Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

18 July 2017*

Appeal — Access to documents of the institutions — Article 15(3) TFEU — Regulation (EC) No 1049/2001 — Scope — Application for access to written submissions filed by the Republic of Austria in the case in which judgment was given on 29 July 2010, *Commission* v *Austria* (C-189/09, not published, EU:C:2010:455) — Documents in the possession of the European Commission — Protection of court proceedings

In Case C-213/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 8 May 2015,

European Commission, represented by P. Van Nuffel and H. Krämer, acting as Agents,

appellant,

supported by:

Kingdom of Spain, represented by M.J. García-Valdecasas Dorrego and S. Centeno Huerta, acting as Agents,

French Republic, represented by G. de Bergues, D. Colas, R. Coesme and F. Fize, acting as Agents,

interveners in the appeal,

the other parties to the proceedings being:

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

applicant at first instance,

Republic of Finland, represented by H. Leppo, acting as Agent,

Kingdom of Sweden, represented by A. Falk, C. Meyer-Seitz, E. Karlsson and L. Swedenborg, acting as Agents,

interveners at first instance,

* Language of the case: German.

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, L. Bay Larsen, T. von Danwitz, E. Juhász, M. Berger, A. Prechal and M. Vilaras, Presidents of Chambers, A. Rosas (Rapporteur), A. Borg Barthet, D. Šváby and E. Jarašiūnas, Judges,

Advocate General: M. Bobek,

Registrar: T. Millett, Deputy Registrar,

having regard to the written procedure and further to the hearing on 26 September 2016,

after hearing the Opinion of the Advocate General at the sitting on 21 December 2016,

gives the following

Judgment

1 By its appeal the European Commission seeks to have set aside the judgment of the General Court of the European Union of 27 February 2015, *Breyer* v *Commission* (T-188/12, EU:T:2015:124, 'the judgment under appeal'), annulling the Commission's decision of 3 April 2012 to refuse Mr Patrick Breyer full access to the 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 (OJ 2006 L 105, p. 54) and the documents relating to the case in which judgment was given on 29 July 2010, *Commission* v *Austria* (C-189/09, not published, EU:C:2010:455), in so far as the decision refused access to the written submissions lodged by the Republic of Austria in that case.

Legal context

2 Part Five of the EC Treaty, 'Institutions of the Community', included Title I, 'Provisions governing the institutions'. In Chapter 2, 'Provisions common to several institutions', of that title, Article 255(2) EC provided:

'General principles and limits on grounds of public or private interest governing the right of access to [European Parliament, Council and Commission] documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 [EC, known as the co-decision procedure,] within two years of the entry into force of the Treaty of Amsterdam.'

3 Part One of the FEU Treaty, 'Principles', includes Title II, 'Provisions having general application', comprising Articles 7 to 17 TFEU. The first to fourth subparagraphs of Article 15(3) TFEU provide:

'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.

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.

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.'

4 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) was adopted on the basis of Article 255(2) EC.

5 In accordance with Article 1(a) of that regulation:

'The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as "the institutions") documents provided for in Article 255 [EC] in such a way as to ensure the widest possible access to documents'.

6 Article 2 of that regulation, 'Beneficiaries and scope', provides in paragraph 3:

'This Regulation shall apply to all documents held by [the European Parliament, the Council or the Commission], that is to say, documents drawn up or received by [those institutions] and in [their] possession, in all areas of activity of the European Union.'

7 Article 3 of the regulation, 'Definitions', provides:

'For the purpose of this Regulation:

(a) "document" shall mean 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;

(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.'

8 In accordance with Article 4 of the regulation, 'Exceptions':

'…

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.

…

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

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

…

7. The exceptions as laid down in [paragraph 2] shall only apply for the period during which protection is justified on the basis of the content of the document. …'

9 Article 6 of the regulation, 'Applications', lays down rules for making applications for access to documents under the regulation.

10 Article 7 of the regulation, 'Processing of initial applications', provides in paragraph 2 that 'in the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.'

Background to the dispute

11 The background to the dispute was set out in paragraphs 6 to 10 and 15 of the judgment under appeal, in the following terms:

'6 By letter of 30 March 2011, … Patrick Breyer, submitted to the … 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]. More precisely, [Mr Breyer] 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 [Mr Breyer] on 30 March 2011.

9 On 13 July 2011, [Mr Breyer] 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 [Mr Breyer] 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 [Mr Breyer] of its intention to adopt a separate decision in respect of the documents relating to *Commission* v *Austria* … (EU:C:2010:455).

