Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 22 May 2014[1]

Case C-127/13 P

Guido Strack
v

European Commission

(Appeals — Regulation (EC) No 1049/2001 — Access to documents of the institutions — Protection of personal data — Application relating to a very long document or to a very large number of documents)

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I – **Introduction**

1. A general right of access to documents has existed in EU law for over 20 years; Regulation No 1049/2001 [2] has applied for more than ten years. Despite this, an astonishingly large number of issues of practical significance still remain unresolved.

2. In the present case the Commission takes issue with the time-limits laid down, whereas the applicant objects to the Commission's disregard of its obligations and complains that the process of judicial protection takes so long. Furthermore, the two appeals relate inter alia to the questions whether the regulation requires the Commission to draw up a document for publication in certain circumstances, whether an ongoing case before the General Court may be assigned to another Chamber or to another judge-rapporteur, to what extent the Commission must prove that particular documents requested do not exist, and how the exception for the protection of personal information is to be applied.

II – **Legal context**

3. Article 42 of the Charter of Fundamental Rights of the European Union ('the Charter'), Article 15(3) TFEU and Article 2(1) of Regulation No 1049/2001 establish a right of access to documents of the institutions.

4. Article 2(3) of Regulation No 1049/2001 contains a provision concerning the scope of the regulation:

'This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.'

5. The term 'document' is defined in Article 3(a) of Regulation No 1049/2001 as follows:

'any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility'.

6. With regard to the substance of the case, the parties to the proceedings are in dispute in particular about the exception for reasons of data protection provided for in Article 4(1)(b) of Regulation No 1049/2001:

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

(a) …

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.'

7. In addition, the first indent of Article 4(2) of Regulation No 1049/2001 guarantees the protection of commercial interests unless there is an overriding public interest in the disclosure of the document.

2 — 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).

8. Furthermore, Article 6(3) of Regulation No 1049/2001 provides as follows in relation to the handling of lengthy applications:

'In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.'

9. Articles 7 and 8 of Regulation No 1049/2001 govern the procedure for the handling of applications for access, and in particular the related time-limits. Article 7 relates to the processing of initial applications:

'1. An application for access to a document shall be handled promptly. An acknowledgment of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.

3. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advanced and that detailed reasons are given.

4. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application.'

10. Article 8 of Regulation No 1049/2001 is concerned with the processing of confirmatory applications:

'1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

3. Failure by the institution to reply within the prescribed time-limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.'

III – **Facts and procedure before the General Court**

11. On 20 June 2007, Mr Strack applied to the Commission for access to

— all documents relating to confirmatory applications for access to documents refused by the Commission since 1 January 2005;

— an extract from the register established by the Commission pursuant to Article 11 of Regulation No 1049/2001 relating to decisions refusing confirmatory applications prior to 1 January 2005; and

— all documents in connection with Case T-110/04 *Sequeira Wandschneider* v *Commission*.[3]

12. The Commission informed him on 25 July 2007 by a decision dated the previous day that his application was registered on 3 July 2007. That notification stated that the decision on some of the documents covered by the first part of the application would rest with OLAF. The remainder of the documents covered by that part of the application would be communicated to him by the General Secretariat in anonymous form, but — given the great number of them — those documents could not be anonymised within the time-limits laid down. The Commission could not accommodate the second part of the application because decisions refusing confirmatory applications were not recorded in the register prior to 1 January 2005. The Commission initially refused access to the documents in connection with Case T-110/04, and — in response to the confirmatory application by Mr Strack — later informed him that it was unable to comply with the time-limit applicable to the decision on that application.

13. On 12 October 2007, Mr Strack instituted proceedings before the General Court against the implied refusal of his confirmatory application.

14. Subsequently, OLAF adopted a decision concerning the part of the application relating to it on 23 October 2007, and the Commission adopted four express decisions: two decisions on 28 November 2007, one on 15 February 2008 and one on 9 April 2008. Following those decisions, access was granted to a considerable number of documents, although parts of them were blanked out in order to ensure the protection of personal information or commercial interests.

15. By his reply of 23 July 2008, Mr Strack extended the scope of his action to cover those decisions.

16. The General Court upheld his action in part by the judgment under appeal. Mr Strack lodged the present appeal and the Commission then submitted a cross-appeal.

IV – **Forms of order sought**

17. Mr Strack now claims that the Court should:

(1) set aside the judgment of the General Court of the European Union (Fourth Chamber) of 15 January 2013 in Case T-392/07 in so far as the form of order sought by the applicant was not granted, or was not granted in full;

(2) grant the form of order sought by the applicant in Case T-392/07;

(3) dismiss the cross-appeal in its entirety;

(4) order the Commission to pay all the costs of the proceedings; and

(5) in the alternative, also annul the decision of the President of the General Court of the European Union by which he allocated Case T-392/07 to the Fourth Chamber of the General Court.

3 — EU:T:2007:78.

18. The Commission contends that the Court should:

(1) dismiss the appeal in its entirety as clearly inadmissible and/or clearly unfounded;

(2) annul the judgment of the General Court of 15 January 2013 in Case T-392/07 *Strack* v *Commission* in so far as it declares null and void the Commission's letter of 24 July 2007 by which the applicant was informed that an extract from the register relating to the decisions on confirmatory applications made prior to 1 January 2005 does not exist;

(3) set aside that judgment in so far as it finds to be admissible the action brought against the allegedly implied decisions by which access to documents relating to the confirmatory applications (Commission and OLAF) was refused; and

(4) order the appellant to pay all the costs incurred in the proceedings before the General Court and before the Court of Justice.

V – **Legal assessment**

19. Consideration must first of all be given to the first ground of appeal of the Commission's cross-appeal, since it concerns the admissibility of parts of the action brought at first instance. The Commission's second ground of appeal in the cross-appeal and five of the nine grounds of appeal advanced by Mr Strack will then be examined in turn.

20. I shall not, however, discuss the third, fourth, eighth and ninth grounds of appeal put forward by Mr Strack, because I consider them to be manifestly unfounded.

A – *The first ground of appeal of the cross-appeal — existence of an implied refusal*

21. The Commission submits that it did not implicitly refuse the application for access to the decisions on confirmatory applications made by the Commission and by OLAF. There is therefore no legal act open to challenge and, to that extent, the action is inadmissible. The General Court failed to appreciate this fact in paragraphs 45 to 53 of the judgment under appeal, and in particular paragraphs 51 and 52 thereof. In addition, the judgment is contradictory as far as those paragraphs are concerned and is thus vitiated by a defect in the statement of reasons.

1. The implied refusal

22. The concept of an implied refusal, on the basis of which proceedings may be instituted, is laid down in Article 8(3) of Regulation No 1049/2001. Failure by the institution to reply within the prescribed time-limit is to be considered as a negative reply and entitle the applicant to institute court proceedings against the institution. Accordingly, the time-limit must have expired in order for an implied refusal to exist.

23. It is necessary to ascertain whether the time-limit expired. That time-limit is, in principle, determined by Articles 7 and 8 of Regulation No 1049/2001. Under Article 7(1), the institution is to give its decision within 15 working days from registration of the application and, where appropriate, to grant access. In accordance with Article 7(3), that time-limit may be extended by a further 15 working days in exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents. If the institution fails to reply within those

time-limits, the applicant is entitled to make a confirmatory application pursuant to Article 7(4). Under Article 8(1), 15 working days are again made available for the handling of that confirmatory application, which — exceptionally — may likewise be extended by an additional 15 working days pursuant to Article 8(2).

24. The Commission nevertheless takes the view that it is entitled to deviate from the time-limits laid down in Regulation No 1049/2001 in the case of particularly lengthy applications.

25. It relies in that regard on Article 6(3) of Regulation No 1049/2001, which allows the institution concerned to confer with the applicant informally, with a view to finding a fair solution in the event of an application relating to a very long document or to a very large number of documents.

26. The Commission bases its argument on the scheme of Regulation No 1049/2001. Since 15 working days must be made available for the decision on a single document alone, a longer period of time must be allowed for the handling of very lengthy applications than the single extension by a further 15 working days.

27. However, this argument may be taken into consideration only in respect of the part of the application on which the General Secretariat of the Commission decided, and not in respect of that part of the application which it forwarded to OLAF. This is because, as Mr Strack rightly points out, OLAF replied for the first time on 23 October 2007 and only after proceedings had been instituted, that is to say long after expiry of all the time-limits laid down. In addition, it did not at any point avail itself of an extension of the time-limits.

