclosure, even partial, of all the documents requested would undermine the interests protected.

19 In those circumstances, the General Court concluded, at paragraph 116 of the judgment under appeal, that the contested decision had to be annulled in so far as it refuses access to the documents exchanged, on the one hand, between the Commission and the notifying parties and, on the other,

between the Commission and third parties, since the Commission had failed to demonstrate to the requisite legal standard that disclosure of those documents would cause concrete and actual harm to the interests protected.

The refusal of access to legal advice, based on the exception laid down in the second indent of Article 4(2) of Regulation No 1049/2001

20 In the present case, this concerns the reply from the Commission's Legal Service regarding the inter-service consultation note (Internal Document 3) and the exchange of e-mails concerning the proposed merger between the competent service and the Legal Service (Internal Document 4). The General Court observed, at paragraph 123 of the judgment under appeal, that the exception provided for in the second indent of Article 4(2) of Regulation No 1049/2001 was intended to protect the institutions' interest in receiving frank, objective and comprehensive advice, but it was apparent from paragraphs 42 and 43 of the judgment in Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723 that the risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical.

21 The General Court stated, at paragraphs 125 to 128 of the judgment under appeal, that whilst it is, in principle, open to the Commission to base its decisions on general presumptions and general considerations which apply to certain categories of documents, it is, however, incumbent on the Commission, in accordance with the findings of the Court at paragraph 50 of its judgment in *Sweden and Turco* v *Council*, to establish in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose. In the contested decision, the Commission bases itself on a general consideration, without specifically ascertaining, for each of the legal opinions requested, whether that consideration was actually applicable to the facts of the present case. Thus the Commission fails to show how disclosure of the legal advice in question would, in the present case, constitute a genuine risk, reasonably foreseeable and not purely hypothetical, to the protection of that advice. Moreover, the General Court points out, at paragraphs 129 to 131 of the judgment under appeal, that openness also remains the principle where the Commission acts, as in the present case, as an administrative authority and not in its legislative capacity and that the obligation to carry out a concrete, individual examination is equally valid where the documents are very brief.

22 In those circumstances, the General Court concluded, at paragraph 132 of the judgment under appeal, that the refusal to grant access to the legal advice requested had to be annulled on the ground that the Commission had not shown that disclosure of those documents would specifically and effectively undermine the protection of legal advice.

The refusal of access to the Commission's internal documents, based on the exception relating to the protection of the decision-making process, laid down in the second subparagraph of Article 4(3) of Regulation No 1049/2001

23 In the present case, this relates to Internal Documents 2 to 5. The General Court noted, in accordance with paragraphs 138 to 139 of the judgment under appeal, that those documents are documents preparatory to the Commission's final decision containing advice and that they come within the scope of the exception provided for in the second indent of Article 4(3) of Regulation No 1049/2001, an exception which can be invoked even after the decision has been taken. At paragraphs 141 to 144 of the judgment under appeal, the General Court found that the application of that exception presupposes none the less that it has been demonstrated that access to the documents requested was likely specifically, actually and seriously to undermine protection of the decision-making process of the institution concerned and that that risk was reasonably foreseeable and not purely hypothetical. However, the Commission's assertion that disclosure of the documents requested would seriously

undermine protection of the institution's decision-making process, given the collective nature of that process, was put forward in a general and abstract manner, without being substantiated by detailed arguments based on the content of the documents in question.

24 The General Court noted, at paragraph 46 of the judgment under appeal, that the Commission based its findings on the nature of the documents requested rather than on the items of information actually contained therein, when such findings should have been based on a concrete, effective examination of each document requested. It also rejected the Commission's argument based on trust and the freedom of expression of its services, considering those assertions to be too hypothetical. The General Court concluded from the foregoing, at paragraph 147 of the judgment under appeal, that the fact that opinions were expressed by the Commission's services in the context of merger control proceedings does not, in principle, justify application of the exception in question to all the internal documents which contain such opinions.

25 In those circumstances, the General Court concluded, at paragraph 150 of the judgment under appeal, that the Commission had not demonstrated to the requisite legal standard that the exception laid down in the second subparagraph of Article 4(3) of Regulation No 1049/2001 applied to the internal documents requested.

26 On the basis of all those considerations, the General Court held, at paragraph 154 of the judgment under appeal, that the contested decision should be annulled.