…

15 On 3 April 2012, in response to [Mr Breyer'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 [Mr Breyer], 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* … (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* … (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 [the judgment of 21 September 2010,] *Sweden and Others* v *API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, … EU:C:2010:541), 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.'

The procedure before the General Court and the judgment under appeal

12 By application lodged at the Registry of the General Court on 30 April 2012, Mr Breyer brought an action seeking inter alia the annulment of the decision of 3 April 2012, in so far as by that decision the Commission had refused him access to the written submissions at issue. In support of his action, he put forward a single plea in law, alleging infringement by the Commission of Article 2(3) of Regulation No 1049/2001. He argued that the ground stated in that decision, namely that the written submissions at issue did not fall within the scope of the regulation, was not correct.

13 By the judgment under appeal, the General Court upheld that plea and consequently annulled the decision of 3 April 2012.

14 As a first step, in paragraphs 35 to 61 of the judgment under appeal, the General Court considered whether the written submissions at issue were documents 'held by an institution' within the meaning of Article 2(3) in conjunction with Article 3(a) of Regulation No 1049/2001.

15 To that end, the General Court found in paragraphs 40 to 48 of the judgment under appeal that, in accordance with Article 2(3) and Article 3(b) of Regulation No 1049/2001, the right of access to documents held by an institution of the EU covers those received inter alia from Member States, and that the broad definition of the concept of a 'document' in Article 3(a) of the regulation 'is … based on the existence of content that is saved and that may be copied or consulted after it has been generated, it being understood [inter alia] … that … [the content] must relate to the policies, activities or decisions of the institution in question'. Observing that, in the present case, first, the Commission did not dispute that copies of the written submissions at issue were in its possession, and, second, the Commission had received those documents in the exercise of its powers in respect of its litigious activities, the General Court concluded that the submissions were to be classified as documents held by an institution within the meaning of Article 2(3) in conjunction with Article 3(a) of the regulation.

16 The General Court went on to reject, in paragraphs 50 to 61 of the judgment under appeal, the various arguments put forward by the Commission to contest the classification of the written submissions at issue as documents held by it within the meaning of Article 2(3) in conjunction with Article 3(a) of Regulation No 1049/2001. The basis of those arguments was that the written submissions had been addressed to the Court of Justice, had been sent to the Commission only in the form of copies, and,

as documents in court proceedings, did not fall within the Commission's administrative activities and were not therefore within its competence, given that Regulation No 1049/2001 did not concern the Commission's litigious activities.

17 In paragraph 51 of the judgment under appeal, the General Court observed, to begin with, that Article 2(3) of Regulation No 1049/2001 did not make the application of the regulation contingent on the document 'received' by the institution in question having been addressed to it and sent directly by its author. Next, in paragraphs 53 and 54 of the judgment under appeal, the General Court, pointing out that the concept of a 'document' within the meaning of Article 3(a) of the regulation is given a broad definition, found that it was irrelevant in this respect that the written submissions at issue had been sent to the Commission in the form of copies rather than originals. Furthermore, in paragraph 57 of the judgment under appeal, the General Court found that it followed from the regulation's objectives of openness, which are apparent in particular from recital 2 of the regulation, the broad definition of the concept of a 'document' within the meaning of Article 3(a) of the regulation, and the wording and very existence, in the second indent of Article 4(2) of the regulation, of an exception relating to the protection of court proceedings, that the EU legislature did not intend to exclude the institutions' litigious activities from the scope of the right of access to documents held by them.

18 Finally, in paragraphs 60 and 61 of the judgment under appeal, the General Court found that the written submissions at issue had been 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), and that the Commission was therefore wrong to submit that it had not received them in the exercise of its powers.

19 As a second step, in paragraphs 63 to 112 of the judgment under appeal, the General Court considered the effect of the fourth subparagraph of Article 15(3) TFEU on the application of Regulation No 1049/2001.

20 The General Court started by recalling, in paragraphs 67 to 73 of the judgment under appeal, that it follows both from Article 15 TFEU 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 of the right of access to documents established by those rules. Moreover, according to the General Court, written submissions lodged by the Commission with the EU judicature in legal proceedings and those lodged by a Member State in an action for failure to fulfil obligations are inherently a part of the judicial activities of that judicature.

