Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

11 December 2018 *

(Access to documents — Regulation (EC) No 1049/2001 — Documents relating to a procedure for reviewing State aid — Refusal to grant access — Exception relating to the protection of commercial interests of third parties — Exception relating to the protection of the purpose of inspections, investigations and audits — General presumption of confidentiality — Obligation to carry out a specific and individual examination — Overriding public interest)

In Case T-440/17,

Arca Capital Bohemia a.s., established in Prague (Czech Republic), represented by M. Nedelka, lawyer,

applicant,

v

European Commission, represented by A. Bouchagiar and A. Buchet, acting as Agents,

defendant,

APPLICATION pursuant to Article 263 TFEU seeking the annulment, first, of the decision allegedly contained in the Commission's response of 15 March 2017 to the initial application for access to documents relating to a procedure for reviewing State aid and, secondly, of Commission Decision C(2017) 3130 final of 4 May 2017 refusing to grant such access,

THE GENERAL COURT (Second Chamber),

composed of M. Prek, President, E. Buttigieg (Rapporteur) and B. Berke, Judges,

Registrar: E. Coulon,

gives the following

Judgment

Background to the dispute

1 On 18 July 2007, the European Commission adopted Decision 2008/214/EC on State aid C 27/2004 which the Czech Republic had implemented for GE Capital Bank and GE Capital International Holdings Corporation, USA (notified under document C(2007) 1965) (OJ 2008 L 67, p. 3).

* Language of the case: English.

2 By that decision, the Commission found that, in the course of the privatisation and restructuring of the bank Agrobanka Praha a.s., GE Capital Bank and GE Capital International Holdings Corporation, USA, had benefited, from 1 May 2004, from State aid that was compatible with the internal market in the form of indemnification for certain claims based on the indemnity agreement concluded between Česká Národní Banka (Czech National Bank, Czech Republic) and GE Capital International Holdings Corporation, USA, on 22 June 1998, as amended by amendment No 1 to the indemnity agreement of 25 April 2004, and in the form of a put option based on the put option deed concluded between the same parties on 22 June 1998.

3 By letter of 23 February 2017, the applicant, Arca Capital Bohemia a.s., applied, on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), for access to certain documents relating to the administrative procedure for reviewing State aid that led to the adoption of Decision 2008/214.

4 More specifically, the application for access concerned the following documents ('the documents at issue'):

– the Framework Agreement of 22 June 1998 concluded between the Czech National Bank, GE Capital Bank, a.s. and GE Capital International Holdings Corporation, USA (including annexes) ('the Framework Agreement');

– amendment No 1 to the Framework Agreement, of 30 November 2000;

– amendment No 2 to the Framework Agreement, of 21 November 2001.

5 By letter of 15 March 2017, the Commission informed the applicant that its application for access to the documents at issue had been rejected on the basis of the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001 ('the response to the initial application'). Recalling its obligation stemming from Article 339 TFEU in respect of the protection of professional secrecy and relying on the judgment of 28 June 2012, *Commission* v *Agrofert Holding* (C-477/10 P, EU:C:2012:394), the Commission expressed the view that those documents were covered by a general presumption of confidentiality according to which their disclosure would, in principle, undermine the protection of the commercial interests of the undertakings concerned. It also stated that the applicant had not put forward any argument to demonstrate that the documents at issue were not covered by the general presumption or to establish that there was an overriding public interest. Finally, the Commission stated that the general presumption also applied in respect of partial access, which, consequently, could not be granted.

6 By letter of 4 April 2017, the applicant made a confirmatory application pursuant to Article 7(2) of Regulation No 1049/2001, claiming that there was an overriding public interest justifying disclosure of the documents at issue consisting, in essence, in citizen scrutiny of the management of public funds by the Czech public authorities during the privatisation of Agrobanka Praha by means of its acquisition by GE Capital Bank and GE Capital International Holdings Corporation, USA.

7 By Decision C(2017) 3130 final of 4 May 2017 ('the second contested decision'), the Commission rejected the applicant's application. It first of all recalled that the documents at issue were part of the administrative file relating to the procedure for reviewing State aid and, relying on the case-law, it expressed the view that, as such, the documents were covered by the general presumption of confidentiality based on the exceptions referred to in the first and third indents of Article 4(2) of Regulation No 1049/2001, even after the definitive closure of the investigation. It also recalled that, as regards procedures for reviewing State aid, Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9), contains specific rules concerning the treatment of information obtained in the course of the procedure for reviewing

State aid and that, consequently, granting access to the file from that procedure to third parties other than the Member State concerned on the basis of Regulation No 1049/2001 would jeopardise the balance which the EU legislature sought to establish between the obligation on the Member States to send the Commission sensitive information, including information relating to the undertakings concerned, and the guarantee of increased protection, under Regulation 2015/1589, for the information thus sent to the Commission. Moreover, recalling that Regulation 2015/1589 requires the protection of professional secrecy and relying on the case-law, the Commission took the view that, in so far as they contained sensitive information on the economic activities of the undertakings concerned, the documents at issue were covered by a general presumption of confidentiality according to which their disclosure would, in principle, undermine the protection of the commercial interests of those undertakings, even after the closure of the investigation.