Forms of order sought by the parties to the appeal

27 The Commission contends that the Court of Justice should:

— set aside the judgment under appeal;

— give a final ruling on the questions which form the subject-matter of the present appeal; and

— order Agrofert to pay the costs of both sets of proceedings.

28 Agrofert contends that the Court should:

— dismiss the appeal in its entirety; and

— order the Commission to pay the costs.

29 The Kingdom of Sweden contends that the Court should:

— dismiss the appeal; and

— order the Commission to bear the costs incurred by the Kingdom of Sweden.

30 PKN Orlen asks the Court to:

— set aside the judgment under appeal;

— give a final ruling on the questions forming the subject-matter of the present appeal; and

— order Agrofert to pay the costs incurred by PKN Orlen in both sets of proceedings.

Appeal

The Commission's arguments

31 The Commission observes, as a preliminary point, that, in the judgment under appeal, the General Court did not seek to establish a genuine and harmonious balance between the legal regimes introduced by Regulation No 139/2004 and Regulation No 1049/2001, which are relevant to the present case, and thus rendered inapplicable the merger control rules on confidentiality of documents.

First plea in law: erroneous interpretation of Regulation No 1049/2001 due to the failure to take into account certain provisions of Regulation No 139/2004 for the purposes of the interpretation of the exceptions provided for in Article 4 of Regulation No 1049/2001

32 The Commission reiterates its argument before the General Court, namely that Article 339 TFEU and Article 17 of Regulation No 139/2004, which contain the obligation to respect professional secrecy, are relevant for the purposes of the interpretation and application of the exceptions to the right of access provided for by Regulation No 1049/2001, in order to preserve the unity of the Union's legal order by a coherent and harmonious interpretation of the various legal instruments.

33 It submits that, although Regulation No 1049/2001 is a rule of general application, the limits to the right of access are none the less drafted in broad terms and must therefore be interpreted so as to protect the legitimate interests, public or private, in all the spheres of activity of the institutions, including, *a fortiori*, when those interests benefit from explicit protection in accordance with other provisions of Union law. That is confirmed by the judgments in Case C-28/08 P *Commission* v *Bavarian Lager* [2010] ECR I-6055, paragraphs 58, 59, 64 and 65, and Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-5885, paragraphs 61 and 63, in which the Court of Justice rejected the interpretation of Regulation No 1049/2001 given by the General Court on the ground that, in the cases giving rise to those judgments, it failed to take account of other equally applicable legal acts. Similarly, in Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others* v *API and Commission* [2010] ECR I-8533, paragraph 84, the Court of Justice confirmed the need for harmonious interpretation of the applicable law.

34 The conclusion of the General Court in the judgment under appeal creates conflict between the applicable legal rules. Regulation No 139/2004 imposes far-reaching binding obligations on the undertakings involved in merger proceedings to provide information and reveal business secrets. These obligations are, however, counterbalanced by the provisions of that regulation introducing guarantees of increased protection. Those guarantees aim, on the one hand, to ensure the proper functioning of the system of control of concentrations in the public interest and, on the other hand, to safeguard the legitimate interests of the undertakings concerned that the information they provide to the Commission is used only for the purposes of the investigation.

35 Referring to Article 28 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1), the Commission points out that the obligation to respect the business secrecy of undertakings, which applies throughout the field of competition, is also intended to protect the undertakings' rights of defence, which form part of the fundamental principles of Union law and are enshrined in Article 6 of the ECHR, in accordance with the finding of the Court in paragraph 299 of its judgment in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375. Moreover, the information submitted to the Commission by the undertakings party to merger proceedings must be regarded as forming part of their private sphere of activity within the meaning of Article 8 of the ECHR. As those undertakings may be obliged to submit their information to the Commission, the conditions laid down by that article should be respected.

36 Within the framework established by Regulation No 139/2004, the right of access to the file is open only to the parties directly involved in the procedure and, if necessary, to other natural or legal persons showing a sufficient interest. Any other applicant not demonstrating such an interest would be refused access to the documents. However, according to the General Court's interpretation, such an applicant has, in principle, on the basis of Regulation No 1049/2001, a right to unconditional access to each of the documents concerned and could, furthermore, freely use those documents for whatever purpose. That would be in clear contradiction with Regulation No 139/2004. Thus, the General Court committed an error of law in finding, at paragraph 88 of the judgment under appeal, that the obligation under Regulation No 139/2004 to limit the use of the information acquired in that regard to the purposes of the request concerns only the manner in which the Commission may use the information supplied and does not govern the access to documents guaranteed by Regulation No 1049/2001.

