Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber, Extended Composition)

2 October 2024*

(Access to documents – Regulation (EC) No 1049/2001 – Documents relating to a proceeding under Article 101 TFEU – Refusal of access – Exception relating to the protection of the purpose of inspections, investigations and audits – Exception relating to the protection of the commercial interests of a third party – General presumption of confidentiality – Obligation to identify the documents covered by the presumption and to provide a list of them)

In Case T-332/22,

TotalEnergies Marketing Nederland NV, established in The Hague (Netherlands), represented by M. van Heezik, lawyer,

applicant,

v

European Commission, represented by P. Van Nuffel, M. Burón Pérez and A.-C. Simon, acting as Agents,

defendant,

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of S. Papasavvas, President, A. Marcoulli, R. Norkus, W. Valasidis (Rapporteur) and L. Spangsberg Grønfeldt, Judges,

Registrar: V. Di Bucci,

having regard to the written part of the procedure,

having regard to the fact that no application for a hearing was submitted by the parties within three weeks after service of notification of the close of the written part of the procedure, and having decided to rule on the action without an oral part of the procedure, pursuant to Article 106(3) of the Rules of Procedure of the General Court,

gives the following

* Language of the case: Dutch.

Judgment

1 By its action based on Article 263 TFEU, the applicant, TotalEnergies Marketing Nederland NV, seeks annulment of Decision C(2022) 1949 final of the European Commission of 23 March 2022 rejecting, pursuant to Article 4 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), its confirmatory applications for access to documents ('the contested decision').

Background to the dispute

2 On 13 September 2006, the Commission adopted a decision relating to a proceeding under Article 101 TFEU (Case COMP/F/38.456 – Bitumen – Netherlands), in which it found that various undertakings, including the applicant, had participated in an infringement of Article 101 TFEU and imposed fines on those undertakings ('the Bitumen case').

3 On 24 June 2021, the applicant submitted five applications for access to documents relating to the Bitumen case.

4 As is apparent from the applications submitted by the applicant, they were worded as follows:

– 'Regarding the (preliminary) investigation and decision-making in the Bitumen case (COMP/F/38.456 – Bitumen – Netherlands): communication between [the Commission] and the Netherlands Competition Authority (now the Authority for Consumers and Markets) and/or other services of the Netherlands State concerning the assistance provided by the Netherlands Competition Authority during (the preparation of) the inspections of undertakings by the Commission in the context of the (preliminary) investigation into possible infringements of European competition law' (application registered by the Commission under the reference GESTDEM 2021/4203);

– 'Regarding the Bitumen case (COMP/F/38.456 – Bitumen – Netherlands): updates with information and requests for information, or other communications concerning the (preliminary) investigation and the decision in the Bitumen case, drawn up by [the Commission] in the period between the preliminary investigation and the final decision of 13 September 2006, or emanating from the Netherlands Competition Authority (also in its capacity as a member of the Advisory Committee [on Restrictive Practices and Dominant Positions]) and/or other services of the Netherlands State' (application registered by the Commission under the reference GESTDEM 2021/4204);

– 'Regarding the (preliminary) investigation and decision-making in the Bitumen case (COMP/F/38.456 – Bitumen – Netherlands): the procedure and/or working arrangements of the Advisory Committee on Restrictive Practices and Dominant Positions which were in force at the time of the (preliminary) investigation and/or of the decision-making process in the Bitumen case' (application registered by the Commission under the reference GESTDEM 2021/4205);

– 'Regarding the (preliminary) investigation and decision-making in the Bitumen case (COMP/F/38.456 – Bitumen – Netherlands): the invitation or invitations to meetings, including but not limited to, the invitation to the 414th and 415th meetings of the Advisory

Committee [on Restrictive Practices and Dominant Positions], held on 4 and 11 September 2006 respectively, during which the Advisory Committee [on Restrictive Practices and Dominant Positions] issued its opinions on the preliminary draft decision (including (a list of) the documents which were sent to it with that preliminary draft pursuant to Article 14(3) of Regulation No 1/2003)' (application registered by the Commission under the reference GESTDEM 2021/4206);

– 'Regarding the (preliminary) investigation and decision-making in the Bitumen case (COMP/F/38.456 – Bitumen – Netherlands): the list or lists of participants (including the national competition authorities) that attended the hearings of 15 and 16 June 2005 on the statement of objections in the Bitumen case' (application registered by the Commission under the reference GESTDEM 2021/4207).

