Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 14 April 2015 [1]

Case C-615/13 P

ClientEarth
Pesticide Action Network Europe
v

European Food Safety Authority

(Appeal — Access to documents of the institutions — Regulation No 1049/2001 and Regulation No 45/2001 — Documents relating to the drawing up of guidance concerning the scientific documents to be included in applications for authorisation to place plant protection products and the active substances contained in those products on the market — Partial refusal of access — Exception concerning protection of privacy and the integrity of the individual — Concept of 'personal data' — Conditions for transferring personal data — Establishing the 'necessity' of a transfer)

1. This case offers the Court of Justice an opportunity of ruling on a question rather similar to an issue that has repeatedly arisen in its case-law, namely, that of the interaction between the general or ordinary regulatory scheme relating to access to the documents of the institutions laid down in Regulation (EC) No 1049/2001, [2] and the specific or special schemes laid down in other EU legislative provisions. [3] This case is not, however, concerned so much with harmonising the provisions of Regulation No 1049/2001 with those of a regulation governing access to the documents involved in particular procedures, [4] as with reconciling, rather more generally, the regulatory scheme relating to access under that regulation with the rules on the processing of personal data laid down in Regulation (EC) No 45/2001. [5]

2. In particular, this is the first time the occasion has arisen for the Court of Justice to rule on the requirement for 'the recipient [*to establish*] *the necessity* [6] of having the [personal] data transferred' within the meaning of Article 8(b) of Regulation No 45/2001 in a case in which such data, sought pursuant to Regulation No 1049/2001, relate to the authorship of certain professional opinions prepared for an institution.

1 — Original language: Spanish.

2 — Regulation of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43, 'Regulation No 1049/2001').

3 — For example, in relation to procedures for reviewing State aid, *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2010:376), infringement procedures, *LPN and Finland* v *Commission* (C-514/11 P and C-605/11 P, EU:C:2013:738) or court proceedings, *Sweden and Others* v *API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541).

4 — Typically in the field of competition law, both in relation to mergers (*Commission* v *Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393), and in proceedings relating to concerted practices (*Commission* v *EnBW*, C-365/12 P, EU:C:2014:112). In this regard, see Lenaerts, K., 'The Interplay between Regulation No 1049/2001 on Access to Documents and the Specific EU Regulations in the Field of Competition Law', *Mundi et Europae civis, Liber Amicorum Jacques Steenbergen*, Larcier, Brussels, 2014, pp. 483 to 492.

5 — Regulation 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, 'Regulation No 45/2001').

6 — Emphasis added.

I – **Legislative framework**

A – *Regulation No 45/2001*

3. Article 2(a) of Regulation No 45/2001 defines the concept of 'personal data' as 'any information relating to an identified or identifiable natural person' and provides 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'.

4. Article 8 of that regulation, headed 'Transfer of personal data to recipients, other than Community institutions and bodies, subject to Directive 95/46 EC', provides:

'Without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC,

(a) if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, or

(b) if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced.'

B – *Regulation No 1049/2001*

5. By virtue of Article 2(1) of Regulation No 1049/2001, '[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation'.

6. Under the heading 'Exceptions', Article 4(1) of the Regulation states that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: … (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data'.

7. Under Article 4(3):

'Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

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.'

II – **Background**

8. On 25 September 2009 the European Food Safety Authority ('EFSA') asked one of its units to draw up a guide to preparing applications under Article 8(5) of Regulation (EC) No 1107/2009.[7] The unit in question set up a working group which eventually submitted a draft guidance document to two EFSA bodies, some of whose members were external scientific experts: the Panel on Plant Protection Products and their Residues ('PPR') and the Pesticide Steering Committee ('the PSC').

9. Those experts were invited to submit comments on the draft guidance document. In the light of those comments, the working group incorporated changes into the draft document, which was subject to public consultation between 23 July and 15 October 2010, several bodies, including the environmental organisation Pesticide Action Network Europe ('PAN Europe'), submitting comments.

10. On 10 November 2010, PAN Europe and ClientEarth, another environmental protection organisation, jointly submitted to EFSA an application requesting access to documents under Regulation No 1049/2001 and Regulation No 1367/2006.[8] The application referred to numerous documents related to the preparation of the draft guidance document, including the comments of the external experts on the PPR and the PSC, and the name of the author of each comment.