8 Next, the Commission examined the possibility of granting the applicant partial access to the documents concerned. In that regard, the Commission concluded that it was not possible to grant such partial access without undermining the purpose of its investigations and the protection of commercial interests. In its view, the documents concerned were clearly and entirely covered by the exceptions raised and there was therefore no obligation to disclose them either in whole or in part.

9 Finally, the Commission concluded that, in the present case, there was no overriding public interest within the meaning of Article 4(2) of Regulation No 1049/2001 that could justify disclosure of the documents concerned. In that regard, it considered that the arguments put forward by the applicant in respect of the alleged unlawfulness of the State aid at issue could not be taken into account in the course of proceedings for access to documents. Furthermore, it noted that the private interest that the applicant might have in obtaining access to the documents at issue could not constitute an overriding public interest.

Procedure and forms of order sought

10 By application lodged at the Court Registry on 4 July 2017, the applicant brought the present action.

11 Under Article 106(3) of its Rules of Procedure, if no request for a hearing has been submitted by the main parties within three weeks after service of notification of the close of the written part of the procedure, the Court may decide to rule on the action without an oral part of the procedure. In the present case, the Court, finding that it has sufficient information available to it from the material in the file, has decided, in the absence of such a request, to rule on the action without an oral part of the procedure.

12 The applicant claims that the Court should:

– annul the response to the initial application and the second contested decision;

– order the Commission to pay the costs.

13 The Commission contends that the Court should:

– dismiss the action as inadmissible with regard to the response to the initial application;

– dismiss the action as unfounded with regard to the second contested decision;

– order the applicant to pay the costs.

Law

The admissibility of the application for annulment of the response to the initial application

14 The Commission contends that the action is partly inadmissible in so far as it is brought against the response to the initial application, on the ground that that response is a preparatory act not capable of affecting the legal position of the applicant.

15 It must be noted that, according to settled case-law, only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in its legal position may be the subject of an action for annulment (see judgment of 26 January 2010, *Internationaler Hilfsfonds* v *Commission*, C-362/08 P, EU:C:2010:40, paragraph 51 and the case-law cited).

16 It is also apparent from settled case-law concerning the admissibility of actions for annulment that the substance of the contested acts must be examined and the intention of those who drafted them as well, in order to classify those acts. In that regard, it is in principle those measures that definitively determine the position of the Commission upon the conclusion of an administrative procedure, and are intended to have legal effects capable of affecting the interests of the applicant, that are open to challenge, and not intermediate measures the purpose of which is to prepare for the definitive decision, or measures that are mere confirmation of an earlier measure not challenged within the prescribed period (see judgment of 26 January 2010, *Internationaler Hilfsfonds* v *Commission*, C-362/08 P, EU:C:2010:40, paragraph 52 and the case-law cited).

17 With regard to Regulation No 1049/2001, it should be pointed out that Articles 7 and 8 of that regulation, by providing for a two-stage procedure, seek to achieve, first, the swift and straightforward processing of applications for access to documents of the institutions concerned and, second, as a priority, an amicable settlement of disputes that may arise. For cases in which such a dispute cannot be resolved by the parties, Article 8(1) provides two remedies, namely, the institution of court proceedings or the lodging of a complaint with the Ombudsman (judgment of 26 January 2010, *Internationaler Hilfsfonds* v *Commission*, C-362/08 P, EU:C:2010:40, paragraph 53).

18 The procedure laid down in Articles 7 and 8 of Regulation No 1049/2001, in that it provides for the making of a confirmatory application, enables in particular the institution concerned to re-examine its position before taking a definitive refusal decision which could be the subject of an action before the Courts of the European Union. Such a procedure makes it possible for initial applications to be dealt with more promptly and, consequently, more often than not to meet the applicant's expectations, while also enabling the institution to adopt a detailed position before definitively refusing access to the documents sought by the applicant, in particular where the applicant repeats the request for disclosure of those documents, notwithstanding a reasoned refusal by that institution (judgment of 26 January 2010, *Internationaler Hilfsfonds* v *Commission*, C-362/08 P, EU:C:2010:40, paragraph 54).

19 It follows that the response to an initial application within the meaning of Article 7(1) of Regulation No 1049/2001 is only the first position adopted, which, in principle, is not actionable, since it does not produce legal effects, failing exceptional circumstances (see, to that effect, judgments of 2 October 2014, *Strack* v *Commission*, C-127/13 P, EU:C:2014:2250, paragraph 36, and of 19 January 2010, *Co-Frutta* v *Commission*, T-355/04 and T-446/04, EU:T:2010:15, paragraph 36).