5 By decision of 4 July 2021, the Commission dismissed the applications bearing the references GESTDEM 2021/4203, GESTDEM 2021/4204, GESTDEM 2021/4206 and GESTDEM 2021/4207, on the ground that the requested documents were covered by the exceptions provided for in the third indent of Article 4(2) and in Article 4(3) of Regulation No 1049/2001, and, to that end, relied on a general presumption of confidentiality concerning the documents in the administrative file relating to a proceeding under Article 101 TFEU. With regard to the application bearing the reference GESTDEM 2021/4205, however, the Commission stated that the requested documents did not specifically concern the Bitumen case and were public, and referred to the websites where they were available.

6 By letter of 25 August 2021, the applicant submitted a confirmatory application ('the confirmatory application') under Article 7(2) of Regulation No 1049/2001, asking the Commission to reconsider its decision of 4 July 2021. In the confirmatory application, the applicant complained that the Commission had not sent it an inventory of the documents covered by the general presumption of confidentiality in accordance with the judgment of 28 May 2020, *Campbell* v *Commission* (T-701/18, EU:T:2020:224), and disputed the fact that the documents falling within the scope of the applications bearing the references GESTDEM 2021/4203 and GESTDEM 2021/4204 were covered by the general presumption of confidentiality applied by the Commission.

7 On 23 March 2022, the Commission adopted the contested decision, by which it dismissed the confirmatory application. In that decision, first, the Commission stated that the documents falling within the scope of the applications bearing the references GESTDEM 2021/4203 and GESTDEM 2021/4204 were communications between itself and the Netherlands Competition Authority or other Netherlands authorities in the context of the Bitumen case and that the documents covered by the applications bearing the references GESTDEM 2021/4206 and GESTDEM 2021/4207 were, two documents and one document, respectively, the nature, dates and numbers of which it indicated. Second, the Commission stated that the refusal to grant access to those documents was based on the exceptions provided for in the first and third indents of Article 4(2) of Regulation No 1049/2001, relying on a general presumption of confidentiality concerning the documents in an administrative file relating to a proceeding under Article 101 TFEU. Moreover, the Commission pointed out that the documents covered by the application bearing the reference GESTDEM 2021/4205 were already public and available.

Forms of order sought by the parties

8 The applicant claims that the Court should:

– annul the contested decision and 'ensure that the documents concerned are disclosed';

– order the Commission to pay the costs.

9 The Commission contends that the Court should:

– declare inadmissible the request that it be ordered to grant access to the documents concerned;

– dismiss the action for the remainder;

– order the applicant to pay the costs.

Law

Jurisdiction of the General Court

10 In its first head of claim, the applicant requests the Court to 'ensure that the documents concerned are disclosed'. The Commission considers that such a request, which does not fall within the Court's jurisdiction, must be rejected as 'inadmissible'.

11 In that regard, and as the Commission argues, it is sufficient to recall that, when exercising judicial review of legality under Article 263 TFEU, the Court has no jurisdiction to issue directions to the institutions, bodies or agencies of the European Union (see order of 26 October 1995, *Pevasa and Inpesca* v *Commission*, C-199/94 P and C-200/94 P, EU:C:1995:360, paragraph 24 and the case-law cited, and judgment of 25 September 2018, *Sweden* v *Commission*, T-260/16, EU:T:2018:597, paragraph 104 and the case-law cited). It is for the institution concerned to adopt, under Article 266 TFEU, the measures necessary to implement a judgment given in proceedings for annulment (see judgment of 25 September 2018, *Amicus Therapeutics UK and Amicus Therapeutics* v *EMA*, T-33/17, not published, EU:T:2018:595, paragraph 19 and the case-law cited).

