Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

7 June 2013*

(Access to documents — Regulation (EC) No 1049/2001 — Documents concerning the negotiations between the European Union and the Republic of India for the purposes of concluding a free trade agreement — Refusal of access — Exception relating to the protection of the public interest in the field of international relations — Documents which have entered the public domain — Non-imposition of a restriction on disclosure of documents)

In Case T-93/11,

Stichting Corporate Europe Observatory, established in Amsterdam (Netherlands), represented by S. Crosby, Solicitor, and S. Santoro, lawyer,

applicant,

v

European Commission, represented initially by F. Clotuche-Duvieusart and C. ten Dam, and subsequently by F. Clotuche-Duvieusart and I. Zervas, acting as Agents,

defendant,

supported by

Federal Republic of Germany, represented by T. Henze, J. Möller, K. Petersen and A. Wiedmann, acting as Agents,

intervener,

ACTION for annulment of the decision of the Commission of 6 December 2010 refusing the applicant full access to several documents relating to the negotiations between the European Union and the Republic of India aimed at concluding a free trade agreement, pursuant to the third indent of Article 4(1)(a) 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),

THE GENERAL COURT (Eighth Chamber),

composed of L. Truchot, President, M.E. Martins Ribeiro (Rapporteur) and A. Popescu, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 11 January 2013,

* Language of the case: English.

gives the following

Judgment

Background to the dispute

1 In 2007, negotiations were started between the European Union and the Republic of India with a view to concluding a free trade agreement.

2 In the context of the *travaux préparatoires* for the establishment of that agreement, and pursuant to Council Decision 98/552/EC of 24 September 1998 on the implementation by the Commission of activities relating to the Community market access strategy (OJ 1998 L 265, p. 31), an advisory committee was created to assist the Commission in its task and, more specifically, to assist it in the identification of barriers to market access in the third State concerned and of measures capable of eliminating those barriers. In accordance with Article 3 of Decision 98/552, that committee is composed of representatives of the Member States and chaired by the representative of the Commission.

3 Representatives of trade associations or companies are involved in this process and participate, as experts, in the work of the advisory committee and of working groups established on the basis of sector-specific expertise.

4 The applicant, Stichting Corporate Europe Observatory, is a foundation governed by Netherlands law. According to its Articles of Association, the applicant is non-profit making (Article 4.2 of the Articles of Association) and its objectives are 'to increase general knowledge about the political and economic influence of transnational companies and financial institutions' and to 'formulate alternatives and policy proposals to limit these influences in order to contribute to a more democratic and socially and economically just society' (Article 4.1 of the Articles of Association).

5 On 5 June 2009, acting 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), the applicant submitted to the Commission an application for access to the following documents:

'(1) a list of meetings of … officials [of the Commission's Directorate General for Trade; "DG Trade"] and/or representatives (including the Commissioner and the Cabinet) and representatives of industry federations such as BusinessEurope, the European Services Forum (ESF), the European Banking Federation (EBF), the European Federation of Pharmaceutical Industries and Associations (EFPIA), Eurochambres or AmCham EU [American Chamber of Commerce to the European Union], in which any issues relating to India, including the EU-India trade negotiations, were dealt with (from February 2008 onwards);

(2) a list of meetings of DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and representatives of individual companies such as Alcoa, Arcelor-Mittal, BASF, BP Europe, Exxonmobil, Pfizer, Shell, Unilever, Vedanta Ressources or Veolia, in which any issues relating to India, including the EU-India trade negotiations, were dealt with (from February 2008 onwards);

(3) minutes and other reports of these meetings, including reports that contain assessments of the meetings and follow-up points;

(4) all correspondence (including emails) between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and representatives of the abovementioned and other industry federations and individual companies, in which any issues relating to India, including the EU-India trade negotiations, were dealt with (from February 2008 onwards).'

6 Following an exchange of correspondence with the Commission between 10 June 2009 and 19 February 2010 regarding the progress made in processing the application for access submitted by the applicant on 5 June 2009, the latter - by letter of 26 March 2010 - drew the Commission's attention to its failure to respond to that application and called on it to remedy that situation before 9 April 2010.