37 The Commission claims that, as regards documents relating to the merger control proceedings, the considerations developed by the Court in paragraphs 54, 55, 61 and 62 of the judgment in *Commission* v *Technische Glaswerke Ilmenau*, given on the procedures relating to State aid, should be applied by analogy, and that it must be recognised that the existence of a general presumption that the disclosure of documents exchanged for the sole purpose of the merger procedure, which are not accessible to persons who do not justify a sufficient interest in the procedure, is, in principle, contrary to the protection of the purpose of investigations. Therefore, the General Court made an error in law by failing to give consideration to the provisions of Regulation No 139/2004 and by conferring primacy on Regulation No 1049/2001 over other legal rules of the Union, which amounts to suppressing the effectiveness of the crucial rules for the correct operation of the system of merger control. The Commission also refers, in this respect, to paragraph 56 of the judgment in *Commission* v *Bavarian Lager*.

Second plea in law: erroneous interpretation of Article 4(2) and (3) of Regulation No 1049/2001

– First head: the obligation to carry out a concrete and individual examination of each document

38 The Commission points out that, according to the General Court, the institution concerned must carry out a concrete and individual examination of each document referred to in an application for access, even if it is clear that a request for access refers to documents covered by an exception. That obligation is said to apply to all the exceptions referred to in Article 4(1) to (3) of Regulation No 1049/2001, regardless of the field to which the requested documents belong and whatever the specific nature of that field. Thus, the General Court does not take account of the rules applicable to the merger control procedure, whereas the Court of Justice, based on the specific characteristics of the State aid control procedure, recognised in *Commission* v *Technische Glaswerke Ilmenau* the existence of a general presumption that the public disclosure of the documents in the file would jeopardise, in principle, the protection of the purposes of the investigation, so that in accordance with that presumption, it was appropriate to refuse access to all the requested documents in that case. The Commission considers that the same conclusion should be reached in the present case.

– Second head: the exception relating to the protection of the purpose of investigations, laid down in the third indent of Article 4(2) of Regulation No 1049/2001

39 As regards the General Court's position that that exception can no longer be invoked once the merger decision is adopted and the administrative procedure is terminated, the Commission replies that, in a merger control procedure, the exceptions for the protection of commercial interests and of the purpose of investigations are narrowly intertwined and the information provided does not lose its confidential nature when the administrative procedure is over. Moreover, under Article 4(7) of Regulation No 1049/2001, commercial interests may be protected even after 30 years. Any other

approach would have very negative consequences on the willingness of undertakings to cooperate with the Commission. Pointing out that, in accordance with the wording of the provision in question, the exception at issue is intended to protect 'the *purpose* of investigations' and not simply the activities of investigation, the Commission submits that the general presumption established in *Commission* v *Technische Glaswerke Ilmenau* must apply even after a merger decision has become definitive.

– Third head: the exception relating to the protection of commercial interests, laid down in the first indent of Article 4(2) of Regulation No 1049/2001

40 This exception relates to documents exchanged between the Commission and the notifying parties and between the Commission and third parties. The Commission restates its position that merger control rules require the transmission to it of a great deal of highly confidential information, which is obviously covered by the obligation of professional secrecy enshrined in Article 339 TFEU and Article 17 of Regulation No 139/2004. That consideration is sufficient to refute the approach adopted by the General Court, namely that it is appropriate to determine, by an individual examination of each document concerned, whether its disclosure is likely specifically and actually to harm the interests protected.

– Fourth head: the exception relating to the protection of the decision-making process, laid down in the second subparagraph of Article 4(3) of Regulation No 1049/2001

41 This exception is relied on in connection with Internal Documents 2 to 5. The Commission points out that Article 17(3) of Regulation No 802/2004 expressly excludes internal documents from the right of access to the file when it is granted to the parties in the procedure for the purposes of the exercise of their right of defence. The restriction on access to those documents is explained by the nature of the procedure and by the collegial nature of the decision-making process of the Commission, which requires that the members of the College of Commissioners have all the information necessary at their disposal to adopt a decision in the public interest. If the Commission services had to take account of the risk of disclosure, it is likely that they would feel less free to highlight any weaknesses in a draft decision or to express divergent opinions, which would undermine the decision-making process. For that reason, such documents should not be accessible, even after the merger decision has become definitive. Furthermore, the General Court's interpretation of Regulation No 1049/2001 would confer greater rights on the public than on the parties directly concerned by the merger control procedure.

