Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

27 February 2015 *

(Access to documents — Regulation (EC) No 1049/2001 — Written submissions lodged by the Republic of Austria in infringement proceedings before the Court of Justice — Refusal to grant access)

In Case T-188/12,

Patrick Breyer, residing in Wald-Michelbach (Germany), represented by M. Starostik, lawyer,

applicant,

supported by

Republic of Finland, represented by J. Heliskoski and S. Hartikainen, acting as Agents,

and by

Kingdom of Sweden, represented initially by A. Falk, C. Meyer-Seitz, C. Stege, S. Johannesson, U. Persson, K. Ahlstrand-Oxhamre and H. Karlsson, then by A. Falk, C. Meyer-Seitz, U. Persson, L. Swedenborg, N. Otte Widgren, E. Karlsson and F. Sjövall, acting as Agents,

interveners,

v

European Commission, represented initially by P. Costa de Oliveira and H. Krämer, then by H. Krämer and M. Konstantinidis, acting as Agents, assisted initially by A. Krämer and R. Van der Hout, then by R. Van der Hout, lawyers,

defendant,

APPLICATION for annulment, first, of the Commission decision of 16 March 2012 rejecting an application made by the applicant for access to the Commission's legal opinion relating to Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54) and, second, of the Commission decision of 3 April 2012 refusing to grant the applicant full access to documents relating to the transposition by the Republic of Austria of Directive 2006/24/EC and to documents relating to Case C-189/09 *Commission* v *Austria*, EU:C:2010:455, in so far as, with regard to the latter decision, access to the written submissions lodged by the Republic of Austria in that case was refused,

* Language of the case: German.

THE GENERAL COURT (Second Chamber),

composed of M.E. Martins Ribeiro, President, S. Gervasoni and L. Madise (Rapporteur), Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 5 September 2014,

gives the following

Judgment

Legislative framework

1 Under the first and fourth subparagraphs of Article 15(3) TFEU:

‘Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union’s institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

...

The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.’

2 The purpose 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) is to define the principles, conditions and limits governing the right of access to documents of the Council of the European Union, the European Parliament and the European Commission provided for in Article 15 TFEU.

3 Under the heading ‘Beneficiaries and scope’, Article 2(1) and (3) of Regulation No 1049/2001 provides:

‘1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

...

3. 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.’

4 Article 3 of Regulation No 1049/2001 gives the following definitions of ‘document’ and ‘third party’:

‘(a) “document” shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audio-visual recording) concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility;

(b) “third party” shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.’

5 Under the heading ‘Exceptions’, Article 4 of Regulation No 1049/2001 includes the following provisions in paragraphs 2 and 5:

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

— ...

— court proceedings and legal advice,

— ...

unless there is an overriding public interest in disclosure.

...

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.’

Background to the dispute

6 By letter of 30 March 2011, the applicant, Patrick Breyer, submitted to the European Commission an application for access to documents pursuant to Article 6 of Regulation No 1049/2001.

7 The requested documents related to infringement proceedings brought in 2007 by the Commission against the Federal Republic of Germany and the Republic of Austria concerning the transposition of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2004 L 105, p. 54). More precisely, the applicant applied for access to all documents relating to the administrative procedures conducted by the Commission and to all documents relating to the court proceedings in Case C-189/09 *Commission* v *Austria* (EU:C:2010:455).

8 On 11 July 2011, the Commission rejected the application submitted by the applicant on 30 March 2011.

9 On 13 July 2011, the applicant made a confirmatory application pursuant to Article 7(2) of Regulation No 1049/2001.

10 By decisions of 5 October and 12 December 2011, the Commission granted the applicant access to some of the requested documents concerning the infringement proceedings brought against the Federal Republic of Germany. In those decisions, the Commission also informed the applicant of its intention to adopt a separate decision in respect of the documents relating to *Commission* v *Austria*, paragraph 7 above (EU:C:2010:455).

11 By letter of 4 January 2012, the applicant applied to the Commission pursuant to Article 6 of Regulation No 1049/2001 for access to an opinion, bearing reference Ares (2010) 828204, of the Commission’s Legal Service concerning a possible amendment of Directive 2006/24 so as to permit optional application by Member States (‘the application of 4 January 2012’).

12 On 17 February 2012, the Commission rejected the application of 4 January 2012.

13 On the same date, the applicant submitted, by email, a confirmatory application pursuant to Article 7(2) of Regulation No 1049/2001.

14 In response to that confirmatory application, the Commission adopted the decision, bearing reference Ares (2012) 313186, of 16 March 2012, by which it confirmed the refusal to grant access to its legal opinion ('the decision of 16 March 2012'). That refusal was based on the exceptions set out in the second indent of Article 4(2) and in Article 4(3) of Regulation No 1049/2001 relating to the protection of legal advice and the protection of the decision-making process, respectively.

15 On 3 April 2012, in response to the applicant's confirmatory application of 13 July 2011, the Commission adopted the decision bearing reference Ares (2012) 399467 ('the decision of 3 April 2012'). By that decision, the Commission ruled on access by the applicant, on the one hand, to documents in the administrative file relating to the infringement proceedings, referred to in paragraph 7 above, brought against the Republic of Austria and, on the other, to documents relating to the court proceedings in *Commission* v *Austria*, paragraph 7 above (EU:C:2010:455). In respect of the latter, the Commission inter alia refused access to the written submissions lodged by the Republic of Austria in those court proceedings ('the written submissions at issue') on the ground that those submissions did not fall within the scope of Regulation No 1049/2001. First of all, according to the Commission, under Article 15(3) TFEU the Court of Justice of the European Union, in its capacity as an institution, is subject to the rules on access to documents only when exercising its administrative tasks. Second, the Commission states that the written submissions at issue were made to the Court, whereas the Commission, as a party to the proceedings in *Commission* v *Austria*, paragraph 7 above (EU:C:2010:455), received only copies. Third, the Commission considers that Article 20 of the Statute of the Court of Justice of the European Union provides for the communication of written pleadings relating to court proceedings only to the parties to those proceedings and to institutions whose decisions are in dispute. Fourth, according to the Commission, in *Sweden and Others* v *API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, ECR, EU:C:2010:541), the Court did not address the question whether the institutions should grant access to the written submissions of another party to court proceedings. Consequently, with regard to written submissions lodged in court proceedings, only written submissions submitted by the institutions, and not those lodged by other parties, fall within the scope of Regulation No 1049/2001, it being understood that if a different interpretation were adopted, the provisions of Article 15 TFEU and specific rules stemming from the Statute of the Court of Justice and the Rules of Procedure of the Court of Justice would be circumvented.

Procedure and forms of order sought

16 By application lodged at the Registry of General Court on 30 April 2012, the applicant brought the present action.

17 By letter lodged at the Registry of the Court on 3 May 2012, the applicant informed the Court that on 30 April 2012 he had read a letter from the Commission which had been sent to him by e-mail and which corresponded to the legal opinion to which his application of 4 January 2012 relates.