12 It follows that the applicant's claim, recalled in paragraph 10 above, must be dismissed on the ground that the Court is not competent to hear it.

Substance

13 In support of its action, the applicant puts forward two pleas in law, the first alleging that the Commission unlawfully refused to provide a list of the requested documents and failed to provide reasons for that refusal, with the second alleging the unlawful application of a general presumption of confidentiality to the documents covered by the applications bearing the references GESTDEM 2021/4203 and GESTDEM 2021/4204. It is appropriate to examine those two pleas together, since they essentially relate, in the circumstances of the case at hand, to the possibility, for the Commission, to apply a general presumption of confidentiality (second plea) and to the arrangements for applying such a presumption (first plea).

14 In the context of the second plea, the applicant claims, in essence, that the Commission was wrong to find that the documents that were the subject of the applications bearing the references GESTDEM 2021/4203 and GESTDEM 2021/4204 were covered by a general presumption of confidentiality. In particular, it does not accept that the communications between the Commission and the Netherlands competition authorities belong to the administrative file in the Bitumen case and complains that the Commission failed to state the reasons why the documents specifically requested could not be disclosed.

15 In the context of the first plea, the applicant maintains, in essence, that the Commission erred in law in failing to submit an inventory of the requested documents and to provide adequate reasons for that failure. In support of its line of argument, it relies on the judgment of 28 May 2020, *Campbell* v *Commission* (T-701/18, EU:T:2020:224), which, in its view, places the Commission under an obligation to submit an inventory. That inventory would, in its view, enable it to rebut the general presumption of confidentiality.

16 The Commission disputes the arguments put forward by the applicant.

17 At the outset, it must be stated that, although the second plea explicitly relates only to the applications bearing the references GESTDEM 2021/4203 and GESTDEM 2021/4204, the arguments developed by the applicant in the context of the first plea also relate only to the exchanges between the Commission and the Netherlands authorities forming the subject of those same applications. Thus, as the response given by the Commission in the contested decision to the applications bearing the references GESTDEM 2021/4205, GESTDEM 2021/4206 and GESTDEM 2021/4207 is not covered, directly or indirectly, by arguments put forward by the applicant, it must be held that the subject matter of the action is limited solely to the response given by the Commission in the contested decision to the applications bearing the references GESTDEM 2021/4203 and GESTDEM 2021/4204.

Preliminary observations

18 It should be recalled that it follows from recital 2 of Regulation No 1049/2001 that openness enables the EU institutions to have greater legitimacy and to be more effective and more accountable to EU citizens in a democratic system. To those ends, Article 1 of Regulation No 1049/2001 provides that the purpose of that regulation is to confer on the public as wide a right of access as possible to documents of the EU institutions (see judgment of 22 January 2020, *MSD Animal Health Innovation and Intervet international* v *EMA*, C-178/18 P, EU:C:2020:24, paragraphs 50 and 51 and the case-law cited).

19 It is apparent from Article 4 of Regulation No 1049/2001, which introduces a system of exceptions in that regard, that that right is, nevertheless, subject to certain limits based on reasons of public or private interest. As such exceptions depart from the principle of the widest possible public access to documents, they must be interpreted and applied strictly (see judgment of 22 January 2020, *MSD Animal Health Innovation and Intervet international* v *EMA*, C-178/18 P, EU:C:2020:24, paragraphs 52 and 53 and the case-law cited).

20 In that regard, it should be borne in mind that where an EU institution, body, office or agency that has received a request for access to a document decides to refuse to grant that request on the basis of one of the exceptions laid down in Article 4 of Regulation No 1049/2001, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by that exception, and the risk of the interest being undermined must be reasonably

foreseeable and must not be purely hypothetical (see judgment of 22 January 2020, *MSD Animal Health Innovation and Intervet international* v *EMA*, C-178/18 P, EU:C:2020:24, paragraph 54 and the case-law cited).