11. By letter of 1 December 2010 EFSA granted the applicants partial access to the documents requested. On the basis of the exception set out in the second subparagraph of Article 4(3) of Regulation No 1049/2001 (protection of the decision-making process of institutions), it refused to grant access to two sets of documents: (i) various working versions of the draft guidance document; and (ii) the comments of the PPR and PSC experts.

12. The refusal was confirmed by a decision of EFSA adopted on 10 February 2011.

13. The guidance document was adopted and officially published on 28 February 2011.

14. On 11 April 2011 the appellants brought an action before the General Court for annulment of the confirmatory decision of 10 February 2011.

15. On 12 December 2011 EFSA adopted a new decision, notifying the appellants that it had decided to 'withdraw', 'annul' and 'replace' the confirmatory decision of 10 February 2011. In the new decision, EFSA granted access to all the documents requested in the initial application, except for some whose existence it had been unable to establish.

16. So far as the comments of the external experts were concerned, EFSA redacted the names of those experts, relying on the exception under Article 4(1)(b) of Regulation No 1049/2001 (privacy and integrity of the individual) and on EU legislation on the protection of personal data. EFSA stated that disclosure of the names of the experts had to be considered a transfer of personal data within the meaning of Article 8 of Regulation No 45/2001 and that the conditions for such a transfer laid down in that provision had not been satisfied.

7 — Regulation of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ 2009 L 309, p. 1). That provision states that 'scientific peer-reviewed open literature, as determined by [EFSA], on the active substance and its relevant metabolites dealing with side-effects on health, the environment and non-target species and published within the last 10 years before the date of submission of the dossier shall be added by the applicant [for authorisation to place a plant protection product on the market] to the dossier'.

8 — Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13).

17. The appellants sought leave from the General Court to adapt their claim to the new EFSA decision of 12 December 2011, so that their action should thenceforward be regarded as directed against that latter decision.

18. The application lodged in the General Court set out three pleas in law: (A) inapplicability of Article 4(1)(b) of Regulation No 1049/2001 and of Regulation No 45/2001; (B) existence of reasons relating to the public interest justifying disclosure of the experts' names, in accordance with Article 8(a) and (b) of Regulation No 45/2001; (C) infringement of the obligation to state reasons.

III – **The judgment of the General Court**

19. The action was dismissed by the General Court by judgment of 13 September 2013 (the judgment under appeal). [9]

20. With regard to the first plea in law, the General Court took the view that the experts' names constituted personal data within the meaning of Regulation No 45/2001, despite the fact that EFSA had already disclosed the names, biographies and declarations of interests of the external experts, it being irrelevant that EFSA had not shown that the experts had objected to the disclosure of their identities.

21. Regarding the second plea in law, the General Court rejected the argument that the appellants had demonstrated the existence of an overriding public interest, since they knew the names of the experts and had not challenged their independence, and went on to hold that they had failed to establish that disclosure was necessary.

22. With regard to failure to provide reasons, the General Court took the view that it was sufficient for EFSA to show that the appellants had not established that the transfer of the personal data sought was necessary.

IV – **The appeal**

23. ClientEarth and PAN Europe rely on three pleas in law in support of their appeal:

24. (A) Misapplication of the concept of 'personal data' within the meaning of Article 2 of Regulation No 45/2001. (B) Misapplication of Article 4(1)(b) of Regulation No 1049/2001, and of Article 8(b) of Regulation No 45/2001 because of failure to weigh up all the interests protected. (C) Infringement of Article 5 TEU, by imposing a disproportionate burden of proof upon the appellants requiring them to show that access to the disputed information was necessary without adequately weighing this against the importance of the legitimate interests worthy of protection.

V – **Procedure before the Court of Justice**

A – *The first ground of appeal*

25. Arguing against the General Court's decision, ClientEarth and PAN Europe maintain that the data under discussion do not constitute personal data within the meaning of Regulation No 45/2001, observing that this case concerns sets of data of a professional nature that appear separately on the EFSA website.

9 — *ClientEarth and PAN Europe* v *EFSA*, T-214/11, EU:T:2013:483.

26. EFSA and the Commission, supported by the European Data Protection Supervisor ('EDPS'), argue in favour of a broad interpretation of the concept of 'personal data', which would cover much more than information that directly identifies an individual, such as a name or a national registration number. Furthermore, they take the view that a piece of information that is personal, such as a name, does not cease to be personal because it is connected to another piece of information, such as, in this case, a comment.

27. The EDPS further argues that both elements of the information at issue constitute personal data: on the one hand, the names of the experts and, on the other, the opinions expressed by the latter, which relate to their work and conduct in their capacity of independent scientific experts and would make them identifiable by anyone with enough other relevant information to make the right connection.

