Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

22 May 2012 *

(Access to documents — Regulation (EC) No 1049/2001 — Documents relating to contract LIEN 97-2011 — Partial refusal of access — Determination of the subject-matter of the initial application — Exception relating to the protection of privacy and the integrity of the individual — Exception relating to protection of the decision-making process — Principle of sound administration — Concrete and individual examination — Duty to state reasons)

In Case T-300/10,

Internationaler Hilfsfonds eV, established in Rosbach (Germany), represented by H. Kaltenecker, lawyer,

applicant,

v

European Commission, represented by P. Costa de Oliveira and T. Scharf, acting as Agents, assisted by R. van der Hout, lawyer,

defendant,

APPLICATION for annulment of the Commission's decision of 29 April 2010 refusing the applicant full access to the file relating to contract LIEN 97-2011,

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová, President, K. Jürimäe (Rapporteur) and M. van der Woude, Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 20 September 2011,

gives the following

Judgment

Background

1 The applicant, Internationaler Hilfsfonds eV, is a non-governmental organisation under German law active in the area of humanitarian aid. On 28 April 1998, it signed, with the Commission of the European Communities, contract LIEN 97-2011 for the cofinancing of a medical aid programme which it was organising in Kazakhstan.

* Language of the case: German.

2 On 1 October 1999, the Commission unilaterally terminated contract LIEN 97-2011 and, following that termination, informed the applicant on 6 August 2001 of its decision to recover a certain sum paid to the latter in connection with the implementation of that contract.

3 On 9 March 2002, the applicant submitted to the Commission a request under European Parliament and Council Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2002 L 145, p. 43), for access to the documents on file concerning contract LIEN 97-2011.

4 By letter of 8 July 2002, the Commission sent the applicant a list of documents ('the letter of 8 July 2002'). In that letter, referring to Article 4(3) of Regulation No 1049/2001, it partially rejected the applicant's request.

5 Its application having been only partially satisfied, the applicant, by letter of 11 July 2002 addressed to the President of the Commission, requested full access to the documents on file concerning contract LIEN 97-2011. That request having not been fully satisfied, the applicant lodged a complaint with the European Ombudsman, registered under reference 1874/2003/GG ('complaint 1874/2003/GG'), denouncing the Commission's refusal to grant it full access to the documents on file relating to contract LIEN 97-2011.

6 Following a draft recommendation of 15 July 2004 sent by the Ombudsman to the Commission and a detailed opinion sent on 12 and 21 October 2004 by the Commission to the Ombudsman, the latter adopted a final decision on 14 December 2004, holding, by way of a critical commentary, that the fact that the Commission had not given valid reasons capable of justifying its refusal to grant the applicant access to a number of documents on file relating to contract LIEN 97-2011 constituted a case of maladministration.

7 On 22 December 2004, on the strength of the conclusions of the Ombudsman's final decision of 14 December 2004, the applicant sent the President of the Commission a fresh request for full access to the documents on file concerning contract LIEN 97-2011. By letter of 14 February 2005, the Commission replied to that request by deciding not to place at the applicant's disposal any documents beyond those to which access had already been granted.

8 By application lodged at the Registry of the General Court on 11 April 2005, the applicant brought an action for annulment of the Commission's decision of 14 February 2005 which was registered under reference T-141/05. Following an objection of inadmissibility raised by the Commission under Article 114(1) of the Rules of Procedure of the General Court, the latter, by judgment of 5 June 2008 in Case T-141/05 *Internationaler Hilfsfonds* v *Commission* (not published in the ECR), dismissed the applicant's action as inadmissible.

9 Following an appeal lodged by the applicant under Article 56 of the Statute of the Cour of Justice, the Court, by judgment of 26 January 2010 in Case C-362/08 P *Internationaler Hilfsfonds* v *Commission* [2010] ECR I-669, annulled the judgment in Case T-141/05 *Internationaler Hilfsfonds* v *Commission*, cited in paragraph 8 above, dismissed the Commission's objection of inadmissibility before the General Court and referred the case back to the latter for it to rule on the applicant's claims for annulment of the Commission's decision of 14 February 2005 refusing it access to the documents in question. The returned case before the General Court was registered under reference T-141/05 RENV.

10 In June 2009, the Commission brought an action before the tribunal de première instance de Bruxelles for repayment of part of the first payment which it had made under contract LIEN 97-2011. Those national proceedings, the reference of which is 00004913/IJ/LB/29, are currently pending.

11 By letters of 28 and 31 August 2009, the applicant brought, under Article 7(1) of Regulation No 1049/2001, a fresh application for full access to the documents on file relating to contract LIEN 97-2011 ('the initial application').

12 By letter of 9 October 2009, the Commission replied to the initial application ('the initial response') by stating that, having regard to the time which had elapsed since its decision on the applicant's request of 22 December 2004 for full access to the documents on file relating to contract LIEN 97-2011, which had formed the subject-matter of the action in Case T-141/05, it had carried out a fresh examination of each document on the file which had not been communicated and that, at the conclusion of that examination, it had decided to grant the applicant more extensive, but not full, access to the said documents.

13 By letter of 15 October 2009, registered by the Commission on 19 October 2009, the applicant made a confirmatory application, under Article 7(2) of Regulation No 1049/2001, whereby it requested the Commission to reexamine the initial response ('the confirmatory application').

14 On 10 November 2009, the Commission extended the extended the deadline for replying to the confirmatory application.

15 By letter of 1 December 2009, the Commission, initially, indicated that, since the confirmatory application required a detailed examination of several relevant documents and discussions on that subject with other services had not yet been completed, it was unfortunately not in a position to give a definitive reply.

16 By application lodged at the Registry of the General Court on 1 February 2010, the applicant brought an annulment action against the Commission's decisions comprised by, first, the letter of 9 October 2009 and, second, the letter of 1 December 2009, that action being registered under reference T-36/10.

17 By decision of 29 April 2010, the Commission, through the intermediary of its Secretariat-General, replied to the confirmatory application ('the contested decision').

18 First, under heading 2 of the contested decision 'The documents concerned by the confirmatory application', the Commission held that the confirmatory application contained, first, in essence, an application for access to documents such as referred to in the initial application, namely 'documents concern[ing] [contract LIEN 97-2011]' to which the applicant had not had access and, second, an application for access to additional documents concerning 'the exchange of 'internal' mail of AIDCO with other Directorates-General which were not in any way concerned with LIEN' ('the additional documents'). The Commission considers that, since the application for access to the additional documents was introduced, for the first time, at the confirmatory stage, it constitutes a new application. Consequently, it states that the contested decision 'concerns only the documents in files 1, 2, 3 and 4 which concern the termination of [contract LIEN 97-2011] and were not disclosed by the letter of 9 October 2009 sent by way of reply by the AIDCO Directorate-General'.

19 Second, under the same heading of the contested decision, the Commission indicates that, following the confirmatory application, the undisclosed documents, as described in the table annexed to the contested decision, were carefully checked through. It states:

— first, that the said table is divided into three parts containing three categories of documents, namely, first, the documents appearing in files 1 to 3 which compose the file concerning contract LIEN 97-2011, second, those appearing in file 4, part I, and, finally, those appearing in file 4, part II;

— second, that, concerning each of the documents identified in the said table, there is either unlimited access to them (AI) or partial access (AP), or they are not accessible (NA);

— third, that, where it is decided that a document is not accessible without limit, the provisions of Regulation 1049/2001 on which that decision is based are stated;

— fourth, that, concerning documents or certain parts of documents which do not fall within the subject-matter of the initial application ('the subject-matter of the initial application') or the scope of Regulation No 1049/2001 ('the scope of the regulation'), those documents are designated as being outside the scope ('hors champ'; HC).

20 Third, in point 3 of the contested decision, the Commission sets out its conclusions on the subject of the confirmatory application.

21 Firstly, under sub-heading 3.1 'Documents outside the scope', it explains the reasons why certain documents, wholly or in part, do not fall within the subject-matter of the initial application or do not fall within the scope of the regulation, and it identifies those documents.

22 Secondly, under sub-heading 3.2 'Documents to which unlimited access is granted', first, it identifies the documents falling within the category of documents in question. Second, it states that some of those documents contain parts which are blocked out on the ground either that they do not fall within the subject-matter of the initial application, or that they do not fall within the scope of the regulation. Finally, it identifies a number of documents or parts of documents the content of which is identical to that of other documents or parts of documents on file concerning contract LIEN 97-2011.

23 Thirdly, under sub-heading 3.3 'Documents to which partial access is granted', first, the Commission identifies documents falling under that heading. Second, it states that the undisclosed parts of those documents are blocked out on the ground either that they fall under one of the exceptions listed in Article 4 of Regulation No 1049/2001, or that they are outside the scope of the regulation or the subject-matter of the initial application. Finally, it again identifies several documents or parts of documents the content of which is identical to that of other documents or parts of documents on file concerning contract LIEN 97-2011.

24 Fourthly, under sub-heading 3.4 'Documents to which no access can be granted', first, the Commission identifies the documents falling within the category of documents in question. Second, it states that the table annexed to the contested decision, in so far as it concerns the said documents, also contains a reference to the exceptions listed in Article 4 of Regulation No 1049/2001 which were held to concern them. Finally, it identifies several documents or parts of documents the content of which is identical to that of other documents or parts of documents on file concerning contract LIEN 97-2011.

25 Fourth, in point 4 of the contested decision, the Commission sets out the reasons for refusal of full access to the documents on file concerning contract LIEN 97-2011, based on Regulation No 1049/2001, namely, first, in point 4.1 of the contested decision, protection of the decision-making process on the basis of the second subparagraph of Article 4(3) of Regulation No 1049/2001 and, second, in point 4.2 of the contested decision, privacy and the integrity of the individual on the basis of Article 4(1)(b) of Regulation No 1049/2001.

26 Fifth, in point 5 of the contested decision, the Commission examines whether there is a higher public interest in disclosure of the documents to which access has been partly or wholly refused at this stage of the examination of the application for access. First, it holds that disclosure of the documents requested can serve only the particular interest relied on by the applicant and not a higher public interest. Second, it does not consider that the public interest in transparency can, in this case, justify granting access to the documents protected by the exceptions relied on in point 4 of the contested decision for refusing to disclose them.

27 By order of 24 March 2011, the General Court declared the action brought in Case T-36/10 clearly inadmissible in so far as it was directed against the Commission's decision of 9 October 2009, and devoid of purpose in so far as it was directed against the implied rejection decision contained in the Commission's letter of 1 December 2009. By application lodged at the Registry of the Court of Justice on 29 April 2011, the applicant lodged an appeal against the order of the General Court of 24 March 2011, pursuant to Article 56 of the Statute of the Court of Justice, registered under reference C-208/11 P.