18 By documents lodged at the Registry of the Court on 3 and 17 August 2012 respectively, the Kingdom of Sweden and the Republic of Finland applied to intervene in these proceedings in support of the forms of order sought by the applicant. By order of 28 September 2012, the President of the Fourth Chamber of the General Court granted those applications. The Kingdom of Sweden lodged its statement in intervention within the prescribed period. The Republic of Finland did not lodge a statement in intervention. The Commission submitted its observations on the Kingdom of Sweden's statement in intervention within the prescribed period.

19 Following a partial change in the composition of the Chambers of the General Court, the case was allocated to a new Judge-Rapporteur. The Judge-Rapporteur was subsequently assigned to the Second Chamber, to which the present case was therefore allocated.

20 Upon hearing the Report of the Judge-Rapporteur, the General Court (Second Chamber) decided to open the oral procedure.

21 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 5 September 2014.

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

— annul the decision of 16 March 2012;

— annul the decision of 3 April 2012 in so far as access to the written submissions at issue was refused;

— order the Commission to pay the costs.

23 In his letter of 3 May 2012 (see paragraph 17 above), the applicant claimed that the Court should declare the application for annulment of the decision of 16 March 2012 devoid of purpose.

24 The Commission contends that the Court should:

— declare the application for annulment of the decision of 16 March 2012 devoid of purpose;

— dismiss as unfounded the application for annulment of the decision of 3 April 2012;

— order the applicant to pay the costs.

25 At the hearing, the Commission claimed in the alternative that in the case of the partial annulment of the decision of 3 April 2012, the applicant should be ordered, in accordance with Article 87(3) of the Rules of Procedure of the General Court, to bear his own costs by reason of exceptional circumstances, which the Court formally noted in the minutes of the hearing. Those exceptional circumstances were the publication on the internet of certain written pleadings relating to the present proceedings and of an exchange of letters on that subject between the Commission and the applicant.

26 The Kingdom of Sweden claims that the Court should annul the decision of 3 April 2012 in so far as access to the written submissions at issue was refused.

Law

The application for annulment of the decision of 16 March 2012

27 As has been recognised by settled case-law, the objective of the dispute, as determined by the action initiating the proceedings, must continue, like the interest in bringing proceedings, until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be liable, if successful, to procure an advantage to the party bringing it (see *LPN* v *Commission*, T-29/08, ECR, EU:T:2011:448, paragraph 56 and cited case-law).

28 It is clear from the material in the file that on 30 April 2012 the applicant received a copy of the Commission's legal opinion to which he had been refused access by the decision of 16 March 2012.

29 In those circumstances it must be held that, as the applicant and the Commission agree, the application for annulment of the decision of 16 March 2012 has become devoid of purpose and that, consequently, there is no need to adjudicate on that application (see, to this effect, *LPN* v *Commission*, paragraph 27 above, EU:T:2011:448, paragraph 57).

The application for partial annulment of the decision of 3 April 2012

30 In support of his application for annulment of the decision of 3 April 2012, the applicant, supported by the Kingdom of Sweden, raises a single plea in law, essentially alleging an infringement of Article 2(3) of Regulation No 1049/2001, which defines the scope of that regulation. By that plea in law, the applicant challenges the conclusion in the decision of 3 April 2012 that the written submissions at issue do not fall within the scope of Regulation No 1049/2001.

31 The Commission contests the validity of the single plea in law, in essence on the ground that written submissions drawn up by a Member State in court proceedings are excluded from the right of access to documents. On the one hand, such written submissions should be regarded as documents of the Court of Justice which, under the fourth subparagraph of Article 15(3) TFEU, are excluded from the right of access to documents, as Regulation No 1049/2001 should be interpreted having regard to that provision of primary law. On the other hand, they do not constitute documents held by an institution within the meaning of Article 2(3) of Regulation No 1049/2001 in conjunction with Article 3(a) of that regulation.

32 First, it is not disputed that in the decision of 3 April 2012 the Commission refused to grant the applicant access to the written submissions at issue on the ground that those written submissions did not fall within the scope of Regulation No 1049/2001 (see paragraph 15 above).

33 Second, it is clear both from the written pleadings lodged by the parties and from the discussions at the hearing that the parties essentially disagree on whether the written submissions at issue fall within the scope of Regulation No 1049/2001. More precisely, on the one hand, their views differ on the classification of the written submissions at issue as documents held by an institution within the meaning of Article 2(3) of Regulation No 1049/2001 in conjunction with Article 3(a) of that regulation. On the other hand, they disagree on whether the written submissions at issue are, by their very nature, excluded from the scope of the right of access to documents under the fourth subparagraph of Article 15(3) TFEU.

34 In those circumstances, in order to assess the validity of the single plea in law, it must be determined, in a first step, whether the written submissions at issue constitute documents capable of falling within the scope of Regulation No 1049/2001, as defined in Article 2(3) in conjunction with Article 3, before examining, if necessary, in a second step, whether even if the conditions governing the application of Regulation No 1049/2001, as set out in the provisions of that regulation, are met, the very nature of those written submissions, which are drawn up for the litigation phase of proceedings for failure to fulfil obligations, nevertheless prevents that regulation being applied to an application for access to those written submissions on the basis of the fourth subparagraph of Article 15(3) TFEU.

The classification of the written submissions at issue as documents held by an institution within the meaning of Article 2(3) of Regulation No 1049/2001 in conjunction with Article 3(a) thereof

35 The applicant, supported by the Kingdom of Sweden, essentially claims that the written submissions at issue fall within the scope of Regulation No 1049/2001 because they are in the possession of the Commission and fall within its competence.

36 The Kingdom of Sweden adds that, as is clear from Article 2(3) thereof, Regulation No 1049/2001 covers all documents held by an institution and in its possession, whether they are copies or originals, whether they were sent directly to the institution in question or whether they were sent to it by the Court in court proceedings, and regardless of their origin, with the result that, as the written submissions at issue fall within the competence of the Commission, they fall within the scope of Regulation No 1049/2001.

37 The Commission, on the other hand, considers that the written submissions at issue do not fall within the scope of Regulation No 1049/2001 because they cannot be classified as documents held by it within the meaning of Article 2(3) of Regulation No 1049/2001 in conjunction with Article 3(a) of that regulation. Those written submissions were made to the Court, were sent to the Commission by the Court only in the form of copies and, as they constitute judicial documents, do not fall within the scope of the Commission's administrative activities nor, therefore, within its competence, as only its administrative activities are covered by the scope of Regulation No 1049/2001.

38 As a preliminary point, it should be noted, in the first place, that, as appears from recital 1 in the preamble to Regulation No 1049/2001, that regulation reflects the intention expressed in the second paragraph of Article 1 TEU to mark a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. As recital 2 in the preamble to Regulation No 1049/2001 notes, the right of public access to documents of the institutions is related to the democratic nature of those institutions (*Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, ECR, EU:C:2008:374, paragraph 34, and *Sweden and Others* v *API and Commission*, paragraph 15 above, EU:C:2010:541, paragraph 68).

39 To that end, Regulation No 1049/2001 is intended, as is apparent from recital 4 in its preamble and from Article 1, to give the fullest possible effect to the right of public access to documents of the institutions (*Sison* v *Council*, C-266/05 P, ECR, EU:C:2007:75, paragraph 61; *Sweden* v *Commission*, C-64/05 P, ECR, EU:C:2007:802, paragraph 53; and *Sweden and Others* v *API and Commission*, paragraph 15 above, EU:C:2010:541, paragraph 69).