20 The situation is different, in particular, where the response to the initial application is vitiated by a formal defect in that it failed to inform the applicant of its right to make a confirmatory application (see, to that effect, judgment of 9 September 2009, *Brink's Security Luxembourg* v *Commission*, T-437/05, EU:T:2009:318, paragraphs 74 and 75), or where an institution adopts a definitive position

with a response to an initial application (see, to that effect, judgments of 26 January 2010, *Internationaler Hilfsfonds* v *Commission*, C-362/08 P, EU:C:2010:40, paragraphs 58 to 62, and of 2 October 2014, *Strack* v *Commission*, C-127/13 P, EU:C:2014:2250, paragraph 36).

21 In the present case, the applicant has identified no exceptional circumstances justifying the admissibility of the action, in so far as it is brought against the response to the initial application. Moreover, it follows from the examination of that response that the latter did not contain the Commission's definitive position, since the applicant was informed of its right to make a confirmatory application asking the Commission to reconsider its position, something which the applicant indeed did.

22 In the light of the foregoing, the action must be dismissed as inadmissible in so far as it is brought against the response to the initial application.

The application for annulment of the second contested decision

23 In support of its action, the applicant raises, in essence, two pleas in law, the first, put forward as the principal plea, alleging that the exceptions laid down in the first and third indents of Article 4(2) of Regulation No 1049/2001 were misapplied and the second, put forward in the alternative, alleging infringement of Article 4(2) of that regulation, in that there was an overriding public interest justifying disclosure of the documents at issue.

The first plea, alleging misapplication of the exceptions laid down in the first and third indents of Article 4(2) of Regulation No 1049/2001

24 By its first plea, the applicant claims that the Commission erred in the application of the first and third indents of Article 4(2) of Regulation No 1049/2001 by interpreting the exceptions laid down in those provisions broadly and erroneously.

25 In the first place, the lawfulness of the second contested decision must be examined, in so far as it relies on the general presumption based on the exception relating to the protection of commercial interests of third parties laid down in the first indent of Article 4(2) of Regulation No 1049/2001.

– The application of the general presumption based on the exception relating to the protection of commercial interests of third parties laid down in the first indent of Article 4(2) of Regulation No 1049/2001

26 The applicant submits that the case-law relied on by the Commission in the second contested decision in support of applying the exception relating to the protection of commercial interests of third parties laid down in the first indent of Article 4(2) of Regulation No 1049/2001 cannot be applied in the present case. It disputes the relevance of the case-law precedents relied on by the Commission which concern cases in the field of merger and cartel law and claims that they are not transposable to its application, which is in the field of State aid. There are differences in the objectives and in the nature of those proceedings. According to the applicant, unlike State aid procedures, which concern the management of public funds and the relationships between the Member States and other entities, merger control proceedings and cartel proceedings concern the relationships between two or more private entities and the documents sent in that regard to the Commission generally contain business secrets which must be protected. By contrast, the State aid procedure is by its nature related to the strong public interest in obtaining as much information as possible in order to control the legitimate functioning of State bodies and the due management of public funds. According to the applicant, the

effect of disclosure on the willingness of undertakings to collaborate is relevant only in the context of cartel proceedings or merger proceedings, where those subject to the proceedings are private entities and no public funds are concerned.

27 In the reply, the applicant claims that it follows from settled case law that the confidential nature of information might be reasonably ruled out on account of the age of the information concerned. Furthermore, it submits that the refusal to grant access cannot be justified, within the meaning of Article 4(7) of Regulation No 1049/2001, on the basis of the content of the documents requested, which is general and outlined by a purchase agreement which is entirely accessible to the public. Consequently, the disclosure of the documents at issue would not compromise the commercial interests of the undertakings concerned.

28 According to the applicant, the Commission was required to carry out an individual examination of the documents in order to show that, in spite of the passage of time, the information contained in the documents at issue still merits protection under the exception relating to the protection of commercial interests.

29 The Commission disputes the applicant's arguments.

30 It must be noted that, while the applicant does not explicitly dispute the principle of the general presumption that documents relating to procedures for reviewing State aid are confidential, it submits, in essence, that such a presumption is not applicable in the present case on the ground that the investigation procedure was definitively closed. It therefore argues that the Commission was required to carry out an individual examination of the documents in order to show that, in spite of the passage of time, the information contained in the documents at issue still merits protection under the exception relating to the protection of commercial interests.

31 As is clear from settled case-law, the recognition that there is a general presumption that the disclosure of documents of a certain nature will, in principle, undermine the protection of one of the interests listed in Article 4 of Regulation No 1049/2001 enables the institution concerned to deal with a global application and to reply thereto accordingly (judgments of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 48, and of 28 March 2017, *Deutsche Telekom* v *Commission*, T-210/15, EU:T:2017:224, paragraph 54).