28 By order of 21 September 2011, the General Court concluded that, following the applicant's loss of an interest in bringing proceedings, there was no further need to adjudicate in Case T-141/05 RENV. By application lodged at the registry of the Court of Justice on 2 November 2011, the applicant lodged an appeal against the order of the General Court of 21 September 2011, pursuant to Article 56 of the Statute of the Court of Justice, registered under reference C-554/11 P.

Procedure

29 By application lodged at the registry of the General Court on 9 July 2010, the applicant brought the present action.

30 By letter lodged at the registry of the General Court on 29 July 2010, the applicant, on the basis of the provisions of Article 48(2) of the Rules of Procedure, requested the General Court to take account of the grounds for a judgment which it had delivered after the lodging of the application.

31 By order of 14 April 2011, in accordance with Article 65(b) to 66(1) and the third subparagraph of Article 67(3) of the Rules of Procedure, a first measure of inquiry was adopted, requiring the Commission to produce a copy of the confidential version of all the documents classified, in the contested decision, in the three following categories, namely, first, those the content of which is 'outside the scope' (point 3.1 of the contested decision), second, those to which partial access is granted (point 3.3 of the contested decision) and, finally, those to which no access can be granted (point 3.4 of the contested decision), it being stated that those documents would not be communicated to the applicant in the present case.

32 By letter of 10 May 2011, the Commission replied to the measure of inquiry contained in the order of 14 April 2011. However, the General Court took the view that that reply did not satisfy, either formally or substantively, the purpose of the said measure.

33 Therefore, by order of 25 May 2011, in accordance with the third subparagraph of Article 67(3) of the Rules of Procedure, a second measure of inquiry was adopted, again ordering the Commission to produce, in accordance with a scheme of presentation mentioned in point 2 of the operative part of that order, a copy of the confidential version of all the documents classified, in the contested decision, in the three categories referred to in points 3.1, 3.3 and 3.4 of the contested decision, it being stated that those documents would not be communicated to the applicant in the present case ('the second measure of inquiry').

34 On 8 June 2011, the General Court sent the parties, by way of measures of organisation of procedure, requests for information to which the Commission replied by letter of 15 June 2011, and the applicant replied by letter of 21 June 2011.

35 By letter of 9 June 2011, the Commission replied and satisfied the second measure of inquiry contained in the order of 25 May 2011.

36 By letter lodged at the registry of the General Court on 11 July 2011, the applicant, on the basis of Article 48(2) of the Rules of Procedure, sought leave to raise a new plea based on matters of law which had become apparent in the course of the proceedings.

37 Following a measure of organisation of procedure implemented at the hearing, the Commission communicated to the General Court a copy of the initial response, as it appeared in the letter of 9 October 2009.

Forms of order sought

38 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

39 The Commission contends that the Court should:

— dismiss the action as partially inadmissible and as unfounded in its entirety;

— order the applicant to pay the costs.

Admissibility of the content of the letters lodged by the applicant at the registry of the General Court on 29 July 2010 and 11 July 2011

40 In the letters of 29 July 2010 and 11 July 2011, the applicant, in essence, on the basis of the provisions of Article 48(2) of the Rules of Procedure, expressly or impliedly claimed to produce two new pleas. In accordance with the provisions of the third subparagraph of Article 48(2) of the Rules of Procedure, it is necessary to assess the admissibility of those two pleas.

41 First, concerning the content of the letter of 29 July 2010, it should be noted that Article 44(1)(c) of the Rules of Procedure clearly provides that pleas raised at the application stage must be set out in a summary manner. Consequently, in the absence of any specific provision in Article 48(2) of the Rules of Procedure, as to the formal requirements for the presentation of a new plea raised during the proceedings, it must be held that the provisions of Article 44(1)(c) of the Rules of Procedure also apply to a plea of that kind.

42 In the letter of 29 July 2010, the applicant maintains that, in the judgment of 7 July 2010 in Case T-111/07 *Agrofert Holding* v *Commission* (not published in the ECR), the General Court dismissed arguments by the Commission, identical with those put forward in the contested decision, based on exceptions listed in Article 4 of Regulation No 1049/2001. However, it does not at any point specify the points in the judgment in *Agrofert Holding* which it considers to be relevant. On the contrary, it merely invites the General Court to verify whether the findings which were made in that judgment are relevant by analogy in the present case.

43 In those circumstances, without there being any need to rule as to the existence of new factors capable of permitting the submission of a new plea, for the purposes of Article 48(2) of the Rules of Procedure, it must be held that the content of the letter of 29 July 2010 does not comply with the formal requirements for the raising of a plea, as laid down by Article 44(1)(c) of the Rules of Procedure. Therefore, the said content must be declared inadmissible.

44 Second, concerning the content of the letter of 11 July 2011, it should be remembered that, in accordance with consistent case-law, a judgment which merely confirms law which ought to have been known to the applicant when it brought an action cannot be regarded as a new matter allowing a fresh plea to be raised (Case 11/81 *Dürbeck* v *Commission* [1982] ECR 1251, paragraph 17; Case T-2/99 *T. Port* v *Council* [2001] ECR II-2093, paragraph 57; Case T-3/99 *Banatrading* v *Council* [2001] ECR II-2123, paragraph 49).

45 In this case, in the letter of 11 July 2011, the applicant relies on the judgment of the General Court of 7 June 2011 in Case T-471/08 *Toland* v *Parliament* [2011] ECR II-2717, of which it summarises the grounds. In that summary, the applicant first itself recalls the consistent case-law which is cited in the said judgment. Second, it refers to the solutions adopted on the substance in *Toland* v *Parliament*, which it considers transposable to the present case.

46 Therefore, it must be held that, having regard to the case-law cited in paragraph 44 above, the judgment in *Toland* v *Parliament*, cited in paragraph 45 above, inasmuch as it merely confirms law which ought to have been known to the applicant when it brought the action, cannot be regarded as a new matter allowing a fresh plea to be raised. Therefore, the content of the letter of 11 July 2011 must be declared inadmissible.

Substance

47 In support of its action, the applicant raises four pleas, claiming, first, in essence, a manifest error of assessment as to the determination of the subject-matter of its initial application and, consecutively, an infringement of the Commission's obligation to give that application a full examination, second, infringement of the duty to state reasons, third, infringement of the provisions of Article 4(1)(b) of Regulation No 1049/2001 and, fourth, infringement of the provisions of the second subparagraph of Article 4(3) of the same regulation.

48 After making preliminary observations on this case, the Court will examine the first plea, then the third and fourth pleas and, finally, the second plea.

Preliminary observations

49 As is apparent from the first paragraph under heading 1 'Context' of the contested decision, the Commission has indicated that 'the file concerning contract ... LIEN 97-2011 was composed of four parts', which it designated under the term files, namely:

— 'File 1: [containing] documents from the application form up to the surveillance report of the Technical Assistance Unit (TAU);

— File 2: [containing] documents from the second intermediate report up to April 2000 — Patten cabinet;

— File 3: [containing] mainly the correspondence from December 1998 to June 2002;

— File 4: [containing] internal documents, including correspondence between the Commission and the internal offices IBF International Consulting ... and the European Volunteer Centre ...'

50 In addition, 'File 4' of the file concerning contract LIEN 97-2011 is subdivided into two parts, namely, as is apparent from the second paragraph under heading 1 'Context' of the contested decision:

— file 4, part I: it contains documents which have been listed in the letter of 8 July 2002;

— file 4, part II: it contains emails which were mentioned in the detailed opinion sent on 12 and 21 October 2004 by the Commission to the Ombudsman.

51 In addition, in this judgment, the term 'sub-part' is used to designate, in the confidential version of the documents on file concerning contract LIEN 97-2011 placed before the Court in this case in response to the second measure of inquiry, the passages which the Commission designates, particularly in the table annexed to the contested decision, under the term 'part', preceded by a number. Similarly, the term 'boxes' (encadré) is used to designate passages which have been clearly delimited by the Commission, by enclosing them in a box in the said confidential version, and in respect of which the Commission has specified the reasons for refusing to disclose their content (for example, having regard to the exceptions in Article 4(1)(b) and the second subparagraph of Article 4(3) of Regulation No 1049/2001).

52 The Court also points out that, in relation to certain documents on file concerning the contract LIEN 97-2011, on the subject of which the Commission has put forward reasons in the contested decision for refusing to grant full access to the applicant, the said reasons have not been

systematically reproduced in the confidential version of the said documents annexed to the Commission's response to the second measure of inquiry. The Court notes that the documents on file relating to contract LIEN 97-2011 concerned by that insufficiency are the following:

— concerning the refusal based on the fact that the content of the document concerned was partially outside the scope of the application for access to the documents on file concerning contract LIEN 97-2011, in file 1: document 2/1999;

— concerning the refusal based on the exception under Article 4(1)(b) of Regulation No 1049/2001:

  — in file 4, part I: document 19/1999 (sub-part 1);

  — in file 4, part II: document 14/1999;

— concerning the refusal based on the exception under the second subparagraph of Article 4(3) of Regulation No 1049/2001:

  — in file 1: document 7/1999 (sub-part 2);

  — in file 4, part I: documents 8/1999 to 11/1999, 13/1999 and 19/1999 (sub-part 1);

  — in file 4, part II: documents 7/1999, 8/1999, 12/1999 and 14/1999.

53 However, as regards the documents on file relating to contract LIEN 97-2011 listed in paragraph 52 above, it must be held that, since the Commission expressly put forward in relation thereto, in the contested decision, a reason for refusing to disclose their content, the lack of indication of that reason as stated in the same point does not permit the conclusion that the Commission has now waived reliance thereon. In the absence of an express mention by the Commission, in the response to the second measure of inquiry, of such a waiver, the possibility cannot be excluded that that absence of indication may result from a simple clerical error. Consequently, concerning the documents listed in paragraph 52 above, it is necessary to assess whether the undisclosed information in the said documents contains elements which coincide with the subject-matter of the exception expressly relied upon in the contested decision in order to refuse disclosure.

The first plea, claiming, in essence, manifest error of assessment as to the determination of the subject-matter of the initial application and, consecutively, infringement of the Commission's obligation to give the said application a full examination

54 The applicant argues that its initial application sought access, first, to the documents contained in files 1 to 4 of the file relating to contract LIEN 97-2011 and, second, to the documents, the existence of which had been revealed in a report drawn up on 9 March 2004 by a colleague of the Ombudsman ('the colleague of the Ombudsman') in the context of the investigation of complaint 1874/2003/GG, designated, in the initial application, under the formula 'a certain number of [documents] containing correspondence and notes drafted from 2002 onwards' ('the other documents sent to the colleague of the Ombudsman'). Consequently, the Commission infringed its obligation to examine fully the application for full access to the documents on file relating to contract LIEN 97-2011.