40 In the second place, it should be observed, first, that in accordance with Article 2(3) of Regulation No 1049/2001, that regulation applies to all documents held by an institution, that is to say drawn up or received by it and in its possession, in all areas of European Union activity (*Sweden* v *MyTravel and Commission*, C-506/08 P, ECR, EU:C:2011:496, paragraph 88). Thus, the right of access to documents held by the Parliament, the Council and the Commission extends not only to documents drawn up by those institutions but also to those received from third parties, including the Member States, as expressly stated in Article 3(b) of that regulation (*Sweden* v *Commission*, paragraph 39 above, EU:C:2007:802, paragraph 55, and *Germany* v *Commission*, T-59/09, ECR, EU:T:2012:75, paragraph 27).

41 Second, the concept of a 'document', which is given a broad definition in Article 3(a) of Regulation No 1049/2001 (see, to this effect, *API* v *Commission*, T-36/04, ECR, EU:T:2007:258, paragraph 59), covers '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'.

42 Accordingly, the definition contained in Article 3(a) of Regulation No 1049/2001 is essentially based on the existence of content that is saved and that may be copied or consulted after it has been generated, it being understood that the nature of the storage medium on which content is saved, the type and nature of the content stored, and the size, length, volume or presentation of the content have no bearing on the question whether or not it falls within the abovementioned definition and that the only restriction on the content that falls within that definition is the condition that it must relate to the policies, activities or decisions of the institution in question (see, by analogy, *Dufour* v *ECB*, T-436/09, ECR, EU:T:2011:634, paragraphs 88 and 90 to 93).

43 Lastly, it has already been ruled that 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 in the second indent of Article 4(2) of that regulation that the Union 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 the institutions are to refuse to disclose documents relating to court proceedings where such disclosure would undermine the proceedings to which those documents relate (*API* v *Commission*, paragraph 41 above, EU:T:2007:258, paragraph 59).

44 In the present case, first of all, it is common ground that the Commission brought an action for failure to fulfil obligations against the Republic of Austria at the Court on the basis of Article 226 EC (now Article 258 TFEU) in *Commission* v *Austria*, paragraph 7 above (EU:C:2010:455).

45 Second, it is also common ground that in the court proceedings relating to that case the Court sent the Commission copies of the written submissions at issue.

46 Lastly, the Commission does not dispute that the copies of the written submissions at issue are in its possession.

47 It follows that, as is claimed, in essence, by the applicant, supported by the Kingdom of Sweden, the Commission, in the exercise of its powers in respect of its litigious activities, received documents drawn up by a Member State, which is a third party within the meaning of Article 3(b) of Regulation No 1049/2001, and that those documents are in its possession within the meaning of Article 2(3) of that regulation in conjunction with Article 3(a) thereof.

48 Consequently, in the light of paragraphs 40 to 43 above, the written submissions at issue must be classified as documents held by an institution within the meaning of Article 2(3) of Regulation No 1049/2001 in conjunction with Article 3(a) thereof.

49 That conclusion is not called into question by the Commission's arguments.

50 First, the Commission observes that the written submissions at issue cannot be classified as documents for the purposes of Article 2(3) of Regulation No 1049/2001 in conjunction with Article 3(a) of that regulation because they were not made to it, but to the Court, and that the Court sent only copies to it.

51 Although under Article 2(3) of Regulation No 1049/2001 only 'documents held by an institution, that is to say, documents drawn up or received by it and in its possession' fall within the scope of that regulation, that provision nevertheless certainly does not make the application of the regulation to documents 'received' by the institution contingent on the document in question having been addressed to it and sent directly by its author.

52 Consequently, and in view of the objective of Regulation No 1049/2001, mentioned in paragraph 39 above, which is to give the fullest possible effect to the right of public access to documents of the institutions, the fact that the written submissions at issue were neither made nor sent directly to the Commission by the Member State in question is not such as to rule out their classification as documents held by the Commission within the meaning of Article 2(3) of Regulation No 1049/2001. The fact remains that those written submissions were received by the Commission and are in its possession.

53 In addition, with regard to the fact that the Commission received only copies of the written submissions at issue and not the originals of those submissions, which were made to the Court, it should be observed that, as has already been stated in paragraphs 41 and 42 above, the notion of document is given a broad definition in Article 3(a) of Regulation No 1049/2001, based on the existence of a content that is saved.

54 Accordingly, it is irrelevant for the purposes of the existence of a document within the meaning of Article 3(a) of Regulation No 1049/2001 that the written submissions at issue were sent to the Commission in the form of copies and not in the form of originals.

55 Second, the Commission asserts that, as is apparent from recital 2 in the preamble to Regulation No 1049/2001 and from Article 3(a) of the Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ 2000 C 177 E, p. 70), the legislature intended to include within the scope of Regulation No 1049/2001 only documents concerning the Commission's administrative activities, to the exclusion of its litigious activities. According to the Commission, the written submissions at issue do not fall within the scope of its administrative activities or within its competence.

56 The Commission's arguments alleging that, having regard to the intention of the Union legislature, only documents relating to its administrative activities fall within the scope of Regulation No 1049/2001 must, as the rules governing the right of access to documents set out in that regulation stand at present, be rejected.

57 Although, as is clear from recital 2 in the preamble to Regulation No 1049/2001, '[o]penness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system', the fact remains that, as is clear from the case-law cited in paragraph 43 above, it follows from the broad definition of the notion of document 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 in the second indent of Article 4(2) of that regulation that, contrary to the claim made by the Commission, the Union legislature did not intend to exclude the institutions' litigious activities from the public's rights of access. This consideration must be made *a fortiori* because the regulation neither excludes the institutions' litigious activities from its scope nor limits its scope to their administrative activities alone.

58 In addition, the clarifications contained in the Proposal for a Regulation mentioned in paragraph 55 above, to the effect that only administrative documents are covered by the right of access to documents, have no bearing on the legislature's intention since, on the basis of the codecision procedure provided for in Article 251 EC (now Article 294 TFEU), under which Regulation No 1049/2001 was adopted in accordance with Article 255 EC (replaced in essence by Article 15 TFEU), whilst the Commission has a right of initiative, it is the Parliament and the Council that adopt the regulation, if necessary after amending the Commission proposal. The limitation of the scope of the right of access to administrative documents alone, which was initially proposed by the Commission, is not included in the adopted version of Article 3(a) of Regulation No 1049/2001.

59 Furthermore, with regard to the arguments alleging, against this background, that the written submissions at issue constitute documents of the Court of Justice or documents sent by the Court in the exercise of its judicial activities, such that they are excluded from the right of access to documents, it should be noted that those arguments are, in essence, identical to those examined in paragraphs 67 to 112 below relating to the effect of the fourth subparagraph of Article 15(3) TFEU on the scope of Regulation No 1049/2001 and the exclusion of the written submissions at issue, by reason of their specific nature, from the scope of that regulation. Consequently, reference should be made in this regard to the analysis contained in those paragraphs.