32 It follows that a general presumption means that the documents covered by it are not subject to an obligation of disclosure of their content, in full or in part (see, to that effect, judgment of 28 June 2012, *Commission* v *Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 133).

33 Consequently, if it should be recognised that the Commission was entitled to refuse, in the present case, to grant the applicant access to the documents at issue on the basis of a general presumption, in spite of the fact that the State aid review procedure at issue had already been closed, it would follow that the Commission was not required to carry out an individual examination of each document to which access had been requested, nor to examine whether, at the very least, partial access to those documents could be granted (see, to that effect, judgment of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 68).

34 It must therefore be assessed whether the Commission was entitled to apply, in the present case, a general presumption based on the exception relating to the protection of commercial interests of third parties laid down in the first indent of Article 4(2) of Regulation No 1049/2001.

35 In that regard, it must be recalled that Regulation No 1049/2001 is intended to give the fullest possible effect to the right of public access to documents of the institutions. It is also apparent from that regulation, in particular from Article 4 thereof, which lays down a set of exceptions in that regard, that the right of access is nevertheless subject to certain limits based on reasons of public or private

interest (judgments of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 51, and of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraph 61).

36 It is true that, according to well-established case-law of the Court of Justice, in order to justify refusal of access to a document the disclosure of which has been requested, it is not sufficient, in principle, for that document to be covered by an activity mentioned in Article 4(2) of Regulation No 1049/2001. The institution concerned must also supply explanations as to how access to that document could specifically and effectively undermine the interest protected by an exception laid down in that article (judgment of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 49; see also judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraph 64 and the case-law cited).

37 However, the Court of Justice has acknowledged that it is open to the EU institution concerned to base itself 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 (judgment of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 54; see also judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraph 65 and the case-law cited).

38 Thus, the Court of Justice has previously acknowledged the existence of such general presumptions in respect of, inter alia, documents in the administrative file relating to a procedure for reviewing State aid (see, to that effect, judgments of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 61, and of 14 July 2016, *Sea Handling* v *Commission*, C-271/15 P, not published, EU:C:2016:557, paragraph 36), documents exchanged between the Commission and the notifying parties or third parties during merger control proceedings (see, to that effect, judgments of 28 June 2012, *Commission* v *Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 123, and of 28 June 2012, *Commission* v *Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 64), or documents in a file relating to proceedings 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 93). The General Court has also recognised the existence of a general presumption in respect of, inter alia, documents in the administrative file for a procedure relating to an abuse of a dominant position (judgment of 28 March 2017, *Deutsche Telekom* v *Commission*, T-210/15, EU:T:2017:224, paragraph 45).

39 As regards the general presumption that documents from the administrative file relating to a procedure for reviewing State aid are confidential, it has been held that, in principle, the disclosure of the documents from such a file adversely affects the protection of the purpose of investigations (judgments of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 61, and of 14 July 2016, *Sea Handling* v *Commission*, C-271/15 P, not published, EU:C:2016:557, paragraph 37).

40 For the purposes of interpreting the third indent of Article 4(2) of Regulation No 1049/2001, the Courts of the European Union have taken account of the fact that interested parties other than the Member State concerned in the procedures for reviewing State aid do not have the right to consult the documents in the Commission's administrative file. If those interested parties were able to obtain access, on the basis of Regulation No 1049/2001, to the documents in the Commission's administrative file, the system for the review of State aid would be called into question (judgments of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 58, and of 25 March 2015, *Sea Handling* v *Commission*, T-456/13, not published, EU:T:2015:185, paragraph 61).

41 The right to consult the administrative file in the context of review proceedings opened in accordance with Article 108(2) TFEU and the right of access to documents pursuant to Regulation No 1049/2001 are legally distinct, but the fact remains that they lead to a comparable situation from a functional

point of view. Whatever the legal basis on which it is granted, access to the file enables the interested parties to obtain all the observations and documents submitted to the Commission (judgments of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 59, and of 25 March 2015, *Sea Handling* v *Commission*, T-456/13, not published, EU:T:2015:185, paragraph 62; see also, to that effect and by analogy, judgment of 28 June 2012, *Commission* v *Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 61).

42 These considerations are also equally valid for the purposes of interpreting the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001, owing to the fact that the legislation governing State aid review procedures lays down strict rules as regards the treatment of commercially sensitive information obtained or findings made in those proceedings. As the Commission correctly contends, Article 30 of Regulation 2015/1589 requires that the information which is gathered through the application of that regulation and is covered by professional secrecy is not disclosed (see, to that effect and by analogy, judgment of 28 June 2012, *Commission* v *Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 60).

43 That provision supplements, in the field of the application of Regulation 2015/1589, the rule of conduct set out in Article 339 TFEU, which provides that the institutions of the European Union are required not to disclose information of the kind covered by professional secrecy, in particular information about undertakings, their business relations or their cost components (see, to that effect, judgments of 8 November 2011, *Idromacchine and Others* v *Commission*, T-88/09, EU:T:2011:641, paragraph 43, and of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-511/09, EU:T:2015:284, paragraph 70).