7 In the absence of a reply on the Commission's part, the applicant sent it, by letter of 13 April 2010, a confirmatory application as provided for in Article 7(4) of Regulation No 1049/2001.

8 By letter of 29 April 2010, the Commission replied to the initial application, granting full access to over 100 documents and partial access to more than 50 others. Access to some 30 documents was refused on the basis of a number of exceptions provided for under Regulation No 1049/2001.

9 By letter of 21 May 2010, the applicant submitted to the Commission a new confirmatory application regarding 17 documents to which full access had been refused, pointing out that those same documents had been disclosed, in full and without any indication that they were in any way confidential, to a large number of persons, the number of potential recipients itself being very large. The applicant took the view that, in those circumstances, the documents at issue did not contain any confidential information or had, in any event, entered the public domain. The applicant explained that, while it had no objection to access being refused on grounds of the protection of the commercial interests of a natural or legal person, it was contesting non-disclosure the justification for which was based on the protection of relations between the European Union and the Republic of India, or any other related interest.

10 By letters of 21 June and 12 July 2010, the Commission informed the applicant that it was not yet in a position to give a final reply to the confirmatory application of 21 May 2010.

11 On 14 September 2010, the applicant brought an action before the General Court by which it sought annulment of the implied decision refusing the confirmatory application of 21 May 2010.

12 By letter of 6 December 2010, the Commission gave its reply to the confirmatory application of 21 May 2010 ('the contested decision').

13 By order of 12 April 2011 in Case T-395/10 *Stichting Corporate Europe Observatory* v *Commission*, not published in the ECR, the Court ruled that it was not necessary to adjudicate on the action and ordered the Commission to pay the costs of the proceedings.

The contested decision

14 In the light of the wording of the confirmatory application of 21 May 2010, the Commission listed 17 documents in the contested decision, under Heading 1 entitled 'The Scope of Your Request':

— document 1 is a letter dated 18 March 2008 from the Member of the Commission responsible for Trade to the Secretary-General of BusinessEurope;

— documents 2 to 8 are the minutes of the meetings of the working groups on market access;

— documents 9 to 13 are the minutes of the meetings of the Market Access Advisory Committee;

— document 14 is an attachment to an email sent by DG Trade to the European Tyre and Rubber Manufacturers' Association (ETRMA), dated 23 July 2008;

— documents 15 to 17 are other emails from DG Trade to ETRMA, sent on 24 July 2008, 23 March 2009 and 7 July 2009.

15 In the contested decision, under Heading 3 entitled 'Protection of the Public Interest as regards International Relations', the Commission granted further partial access to documents 11 and 12. By contrast, it confirmed its refusal to grant access to the passages in documents 1 to 13 and 15 to 17 that had been deleted, and also to document 14 in its entirety, on the basis of the third indent of Article 4(1)(a) of Regulation No 1049/2001, which provides for an exception to the right of access in order to safeguard the protection of international relations.

16 In response to the applicant's claim that the documents at issue had already entered the public domain, the Commission stated that document 1 is a 'letter [which] has been sent to a particular addressee in a specific context, which is clearly not the same as publication of a document'.

17 In the case of documents 2 to 13, the Commission explained that the standard rules applicable to the Market Access Advisory Committee provide for the possibility of forming working groups and of inviting experts. The Commission added the following:

'It is in this capacity as experts with a specific knowledge of particular fields that representatives from various associations have taken part in discussions in market access working groups as well as in the [Market Access Advisory Committee] itself. The abovementioned standard rules stipulate that the committee's discussions shall be kept confidential. By signing the participants list, the persons concerned clearly undertake to respect this condition.

The advisory committee and its working groups are specifically created to advise and accompany the work of the Commission in a particular domain. It is crucial that this committee and the working groups have the right composition in terms of expertise in order to provide real added value to the EU's position and fulfil the role assigned to it by the Council. Sharing of information in this particular context is the key ingredient for those groups to be able to carry out their work. Disclosure of information in the committee, to a selected group of persons and limited to the issues on which their expertise is sought, cannot be equated with disclosure to the public at large.'