60 In addition, the applicant and the Kingdom of Sweden are correct in their view that the Commission also wrongly claims that the written submissions at issue were not sent to it in the exercise of its powers.

61 As was made clear in paragraphs 44 and 45 above, the written submissions at issue were sent to the Commission in the context of an action for failure to fulfil obligations which it had brought in the exercise of its powers under Article 226 EC (now Article 258 TFEU). Thus, the Commission received those submissions in the exercise of its powers.

62 In the light of the above considerations, it must be concluded that the written submissions at issue constitute documents held by an institution within the meaning of Article 2(3) of Regulation No 1049/2001 in conjunction with Article 3(a) thereof. Accordingly, having regard to the provisions of that regulation, those written submissions fall within the scope of the regulation.

63 In these circumstances, as was stated in paragraph 34 above, it is necessary, in a second step, to examine whether the fourth subparagraph of Article 15(3) TFEU nevertheless prevents Regulation No 1049/2001 being applied to the written submissions at issue by reason of their specific nature.

The effect of the fourth subparagraph of Article 15(3) TFEU on the application of Regulation No 1049/2001

64 The applicant, supported by the Kingdom of Sweden, essentially claims that in so far as it follows from case-law that the Commission's written submissions fall within the scope of Regulation No 1049/2001, a Member State's written submissions sent by the Court to the Commission in court proceedings should also be included. In addition, the applicant points out that this consideration is not called into question either by Article 15(3) TFEU, which merely establishes a minimum standard for access to the documents of the institutions, or by the rules applicable to documents of the Court of Justice, as those rules do not apply to the parties to proceedings. Furthermore, the exception relating to the protection of court proceedings provided for in the second indent of Article 4(2) of Regulation No 1049/2001 and the regulation in its entirety would be rendered redundant if written submissions in the possession of the Commission did not fall within the scope of the regulation.

65 The Kingdom of Sweden adds that the fact that a Member State's written submissions before the Court are covered by the fourth subparagraph of Article 15(3) TFEU has no bearing on the fact that, because those written submissions were sent to the Commission, Regulation No 1049/2001 is applicable, as it is also clear from case-law that a Member State's written submissions fall within the scope of that regulation. It further adds that, contrary to the claim made by the Commission, the fourth subparagraph of Article 15(3) TFEU is not rendered redundant by the inclusion of a Member State's written submissions within the scope of Regulation No 1049/2001, given that the protection of court proceedings can be ensured, where necessary, by a refusal to grant access based on the second indent of Article 4(2) of Regulation No 1049/2001.

66 The Commission replies, in essence, that, unlike its own written submissions, a Member State's written submissions must be regarded as documents of the Court of Justice falling within the scope of its judicial activities with the result that, having regard to the fourth subparagraph of Article 15(3) TFEU, those written submissions are excluded from the general right of access to documents and are covered by the specific rules relating to access to judicial documents. Any interpretation allowing access to a Member State's written submissions would render both the fourth subparagraph of Article 15(3) TFEU and the specific rules relating to access to judicial documents meaningless.

67 In the first place, it should be noted that, according to case-law, it is clear, both from the wording of the relevant provisions of the Treaties and from the broad logic of Regulation No 1049/2001 and the objectives of the relevant EU rules, that judicial activities are as such excluded from the scope, established by those rules, of the right of access to documents (*Sweden and Others* v *API and Commission*, paragraph 15 above, EU:C:2010:541, paragraph 79).

68 As regards, first, the relevant provisions of the Treaties, it is quite clear from the wording of Article 15 TFEU, which, while extending the scope of the principle of transparency, replaced Article 255 EC on the basis of which Regulation No 1049/2001 had been adopted, that under the fourth subparagraph of paragraph 3 thereof the Court of Justice is to be subject to obligations of transparency only when exercising its administrative tasks (see, to this effect, *Sweden and Other*s v *API and Commission*, paragraph 15 above, EU:C:2010:541, paragraphs 80 and 81). It follows that the fact that, under the fourth subparagraph of Article 15(3) TFEU, the Court of Justice is not among the institutions which, in accordance with Article 15(3) TFEU, are subject to those obligations is justified precisely because of the nature of the judicial responsibilities which it is called upon to discharge under the first subparagraph of Article 19(1) TEU (see, by analogy, *Sweden and Others* v *API and Commission*, paragraph 15 above, EU:C:2010:541, paragraph 82).

69 Second, that interpretation is also borne out by the broad logic of Regulation No 1049/2001, the legal basis for which is Article 255 EC itself. Article 1(a) of Regulation No 1049/2001, which defines the scope of that regulation, makes no reference to the Court and, by dint of that omission, excludes it from the institutions subject to the obligations of transparency which it lays down, while Article 4 of that regulation devotes one of the exceptions to the right of access to the documents of the institutions precisely to the protection of court proceedings (*Sweden and Others* v *API and Commission*, paragraph 15 above, EU:C:2010:541, paragraph 83).

70 In the second place, it should be noted that, with regard to the Commission's written submissions, the Court has ruled that pleadings lodged before the European Union Courts in court proceedings are wholly specific since they are inherently more a part of the judicial activities of those Courts than of the administrative activities of the Commission, those latter activities not requiring, moreover, the same breadth of access to documents as the legislative activities of an EU institution (*Sweden and Others* v *API and Commission*, paragraph 15 above, EU:C:2010:541, paragraph 77).

71 According to that case-law, those pleadings are drafted exclusively for the purposes of the court proceedings, in which they play the key role. It is by means of the application initiating proceedings that the applicant defines the parameters of the dispute and it is, in particular, during the written procedure — the oral procedure not being obligatory — that the parties provide the European Union Courts with the information on the basis of which it is to adjudicate (*Sweden and Others* v *API and Commission*, paragraph 15 above, EU:C:2010:541, paragraph 78).

72 In the third place, it should be stated that written submissions lodged with the Court by a Member State in the content of an action for failure to fulfil obligations brought against it by the Commission, like the Commission's written submissions, are specific since they are inherently a part of the judicial activities of the Court.

73 Given that, according to case-law, in its written submissions, the defendant Member State may inter alia raise all the pleas available to it in order to defend itself (*Commission* v *Spain*, C-414/97, ECR, EU:C:1999:417, paragraph 19, and *Commission* v *Netherlands*, C-34/04, ECR, EU:C:2007:95, paragraph 49), in responding to the grounds of complaint raised by the Commission, which define the subject-matter of the dispute, the written submissions of the defendant Member State provide the Court with the information on the basis of which it is to adjudicate.

74 In the fourth place, it is clear from the case-law relating to the exception concerning the protection of court proceedings under the second indent of Article 4(2) of Regulation No 1049/2001 that the Commission's written submissions fall within the scope of that regulation, even though, as was stated in paragraph 70 above, they are a part of the judicial activities of the European Union Courts and that under the fourth subparagraph of Article 15(3) TFEU such activities are excluded from the right of access to documents.