21 The Court of Justice has acknowledged, however, that it is open to that institution, body, office or agency to base its decisions in that regard on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature (see judgment of 22 January 2020, *MSD Animal Health Innovation and Intervet international* v *EMA*, C-178/18 P, EU:C:2020:24, paragraph 55 and the case-law cited).

22 The objective of such general presumptions is the possibility, for the EU institution, body, office or agency concerned, to consider that the disclosure of certain categories of documents undermines, in principle, the interest protected by the exception which it is invoking, by relying on such general considerations, without being required to examine specifically and individually each of the documents requested (see judgment of 22 January 2020, *MSD Animal Health Innovation and Intervet international* v *EMA*, C-178/18 P, EU:C:2020:24, paragraph 56 and the case-law cited).

23 As general presumptions constitute an exception to the rule that the EU institution concerned is obliged to carry out a specific and individual examination of every document which is the subject of a request for access and, more generally, to the principle that the public should have the widest possible access to the documents held by the institutions of the European Union, they must be interpreted and applied strictly (judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 80).

24 The existence of a general presumption of confidentiality does not exclude the possibility of demonstrating that a given document, disclosure of which has been requested, is not covered by that presumption, or that there is a higher public interest justifying the disclosure of the document concerned by virtue of Article 4(2) of Regulation No 1049/2001 (judgment of 28 June 2012, *Commission* v *Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 126).

25 The Court of Justice has recognised five categories of documents which enjoy general presumptions of confidentiality: (i) the documents in an administrative file relating to a procedure for reviewing State aid; (ii) the submissions lodged in proceedings before the Courts of the European Union, for as long as those proceedings remain pending; (iii) the documents exchanged between the Commission and notifying parties or third parties in the course of merger control proceedings; (iv) the documents relating to an infringement procedure during its pre-litigation stage, including the documents exchanged between the Commission and the Member State concerned during an EU Pilot procedure, and (v) the documents relating to a proceeding under Article 101 TFEU. In each of those cases, the refusal of access in question related to a set of documents which were clearly defined by the fact that they all belonged to a file relating to ongoing administrative or judicial proceedings (see, to that effect, judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 81).

26 More specifically, with regard to procedures for implementing competition rules, the Court of Justice has held that a general presumption of confidentiality applies to a request for access to a set of documents in a file relating to a proceeding under Article 101 TFEU (see, to that effect, judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraph 81).

27 To that effect, the Court of Justice has held that generalised access, on the basis of Regulation No 1049/2001, to the documents in a file relating to a proceeding under Article 101 TFEU would jeopardise the balance which the EU legislature sought to ensure in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1), and in Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102 TFEU] (OJ 2004 L 123, p. 18), between the obligation on the undertakings concerned to submit to the Commission possibly sensitive commercial information to enable it to ascertain whether a concerted practice was in existence and to determine whether that practice was compatible with that provision, on the one hand, and the guarantee of increased protection, by virtue of the requirement of professional secrecy and business secrecy, for the information so provided to the Commission, on the other (see, to that effect, judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraph 90).

28 The Court of Justice has thus found that, for the purposes of the application of the exceptions provided for in the first and third indents of Article 4(2) of Regulation No 1049/2001, the Commission is entitled to presume, without carrying out a specific, individual examination of each of the documents in a file relating to a proceeding under Article 101 TFEU, that disclosure of such documents would, in principle, undermine the protection of the commercial interests of the undertakings involved in such a proceeding and the protection of the purpose of the investigations relating to the proceeding (see, to that effect, judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraph 93).

29 It is in the light of those principles that the applicant's pleas should be examined.

Breach of the obligation to state reasons

30 Regarding the reasons set out in the contested decision, it should be recalled that the statement of reasons required by Article 296 TFEU and by Article 41(2)(c) of the Charter of Fundamental Rights of the European Union must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its jurisdiction to review legality (judgment of 25 November 2020, *Bronckers* v *Commission*, T-166/19, EU:T:2020:557, paragraph 22).