– Fifth head: the exception relating to the protection of legal advice, laid down in the second indent of Article 4(2) of Regulation No 1049/2001

42 This exception is raised specifically in connection with Internal Documents 3 and 4. The Commission notes that those two opinions were concretely and individually examined, after which it came to the conclusion that, in any event, they were covered in their entirety by this exception. The Commission then examined the existence of any overriding public interest in disclosure of those same documents and came to the conclusion that, in the present case, the interest was clearly a private interest, in so far as the applicant invoked 'the damage suffered by the applicant and minority shareholders of Unipetrol'.

The arguments of the other parties

43 Agrofert, the applicant in the proceedings before the General Court, submits that *Commission* v *Technische Glaswerke Ilmenau* is irrelevant in this case as it concerns the State aid procedure, which regulates access to the file in a different manner. Agrofert supports the General Court's approach that the fact that a document concerns an interest protected by an exception laid down in Article 4(2) and

(3) of Regulation No 1049/2001 cannot of itself justify application of that exception. Therefore, the Commission should have examined the request for disclosure in the light of the information contained in each requested document and not in general.

44 PKN Orlen, which intervened in support of the Commission in the proceedings before the General Court, observes that it cooperated with the Commission with full confidence that the documents containing business secrets submitted to that institution and all other communications exchanged in the course of the merger control proceedings were to be used solely for the purposes of the investigation and would not be disclosed to third parties. It was fully justified in having that confidence on the basis, in particular, of Regulation No 139/2004. European Union law cannot offer guarantees of protection of information and documents under one regulation and, on the basis of another, render that protection ineffective. The nature of the information provided does not change once the merger proceedings are complete. Allowing public access to the file after the proceedings are concluded would mean that the considerations which lie at the basis of the protection of the investigation process are totally circumvented.

45 The Kingdom of Sweden, which intervened in the proceedings before the General Court in support of Agrofert, submits that, under Regulation No 1049/2001, access to documents is the general rule. Therefore, exceptions to that general rule are to be interpreted strictly. Details of the procedure which the institutions should follow in response to a request for access were set out by the Court in *Sweden and Turco* v *Council*, in which it describes the three stages which should normally be used to determine whether a request for access can be accepted. However, the General Court correctly observed, in the judgment under appeal, that the Commission had not complied with all the stages of the examination.

46 The Kingdom of Sweden submits that the fact that there are different rules on access to documents in specialised legislation does not mean that those rules, the objective of which is quite different from that of the exceptions provided for in Regulation No 1049/2001, must automatically take precedence over the provisions of the latter, because such an interpretation would render Regulation No 1049/2001 meaningless. Accordingly, the scope of *Commission* v *Technische Glaswerke Ilmenau* is clearly limited to the area of State aid. In conclusion, not all information acquired is covered by an absolute obligation of professional secrecy, and a refusal to grant access to documents can be based only on the exceptions laid down in Regulation No 1049/2001.

Findings of the Court

47 By way of a preliminary point, it should be noted that, in the contested decision, the Commission drew a distinction between, on the one hand, the documents that that institution had exchanged with the notifying parties and with third parties in the context of the merger control proceedings at issue, which are covered by the first and third indents of Article 4(2) of Regulation No 1049/2001, relating to the protection of commercial interests and to the protection of the purpose of investigations, as well as by Article 17 of Regulation No 139/2004, and, on the other hand, the internal documents, prepared by the Commission's services in the context of this merger transaction, which fall within the second indent of Article 4(2) and the second subparagraph of Article 4(3) of Regulation No 1049/2001, relating respectively to the protection of legal advice and the protection of the institution's decision-making process.

48 That distinction between the documents exchanged by the Commission with the notifying parties or with third parties, on the one hand, and the internal documents, on the other hand, was adopted by that institution in its defence submitted at first instance and also by the General Court in the judgment under appeal. Furthermore, the same categorisation of the documents concerned constitutes the framework of the Commission's reasoning in its appeal. Consequently, the Court's findings will also be based on that same distinction.