75 First of all, it is clear from that case-law that the words 'court proceedings' must be understood as meaning that the protection of the public interest precludes the disclosure of the content of documents drawn up solely for the purposes of specific court proceedings (see *Franchet and Byk* v *Commission*, T-391/03 and T-70/04, ECR, EU:T:2006:190, paragraphs 88 and 89 and cited case-law; *Jurašinović* v *Council*, T-63/10, ECR, EU:T:2012:516, paragraph 66). The latter words cover not only the pleadings or other documents lodged and internal documents concerning the investigation of the case, but also correspondence concerning the case between the Directorate-General concerned and the Legal Service or a lawyers' office (*Franchet and Byk* v *Commission*, cited above, EU:T:2006:190, paragraph 90, and *Jurašinović* v *Council*, cited above, EU:T:2012:516, paragraph 67).

76 Second, on the basis of that definition of the notion of 'court proceedings', the Court has ruled that the Commission's pleadings before the Union judicature fell within the scope of the exception relating to the protection of court proceedings, laid down in the second indent of Article 4(2) of Regulation No 1049/2001, in that they related to a protected interest (*API* v *Commission*, paragraph 41 above, EU:T:2007:258, paragraph 60).

77 Lastly, the Court has allowed a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings, for the purposes of the second indent of Article 4(2) of Regulation No 1049/2001, while those proceedings remain pending (*Sweden and Others* v *API and Commission*, paragraph 15 above, EU:C:2010:541, paragraph 94).

78 As the applicant and the Kingdom of Sweden rightly point out, the inclusion, by those judgments, of an institution's written submissions within the scope of the exception relating to the protection of court proceedings presupposes that, as the Commission acknowledges, such written submissions, notwithstanding their specific characteristics as outlined in paragraphs 70 and 71 above, fall within the scope of Regulation No 1049/2001, without that conclusion being affected by the exclusion of the judicial activities of the Court of Justice from the scope of the right of access to documents under the fourth subparagraph of Article 15(3) TFEU.

79 In the light of the foregoing considerations, even though they are a part of the judicial activities of the European Union Courts, written submissions lodged before those Courts by an institution are not excluded, by virtue of the fourth subparagraph of Article 15(3) TFEU, from the right of access to documents.

80 By analogy, written submissions which are, like the written submissions at issue, produced by a Member State in infringement proceedings must be regarded as not being excluded, any more than those of the Commission, from the right of access to documents established in respect of the judicial activities of the Court of Justice by the fourth subparagraph of Article 15(3) TFEU.

81 Aside from the fact that written submissions drawn up by the Commission and those drawn up by a Member State for court proceedings have shared specific characteristics, as was explained in paragraphs 72 and 73 above, it should be noted that neither the fourth subparagraph of Article 15(3) TFEU nor the fact that those written submissions originate from different authors nor the nature of those written submissions require a distinction to be made, for the purposes of their inclusion within the scope of the right of access to documents, between written submissions originating from the Commission and those originating from a Member State. It follows that, contrary to the statement

made by the Commission at the hearing, the fourth subparagraph of Article 15(3) TFEU cannot be interpreted as having established, as regards access to written submissions drawn up for court proceedings, any authorship rule requiring a distinction to be made between written submissions drawn up by an institution for court proceedings and those produced by a Member State at the litigation phase of infringement proceedings.

82 However, a distinction should be made between the exclusion under the fourth subparagraph of Article 15(3) TFEU of the judicial activities of the Court of Justice from right of access to documents and written submissions drawn up for proceedings, which, although they are a part of those judicial activities, are nevertheless not covered by the exclusion established by that provision and are instead subject to the right of access to documents.

83 Therefore, the fourth subparagraph of Article 15(3) TFEU does not preclude the inclusion of the written submissions at issue within the scope of Regulation No 1049/2001, provided that the conditions governing the application of that regulation are met and without prejudice to the application, if appropriate, of one of the exceptions set out in Article 4 of that regulation and the possibility under Article 4(5) for the Member State concerned to request the institution concerned not to disclose its written submissions.

84 This conclusion is not called into question by the Commission's arguments.

85 In the first place, the Commission considers that a distinction should be made between its own written submissions and those of a Member State. A Member State's written submissions, which are made to the Court, should be regarded as documents of the Court of Justice forming part of its judicial activities such that, in accordance with the fourth subparagraph of Article 15(3) TFEU, those submissions are excluded from the right of access to documents and are covered by the specific rules relating to access to judicial documents. Such a distinction should also be made having regard to case-law. First of all, because, in *Sweden and Others* v *API and Commission*, paragraph 15 above (EU:C:2010:541), the Court confined itself to ruling on the Commission's written submissions without mentioning those of a Member State, it intended to exclude the latter from the scope of Regulation No 1049/2001. Second, the considerations set out in paragraph 87 of that judgment regarding equality of arms are meaningful only if the Commission's written submissions and a Member State's written submissions are treated differently. Lastly, the case-law according to which a party may publish its own written submissions does not imply that an institution is required to grant access to a Member State's written submissions and would be unnecessary if the Commission were also required to disclose a Member State's written submissions.

86 It should be pointed out in this regard that, contrary to the argument put forward by the Commission, a distinction should not be made, for the purposes of the effect of the fourth subparagraph of Article 15(3) TFEU on the right of access to documents, between that institution's written submissions and those of a Member State, as is stated in essence in paragraph 81 above. It certainly does not follow from the case-law cited in paragraphs 70 and 71 above that the Commission's written submissions, in so far as they are a part of the judicial activities of the Court hearing the case, must be regarded as documents of that Court and thus be attributed to it. On the contrary, as the Commission acknowledges, its own written submissions fall within the scope of Regulation No 1049/2001.

87 In any event, it should be added that, as the Commission explained at the hearing in response to a question asked by the Court, its reasoning is based on the premise that both its own written submissions and those of a Member State become documents of the Court of Justice by virtue of being sent to the Court, it being understood that, according to the Commission, its own written submissions continue to be documents of the Commission concurrently and thus have a dual nature. The Commission itself thus recognises that such classification of its own written submissions as documents of the Court of Justice, assuming it to be correct, certainly does not prevent those written submissions being included within the scope of the right of access to documents.

88 In those circumstances, the distinction made by the Commission between its own written submissions and those of a Member State is actually based less on their supposed status as documents of the Court of Justice than on the difference in their respective authors. In this regard, it is sufficient to observe that, as was stated, in essence, in paragraph 81 above, that difference cannot justify a difference in treatment of written submissions drawn up by the Commission and those originating from a Member State.

89 In addition, contrary to the Commission's claim, no distinction between its own written submissions and those of a Member State can be inferred from the case-law which it cites in this regard.

90 First, as is observed by the Commission, in *Sweden and Others* v *API and Commission*, paragraph 15 above (EU:C:2010:541), the Court was not asked to examine the question of access to a Member State's written submissions held by the Commission. Consequently, as the Court confined itself to ruling on the dispute before it, it cannot be inferred from that judgment that access to documents is limited only to written submissions drawn up by an EU institution, to the exclusion of a Member State's written submissions.