55 The Commission argues that access to those additional documents was not applied for in the initial application, but, for the first time, in the confirmatory application. Therefore, it argues, the present action is inadmissible in so far as it concerns the said documents. In any event, such an application for access was too general and imprecise for the Commission to be able to give a favourable reply, which the applicant was moreover told in a letter dated 20 July 2010.

56 In this case, both the partial inadmissibility of the action, raised by the Commission, and the first plea have as their subject-matter, in essence, to determine whether the Commission was right not to reply to the application for access to the other documents sent to the colleague of the Ombudsman.

57 Consequently, examination of the partial inadmissibility of the action, raised by the Commission, is closely linked to that of the first plea, so that it is necessary at the outset to assess whether the latter is well founded. Thus, if the first plea is well founded, the partial inadmissibility of the action as raised by the Commission should be dismissed.

58 In order to assess whether the first plea is well founded, it is necessary, as a preliminary, to determine the subject-matter of the initial application.

The subject-matter of the initial application

59 Primarily, it must be held that, in the initial application, the applicant based its claim expressly on the findings appearing in the report drawn up, on 9 March 2004, by the colleague of the Ombudsman.

60 Thus, in the said application, the applicant claimed:

'Following complaint 1874/2003/GG, the European Ombudsman concluded, [by letter of] 18 March 2004 … that the documents sent to the applicant in reply to the application for access which I had made on behalf of [the applicant] in the case [concerning contract LIEN 97-2011] were incomplete. That letter was accompanied by a report [of the colleague of the Ombudsman], of 9 March 2004 …

It is apparent from the report [of the colleague of the Ombudsman] that the following [documents] have not been disclosed to [the applicant] by the Commission and I request you to authorise [the applicant] to have access to them. [The colleague of the Ombudsman] has identified the following missing documents:

— file 1: …

— file 2: …

— file 3: …

— file 4: …

— [the colleague of the Ombudsman] further mentions: "The Commission has also presented a certain number of [documents] containing correspondence and notes drafted as from 2002. Given that the complaint concerned only access to files 1 to 4 mentioned above, those other [documents] have not been inspected by the Ombudsman's staff."

Allow me in that respect … to indicate that, logically, [the applicant] can mention to the European Ombudsman, with a view to an inspection, only [documents] of which it is aware …

The existence of additional [documents] referred to by [the colleague of the Ombudsman] — "The Commission has also presented a certain number of [documents] containing correspondence and notes drafted from 2002 onwards" — has always been hidden from [the applicant] by the Commission … It is therefore necessary for those [documents], "a certain number of [documents] containing correspondence and notes drafted from 2002 onwards", revealed by [the colleague of the Ombudsman], to be also sent without delay to [the applicant].

…

In that anticipation, I thank you in advance for the assistance you will give to my fresh application for full access [to the documents on file relating to contract LIEN 97-2011], as is guaranteed by Regulation No 1049/2001.'

61 It is thus apparent from the express wording of the initial application that the subject-matter of the latter was an application for full and immediate access not only to all the documents identified by the colleague of the Ombudsman in files 1 to 4 of the file relating to contract LIEN 97-2011, but also to the other documents sent to the said colleague.

62 It should also be remembered that, at the inquiry led by the colleague of the Ombudsman in the offices of the Commission, in the context of the investigation of complaint 1874/2003/GG, which concerned the Commission's refusal to give the applicant access to all the documents contained in the file relating to contract LIEN 97-2011, the Commission, on its own initiative, sent to the said colleague not only the documents contained in files 1 to 4 of the said file, but also, as is apparent from the report of the said colleague, the other documents.

63 Therefore, the Commission cannot now claim that the documents on file relating to contract LIEN 97-2011, to which the applicant requests access, are only those referred to in the list of documents sent by the Commission in its letter of 8 July 2002 and contained in files 1 to 4 of the file relating to contract LIEN 97-2011. That affirmation is contradicted by the wording, not challenged by the Commission, of the report of 9 March 2004 of the colleague of the Ombudsman.

The legality of the absence of any decision by the Commission concerning the application for full access to the other documents sent to the colleague of the Ombudsman

64 It should be remembered that Regulation No 1049/2001 is intended, as is apparent from recital 4 in its preamble and from Article 1, to give the fullest possible effect to the right of public access to documents of the institutions.

65 Recital 1 of Regulation No 1049/2001 refers to the provisions of the second paragraph of Article 1 TEU, according to which the said treaty marks a new stage in the process of creating an ever closer union between the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. As is recalled in recital 2 of the said regulation, public access to the documents of the institutions is linked to their democratic character.

66 When the Commission is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents of the institutions set out in Article 4 of Regulation No 1049/2001 (see, to that effect, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraph 35).

67 Moreover, as is apparent from the wording of recital 13 of Regulation No 1049/2001, provision has been made for the application of a two-stage administrative procedure, with the additional possibility of court proceedings or complaints to the Ombudsman, in order to ensure full compliance with the right of public access to documents of the EU institutions.

68 Similarly, according to the case-law, Articles 7 and 8 of Regulation No 1049/2001, by providing for a two-stage procedure, aim to achieve, first, the swift and straightforward processing of applications for access to documents of the institutions concerned and, second, as a priority, a friendly settlement of disputes which may arise (judgment in Case C-362/08 P *Internationaler Hilfsfonds* v *Commission*, cited in paragraph 9 above, paragraph 53).

69 It follows from the reminders given in paragraphs 64 to 68 above that the institution concerned is required to carry out a full examination of all the documents referred to in the application for disclosure. Such a requirement applies, in principle, not only when dealing with a confirmatory application, within the meaning of Article 8 of Regulation No 1049/2001, but also when dealing with an initial application, within the meaning of Article 7 of the said regulation.

70 In this case, first, it should be noted that, in the initial response, the Commission states: 'This letter obviously concerns only the documents to which you were not granted access on your visit in 2002. As has already been explained to you by letter of 8 July 2002, the file relating to contract LIEN 97-2011 is composed of four parts [files 1 to 4].'

71 Thus, without it being challenged, moreover, by the Commission, it must be held that the initial response does not contain any element of reply to the initial application in so far as it was designed to obtain full access to the other documents sent to the colleague of the Ombudsman.

72 Second, it should be noted that, in the initial response, the Commission contented itself with stating that the documents on file relating to contract LIEN 97-2011 were contained in files 1 to 4 of the said file. However, it is apparent from the report of the colleague of the Ombudsman, to which the initial application expressly referred, that other documents than those contained in files 1 to 4 of the file relating to contract LIEN 97-2011 had been sent to him in the context of the investigation of complaint 1874/2003/GG. Having regard to the findings of the colleague of the Ombudsman in his report, drawn up after the communication of the list appearing in the letter of 8 July 2002, it was at least incumbent on the Commission, in default of examining the initial application for full access to the other documents sent to the colleague of the Ombudsman, to explain why, in its view, those documents did not form part of the file relating to contract LIEN 97-2011.

73 It is apparent from the considerations set out in paragraphs 70 and 72 above that, since the initial response did not contain any reply to the application for full access to the other documents sent to the colleague of the Ombudsman, the Commission has not complied with its obligation to make a full examination of that application. Such an omission on its part clearly undermines the objective pursued by the regulation of rapid and easy handling of applications for access such as recalled in paragraph 68 above.

74 Third, it is true that, as the Commission in essence argues, the wording of the confirmatory application capable of defining its subject-matter does not correspond exactly to that used for the same purposes in the initial application.

75 As has been held in paragraph 61 above, in the initial application, the applicant expressly sought unlimited and immediate access not only to all the documents identified by the colleague of the Ombudsman in files 1 to 4 of the file relating to contract LIEN 97-2011, but also to the other documents sent to the said colleague.

76 By contrast, in the confirmatory application, the applicant expressly requested the Commission 'immediately to send [it] all the documents which [it had] refused to disclose, without exception, from file 1 to file 4 of the file relating to contract LIEN 97-2011, but also [the additional documents]'.

77 Consequently, the subject-matter of the initial application and that of the confirmatory application formally coincide only in relation to the request for unlimited access to the documents contained in files 1 to 4 of the file relating to contract LIEN 97-2011. On the other hand, it must be noted that, over and above those latter documents, the applicant was also requesting such access, first, in the initial application, to the other documents sent to the colleague of the mediator and, second, in the confirmatory application, to the additional documents.

78 However, such a lack of terminological concordance as to the subject-matter of the initial application and that of the confirmatory application can neither justify the failure of the Commission fully to examine the initial application, as pointed out in paragraph 73 above, or have the consequence, as the Commission maintains, of rendering the application for unlimited access to the additional documents, as contained in the confirmatory application, a fresh application, so that the subject-matter of the applicant's request for access would be limited to the documents contained in files 1 to 4 of the file relating to contract LIEN 97-2011.

79 First, it must be remembered that the initial application for unlimited access to the documents of the file relating to contract LIEN 97-2011 constitutes a fresh application for access with follows two previous requests for access to the same file, respectively dated 9 March 2002 (see paragraph 3 above) and 22 December 2004 (see paragraph 7 above).

80 Having regard to the objectives of speed and simplicity of the procedure established by Regulation No 1049/2001, in the circumstances of the present case, as referred to in paragraph 79 above, the Court has held, in essence, that a derogation could be made from the two-stage procedure provided for under Articles 7 and 8 of Regulation No 1049/2001 (judgment in Case C-362/08 P *Internationaler Hilfsfonds* v *Commission*, cited in paragraph 9 above, at paragraphs 60 and 61).

81 Thus, the circumstances of the present case having been modified only in that the applicant lodged, by letters of 28 and 31 August 2009, a fresh application for unlimited access to the documents of the file relating to contract LIEN 97-2011, the Commission was required, without waiting for a hypothetical confirmatory application, to carry out a full examination of the initial application, in particular concerning the other documents sent to the colleague of the Ombudsman.

82 Second, the Commission cannot, in order to justify failure to examine the applicant's requests for unlimited access in the initial application, or in the confirmatory application, to documents other than those contained in files 1 to 4 of the file relating to contract LIEN 97-2011, rely on the allegedly too general and imprecise character of those applications.

83 Even supposing that the application for access to the other documents sent to the colleague of the Ombudsman or to the additional documents had been formulated in too general and imprecise a manner, it should be remembered that Article 6(2) of Regulation No 1049/2001 provides that '[i]f an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents'.

84 Thus, it is clear from the wording of that provision, and in particular from the use of the verbs 'ask' and 'assist', that the mere finding that the application for access was insufficiently precise, whatever the reasons, must lead the addressee institution to make contact with the applicant in order to define as closely as possible the documents requested. It is thus a provision which, in the area of public access to documents, constitutes the formal transcription of the principle of sound administration, which is one of the guarantees afforded by the EU legal order in administrative procedures (Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-1121, paragraph 107). The duty of assistance is thus fundamental to ensure the effectiveness of the right of access defined by Regulation No 1049/2001.