21 The General Court concluded, in paragraphs 75 to 80 of the judgment under appeal, both from its own case-law (judgments of 6 July 2006, *Franchet and Byk* v *Commission*, T-391/03 and T-70/04, EU:T:2006:190, paragraphs 88 to 90; of 12 September 2007, *API* v *Commission*, T-36/04, EU:T:2007:258, paragraph 60; and of 3 October 2012, *Jurašinović* v *Council*, T-63/10, EU:T:2012:516, paragraphs 66 and 67) and from that of the Court of Justice (judgment of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 94), that, even though they are a part of the judicial activities of the EU judicature, those submissions are not excluded, by virtue of the fourth subparagraph of Article 15(3) TFEU, from the right of access to documents. In this connection, in paragraph 82 of the judgment under appeal, the General Court found that '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 [the] 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'.

22 It therefore held, in paragraph 83 of the judgment under appeal, that 'the fourth subparagraph of Article 15(3) TFEU [did] not preclude the inclusion of the written submissions at issue within the scope of Regulation No 1049/2001', and went on to reject the arguments put forward by the Commission to the effect that, first, a distinction should be drawn for the purpose of this analysis between its own written submissions and those of a Member State and, secondly, the specific rules relating to access to court documents would be rendered meaningless and circumvented if access under that regulation were allowed to written submissions drawn up by a Member State for court proceedings.

23 As regards those arguments, the General Court considered, first, in paragraph 92 of the judgment under appeal, that, in view of the different contexts of the case in which judgment was given on 21 September 2010, *Sweden and Others* v *API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541), which concerned a dispute over the disclosure of written submissions of the Commission relating to pending court proceedings, and the present case, the considerations regarding equality of arms set out in paragraphs 86 and 87 of that judgment were not relevant here.

24 The General Court observed, secondly, in paragraph 102 of the judgment under appeal, that by interpreting the exception for the protection of court proceedings in the second indent of Article 4(2) of Regulation No 1049/2001 in its judgment of 21 September 2010, *Sweden and Others* v *API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541) the Court of Justice had implicitly accepted that that regulation applied to written submissions of the Commission. The General Court also observed, in paragraphs 103 to 105 of the judgment under appeal, that including the written submissions at issue within the scope of the regulation did not undermine the objective of the specific rules relating to access to documents concerning court proceedings, in so far as the protection of court proceedings could, if necessary, be ensured by the application of the exception to access laid down in the second indent of Article 4(2) of the regulation.

25 Finally, with respect to costs, the General Court considered that the publication on the internet by Mr Breyer of the Commission's defence and of the exchange of letters between him and the Commission concerning that publication constituted misuse of the pleadings, justifying the sharing half and half between Mr Breyer and the Commission of the costs incurred by him.

Procedure before the Court and forms of order sought

26 By decisions of the President of the Court of 3 September and 6 October 2015, the Kingdom of Spain and the French Republic were granted leave to intervene in support of the form of order sought by the Commission.

27 By its appeal the Commission asks the Court to set aside the judgment under appeal, give final judgment on the dispute by dismissing Mr Breyer's action, and order him to pay the costs.

28 Mr Breyer, the Republic of Finland and the Kingdom of Sweden ask the Court to dismiss the appeal and order the Commission to pay the costs.

The appeal

Arguments of the parties

29 By its single ground of appeal, the Commission submits that the General Court erred in law by holding that the fourth subparagraph of Article 15(3) TFEU did not preclude the application of Regulation No 1049/2001 to an application for access to documents drawn up by a Member State for the purpose of court proceedings and in the possession of the Commission, such as the written submissions at issue, having regard to the particular nature of those documents.

30 According to the Commission, written submissions lodged by an EU institution with the EU judicature are of a 'dual nature' in that they fall at the same time within the general right of access to documents of the institutions, laid down in the first subparagraph of Article 15(3) TFEU, and within the exception for documents relating to the judicial activity of the Court of Justice of the European Union, laid down in the fourth subparagraph of that provision. The Court took that 'dual nature' into account when it ruled, from the point of view of Regulation No 1049/2001, on access to the written submissions of the Commission at issue in the case in which judgment was given on 21 September 2010, *Sweden and Others* v *API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541). The Commission submits that, by contrast, documents relating to the judicial activity of the Court of Justice of the European Union that have not been drawn up by an institution are not of such a 'dual nature', and that the present case has a different context from the case in which that judgment was given, both factually, in that it relates to written submissions drawn up by a Member State, and legally, since the legal context changed with the entry into force of the Treaty of Lisbon.