31 It must be pointed out that, in the case at hand, in the contested decision, as is apparent from paragraph 7 above, the Commission first identified the requested documents and then explained to the applicant that those documents belonged to the administrative file relating to a proceeding under Article 101 TFEU. Last, the Commission indicated that the examination of the applications had led it to conclude that the requested documents were covered by the exceptions provided for in the first and third indents of Article 4(2) of Regulation No 1049/2001 and by the general presumption of confidentiality established in the judgment of 27 February 2014, *Commission* v *EnBW* (C-365/12 P, EU:C:2014:112).

32 It follows that the contested decision contains a sufficient statement of reasons within the meaning of the case-law cited in paragraph 30 above, in so far as it identifies the documents concerned and the basis of the Commission's refusal to grant access under Article 4 of Regulation No 1049/2001 by applying a general presumption of confidentiality. The applicant's line of argument alleging insufficient reasoning must therefore be rejected, without its even being necessary to rule on its admissibility, disputed by the Commission.

Applicability of the general presumption of confidentiality relied on by the Commission

33 As to whether the documents covered by the applications bearing the references GESTDEM 2021/4203 and GESTDEM 2021/4204 fall within the scope of the general presumption of confidentiality applied by the Commission, it should be noted that those documents, as is apparent from the applicant's applications and from the contested decision, are communications between the Commission and the Netherlands Competition Authority (or other Netherlands authorities) in the context of the investigation that led to adoption of the final decision of 13 September 2006, relating to the Bitumen case.

34 In particular, it is apparent from those applications that the documents in question consist of exchanges between the Commission and the Netherlands authorities concerning the preliminary investigation, including inspections and requests for information, and decision-making in the Bitumen case. As the Commission noted in the contested decision, such documents relate to the correspondence that the Commission and the Netherlands authorities were obliged to maintain in the context of that case.

35 In that regard, it is sufficient to recall that, in the context of an investigation seeking to apply Article 101 TFEU, the Commission, in accordance with Article 11(2) of Regulation No 1/2003, is to transmit to the competition authorities of the Member States copies of the most important documents it has collected with a view to adopting a decision. In addition, in accordance with Article 12(1) of that regulation, it may exchange any information with the national competition authorities. Last, in accordance with Article 20(3) of that regulation, it must give notice to the competition authority of the Member State in whose territory an inspection is to be conducted.

36 Consequently, documents such as those requested by the applicant in this case on the subject of the exchanges between the Commission and the Netherlands authorities in the context of the investigation relating to the Bitumen case, concerning the inspections, requests for information, updates and decision-making in that case, are documents which clearly pertain to a proceeding under Article 101 TFEU and which, as such, in view of their nature, belong to the Commission's administrative file relating to the said case.

37 In the latter regard, it is apparent from Article 27(2) of Regulation No 1/2003 that, in the context of a Commission investigation relating to the application of Article 101 TFEU, the correspondence between the Commission and the competition authorities of the Member States, or between the latter, including the documents drawn up pursuant to Articles 11 and 14 of that regulation, is among the internal documents contained in the Commission's file (see, to that effect, judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraph 86). Moreover, it is apparent from paragraphs 1 and 15 of the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles [101] and [102 TFEU], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ 2005 C 325, p. 7) that the correspondence maintained between the Commission and other public authorities during an investigation, such as that with the competition authorities or other authorities of the Member States, counts among the inaccessible internal documents belonging to the Commission's file.

38 As has been recalled in paragraph 26 above, however, in the context of the application of the provisions of Regulation No 1049/2001, the Court of Justice has accepted that a general presumption of confidentiality exists as regards the documents in a file relating to a proceeding

under Article 101 TFEU, among which were also the communications between the Commission and national authorities (see, to that effect, judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraphs 16 and 81).

39 It follows from all the foregoing considerations that the Commission was entitled, in the case at hand, to assert the existence of a general presumption of confidentiality, pursuant to the first and third indents of Article 4(2) of Regulation No 1049/2001, according to which the disclosure of the documents from the administrative file in the Bitumen case undermined, in principle, on the one hand, the protection of the purpose of inspections, investigations and audits and, on the other hand, the protection of commercial interests.