85 In the present case, it does not appear from the documents before the Court that, in accordance with the provisions of Article 6 of Regulation No 1049/2001 and the principle of sound administration, the Commission asked the applicant to define more precisely the documents requested in the initial application and the confirmatory application, before adopting the contested decision.

86 Next, in any event, the Commission cannot argue that it told the applicant of the allegedly too general and imprecise character of its application for unlimited access, in a letter of 20 July 2010. It must be held that, whatever its content, that letter was not sent to the applicant following the initial application or the confirmatory application, before the adoption of the contested decision, but at a date subsequent to the latter. Consequently, that letter is clearly not relevant for the purposes of ruling on the legality of the contested decision.

87 It follows from the whole of the above considerations that the Court must uphold the first plea, claiming manifest error of assessment as to the determination of the subject-matter of the initial application and, consecutively, an infringement of the Commission's obligation to give that application a full examination, and consequently dismiss the Commission's claim that the application for access to the documents in question is partly inadmissible.

88 Thus, the contested decision must be annulled in so far as it implies, with regard to the applicant, refusal of access to the documents which the Commission sent to the colleague of the Ombudsman, other than those identified by the latter in files 1 to 4 of the file relating to contract LIEN 97-2011.

The third and fourth pleas, claiming, respectively, infringement of the provisions of Article 4(1)(b) and the second subparagraph of Article 4(3) of Regulation No 1049/2001

Preliminary reminders

89 Regulation No 1049/2001 lays down as a general rule that the public may have access to the documents of the institutions, but provides for exceptions by reason of certain public and private interests.

90 According to settled case-law, the exceptions to document access must be interpreted and applied strictly so as not to frustrate application of the general principle that the public should be given the widest possible access to documents held by the institutions (Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 63 and case-law cited; *Sweden and Turco* v *Council*, cited in paragraph 66 above, at paragraphs 35 and 36). Furthermore, the principle of proportionality requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view (Case C-353/99 P *Council* v *Hautala* [2001] ECR I-9565, paragraph 28).

91 Moreover, in principle, the examination required for dealing with an application for access to documents must be concrete in character. First, the mere fact that a document concerns an interest protected by an exception cannot be sufficient to justify the application of the latter (see, to that effect, Case T-20/99 *Denkavit Nederland* v *Commission* [2000] ECR II-3011, paragraph 45). Such an application can, in principle, be justified only in the case where the institution has previously assessed, first, whether access to the document would specifically and actually undermine the interest protected and, second, in the cases referred to in Article 4(2) and (3) of Regulation No 1049/2001, whether there was no higher public interest justifying the disclosure of the document referred to. Second, the risk of a protected interest being undermined must be reasonably foreseeable and not merely hypothetical (Case T-211/00 *Kuijer* v *Council* [2002] ECR II-485, paragraph 56). Consequently, the examination which the institution must carry out in order to apply an exception must be carried out in a concrete manner and must be apparent from the grounds of the decision (see, to that effect, Case T-14/98 *Hautala* v *Council* [1999] ECR II-2489, paragraph 67; Case T-188/98 *Kuijer* v *Council* [2000] ECR II-1959, paragraph 38; and *Verein für Konsumenteninformation* v *Commission*, cited in paragraph 84 above, paragraph 69).

92 In principle, a concrete, individual examination of each document is also necessary where, even if it is clear that a request for access refers to documents covered by an exception, only such an examination can enable the institution to assess whether it is possible to grant the applicant partial access under Article 4(6) of Regulation No 1049/2001. In the context of applying the Code of conduct on public access to Council and Commission documents (OJ 1993 L 340, p. 41), the Court has moreover already rejected as insufficient an assessment relating to documents which is carried out by reference to categories rather than on the basis of the actual information contained in those documents, since the examination required of an institution must enable it to assess specifically whether an exception invoked actually applies to all the information contained in those documents (*Verein für Konsumenteninformation* v *Commission*, cited in paragraph 84 above, paragraph 73; Joined Cases T-391/03 and T-70/04 *Franchet and Byk* v *Commission* [2006] ECR II-2023, paragraph 117; Case T-123/99 *JT's Corporation* v *Commission* [2000] ECR II-3269, paragraph 46).

93 Thus, in principle, it is for the institution to examine, first, whether the document forming the subject-matter of the application for access falls within the scope of one of the exceptions listed in Article 4 of Regulation No 1049/2001, second, whether disclosure of that document would specifically and actually undermine the interest protected, and, third, if so, whether the need for protection applies to the whole of the document.

94 It is in the light of those principles that it is necessary to examine the third and fourth pleas raised by the applicant.

The third plea, claiming infringement of the provisions of Article 4(1)(b) of Regulation No 1049/2001

95 The applicant maintains, in essence, that a single person, capable of benefiting from the protection of privacy and the integrity of the individual, was the subject-matter of a criminal investigation conducted by the Kazakhstan authorities, before the termination of the contract; that his name was known to the authorities and the public of that country, but also to the Commission, and that the said person was sentenced, on account of serious misdemeanours, to a fine, so that the reputation of that person has already been undermined. It adds that, without identifying by name the persons whose private lives and integrity needed, in the Commission's view, to be protected, the latter could have indicated their functions. Finally, the documents on the subject of which the Commission alleges a risk of infringement of privacy and integrity of the individual are of major importance for the purposes of the dispute at issue in this case.

96 The Commission considers that the third plea is unfounded, and argues that, at the time of the investigation of the documents requested, it found that the privacy and integrity of a certain number of persons could be affected. It argues that it is not for the applicant to judge which individual is deserving of protection of his privacy and integrity. Moreover, the applicant has never named the person whom it identifies in the reply.

97 In this case, the Court notes that, according to recital 11 of Regulation No 1049/2001, '[i]n assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities'.

98 Article 4(1)(b) of Regulation No 1049/2001 lays down an exception to access to a document in cases where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

99 It is apparent from the case-law that the wording of Article 4(1)(b) of Regulation No 1049/2001, which is an indivisible provision, requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1) (Case C-28/08 P *Commission* v *Bavarian Lager* [2010] ECR I-6055, paragraph 59).

100 Article 4(1)(b) of Regulation No 1049/2001 establishes a specific and reinforced system of protection of a person whose personal data could, in certain cases, be communicated to the public (*Bavarian Lager*, cited in paragraph 99 above, paragraph 60).

101 Regulations Nos 45/2001 and 1049/2001 were adopted on dates very close to each other. They do not contain any provisions granting one regulation primacy over the other. In principle, their full application should be ensured (*Bavarian Lager*, cited in paragraph 99 above, paragraph 56).

102 According to Article 1(1) of Regulation No 45/2001, the purpose of that regulation is to 'protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data'.

103 It is clear from the first sentence of recital 15 of Regulation No 45/2001 that the Union legislature has pointed to the need to apply Article 6 TEU and, by that means, Article 8 of the ECHR, '[w]here such processing is carried out by Community institutions or bodies in the exercise of activities falling

outside the scope of this Regulation, in particular those laid down in Titles V and VI of the [EU Treaty in its version prior to the Treaty of Lisbon]'. By contrast, such a reference was not found necessary for processing carried out in the exercise of activities within the scope of that regulation, given that, in such cases, it is clearly Regulation No 45/2001 itself which applies (*Bavarian Lager*, cited in paragraph 99 above, paragraph 62).

104 It follows that, where a request based on Regulation No 1049/2001 seeks to obtain access to documents including personal data, the provisions of Regulation No 45/2001 become applicable in their entirety (*Bavarian Lager*, cited in paragraph 99 above, paragraph 63). It should be remembered that Article 8 of Regulation No 45/2001 requires the recipient of a transfer of personal data, inter alia, to demonstrate the need for their disclosure (*Bavarian Lager*, paragraph 45). Similarly, Article 18 of that regulation gives the person concerned the possibility of objecting at any time, on compelling legitimate grounds relating to his or her particular situation, to the processing of data relating to him or her.

105 In this case, first, concerning the documents on file relating to contract LIEN 97-2011 the content of which the Commission considered could not be disclosed on the ground that it was covered by the exception under Article 4(1)(b) of Regulation No 1049/2001, the latter may be identified, having regard to point 4.2 of the contested decision and the table annexed to that decision, as follows:

— file 1: documents 2/1999 and 7/1999, sub-part 2 (boxes 1 and 2);

— file 4, part I: documents 19/1999, 2/2000, 5/2000, 10/2001, 14/2001 (boxes 1 to 3);

— file 4, part II: documents 14/1999, 19/1999, 9/2001 (boxes 1 to 3).

106 Second, at the conclusion of the examination of the Commission's reply to the second measure of inquiry, it must be held, first, that the content of the following documents, referred to by the Commission as allegedly covered by the exception under Article 4(1)(b) of Regulation No 1049/2001, concerns personal data concerning the applicant itself:

— file 1: documents 2/1999 and 7/1999 sub-part 2 (boxes 1 and 2);

— file 4, part I: documents 19/1999 and 2/2000;

— file 4, part II: document 14/1999.

107 Having regard to the reminders made in paragraphs 90 and 102 above concerning both the strict interpretation of the exceptions listed in Article 4 of Regulation No 1049/2001 and the purpose of Regulation No 45/2001, it must be held that the disclosure of personal data exclusively concerning the applicant for access in question cannot be refused on the ground that it would undermine the protection of privacy and the integrity of the individual.

108 Consequently, the Commission was wrong to refuse disclosure of the documents referred to in paragraph 106 above on the basis of the exception under Article 4(1)(b) of Regulation No 1049/2001.

109 Moreover, it is necessary to define the scope of such a disclosure of documents containing personal data concerning the applicant for access. In such circumstances, whilst protection of the interest referred to in Article 4(1)(b) of Regulation No 1049/2001 is not necessary in relation to the applicant for access, it must, however, be guaranteed, in accordance with the provisions of Regulation No 45/2001, in relation to third parties. Consequently, contrary to the principle according to which the purpose of Regulation No 1049/2001 is to open a right of access of the public in general to the documents of the institutions (*Sison* v *Council*, cited in paragraph 90 above, at paragraph 43), it must be held that, where, as in this case, the documents in question contain personal data concerning the

applicant for access, the right of the latter to obtain their disclosure on the basis of the right of access to documents of the institutions cannot have the consequence of opening a right of access of the public in general to the said documents.