The refusal of access to the documents exchanged between the Commission and the notifying parties and between the Commission and third parties

49 By its first plea in law, as well as by the first to third heads of the second plea of its appeal, the Commission, in essence, criticises the General Court for not having taken into consideration the relevant provisions of Regulation No 139/2004 concerning access to the documents in proceedings for the control of a merger between undertakings when it interpreted the exceptions provided for in the first and third indents of Article 4(2) of Regulation No 1049/2001 concerning, respectively, the protection of commercial interests and the protection of the purposes of investigations.

50 In the light of the case-law of the Court of Justice concerning the relationship between Regulation No 1049/2001 and certain specific rules of European Union law, established in particular by the judgments in *Commission* v *Bavarian Lager*, *Commission* v *Technische Glaswerke Ilmenau* and *Sweden and Others* v *API and Commission*, that complaint is well founded.

51 The present case concerns the relationship between Regulation No 1049/2001 and another regulation, Regulation No 139/2004, which governs a specific area of Union law. Those two regulations have different objectives. The first regulation is designed to ensure the greatest possible transparency of the decision-making process of public authorities and of the information on which they base their decisions. It is thus designed to facilitate as far as possible the exercise of the right of access to documents and to promote good administrative practices. The second regulation is designed to ensure respect for professional secrecy in merger control proceedings between undertakings with a Community dimension.

52 Those regulations do not contain a provision expressly giving one regulation primacy over the other. Therefore, it is appropriate to ensure that each of those regulations is applied in a manner which is compatible with the other and which enables a coherent application of them.

53 In accordance with the Court's case-law, although Regulation No 1049/2001 is designed to confer on the public as wide a right of access to the documents of the institutions as possible, that right is, nevertheless, subject, in the light of the exceptions laid down in Article 4 of that regulation, to certain limits based on reasons of public or private interest (see, to that effect, *Commission* v *Technische Glaswerke Ilmenau*, paragraph 51).

54 In the present case, the request submitted by Agrofert concerns all the unpublished documents relating to the merger control proceedings at issue. The Commission had refused to deliver to Agrofert the documents relating to those proceedings that had been exchanged between it and the notifying parties or third parties, by invoking the exception to the right to access provided for in the first and third indents of Article 4(2) of Regulation No 1049/2001, relating, respectively, to the protection of commercial interests and to that of the purpose of investigations.

55 In that respect, it must be noted that an institution of the European Union, when assessing a request for access to documents held by it, may take into account more than one of the grounds for refusal provided for in Article 4 of Regulation No 1049/2001.

56 It is not disputed that the documents at issue do in fact fall within the scope of an investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001. Furthermore, in the light of the objective of the merger control proceedings, which consists in verifying whether a transaction gives the notifying parties market power which would significantly impede effective competition, the Commission gathers, in those proceedings, commercially sensitive information relating to the commercial strategies of the undertakings involved, their sales figures, market shares or customer relations, with the result that access to the documents of such proceedings may undermine the protection of commercial interests of those undertakings. Therefore, the exceptions relating to the protection of commercial interests and to that of the purpose of investigations are, in the present case, closely connected.

57 Certainly, in order to justify refusing access to a document, it is not sufficient, in principle, for the document to fall within an activity or an interest referred to in Article 4(2) of Regulation No 1049/2001; the institution concerned must also explain how access to that document could specifically and actually undermine the interest protected by an exception laid down in that article. However, it is open to that institution to base its decisions in that regard on general presumptions which apply to certain categories of documents, as similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature (*Commission* v *Technische Glaswerke Ilmenau*, paragraphs 53 and 54, and the case-law cited).

58 As regards procedures for reviewing State aid, the Court has held that such general presumptions may arise from Council Regulation (EC) No 659/1999 of 22 March 1999 laying down rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1), which specifically regulates the field of State aid and which contains provisions concerning access to information and to documents obtained in the context of the investigation and aid review proceedings (see, to that effect, *Commission* v *Technische Glaswerke Ilmenau*, paragraphs 55 to 57).

59 Such general presumptions are applicable to merger control proceedings, because the legislation which governs those proceedings also provides for strict rules regarding the treatment of information obtained or established in the context of such proceedings.

60 Articles 17 and 18(3) of Regulation No 139/2004, as well as Article 17 of Regulation No 802/2004, restrict the use of information gathered in the context of merger control proceedings by limiting access to the file to the 'parties directly involved' or to 'other involved parties', subject to the legitimate interest of the undertakings concerned in the non-disclosure of their business secrets, and by requiring that the information gathered is used only for the purposes of the relevant request, review or hearing and that information which, by its nature, is covered by the obligation of professional secrecy is not disclosed.

