Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

12 October 2022*

(Access to documents – Regulation (EC) No 1049/2001 – Commission correspondence with AstraZeneca and the German authorities concerning the quantity of COVID-19 vaccines and their delivery times – Exception relating to the protection of court proceedings – Documents having been produced in the context of court proceedings that were closed at the time of adoption of the decision refusing access to those documents – Exception relating to the protection of privacy and the integrity of the individual – Exception relating to the protection of commercial interests of a third party)

In Case T-524/21,

Hans-Wilhelm Saure, residing in Berlin (Germany), represented by C. Partsch, lawyer,

applicant,

v

European Commission, represented by G. Gattinara, K. Herrmann and A. Spina, acting as Agents,

defendant,

THE GENERAL COURT (Eighth Chamber),

Composed, at the time of the deliberations, of J. Svenningsen (Rapporteur), President, C. Mac Eochaidh and J. Laitenberger, Judges,

Registrar: S. Jund, Administrator,

having regard to the written part of the procedure,

further to the hearing on 12 July 2022,

gives the following

* Language of the case: German.

Judgment [1]

1 By his action based on Article 263 TFEU, the applicant, Mr Hans-Wilhelm Saure, seeks annulment, first, of Commission Decision C(2021) 5327 final of 13 July 2021 refusing the confirmatory application for access to certain documents ('the first contested decision'), and, secondly, of Commission Decision C(2022) 870 final of 7 February 2022 refusing access to certain documents ('the second contested decision').

Background to the dispute

2 The applicant is a journalist employed by the German newspaper *Bild*.

3 By letter of 29 January 2021, he applied, on the basis of 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), to the European Commission for access to copies of all the correspondence exchanged since 1 April 2020 between the Commission and, first, AstraZeneca plc or its subsidiaries and, secondly, the Federal Chancellery of the Federal Republic of Germany or the Federal Ministry of Health of that Member State regarding that company and its subsidiaries, and relating to, inter alia, the quantity of COVID-19 vaccines and delivery times offered by AstraZeneca. That request was registered under reference GESTDEM 2021/0550 on 1 February 2021.

4 On 16 March 2021, having received no reply from the Commission within the time limit provided for by Article 7(1) of Regulation No 1049/2001, as extended in accordance with paragraph 3 of that provision, the applicant sent the Commission a confirmatory application.

5 On the same day, the Commission's services acknowledged receipt of the confirmatory application. On 9 April 2021, namely, on the expiry of the time limit for processing that application, the Commission's services informed the applicant that that application was still under examination and that the time limit had been extended until 30 April 2021, that is, until the expiry of the additional 15 working days provided for in Article 8(2) of Regulation No 1049/2001.

6 On 23 April 2021, the European Union, represented by the Commission, brought proceedings before the tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking), Belgium) against AstraZeneca concerning the performance of the advance purchase agreement concluded with it.

7 On 30 April 2021, the Commission's services again informed the applicant that they could not reply to the confirmatory application within the fixed time limit and stated that they would do everything in their power to provide him with a reply as soon as possible. On that date, the failure to reply to the confirmatory application gave rise to an implied negative decision relating to the documents requested, in accordance with Article 8(3) of Regulation No 1049/2001, against which the applicant brought an action for annulment registered as Case T-232/21, which was dismissed by order of 18 March 2022, *Saure* v *Commission* (T-232/21, not published, EU:T:2022:165).

[1] Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

8 By order of 18 June 2021, the judge hearing applications for interim measures in the court proceedings between the European Union and AstraZeneca ordered AstraZeneca to deliver 50 million doses of additional vaccines to the EU Member States in accordance with a binding schedule, on pain of periodic penalty payments.

9 On 13 July 2021, the Secretary-General of the Commission adopted the first contested decision in response to the confirmatory application of 16 March 2021. That decision, in particular, identified various documents and stated that access to those documents had to be refused since they fell within the exception relating to the protection of court proceedings provided for by the second indent of Article 4(2) of Regulation No 1049/2001, given that such proceedings were pending before the tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking)).