18 As regards documents 14 to 17, the Commission stated as follows:

'It has to be borne in mind that in the context of trade negotiations, the Commission services may need to engage [in] an information exchange and a dialogue with stakeholders in order to obtain [an] up-to-date and comprehensive understanding of the situation and, thus, to be able to better pursue the Union's interest. This exchange is limited to the specific issues on which the expertise and opinions of the organisations concerned are sought. These issues are also of particular concern to these specific stakeholders. Consequently, it has to be concluded that such exchanges do not take place in the context of Regulation [No] 1049/2001, since … this regulation does not allow the institutions to take the particular interest of an applicant into account. Therefore, it cannot be excluded that information exchanged in this specific context may be covered by certain exceptions under [that] Regulation ...'

Procedure and forms of order sought

19 By application lodged at the Registry of the General Court on 15 February 2011, the applicant brought the present action.

20 By document lodged at the Registry of the General Court on 9 May 2011, the Federal Republic of Germany applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission.

21 By order of 24 June 2011, the President of the Eighth Chamber of the General Court granted the Federal Republic of Germany leave to intervene and ordered that it be sent a copy of all of the procedural documents.

22 The intervener lodged its statement in intervention within the period prescribed.

23 After hearing the Report of the Judge-Rapporteur, the Court decided to open the oral procedure.

24 At the hearing held on 11 January 2013, the parties presented oral argument and replied to the questions put to them by the Court.

25 The applicant claims that the Court should:

— declare that the contested decision infringes Regulation No 1049/2001 and, in particular, the third indent of Article 4(1)(a) of that regulation, and, accordingly, annul the contested decision;

— order the Commission to pay the costs.

26 The Commission, supported by the intervener, contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

The plea in law alleging misapplication of the third indent of Article 4(1)(a) of Regulation No 1049/2001

27 The applicant claims that the exception relating to the protection of the public interest as regards international relations is inapplicable in the present case, 'not because the Commission's assessment of [that exception's] relevance in relation to the documents [at issue] is necessarily wrong', but because those documents have entered the public domain as a result of the Commission's actions and omissions.

28 The applicant submits, in this regard, that the documents at issue were sent, in full and without indication that they were in any way of a confidential nature, to trade associations with very large memberships and, therefore, to a very large, possibly indeterminate, number of persons, which effectively amounted to publishing or releasing those documents into the public domain. It also puts forward the fact that, at the foot of the letter of 18 March 2008 from the Member of the Commission responsible for Trade to the Secretary-General of BusinessEurope, there is a handwritten note by the author inviting the addressee to discuss that letter with the Confederation of Indian Industry (CII), which has 8 100 members. According to the applicant, the Commission's position is valid only if the question of whether or not the documents at issue are in the public domain is decided on the basis of their direct addressees, but is no longer valid if account is taken of the number of persons entitled to see the documents after the first recipient.

29 As it confirmed at the hearing in answer to a question put by the Court, the applicant does not dispute the assessment carried out by the Commission in the light of the subject-matter and specific content of the documents sought; rather, it submits that their further disclosure, in accordance with Regulation No 1049/2001 on which its application is founded, can no longer undermine the protection of international relations since the documents and the information contained within them have already been made public by the Commission.

30 It is, therefore, necessary to determine whether (i) the minutes of the meetings of the advisory committee and of the working groups on market access, sent to all those who participated in those meetings and, in particular, to trade associations with large memberships, (ii) the emails sent to ETRMA and (iii) the letter of 18 March 2008 from the Member of the Commission responsible for Trade to the Secretary-General of BusinessEurope may be regarded, in the light of the circumstances of their dissemination, as documents that are in the public domain.

31 In the first place, as regards the recipients of the documents at issue, it should be noted, first, that the dissemination of the documents by the Commission took place within the framework of a consultation process made mandatory by Article 3 of Decision 98/552.

32 Even though the Commission eventually made it clear, at the hearing, that the advisory committee, notwithstanding the reference made to them in the contested decision, did not, at the material time, have rules of procedure modelled on the standard rules of procedure referred to in Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23), the establishment of working groups to examine specific issues, the admission of third parties as experts and the taking of minutes or drafting of reports of the meetings of the advisory committee and the working groups on market access indicate actual working practices that correspond to those envisaged by the standard rules of procedure set out in Decision 1999/468.