44 In those circumstances, generalised access, on the basis of Regulation No 1049/2001, to the documents relating to the administrative file concerning the State aid review procedure would be such as to jeopardise the balance which the EU legislature wished to ensure, in Regulation 2015/1589, between the obligation on the Member State concerned and, as the case may be, the willingness of third parties to communicate possibly sensitive commercial information to the Commission in order that it may assess the compatibility of State aid with the internal market, on the one hand, and the guarantee of increased protection, by virtue of the requirement of professional and business secrecy, for the information so provided to the Commission, on the other hand (see, to that effect and by analogy, judgment of 28 June 2012, *Commission* v *Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 62).

45 If persons other than the Member State concerned by the State aid review procedure, which is the only party entitled by the rules on State aid to have access to the file of that procedure, were able to obtain access to the documents relating to such a procedure on the basis of Regulation No 1049/2001, the system introduced by those rules would be undermined (see, to that effect and by analogy, judgment of 28 June 2012, *Commission* v *Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 63).

46 Consequently, for the purposes of interpreting the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001, the existence of the general presumption, according to which the disclosure of the documents in the administrative file relating to the review of State aid would, in principle, undermine the commercial interests of the undertakings concerned by that procedure, must be recognised.

47 In the present case, it is common ground that the documents at issue, mentioned in paragraph 1 of the second contested decision, were produced in the course of the procedure for reviewing State aid C 27/2004 which led to the adoption of Decision 2008/214 and therefore form part of the administrative file relating to that procedure. Furthermore, as regards a framework agreement and the amendments thereto, these must be regarded as being included in the same category of documents. Those documents are therefore covered by the general presumption of confidentiality.

48 As the Commission correctly noted in the second contested decision, and contrary to what the applicant claims, that conclusion applies irrespective of whether the application for access concerns a procedure that has already been closed or a pending procedure. Having regard to the interests protected in the context of a procedure for reviewing State aid, the publication of sensitive information concerning the economic activities of the undertakings involved in that procedure, inter alia the beneficiary of the aid, is likely to harm their commercial interests, regardless of the fact that the procedure under Article 108 TFEU has already been closed (see, by analogy, judgments of 28 June 2012, *Commission* v *Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 124; of 28 June 2012, *Commission* v *Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 66, and of 13 September 2013, *Netherlands* v *Commission*, T-380/08, EU:T:2013:480, paragraph 43).

49 It must, in addition, be pointed out that, under Article 4(7) of Regulation No 1049/2001, the exceptions relating to commercial interests or to sensitive documents may apply for a period of 30 years and may, if necessary, continue to apply after that period (judgments of 28 June 2012, *Commission* v *Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 125; of 28 June 2012, *Commission* v *Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 67, and of 13 September 2013, *Netherlands* v *Commission*, T-380/08, EU:T:2013:480, paragraph 44).

50 In that regard, it is necessary to reject the applicant's claim that the case-law on access to documents from a file relating to a merger control procedure and to proceedings under Article 101 TFEU is irrelevant in the present case concerning access to documents from the file in the procedure for reviewing State aid. It has previously been held that, from the perspective of access to the administrative file, procedures for reviewing State aid and merger control procedures are comparable and that it is appropriate to recognise the existence of a general presumption that the documents relating to those procedures are confidential in each of them (judgments of 28 June 2012, *Commission* v *Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraphs 117 to 123, and of 14 July 2016, *Sea Handling* v *Commission*, C-271/15 P, not published, EU:C:2016:557, paragraphs 45 and 62). The Court of Justice has also drawn, in that regard, an analogy between procedures for reviewing State aid and those conducted under Article 101 TFEU (judgment of 14 July 2016, *Sea Handling* v *Commission*, C-271/15 P, not published, EU:C:2016:557, paragraph 46).

51 While it is true that there are differences in the nature and conduct of merger control or cartel procedures and those of State aid procedures, the fact remains, contrary to what the applicant claims, that the commercial interests of undertakings which are protected in those procedures are similar in nature.

52 Having regard to the objective of a procedure under Article 108 TFEU, which is to ascertain whether or not State aid is compatible with the internal market, the Commission, as it correctly points out, is likely to gather from the Member State or private parties such as complainants or other third parties like competitors or clients of the beneficiary information on the economic activities of the undertakings concerned which is commercially sensitive and the disclosure of which could undermine their commercial interests.

53 According to the case-law, the information covered by professional secrecy may be both confidential information and business secrets (see judgment of 8 November 2011, *Idromacchine and Others* v *Commission*, T-88/09, EU:T:2011:641, paragraph 45 and the case-law cited). As is apparent from recitals 10 and 11 of Commission Communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions (OJ 2003 C 297, p. 6), business secrets in files relating to a State aid review procedure, which relate, in the first place, to the beneficiary of the aid but also to a third party, may concern, inter alia, methods of assessing manufacturing and distribution costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost price structure, sales policy, and information on the internal organisation of the undertaking.