28. EFSA, the Commission and the EDPS all maintain that it is immaterial that the identities of the experts are public and that EFSA has made their comments public under cover of anonymity. They believe that it is also irrelevant that the personal data in question relate to activities in a professional context, for that would not prevent them being protected as personal data.

29. Finally, these parties argue that the restrictive interpretation of respect for private life put forward by the appellants is not consistent with the provisions of Regulation No 45/2001 and that the scope of Article 8 of the Charter of Fundamental Rights of the European Union ('the Charter') is wider than that of Article 7 of the Charter, covering any information relating to a natural person, including information connected to that person's professional activity. In this regard, the EDPS emphasises that, although the two may sometimes overlap, there are differences between the notions of privacy and of personal data, while EFSA and the Commission add that, in the case-law of both the Court of Justice and the European Court of Human Rights, it is accepted that data concerning activities of a professional nature may be covered by the concept of privacy.

B – *The second ground of appeal*

30. In this section, the appellants criticise the reasons for which the General Court rejected their second plea in law, having concluded that they had not demonstrated that there existed an overriding public interest. In the opinion of ClientEarth and PAN Europe, neither the General Court nor EFSA weighed all the interests protected by Article 4(1)(b) of Regulation No 1049/2001 and Article 8(b) of Regulation No 45/2001, that is to say, the right to transparency, on the one hand, and the protection of privacy, on the other.

31. EFSA and the Commission, with the additional support of the EDPS, maintain that when 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, including Articles 8 and 18 thereof, and the further conditions laid down in Article 4(1)(b) of Regulation No 1049/2001 need not be considered. The appellants were, therefore, required to show the existence of an overriding public interest that might justify the transfer of the personal data sought, which would have allowed EFSA to weigh up the different interests involved. However, ClientEarth and PAN Europe delayed producing that evidence until after legal proceedings had already been commenced, wherefore EFSA could not undertake any weighing up at all when ruling on the application for access to the documents.

C – *The third ground of appeal*

32. ClientEarth and PAN Europe maintain that the General Court infringed the principle of proportionality by rejecting as it did the arguments put forward by the appellants in order to establish the necessity of access to the information requested.

33. In this regard, they argue that because, on the one hand, the interest the General Court sought to protect did not in fact exist, for the names of the experts concerned were publicly available and, on the other, they had demonstrated that the transfer of the data requested was necessary, it remained only for them to establish the existence of legitimate basis laid down by law, in accordance with Article 8(2) of the Charter, which they would have done by relying on the principle of transparency.

34. EFSA, for its part, wonders if the third plea is not inadmissible, given that, in its opinion, the crucial elements of the judgment under appeal are not indicated precisely enough and the appellants confine themselves to reproducing the arguments previously submitted at first instance. As far as the substance is concerned, EFSA agrees with the Commission that the appellants' complaint is manifestly unfounded, since the General Court merely requested them, in accordance with the requirements of Regulation No 45/2001 and with the case-law, to demonstrate their legitimate interest in obtaining the data in question. A requirement that could not be considered disproportionate and that fully guaranteed the necessary balance between the interests and fundamental rights concerned.

VI – **Assessment**

A – *The first ground of appeal*

35. By their first ground of appeal, the appellants argue that the data at issue do not constitute personal data within the meaning of Regulation No 45/2001. It seems clear to me, however, in accordance with the case-law of the Court of Justice on this point, that these are data of a personal nature.

36. In the judgment in *Commission* v *Bavarian Lager*,[10] it was concluded that the list of participants in a meeting held in the context of an infringement procedure contained personal data.[11] In this case, the point is that it is not only the names of the experts that have been requested but that the comments made by each of them in connection with a draft document are sought too.

37. Under Article 2(a) of the Regulation No 45/2001, '"personal data" shall mean any information relating to an identified or identifiable natural person'. In the instant case, a) the persons involved would be identified once their names were made known and, b) additionally, certain information about them would be made available, namely the particular comments submitted by them in the course of pursuing their professional activity. The defining elements of the concept of 'personal data' are therefore clearly present, since the comments submitted by the experts constitute 'information relating to an identified natural person'. Put another way, there is information relating to each of the experts, who are clearly identified by their names.