28. Furthermore, despite a finding to that effect by the General Court in paragraph 51 of the judgment under appeal, the Commission fails to appreciate that provision is made for the extension by a further 15 working days under Article 7(3) and Article 8(2) expressly for applications for access to a very large number of documents. It is clear from this inter alia that, contrary to view taken by the Commission, the regulation is not simply directed towards applications relating to individual documents. The scheme of the regulation does not therefore support the position adopted by the Commission.

29. Furthermore, in the view of the Commission, Mr Strack's application relates to a 'clearly disproportionate number of documents'.

30. Contrary to first impressions, the intention behind that argument is not that the application should be rejected as disproportionate as a whole, but rather that the processing time-limits laid down in Regulation No 1049/2001 should be found to be disproportionate given the number of documents requested. In order to protect the interest in good administration, the Commission therefore takes the view that it was not required to observe those time-limits. In addition, it is of the opinion that it is improper to insist that the time-limits are observed in the case of such a lengthy application.

31. However, in reply to the Commission's argument, it must be stated that the time-limit for bringing proceedings commences on expiry of the time-limits for replying to the confirmatory application, as the General Court rightly found in paragraphs 47 and 52 of the judgment under appeal.

32. It is settled case-law of the Court of Justice that the time-limits for bringing proceedings under Article 263 TFEU are a matter of public policy and are not subject to the discretion of the parties or the General Court,[4] since they were established in order to ensure that legal positions are clear and certain.[5] This is the case, in particular, in relation not just to the implied refusal of an application provided for in connection with access to documents but also to that under the law governing officials of the European Union.[6]

33. In that connection, the Court has already held that the announcement of an express, subsequent decision cannot prevent either the fiction of an implied refusal or the commencement of the time-limit for bringing proceedings.[7] If an application has already been implicitly refused, a subsequent, express decision does not — contrary to the view of the Commission — trigger a new time-limit for bringing proceedings.[8]

34. Where an applicant allows himself to be put off by the Commission, he risks, as a result, an action brought against a subsequent, express decision being dismissed because it is directed against a decision which merely confirms a previous decision.[9] He must even fear the Commission relying on the time-limit for bringing proceedings against the implied refusal being exceeded,[10] even though the Commission has previously repeatedly availed itself of further extensions to the processing time-limits.[11]

35. Even if the Commission were to refrain from claiming that proceedings had been initiated out of time, or if it were to be barred from raising that objection because to do so would be to act in bad faith (*venire contra factum proprium*), the action brought would not necessarily be admissible. This is because the courts may examine of their own motion whether the time-limit for bringing proceedings has been observed as a mandatory procedural requirement,[12] even though the General Court does not appear to do so systematically in proceedings concerning access to documents.[13]

36. For this reason, it is not improper for an applicant to refuse to accept an extension of the processing time-limits. Given the current state of EU law and the related case-law, a prudent applicant must rather insist on the time-limits being observed if, from the outset, he does not intend to rule out an action being brought at a later stage.

37. The Commission is, however, right to submit that the processing of lengthy applications within the prescribed time-limits may present considerable difficulties. In view of the institutions' other tasks and the resources available to them, it may — from an objective point of view — be inappropriate to take personnel away from other tasks in order to observe the time-limits.

4 — Judgment in *Coen* (C-246/95, EU:C:1997:33, paragraph 21), and order in *Städter* v *ECB* (C-102/12 P, EU:C:2012:723, paragraph 13).

5 — Judgments in *Moussis* v *Commission*, 227/83 (EU:C:1984:276, paragraph 12); *Coen* (EU:C:1997:33, paragraph 21); and *Transportes Evaristo Molina* v *Commission* (C-36/09 P, EU:C:2010:670, paragraph 37).

6 — Judgments in *Müllers* v *ESC* (79/70, EU:C:1971:79, paragraph 18), and *Politi* v *ETF* (C-154/99 P, EU:C:2000:354, paragraph 22).

7 — Judgment in *Müllers* v *ESC* (EU:C:1971:79, paragraph 17).

8 — Judgments in *Müllers* v *ESC* (EU:C:1971:79, paragraph 19 et seq.), and, with regard specifically to access to documents, *ClientEarth and Others* v *Commission* (T-278/11, EU:T:2012:593, paragraph 45).

9 — Judgment in *ClientEarth and Others* v *Commission* (EU:T:2012:593, paragraph 41).

10 — Judgment in *ClientEarth and Others* v *Commission* (EU:T:2012:593, paragraph 26).

11 — Judgment in *ClientEarth and Others* v *Commission* (EU:T:2012:593, paragraphs 8 and 10 to 12).

12 — Judgments in *Müllers* v *ESC* (EU:C:1971:79, paragraph 6); *Transportes Evaristo Molina* v *Commission* (EU:C:2010:670, paragraph 33); and *Gbagbo and Others* v *Council* (C-478/11 P to C-482/11 P, EU:C:2013:258, paragraph 53). See also, for example, order in *ClientEarth and Others* v *Commission* (EU:T:2012:593, paragraph 30).

13 — See, with regard to the timeline, for example, judgment in *Stichting Greenpeace Nederland and PAN Europe* v *Commission* (T-545/11, EU:T:2013:523, paragraphs 4, 6 and 12).

38. The Court cannot, however, address this issue by allowing an institution *retrospectively* to prevent an implied decision from being made and the time-limit for bringing proceedings commencing. Such a departure from the wording of Article 8(3) of Regulation No 1049/2001 would be incompatible with the objectives of the time-limits for bringing proceedings which, as previously stated, are intended to ensure that legal positions are clear and certain. [14]

39. The same conclusion must still be reached even following the judgment in *Internationaler Hilfsfonds* v *Commission*, [15] which was delivered only after proceedings had been instituted by Mr Strack and which hints at a degree of flexibility in the application of the time-limits laid down in Regulation No 1049/2001.

40. According to that judgment, a decision on an application for access which has become final does not bring about legal certainty within the particular scheme of the regulation. On the contrary, the decision may be called into question at any time by a new application for access. [16] However, an argument that the applicant can be deprived, without warning and in retrospect, of the possibility of bringing proceedings, a possibility afforded to him under the clear wording of Article 8(3) of Regulation No 1049/2001, cannot be inferred from those facts.

41. Accordingly, on this point, the judgment under appeal is not vitiated by an error of law. This ground of appeal raised in the cross-appeal must therefore be rejected.

2. A suggested solution for the future

42. In the event that the Court were to wish to go a step further and take the place of the legislature in order to enable account to be taken of the principle of proportionality in connection with the fixing of time-limits for processing applications, it could do so at most in the form of guidance for the future, which would provide the necessary legal clarity for the Commission and the applicants concerned.

43. In that regard, the Commission is right to state that Article 6(3) of Regulation No 1049/2001 may be understood to mean that the fair solution provided for therein may in exceptional cases include a suspension of the time-limits for bringing proceedings on account of an extension of the time-limits for processing applications. However, in such cases, the time-limit for bringing proceedings would thus be placed at the discretion of the parties concerned.

44. Nevertheless, Article 6(3) of Regulation No 1049/2001 cannot entitle the institutions to deviate unilaterally and without restriction from time-limits laid down by the legislature. As is demonstrated by the reference in the provision in question to the institution conferring informally with the applicant, a fair solution must — as a general rule — be found by mutual agreement.

45. There is nothing to indicate in the present case that a mutual agreement was reached in relation to the time-limits or that the Commission would have genuinely endeavoured to achieve a mutually agreeable solution. It simply announced that the time-limits could not be met. [17] Such an announcement cannot therefore suffice, not least because it abandons the precise timeframe set out in Regulation No 1049/2001 and offers no replacement.

14 — Judgments in *Moussis* v *Commission* (EU:C:1984:276, paragraph 12); *Coen* (EU:C:1997:33, paragraph 21); and *Transportes Evaristo Molina* v *Commission* (EU:C:2010:670, paragraph 37).

15 — Judgment in *Internationaler Hilfsfonds* v *Commission* (C-362/08 P, EU:C:2010:40).

16 — Judgment in *Internationaler Hilfsfonds* v *Commission* (C-362/08 P, EU:C:2010:40, paragraph 57 et seq.).

17 — Letters of 24 July and 7 September 2007.