110 Likewise at the conclusion of the examination of the Commission's reply to the second measure of inquiry, it must be held that the content of the following documents, referred to by the Commission as allegedly covered in part by the exception under Article 4(1)(b) of Regulation No 1049/2001, concerns personal data relating to physical persons who are not connected with the applicant:

— file 4, part I: documents 5/2000, 10/2001 and 14/2001 (boxes 1 to 3);

— file 4, part II: documents 19/1999 and 9/2001 (boxes 1 to 3).

111 The Court must, it is true, dismiss at the outset the Commission's argument that the applicant never named, in the reply, the person which it identifies as not being capable of benefiting from protection of privacy and the integrity of the individual. Such a claim is clearly erroneous in fact, since it is expressly clear from the application that the applicant there named the said person.

112 However, the Commission is right to argue that it is not for the applicant to assess whether or not a person is capable of benefiting from the protection of his privacy and integrity. It is apparent from the case-law referred to in paragraphs 99 to 101, 103 and 104 above that the protection which must be accorded to personal data in the context of the application of the provisions of Article 4(1)(b) of Regulation No 1049/2001 must be assured in strict compliance with the provisions of Regulation No 45/2001. That latter regulation does not lay down an exception to the protection of the fundamental right which it guarantees, on the ground that the data in question concern a person who is not worthy of such protection.

113 It therefore needs to be examined only whether the Commission was right to consider that some of the documents for which the applicant had applied for full access contained personal data capable of justifying the decision to refuse to grant the applicant full access to the said documents, on the basis of Article 4(1)(b) of Regulation No 1049/2001.

114 In that respect, first, it is apparent from the provisions of Article 2(a) of Regulation No 45/2001 that 'personal data shall mean any information relating to an identified or identifiable natural person hereinafter referred to as [a] data subject, [and that] an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity'.

115 Second, it is apparent from the case-law that surnames and forenames may be regarded as personal data within the meaning of Article 2(a) of Regulation No 45/2001 (*Bavarian Lager*, cited in paragraph 99 above, paragraph 68).

116 Moreover, the Court has ruled that the act of referring, on a communication support, to various persons and identifying them by name or by other means, for instance by giving their telephone number or information regarding their working conditions and hobbies, constitutes a 'processing of data' within the meaning of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) (Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 27).

117 Thus, in addition to names, it must be held that information concerning the professional or occupational activities of a person can also be regarded as personal data where, first, the information relates to the working conditions of the said persons and, second, the information is capable of indirectly identifying, where it can be related to a date or a precise calendar period, a physical person within the meaning of Article 2(a) of Regulation No 45/2001.

118 In the present case, it is apparent from the contested decision that, with regard to the exception under Article 4(1)(b) of Regulation No 1049/2001, the Commission has stated that the undisclosed parts of certain documents contained the names of persons and information concerning their reputation and that those documents referred to information concerning criminal investigations, illegalities, and accusations of corruption against non-governmental organisations participating in contract LIEN 97-2011, those references not necessarily reflecting the position of the Commission, but being capable, if disclosed, of damaging the reputation of the said persons and thereby undermining protection of their privacy and integrity.

119 In that regard, first of all, it must be pointed out that the applicant does not deny that the documents on file relating to contract LIEN 97-2011 referred to in paragraph 110 above contain personal data within the meaning of Regulation No 45/2001.

120 Next, as the applicant cannot deny either, it must be held that the Commission carried out a concrete and individual examination of the documents on file relating to contract LIEN 97-2011 referred to in paragraph 110 above.

121 Notwithstanding the brevity of the reasoning used by the Commission, as summarised in paragraph 118 above, in order to justify the application of the exception under Article 4(1)(b) of Regulation No 1049/2001, it is apparent from that reasoning that the Commission identified, in the documents on file relating to contract LIEN 97-2011 referred to in paragraph 110 above, data capable of being protected under the provisions of the said exception.

122 Finally, the applicant states that the documents on file relating to contract LIEN 97-2011 referred to in paragraph 110 above contain data on a single person not capable of benefiting from the protection of privacy and integrity of the individual, and that those documents are of major importance in the dispute between the applicant and the Commission in this case, but also in that which is pending before the tribunal de première instance de Bruxelles. However, none of those arguments can succeed.

123 First, as has been pointed out in paragraph 112 above, there is no occasion, under the heading of applying provisions of Article 4(1)(b) of Regulation No 1049/2001, to verify whether the data in question concern a person not capable, by virtue of the said provisions, of benefiting from the protection of his privacy and integrity.

124 Second, it is apparent from the case-law referred to in paragraphs 99 to 101, 103 and 104 above that the protection which must be granted to personal data in the context of the application of the provisions of Article 4(1)(b) is specific and reinforced. Thus, the said application must be assured in strict compliance with the provisions of Regulation No 45/2001. Unlike the exception referred to in the second subparagraph of Article 4(3) of Regulation No 1049/2001, that falling within the provisions of Article 4(1)(b) of Regulation No 1049/2001 and Regulation No 45/2001 is not capable of being dismissed on the basis of the existence of a higher public interest. Thus, if the applicant had claimed, alleging that the documents concerned were of major importance both in relation to its dispute with the Commission in this case and in the dispute pending before the tribunal de première instance de Bruxelles, to be relying on a higher public interest, that argument would have to be held to be clearly inoperative.

125 Consequently, the Commission was right, in relation to the documents listed in paragraph 110 above, to refuse full disclosure on the basis of the exception under Article 4(1)(b) of Regulation No 1049/2001.

126 It follows from paragraphs 108 and 125 above that the third plea must be upheld as partially well founded, the contested decision incurring annulment in so far as it infringes the provisions of Article 4(1)(b) of Regulation No 1049/2001 by expressly refusing the applicant access to the documents listed in paragraph 106 above on the basis of the said provisions.

The fourth plea, alleging infringement of the provisions of the second subparagraph of Article 4(3) of Regulation No 1049/2001

127 The applicant argues, in essence, that the Commission has not raised any concrete argument to justify refusal to divulge the documents on file relating to contract LIEN 97-2011 on the basis of the second subparagraph of Article 4(3) of Regulation No 1049/2001 and has not demonstrated that, 10 years after the termination of the contract, disclosure of the documents which concerned either the carrying out of an audit, or the decision-making process now closed on the subject of the contract seriously undermined its capacity correctly to administer the financial resources of the Union and its decision-making process in relation to future contracts. It adds that the Commission is wrong to rely on the proceedings in progress before the tribunal de première instance de Bruxelles in order to refuse the applicant full access to the documents on file relating to contract LIEN 97-2011, on the ground that the information which they contain might demonstrate that the action brought by the Commission before that court lacked foundation.

128 Finally, the applicant argues that there are several higher public interests which justify disclosure of the requested documents, namely, first, that of the applicant, its donors, and the public, in determining why the Commission unilaterally annulled the contract, cofinanced by the applicant, which was of major interest in terms of public health; second, that based on the fact that the action brought by the Commission before the tribunal de première instance de Bruxelles necessitates, in the public interest, that the reasons for the Commission's conduct should be determined; and, finally, that of the Member States in knowing whether the Commission complies with the rules of EU law.

129 The Commission essentially challenges the foundation of the fourth plea, and refers to the line of argument in point 4.1 of the contested decision, which concerns the general need to protect the decision-making process of the institution. It maintains that it is not required, in the context of the exceptions under the second subparagraph of Article 4(3) of Regulation No 1049/2001, to take account of the individual interest of the applicant in a disclosure of certain documents, in particular for the purposes of enabling it to defend itself better in current litigation before the tribunal de première instance de Bruxelles. It considers that the applicant is setting out new arguments in the reply designed to demonstrate the existence of a higher public interest, which are thus not admissible and which are, in any event, insufficient to derogate from the exception under the second subparagraph of Article 4(3) of Regulation No 1049/2001.

130 In this case, the Court notes that, pursuant to the second subparagraph of Article 4(3) of Regulation No 1049/2001, access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

131 Having regard to the principle, referred to in paragraph 90 above, that exceptions to the right of access to institution documents must be interpreted strictly, the Court has ruled that it is only for part of the documents for internal use, namely those containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned, that the second subparagraph of Article 4(3) allows access to be refused even after the decision has been taken, where their disclosure would seriously undermine the decision-making process of that institution (Case C-506/08 P *Sweden* v *MyTravel and Commission* [2011] ECR I-6237, paragraph 79).

132 The purpose of that provision of Regulation No 1049/2001 is thus to protect certain types of documents drawn up in the context of a proceeding, the disclosure of which, even after that proceeding has terminated, would seriously undermine the decision-making process of the institution concerned. Those documents must contain 'opinions for internal use as part of deliberations and preliminary consultations within the institution concerned'.

133 Finally, according to consistent case-law, referred to in paragraphs 91 and 92 above, first, the examination required for the handling of an application for access to documents must be concrete and individual in character and, second, the risk of a protected interest being adversely affected must, to be relied upon, be reasonably foreseeable and merely hypothetical.

– Principal considerations

134 In this case, concerning documents on file relating to contract LIEN 97-2011 the content of which the Commission considered could not be disclosed because it was covered by the exception under the second subparagraph of Article 4(3) of Regulation No 1049/2001, those documents may be identified, having regard to point 4.1 of the contested decision and the table annexed to the contested decision, as follows:

— file 1: documents 4/1999, 6/1999 (box 2), 7/1999 (sub-part 2) and 8/1999;

— file 2: documents 4/1999 and 1/2000;

— file 4, part I: an unnumbered document, designated by the Commission, in point 4.1 of the contested decision (p. 8) and in the table annexed to the said decision (p. 3) as being undated, and documents 2/1999, 3/1999 (box 2), 4/1999 (boxes 1, 2 and 3), 5/1999, 7/1999 to 14/1999, 16/1999, 17/1999, 19/1999 (sub-part 1), 23/1999, 25/1999, 26/1999 (sub-part 1), 1/2000, 2/2000, 4/2000, 2/2001 (boxes 1 and 2), 3/2001 (boxes 1 and 2), 6/2001, 13/2001 (boxes 1 and 2) and 19/2001 (box 3);

— file 4, part II: documents 2/1999 (box 2), 7/1999 to 9/1999, 12/1999, 14/1999, 18/1999 (boxes 1 and 2), 20/1999 (boxes 2, 3, 5, 7 and 9), 2/2000 (box 2), 3/2000 (box 2), 4/2000 (box 1), 1/2001, 2/2001 (boxes 1 and 2), 3/2001 (boxes 1 and 2) and 7/2001 (boxes 1 and 2).

135 At this stage of the examination of the fourth plea, it is necessary at the outset to verify whether, in accordance with the case-law referred to in paragraph 92 above, the Commission, in the contested decision, carried out a concrete and individual examination of each of the documents listed in paragraph 134 above.

136 On that point, it must be noted that the reasoning concerning the application of the exception under the second subparagraph of Article 4(3) of Regulation No 1049/2001 appears in point 4.1 of the contested decision and table annexed to that decision.