54 That information, which is not in the public domain, could be used profitably by other undertakings if it were to be disclosed since it gives the undertaking which possesses it an economic, strategical or organisational and structural advantage. Such disclosure is therefore liable to undermine the commercial interests of the beneficiary of the aid or a third party involved in the State aid review procedure. As that information has been gathered through the application of Regulation 2015/1589, it is therefore covered by professional secrecy (see, to that effect and by analogy, judgments of 30 May 2006, *Bank Austria Creditanstalt* v *Commission*, T-198/03, EU:T:2006:136, paragraph 71, and of 12 October 2007, *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission*, T-474/04, EU:T:2007:306, paragraph 65).

55 It follows that the Commission was fully entitled to refuse, in the present case, access to the documents requested by the applicant by applying a general presumption based on the exception relating to the protection of the commercial interests of the undertakings concerned, within the meaning of the first indent of Article 4(2) of Regulation No 1049/2001, irrespective of the fact that the State aid review procedure at issue had already been closed.

56 Consequently, in accordance with the case-law recalled in paragraphs 31 to 33 above, and contrary to what the applicant claims, the Commission was not required to carry out an individual examination of each document to which access had been requested, in order to verify whether, in spite of the passage of time, the information contained in the documents at issue still merits protection under the exception relating to the protection of commercial interests. Such a requirement would deprive the general presumption of its proper effect, which is to permit the Commission to reply to a global request for access in a manner equally global (judgment of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 68).

57 That conclusion cannot be called into question by the arguments which the applicant seeks to draw from the case-law of the Court of Justice. First of all, it must be noted that the applicant appears to rely on the case-law solely to challenge the application, beyond the duration of the State aid review procedure, of the general presumption based on the exception relating to the protection of the purpose of investigations, but not the exception relating to the protection of commercial interests of third parties.

58 Next, in any event, it should be stated that, in the cases which gave rise to the judgments of 21 July 2011, *Sweden* v *MyTravel and Commission* (C-506/08 P, EU:C:2011:496), and 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), on which the applicant relies, the Court of Justice interpreted the effect of the closure of the procedure at issue on the application, respectively, of the exception to protect the decision-making process laid down in Article 4(3) of Regulation No 1049/2001 and the exception relating to the protection of court proceedings and legal advice referred to in the second indent of Article 4(2) of that regulation, but not the exception designed to protect commercial interests of third parties laid down in the first indent of Article 4(2) of that regulation. The applicant has not presented any arguments to demonstrate in what way that case-law would be applicable in respect of the latter exception.

59 The applicant's arguments in that regard must therefore be rejected.

60 However, the general presumption of confidentiality does not exclude the right of those interested parties to demonstrate that a given document disclosure of which has been requested is not covered by that presumption, inter alia, due to the passage of time (see, to that effect, judgment of 13 September 2013, *Netherlands* v *Commission*, T-380/08, EU:T:2013:480, paragraph 27), or that there is an overriding public interest justifying disclosure of the document concerned by virtue of Article 4(2) of Regulation No 1049/2001 (judgments of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 62, and of 14 July 2016, *Sea Handling* v *Commission*, C-271/15 P, not published, EU:C:2016:557, paragraph 39).

61 It is for the person requesting the disclosure of a document to adduce evidence capable of establishing either that the general presumption that documents relating to procedures for reviewing State aid are confidential does not cover that document or that there is an overriding public interest justifying such disclosure (see, to that effect, judgment of 14 July 2016, *Sea Handling* v *Commission*, C-271/15 P, not published, EU:C:2016:557, paragraph 40).

62 In the present case, it must be noted that, in its confirmatory application, the applicant confined itself to claiming that there was an overriding public interest capable of justifying, in the present case, the disclosure of the documents at issue. By contrast, it did not adduce any evidence to demonstrate that the documents at issue were not covered by the general presumption based on the exception relating to the protection of commercial interests, which had already been relied on by the Commission in its response to the initial application. The applicant did not, inter alia, submit, as it did in the reply presented in the course of the present proceedings, that the information contained therein was no longer confidential on account of its age or the fact that it had been made public. In the absence of objections in the confirmatory application specifically concerning the fact that the documents at issue are not covered by the general presumption, it must be considered that, contrary to what is claimed by the applicant, the Commission was not bound to carry out a concrete, individual examination of them in the second contested decision and could apply to them the general presumption that their disclosure would undermine the commercial interests of the undertakings involved (see, to that effect, judgment of 10 December 2010, *Ryanair* v *Commission*, T-494/08 to T-500/08 and T-509/08, EU:T:2010:511, paragraph 80).