46. The institution should on the contrary have endeavoured to safeguard both the principle of proportionality and the objectives of Regulation No 1049/2001. If the timeframe laid down in Articles 7 and 8 does not appear to be proportionate given the circumstances of the particular case in question, the institution must propose a new and appropriate timeframe to the applicant.

47. Furthermore, the applicant is entitled to be provided with a detailed statement of reasons for such a new timeframe, since even the extensions of time-limits provided for in Article 7(3) and Article 8(2) of Regulation No 1049/2001 are subject to such a duty to state reasons. The institution must therefore indicate how it has arrived at the proposed time-limit.

48. It would also have been possible in the present case for the documents requested to have been communicated in smaller lots, and therefore earlier in the case of some documents, rather than in two large batches for the years 2005/2006 and 2007, which were not dispatched until 2008.

49. Finally, the institution must provide as binding a statement as is possible that it will not rely on the time-limits for bringing proceedings having been exceeded by reason of the processing time-limits applied, but will rather support the applicant before the courts of the European Union on this point at least in the event of an action subsequently being brought.

50. If an applicant were to reject such an appropriate proposal without justification, the fiction of an implied refusal of the application could conceivably be denied on expiry of the time-limits laid down. However, the criterion of appropriateness also makes clear that, in such circumstances, the legal certainty associated with the clear time-limits laid down in Regulation No 1049/2001 would be wholly abandoned. It would be virtually impossible to predict when an implied refusal may be held to exist and when not.

51. Such an approach would therefore attract significant scepticism. Instead, the EU legislature would have to come up with a new and appropriate instrument. I mention merely as an aside in this connection that, pursuant to Article 3 of Regulation (EC) No 1367/2006,[18] the time-limits provided for in Regulation No 1049/2001 likewise apply to access to environmental information within the meaning of the Aarhus Convention;[19] the present case is not concerned with such access. However, Article 4(2) of the Convention provides for even shorter time-limits than are expressly laid down at present in Regulation No 1049/2001, namely time-limits of one month, or a maximum of two months, for the final administrative decision.

3. The General Court's reasoning

52. Finally, in so far as the Commission objects to the General Court's reasoning on this point, its line of argument is restricted to contesting the relevance of the case-law to which the General Court refers. However, the fact that the General Court construes particular precedents in a different way to the Commission cannot constitute a failure to state reasons.[20]

18 — Regulation of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13).

19 — Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (OJ 2005 L 124, p. 4).

20 — See judgment in *Wunenburger* v *Commission* (C-362/05 P, EU:C:2007:322, paragraph 80), and *Gogos* v *Commission* (C-583/08 P, EU:C:2010:287, paragraph 35).

4. Conclusion on the first ground of appeal of the cross-appeal

53. The first ground of appeal of the cross-appeal must thus be rejected. The admissibility of the proceedings at first instance is therefore not in doubt.

B – *The second ground of appeal of the cross-appeal — non-existence of an extract from the register*

54. The second ground of appeal of the cross-appeal concerns Mr Strack's application to obtain an extract from the register established by the Commission pursuant to Article 11 of Regulation No 1049/2001 relating to the decisions refusing confirmatory applications made prior to 1 January 2005.

55. Under Article 11(1) of Regulation No 1049/2001, to make citizens' rights under the regulation effective, each institution is to provide public access to a register of documents. In accordance with that provision, references to documents are to be recorded in the register without delay. Pursuant to paragraph 2, for each document the register is to contain a reference number, the subject-matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register.

56. However, the Commission informed Mr Strack in its letter of 24 July 2007 that decisions refusing confirmatory applications for access had not been recorded in the register.

57. In that regard, the General Court held in paragraph 102 of the judgment under appeal that the Commission had acted in an arbitrary and unpredictable manner by refraining from recording in the register all decisions made prior to 1 January 2005 refusing confirmatory applications in whole or in part. Consequently, by submitting that the extract in question from the register does not exist, it infringed the applicant's right of access to the register provided for in Article 2 of Regulation No 1049/2001. For that reason, the General Court annulled the express decision of 24 July 2007 refusing access to an extract from the register.

58. More specifically, the Commission complains that the General Court found a document to exist which does not in fact exist (see section 1 below), that it incorrectly inferred from the regulation an obligation to draw up and disclose documents (see section 2 below) and, finally, that it ruled *ultra petita* (see section 3 below).

1. The 'existence' of a non-existent document

59. The Commission takes the view that, in paragraph 77 of the judgment under appeal, the General Court found that the extract from the register requested did exist and was in the Commission's possession. That argument — seemingly an implicit complaint of a distortion of facts — is, however, based on a misunderstanding of the judgment under appeal.

60. The General Court did no more than refute the plea in defence that an extract from the register, *if it were to exist*, is not a document and, on this point, the application made by Mr Strack would not be covered by Regulation No 1049/2001. A finding that the extract *does* in fact exist was not made by the General Court in that paragraph or at any other point in the judgment under appeal.

61. That part of the second ground of appeal cannot therefore be upheld.

2. The obligation to draw up a document

62. The Commission also criticises the fact that the General Court held in paragraph 99 of the judgment under appeal that it would be contrary to the requirement of transparency, on which Regulation No 1049/2001 is based, for institutions to rely on the non-existence of documents in order to prevent the application of the regulation. In order for the right of access to documents to be exercised effectively, the institutions concerned must have documented their activities in as non-arbitrary and as predictable a manner as possible and have saved copies of the related documents.

63. In paragraphs 100 and 101 of the judgment under appeal, the General Court equates an obligation derived from Article 11 of Regulation No 1049/2001 to record decisions refusing confirmatory applications in the register with that documentation requirement. The General Court bases the abovementioned finding made in paragraph 102 of the judgment under appeal on that equation.

64. The Commission contends that Regulation No 1049/2001 does not impose the requirement to draw up documents.

65. That contention is based on the accurate view that the right of access to documents under Article 2(3) of Regulation No 1049/2001 covers all documents held by an institution, that is to say, documents (already) drawn up or received by it and in its possession. In that connection, under Article 3(a), documents are to mean any content whatever its medium. Non-existent entries in the register do not, however, constitute content nor can they be disclosed.

66. The General Court rightly found that Article 11 of Regulation No 1049/2001 requires the institutions to establish the register and to record documents in it. Furthermore, the Commission does not call into question the fact that the obligation to record documents in the register extends to decisions refusing confirmatory applications.

67. Nevertheless, Regulation No 1049/2001 does not directly link the obligation under Article 11 to the right of access to documents under Article 2(1). Compliance with the duty to register documents cannot therefore be enforced by means of an application for access to documents. Rather, in order to enforce such compliance, an action for failure to act under Article 265 TFEU would have to be brought.

68. It must therefore be held that the General Court was wrong to find in paragraphs 99 to 102 of the judgment under appeal that the right of access to documents requires the Commission, in the event of a corresponding application for access, to complete the public register in order to provide the extract from the register requested.

69. However, the judgment of the General Court must be upheld on other grounds. Since, on account of its own failings, the Commission was not in a position to produce the requested extract from the public register in accordance with Article 11 of Regulation No 1049/2001, it should at least have considered whether it could provide the information requested to the applicant in the form of one or more other documents. In that connection, for example, extracts from internal registers would be conceivable sources of such information, as might the materials which were used to draw up the annual reports on the application of the Regulation. However, as the letter of 24 July 2007 makes clear, the Commission did not consider so doing. Consequently, the decision contained in that letter had to be set aside because the part of the application in question was not processed fully.

70. This part of the Commission's ground of appeal is therefore likewise unsuccessful.

3. The scope of the form of order sought by Mr Strack

71. Finally, the Commission takes the view that the General Court ruled *ultra petita* on two points.

72. First, it submits that the General Court decided in paragraph 101 that the Commission was required to include the decisions on initial applications in the register as a matter of necessity. However, that submission relates not to a decision by the General Court, which could go beyond the form of order sought by Mr Strack, but simply one element of the General Court's reasoning. That reasoning is not bound by the scope of the form of order sought.

73. However, in line with the form of order sought by Mr Strack, the decision of the General Court in paragraph 102 of the judgment under appeal is restricted to the finding that the refusal of access to the extract from the register relating to all decisions refusing confirmatory applications should be annulled.

74. In that regard, the Commission submits that Mr Strack requested that an implied refusal of access to the extract from the register be annulled, but that, in addition, the General Court also set aside an express refusal.