33 In order to enable the advisory committee to give its opinion in accordance with a procedure requiring its involvement, it was necessary for the Commission to prepare and send documents to the members of that committee as well as to the trade associations and companies that were acting as experts; this permitted the inference that the documents were internal documents within the terms of Article 4(3) of Regulation No 1049/2001 (see, to that effect, Case T-403/05 *MyTravel* v *Commission* [2008] ECR II-2027, paragraph 111, upheld by the Court of Justice in its judgment in Case C-506/08 P *Sweden* v *Commission and MyTravel* [2011] ECR I-6237, paragraph 93). The applicant itself acknowledges, in the confirmatory application, that the Commission's statement that the minutes of the meetings of the advisory committee and of the working groups on market access were distributed to the various participants is 'utterly believable, because otherwise the work of the groups in question would be unmanageable'.

34 As the Commission and the intervener correctly point out, the documents at issue were, therefore, provided to a specific group of persons and for specific reasons as well.

35 The recipients of the documents requested by the applicant are Member States, trade associations and companies participating, as experts in the case of the latter two categories, in the work of the advisory committee and its working groups on access to the markets of a third State, and within the framework of meetings that were not open to the public.

36 Participation in this process of assistance to the Commission constitutes a predetermined differentiating criterion, the satisfaction of which determines a person's status as a recipient of the documents at issue.

37 The documents in question were provided, not by way of general information, but within the framework of a limited technical exchange and with the sole purpose of enabling all of the participants to fulfil their roles as advisers to the Commission, through the work of the advisory committee and of the working groups, on issues of obvious special interest to all of the private sector entities involved in that process of consultation, reflection and information exchange.

38 The circumstance upon which the applicant relies in support of its action, to the effect that the documents sought were sent to their recipients without deletion of any passages whatsoever, merely serves to emphasise the special nature of the position of the trade associations and companies involved, as described above.

39 In those circumstances, the Commission's dissemination of the documents at issue cannot be regarded as having been intended to, and liable to, make those documents known to the public, that is to say, to an indeterminate group of persons, considered in general and in the abstract.

40 Nor can the group of putative recipients of the documents requested, namely the members of the trade associations participating in the work of the advisory committee and of the working groups on market access, be treated as synonymous with the 'public'. Those members also represent a specific group of persons defined according to a predetermined criterion, in this case membership of a trade association whose expertise is required in connection with the provision of assistance to the Commission for the purpose of deciding upon a strategy for access to the markets of a third State.

41 Secondly, the analysis of the circumstances in which the documents at issue were distributed, carried out in the light of certain provisions of Regulation No 1049/2001 concerning the 'active' information with which the institutions in question are charged, contradicts the applicant's claims.

42 Thus, Article 12(1) of Regulation No 1049/2001 provides that the institutions are, as far as possible, to make documents 'directly' accessible to the public, in electronic form or through a register. Paragraph 2 of that article states that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9 of Regulation No 1049/2001, be 'made directly accessible'.

43 Article 10 of Regulation No 1049/2001 provides that an applicant is to have access to documents either by consulting them on the spot or by receiving a copy, including, where available, an electronic copy, according to the applicant's preference, but that, if a document has already been released by the institution concerned and is 'easily accessible' to the applicant, the institution may fulfil its obligation to grant access to documents by informing the applicant how to obtain the requested document.

44 The wording on making documents 'directly' accessible or concerning their 'easily accessible' nature, which is characteristic of situations in which the right of access by the 'public' is undertaken actively by the institutions, clearly does not cover the selective approach adopted by the Commission in the present case in relation to the communication of the documents.

45 Thirdly, the applicant has not produced any specific evidence which makes it possible to infer conclusively that any of the documents covered by the confirmatory access application of 21 May 2010 in fact ended up in the possession of, or were made directly accessible to, legal or natural persons other than their initial recipients.