63 Likewise, in the context of the present action, the applicant did not put forward, at the application stage, any argument to demonstrate that such a general presumption did not cover in particular the documents at issue. It is only at the stage of the reply that the applicant claimed that the documents at issue did not contain commercially sensitive information on account of their age and the fact that the purchase agreement setting out the terms of the Framework Agreement had been made public. Those claims, put forward for the first time at the stage of the reply, may not therefore be regarded as constituting the amplification of a plea put forward in the application and must, in any event, be rejected as inadmissible (see, to that effect, judgment of 27 April 2017, *Germanwings* v *Commission*, T-375/15, not published, EU:T:2017:289, paragraph 128).

64 The applicant's arguments seeking to demonstrate that there is an overriding public interest justifying, in the present case, disclosure of the documents at issue pursuant to Article 4(2) of Regulation No 1049/2001, within the meaning of the case-law recalled in paragraphs 60 and 61, will be examined in the course of the examination of the second plea.

– The application of the general presumption based on the exception relating to the protection of the purpose of inspections, investigations and audits laid down in the third indent of Article 4(2) of Regulation No 1049/2001

65 It is clear from paragraph 55 above that the second contested decision is based on its reasoning concerning the exception relating to the protection of the commercial interests of the undertakings concerned provided for in the first indent of Article 4(2) of Regulation No 1049/2001. It follows that any unlawfulness that might vitiate that decision with regard to the reasoning based on the exception relating to the protection of the purpose of investigations within the meaning of the third indent of Article 4(2) of Regulation 1049/2001 would, in any event, have no effect on its lawfulness. It is therefore unnecessary to ascertain whether, in the present case, the Commission could effectively base the refusal to grant access on the general presumption founded on the latter exception (see, to that effect, judgments of 13 September 2013, *Netherlands* v *Commission*, T-380/08, EU:T:2013:480, paragraph 88, and of 25 March 2015, *Sea Handling* v *Commission*, T-456/13, not published, EU:T:2015:185, paragraph 86).

66 Consequently, the first plea in law cannot succeed and must be rejected.

The second plea, alleging infringement of Article 4(2) of Regulation No 1049/2001

67 In the second plea, the applicant submits, in the alternative, that there is an overriding public interest justifying disclosure of the documents at issue. That interest relates, in its view, to transparency, control of public funds and control of privatisation procedures, and arises from the potential threat to the stability of the banking sector in the Czech Republic.

68 First, it submits, the privatisation of Agrobanka Praha was carried out in a non-transparent way and there are reasonable grounds for suspecting unlawful conduct on the part of the Czech State's bodies in the course of the bank's restructuring and conversion. Furthermore, criminal proceedings are currently taking place concerning the misconduct of certain individuals during that restructuring. According to the applicant, as the State aid granted by the Czech Republic came from the State budget, and thus from Czech citizens, there is an overriding public interest justifying disclosure of the documents at issue.

69 Secondly, the applicant argues that, as the lawfulness of the sale of part of Agrobanka Praha to GE Capital Bank is questionable, the stability of the Czech banking sector is consequently threatened, which could require the payment of substantial public subsidies funded by Czech taxpayers.

70 Finally, the applicant submits that the mere fact that civil proceedings involving it are in progress does not mean that there is a mere private interest in obtaining access to the documents at issue which is capable of ruling out the existence of an overriding public interest.

71 The Commission contends that the second plea should be rejected as unfounded.

72 In that regard, it must be noted, as recalled in paragraph 60 above, that the general presumption that documents from the file relating to a procedure for reviewing State aid are confidential does not rule out the possibility of demonstrating that a specific document disclosure of which has been requested is not covered by that presumption, or that there is an overriding public interest justifying disclosure of the document by virtue of Article 4(2) of Regulation No 1049/2001 (judgments of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 62, and of 14 July 2016, *Sea Handling* v *Commission*, C-271/15 P, not published, EU:C:2016:557, paragraph 39).

73 However, according to the case-law, it is for the person alleging the existence of an overriding public interest to state the specific circumstances which justify the disclosure of the documents concerned (see, to that effect, judgments of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 94 and the case-law cited, and of 14 July 2016, *Sea Handling* v *Commission*, C-271/15 P, not published, EU:C:2016:557, paragraph 40).

74 In the present case, in the second contested decision, the Commission considered that there was no overriding public interest justifying disclosure of the documents pursuant to the last clause of Article 4(2) of Regulation No 1049/2001. According to the Commission, the lawfulness of the State aid at issue could not be assessed in the course of the procedure relating to the access to documents and the private interest that the applicant might have in obtaining access to the documents concerning the capital injection to GE Group could not be taken into account in assessing whether there was an overriding public interest.