75. However, that argument may be countered in formal terms by the finding that Mr Strack requested that the decisions actually made by the Commission or implied on account of the statutory fiction of refusal under Article 8(3) of Regulation No 1049/2001 be set aside. That includes the express decision annulled by the General Court which was communicated on 25 July 2007.

76. The issue of whether that decision was actually appropriate subject-matter for the judgment of the General Court or whether it should instead have considered a later implied decision on a confirmatory application can be left unanswered in the present case, because the Commission does not raise any objections in this regard.

77. In the event that the Court wishes to examine that issue of its own motion, it should be pointed out that Mr Strack had already made a first confirmatory application on 23 July 2007, after more than 20 working days had already passed since his initial application of 20 June. By contrast, the notification dated 24 July 2007 was sent by the Commission only on 25 July, that is to say, two days after that first confirmatory application. Although the Commission did avail itself of an extension of the time-limit to reply to the initial application in that notification, it did not indicate that it also required that extension of the time-limit in relation to the extract from the register. This is because at the same time it informed the applicant that the register did not contain the requested data. Accordingly, the General Court did not distort that notification where it interpreted it as meaning that, in that notification, the Commission set out its definitive position in relation to the extract from the register requested in the form of a decision on a confirmatory application. [21]

78. That part of the second ground of appeal must likewise be rejected.

C – *The first ground of appeal of the appeal — infringement of the right of access to due process*

79. By the first ground of appeal, Mr Strack objects to the fact that, on 13 October 2011, the President of the General Court assigned the case to another chamber in the interest of a prompt resolution of the proceedings and the proper administration of justice because the judge-rapporteur was due to leave his post in the very near future.

21 — See judgment in *Internationaler Hilfsfonds* v *Commission* (EU:C:2010:40, paragraph 60).

80. According to Mr Strack, that assignment constitutes an infringement of the principle of the right to be heard by a court or tribunal established in accordance with the law of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') Article 6(1), the second paragraph of Article 47 of the Charter, the second paragraph of Article 50 of the Statute of the Court of Justice and Articles 12 and 13 of the Rules of Procedure of the General Court, read in conjunction with the decisions on the assignment of cases and the allocation of judges to chambers.

81. The existence of guarantees concerning the composition of a court or tribunal are the cornerstone of the right to a fair trial, compliance with which must be verified by the Union judicature if an infringement of that right is complained of.[22] This is because, pursuant to the second paragraph of Article 47 of the Charter and Article 6(1) of the ECHR, which is largely identical to the provision in the Charter and must be taken into consideration when interpreting that provision,[23] everyone is entitled to a hearing by a court or tribunal (previously)[24] established by law.

82. In that connection, 'law' comprises in particular the legal provisions on the establishment and competence of judicial bodies. If a court or tribunal does not have jurisdiction to hear a case in accordance with those provisions, it is not therefore a court or tribunal established by law.[25] Furthermore, the European Court of Human Rights ('ECtHR') makes clear in its settled case-law that the organisation of the judicial system may not be left to the discretion of the judicial authorities, although the courts may enjoy some latitude when interpreting the relevant legislation.[26] However, more extensive requirements, such as a provision which determines in advance which judges have jurisdiction to hear a case on the basis of abstract criteria,[27] have not as yet been applied in the context of the right to a fair trial under Article 47 of the Charter and Article 6(1) ECHR.

83. When assessing this ground of appeal, the deciding factor is therefore whether the decision of the President of the General Court of 13 October 2011 was consistent with the provisions on the allocation of cases to the chambers of the General Court.[28]

84. In accordance with the second paragraph of Article 50 of the Statute of the Court of Justice, the composition of the chambers and the assignment of cases to them are to be governed by the Rules of Procedure of the General Court. Pursuant to Article 13(1) of the Rules of Procedure, as soon as the application initiating proceedings has been lodged, the President of the General Court is to assign the case to one of the chambers. Article 12 of the Rules of Procedure provides that the General Court is to lay down criteria by which cases are to be allocated among the chambers.

85. It would appear that the action brought by Mr Strack was originally assigned in accordance with the criteria applicable at that time[29] on the basis of the date on which it was registered at the Registry.

22 — Judgments in *Chronopost* v *UFEX and Others* (C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 46), and *Gorostiaga Atxalandabaso* v *Parliament* (C-308/07 P, EU:C:2009:103, paragraph 42).

23 — See Article 52(3) of the Charter. See also judgments in *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 44), and *Arango Jaramillo and Others* v *EIB* (C-334/12 RX-II, EU:C:2013:134, paragraph 42 et seq.).

24 — Appears in the second paragraph of Article 47 of the Charter only.

25 — See, for example, with regard to Article 6(1) ECHR, judgment of the ECtHR in *Jorgic v. Germany*, no. 741613/01 §§ 64 and 65, ECHR 2007-III.

26 — Judgments of the ECtHR in *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 98, ECHR 2000-VII; *DMD GROUP, a.s., v. Slovakia*, no. 19334/03, § 60, 5 October 2010; and *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 150, ECHR 2013.

27 — See, for example, the rule laid down in Article 101 of the German Grundgesetz (Basic Law) following the order of the German Bundesverfassungsgericht (Federal Constitutional Court) of 8 April 1997 (1 PBvU 1/95, BVerfGE 95, 332, 327 et seq.) and the recommendation of the European Commission for Democracy through Law (Venice Commission), Report on the Independence of the Judicial System, Part I: The Independence of Judges, of 16 March 2010 (CDL-AD(2010)004, paragraph 75).

28 — See, to that effect, order in *Marcuccio* v *Commission* (C-528/08 P, EU:C:2009:761, paragraph 58).

29 — See communication published in OJ 2007 C 269, p. 42.

86. With regard to the re-assignment of the case complained of, although the criteria were set out in a more recent communication [30] the content of that communication remained unchanged.

87. Mr Strack correctly submits that none of those provisions expressly provides for a re-assignment of already assigned cases by the President of the General Court.

88. Nevertheless, it is stated in the criteria governing assignment that the President of the General Court may derogate from the allocation rotas laid down, inter alia with a view to ensuring an even spread of the workload. It is true that the reference to the criteria governing assignment according to the date on which a case is registered does support the argument that that power of derogation should relate to the original assignment of cases. However, the wording does not preclude the application of that power in the case of a later re-assignment of a case.

89. Such a re-assignment may even prove essential following the replacement of judges and the change in the composition of the chambers. [31]

90. However, the re-assignment of a case may also be justified by the objective of ensuring an even spread of the workload. That objective is not simply organisational in nature, but rather seeks in particular to ensure that — in accordance with the second paragraph of Article 47 of the Charter and Article 6(1) ECHR — cases are handled within a reasonable time.

91. The present case illustrates that it may be necessary to re-assign a case at a later stage for that reason. In 2011, the action had already been pending for four years and further delays were to be feared because the judge-rapporteur was soon to stand down from his post. By contrast, the new chamber was in a position to proceed with the case immediately.

92. Accordingly, the power of the President of the General Court to derogate from the assignment criteria must be construed such that, following its original assignment, a case may be assigned by him to another chamber with a view to ensuring an even spread of the workload.

93. The judgment under appeal was therefore given by the court having jurisdiction, meaning that the first ground of appeal must be rejected.

D – *The second ground of appeal — various procedural errors*

94. By the second ground of appeal, the appellant claims that a number of procedural errors were made, namely the refusal of an application to deal with the case under an expedited procedure, the restriction of the right to a fair hearing, the General Court's refusal to examine the documents requested, the delimitation of the subject-matter of the application and the excessive length of the proceedings.

1. The first and fifth parts of the ground of appeal — expedited procedure and length of the proceedings

95. By the first part of this ground of appeal, Mr Strack complains that the General Court refused his application for the case to be dealt with under an expedited procedure without providing any reasons for that refusal. Since the interest in such an expedited procedure goes hand in hand with the requirement to ensure that proceedings are conducted within a reasonable time, which is claimed by the fifth part of this ground of appeal, the two parts of the ground of appeal can be dealt with jointly.

30 — OJ 2010 C 288, p. 5.

31 — See judgment in *Salzgitter* v *Commission* (C-182/99 P, EU:C:2003:526, paragraph 28 et seq.).