10 On 3 September 2021, the Commission stated, in a press release, that the European Union and AstraZeneca had reached an agreement that would, inter alia, end the litigation pending before the tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking)). That court took formal note of the withdrawal of the action in a judgment of 15 October 2021.

11 On 7 February 2022, having regard to the closure of those court proceedings, the Secretary-General of the Commission, after re-examining the confirmatory application of 16 March 2021 on the basis of Article 4(7) of Regulation No 1049/2001, adopted the second contested decision, from which it is apparent that it replaces the first contested decision.

12 First, the Commission stated that the exception relating to the protection of court proceedings applied to all of the following documents:

– an annex to the bid submitted by AstraZeneca ('document No 1.2');

– a document of 12 June 2020 exchanged between AstraZeneca and the governments of a number of Member States for the negotiation and conclusion of a financing contract ('document No 2');

– a draft financing contract sent by AstraZeneca on 24 June 2020 to the governments of a number of Member States ('document No 3');

– a document of 20 November 2020 concerning the second payment instalment provided for in the advance purchase agreement concluded with AstraZeneca ('document No 5');

– the presentations used by AstraZeneca during the meetings of the Steering Committee of 4 December 2020, 22 January, 1, 11, 19 and 23 February and 11 March 2021 ('document No 6');

– a presentation used by AstraZeneca during a meeting of 7 December 2020 ('document No 7');

– a presentation used by AstraZeneca during a meeting of 19 January 2021 ('document No 8');

– a document relating to the vaccine delivery dates ('document No 9') with five annexes ('documents No 9.1 to No 9.5');

– a presentation used by AstraZeneca during a meeting of the Steering Committee of 25 January 2021 ('document No 10').

13 In addition, the Commission partially refused access to the emails exchanged between the Commission and AstraZeneca on 27 July 2020 ('document No 11') on the basis of the exception relating to the protection of court proceedings.

14 Secondly, on the basis of the exception relating to the protection of privacy and the integrity of the individual provided for in Article 4(1)(b) of Regulation No 1049/2001, the Commission partially refused access to certain documents, from which it redacted the personal data of representatives of AstraZeneca and of members of staff of the Commission not holding senior management positions. The documents concerned are:

– the email sent to the Commission containing AstraZeneca's bid submission ('document No 1.1');

– the emails exchanged between AstraZeneca, the Commission and the German Government between 2 and 13 July 2020 ('document No 4');

– document No 11;

– the advance purchase agreement concluded on 27 August 2020 between AstraZeneca and the Commission ('document No 12').

15 Thirdly, the Commission stated that the exception relating to the protection of commercial interests, provided for in the first indent of Article 4(2) of Regulation No 1049/2001, justified the granting of only partial access to the following documents:

– the minutes of the meetings of the Steering Committee of 4 December 2020, 22 January, 1, 11, 19 and 23 February and 11 March 2021 ('documents No 6.1 to No 6.6');

– document No 12.

16 Furthermore, taking the view that the document containing the bid submitted by AstraZeneca ('document No 1') was covered by a general presumption of confidentiality by virtue of the exception relating to the protection of commercial interests, the Commission refused altogether to grant access to that document.

17 Fourthly, the Commission granted full access to two annexes to document No 11.

Forms of order sought

18 In the application, the applicant claims that the Court should:

– annul the first contested decision;

– order the Commission to pay the costs.

19 In its application for a declaration that there is no need to adjudicate, the Commission claims that the Court should:

– declare that there is no longer any need to adjudicate on the action;

– order each party to bear its own costs.

20 In the statement of modification of the application, the applicant claims that the Court should annul the second contested decision.

21 In its response to the statement of modification of the application, the Commission contends that the Court should:

– dismiss the modified application;

– order the applicant to pay the costs.

Law

…

Claim for annulment of the second contested decision

28 In support of the application for annulment of the second contested decision, the applicant puts forward three pleas in law, alleging that the three exceptions relied on by the Commission to justify its refusal to grant access to the requested documents are inapplicable.