46 While it is true that trade associations are, generally, tasked with keeping their members informed about, and consulting their members on, issues of interest to the sector or the interests represented, that characteristic, common to those organisations' objectives under their statutes and highlighted by the applicant, does not mean that those organisations forward, systematically and in full, all of the documents that are provided to them in connection with their representation and defence of their members' interests before an international organisation.

47 As regards the handwritten note at the foot of the letter of 18 March 2008 from the Member of the Commission responsible for Trade to the Secretary-General of BusinessEurope, it is worded as follows: 'You might make some comments to your counterparts in the CII in view of the above.' It cannot be inferred from such a note that the content of the letter of 18 March 2008 did indeed come to the knowledge of the CII and its members.

48 In those circumstances, it has not been established that all or part of the documents sought were disclosed (i) to the members of the trade associations participating in the process of assistance to the Commission for the purposes of deciding on a strategy for access to the markets of a third State or (ii) to third parties.

49 In the second place, the applicant claims, in essence, that, since the Commission did not indicate that the documents at issue, or certain passages in them, were of a confidential nature, which it ought to have done to prevent their disclosure to third parties, the Commission, by implication, relinquished all control over the documents at the time when it sent them to their first recipients, and thereby brought them into the public domain.

50 It should be pointed out, first of all, that the copy of an email sent by DG Trade to ETRMA, dated 7 July 2009, contains an express confidentiality warning. The applicant's claim as regards that document has, therefore, no factual basis.

51 Next, it should be recalled that, under Article 9(1) of Regulation No 1049/2001, 'sensitive documents' are documents originating from the institutions, or the agencies established by them, from Member States, third countries or international organisations, classified as 'TRÈS SECRET/TOP SECRET', 'SECRET' or 'CONFIDENTIEL' in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a) of Regulation No 1049/2001, notably public security, defence and military matters.

52 Although classification as a 'sensitive document' makes that document subject to special treatment, it cannot, on its own, justify the application of the grounds for refusal provided for in Article 4(1) of Regulation No 1049/2001 (Joined Cases T-110/03, T-150/03 and T-405/03 *Sison* v *Council* [2005] ECR II-1429, paragraph 73). Where such a document is the subject of a request for access, the harm caused by its disclosure is assessed just as it is for any other document, that is, as a rule, starting from a specific examination of its content.

53 By the same token, the fact that none of the designations referred to in Article 9(1) of Regulation No 1049/2001 appears on the documents requested, as in the present case, is not sufficient to preclude application of the exceptions provided for in Article 4 of that regulation, as otherwise that provision would be rendered redundant and the interests protected by it adversely affected.

54 The same conclusion must be reached with regard to the absence of the designation 'EU Restricted' on the documents, a classification defined in Section 16.1 of the annex entitled 'Rules on security' to the Rules of Procedure of the Commission (OJ 2000 L 308, p. 26), as amended, inter alia, by Commission Decision 2001/844/EC, ECSC, Euratom of 29 November 2001 amending its internal Rules of Procedure (OJ 2001 L 317, p. 1), invoked by the applicant at the hearing.

55 The presence or absence of one of the designations referred to in Article 9(1) of Regulation No 1049/2001 or of the 'EU Restricted' classification on a document does not, therefore, constitute a conclusive factor in the assessment of whether or not the document must be protected.

56 Lastly, it should be noted that the applicant cannot legitimately attach to a lack of action on the Commission's part legal effects such as to create a right in the applicant's favour.

57 As a general rule, no legal consequences may arise from an institution's lack of action except where those consequences are expressly provided for by European Union law (see, as regards the issue of whether or not a decision has been adopted, Case C-123/03 P *Commission* v *Greencore* [2004] ECR I-11647, paragraph 45).

58 In the context of access to documents, the silence of an institution is taken into account solely under Article 8(3) of Regulation No 1049/2001; that provision, concerning the processing of confirmatory applications, states clearly that '[f]ailure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty'.

59 The applicant's claims regarding the 'risks' taken by the Commission or its 'lack of caution' in the dissemination of the documents and on the damage that might arise from such a situation are irrelevant for the purposes of resolving the present case and relate to a separate issue, that of, in a particular case, the possible non-contractual liability of the European Union, within the meaning of the second paragraph of Article 340 TFEU, on the ground of unlawful conduct by its institutions.