96. Under the second paragraph of Article 47 of the Charter and Article 6(1) of the ECHR, everyone is entitled to a hearing within a reasonable time. A failure to adjudicate within a reasonable time must, as a procedural irregularity constituting the breach of a fundamental right, give rise to an entitlement of the party concerned to an effective remedy granting him appropriate relief. [32]

97. However, where there are no indications that the excessive length of the proceedings before the General Court affected their outcome, failure to deliver judgment within a reasonable time cannot lead to the setting-aside of the judgment under appeal. [33] That must also be the case where the excessive length of the proceedings is due to the fact that the case was not dealt with under an expedited procedure.

98. However, Mr Strack has failed to demonstrate to what extent the length of the proceedings influenced their outcome. Those parts of the ground of appeal cannot therefore succeed.

99. Accordingly, the failure to provide a statement of reasons when the application for the case to be dealt with under an expedited procedure was refused likewise cannot lend weight to the success of the appeal.

100. In that connection, Mr Strack also objects to the fact that, in paragraph 93 of the judgment under appeal, the General Court dismissed as inadmissible an application for damages on account of the excessive length of the proceedings. Relying on *Baustahlgewebe* [34] and my Opinion in *Solvay*, [35] he submits that the principle of effective legal protection requires that, as far as is possible, a decision on any compensation is to be made in the course of the unduly long proceedings themselves.

101. However, this argument must likewise fail. Indeed, the Court has in the meantime distanced itself from its findings in *Baustahlgewebe* [36] and held that another formation of the General Court must determine an application for damages on account of the excessive length of the proceedings. [37] The General Court was therefore right to find that the claim for damages must be made by a separate action.

102. Both parts of the second ground of appeal must therefore be rejected.

2. The second part of the ground of appeal — right to be heard

103. By this part of the second ground of appeal, Mr Strack complains that he was not given, to the appropriate standard, the right to be heard. The General Court did not give him a separate opportunity to make known his views on the documents released by OLAF, which he received only after submitting his reply. In addition, it refused to allow a lengthy letter of 14 May 2012 to be used in preparation for the hearing, it allowed him to speak for only 30 minutes at the hearing rather than the requested speaking time of 60 minutes, it refused an application to admit an additional document at the hearing and also rejected a further document of 25 July 2012 after the hearing, which contained inter alia a request to correct the report for the hearing.

The right to be heard in general

32 — Judgment in *Groupe Gascogne* v *Commission* (C-58/12 P, EU:C:2013:770, paragraph 72), and judgment of the ECtHR in *Kudła v. Poland* [GC], no. 30210/96, §§ 156 and 157, ECHR 2000-XI.

33 — Judgment in *Der Grüne Punkt — Duales System Deutschland* v *Commission* (C-385/07 P, EU:C:2009:456, paragraphs 190 and 196), and *Groupe Gascogne* v *Commission* (EU:C:2013:770, paragraph 73).

34 — Judgment in *Baustahlgewebe* v *Commission* (C-185/95 P, EU:C:1998:608).

35 — Opinion in *Solvay* v *Commission* (C-109/10 P, EU:C:2011:256).

36 — Judgment in *Groupe Gascogne* v *Commission* (EU:C:2013:770, paragraphs 82 and 83).

37 — Judgment in *Groupe Gascogne* v *Commission* (EU:C:2013:770, paragraph 90).

104. It must be borne in mind in relation to this part of the ground of appeal that in order to satisfy the requirements associated with the right to a fair hearing, it is important for the parties to be able to debate and be heard on the matters of fact and of law which will determine the outcome of the proceedings. [38]

105. That was, in principle, possible before the General Court. Mr Strack was able to make known his views comprehensively in the application, in the reply and at the hearing. The General Court allowed him to exceed significantly the page length stipulated in the Practice Directions to Parties in relation to his reply, and at the hearing granted him double the length of the speaking time specified in those instructions. Furthermore, the General Court included additional correspondence from Mr Strack dated 16 November 2011, 25 January 2012 and 1 April 2012 in the file and communicated those documents to the Commission for its observations.

106. The objections raised in relation to the documents from OLAF and to the correction of the report for the hearing do, however, merit separate discussion.

The documents from OLAF

107. OLAF's decision of 23 October 2007 was communicated to Mr Strack at the latest as Annex B.1 to the defence of 30 May 2008. Mr Strack therefore also made it part of the subject-matter of his reply.

108. By contrast, according to the argument advanced by Mr Strack and not called into question by the Commission, the anonymised documents subsequently released were received by him only on 17 October 2008, after he had already submitted his reply. The apparent reason for this was that the decision and the documents were sent as attachments to very large e-mails and the limits on the capacity of Mr Strack's e-mail inbox were exceeded with the first mailing. Mr Strack apparently learnt of this issue from the annex to a letter from the General Court of 9 May 2012, which contained a print-out of a related error message which the Commission received when attempting to communicate the documents on 23 October 2007.

109. It is true that Mr Strack was able to submit his views on the actual decision of 23 October 2007 in his reply of 20 August 2008 and, to that extent, therefore also extended the scope of his application. However, since he did not receive the documents until 17 October 2008, he was unable to take them and the deletions made therein into account in the reply. He further submits that he was denied an appropriate extension of the speaking time during the course of the hearing.

110. This objection is based on a rather unusual situation from the point of view of procedural law, namely the fact that, in the context of a dispute about access to documents, the General Court allowed a subsequent extension of the application where that application initially concerned an implied refusal of access which was later replaced by an express decision.

111. If the General Court allows an extension of the application, it must grant a reasonable opportunity for observations to be submitted. The possibility of expressing views at the hearing cannot fully replace the submission of written pleadings, since the procedural law of the courts of the European Union provides in all cases for a written procedure, which is merely supplemented by the hearing. In addition, Mr Strack was not afforded the speaking time at the hearing which, in his view, he required.

38 — Judgments in *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:742, paragraph 56); and *M* v *EMEA* (C-197/09 RX-II, EU:C:2009:804, paragraph 41).

112. The Commission takes the view that Mr Strack is himself responsible for curtailing the opportunities to express his views, since he also had the possibility of bringing a separate action against the decision of 23 October 2007. The subject-matter of Case T-392/08 was extended to include that decision solely in Mr Strack's interest.

113. I find that argument surprising. The reason that the extension of the application was possible in the first place was that the Commission failed to comply with its own obligations to decide on the applications made in a timely manner. In addition, the Commission apparently failed to ensure that Mr Strack also received the belatedly adopted decision of 23 October 2007 and the relevant documents in good time. It in fact even appears to have ignored the error message which indicated that its e-mails had failed to transmit. The Commission is therefore initially responsible for the fact that Mr Strack did not enjoy all the opportunities provided to express his views.

114. In addition, it must be observed that the extension of the application did not just serve the interests of Mr Strack, but in fact at the same time reduced the burden on the General Court and on the opposing party, in this case the Commission. It is more efficient for all the parties to the proceedings for the scope of the dispute to be extended rather than for separate proceedings to be initiated in relation to every new decision.

115. Nevertheless, Mr Strack must be criticised for having himself failed to take all the required steps to protect his right to be heard. After receiving OLAF's decision of 23 October 2007 for the first time along with the defence, he should in fact have made every reasonable effort to obtain the missing documents so that he could take account of them in the reply. In particular, he should have made the Commission aware that the communication of the documents had failed and, if necessary, made an application to the General Court for an extension of the time-limit for the submission of the reply.

116. In that regard, the same considerations must apply as in the case of the determination of the time-limit for bringing proceedings once the person concerned has learnt of the decision in question. In that connection, failing publication or notification, it is for the party which has knowledge of a decision concerning it to request the whole text thereof within a reasonable period. [39]

117. This must *a fortiori* be true inasmuch as Mr Strack is partly responsible for the communication problems, since he made an extensive application for access to documents but provided only an e-mail inbox with a limited capacity as the means of receiving those documents.

118. In no circumstances should Mr Strack have waited for more than three years and until shortly before the hearing before claiming that it was necessary for him to set out his position in relation to those documents.

119. Therefore, despite the conduct of the Commission, the loss of the opportunity to submit his views in writing and the restriction of the possibility of expressing himself at the hearing in relation to the documents released by OLAF must ultimately be laid at the door of Mr Strack himself.

The part of the ground of appeal relating to the minutes

120. Finally, Mr Strack complains that, in paragraph 27 of the judgment under appeal, the General Court did not come to a decision on the substance of an application to correct the minutes of the hearing, but rather adopted a decision refusing to reopen the hearing.