The first plea in law, alleging inapplicability of the second indent of Article 4(2) of Regulation No 1049/2001

29 The applicant submits that the exception relating to the protection of court proceedings applies only for as long as a dispute is pending before a court. Since the proceedings before the tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking)) have been closed, the disclosure of the requested documents would no longer be likely to undermine any court proceedings within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001. He also contends that Article 871*bis* of the code judiciaire belge (Belgian Judicial Code) does not permit a derogation from the clear wording of that article.

30 The Commission contends that, even after the conclusion of the court proceedings, the exception relating to the protection of court proceedings continues to apply in the present case to certain documents produced in the context of those proceedings. It considers that the refusal to grant access to the documents at issue was necessary to ensure, inter alia, respect for the integrity of the court proceedings.

31 It also relies on its duty of sincere cooperation with the judicial authorities, which requires it not to disclose certain documents produced in the course of those proceedings and classified as confidential under Article 871*bis* of the Belgian Judicial Code.

32 Furthermore, the applicant has not relied on any overriding public interest capable of justifying the disclosure of those documents to the public.

33 Under the second indent of Article 4(2) of Regulation No 1049/2001, the institutions are to refuse access to a document where disclosure would undermine the protection of court proceedings, unless there is an overriding public interest in disclosure.

34 Furthermore, according to the first sentence of Article 4(7) of Regulation No 1049/2001, the exceptions as laid down in paragraphs 1 to 3 are only to apply for the period during which protection is justified on the basis of the content of the document.

35 It follows that the application of the exception laid down in the second indent of Article 4(2) of Regulation No 1049/2001 is necessarily limited in time in so far as it precludes the disclosure of documents only for as long as, having regard to their content, the risk of undermining court proceedings persists (see, to that effect, judgment of 6 February 2020, *Compañía de Tranvías de la Coruña* v *Commission*, T-485/18, EU:T:2020:35, paragraph 43 and the case-law cited).

36 According to the case-law, the protection of court proceedings is accounted for by the need to ensure compliance with the principles of equality of arms and the sound administration of justice (see, to that effect, judgment of 21 September 2010, *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 85).

37 As regards the principle of equality of arms, it has in particular been held that, if the content of documents setting out an institution's position in a dispute were to form the subject of public debate, criticism of them could unduly influence the position defended by the institution before the courts in question (see judgment of 6 February 2020, *Compañía de Tranvías de la Coruña* v *Commission*, T-485/18, EU:T:2020:35, paragraph 39 and the case-law cited).

38 As regards the sound administration of justice and the integrity of court proceedings, the exclusion of judicial activities from the scope of the right of access to documents is justified in the light of the need to ensure that, throughout the court proceedings, the exchange of argument by the parties and the deliberations of the court concerned in the case before it take place in an atmosphere of total serenity, without any external pressure on judicial activities (see judgment of 6 February 2020, *Compañía de Tranvías de la Coruña* v *Commission*, T-485/18, EU:T:2020:35, paragraph 40 and the case-law cited).

39 In the present case, it should be noted that the documents to which access was refused by the Commission relate to the quantity and delivery of vaccines manufactured by AstraZeneca, and that they include documents which the Commission held before 16 March 2021, the date on which the applicant submitted a confirmatory application for access.

40 It was only subsequently that those documents were produced in the course of proceedings brought before the tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking)) on 23 April 2021 concerning the delivery of vaccines under the advance purchase agreement concluded with AstraZeneca. Those proceedings ended on 15 October 2021, the date on which the national court took formal note of the withdrawal of the action, the effect of which was to bring those proceedings definitively to a close.

41 Therefore, on 7 February 2022, the date on which the second contested decision was adopted, the court proceedings capable of justifying the application of the exception relating to the protection of those proceedings were closed.

42 In that context, it must be recalled that a document which was not drawn up in the context of specific court proceedings may indeed be protected under the exception laid down in the second indent of Article 4(2) of Regulation No 1049/2001 if, on the date on which that request for access is replied to, it has been produced in those court proceedings (judgment of 29 October 2020, *Intercept Pharma and Intercept Pharmaceuticals* v *EMA*, C-576/19 P, EU:C:2020:873, paragraph 48).