38. Admittedly, the names of the experts do indeed appear on the EFSA website. However, what the appellants seek is not the names of all the EFSA experts, but only the names of those who submitted comments. They have also applied for access to those comments; not, however, redacted so as to be anonymous, but identifying the author. In short, the names of the experts are public knowledge, as are the comments submitted, but what is requested is the 'intersection' of the two pieces of information, which gives rise to a new piece of 'information relating to an identified … natural person' (Article 2(a) of Regulation No 45/2001). It therefore seems quite clear that what is sought is 'personal data' within the meaning of that regulation.

39. In consequence, I consider that the first ground of appeal must be rejected.

10 — C-28/08 P, EU:C:2010:378.

11 — *Commission* v *Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 70.

B – *The second ground of appeal*

40. The second ground of appeal concerns the debate as to whether the conditions required for the transfer of personal data under Article 8(b) of Regulation No 45/2001, namely: that it is necessary to have the data transferred and that there is no reason to assume that the data subject's legitimate interests might be prejudiced, must be met cumulatively. In the appellants' opinion, the General Court, by taking that approach, did not properly weigh the right to privacy (Article 4(1)(b) of Regulation No 1049/2001), on the one hand, against the right to transparency (Article 8(b) of Regulation No 45/2001), on the other.

41. It should be recalled that, under Article 8(b) of Regulation No 45/2001, personal data may be transferred only 'if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced'.

42. In paragraph 83 of the judgment under appeal, the General Court took the view that these two conditions are cumulative and that, because the appellants had failed to satisfy the first, in other words, they had not established that the transfer of the personal data requested was necessary, there was no need to tackle the second, which was, to determine whether there were reasons to assume that the data subject's legitimate interests might be prejudiced by any such transfer. For the General Court, as can be seen from paragraph 64 of the judgment under appeal, when the recipient does not provide any express legitimate justification or any convincing argument in order to demonstrate the necessity of the transfer, the institution having received the application can neither weigh up the interests of the parties nor verify whether the second condition laid down in Article 8(b) of Regulation No 45/2001 has been satisfied and is, therefore, entitled to refuse the application for access.

43. It is clear to me that each of the two conditions mentioned in Article 8(b) of Regulation No 45/2001 is addressed to a different person. The first of them is obviously addressed to the 'recipient' of the information, in other words, to the person requesting it. The second, on the other hand, is addressed to the institution that has control of the information requested, for, unlike the first, this condition is not specifically addressed to the recipient, but rather the use of the impersonal form 'there is no …' must refer to the person deciding the application, namely: the institution from which the disclosure has been requested or, as the case may be, the court hearing the appeal against a refusal of the application. Thus, it is for the recipient alone to establish the 'necessity' of the transfer, as the wording of the provision clearly indicates. And it is for the institution alone to verify that 'there is no reason to assume that the data subject's legitimate interests might be prejudiced', since such a 'reason' could exist quite independently of whether the 'necessity' of the transfer of the data to the person requesting it has been established.

44. It is apparent from the foregoing that, the conditions having different objects: on the one hand, the necessity of the transfer — quite independently of any harm that this might cause to the interests of the persons concerned — and, on the other, the possibility of such harm occurring — also viewed independently of the abovementioned necessity –, their fulfilment can only be cumulative, as the General Court correctly concluded, for which reason there was no need to examine the second condition.

45. I therefore take the view that the second ground too must be rejected.

C – *The third ground of appeal*

46. By the third ground of appeal the appellants argue that their putting forward the principle of transparency was enough to substantiate the necessity of having the requested data transferred to them. They take the view that, in the context of a reference to a certain atmosphere of distrust vis-à-vis EFSA, this would be sufficient to justify disclosure of the information requested. They argue that the General Court's requiring the necessity of the transfer to be established was disproportionate.

47. I should sound a preliminary note of warning in relation to the analysis of the third ground of appeal. As pointed out in paragraph 72 of the judgment under appeal, the refusal of access was initially based on the exception relating to protection of the decision-making process (second subparagraph of Article 4(3) of Regulation No 1049/2001), whereas it was only in the decision of 12 December 2011, taken after the application to the General Court had been lodged, that EFSA relied, for the first time, on the exception relating to the protection of personal data (Article 4(1)(b) of Regulation No 1049/2001 and Article 8 of Regulation No 45/2001). This alteration in the terms of the debate means that the appellants cannot be criticised, as EFSA and the Commission have done, for not having demonstrated at the pre-litigation stage the necessity of having the requested data transferred, or in other words, for not having applied the reasoning of Article 8(b) of Regulation No 45/2001 at that stage.