40 That conclusion is not called into question by the arguments put forward by the applicant.

41 It is indeed true that, as has been indicated in paragraph 24 above, the application of a general presumption of confidentiality does not exclude the possibility of demonstrating not only that a given document, disclosure of which has been requested, is not covered by that presumption, but also there is a higher public interest justifying the disclosure of the document concerned.

42 However, first, in order to demonstrate that the requested documents are not covered by the general presumption of confidentiality, the applicant submits, in essence, that not every communication between the Commission and the Netherlands authorities belongs to the file in the Bitumen case. In that regard, however, it is sufficient to note that the applicant requested access not to any communication whatsoever between the Commission and the Netherlands authorities, but specifically only to the communications relating to the Bitumen case.

43 Moreover, it should be noted that the applicant was among the addressees of the Commission decision in the Bitumen case and that, in its capacity as party in that case, it had a specific and limited right of access by virtue of the provisions of recital 32 and Article 27 of Regulation No 1/2003 and of Article 15(2) of Regulation No 773/2004. It is therefore contrary to the spirit of Regulations No 1/2003 and No 773/2004 for an applicant to use the provisions of Regulation No 1049/2001 to circumvent the rules of confidentiality introduced by the said regulations and to obtain the communication of documents regarded as confidential in the context of a proceeding under Article 101 TFEU (see, to that effect, judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraph 88).

44 Second, suffice it to note that the applicant has not submitted any argument to establish the existence of a higher public interest. It is limited to stating that its applications for access were justified by the existence of claims made against it by direct and indirect customers, without, however, demonstrating the existence of those claims. It is certainly true that the right to a fair hearing is in itself a general interest. However, the fact that that right is manifested in the present case by the applicant's individual interest in defending itself in the context of actions for damages implies that the interest which the applicant invokes is not a general, but rather a private, interest (judgment of 6 July 2006, *Franchet and Byk* v *Commission*, T-391/03 and T-70/04, EU:T:2006:190, paragraph 138).

Rules for applying the general presumption of confidentiality relied on by the Commission

45 As regards the question whether the Commission failed to comply with the obligations stemming from the judgment of 28 May 2020, *Campbell* v *Commission* (T-701/18, EU:T:2020:224), it should be recalled that it follows from that judgment that, where an institution considers that a general

presumption of confidentiality is applicable, it is able to reply in a global manner to a request for access, in the sense that that presumption relieves it from providing explanations as to how access to a document covered by that request specifically undermines the interest protected. However, the application of a presumption of confidentiality cannot be interpreted as permitting the institution to reply, in a global manner, that all the documents covered by the application for access are part of a file covered by a general presumption of confidentiality, without having to identify those documents or draw up a list of them. It must be held that it is only once the institution has identified which documents were covered by the request for access that it can classify them into categories according to their common characteristics, their same nature or their belonging to the same file and that it can then apply a general presumption of confidentiality to them. In the absence of such identification, the general presumption of confidentiality would be irrebuttable (see, to that effect, judgment of 28 May 2020, *Campbell* v *Commission*, T-701/18, EU:T:2020:224, paragraphs 40, 41, 45 and 46).

46 In that regard, it should be noted that, in the case giving rise to the judgment of 28 May 2020, *Campbell* v *Commission* (T-701/18, EU:T:2020:224), the applicant had requested access to 'all documents in relation to Ireland's compliance or non-compliance with its obligations under [various] framework decisions' (see, to that effect, judgment of 28 May 2020, *Campbell* v *Commission*, T-701/18, EU:T:2020:224, paragraph 59). His request for access had therefore been worded in a general and abstract manner, covering all the documents held by the Commission. Thus, the Court held that the Commission had been wrong to find that that request related solely to the documents concerning the procedure seeking to establish Ireland's failure to transpose the framework decisions at issue.