31 The Commission submits, as regards the latter point, that the fourth subparagraph of Article 15(3) TFEU prohibits the EU legislature from extending, by means of a regulation based on the second subparagraph of that provision, the right of access to documents of the institutions to documents relating to the judicial activity of the Court of Justice of the European Union. Although not arguing that Regulation No 1049/2001 is invalid, the Commission, while accepting that the validity of EU acts must be assessed by reference to the factual and legal elements existing at the time of their adoption, nonetheless considers that, having regard to the fourth subparagraph of Article 15(3) TFEU, the General Court should have interpreted Article 2(3) of Regulation No 1049/2001 restrictively. It should thus have considered that that regulation does not apply to documents connected with that judicial activity, in so far as they have not been drawn up by an institution.

32 The Kingdom of Spain and the French Republic support the Commission's argument, whereas Mr Breyer, supported by the Republic of Finland and the Kingdom of Sweden, interveners at first instance, puts forward the contrary view.

Findings of the Court

33 It must be observed, as a preliminary point, that by its single ground of appeal the Commission disputes the General Court's assessment of whether Regulation No 1049/2001 applies at all to Mr Breyer's application to the Commission for access to the written submissions at issue, without raising the different issue, not before the Court in the context of this appeal, of whether access to those submissions should be granted or refused, as the case may be, pursuant to the provisions of that regulation.

34 The single ground of appeal relates to the effect of the fourth subparagraph of Article 15(3) TFEU on the interpretation of the scope of Regulation No 1049/2001. Before assessing whether the Commission's arguments on this point are well founded, an examination must be made, in the first place, of the scope of that regulation, as it follows from the wording of the regulation.

35 In accordance with Article 2(3) in conjunction with Article 1(a) of Regulation No 1049/2001, the regulation is to apply to all documents held by the Parliament, the Council and the Commission, that is to say, documents drawn up or received by those institutions and in their possession, in all areas of activity of the European Union. In accordance with Article 3(a) of the regulation, 'document' means 'any content whatever its medium … concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility'.

36 It should be added that Article 3(b) of Regulation No 1049/2001 expressly provides that 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 themselves but also to documents they have received from third parties, including the other EU institutions as well as the Member States (see, to that effect, judgment of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 55).

37 The scope of Regulation No 1049/2001 is thus defined by reference to the institutions listed in the regulation, not by reference to particular categories of documents or, as the Court has previously observed (see, to that effect, judgment of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 56), the author of the document held by one of those institutions.

38 In this context, the fact that documents held by one of the institutions referred to in Regulation No 1049/2001 were drawn up by a Member State and are linked to court proceedings cannot exclude such documents from the scope of the regulation. First, the fact that Regulation No 1049/2001 does not apply to applications for access to documents in the possession of the Court of Justice of the European Union does not mean that documents linked to that institution's judicial activity are, as a matter of principle, outside the scope of the regulation where they are in the possession of the EU institutions listed in the regulation, such as the Commission.

39 Secondly, the Court has previously held that the legitimate interests of the Member States regarding such documents can be protected on the basis of the exceptions laid down in Regulation No 1049/2001 to the principle of the right of access to documents (see, to that effect, judgment of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 83).

40 Regulation No 1049/2001 lays down provisions which take care to define the objective limits of public or private interest that are capable of justifying a refusal to disclose documents (judgment of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 57), including in particular the second indent of Article 4(2) of the regulation, according to which the institutions are to refuse access to a document inter alia where disclosure would undermine the protection of court proceedings, unless there is an overriding public interest in disclosure.

41 It should be recalled in this connection that in its judgment of 21 September 2010, *Sweden and Others* v *API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541), the Court accepted the existence of a general presumption that disclosure of the written submissions lodged by an institution in court proceedings would undermine the protection of court proceedings within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001, as long as those proceedings remain pending. That general presumption of confidentiality applies also to written submissions lodged by a Member State in such proceedings.

42 However, as the Court has stated, the existence of such a presumption does not exclude the right of the person concerned to demonstrate that a document whose disclosure has been requested is not covered by that presumption (see, to that effect, judgment of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 103).

43 Moreover, in the case of written submissions drawn up by a Member State, it should be observed, as the General Court did in paragraph 97 of the judgment under appeal on the basis of the relevant case-law, that Article 4(5) of Regulation No 1049/2001, which provides that a Member State may

request an institution not to disclose a document originating from that State without its prior agreement, gives the Member State concerned 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) to (3) of the regulation preclude access being given to the document in question, including where written submissions drawn up for the purpose of court proceedings are concerned. However, Article 4(5) of Regulation No 1049/2001 does not confer on that Member State a general and unconditional right of veto enabling it to oppose, in a discretionary manner, the disclosure of documents originating from it and held by an institution.