48. It is clear to me that during the pre-litigation stage the appellants could refer only to the exception relied on by EFSA at that time, namely, the exception provided for in the second subparagraph of Article 4(3) of Regulation No 1049/2001 concerning the protection of the decision-making process. It became possible to debate the exception ultimately relied on by EFSA in its decision of 12 December 2011 only during the course of the proceedings before the General Court, and this was in fact what happened, as evidenced by paragraph 73 of the judgment under appeal, which indicates that at the hearing, EFSA and the Commission agreed that the General Court could examine that plea. There is therefore nothing to prevent the issue being debated in the present proceedings too. [12]

49. As far as definition of the concept 'necessity of the transfer of the data' is concerned, it is essential, in my opinion, to start from the principle that in order to interpret it the effects of Regulation No 1049/2001 must be taken into particular consideration, given that the appellants acted in the exercise of the right of access to documents of the institutions, 'the principles, conditions and limits [of which are] defined in [that] Regulation', to quote Article 2(1) of Regulation No 1049/2001.

50. It is, therefore, necessary in the case of Regulation No 45/2001 too to coordinate its specific regulatory scheme on access to documents with the general scheme laid down in Regulation No 1049/2001, just as the Court has done in those areas in which the EU legislature has created specific legislation on access, as in the field of competition [13] or in relation to court proceedings [14] or infringement procedures. [15]

51. In the case of Regulation No 45/2001, the need of such coordination is not merely the result of a general systemic requirement, dictated by the existence of different sets of rules on access applicable to the same document. It is not only that, various sets of rules on access potentially being applicable, it is necessary to arrive at an integrated systematic interpretation of all of them with the purpose of

12 — However, it is somewhat contradictory that the General Court had stated in paragraph 68 of the judgment under appeal that the appellants had not provided any evidence, before the adoption of the decision of 12 December 2011, capable of demonstrating that the transfer of the personal data in question was necessary, which meant that EFSA was therefore not in a position either to weigh up the various interests of the parties or to verify whether there was any reason to assume that the data subjects' legitimate interests might be prejudiced and was also unable to state reasons in that regard in the contested decision. The General Court did, nevertheless, consider whether the appellants had any justification, albeit to decide that they did not.

13 — *Commission* v *Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112.

14 — *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541.

15 — *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738.

reaching a satisfactory solution for the interests protected by each of those schemes. Unlike the position with other regulatory provisions on access to documents, this integrated systematic interpretation is specifically required by Regulation No 1049/2001 itself, which states in Article 4(1)(b) that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: … (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection [of personal data]'. The Court of Justice has inferred from this 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, including Articles 8 and 18 thereof',[16] such that a 'particular and restrictive interpretation … [of] Article 4(1)(b) of Regulation No 1049/2001 does not correspond to the equilibrium which the Union legislature intended to establish between the two regulations in question'.[17]

52. It is the Court's call for 'equilibrium' between the objectives of the two regulations that I think worth underlining here in order to address the issues to which this case gives rise.

53. I am certainly of the view that the spirit of 'equilibrium' to which the Court refers means that we cannot rule out 'at the outset' the application of Article 8(b) of Regulation No 45/2001, as was done in *Commission* v *Bavarian Lager*.[18] That is quite different from saying that the categories referred to in that regulation must be applied without alteration in the context of any request for access to documents of the institutions, in other words, without due attention being paid to the nature of the information specifically sought.

54. It is, in my opinion, clear that the 'necessity' to which Regulation No 45/2001 refers cannot be understood with the same rigour or scope when access is sought to documents quite devoid of public interest as when the application concerns information of obvious public interest and relating to an individual's professional activities, as is the case here. Activities that, while 'personal' too, as the Court found in *Commission* v *Bavarian Lager*,[19] are so to a lesser degree than those relating to conduct unrelated to the profession of the person concerned.

55. The concept of 'necessity' must, therefore, be relaxed to a certain extent when the personal data are not, so to speak, the main object of the request for information, but the request relates instead to documents of a public nature that incidentally include information relating to individuals and, as such, contain 'personal data'.[20] Admittedly, the data are 'personal' in so far as they contain 'information relating to an identified … natural person' (Article 2(a) of Regulation No 45/2001), but this is *prima facie* 'professional data' and therefore less sensitive than information falling within the ambit of privacy or private life *sensu stricto*.

56. In other words, a 'balanced interpretation' of the two regulations would indicate that, when assessing 'necessity', a distinction must necessarily be drawn between cases in which a request is made for personal data totally unrelated, *prima facie*, to any public decision-making process and other cases in which data associated in some way with the actions of a public authority are requested.