61 It is true that the right to consult the administrative file in the context of merger control proceedings and the right of access to documents pursuant to Regulation No 1049/2001 are legally distinct, but the fact remains that they lead to a comparable situation from a functional point of view. Whatever the legal basis on which it is granted, access to the file enables the interested parties to obtain all the observations and documents submitted to the Commission (see, to that effect, *Commission* v *Technische Glaswerke Ilmenau*, paragraph 59).

62 In those circumstances, generalised access, on the basis of Regulation No 1049/2001, to the documents exchanged in the context of such a procedure, between the Commission and the notifying parties or third parties would, as the Commission pointed out, jeopardise the balance which the Union legislature wished to ensure in the EC merger regulation between the obligation on undertakings to communicate possibly sensitive commercial information to the Commission in order that it may assess the compatibility of the proposed transaction with the common market, on the one hand, and the guarantee of increased protection, by virtue of the requirement of professional and business secrecy, for the information so provided to the Commission, on the other hand.

63 If persons other than those authorised to access the file by the merger control legislation, or those who could be considered as involved parties but who did not use their right of access to the information or who have been refused access, were able to obtain access to the documents on the basis of Regulation No 1049/2001, the scheme instituted by that legislation would be undermined.

64 Consequently, for the purpose of the interpretation of the exceptions under the first and third indent of Article 4(2) of Regulation No 1049/2001, the General Court ought to have acknowledged the existence of a general presumption that the disclosure of the documents concerned undermines, in principle, the protection of the commercial interests of the undertakings involved in the merger and also the protection of the purpose of investigations relating to the control proceedings (see, to that effect, *Commission* v *Technische Glaswerke Ilmenau*, paragraph 61).

65 The finding, by the General Court, at paragraph 88 of the judgment under appeal, that the obligation under Regulation No 139/2004 to limit the use of the information obtained by the undertakings in the context of merger control proceedings concerns only the manner in which the Commission may use that information and does not govern the access to documents guaranteed by Regulation No 1049/2001, is also wrong in law.

66 In view of the nature of the interests protected in the context of merger control proceedings, the conclusion drawn at paragraph 64 of the present judgment applies regardless of whether the request for access concerns control proceedings which have already been closed or proceedings which are pending. The publishing of sensitive information concerning the economic activities of the undertakings involved is liable to undermine their commercial interests irrespective of whether the proceedings are pending. Furthermore, the prospect of such a publication after the review procedure is closed could jeopardise the willingness of undertakings to cooperate when such proceedings are pending.

67 It should be noted, moreover, that, under Article 4(7) of Regulation No 1049/2001, the exceptions concerning commercial interests or sensitive documents may apply for a period of 30 years and possibly beyond that period if necessary.

68 The abovementioned general presumption does not exclude the possibility of demonstrating that a given document, of which disclosure is sought, is not covered by that presumption or that there is a higher public interest justifying the disclosure of that document under Article 4(2) of Regulation No 1049/2001 (*Commission* v *Technische Glaswerke Ilmenau*, paragraph 62).

69 In the light of the foregoing considerations, it must be concluded that the General Court erred in its interpretation of the first and third indents of Article 4(2) of Regulation No 1049/2001, by failing to take into consideration the system for the regulation of access to documents in the context of merger control proceedings and by wrongly holding, in essence, at paragraphs 63, 64, 66, 80, 101, 103, 104 and 110 to 114 of the judgment under appeal, that it was not obvious in this case that it was appropriate to refuse access to the documents exchanged between the Commission and the notifying parties and the Commission and the third parties, referred to in the request for access made by Agrofert on the basis of Regulation No 1049/2001, without first carrying out a concrete, individual examination of those documents.

70 Consequently, the first plea in law and the first to third heads of the second plea in law in the appeal must be upheld, and the judgment under appeal must be set aside in so far as it annulled the contested decision concerning the refusal of access to the documents exchanged between the Commission and the notifying parties and between the Commission and third parties.

The refusal of access to the Commission's internal documents

71 This refusal of access concerns the documents identified under numbers 2 to 5 of the list submitted by the Commission and as set out in paragraph 14 of the judgment under appeal (see paragraph 7 of the present judgment).