60 Although an implicit waiver of any restrictions on the dissemination of the documents covered by the request for access cannot, therefore, be inferred from the mere fact that the Commission did not mark the documents concerned as being confidential, the situation would be different if there were an express indication to that effect from that institution.

61 In that context, it should be recalled that, at the foot of the letter of 18 March 2008 from the Member of the Commission responsible for Trade to the Secretary-General of BusinessEurope, there is a handwritten note by the author worded as follows: 'You might make some comments to your counterparts in the CII in view of the above.' According to the applicant, it is clear from that note that its author had no objection to the letter being disclosed to the CII, which has 8 100 members.

62 The parties agree that the note in question does not contain permission to forward the letter itself, but envisages only that the Secretary-General of BusinessEurope might make comments in connection with the content of that letter solely to his counterparts in the CII, and not to the members of the CII.

63 Authorisation to communicate of that nature cannot be considered to be an express waiver of all restrictions on the dissemination of the letter or of the information contained within it; only a waiver of that kind could permit the inference that the document had genuinely entered the public domain and was, therefore, from that time on accessible to any individual or undertaking having an interest (see, to that effect, Case C-343/09 *Afton Chemical* [2010] ECR I-7027, paragraph 39).

64 In addition, if it were to be assumed that the sending of the letter to the Secretary-General of BusinessEurope, together with a limited authorisation to communicate its content, might be liable to affect adversely the public interest in the protection of international relations, without it being possible to take the view that the document in question was in the public domain, the Commission should be recognised as having the power to invoke the exception provided for in the third indent of Article 4(1)(a) of Regulation No 1049/2001 in order to prevent exacerbation of the damage caused by the initial dissemination.

65 It follows from the foregoing that, contrary to the applicant's claims, the view cannot be taken that the documents at issue and the information contained within them entered the public domain as a result of the Commission's actions and omissions.

66 The references made by the applicant to the Opinion of Advocate General Kokott in Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-5885, I-5887, to the judgment in Case T-36/04 *API* v *Commission* [2007] ECR II-3201 and to the 'internal rules' of the Commission are,

therefore, entirely irrelevant, as the situation in which various documents were indeed made available to the public, referred to in those three texts, is precisely the element that is absent from the circumstances of the present case.

67 It should be pointed out, moreover, that it was in the light of information relating to public aid contained in the decision to initiate the formal investigation procedure and of that decision's publication in the *Official Journal of the European Union*, in accordance with Article 26(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] EC (OJ 1999 L 83, p. 1), that the Commission was considered to have 'made public' the relevant content of the file relating to that aid (Opinion of Advocate General Kokott in *Commission* v *Technische Glaswerke Ilmenau*, paragraph 66 above, point 134).

68 Such a situation is not in any way comparable to the present case, in which there was no publication whatsoever of the documents requested or of the information contained within them.

69 Nor can a valid comparison be made between the documents requested and the report for the hearing, which the Court has found is made public on the day of the hearing (*API* v *Commission*, paragraph 66 above, paragraph 98), meaning that it is made generally and directly accessible. The report for the hearing is physically made available outside the courtroom to any person interested before the arguments of the parties, which that document is intended to summarise, are set out in a public hearing.

70 As regards the Commission's internal rules, the applicant claims that these provide that if 'information contained in a document has already been transmitted to a large number of people … a refusal to disclose it would not be justified' and that, in refusing access to the documents requested, the Commission has therefore infringed its own rules.

71 In addition to the fact that the documents at issue were sent to a restricted and specific group of persons only, established on the basis of a predetermined criterion consisting of participation in a process of assistance to the Commission (see paragraphs 34 to 36 above), the applicant's argument on this point is not, in any event, capable of substantiating the alleged illegality of the contested decision.

72 It is clear from the case-law that there is nothing to prevent rules on the internal organisation of the work of an institution from having legal effects vis-à-vis third parties (Case C-58/94 *Netherlands* v *Council* [1996] ECR I-2169, paragraph 38 and the case-law cited).