44 In the present case, it is common ground that the written submissions at issue are in the possession of the Commission. In addition, as the General Court rightly held in paragraphs 51 and 52 of the judgment under appeal, the fact that the Commission received those submissions from the Court of Justice of the European Union, not from the Member State concerned, has no effect on the determination of whether Regulation No 1049/2001 is applicable at all.

45 As to the fact, relied on by the Commission, that neither the Statute of the Court of Justice of the European Union nor the rules of procedure of the EU Courts provide for a right of access by third parties to written submissions filed in court proceedings, while that fact is indeed to be taken into account for the purpose of interpreting the exception laid down in Article 4(2) of Regulation No 1049/2001 (see judgment of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 100), it cannot, on the other hand, have the consequence that the regulation does not apply to applications for access to written submissions that have been drawn up by a Member State for the purpose of court proceedings before the EU judicature and are in the possession of the Commission.

46 In those circumstances, in accordance with the wording of Regulation No 1049/2001, the written submissions at issue fall within the scope of that regulation, as 'documents held by an institution' within the meaning of Article 2(3) of the regulation.

47 In the second place, as regards the Commission's argument that the fourth subparagraph of Article 15(3) TFEU, introduced into primary law following the entry into force of the Treaty of Lisbon, prevents the EU legislature from providing for a right of access in relation to documents linked to the judicial activity of the Court of Justice of the European Union that have not been drawn up by an institution, so that the only permissible interpretation of Article 2(3) of Regulation No 1049/2001 is to exclude such documents from the scope of that regulation, an examination must be made of the general scheme and objectives of Article 15(3) TFEU.

48 In accordance with the fourth subparagraph of Article 15(3) TFEU, the Court of Justice of the European Union is subject to the system of access to documents of the institutions, laid down in the first subparagraph of that provision, only when exercising its administrative tasks. It follows that the conditions of access to documents held by that institution which relate to its judicial activity cannot be laid down by regulations adopted on the basis of the second subparagraph of Article 15(3) TFEU, while access to its documents of an administrative nature is governed by its decision of 11 December 2012 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (OJ 2013 C 38, p. 2), replaced by decision of 11 October 2016 (OJ 2016 C 445, p. 3).

49 However, the non-applicability of the system of access to documents laid down in the first subparagraph of Article 15(3) TFEU to the Court of Justice of the European Union when it exercises judicial functions does not preclude the application of that system to an institution to which the provisions of Article 15(3) TFEU and Regulation No 1049/2001 are fully applicable, such as the Commission, where that institution holds documents drawn up by a Member State, such as the written submissions at issue, relating to court proceedings.

50 It should be recalled here that the Court has explained, following the entry into force of the Treaty of Lisbon, that the introduction of Article 15 TFEU, which replaced Article 255 EC, extended the scope of the principle of transparency in EU law (see, to that effect, judgment of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 81).

51 Unlike Article 255 EC, whose scope was limited to documents of the Parliament, the Council and the Commission, Article 15(3) TFEU now provides for a right of access to documents of the institutions, bodies, offices and agencies of the EU, including the Court of Justice of the European Union, the European Central Bank and the European Investment Bank, where they exercise administrative functions. Contrary to what the Commission essentially submits, there are no grounds for maintaining that the extension of that right to cover those administrative activities goes hand in hand with the introduction of any restriction whatsoever of the scope of Regulation No 1049/2001 with respect to documents originating from a Member State, such as the written submissions at issue, that are held by the Commission in connection with proceedings before the Court of Justice of the European Union.

52 That broad interpretation of the principle of access to documents of the EU institutions is, moreover, borne out by Article 15(1) TFEU, which provides that the institutions, bodies, offices and agencies of the EU are to conduct their work as openly as possible, that principle of openness also being expressed in the second paragraph of Article 1 TEU and Article 298 TFEU, and by the enshrining of the right of access to documents in Article 42 of the Charter of Fundamental Rights of the European Union. Having regard to those provisions of primary law laying down the objective of an open European administration, the fourth subparagraph of Article 15(3) TFEU cannot, contrary to the Commission's submissions, be interpreted as requiring a restrictive reading of the scope of Regulation No 1049/2001 with the consequence that documents drawn up by a Member State, such as the written submissions at issue, do not fall within the scope of that regulation where they are held by the Commission.