43 However, first, it follows from the broad definition of the notion of 'document', as set out in Article 3(a) of Regulation No 1049/2001, and from the wording and the very existence of the exception relating to the protection of court proceedings, that the EU legislature did not intend to exclude the institutions' litigious activities from the public's rights of access, but that it provided, in that regard, that they are to refuse to disclose documents relating to court proceedings where such disclosure would undermine the proceedings to which those documents relate (see judgment of 27 February 2015, *Breyer* v *Commission*, T-188/12, EU:T:2015:124, paragraph 43 and the case-law cited).

44 Secondly, it is apparent from the first sentence of Article 4(7) of Regulation No 1049/2001 that, in order to determine whether a document falls within the scope of one of the exceptions to the right of access to documents laid down in paragraphs 1 to 3 of that article, only the content of the document requested is relevant (judgment of 29 October 2020, *Intercept Pharma and Intercept Pharmaceuticals* v *EMA*, C-576/19 P, EU:C:2020:873, paragraph 36).

45 It follows from paragraphs 43 and 44 above that the fact that a document was produced in the context of court proceedings means only that such a document is capable of being protected under the exception provided for in the second indent of Article 4(2) of Regulation No 1049/2001, which must be verified in the light of the content of that document, in accordance with Article 4(7) of Regulation No 1049/2001.

46 In other words, to assess whether, as the applicant claims, the exception relating to the protection of court proceedings could no longer justify the refusal of access to the documents at issue after the closure of those proceedings, it is necessary to examine whether, in the light of the content of those documents, the Commission has demonstrated that their disclosure would continue to undermine such proceedings.

47 In the present case, the Commission has failed to explain how access to the documents in question could, in the light of their content, specifically and actually continue to undermine the court proceedings which were closed at the time when the decision refusing access to those documents was adopted.

48 Therefore, in the absence of such an explanation resulting from a specific examination of the content of the documents at issue, the applicant is right to point out, in essence, that the disclosure of a document produced in the context of the court proceedings in question is no longer likely to undermine the judicial activities of the national court, since those activities have come to an end with the closure of the proceedings. Similarly, in such circumstances, that disclosure is, in principle, no longer capable of compromising the defence of the author of that document or, therefore, of undermining the principle of equality of arms, as the Commission

acknowledged at the hearing, during which it focused on the need to ensure respect for the integrity of the court proceedings. On that last point, it must also be noted that, following the closure of the proceedings, the exchange of argument by the parties and the deliberations of the court concerned in the case before it were able to take place in an atmosphere of total serenity, without any external pressure on judicial activities.

49 That conclusion is not invalidated by paragraph 132 of the judgment of 21 September 2010, *Sweden and Others* v *API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541), to which the Commission referred at the hearing. In that case, the Court of Justice held that an institution could refuse access to written pleadings drawn up in the context of court proceedings which were closed where, following an examination of the content of those pleadings, it was apparent that they contained arguments used in support of the legal position defended by that institution in other similar court proceedings which remained pending. In such a case, it cannot be ruled out that the disclosure of those pleadings would undermine those proceedings.

50 In the present case, no other court proceedings were pending, or even imminent, at the time of adoption of the second contested decision.

51 Notwithstanding that finding, the Commission nevertheless argues that, irrespective of the content of the documents at issue, it was required to refuse access to those documents in order to comply with the requirements of Article 871*bis* of the Belgian Judicial Code.

52 That article is worded, inter alia, as follows:

‘Parties … who, because of their participation in court proceedings, or their access to documents forming part of such court proceedings, are aware of a business secret or alleged business secret … that the court has, in response to a duly reasoned request by an interested party or of its own motion, classified as confidential, are not authorised to use or disclose that business secret or alleged business secret.

That obligation to maintain confidentiality … shall continue after the court proceedings have ended.’

53 In other words, a party to court proceedings is not authorised to disclose a business secret or alleged business secret of which it has become aware as a result of its participation in the proceedings, even after the proceedings have ended, where the court has decided that such a secret should remain confidential.