39 — Judgments in *Wirtschaftsvereinigung Eisen- und Stahlindustrie* v *Commission* (C-180/88, EU:C:1990:441, paragraphs 22, 29 and 30), and *Windpark Groothusen* v *Commission* (C-48/96 P, EU:C:1998:223, paragraph 25).

121. It is true that provision is not made in the Rules of Procedure of the General Court for an application to correct the minutes; however, the parties to the proceedings must, in principle, be entitled to complain of errors or omissions in that document. This is because, pursuant to the second sentence of Article 63(1) of the Rules of Procedure, those minutes are an official record, which — accordingly — may therefore also be relied upon as evidence of the content of the hearing. [40]

122. However, the fact that the General Court did not give consideration to that application is not, in isolation, capable of calling into question the *judgment* under appeal, rather it restricts the probative value of the minutes. The part of the ground of appeal relating to the minutes is therefore ineffective and must therefore be rejected.

The argument allegedly advanced out of time by the Commission relating to Regulation No 45/2001

123. Finally, Mr Strack wrongly claims that the General Court gave consideration to the argument advanced by the Commission regarding Regulation No 45/2001 in the course of the hearing even though that argument was advanced out of time. The roots of that argument had in fact already been set out by the Commission's reliance on the exception in connection with the protection of personal data under Article 4(1)(b) of Regulation No 1049/2001. The fact that, in this regard, particular importance is attributed to Regulation No 45/2001 was, however, not as clear during the exchange of written pleadings as it was at the time of the hearing, since that importance was made clear primarily in *Bavarian Lager*, [41] a judgment which had been given in the meantime.

3. The third part of the ground of appeal — review of all the documents

124. By this third part of the second ground of appeal, Mr Strack complains that, contrary to his application, the General Court did not review all the documents in order to determine whether the deletions were justified by the exception provided for in order to protect personal information.

125. The Court of Justice has held that the General Court is required to consult documents where there is a dispute as to whether particular exceptions may be applied in the light of the documents' content. [42] However, in the case of the deletions of personal information at issue here, the question is whether the protection of such information requires that names and other personal details of certain groups of people must be treated confidentially. The documents in question do not need to be consulted in order to make that determination, rather — as a general rule — it is sufficient to consider the reasons stated for the judgment.

4. The fourth part of the ground of appeal — complete nature of the Commission's decisions

126. The fourth part of this ground of appeal concerns the question whether the Commission provided a full response to the application for access to all the documents relating to the confirmatory applications to access documents refused by the Commission since 1 January 2005. Mr Strack objects to the fact that, in paragraph 139 of the judgment under appeal, the General Court rejected his argument that the Commission had failed to demonstrate that it had communicated to him all the decisions refusing confirmatory applications adopted within the periods of time in question.

127. This part of the ground of appeal is directed against the manner in which the General Court assessed the parties' arguments in relation to the abovementioned issue.

40 — See, by way of illustration, *M* v *EMEA* (EU:C:2009:804, paragraph 45); *Iride and Iride Energia* v *Commission* (C-150/09 P, EU:C:2010:34, paragraph 74); and *Kronoply* v *Commission* (C-117/09 P, EU:C:2010:370, paragraph 44).

41 — Judgment in *Commission* v *Bavarian Lager* (C-28/08 P, EU:C:2010:378, paragraph 59).

42 — Judgment in *Jurašinović* v *Council* (C-576/12 P, EU:C:2013:777, paragraph 27).

128. It is clear from the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that the General Court has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. [43]

129. Nevertheless, complaints based on findings of fact and on the assessment of those facts in the contested judgment are admissible on appeal where the appellant contends that the General Court has made findings which the documents in the file show to be substantially incorrect or that it has distorted the evidence before it. [44]

130. A distortion exists where, without recourse to new evidence, the assessment of the existing evidence is manifestly incorrect. [45] Where the General Court — as is the case here — draws conclusions from certain facts, it is necessary to assess whether it has not manifestly exceeded the limits of a reasonable assessment of the evidence. [46]

131. That is the situation here.

132. In the proceedings at first instance, Mr Strack based his views on the fact that the number of documents communicated to him (315) is significantly lower than the number of decisions refusing confirmatory applications totally or in part stated in the official reports (575). [47]

133. Nevertheless, the Commission contends that the figures do not tally because some decisions covered several confirmatory applications made by the same person and other confirmatory applications had not yet been decided upon at the end of the year in question.

134. However, the Commission fails to provide a precise breakdown of the figures which would clear up all the discrepancies. Such a breakdown would perhaps also have taken account of OLAF's decisions on confirmatory applications (apparently thus far ignored in this regard by both parties), documents which — as far as can be seen — were not counted amongst the documents communicated but are seemingly included in the Commission's reports.

135. The Commission gives equally scant consideration to the fact that Mr Strack states that no decisions on multiple confirmatory applications are identifiable in the documents communicated to him.

136. Accordingly, taking into consideration solely the argument that not all confirmatory applications had been decided at the end of the year, decisions on 250 confirmatory applications were still pending at the end of the three-year period in dispute. In view of the time-limits laid down in Regulation No 1049/2001, such a backlog appears scarcely credible.

137. The line of argument advanced by the Commission may therefore be capable of explaining more minor discrepancies, but the significant differences in the present case are too great. By nevertheless accepting the Commission's argument, the General Court manifestly exceeded the limits of a reasonable assessment of the evidence.

43 — Judgment in *Commission* v *Aalberts Industries and Others* (C-287/11 P, EU:C:2013:445, paragraph 47).

44 — Judgment in *PKK and KNK* v *Council* (C-229/05 P, EU:C:2007:32, paragraph 35).

45 — Judgments in *PKK and KNK* v *Council* (EU:C:2007:32, paragraph 37); *Lafarge* v *Commission* (C-413/08 P, EU:C:2010:346, paragraph 17); and *Commission* v *Aalberts Industries and Others* (EU:C:2013:445, paragraph 51).

46 — Judgments in *Activision Blizzard Germany* v *Commission* (C-260/09 P, EU:C:2011:62, paragraph 57), and *Commission* v *Aalberts Industries and Others* (EU:C:2013:445, paragraph 52).

47 — According to the Report from the Commission on the application in 2007 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (COM(2008) 630 final, p. 10).

138. However, unlike in a case in the course of which the existence of additional documents was established,[48] it cannot be held with certainty in the present case that the Commission's reply was incomplete. Indeed, the General Court could have cleared up this point with relative ease if it had required the Commission to explain in detail the discrepancy between the figures in the report and the number of documents communicated to Mr Strack.

139. It is true that the General Court is the sole judge of whether it is necessary to supplement the information available to it concerning the cases before it. In addition, whether or not the evidence before it is convincing is a matter to be appraised by it alone and is not subject to review by the Court of Justice on appeal, except where the clear sense of the evidence submitted has been distorted or the substantive inaccuracy of the General Court's findings is apparent from the documents in the case-file.[49]

140. However, in the present case, the failure to adduce sufficient evidence is the direct result of a distortion of evidence occasioned by the drawing of a conclusion which manifestly exceeded the limits of a reasonable assessment. The Court of Justice is therefore exceptionally entitled to find there to have been an error of law in the failure to conduct the necessary measures of enquiry.

141. This part of the second ground of appeal should therefore be accepted and the judgment under appeal should be set aside in so far as it rejects the argument advanced by Mr Strack that the Commission did not decide on all the decisions refusing confirmatory applications.

142. On this point, the state of the proceedings does not permit final judgment to be given, since neither the contribution of the documents from OLAF, nor the existence and number of collective decisions on confirmatory applications nor the decisions on confirmatory applications still outstanding at the end of 2007 has been sufficiently clarified.[50] Accordingly, with regard to this point, the case should be referred back to the General Court in accordance with the first paragraph of Article 61 of the Statute of the Court of Justice.

E – *The fifth ground of appeal — application of the data protection exception*

143. The fifth ground of appeal relates to the application of the data protection exception, that is to say the reasons stated for its application (see 1 below), the individual examination of the blanked-out sections (see 2 below) and the legality of blanking out personal information pertaining to certain categories of people (see 3 below).

1. The reasons stated in the Commission decision

144. Mr Strack objects to the fact that the General Court found the statement of reasons for the Commission's decisions to be sufficient, even though they did not contain any information about the consultation of the persons concerned or as to whether those persons had requested that their data be treated confidentially. Furthermore, the Commission failed to give consideration to the different categories of people concerned.