53 As to the risk asserted by the Commission that the procedural rules mentioned in paragraph 45 above might be circumvented, it must be recalled that the limitations of access to documents relating to court proceedings, whether provided for under Article 255 EC, which was succeeded by Article 15 TFEU, or under Regulation No 1049/2001, pursue the same objective, namely to ensure that the right of access to documents of the institutions is exercised without undermining the protection of court proceedings, and that protection means in particular that compliance with the principles of equality of arms and the sound administration of justice must be ensured (see, to that effect, judgment of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraphs 84 and 85).

54 Since Regulation No 1049/2001 allows for the disclosure of documents connected with proceedings before the EU judicature to be refused if appropriate, and for the protection of such court proceedings to be ensured on that basis, as follows from paragraphs 40 to 42 above, it must be considered, contrary to what the Commission essentially submits, that the fourth subparagraph of Article 15(3) TFEU need not be interpreted as meaning that submissions drawn up by a Member State and held by the Commission, such as the written submissions at issue, must necessarily be excluded from the scope of that regulation. In so far as the protection of court proceedings is thus ensured, in accordance with the purpose of the fourth subparagraph of Article 15(3) TFEU, the effectiveness of that provision is not liable to be compromised.

55 In those circumstances, the General Court was right to consider, in particular in paragraph 80 of the judgment under appeal, that the written submissions at issue were not excluded, any more than those drawn up by the Commission itself, from the right of access to documents in the fourth subparagraph of Article 15(3) TFEU.

56 Consequently, the General Court did not err in law in finding, in paragraph 113 of the judgment under appeal, that the written submissions at issue fell within the scope of Article 2(3) of Regulation No 1049/2001 and, accordingly, annulling the Commission's decision of 3 April 2012 to refuse Mr Breyer access to those submissions.

57 It follows that the Commission's appeal must be dismissed.

Costs

58 Under Article 184(2) of the Rules of Procedure of the Court, where the appeal is unfounded, the Court is to make a decision as to costs.

59 Under Article 138(1) of those rules, which applies to the procedure on appeal by virtue of Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

60 Under Article 138(3) of those rules, where each party succeeds on some and fails on other heads, the parties are to be ordered to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

61 In the present case, while the Commission's appeal has not been allowed, it is not disputed that Mr Breyer, who applied for the Commission to be ordered to pay the costs, published on the internet anonymised versions of the pleadings exchanged in the present appeal proceedings.

62 As follows from Article 171(1) of the Rules of Procedure, the appeal is to be served on the other parties to the relevant case before the General Court. The procedural documents thus communicated to the parties to the case before the Court of Justice are not available to the public. Consequently, Mr Breyer's publication on the internet of the pleadings in the present proceedings, without being authorised to do so, constitutes misuse of the pleadings liable to harm the sound administration of justice, which should be taken into account when sharing the costs incurred in the present proceedings (see, to that effect, judgment of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraphs 92, 93 and 97 to 99).

63 In those circumstances, the Commission must be ordered to bear its own costs and to pay half of the costs incurred by Mr Breyer in connection with the present appeal, the other half being borne by Mr Breyer.

64 Moreover, in so far as Mr Breyer, in his response to the appeal, contests the General Court's reasoning on the award of costs at first instance in paragraph 119 of the judgment under appeal, in particular in so far as the General Court considered that a party who is granted access to the procedural documents of the other parties is entitled to use those documents only for the purpose of pursuing his own case and not for any other purpose, such as inciting criticism on the part of the public in relation to arguments raised by the other parties in the case, it suffices to recall that, in accordance with Article 174 of the Rules of Procedure, the form of order sought in the response must be for the appeal to be allowed or disallowed in whole or in part.

65 Since the form of order sought in the Commission's appeal does not address the question of the sharing of costs in the judgment under appeal, this part of the form of order sought by Mr Breyer is inadmissible.

66 Finally, Article 140(1) of the Rules of Procedure, which applies to the procedure on appeal by virtue of Article 184(1) of those rules, provides that the Member States and institutions which have intervened in the proceedings are to bear their own costs. In the present case, the Kingdom of Spain, the French Republic, the Republic of Finland and the Kingdom of Sweden must be ordered to bear their own costs of the present appeal.

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

1. **Dismisses the appeal;**

2. **Orders the Commission to bear its own costs and to pay half of the costs incurred by Mr Breyer;**

3. **Orders the Kingdom of Spain, the French Republic, the Republic of Finland and the Kingdom of Sweden to bear their own costs.**

[Signatures]