16 — *Commission* v *Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 63.

17 — *Commission* v *Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 65.

18 — *Commission* v *Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 64.

19 — *Commission* v *Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraphs 68 to 70.

20 — In this respect I am substantially in agreement with the classificatory approach proposed by Advocate General Sharpston in her Opinion in *Commission* v *Bavarian Lager*, C-28/08 P, EU:C:2009:624, points 158 to 166.

57. The appellants take the view that they needed only to invoke the principle of transparency in order to establish that it was necessary to have the requested data transferred to them. They did so in the context of a reference to an atmosphere of mistrust as regards EFSA, for there had been certain suspicions of partiality and of appointing to its panels members with certain personal interests. In particular, it is stated, in paragraph 79 of the judgment under appeal, that a study by PAN Europe pointed out that eight out of 13 members of an EFSA working group were linked to industry lobbies.

58. The response of the General Court, in paragraph 80 of the judgment under appeal, was that the appellants had been informed of the names of the experts concerned and given access to their declarations of interests. Inasmuch as the appellants did not challenge the independence of any of those experts, the General Court took the view that it was not necessary to examine whether the suspicions as to lack of impartiality could justify the access sought.

59. I do not share the General Court's opinion, for it seems to me that the reference to an element of mistrust as to EFSA's impartiality is enough to establish the necessity of having the data transferred, particularly if the data in question, although 'personal', relate to the professional activity of the individuals concerned.

60. To require the appellants, above and beyond putting forward the element of suspicion concerning EFSA's impartiality, based on indications of which some documentary evidence is produced, to challenge the independence of certain experts formally specifically, would mean not only imposing on the appellants a manifestly disproportionate burden for the purposes of substantiating the necessity of having the data requested transferred, but also destroying the balance of the relationship between the objectives sought by the two regulations. Such a requirement might be appropriate if it were a matter of challenging the validity of the studies or taking action against the experts' conduct, but in the context of the present case, it is simply a question of collecting the information and the data needed to enable an assessment to be made of, precisely, whether EFSA's impartiality can seriously be questioned and, if so, whether action may be taken against EFSA itself or against any of its experts. In essence, this is simply a case of enabling exercise of the right to demand accountability of those who may have acted improperly. Ultimately, then, this is the classic situation in which the principle of transparency and the right of access to information play a part.

61. Consequently, I am of the opinion that in this case the appellants have adequately established the 'necessity' to which Article 8(b) of Regulation No 45/2001 refers and that the third ground of appeal should therefore be upheld.

62. This does not, however, mean that the documents requested are to be transferred, for Article 8(b) requires also (and, as I have mentioned, cumulatively) that 'there [be] no reason to assume that the data subject's legitimate interests might be prejudiced [by such transfer]'. This second requirement was not, however, examined by the General Court, which took the view that, the first requirement not having been met, there was no need to determine whether any such reasons existed.

63. It follows that it will be when it gives a new ruling that the General Court will be able to examine the issue from the perspective of the legitimate interests of the persons concerned, that is to say, the experts who submitted every one of the comments requested by the appellants and whose interests, precisely because the information relates to their professional activities, might well be served by their authorship being made public.

VII – **Final judgment in the dispute by the Court of Justice**

64. Under Article 61 of the Statute of the Court of Justice, 'if the appeal is well founded, the Court of Justice shall quash the decision of the General Court', but 'may itself give final judgment in the matter where the state of the proceedings so permits'.

65. In my opinion, these are not circumstances in which the Court of Justice may properly give final judgment in the matter. This is because, as I have explained, the General Court has not considered whether the second of the conditions mentioned in Article 8(b) of Regulation No 45/2001, namely, that the transfer of the data might prejudice the legitimate interests of the persons concerned, has been met in this case.

VIII – **Costs**

66. Pursuant to Article 138(1) of the Rules of Procedure, which applies to the procedure on appeal by virtue of Article 184(1) of the Rules of Procedure, I propose that the Court order EFSA to pay the costs.

IX – **Conclusion**

67. In the light of the foregoing considerations, I propose that the Court should:

(1) uphold the third ground of appeal;

(2) set aside the judgment of the General Court in *ClientEarth and PAN Europe* v *EFSA* (T-214/11, EU:T:2013:483);

(3) refer the case back to the General Court for it to decide whether the legitimate interests of the persons affected by the transfer of the personal data requested might be prejudiced;

(4) order EFSA to pay the costs.