73 The Court of Justice has already held, in a judgment concerning internal measures adopted by the administration, that, although those measures may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of conduct indicating the practice to be followed from which the administration may not depart, in an individual case, without giving the reasons which led it to do so, which must be compatible with the principle of equal treatment. Such measures therefore constitute measures of a general nature and the officials and other staff concerned may invoke their illegality in support of an action against the individual decisions taken on the basis of those measures (Case C-171/00 P *Libéros* v *Commission* [2002] ECR I-451, paragraph 35).

74 That case-law applies *a fortiori* to rules of conduct designed to produce external effects, as is the case of the guidelines on the method of setting fines imposed on undertakings for infringements of the competition rules. In adopting such rules of conduct and announcing, by means of their publication, that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules lest it be found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot, therefore, be ruled out that, under certain conditions and depending on their

content, such rules of conduct, which are of general application, may produce legal effects (see, to that effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraphs 210 and 211).

75 In the present case, the applicant produced at the hearing a document entitled 'Vademecum on access to documents' and marked 'DG Trade'. It is sub-divided into three parts, under the headings 'Overall principles', 'Access in relation to particular types of DG Trade Documents' and 'Practical implications for DG Trade', and contains merely a summary of the various provisions of the rules applicable, the relevant case-law and the practices followed by the directorate concerned when dealing with requests for access.

76 At the hearing, the Commission explained that the document entitled 'Vademecum on access to documents' was a purely internal document which, at the material time, did not even appear on its website. The applicant, which stated that it had obtained the document in question following a request for access based on Regulation No 1049/2001, has neither alleged nor, still less, established that the document in question had been the subject of any form of publication intended for third parties.

77 It appears, in those circumstances, that the DG Trade document entitled 'Vademecum on access to documents' was in no way intended to produce external effects and was to be regarded as a mere internal service memorandum, having effects internal to the administration only, more specifically within the directorate mentioned above, and which did not create any right for the benefit of third parties.

78 It follows from all of the foregoing that the ground for annulment alleging misapplication of the third indent of Article 4(1)(a) of Regulation No 1049/2001 must be rejected.

The plea in law alleging discriminatory treatment of the applicant

79 The applicant claims that there is 'no relevant difference' between it and the industrial sectors consulted by the Commission and that, accordingly, by disclosing material only to the latter, the Commission acted in a discriminatory manner. The applicant argues that this is particularly the case as the Commission is unable to show why the applicant is less reliable or trustworthy than the trade organisations which received the documents.

80 According to settled case-law, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95, and judgment in Case C-250/11 *Lietuvos geležinkeliai* [2012] ECR, paragraph 44).

81 As stated in paragraphs 35 and 37 above, the documents requested by the applicant were provided to trade associations and companies participating as experts in the work of the advisory committee and of its working groups on access to markets of a third State and for the sole purpose of enabling all of the participants to fulfil their roles as advisers to the Commission. It is common ground that the documents in question were not provided on the basis of Regulation No 1049/2001.

82 Suffice it to state that the applicant objectively lacks the abovementioned status, whatever the alleged importance of its role in international negotiations or its reliability as an organisation entered in the Commission's interest group register.

83 That objective difference in the respective situations explains and justifies the difference in treatment in relation to access to the documents at issue; accordingly, no infringement of the principle of equal treatment to the detriment of the applicant can be imputed to the Commission.

84 It follows that the ground for annulment referred to in paragraph 79 above must be rejected.

85 In so far as the applicant also intended to plead the existence of a particular interest in obtaining the documents requested, such an interest cannot be taken into account when the mandatory exceptions provided for by Article 4(1)(a) of Regulation No 1049/2001 are applied (*Sison* v *Council*, paragraph 52 above, paragraph 52, upheld by the Court of Justice in Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 47), as the Commission pointed out in the contested decision.

86 It follows from all of the foregoing that the action must be dismissed.

Costs

87 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. 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.

88 The Federal Republic of Germany shall bear its own costs, in accordance with Article 87(4) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the applicant to bear its own costs and to pay those incurred by the European Commission;**

3. **Orders the Federal Republic of Germany to bear its own costs.**

Truchot Martins Ribeiro Popescu

Delivered in open court in Luxembourg on 7 June 2013.

[Signatures]