91 Second, for the same reason, the Commission's argument regarding the considerations made by the Court on the subject of equality of arms must be rejected because, in stating in paragraph 87 of its judgment in *Sweden and Others* v *API and Commission*, paragraph 15 above (EU:C:2010:541), that 'only the institution concerned by an application for access to its documents, and not all the parties to the proceedings, would be bound by the obligation of disclosure', the Court did not take a view on the situation where an application for access to a Member State's written submissions is made to the Commission. It is evident from the grounds of which paragraph 87 of the judgment in *Sweden and Others* v *API and Commission*, paragraph 15 above (EU:C:2010:541), forms part, in particular from reading that paragraph in conjunction with paragraph 91 of that judgment, that the Court merely held that in so far as only the institution concerned was, unlike other parties to court proceedings, bound by the obligation of transparency in accordance with the rules laid down in Regulation No 1049/2001, equality of arms could be affected if the institution was obliged to grant access to its own written pleadings relating to ongoing court proceedings.

92 In addition, that consideration, set out in paragraph 87 of the judgment in *Sweden and Others* v *API and Commission*, paragraph 15 above (EU:C:2010:541), was made in a different context from that of the present case. It formed part of the examination of the scope of the exception relating to the protection of court proceedings set out in the second indent of Article 4(2) of Regulation No 1049/2001 in respect of an application for access to written submissions of the Commission relating to pending court proceedings. In that context, the Court held, in paragraph 86 of the judgment, that if the content of the Commission's pleadings were to be open to public debate, there would be a danger that the criticism levelled against them, whatever its actual legal significance, might influence the position defended by the Commission before the EU Courts, before pointing out, in paragraph 87 of its judgment, that such a situation could well upset the balance between the parties since only the institution would be required to disclose its written submissions in the case of an application for access to documents. In contrast, the present case concerns an application for access to written submissions relating to proceedings which have ended, with the result that the considerations regarding equality of arms set out in paragraphs 86 and 87 of the judgment in *Sweden and Others* v *API and Commission*, paragraph 15 above (EU:C:2010:541), are not relevant here. In addition, in so far as, by its argument relating to paragraph 87 of that judgment, the Commission seeks to claim that each party to court proceedings may freely dispose of its own written submissions, reference should be made to the examination of that argument in paragraphs 93 to 97 below.

93 Lastly, with regard to the argument concerning the Member State's power to dispose of its written submissions drawn up for court proceedings, it follows from case-law that no rule or provision authorises or prevents parties to proceedings from disclosing their own written submissions to third parties and that, apart from exceptional cases where disclosure of a document might adversely affect

the proper administration of justice, the principle is that parties are free to disclose their own written submissions (order in *Germany* v *Parliament and Council*, C-376/98, ECR, EU:C:2000:181, paragraph 10, and judgment in *API* v *Commission*, paragraph 41 above, EU:T:2007:258, paragraph 88).

94 Nevertheless, the case-law cited in paragraph 93 above does not preclude the inclusion of the written submissions at issue within the scope of the right of access to documents and thus within the scope of Regulation No 1049/2001.

95 It should be pointed out that in the case-law cited in paragraph 93 above neither the Court of Justice nor the General Court examined the scope of the right of access to documents. Nor did they take a view on the existence and, as the case may be, the extent of a party's power to object to the disclosure of its written submissions by another party to the proceedings.

96 Furthermore and in any event, it should be noted that the present case concerns an application for access to written submissions relating to court proceedings which had ended when that application was made. On the other hand, the considerations referred to in paragraph 93 above concerned the disclosure of written pleadings relating to pending court proceedings. Without there being any need to rule on the extent of each party's power to dispose freely of its written submissions, in so far as this would allow the party concerned to object to any form of disclosure of the content of its own written submissions, it should be pointed out that, in any event, such a power is subject to limits once court proceedings have ended. After the end of the court proceedings, the arguments contained in those written submissions are already in the public domain, at the very least in summary form, as their content has possibly been debated at a hearing and, in some circumstances, also reproduced in the final judgment (see, to this effect, *API* v *Commission*, paragraph 41 above, EU:T:2007:258, paragraph 106). Furthermore, the content of a Member State's written submissions may be reflected in the written submissions drawn up by an EU institution for the same proceedings, whether in summary form or through arguments raised in response by the institution. Therefore, any disclosure by that institution of its own written submissions may grant a degree of access to the content of the written submissions of the Member State concerned.

97 In addition, in this case, with regard to written submissions drawn up by a Member State, it should be observed that Article 4(5) of Regulation No 1049/2001 provides that a Member State may request an institution not to disclose a document originating from that State without its prior agreement. According to case-law, Article 4(5) of Regulation No 1049/2001 thus gives the Member State the opportunity to participate in the taking of the decision which the institution is required to adopt, and to that end establishes a decision-making process for determining whether the substantive exceptions listed in Article 4(1), (2) and (3) preclude access being given to the document concerned (*Germany* v *Commission*, paragraph 40 above, ECR, EU:T:2012:75, paragraph 31; see also, to this effect, *Sweden* v *Commission*, paragraph 39 above, EU:C:2007:802, paragraphs 76, 81, 83 and 93). Whilst it is true that that provision does not confer on the Member State concerned a general and unconditional right of veto, so that it could in a discretionary manner oppose the disclosure of documents originating from it and held by an institution (*Sweden* v *Commission*, paragraph 39 above, EU:C:2007:802, paragraph 75), it does nevertheless permit it to participate in the decision to grant access to the document at issue, including written submissions drawn up for court proceedings.

98 In the second place, the Commission claims that both the fourth subparagraph of Article 15(3) TFEU and the specific rules relating to access to judicial documents would be rendered meaningless and circumvented if access were allowed to written submissions drawn up by a Member State for court proceedings. It would then be possible systematically to apply to the Commission for access to copies of all documents sent to it in any court proceedings even though the Court could not grant access to them. Furthermore, aside from the circumvention of the specific rules, the very existence of a right of access to the other parties' written submissions would, in each case, depend on whether or not the Commission was participating in the court proceedings, which would be contrary to the system underlying those provisions.

99 First of all, the Commission's argument alleging a circumvention of the specific rules relating to access to documents concerning court proceedings must be rejected.

100 It should be observed in this regard that it is true that, in respect of the Commission's written submissions, it has been ruled that, while the court proceedings were pending, the disclosure of those written submissions would flout the special nature of that category of documents and would be tantamount to making a significant part of the court proceedings subject to the principle of transparency and, as a consequence, the effectiveness of the exclusion of the Court of Justice from the institutions to which the principle of transparency applies, in accordance with the fourth subparagraph of Article 15(3) TFEU, would be largely frustrated (see, to this effect, *Sweden and Others* v *API and Commission*, paragraph 15 above, EU:C:2010:541, paragraph 95). It has also been ruled that neither the Statute of the Court of Justice nor the Rules of Procedure of the European Union Courts provide for any third-party right of access to pleadings submitted to the Courts in court proceedings (*Sweden and Others* v *API and Commission*, paragraph 15 above, EU:C:2010:541, paragraph 99).

101 However, according to that same case-law, the considerations mentioned in paragraph 100 above are not such as to render the provisions of Regulation No 1049/2001 inapplicable to an application for access to written submissions relating to court proceedings.