47 Moreover, in its response to the confirmatory application in the case giving rise to the judgment of 28 May 2020, *Campbell* v *Commission* (T-701/18, EU:T:2020:224), the Commission had stated merely that the documents identified as corresponding to the applicant's request 'contain[ed] exchanges between [its] services and Ireland and pertain to three … EU Pilot procedures'. In the Court's view, on the one hand, that wording did not enable the applicant to assess whether there were other documents which might be covered by his request or whether all the documents covered by that request related to the EU Pilot procedures at issue, as is apparent from paragraph 56 of the judgment of 28 May 2020, *Campbell* v *Commission* (T-701/18, EU:T:2020:224). On the other hand, the wording used by the Commission indicated that, as regards the examination of the applicant's confirmatory application, the Commission had merely stated that EU Pilot procedures had been opened in relation to the transposition by Ireland of the framework decisions in question, and that it had concluded that a presumption of confidentiality applied. The Court considered, however, that such a reply was not sufficient to establish that the Commission had first carried out a specific examination of the applicant's request or that it actually identified the documents covered by the request for access, as can be seen from paragraph 57 of the said judgment.

48 It is in that context that the Court concluded that the wording used by the Commission in its response was not sufficient to enable the applicant to identify the documents covered by his request for access and that, therefore, the applicant was unable to rebut the presumption of confidentiality relied on by the Commission (see, to that effect, judgment of 28 May 2020, *Campbell* v *Commission*, T-701/18, EU:T:2020:224, paragraphs 58 and 65).

49 By contrast, in the case at hand, the applications bearing the references GESTDEM 2021/4203 and GESTDEM 2021/4204 concern the documents defined by the applicant in the wording used in the first and second indents of paragraph 4 above. It appears from those applications that the

applicant requested access to a specific type of document (the communications exchanged between the Commission and the Netherlands authorities), and relating to a precisely identified proceeding under Article 101 TFEU (the Bitumen case), unlike the case giving rise to the judgment of 28 May 2020, *Campbell* v *Commission* (T-701/18, EU:T:2020:224), in which the request for access related not to a specific type of document or a particular proceeding, but to all the documents concerning a Member State's compliance or non-compliance with certain framework decisions of the Council.

50 Moreover, in the contested decision, the Commission identified jointly the documents covered by the applications bearing the references GESTDEM 2021/4203 and GESTDEM 2021/4204, specifying in its assessment that they were exchanges with the Netherlands State in the context of the Bitumen case, comprising both the documents that it was obliged to exchange with the national competition authorities under Regulation No 1/2003 and the direct correspondence with the Netherlands Competition Authority and that, as such, those documents belonged to the file in the Bitumen case and were covered by the general presumption of confidentiality established in the judgment of 27 February 2014, *Commission* v *EnBW* (C-365/12 P, EU:C:2014:112). The Commission also set out the parameters of that general presumption of confidentiality and its application to the case at hand.

51 The applicant moreover does not dispute that the Commission, in the specific examination of its applications for access, correctly identified the documents covered by the applications bearing the references GESTDEM 2021/4203 and GESTDEM 2021/4204, but merely argues that the Commission should have produced an inventory or list of those documents.

52 In the latter regard, it should be pointed out that, contrary to what the applicant suggests, it is not apparent from the judgment of 28 May 2020, *Campbell* v *Commission* (T-701/18, EU:T:2020:224), that the EU institution, body, office or agency responding to a request for access to documents, when it applies a general presumption of confidentiality, is in every case required to provide the requesting party with a list of the documents covered by that presumption. On the contrary, as is apparent from paragraph 45 above, the provision of such a list is but one of the possible ways of identifying the documents requested, in order for the applicant to have the possibility of rebutting the application of that presumption.

53 Thus, the judgment of 28 May 2020, *Campbell* v *Commission* (T-701/18, EU:T:2020:224), states that the provision of a list of documents covered by a general presumption of confidentiality is not necessary where the documents referred to, or at least their type, are already clear from the request for access and the applicant, in principle, has the opportunity of arguing that a document is not covered by the general presumption of confidentiality (see, to that effect, judgment of 28 May 2020, *Campbell* v *Commission*, T-701/18, EU:T:2020:224, paragraph 62 and the case-law cited).