54 The Commission cannot, however, rely on that article to justify the application of the second indent of Article 4(2) of Regulation No 1049/2001 and, therefore, the refusal of access to the documents in question.

55 In the first place, it must be noted that the purpose of Article 871*bis* of the Belgian Judicial Code is to transpose Article 9(1) of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ 2016 L 157, p. 1).

56 Recital 11 of that directive states that the directive should not affect the application of EU or national rules that require the disclosure of information, including trade secrets, to the public or to public authorities. Nor should it affect the application of rules that allow public authorities to collect information for the performance of their duties, or rules that allow or require any subsequent disclosure by those public authorities of relevant information to the public. Such rules include, in particular, rules on the disclosure by the EU institutions and bodies or national public authorities of business-related information they hold pursuant to Regulation No 1049/2001.

57 It follows that the Commission cannot rely on a provision of national law transposing that directive in order to frustrate its obligations under Regulation No 1049/2001.

58 In the second place, on the one hand, it should be noted, as is apparent from paragraph 39 above and as the Commission confirmed at the hearing, that the documents at issue are not documents which the Commission holds because of its participation in the court proceedings within the meaning of Article 871*bis* of the Belgian Judicial Code, since they were already in its possession before those proceedings began.

59 On the other hand, it should be pointed out that, in the second contested decision, the Commission referred to an order of the national court in which that court decided that certain documents produced in the course of those proceedings would continue to be covered by the obligation to protect their confidentiality in accordance with Article 871*bis* of the Belgian Judicial Code.

60 Nevertheless, it is apparent, in essence, from the Commission's replies to a measure of organisation of procedure that the national court before which the matter was brought did not adopt any decision pursuant to that article. It is the parties themselves that concluded an agreement according to which certain documents produced in the course of those proceedings would remain confidential under that article, an agreement which, moreover, was intended to replace a decision of the court in that respect.

61 In that regard, it is important in particular to note that, in the document by which they informed the national court of their amicable agreement, the parties, in the part of the document setting out the form of order sought, expressly requested the tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking)) to 'take formal note … of the fact that the obligation of confidentiality as referred to in [their] letters … is to remain applicable after the end of the court proceedings, in accordance with the third subparagraph of Article 871*bis* (1) of the Belgian Judicial Code'.

62 In its judgment of 15 October 2021, the national court limited itself, first, to taking 'formal note of the withdrawal of the action by the claimants' and, secondly, to taking 'formal note of the parties' agreement as to costs', without expressing an opinion on the head of claim whereby the parties asked it to 'record' that certain documents would remain confidential after the closure of the proceedings.

63 It is also not clear from the interim order of 18 June 2021 that the court decided that certain documents produced in the course of the court proceedings had to be classified as confidential under Article 871*bis* of the Belgian Judicial Code. That order merely refers to the fact that, '[at] the hearing of 26 May 2021, and upon request, the parties confirmed that the confidential mark affixed to certain documents and extracts from their pleadings did not preclude some of their extracts from being reproduced in [that] order', without referring to that article or its content.

64 In those circumstances, it must be held that the Commission cannot, by means of a mere agreement concluded with a third-party company, restrict the right which every EU citizen derives directly from Article 2(1) of Regulation No 1049/2001 of access to documents held by that institution. Similarly, to accept that an institution can rely on such an agreement in order to refuse access to documents which it holds would amount to authorising it to circumvent its obligation to give access to those documents, except where their disclosure would undermine one of the interests protected by Article 4 of Regulation No 1049/2001.

65 It also follows from the foregoing that, in so far as the parties themselves agreed to classify certain documents as confidential, without further intervention of the national court other than that referred to in paragraphs 61 to 63 above, the Commission cannot rely on its duty of sincere cooperation with the judicial authorities of the Member States to justify the refusal of access to those documents.