102 The considerations mentioned in paragraph 100 above were taken into account for the purposes of interpreting the exception relating to the protection of court proceedings laid down in the second indent of Article 4(2) of Regulation No 1049/2001 (see, to this effect, *Sweden and Others* v *API and Commission*, paragraph 15 above, EU:C:2010:541, paragraphs 94, 95, 99, 100 and 102), which necessarily implies that they certainly do not preclude the application of that regulation. Contrary to the claim made by the Commission, it must be held, having regard to paragraphs 72, 73 and 81 above, that those same considerations apply in the context of an application for access to a Member State's written submissions.

103 It should also be recalled that even though Regulation No 1049/2001 is designed to confer on the public as wide a right of access as possible to documents of the institutions, that right is nevertheless subject, in the light of the regime of exceptions provided for in Article 4 of that regulation, to certain limits based on reasons of public or private interest (*Commission* v *Éditions Odile Jacob*, C-404/10 P, ECR, EU:C:2012:393, paragraph 111, and *Commission* v *Agrofert Holding*, C-477/10 P, ECR, EU:C:2012:394, paragraph 53). In addition, it follows both from the fourth subparagraph of Article 15(3) TFEU and from Regulation No 1049/2001 that the limitations placed on the application of the principle of transparency in relation to judicial activities pursue the same objective: that is to say, they seek to ensure that exercise of the right of access to the documents of the institutions does not undermine the protection of court proceedings (see, to this effect, *Sweden and Others* v *API and Commission*, paragraph 15 above, EU:C:2010:541, paragraph 84).

104 Thus, contrary to the claim made by the Commission, the protection of court proceedings can, if necessary, be ensured by the application of the exception laid down in the second indent of Article 4(2) of Regulation No 1049/2001, it being understood that, according to case-law, account can be taken of the absence, in the specific rules relating to the European Union Courts, of a right of third-party access to written submissions made to those Courts in court proceedings for the purposes of interpreting the exception relating to the protection of court proceedings (see, to this effect, *Sweden and Others* v *API and Commission*, paragraph 15 above, EU:C:2010:541, paragraph 100).

105 Consequently, including the written submissions at issue within the scope of Regulation No 1049/2001 does not undermine the objective of the specific rules relating to access to documents concerning the court proceedings.

106 That conclusion is confirmed, moreover, by the fact that the Court has ruled, pursuant to the application of the Code of conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41), that it is not possible to infer from the right of every person to a fair hearing by an independent tribunal that the court hearing a dispute is necessarily the only body empowered to grant access to the documents in the proceedings in question, especially since the risks that the independence of the court might be undermined are sufficiently taken into account by that code and by the protection afforded by the courts at Union level with respect to measures of the Commission granting access to documents which it holds (*Netherlands and van der Wal* v *Commission*, C-174/98 P and C-189/98 P, ECR, EU:C:2000:1, paragraphs 17 and 19). It cannot therefore be accepted, in the absence of specific provisions laid down to that effect, that the scope of application of Regulation No 1049/2001 may be restricted on the ground that the provisions of the Statute of the Court and of the Rules of Procedure of the European Union Courts do not govern access of third parties to documents (*API* v *Commission*, paragraph 41 above, EU:T:2007:258, paragraph 89; see also, to this effect and by analogy, *Interporc* v *Commission*, T-92/98, ECR, EU:T:1999:308, paragraphs 37, 44 and 46).

107 Second, in so far as the Commission argues that such inclusion would effectively permit applications for access to all documents transmitted to the Commission by the European Union Courts, including, in addition to all the written submissions of all the parties, minutes of hearings, it should be pointed out that the conclusion, in paragraph 83 above, that a Member State's written submissions which are sent to an institution in court proceedings are not inherently excluded from the scope of Regulation No 1049/2001 in no way prejudges the different question whether documents drawn up by the Court itself and sent to an institution in court proceedings are also covered by the scope of that regulation. Since the subject-matter of the present dispute is limited, having regard to the single plea in law raised by the applicant, to assessing the lawfulness of the Commission's refusal to grant him access to the written submissions at issue, there is no need for the Court to take a view in the present case on whether Regulation No 1049/2001 is also applicable to other documents sent to an institution in court proceedings, such as minutes of hearings. According to case-law, the Courts of the European Union may not rule *ultra petita* (*Meroni* v *High Authority*, 46/59 and 47/59, ECR, EU:C:1962:44, p. 801, and *Jamet* v *Commission*, 37/71, ECR, EU:C:1972:57, paragraph 12).

108 In addition, with regard to the Commission's argument that including the written submissions of other parties to court proceedings within the scope of Regulation No 1049/2001 would effectively open up access to all the documents of all the parties to the proceedings and make the very existence of such a right of access contingent on its participation in the court proceedings in question, it should be observed that, according to the case-law cited in paragraph 106 above, in the absence of specific provisions laid down to that effect, the scope of application of Regulation No 1049/2001 cannot be restricted on the ground that the provisions of the Statute of the Court of Justice and of the Rules of Procedure of the European Union Courts do not govern the right access of third parties to documents. In those circumstances and, having regard to the statements made in paragraph 107 above, without prejudice to the question, which is different from that raised in the present case, of the inclusion within the scope of the right of access to documents of any written submission drawn up by any party in any court proceedings, the fact that possible access to such written submissions where an application is made to an institution is dependent on that institution's participation in the court proceedings in question cannot be considered capable of restricting the scope of Regulation No 1049/2001. Such dependence would only be the consequence of the absence of specific provisions governing access of third parties to written submissions drawn up for proceedings before the European Union Courts.

109 Lastly, in so far as the Commission seeks to claim that applications for access to a Member State's written submissions should be made to the Court or to the Member State which is the author of those written submissions, it should be noted, with regard to any obligation to make an application for access to the written submissions at issue to the Court, that, according to the case-law cited in paragraph 106 above, it is not possible to infer from the right of every person to a fair hearing by an

independent tribunal that the court hearing a dispute is necessarily the only body empowered to grant access to the documents in the proceedings in question. In accordance with the provisions of Regulation No 1049/2001, an application for access to documents may be made to the Commission for documents held by it provided the conditions governing the application of that regulation are met.

110 It should also be noted, with regard to any obligation to submit an application to the Member State which is the author of the written submissions at issue, that in adopting Regulation No 1049/2001 the EU legislature abolished the authorship rule, under which, where the author of a document held by an institution was a third party, the request for access to the document had to be made directly to the author of the document (*Sweden* v *Commission*, paragraph 39 above, EU:C:2007:802, paragraph 56, and *Germany* v *Commission*, paragraph 40 above, EU:T:2012:75, paragraph 28), which is, moreover, not contested by the Commission.

111 Furthermore, contrary to the statement made by the Commission at the hearing, such an obligation to submit an application for access to the Member State which is the author of the written submissions at issue also cannot stem from the fourth subparagraph of Article 15(3) TFEU, which, as can be seen from the considerations set out in paragraph 81 above, cannot be interpreted as having reintroduced the authorship rule in respect of access to written submissions drawn up for court proceedings. Aside from the fact that that provision does not contain an explicit rule to that effect, it is clear from the considerations set out in paragraph 81 above that neither that provision nor the nature of the written submissions at issue requires a distinction to be made, for the purposes of their inclusion within the scope of the right of access to documents, between written submissions originating from the Commission and those originating from a Member State.