72 The Commission's position in respect of those documents, as is apparent from both the contested decision and its defence before the General Court, as well as from the fourth and fifth heads of the second plea in law of its appeal, is based on the argument that the refusal of access to those documents is justified on the basis of the exception relating to the protection of the decision-making process, within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001 and, in addition, as regards Document 3 and Document 4, on the basis of the exception relating to the protection of legal advice, pursuant to the second indent of Article 4(2) of that regulation.

73 In the present case, it is not disputed that the internal documents to which access is sought all fall within the scope of the exception based on the protection of the decision-making process of the institution and that two of those documents, namely Document 3 and Document 4, also fall within the scope of the exception concerning the protection of legal advice. It is also common ground that,

at the time of the submission of the request for access to the documents, the merger control proceedings to which those documents relate had been closed and that the relevant Commission Decision had become final.

74 In that respect, it must be noted that, in a case where, at the time of the request for access to internal documents prepared in the context of merger control proceedings, the Commission's decision on the transaction at issue had been annulled by a judgment of the General Court which had the force of *res judicata* in the absence of an appeal against it, and where the Commission had not, following this annulling judgment, resumed its investigation for the purpose of the possible adoption of a new decision relating to the transaction, the Court, in its judgment in Case C-506/08 P *Sweden* v *MyTravel and Commission* [2011] ECR I-6237 ('*MyTravel*'), held, in essence, that in order to be able to refuse access to such an internal document, the institution concerned is obliged to carry out a concrete, individual examination of the document at issue and to provide specific reasons for which it considers that its disclosure would concretely and actually undermine the interest protected by the second subparagraph of Article 4(3) or by the second indent of Article 4(2) of Regulation No 1049/2001.

75 Such a solution also applies in a situation, such at that in the present case, where the request for access to internal documents was submitted when the Commission decision closing the merger control proceedings to which the documents relate had become definitive in the absence of an appeal against that decision.

76 In such a case, it is for the Commission to set out, in the decision to refuse access, the specific reasons, supported by detailed evidence, having regard to the actual content of the various documents sought, from which it may be concluded that the disclosure of those documents would seriously undermine that institution's decision-making process (see, to that effect, *MyTravel*, paragraphs 81, 82, 89, 90, 98, 102 and 103).

77 It is important to note in that respect that the reliance on the exception laid down by the second subparagraph of Article 4(3) of Regulation No 1049/2001 after a decision has been taken is subject to strict conditions (see, to that effect, *MyTravel*, paragraphs 78 to 80). Indeed, it only covers certain types of documents and the condition justifying refusal is that the disclosure would 'seriously' undermine the institution's decision-making process.

78 Concerning reliance on the exception relating to the protection of legal advice, particular importance should also be attached to the fact that, in the present case, the Commission's decision had become definitive and that no further action concerning the legality of that decision could be envisaged before the Union judicature. In such circumstances, the institution concerned was under a duty to explain how access to that document was likely actually and specifically, and not on the basis of general and abstract considerations, to undermine the interest protected by that exception (see, by analogy, *MyTravel*, paragraphs 110, 115 and 117).

79 In the light of the foregoing, it must be concluded that, in the present case, the General Court did not err in law in holding, in essence, at paragraphs 120 to 132 and 137 to 147 of the judgment under appeal, that the Commission should have demonstrated that access, including partial access, to each of the internal documents sought was liable specifically, actually and seriously to undermine protection of its decision-making process and that, more particularly, the disclosure of the documents containing legal advice would pose a reasonably foreseeable and not purely hypothetical risk to the protection of that advice.

80 Consequently, the fourth and fifth heads of the second plea in law of the appeal must be rejected.

The action before the General Court

81 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court, where the judgment under appeal has been set aside, may give judgment in the matter where the state of the proceedings so permits. Such is the position in the present case as regards the dispute concerning the refusal of access to the documents covered by the part of the judgment under appeal which must be set aside by the present judgment.

82 The Court possesses all the information necessary for it to give final judgment on Agrofert's pleas in law directed against the Commission's refusal, in reliance on the exceptions based on the protection of commercial interests and the objectives of investigations, to grant access to the documents which it had exchanged with the notifying parties and with third parties.

83 As regards the application of those exceptions, Agrofert had claimed, firstly, in its action before the General Court, that the first and third indents of Article 4(2) of Regulation No 1049/2001 must be interpreted as meaning that the institution concerned is obliged to undertake a concrete and individual examination of each of the documents covered in the application for access, that all the documents and all the information contained therein are not covered by those exceptions and that, consequently, only access to certain passages of a document could be refused. Furthermore, the Commission wrongly relied on Article 17 of Regulation No 139/2004.