137 Point 4.1 of the contested decision contains three sub-divisions which concern three distinct decision-making processes relating, respectively, to the implementation of an audit and enquiries on the subject of contract LIEN 97-2011 (point 4.1.1), the termination of contract LIEN 97-2011 (point 4.1.2) and the appropriateness of adopting and implementing a recovery order (point 4.1.3). In addition, those three points are preceded by four paragraphs constituting the introduction to point 4.1 of the contested decision ('the introduction to point 4.1'). Finally, it is apparent from the grounds of the contested decision, as set out from the second subparagraph of point 4.1.3 (see p. 10 of the contested decision), to the final subparagraph of point 4.1, that the said grounds concern all the areas referred to respectively by points 4.1.1, 4.1.2 and 4.1.3. Consequently, those grounds constitute a conclusion to point 4.1 of the contested decision ('the grounds set out in the conclusion to point 4.1').

138 First, concerning the grounds set out in the introduction to point 4.1 of the contested decision, it should be noted that the Commission was content merely to recall the provisions of the second subparagraph of Article 4(3) of Regulation No 1049/2001, list all of the documents in relation to which it relied on the exception under those provisions, and, finally, indicate that the content of those documents '[did] not reflect definitive positions of the Commission but [contained] reflections,

negotiating strategies and possible scenarios conceived by Commission officials' and that 'those documents [had] been conceived in order to supply instructions intended for internal use and [served] as preparatory documents for opinions in the course of the decision-making process'.

139 Consequently, the grounds set out in the introduction to point 4.1 of the contested decision do not contain a concrete and individual examination of the documents on file relating to contract LIEN 97-2011 in relation to which the Commission had relied on the exception under the second subparagraph of Article 4(3) of Regulation No 1049/2001.

140 Second, concerning the grounds set out in points 4.1.1 to 4.1.3 of the contested decision, it must be noted that the Commission contented itself with merely setting out in a general and abstract manner the reasons why the exception under the second subparagraph of Article 4(3) of Regulation No 1049/2001 applied to the documents on file relating to contract LIEN 97-2011 listed in those three points.

141 Indeed, in point 4.1.1, which concerns the decision-making process as to the 'preparation of an inspection visit and opinions on the question whether, when and how an audit should be implemented', the Commission merely listed the documents on file relating to contract LIEN 97-2011 which related to such a process and indicated, generally, that they concerned meetings and telephone conversations of officials who managed contract LIEN 97-2011 and who sought all the relevant facts which caused the applicant to change partner in the context of the said contract. Finally, it added that its definitive position concerning the inspection visit carried out in this case and the facts in relation to the change of partner had been communicated to the applicant and appeared in various disclosed documents.

142 Similarly, in point 4.1.2, which concerns the decision-making process as regards the 'termination of contract [LIEN 97-2011]', the Commission merely listed the documents on file relating to contract LIEN 97-2011 in relation to such a process and indicated, generally, that they constituted internal consultations and propositions which had in large part not been followed by it in the definitive decision to terminate contract LIEN 97-2011.

143 Finally, in point 4.1.3, which concerns the decision-making process as to the appropriateness of adopting and implementing a recovery order, the Commission merely listed the documents on file relating to contract LIEN 97-2011 in relation to such a process and indicated, generally, that a number of them contained calculations which had not been followed by its services. Finally, it added that its definitive position concerning the size of the amount to be recovered and the final calculations on which the recovery order was based had been communicated.

144 Consequently, the grounds set out in points 4.1.1 to 4.1.3 of the contested decision do not contain a concrete and individual examination of the documents on file relating to contract LIEN 97-2011 on the subject of which the Commission relied on the exception under the second subparagraph of Article 4(3) of Regulation No 1049/2001.

145 Third, concerning the grounds set out in the conclusion of point 4.1 of the contested decision, the Commission there puts forward several arguments, set out essentially in paragraphs 159 to 161 below, in the light of which it considers that disclosure of the documents on file relating to contract LIEN 97-2011 which were at issue 'would give the public a view [of its] working methods ... when taking a decision, [and that] such a situation would have extremely negative repercussions on [its] decision-making process in cases of this type'. It must be held that such grounds are general and abstract in character and do not contain a concrete and individual examination of the documents on file relating to contract LIEN 97-2011 on the subject of which the Commission relied on the exception under the second subparagraph of Article 4(3) of Regulation No 1049/2001.

146 Fourth, concerning the table annexed to the contested decision, it is sufficient to note that the Commission indicates, in the final paragraph of page 3 of the said decision, that 'where a document is not accessible without restriction, reference is made [in the said table] to Regulation No 1049/2001 and the corresponding exceptions'.

147 Moreover, as is shown in the heading of the six columns of the table annexed to the contested decision, the Commission merely indicated in those columns, in relation to each of the documents concerned, as follows:

— its number (column 1);

— its date (column 2);

— its description (column 3);

— its content and scope (column 4);

— the status of its disclosure (column 5);

— the exceptions applicable to it (column 6).

148 Thus, in that table, the Commission briefly describes the subject-matter of each of the said documents, the disclosure status adopted, and, where unlimited access to a document is not granted, the legal basis of that refusal. By contrast, it contains no justification explaining why full disclosure of the content of a document would adversely affect the interest protected by the exception relied upon by the Commission.

149 Consequently, the table annexed to the contested decision does not contain a concrete and individual examination of the documents on file relating to contract LIEN 97-2011 on the subject of which the Commission relied on the exception under the second subparagraph of Article 4(3) of Regulation No 1049/2001.

150 It follows from the whole of the considerations set out above that, in the absence, in the contested decision, of a concrete and individual examination of the undermining of the interest protected by the second subparagraph of Article 4(3) of Regulation No 1049/2001, which would result from the disclosure of one of the documents on file relating to contract LIEN 97-2011 listed in paragraph 134 above, the Commission has, by expressly refusing to disclose those documents on the basis of the said provisions, infringed the latter.

– Additional considerations

151 For the sake of completeness, in the interests of the sound administration of justice and having regard to the objective of rapid and easy handling of requests for access to documents of the institutions concerned pursued by Regulation No 1049/2001 referred to in paragraph 68 above, it is appropriate, in order in particular to enable the Commission to draw all useful consequences from the present judgment, to examine whether, notwithstanding the conclusion drawn in paragraph 150 above, it was able to rely, concerning all the documents listed in paragraph 134 above, first, on the exception under the provisions of the second subparagraph of Article 4(3) of Regulation No 1049/2001 and, second, under the heading of the said exception, on the general and abstract grounds which it used in refusing to disclose the said documents.

152 First, having regard to the case-law referred to in paragraph 131 above, it is appropriate to examine whether the documents listed in paragraph 134 above contain opinions within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001.

153 However, having regard to the matters appearing in the file of the present case and in the absence of a concrete and individual examination by the Commission of the documents on file relating to contract LIEN 97-2011 on the subject of which it has relied on the provisions of the second subparagraph of

Article 4(3) of Regulation No 1049/2001, the General Court is not in a position to rule as to whether or not all the documents listed in paragraph 134 constitute opinions. Therefore, it is only when the said documents manifestly do not contain an opinion, within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001, that, in the interests of the sound administration of justice, the General Court will rule on that qualification.

154 Thus, at the conclusion of the examination of the Commission's response to the second measure of inquiry, having regard to the case-law referred to at paragraph 131 above and the considerations set out in paragraph 53 above, the General Court finds that, amongst the documents listed in paragraph 134 above, the following documents clearly do not contain opinions, but:

— notes on telephone conversations or meetings with the applicant, or on exchanges of information or comments between agents concerning the applicant, namely:

  — file 1: documents 4/1999 and 7/1999 (sub-part 2);

  — file 2: document 4/1999;

  — file 4, part I: documents 2/1999, 12/1999, 13/1999, 16/1999, 19/1999 (sub-part 1) and 2/2000;

  — file 4, part II: documents 9/1999, 14/1999 and 4/2000 (box 1);

— general comments on the case concerning contract LIEN 97-2011, namely:

  — file 4, part I: document 4/1999 (boxes 1 and 2);

  — file 4, part II: documents 2/1999 (box 2), 2/2000 (box 2) and 3/2000 (box 2);

— requests for, or exchanges of, general information on the case concerning contract LIEN 97-2011, namely:

  — file 4, part I: documents 8/1999 to 11/1999 and 23/1999;

  — file 4, part II: documents 7/1999, 8/1999, 20/1999 (boxes 2, 3 and 9) and 3/2000 (box 2);

— instructions or general comments concerning the implementation of an audit in the case concerning contract LIEN 97-2011, namely:

  — file 1: document 6/1999 (box 2);

  — file 4, part I: documents 3/1999 (box 2) and 17/1999;

  — file 4, part II: document 12/1999.

155 Consequently, the Commission was clearly wrong to rely on the second subparagraph of Article 4(3) of Regulation No 1049/2001 in order to refuse access to the documents on file concerning contract LIEN 97-2011 listed in paragraph 154 above, in so far as the said documents clearly do not contain opinions within the meaning of that article.

156 Second, it needs to be determined whether, concerning the documents in paragraph 134 above, save for those listed in paragraph 154 above, since they clearly do not contain opinions, the abstract and general grounds used by the Commission in relation to them in the contested decision are capable of supporting, over and above concrete and individual grounds, a refusal to disclose the said documents.

157 In essence, the said grounds, such as referred to in paragraphs 138, 141 to 143 and 145 above, may be grouped into the four categories defined below.

158 First of all, it is apparent from the grounds set out in the introduction to point 4.1 of the contested decision and in points 4.1.1 to 4.1.3 of the said decision that the documents concerned contained opinions of agents of the Union, formulated in consultations and preliminary deliberations, in relation to contract LIEN 97-2011. More precisely, those opinions concerned decisions taken as to, first, the implementation of an audit and investigations, second, the termination of the said contract and the appropriateness of adopting a recovery order. However, those opinions did not reflect the definitive positions adopted by the Commission on those three subjects.

159 Next, it is apparent from the grounds set out in the conclusion of point 4.1 of the contested decision that it was necessary, in order to protect the essential principles on which the decision-making process of the Commission is based, particularly the principle of collegiality, that its agents be able to express their opinions and proposals freely.

160 Moreover, it is also apparent from the grounds set out in the conclusion of point 4.1 of the contested decision that the disclosure of the documents listed in paragraph 134 above would give the public a glimpse of the Commission's working methods when it takes a decision. Therefore, that would have extremely negative repercussions on its decision-making process in similar cases.

161 Finally, it is apparent from the grounds set out in the conclusion of point 4.1 of the contested decision that disclosure of the documents concerning the calculation method adopted under the heading of the demand for recovery would entail a foreseeable risk to the national legal proceedings under way in Belgium.