66 In the third place, it must be noted that the purpose of Article 871*bis* of the Belgian Judicial Code, in so far as it is intended to protect business secrets, differs from that pursued by the second indent of Article 4(2) of Regulation No 1049/2001, which seeks to ensure compliance with the principles of equality of arms and the sound administration of justice and integrity of court proceedings. Therefore, the mere fact that the documents at issue contain business secrets or alleged business secrets does not, in any event, explain how access to those documents could specifically and actually continue to undermine the court proceedings which were closed at the time when the second contested decision was adopted.

67 Accordingly, while it is conceivable that a document containing business secrets could fall within the scope of one or other of the exceptions provided for in Article 4 of Regulation No 1049/2001, such as the exception relating to the protection of commercial interests, which it is for the institution concerned to verify in the light of the content of the document in question, the mere fact that such a business secret has been revealed in the context of court proceedings which have now been closed and has been classified by the parties to the proceedings as confidential, within the meaning of Article 871*bis* of the Belgian Judicial Code, is not sufficient to justify the application to the documents in question of the exception laid down in the second indent of Article 4(2) of the Regulation No 1049/2001.

68 In the light of all of the foregoing, the first plea in law must be upheld.

…

The third plea in law, alleging inapplicability of the first indent of Article 4(2) of Regulation No 1049/2001

…

104 Since the first plea in law must be upheld and the Commission has not relied on any other exception in the second contested decision to justify the refusal of access to documents No 1.2, No 2, No 3, No 5, No 6, No 7, No 8, No 9, No 9.1 to No 9.5 and No 10, and to part of document No 11, that decision must be annulled in so far as it refuses the applicant access to those documents.

105 More specifically, as regards document No 1.2, consisting of an annex to the bid submitted by AstraZeneca (document No 1), it should be noted that, as is apparent from paragraph 97 above, the Commission did indeed indicate in the second contested decision that the bid and its annexes were covered by a general presumption of confidentiality according to which their disclosure would undermine the protection of AstraZeneca's commercial interests. However, in response to a question put by the Court at the hearing, the Commission stated that it did not intend to rely on the exception relating to the protection of commercial interests in relation to document No 1.2, which was covered exclusively by the exception relating to the protection of court proceedings.

106 By contrast, in so far as it is directed against the second contested decision refusing access to documents No 1, No 1.1, No 4, No 6.1 to No 6.6 and No 12 and the data in document No 11 which are covered by the exception relating to privacy and the integrity of the individual, the present action must be dismissed.

…

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Declares that there is no longer any need to adjudicate on the claim for annulment of Commission Decision C(2021) 5327 final of 13 July 2021 refusing the confirmatory application for access to certain documents;**

2. **Annuls Commission Decision C(2022) 870 final of 7 February 2022, in so far as it refused Mr Hans-Wilhelm Saure access to the following documents:**

   – **an annex to the bid submitted by AstraZeneca (document No 1.2);**

   – **a document of 12 June 2020 exchanged between AstraZeneca and the governments of a number of Member States for the negotiation and conclusion of a financing contract (document No 2);**

   – **a draft financing contract sent by AstraZeneca on 24 June 2020 to the governments of a number of Member States (document No 3);**

   – **a document of 20 November 2020 concerning the second payment instalment provided for in the advance purchase agreement concluded with AstraZeneca (document No 5);**

   – **the presentations used by AstraZeneca during the meetings of the Steering Committee of 4 December 2020, 22 January, 1, 11, 19 and 23 February and 11 March 2021 (document No 6);**

   – **a presentation used by AstraZeneca during a meeting of 7 December 2020 (document No 7);**

– **a presentation used by AstraZeneca during a meeting of 19 January 2021 (document No 8);**

– **a document relating to the vaccine delivery dates (document No 9) with five annexes (documents No 9.1 to No 9.5);**

– **a presentation used by AstraZeneca during a meeting of the Steering Committee of 25 January 2021 (document No 10);**

– **part of the emails exchanged between the Commission and AstraZeneca on 27 July 2020 (document No 11);**

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

4. **Orders the European Commission to pay the costs.**

Svenningsen Mac Eochaidh Laitenberger

Delivered in open court in Luxembourg on 12 October 2022.

[Signatures]