48 — Judgment in *Williams* v *Commission* (T-42/05, EU:T:2008:325, paragraph 68).

49 — Judgments in *Ismeri Europa* v *Court of Auditors* (C-315/99 P, EU:C:2001:391, paragraph 19); *Glencore and Compagnie Continentale* v *Commission* (C-24/01 P and C-25/01 P, EU:C:2002:642, paragraphs 77 and 78); and *Erste Bank der österreichischen Sparkassen* v *Commission* (C-125/07 P, C-133/07 P and C-137/07 P, EU:C:2009:576, paragraph 319).

50 — The parties to the proceedings should, however, be advised that either the Commission must clarify this issue of its own motion by informing Mr Strack of the corresponding figures — and, if necessary, communicating the missing documents — or Mr Strack must make a further application for access to the allegedly thus far still missing documents, which would enable the Commission to set out its position taking into account my comments. This aspect of the dispute could then be deemed to be settled — potentially even before judgment is given on this appeal — and the parties would not have to refer the matter to the General Court again unnecessarily.

145. This part of the ground of appeal cannot however succeed, since in paragraphs 120, 125 and 126 of the judgment under appeal the General Court attached appropriate conditions to the statement of reasons provided by the Commission. Even a brief statement of reasons can suffice if it makes the reasons for the decision sufficiently clear.

146. With regard more specifically to the lack of information about any consultation with the persons concerned, the absence of such details is a sufficiently clear indication that no such consultations took place. In addition, nor was the Commission required to consider the lack of a statement of reasons for the application for access pursuant to Article 8(b) of Regulation No 45/2001, since no such reasons were stated.

147. Finally, to the extent that Mr Strack submits in the context of this part of the ground of appeal that the General Court did not give not sufficient consideration to his criticism of the deletions made by OLAF, it is sufficient to state that he does not criticise that decision in detail in the reply, even though he had learnt of its existence and the reasons stated for it at the latest in the defence. [51]

2. The individual examination of the documents

148. By the second part of the fifth ground of appeal, Mr Strack complains that, in paragraphs 162 to 164 of the judgment under appeal, the General Court incorrectly found that the Commission gave sufficient consideration on an individual basis to the need to treat the information deleted confidentially. He bases his view in that regard in particular on the fact that every name was blanked out indiscriminately without it actually being examined whether the privacy of those concerned was affected. That does not, however, constitute proof of the failure to conduct an individual examination of the documents, but rather at most proof of the Commission's belief as regards the scope of the exception provided for in Article 4(1)(b) of Regulation No 1049/2001. Nevertheless, the scope of that exception does form the subject-matter of the third part of this ground of appeal, which must be considered below.

3. The legality of the deletions

149. Finally, by the third part of the fifth ground of appeal, Mr Strack objects to the General Court's acceptance of the application of the exception in connection with the protection of personal data provided for in Article 4(1)(b) of Regulation No 1049/2001.

150. Under that provision, the institutions are to refuse access to a document where its disclosure would undermine the protection of the privacy and the integrity of the individual, in particular in accordance with Union legislation regarding the protection of personal data.

151. The Commission gave effect to that exception in accordance with Article 4(6) of Regulation No 1049/2001 by blanking out all the names and addresses in the documents disclosed.

152. The Court has already held that, pursuant to Article 4(1)(b) of Regulation No 1049/2001, where a request based on Regulation No 1049/2001 seeks to obtain access to documents including personal data, the provisions of Regulation No 45/2001 become applicable in their entirety. This means in particular that, as a general rule, an applicant is required to establish the necessity for those personal data to be transferred in accordance with Article 8(b) of Regulation No 45/2001. [52]

51 — See above, point 107 et seq.

52 — Judgment in *Commission* v *Bavarian Lager* (EU:C:2010:378, paragraphs 63 and 77).

a) Assessment

153. Mr Strack is correct to submit that the institutions may be required take into account pressing reasons for a transfer even where the applicant fails to provide proof of such reasons; however, in the present case, no such reasons are identifiable nor have any been put forward by Mr Strack.

154. Mr Strack goes on to develop the idea that the objective of Regulation No 1049/2001 of facilitating access to documents justifies a transfer under Article 8(a) of Regulation No 45/2001, since that transfer is in the public interest. However, such an interpretation of Article 8(a) would render the abovementioned case-law relating to Article 8(b) [53] meaningless.

155. It is similarly irrelevant whether, in the case of confirmatory applications, applicants divulge critical data about themselves. Indeed, the protection of personal data applies first and foremost regardless of the significance of the data in question.

b) The requirement to consult the persons concerned

156. Mr Strack is further of the view that the Commission should not have simply blanked out all the names and addresses, but should rather have asked the persons concerned whether they consented to a transfer of their data.

157. In that regard, the General Court held in particular in paragraph 178 of the judgment under appeal that consultation was not necessary because it was clear that personal data must be treated confidentially where there are no overriding reasons for a transfer.

158. That finding is not vitiated by an error of law.

159. Under Article 4(4) of Regulation No 1049/2001, in cases of applications for access to documents communicated by third parties to the institutions, consultation of those third parties is necessary only where it is unclear whether the document may or may not be disclosed. Any duty of consultation in relation to the documents drawn up by the institutions can under no circumstances extend any further.

160. Mr Strack clearly assumes that the possibility of transferring personal data is in doubt where the persons concerned have not decided whether they consent to the transfer. This is however not true.

161. Since the transfer of personal information constitutes processing, it is permissible only where one of the grounds for processing listed in Article 5 of Regulation No 45/2001 is satisfied. The consent of the data subject is one of those reasons. Transfers are otherwise generally not permissible.

162. The purpose of the requirement to consult the persons concerned is not therefore to inform them of the possibility of a transfer, but is rather intended to establish the conditions for a transfer. Article 4(4) of Regulation No 1049/2001 does not, however, lay down any obligation for the institutions in that regard.

53 — See above, point 152.

163. For the same reason, Mr Strack's argument that, as part of the complete handling of his application for access,[54] the Commission was required to consult the persons concerned in any event in order to be able to decide on the transfer of their confirmatory applications likewise cannot succeed. Although Article 4(4) of Regulation No 1049/2001 does apply to access to such documents, the personal information contained therein does not create any uncertainty as to whether access may be granted. Accordingly, it is not necessary to rule on whether any consultation had to be used for the purposes of seeking the consent of the people concerned to a transfer.

c) The consent of the people concerned to the transfer

164. Mr Strack also takes the view that the Commission and the General Court should have taken into consideration whether the persons concerned had already consented in advance to a transfer of their personal data in relation to their confirmatory applications. In at least one case this is even clear from the documents communicated to him. In that case, an applicant had stated the following:

'In view of the public interest, I cannot treat this as confidential. My question was not confidential. The public interest in this issue must prevail.'[55]

165. However, it appears highly unlikely that, in connection with confirmatory applications, the persons concerned consent in abstract and general terms to a transfer of their data. Even the example given is likely rather to be understood such that the person concerned objects to the refusal to grant access but not however that he consents to the disclosure of his personal data.

166. Furthermore, Mr Strack cannot criticise the General Court for failing to examine this argument, since he advanced it — if at all — only in the course of the hearing and therefore out of time.

d) The officials signing the decisions on confirmatory applications

167. With regard to Mr Strack's request to be provided with the names of officials who signed the decisions on confirmatory applications, it is not clear that he made that request before the General Court. Pursuant to the second sentence of Article 170(1) of the Rules of Procedure of the Court of Justice, that argument is therefore inadmissible because the appeal may not go beyond the subject-matter of the proceedings at first instance. Furthermore, the Commission submits that those names — namely those of the Secretary-General of the Commission and the Director of OLAF — were stated. This is clear at least indirectly inter alia from the letterhead of the examples of decisions on confirmatory applications submitted by Mr Strack. Mr Strack did not submit the pages containing the signatures.

e) The names of officials mentioned in the documents relating to Case T-110/04

168. With regard to the blanked-out names of officials mentioned in the documents relating to Case T-110/04, Mr Strack requests that a distinction be drawn between officials accused of having acted inappropriately and other officials. However, as far as both groups are concerned, it is in principle the case that the transfer of their personal data is not possible as a general rule for reasons of data protection. The fact that the names of officials who are accused of having acted inappropriately may be particularly deserving of protection does not therefore require that a distinction be drawn.