112 In the light of the above considerations, it should be held that, contrary to the statement made by the Commission and without there being any need to examine the other arguments raised by the applicant in this regard, the written submissions at issue do not constitute documents of the Court of Justice which, having regard to the provisions of the fourth subparagraph of Article 15(3) TFEU, would be excluded from the scope of the right of access to documents and thus from the scope of Regulation No 1049/2001.

113 Having regard to all the foregoing considerations, and in particular the findings made in paragraphs 48 and 83 above, it must be concluded that by considering, in the decision of 3 April 2012, that the written submissions at issue did not fall within the scope of Regulation No 1049/2001, the Commission infringed Article 2(3) of that regulation.

114 Consequently, the single plea in law and thus the application for annulment of the decision of 3 April 2012, in so far as it refused the applicant access to the written submissions at issue, should be granted.

Costs

115 First, in respect of the costs incurred by the applicant and by the Commission, Article 87(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 87(3) of the Rules of Procedure, where the circumstances are exceptional, the General Court may order that the costs be shared or that each party bear its own costs. In addition, under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment, the costs are to be in the discretion of the General Court.

116 In the present case, as the Court has held above, although the action is now devoid of purpose in so far as it seeks the annulment of the decision of 16 March 2012, it has been granted in so far as it seeks the partial annulment of the decision of 3 April 2012.

117 Nevertheless, at the hearing the Commission claimed that, in the case of the partial annulment of the decision of 3 April 2012, the applicant should be ordered to bear his own costs by reason of exceptional circumstances. The reason for that claim was the publication on the applicant's website of the defence, the reply, the Kingdom of Sweden's statement in intervention and an exchange of letters between the Commission and the applicant on the subject of the publication of those documents. According to the Commission, by publishing those documents relating to ongoing court proceedings, the applicant breached the principles of equality of arms and the due administration of justice.

118 It should be observed in this regard that under the rules which govern procedure in cases before the General Court, parties are entitled to protection against the misuse of pleadings and evidence (*Svenska Journalistförbundet* v *Council*, T-174/95, ECR, EU:T:1998:127, paragraph 135). Thus, in accordance with the third subparagraph of Article 5(3) of the Instructions to the Registrar of the General Court, no third party, private or public, may have access to the case-file or to the procedural documents without the express authorisation of the President of the General Court or, where the case is still pending, of the President of the formation of the Court that is hearing the case, after the parties have been heard, it being understood that that authorisation may be granted only upon written request accompanied by a detailed explanation of the third party's legitimate interest in inspecting the file.

119 That provision reflects a general principle in the due administration of justice according to which parties have the right to defend their interests free from all external influences and particularly from influences on the part of members of the public (*Svenska Journalistförbundet* v *Council*, paragraph 118 above, EU:T:1998:127, paragraph 136). It follows that a party who is granted access to the procedural documents of other parties is entitled to use those documents only for the purpose of pursuing his own case and for no other purpose, including that of inciting criticism on the part of the public in relation to arguments raised by other parties in the case (*Svenska Journalistförbundet* v *Council*, paragraph 118 above, EU:T:1998:127, paragraph 137).

120 According to case-law, an action contrary to that principle involves an abuse of rights which may be taken into account in awarding costs in respect of exceptional circumstances in accordance with Article 87(3) of the Rules of Procedure (see, to this effect, *Svenska Journalistförbundet* v *Council*, paragraph 118 above, EU:T:1998:127, paragraphs 139 and 140).

121 In this case, it is common ground that the applicant published both certain written pleadings relating to the present case, in particular, in addition to his reply, the Commission's defence and an exchange of letters between the parties on the subject of the publication of those documents, namely a letter from the Commission requesting him to remove the two abovementioned written submissions from his website and his reply to that letter. In addition, the Commission claims that the applicant also published the Kingdom of Sweden's statement in intervention, which has not been contested by the applicant.

122 It is also common ground that the applicant made a number of comments in conjunction with the publication of those documents. Thus, the publication of the defence and the reply was accompanied by a brief post stating that the Commission was still refusing to grant the applicant access to the written submissions at issue. It is stated that in the applicant's reply that he had 'dissected' the Commission's arguments in this regard. The publication of the exchange of letters mentioned in paragraph 121 above formed part of a post by the applicant, entitled 'The Commission wants to ban the publication on the internet of written submissions concerning the retention of data'. That post, which takes a relatively critical tone, states that the Commission's refusal to grant the applicant access to the written submissions at issue is in 'flagrant contradiction' with the case-law of the Court of Justice and that the Commission was opposed to the publication of 'its vain attempts to maintain secrecy'. The two posts offer internet users the possibility to make comments, which gave rise, in connection with the publication of the second post mentioned above, to a number of comments which were very critical of the Commission.

123 The publication by the applicant, on the internet, of the Commission's defence and the exchange of letters concerning the publication of those documents constitutes misuse, within the meaning of the case-law cited in paragraph 118 above, of the pleadings sent to the applicant in the context of the present proceedings.

124 By publishing those documents, the applicant availed himself of his right of access to the Commission's written pleadings relating to the present proceedings for purposes other than solely defending his own case in those proceedings and thus impaired the Commission's right to defend its position without any outside influence. This consideration must be made *a fortiori* since, as is clear from paragraph 122 above, the publication of the documents offered internet users the possibility to make comments and gave rise to a number of comments which were critical of the Commission.

125 In addition, after the Commission sent the letter requesting the removal of the written submissions from the applicant's website, the applicant kept those documents on his website.

126 Therefore, having regard to the case-law cited in paragraph 120 above, it must be concluded that the publication of the Commission's written pleadings on the internet, which is a contrary to the principles set out in paragraphs 118 and 119 above, involves an abuse of rights which may be taken into account in awarding costs in respect of exceptional circumstances in accordance with Article 87(3) of the Rules of Procedure.

127 In the light of the above considerations, the circumstances of the case will be fairly assessed by ruling that the Commission should, in addition to its own costs, bear half the costs incurred by the applicant.

128 Second, in respect of the costs incurred by the interveners, under the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States which intervened in the proceedings must bear their own costs. Accordingly, the Republic of Finland and the Kingdom of Sweden must bear their own costs.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Annuls the Commission decision of 3 April 2012 refusing to grant Patrick Breyer full access to documents relating to the transposition by the Republic of Austria of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC and to documents relating to Case C-189/09 *Commission* v *Austria*, in so far as it refuses access to the written submissions lodged by the Republic of Austria in that case;**

2. **Declares that there is no need to adjudicate on the application for annulment of the Commission decision of 16 March 2012 rejecting an application made by Mr Breyer for access to its legal opinion relating to Directive 2006/24;**

3. **Orders the Commission, in addition to its own costs, to bear half the costs incurred by Mr Breyer;**

4. **Orders the Republic of Finland and the Kingdom of Sweden to bear their own costs.**

Martins Ribeiro Gervasoni Madise

Delivered in open court in Luxembourg on 27 February 2015.

[Signatures]