162 Having regard to those four categories of general and abstract grounds, first, the Court finds that the Commission's argument that the documents in question cannot be disclosed because they contain personal opinions expressed by its agents for internal purposes, those opinions being at a preliminary phase of the Commission's decision and which, moreover, do not reflect the position which it finally adopted, infringes the very wording of the second subparagraph of Article 4(3) of Regulation No 1049/2001.

163 Indeed, it should be noted that the second subparagraph of Article 4(3) of Regulation No 1049/2001 expressly acknowledges that, after the decision has been taken, access to a document containing opinions for internal use in the context of preliminary deliberations and consultations within the institution concerned is granted, unless disclosure of the document seriously undermines the decision-making process of the institution.

164 In this case, the Commission contented itself with alleging that 'the fact that the documents in question which concern the implementation of an audit or the termination of the contract were drafted and distributed a number of years ago does not prevent one from being entitled to expect that [its] decision-making process … could be seriously affected for the aforesaid reasons'. Such a justification, by reason of its purely hypothetical character, is insufficient having regard to the requirement referred to in paragraph 91 above as to the existence of a concrete objective, not hypothetical, risk that a protected interest may be affected.

165 Second, the Commission cannot maintain that the fact of making public documents concerning the implementation of the audit and the recovery order at issue in this case would allow recipients of Union funds to circumvent the rules applicable to audits or recovery orders and, thereby, very seriously undermine its decision-making process in the future.

166 The detailed rules for implementing an audit are based on legal and scientific rules known to professionals, since they are taught in the auditors' training course. The same applies to the rules for implementing a recovery order. Thus, it cannot be maintained that knowledge of such rules would seriously undermine the decision-making process terminated in this case, or the decision-making process of the Commission in similar cases.

167 Third, neither can the Commission justify its refusal of access to the documents in question by the need in the future, in similar situations, to protect its agents against all external pressure and, thus, the decision-making process in similar cases.

168 Even if the documents in question do contain information concerning Commission agents which should not be disclosed so as not to expose the latter to external pressure, it must be pointed out that, first, as is apparent from the reminders issued in paragraphs 130 to 132 above, the second subparagraph of Article 4(3) of Regulation No 1049/2001 is not designed to protect personal data capable in particular of exposing agents to external pressures, but only certain types of documents. Next, it should be remembered that, in Article 4(1)(b) of Regulation No 1049/2001, the Union legislature made a special provision which is designed expressly, where necessary, to restrain the disclosure of personal data in order to protect the privacy and integrity of individuals.

169 Consequently, the Commission cannot base its refusal to disclose such personal data on the provisions of the second subparagraph of Article 4(3) of Regulation No 1049/2001.

170 Fourth, it must be held that, contrary to what the Commission argues, the fact that certain documents concern the calculation of the amount to be recovered, which forms the subject-matter of a dispute pending before a Belgian national court, cannot constitute a ground for refusing to disclose the said documents on file relating to contract LIEN 97-2011.

171 Recital 16 of Regulation No 1049/2001 does indeed provide that the regime of public access to documents of the institutions, which the said regulation implements, applies without prejudice the rights of access to documents for judicial authorities.

172 However, it does not follow from the provisions of Regulation No 1049/2001 that the right of access to documents enjoyed by national judicial authorities allows derogation from the general rule of public access to the documents of the institutions established by Regulation No 1049/2001, particularly bearing in mind the case-law referred to in paragraph 90 above, according to which the exceptions to the said right are to be interpreted strictly and are exhaustively listed in Article 4 of Regulation No 1049/2001.

173 Therefore, concerning documents which concern the calculation of the demand for recovery, the Commission was wrong to refuse to disclose its content on the ground that the said calculation forms the subject-matter of a dispute pending before a Belgian national court.

174 It follows from the above additional considerations that none of the four abstract and general grounds used by the Commission, on the subject of the documents listed in paragraph 134 above, can support, over and above the concrete and individual grounds, a refusal to disclose the said documents.

175 Having regard to the unlawfulness found, primarily, in paragraph 150 above, it is necessary, without there being any need to examine the applicant's argument as to the existence of a higher public interest, to uphold the fourth plea in its entirety, and thus annul the contested decision in so far as it expressly refuses to grant the applicant access to the documents on file relating to contract LIEN 97-2001 which are listed in paragraph 134 above, by relying on the exception under the provisions of the second subparagraph of Article 4(3) of Regulation No 1049/2001.

The second plea, claiming infringement of the duty to state reasons

176 First, the applicant accuses the Commission, on the one hand, of not justifying the reasons why the number of documents, the content of which was declared either partly or wholly outside the scope of the request for unlimited access to the documents on file relating to contract LIEN 97-2011, increased between the initial response and the contested decision. Second, the Commission did not explain, first,

on what legal basis it relied in stating that certain documents or parts of documents were wholly or partially outside the scope of that request for access and, second, the reasons why the file relating to contract LIEN 97-2011 contains documents or parts of documents which are foreign to the said subject-matter. The applicant adds that these incoherencies, or even contradictions, which arise from the contested decision, are clearly referred to in two letters which it sent to the President of the Commission, on 11 June 2010 and 11 August 2010 respectively, annexed to the reply.

177 The Commission argues that the second plea is without foundation and, in that respect, considers that it has complied to a sufficient legal standard with its duty to state reasons as regards application of the exceptions on which its decision to refuse to grant full access to the documents on file relating to contract LIEN 97-2011 is based.

178 In this case, it should be noted at the outset that the two letters sent by the applicant to the President of the Commission, on 11 June 2010 and 11 August 2010 respectively, were sent after the adoption of the contested decision and the lodging of the application in the present case. As such letters were drafted by the applicant itself, they cannot be regarded as constituting evidence the existence of which the applicant discovered during the procedure in progress. Such a qualification would allow a party to constitute evidence itself and to circumvent the rule on the production of evidence by the applicant at the application stage, as laid down in Article 44 of the Rules of Procedure. Moreover, for the same reason, it is not possible to take the view that, the existence of those letters having been revealed during the present proceedings, they constitute new factors which allow the production of a new plea, within the meaning of Article 48(2) of the Rules of Procedure.

179 Therefore, the Court must dismiss the application of the applicant to place on file in this case the two letters sent to the President of the Commission on 11 June 2010 and 11 August 2010 respectively.

180 Primarily, it should be remembered that, in accordance with the case-law, the obligation to provide a statement of reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049, paragraph 94).

181 Moreover, according to settled case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the EU judicature to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, *Sison* v *Council*, cited in paragraph 90 above, at paragraph 80).

182 As regards an application for access to documents, where the institution in question refuses such access, it must demonstrate in each individual case, on the basis of information which it has at its disposal, that the documents to which access is sought do indeed fall within the exceptions listed in Article 4 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 60; Case T-93/04 *Kallianos* v *Commission* [2006] ECR-SC I-A-2-115 and II-A-2-537, paragraph 90). Under that case-law, it is therefore for the institution which has refused access to a document to provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine (*Sison*, paragraph 61).

183 In the present case, in order to assess whether the second plea is well founded, it is necessary to distinguish the three following categories of documents:

— documents in respect of which the Commission has not taken a decision on the ground that, not having been the subject-matter of a confirmatory application within the meaning of Article 8 of Regulation No 1049/2001, they were outside the scope of the application for access in question;

— documents in respect of which the Commission has not taken a decision on the ground that, since they do not concern contract LIEN 97-2011, they were outside the scope of the application for access in question;

— documents, or passages of documents, in respect of which the Commission has refused to allow the applicant access on the ground that they fell within one of the exceptions listed in Article 4 of Regulation No 1049/2001.

Documents in respect of which the Commission has not taken a decision on the ground that, not having been the subject-matter of a confirmatory application, they were outside the scope of the application for access

184 It is undisputed that these documents are the other documents sent to the colleague of the ombudsman, as they are designated in the initial application.

185 In respect of those documents, it must be held that the Commission's failure to take a decision, whereas, as stated in paragraph 61 above, it is expressly clear from the initial application that the applicant had sought unlimited access to the other documents sent to the colleague of the ombudsman, must be classified as an implied refusal of access, for the purposes of Article 8 of Regulation No 1049/2001, in respect of which an action may be brought before the General Court.

186 Such an implied refusal implies, by definition, an absolute lack of reasoning. It follows that the arguments and affirmations made in that respect by the Commission before the Union judicature, even assuming them to be correct, cannot remedy such a lack of reasoning (see, to that effect, Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151, paragraph 48; Case T-318/00 *Freistaat Thüringen* v *Commission* [2005] ECR II-4179, paragraph 127). That applies in particular as regards the alleged imprecision in the terms of the initial application. As has been held in paragraphs 83 and 85 above, in such a case, it was for the Commission, in accordance with Article 6(2) of Regulation No 1049/2001 and the principle of sound administration, to invite the applicant to define more precisely the documents requested, which, moreover, it did not do in this case.

187 It follows from the above considerations that, as regards the other documents sent to the colleague of the ombudsman, the contested decision entails an implied refusal of access to those documents requested by the applicant and that that refusal does not satisfy the duty to state reasons which Article 296 TFEU imposes on EU institutions.

Documents in respect of which the Commission has not taken a decision on the ground that, since they do not concern contract LIEN 97-2011, they were outside the scope of the application for access

188 Concerning these documents, it should be noted at the outset that, in reply to a question put by the General Court during the hearing, the applicant expressly confirmed that its application for access related only to documents which concerned contract LIEN 97-2011. Having regard to the subject-matter of that application, as confirmed at the hearing by the applicant, it thus needs to be examined, on the basis of the Commission's response to the second measure of inquiry, whether it

was right to take the view that the content of certain documents in the file relating to contract LIEN 97-2011 were wholly or partially extraneous to that subject-matter. In that respect, it should be remembered that the said documents are those referred to in point 3.1 of the contested decision.

– Documents the content of which is allegedly wholly extraneous to the scope of the application for access

189 Concerning the documents the scope of which the Commission considers to be wholly extraneous to the scope of the application for access, the latter may be identified, in relation to point 3.1 of the contested decision and annexed table as follows:

— file 1: document 7/1999, sub-part 1 (which corresponds to the email sent to the European Volunteer Centre on 30 March 1999 at 09.50);

— file 4, part I: document 6/1999 (only mentioned in the table annexed to the contested decision (page 5));

— file 4, part II: documents 15/1999, 21/1999, 23/1999, 24/1999, 26/1999, 1/2000, 5/2000, 6/2000, 10/2000, 11/2000, 14/2000, 4/2001 and 6/2001.