84 As is apparent, in particular from paragraphs 57 to 67 of the present judgment, the first and third indents of Article 4(2) of Regulation No 1049/2001, interpreted in the light of the specific legislation on merger control proceedings, enables the Commission to apply a general presumption that the disclosure of the documents exchanged with the notifying parties and with third parties in the context of such control proceedings undermines, in principle, the protection of the commercial interests involved and the protection of the purpose of investigations relating to those proceedings, without the Commission being obliged to carry out a concrete and individual examination of those documents. Consequently, that argument of Agrofert must be rejected.

85 Secondly, Agrofert claimed before the General Court that an overriding public interest requires that the requested documents be disclosed, the interest in the present case being represented by the prejudice that that party would suffer as a minority shareholder in Unipetrol, acquired by PKN Orlen in the context of the merger at issue.

86 In that regard, although, indeed, as is apparent from paragraph 68 of the present judgment, the abovementioned general presumption does not exclude the right, for the interested party, to demonstrate the existence of an overriding public interest justifying the disclosure of the documents sought, it is important to note that the interest to which Agrofert refers does not constitute an overriding public interest, within the meaning of Article 4(2) of Regulation No 1049/2001. Therefore, that line of argument is unfounded.

87 The other arguments raised by Agrofert at first instance are also unfounded.

88 The alleged infringement of the second paragraph of Article 1 TEU is not distinct from the plea alleging a wrongful application of the exceptions referred to in Article 4(2) of Regulation No 1049/2001. The principle of openness stated in a general manner in the second paragraph of Article 1 TEU is crystallised by that regulation.

89 The plea alleging maladministration in the treatment of the request for access, by which Agrofert criticises the Commission for having failed to meet the prescribed time-limits for responding to its confirmatory application, is ineffective. Given that the Commission responded to that application before Agrofert had drawn any inferences from the lack of response within the period provided for under Article 8(3) of Regulation No 1049/2001, that delay does not taint the Commission's decision with unlawfulness justifying its annulment.

90 Consequently, the Court must dismiss the action brought by Agrofert before the General Court, seeking annulment of the contested decision in so far as it refuses access to the documents exchanged between the Commission and the notifying parties and between the Commission and third parties in the context of the proceedings concerning the merger between PKN Orlen and Unipetrol.

Costs

91 Under the first paragraph of Article 122 of the Rules of Procedure of the Court of Justice, where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

92 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In accordance with Article 69(3) of the Rules, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs. The first paragraph of Article 69(4) of the Rules provides that the Member States which have intervened in the proceedings are to bear their own costs and, under the third subparagraph of this provision, the Court may decide that another intervening party should bear its own costs.

93 Since the Commission has been partly unsuccessful and since Agrofert's action has been partly dismissed, the parties must bear their own costs incurred both at first instance and in this appeal.

94 PKN Orlen and the Kingdom of Sweden are to bear their own costs.

On those grounds, the Court (Third Chamber) hereby:

1. **Annuls paragraph 2 of the operative part of the judgment of the General Court of the European Union of 7 July 2010 in Case T-111/07 *Agrofert Holding* v *Commission* in so far as it annuls Commission Decision D (2007) 1360 of 13 February 2007 refusing access to the documents of Case COMP/M.3543 concerning the merger between Polski Koncern Naftowy Orlen SA and Unipetrol, exchanged between the Commission and the notifying parties and between the Commission and third parties;**

2. **Annuls paragraph 3 of the operative part of that judgment;**

3. **Dismisses the appeal as to the remainder;**

4. **Dismisses the action brought by Agrofert Holding a.s. before the General Court of the European Union seeking the annulment of Commission Decision D (2007) 1360 of 13 February 2007 refusing access to the documents in Case COMP/M.3543 concerning the merger between Polski Koncern Naftowy Orlen SA and Unipetrol, exchanged between the Commission and the notifying parties and between the Commission and the third parties;**

5. **Orders the European Commission and Agrofert Holding a.s. to bear their own costs both at first instance and in this appeal;**

6. **Orders Polski Koncern Naftowy Orlen SA and the Kingdom of Sweden to bear their own costs.**

[Signatures]