75 That assessment by the Commission is not vitiated by any error of assessment.

76 First, as regards the interest in transparency, it must be noted that this constitutes a public interest, to the extent that it is objective and general in nature (see judgment of 12 May 2015, *Technion and Technion Research & Development Foundation* v *Commission*, T-480/11, EU:T:2015:272, paragraph 78 and the case-law cited). However, considerations as general as those put forward by the applicant, namely, an interest in understanding how the privatisation of Agrobanka Praha unfolded so that alleged irregularities of the same type do not recur in the future, as well as the interest in building the confidence of Czech citizens in their governmental institutions, so that they can satisfy themselves that the actions of the governmental institutions involved were lawful, adequate and appropriate, cannot provide an appropriate basis for establishing that, in the present case, the interest in transparency was in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question (see, to that effect, judgment of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 92 and 93).

77 In that respect, it must be noted that the European Union Courts have previously had occasion to find that the interest of the public in obtaining access to a document pursuant to the principle of transparency, which seeks to ensure greater participation by citizens in the decision-making process and to guarantee that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system, does not, where the document relates to an administrative procedure, have the same weight as where the document relates to a procedure in which the institution in question acts in its capacity as legislator (see, to that effect, judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 60, and of 20 March 2014, *Reagens* v *Commission*, T-181/10, not published, EU:T:2014:139, paragraph 140).

78 In the present case, the documents at issue manifestly form part of an administrative procedure, namely a procedure for reviewing State aid.

79 As regards, moreover, the interest relating to control of the management of public funds and control of privatisation procedures, as well as the interest allegedly arising from a potential threat to the stability of the banking sector in the Czech Republic on account of the alleged unlawfulness of the privatisation operations in respect of Agrobanka Praha bank, it must be noted, as the Commission correctly observes, that, in its Decision 2008/214, it considered that the State aid granted, in the course of the privatisation and restructuring of Agrobanka Praha bank, to GE Capital Bank and GE Capital International Holdings Corporation, USA, was compatible with the internal market. The applicant cannot, in the present proceedings, call those assessments into question through allegations relating to the potential unlawfulness of the measures adopted by the Czech State. It is not for the applicant to establish the unlawfulness of the privatisation of Agrobanka Praha, nor for the Court to question it in the course of the present case concerning access to documents (see, to that effect and by analogy, judgment of 7 September 2017, *AlzChem* v *Commission*, T-451/15, not published, under appeal, EU:T:2017:588, paragraph 46).

80 On the contrary, if the national proceedings, inter alia those concerning the misconduct of certain individuals involved in the operations for the privatisation of Agrobanka Praha, are ongoing, which the applicant acknowledges, then it is in those proceedings that the protection of the public interest relating to control of the management of public funds by State bodies could be ensured. Thus, the general interest could be served, in the present case, by those national proceedings seeking to verify the lawfulness of the conduct of those persons in the course of the privatisation at issue (see, to that effect and by analogy, judgment of 25 September 2014, *Spirlea* v *Commission*, T-306/12, EU:T:2014:816, paragraph 98).

81 The access to documents requested by the applicant can therefore come only under its potential private interest in supporting its own convictions, as set out in the confirmatory application and in the application, as to the unlawfulness of the conduct of the Czech State bodies and, as the case may be, in proving them in the course of the judicial proceedings brought by it or in publicly denouncing any errors committed in the course of those proceedings.

82 The purpose of Regulation No 1049/2001, however, is to give the general public a right of access to documents of the institutions and not to lay down rules designed to protect the particular interest which a specific individual may have in gaining access to one of them (judgment of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 43).

83 In addition, if the rules on exceptions provided for in Article 4(2) of Regulation No 1049/2001 are based on the weighing-up of the conflicting interests in a given situation, namely, on the one hand, the interests that would be threatened by disclosure of the documents concerned and, on the other, the interests that would be favoured by such disclosure of those documents, only an overriding public interest can be taken into account. That interest must be objective and general in nature and must not be indistinguishable from individual or private interests, such interests being irrelevant to the weighing-up of interests provided for in Article 4(2) of that regulation (see, by analogy, judgment of 20 March 2014, *Reagens* v *Commission*, T-181/10, not published, EU:T:2014:139, paragraph 142).

84 It follows from the foregoing that the particular interest of an applicant in obtaining access to documents and his individual situation cannot, unless they relate to an overriding public interest, be taken into account by the institution called upon to rule on the question whether the disclosure to the public of those documents would undermine the interests protected by Article 4(2) of Regulation No 1049/2001 (see, to that effect, judgment of 12 May 2015, *Unión de Almacenistas de Hierros de España* v *Commission*, T-623/13, EU:T:2015:268, paragraph 90 and the case-law cited).

85 It follows that the second plea in law must be rejected and, consequently, that the action must be dismissed in its entirety.

Costs

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

hereby:

1. Dismisses the action;

2. Orders Arca Capital Bohemia a.s. to pay the costs.

Prek Buttigieg Berke

Delivered in open court in Luxembourg on 11 December 2018.

E. Coulon
Registrar

M. Prek
President