190 At the conclusion of the examination of the Commission's response to the second measure of inquiry, the Court finds, first, that the content of the following documents, referred to by the Commission as being wholly extraneous in their content to the subject-matter of the applicant's application for access, is, on the contrary — directly or indirectly and wholly or partially, without it being the task of the Court to designate in this judgment the passages in question in the said documents — connected with the subject-matter of the application for access to the file of contract LIEN 97-2011, namely:

— file 1: document 7/1999, sub-part 1;

— file 4, part I: document 6/1999;

— file 4, part II: documents 15/1999, 21/1999, 24/1999, 26/1999, 1/2000, 10/2000 and 6/2001.

191 Next, concerning document 23/1999 of file 4, part II, of the file relating to contract LIEN 97-2011, the Court finds that, contrary to what the Commission indicated on page 12 of the table annexed to the contested decision, its content does not relate exclusively to a meeting which did not concern contract LIEN 97-2011. Whilst that is the case as regards the second sub-part of the said document, which begins with 'Now, another very important issue', the content of the first sub-part of the same document, which begins after the introduction 'Dear Isabella', does concern contract LIEN 97-2011.

192 Similarly, concerning document 6/2000 of file 4, part II, of the file relating to contract LIEN 97-2011, the Court finds that that document contains, first, a first sub-part reproducing an email the subject-matter of which does not concern contract LIEN 97-2011 and, second, a second sub-part containing handwritten notes. Those notes are sufficiently legible to be able to identify the chronology of events in connection with contract LIEN 97-2011. Moreover, some of the said events are described in document 23/1999 in file 4, part I, of the file relating to contract LIEN 97-2011, the said document having been made public, save for line 49 of the table which it contains. Consequently, only the content of the first sub-part of document 6/2000 of file 4, part II, of the file relating to contract LIEN 97-2011 concerns a subject extraneous to the subject-matter of the applicant's application for access.

193 Finally, concerning the following documents, the Court finds that the Commission was right to regard their content as wholly extraneous to the subject-matter of the applicant's application for access: file 4, part II: documents 5/2000, 11/2000, 14/2000 and 4/2001.

194 It follows from the above findings that, as regards the documents listed in paragraph 190 above, document 23/1999 (sub-part 1) of file 4, part II, and document 6/2000 (sub-part 2) of file 4, part II, it must be held that, as in the case of the conclusion drawn in paragraph 187 above, the contested decision entails an implied refusal of access to those documents requested by the applicant and that that refusal does not satisfy the duty to state reasons which Article 296 TFEU imposes on EU institutions.

– Documents the content of which is alleged to be partially extraneous to the scope of the application for access

195 Concerning these documents, the latter may be identified, having regard to point 3.1 of the contested decision and the annexed table, as follows:

— file 1: documents 1/1999, 2/1999 and 6/1999;

— file 2: documents 1/1999 and 5/1999;

— file 4, part I: documents 1/1999, 3/1999 (box 1), 14/2001 (box 4) and 19/2001 (boxes 1 and 2);

— file 4, part II: documents 1/1999, 2/1999, 5/1999, 12/1999, 18/1999, 20/1999, 22/1999, 2/2000 to 4/2000, 8/2000, 9/2000 and 9/2001.

196 At the conclusion of the examination of the Commission's response to the second measure of inquiry, the Court finds that the content of the following documents, referred to by the Commission as being wholly extraneous in their content to the subject-matter of the applicant's application for access, is, on the contrary, directly or indirectly connected with the contract LIEN 97-2011:

— file 1: documents 2/1999 and 6/1999 (box 1);

— file 2: document 1/1999;

— file 4, part I: documents 3/1999 (box 1), 14/2001 (box 4) and 19/2001 (boxes 1 and 2);

— file 4, part II: documents 1/1999 (box 1), 12/1999, 3/2000 (box 3), 8/2000 and 9/2001 (box 4).

197 By contrast, with regard to the content of the following documents, the Court finds that the Commission was right to regard it as extraneous to the subject-matter of the application for access:

— file 1: document 1/1999;

— file 2: document 5/1999;

— file 4, part I: document 1/1999;

— file 4, part II: documents 1/1999 (boxes 2 to 4), 2/1999 (boxes 1 and 3), 5/1999, 18/1999 (box 3), 20/1999 (box 11), 22/1999, 2/2000 (boxes 1 and 3), 3/2000 (box 1), 4/2000 (box 2) and 9/2000.

198 It follows from the above findings that, as regards the documents listed in paragraph 196 above, it must be held that, as in the case of the conclusion drawn in paragraph 187 above, the contested decision entails an implied refusal of access to those documents requested by the applicant and that that refusal does not satisfy the duty to state reasons which Article 296 TFEU imposes on EU institutions.

Documents in respect of which the Commission has refused to allow the applicant access on the ground that they fell within one of the exceptions listed in Article 4 of Regulation No 1049/2001

199 Concerning the content of these documents, it should, first of all, be remembered that the Commission, in refusing the applicant access, relied on the provisions of Article 4(1)(b) and the second subparagraph of Article 4(3) of Regulation No 1049/2001.

200 It is, admittedly, apparent from the contested decision that it contains, under heading 4 'Grounds for refusal', a summary of all the reasons why the Commission considered that disclosure of the content of the documents concerned would have undermined the objectives protected respectively by Article 4(1)(b) and the second subparagraph of Article 4(3) of Regulation No 1049/2001, and should, therefore, have been refused by virtue of those articles.

201 However, as pointed out in paragraph 181 above, the statement of reasons required must, in particular, allow the Union judicature to exercise its power of review. Moreover, having regard to the case-law cited in paragraph 182 above, it needs to be verified whether the documents in relation to which the Commission relied on the provisions of Article 4(1)(b) and the second subparagraph of Article 4(3) of Regulation No 1049/2001 do in fact concern the area referred to by the exception pleaded and, moreover, whether the need for protection in relation to that exception is genuine.

202 First, concerning documents in relation to which the Commission relied on the exception under Article 4(1)(b) of Regulation No 1049/2001 of Regulation No 1049/2001, it is apparent from the findings made in paragraphs 106 and 110 above that the said documents do in fact concern the area referred to by the said exception. Moreover, it is apparent from paragraphs 97 to 126 above that the General Court has been able to exercise its judicial review of the contested decision in so far as it concerns the said documents. Consequently, concerning the latter, the Commission has satisfied the obligation to state reasons which Article 296 TFEU imposes on EU institutions.

203 Second, concerning documents in relation to which the Commission relied on the exception under the second subparagraph of Article 4(3) of Regulation No 1049/2001, notwithstanding the fact that the Court has concluded in paragraph 155 above that the documents listed in paragraph 154 above clearly do not constitute opinions within the meaning of that provision, it must be held that, moreover, the Commission has not indicated, contrary to the requirements laid down by the case-law referred to in paragraph 182 above, in what way the said documents, in its view, contained such opinions. Therefore, the refusal to disclose the documents listed in paragraph 154 above does not satisfy the duty to state reasons which Article 296 TFEU imposes on EU institutions.

204 On the other hand, concerning documents, other than those listed in paragraph 154 above, in relation to which the Commission relied on the exception under the second subparagraph of Article 4(3) of Regulation No 1049/2001, it is apparent from the grounds set out in paragraphs 134 to 174 above concerning the fourth plea that, notwithstanding the unlawfulness established as the main finding, first, the said documents do indeed concern the area referred to by the said exception and, second, the General Court has been able to exercise its judicial review of the contested decision in so far as it concerned the said documents. Consequently, concerning the latter, the Commission has satisfied the duty to state reasons which Article 296 TFEU imposes on EU institutions.

205 It follows from the whole of the conclusions drawn in paragraphs 187, 194, 198, 203 and 204 above that the second plea must be upheld in part.

206 It follows from the conclusions drawn, respectively, in paragraphs 87, 126, 175 and 205 above that the action is partially well founded and that, on that basis, the contested decision must be annulled in so far as, first, it impliedly refuses to grant access to the other documents sent to the colleague of the ombudsman and, second, it expressly refuses to grant access to the documents on the file relating to contract LIEN 97-2011 referred to in paragraphs 106, 134, 190 and 196 above.

Costs

207 In accordance with the first subparagraph of Article 87(3) of the Rules of Procedure, the General Court may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads.

208 In the circumstances of the present case, given that the Commission has been unsuccessful in most of its claims, the Court considers it a just assessment to order the Commission to bear its own costs and four fifths of the costs incurred by the applicant.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Annuls the decision of the European Commission of 29 April 2010 in so far as it impliedly refuses access to the documents which it sent to the colleague of the European Ombudsman, other than those identified by the latter in files 1 to 4 of the file relating to contract LIEN 97-2011;**

2. **Also annuls the Commission's decision of 29 April 2010 in so far as it expressly or impliedly refuses access to the documents of the file relating to contract LIEN 97-2011 referred to in paragraphs 106, 134, 194 and 196 of this judgment;**

3. **Dismisses the action as to the remainder;**

4. **Orders the Commission to bear its own costs and four fifths of the costs incurred by Internationaler Hilfsfonds eV.**

Pelikánová Jürimäe Van der Woude

Delivered in open court in Luxembourg on 22 May 2012.

[Signatures]

Table of contents

Background 1

Procedure 5

Forms of order sought 5

Admissibility of the content of the letters lodged by the applicant at the registry of the General Court on 29 July 2010 and 11 July 2011

Substance

Preliminary observations 7

The first plea, claiming, in essence, manifest error of assessment as to the determination of the subject-matter of the initial application and, consecutively, infringement of the Commission's obligation to give the said application a full examination 8

The subject-matter of the initial application 9

The legality of the absence of any decision by the Commission concerning the application for full access to the other documents sent to the colleague of the Ombudsman 10

The third and fourth pleas, claiming, respectively, infringement of the provisions of Article 4(1)(b) and the second subparagraph of Article 4(3) of Regulation No 1049/2001 13

Preliminary reminders 13

The third plea, claiming infringement of the provisions of Article 4(1)(b) of Regulation No 1049/2001 . 14

The fourth plea, alleging infringement of the provisions of the second subparagraph of Article 4(3) of Regulation No 1049/2001 18

– Principal considerations 19

– Additional considerations 21

The second plea, claiming infringement of the duty to state reasons 24

Documents in respect of which the Commission has not taken a decision on the ground that, not having been the subject-matter of a confirmatory application, they were outside the scope of the application for access 26

Documents in respect of which the Commission has not taken a decision on the ground that, since they do not concern contract LIEN 97-2011, they were outside the scope of the application for access 26

– Documents the content of which is allegedly wholly extraneous to the scope of the application for access 27

– Documents the content of which is alleged to be partially extraneous to the scope of the application for access 28

Documents in respect of which the Commission has refused to allow the applicant access on the ground that they fell within one of the exceptions listed in Article 4 of Regulation No 1049/2001 29

Costs 30