54 — As the General Court held in paragraph 141 of the judgment under appeal, Mr Strack's application related not just to the decisions on confirmatory applications but also the confirmatory applications themselves, a fact which the Commission ignored.

55 — See p. 126 of the annexes to the appeal.

f) The coding of names

169. Mr Strack further argues that, in the documents relating to Case T-110/04, the Commission should not have blanked out the names, but should rather have coded them (anonymously) in order to improve the legibility of the documents. This should have been required not least because the General Court had coded names in that case.

170. However, in this regard, the General Court correctly held in paragraphs 202 to 208 of the judgment under appeal that the comprehensive coding of names in the Commission documents covered by an extensive application would impose a disproportionate burden on the Commission. This argument advanced by Mr Strack therefore likewise cannot succeed.

4. Interim conclusion on the fifth ground of appeal

171. The fifth ground of appeal must therefore be rejected in its entirety.

F – *The sixth ground of appeal — confidential handling of anti-dumping proceedings*

172. The sixth ground of appeal concerns the protection of commercial interests in accordance with the first indent of Article 4(2) of Regulation No 1049/2001.

173. The Commission refused access to particular information and documents in order to prevent the identification of undertakings involved in anti-dumping cases which the applicant in Case T-110/04 handled.

174. The General Court endorsed that refusal in paragraphs 226 to 229 of the judgment under appeal because, in part, it related to business secrets and, moreover, the reputation of the undertakings concerned had to be protected. There was no apparent overriding public interest in the disclosure of that information.

175. Mr Strack states first of all that anti-dumping measures are published and, as part of such publication, inter alia the names of undertakings are stated. However, there is no indication that the information refused related to proceedings which ended in such publication. It has therefore not been proven that the interest in the confidential treatment of information has lapsed.

176. In addition, contrary to the view taken by Mr Strack, an interest may exist in both the names of the undertakings and the allegation being treated confidentially, since the allegation may allow conclusions to be drawn about the undertaking.

177. Mr Strack, however, raises the objection that there is an overriding public interest in the investigation of anti-dumping proceedings which justifies the transfer of that information and must be examined both by the Commission and by the General Court of its own motion.

178. That view is essentially correct. The Court has found that, in the situations referred to in Article 4(2) of Regulation No 1049/2001, the institution in question must explain whether or not there is an overriding public interest that might nevertheless justify disclosure of the document concerned.[56] It is therefore necessary to consider, of the institution's own motion, at least the most striking aspects of the individual case.[57] However, at this stage, such consideration will also as a general rule turn quite significantly on particular aspects which must be raised by the applicant.[58]

179. It is *a fortiori* true that, in court proceedings, an infringement of Article 4(2) of Regulation No 1049/2001 will fall to be considered, in connection with an examination of the overriding public interest, only if the applicant makes a complaint in that regard. If such a complaint does not concern the complete absence of such an examination, it must indicate the aspects which were not correctly assessed. It does not therefore constitute an error in law if the General Court concentrates on the applicant's submissions.[59]

180. Mr Strack did not, however, submit in the proceedings before the General Court that insufficient account had been taken of the particular interest in the transparency of anti-dumping proceedings.[60] Consequently, the General Court cannot be criticised for any error of law in that regard.

181. In addition, in so far as Mr Strack objects to the fact that the names of officials who were responsible for particular procedures were blanked out, it is not clear that that issue even formed part of the subject-matter of the first-instance proceedings. That argument is inadmissible pursuant to the second sentence of Article 170(1) of the Rules of Procedure because the appeal may not go beyond the subject-matter of the proceedings at first instance.

G – *The seventh ground of appeal — damages in relation to the processing of his application for access*

182. The seventh ground of appeal relates to Mr Strack's application for compensation in respect of the non-material damage suffered by him as a result of the Commission's processing of his application for access to documents. That damage is said to consist, first, in a deterioration in Mr Strack's physical health and, second, in a restriction on his right to take part in the Commission's consultation on transparency and access to documents of the institutions.

183. In paragraphs 261 to 266 of the judgment under appeal, the General Court held in essence that a sufficiently specific causal link between the alleged unlawful conduct and the damage claimed cannot be proven.

184. Those findings are largely in line with the applicable criteria.

185. The principles common to the laws of the Member States to which the second paragraph of Article 340 TFEU refers cannot be relied upon to found an obligation on the Union to make good every harmful consequence, even a remote one, of conduct of its institutions. The condition laid down in that provision of a causal link rather concerns a sufficiently direct causal nexus between the conduct of the institutions and the damage.[61]

56 — Judgment in *Sweden and Turco* v *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 49).

57 — See judgments in *Sweden and Others* v *API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 152), and, in relation to legal opinions in legislative processes, *Sweden and Turco* v *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 67).

58 — Judgment in *LPN and Finland* v *Commission* (C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 94 and the case-law cited).

59 — See my Opinion in *Sweden* v *MyTravel and Commission* (C-506/08 P, EU:C:2011:107, point 105).

60 — See paragraphs 71-73 of the reply in the proceedings at first instance.

61 — Judgments in *Dumortier and Others* v *Council* (64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79, EU:C:1979:223, paragraph 21); *Trubowest Handel and Makarov* v *Council and Commission* (C-419/08 P, EU:C:2010:147, paragraph 53 and the case-law cited); and *Mauerhofer* v *Commission* (C-433/10 P, EU:C:2011:204, paragraph 127).

186. The complaint cannot be made in this connection that, without exhausting all the evidence adduced by Mr Strack, the General Court assumed in paragraphs 263 and 264 of the judgment under appeal, in view of the numerous legal disputes between him and the Commission and his own partial responsibility for the present dispute, that such a link in relation to any deterioration in his mental health would be incapable of being found.

187. As far as the restriction on the opportunities to participate in the Commission's consultation is concerned, and contrary to the findings made by the General Court in paragraph 265 of the judgment under appeal, it is, however, irrelevant that Mr Strack could take part in the debate even without the documents (and did in fact do so). It is irrelevant because he was prevented from developing arguments pertinent to that debate on the basis of those documents.

188. However, the idea likewise developed in that paragraph that Mr Strack made the application for access of 20 June 2007 a relatively short period of time before the end of the consultation period on 31 July 2007 is more viable. Mr Strack has not proven that, if the Commission had acted properly, he would have received the documents requested in good time to be able to use them in connection with the consultation.

189. Even if it were to be assumed — as Mr Strack has assumed — that his application was registered too late and that the extension of the time-limit for a decision by a further 15 days was also out of time and therefore ineffective, it cannot be denied that the Commission was in principle entitled, given the volume of that application, to avail itself of the extension of the time-limit. Accordingly, if it had duly availed itself of the extension of the time-limit, the Commission would have had to reply to the initial application on 31 July 2007 at the earliest. Effective participation in the consultation on the basis of the documents requested would no longer have been possible at that time.

190. The General Court could therefore quite rightly assume that there is not a sufficiently direct causal nexus between any failings on the part of the Commission and the restrictions on Mr Strack's opportunities to participate. [62]

VI – **Costs**

191. Since the case is to be referred back to the General Court, the General Court's decision as to costs should be set aside and the decision on the costs of the present appeal proceedings reserved. [63]

VII – **Conclusion**

192. I therefore propose that the Court should:

(1) set aside point 6 of the operative part of the judgment in *Strack* v *Commission* (T-392/07, EU:T:2013:8) in so far as the General Court rejected the plea in law advanced by Mr Strack that the Commission did not decide on all the decisions refusing confirmatory applications;

(2) set aside the decision as to costs in point 7 of the operative part of the abovementioned judgment;

(3) dismiss the appeal and the cross-appeal as to the remainder;

62 — The judgments in *Richez-Parise and Others* v *Commission* (19/69, 20/69, 25/69 and 30/69, EU:C:1970:47, paragraphs 43 and 44); *Odigitria* v *Council and Commission* (T-572/93, EU:T:1995:131, paragraph 65); and *Farrugia* v *Commission* (T-230/94, EU:T:1996:40, paragraph 43) are based on similar considerations.

63 — See Article 184(2) of the Rules of Procedure.

(4) refer the case back to the General Court of the European Union for a decision as regards the plea in law stated in point 1 of the operative part of the abovementioned judgment;

(5) reserve the costs.