54 Such is the case here, given that the applications bearing the references GESTDEM 2021/4203 and GESTDEM 2021/4204 and the contested decision identify the documents covered both as regards their nature and as regards their belonging to the file of a given proceeding under Article 101 TFEU.

55 Furthermore, in the context of the proceedings before the Court, the applicant has in no way indicated how the absence of communication of a list of the documents at issue prevented it from rebutting the general presumption of confidentiality applied by the Commission, when it was party to the proceedings brought by that institution in the Bitumen case. It was in fact the

addressee of the final decision that the Commission had adopted in the Bitumen case and, consequently it was involved in the administrative procedure which led to the adoption of that decision. It should also be noted that the Court of Justice has previously held that the fact that it was difficult to adduce the evidence necessary to rebut a presumption did not in itself mean that that presumption was in fact irrebuttable (see judgment of 13 March 2019, *AlzChem* v *Commission*, C-666/17 P, not published, EU:C:2019:196, paragraph 39 and the case-law cited). Therefore, it must be held that the applicant was, in principle, able to rebut the general presumption of confidentiality in the absence of the communication, by the Commission, of an exhaustive list of the documents at issue.

56 However, it is apparent from the arguments put forward in the application, in the context of the first plea, that a list of documents within the meaning of the judgment of 28 May 2020, *Campbell* v *Commission* (T-701/18, EU:T:2020:224), was not requested by the applicant to be able potentially to rebut the application of the general presumption of confidentiality applied by the Commission. The applicant indicates that the purpose of that list would have been to enable it to know 'whether and, if so, when and at what levels, the State [had] had contacts with the Commission', in order 'to determine accurately and completely the set of facts in which the claims [of its customers for the damage allegedly caused by the infringement had to] be situated', which is not part of the logic underpinning the obligation to identify the documents concerned highlighted by the Court in the judgment of 28 May 2020, *Campbell* v *Commission* (T-701/18, EU:T:2020:224).

57 Consequently, the fact that the documents disclosure of which was requested were of the same type and belonged to the administrative file relating to a proceeding under Article 101 TFEU was sufficient, in the case at hand, to justify the application of the general presumption of confidentiality of the documents concerning such a proceeding, without the Commission being required to provide the applicant with a list of those documents.

58 Furthermore, in the first place, in so far as the arguments put forward by the applicant must be understood as maintaining that, in its applications bearing the references GESTDEM 2021/4203 and GESTDEM 2021/4204, it had requested access to an inventory of the exchanges between the Commission and the Netherlands authorities, those arguments are based on incorrect premisses and must be rejected.

59 On the one hand, it is not apparent from the wording of the applications bearing the references GESTDEM 2021/4203 and GESTDEM 2021/4204 (see paragraph 4 above) that the applicant requested, as such, an inventory of the documents in the file in the Bitumen case and specifically of the exchanges between the Commission and the Netherlands authorities.

60 On the other hand, it should be noted that it is apparent from the applicant's confirmatory application that, when it disputed the absence of an inventory of the documents requested, it was referring to the alleged failure by the Commission to comply with the obligation to produce an inventory of the documents covered by the general presumption of confidentiality which, in the applicant's view, stemmed from the judgment of 28 May 2020, *Campbell* v *Commission* (T-701/18, EU:T:2020:224), and not to a document which, as such, was covered by its applications bearing the references GESTDEM 2021/4203 and GESTDEM 2021/4204.

61 In the second place, as the Commission was not obliged to provide a list of the documents covered by the applications bearing the references GESTDEM 2021/4203 and GESTDEM 2021/4204, the applicant's argument alleging an inadequate statement of reasons for the refusal to produce such a list, which the Commission contends that the Court should find inadmissible, must also be rejected without its being necessary to rule on its admissibility.

62 It follows from all of the foregoing that the first and second pleas in law must be rejected in their entirety and, accordingly, the action must be dismissed in its entirety.

Costs

63 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

64 Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders TotalEnergies Marketing Nederland NV to pay the costs.

Papasavvas Marcoulli Norkus

Valasidis Spangsberg Grønfeldt

Delivered in open court in Luxembourg on 2 October 2024.

[Signatures]