Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 6 April 2017 [1]

Case C-331/15 P

French Republic
v

Carl Schlyter

(Appeal — Access to documents — Detailed opinion of the Commission concerning a draft Order relating to the annual declaration of nanoparticle substances communicated to the Commission by the French authorities pursuant to Directive 98/34/EC — Decision of the Commission refusing access — Regulation (EC) No 1049/2001 — Third indent of Article 4(2) — Exception to the right of access — Protection of the purposes of the investigations)

Introduction

1. By its appeal, the French Republic asks the Court to set aside the judgment of the General Court of the European Union of 16 April 2015, *Schlyter* v *Commission* (T-402/12, EU:T:2015:209, 'the judgment under appeal'), whereby the General Court upheld the action brought by Mr Carl Schlyter for annulment of the Commission's Decision of 27 June 2012 ('the decision at issue').

2. By the decision at issue, the European Commission refused, on the basis of the third indent of Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [2] to grant Mr Schlyter access during the 'standstill' or 'suspension' period [3] to the Commission's detailed opinion [4] concerning a draft Order relating to the content and submission conditions of the annual declaration of nanoparticle substances (2011/673/F), which had been notified to it by the French authorities pursuant to Directive 98/34, as amended by Directive 98/48/EC of the European

1 Original language: French.

2 OJ 2001 L 145, p. 43.

3 Provided for in the second indent of Article 9(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37).

4 Delivered in application of the second indent of Article 9(2) of Directive 98/34.

Parliament and of the Council of 20 July 1998.[5] That position was based on an analogy between, on the one hand, the procedure laid down in Directive 98/34 and, on the other hand, the infringement procedure laid down in Article 258 TFEU and the State aid procedure laid down in Article 108 TFEU.[6]

3. The present appeal concerns the exception provided for in the third indent of Article 4(2) of Regulation No 1049/2001 on the protection of the purpose of inspections, investigations and audits, and more specifically whether a detailed opinion issued by the Commission in the context of the procedure laid down by Directive 98/34 forms part of an investigation within the meaning of that provision.

4. It will therefore be necessary to examine the characteristics of the procedure laid down in Articles 8 and 9 of Directive 98/34 in order to ascertain whether that procedure is an investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

5. In addition, if the detailed opinion issued by the Commission in the context of the procedure laid down in Articles 8 and 9 of Directive 98/34 of Regulation No 1049/2001 does form part of an investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001, the question will arise whether, in the present case, disclosure of that document would undermine the purpose of the procedure laid down in Directive 98/34.

Legal context

Directive 98/34

6. Article 8 of Directive 98/34 provides as follows:

‘1. Subject to Article 10, Member States shall immediately communicate to the Commission any draft technical regulation …; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft.

…

The Commission shall immediately notify the other Member States of the draft and all documents which have been forwarded to it. …

With respect to the technical specifications …, the comments or detailed opinions of the Commission or Member States may concern only aspects which may hinder trade or, in respect of rules on services, the free movement of services or the freedom of establishment of service operators and not the fiscal or financial aspects of the measure.

5 OJ 1998 L 217, p. 18. It should be noted that Directive 98/34 was repealed by Article 10 of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1). Since Directive 98/34 had ‘been amended several times [it was] in the interests of clarity and rationality [that] that Directive should be codified’ (see recital 1 of Directive 2015/1535). I would observe, in that regard, that Articles 5 and 6 of Directive 2015/1535 (which, *ratione temporis*, are not applicable to the present case) essentially correspond to Articles 8 and 9 of Directive 98/34.

6 See paragraph 41 of the judgment under appeal. In the decision at issue, the Commission emphasised that both the State aid procedure and the procedure laid down in Directive 98/34 are bilateral in nature and that the Commission’s detailed findings and comments are addressed solely to the Member State concerned.

2. The Commission and the Member States may make comments to the Member State which has forwarded a draft technical regulation; that Member State shall take such comments into account as far as possible in the subsequent preparation of the technical regulation.

3. Member States shall communicate the definitive text of a technical regulation to the Commission without delay.

4. Information supplied under this Article shall not be confidential except at the express request of the notifying Member State. Any such request shall be supported by reasons. …

…'

7. Article 9 of that directive provides as follows:

'1. Member States shall postpone the adoption of a draft technical regulation for three months from the date of receipt by the Commission of the communication referred to in Article 8(1).

2. Member States shall postpone:

– …

– without prejudice to paragraphs 3, 4 and 5, for six months the adoption of any other draft technical regulation (except for draft rules on services),

from the date of receipt by the Commission of the communication referred to in Article 8(1) if the Commission or another Member State delivers a detailed opinion, within three months of that date, to the effect that the measure envisaged may create obstacles to the free movement of goods within the internal market;

…

The Member State concerned shall report to the Commission on the action it proposes to take on such detailed opinions. The Commission shall comment on this reaction.

…

3. With the exclusion of draft rules relating to services, Member States shall postpone the adoption of a draft technical regulation for twelve months from the date of receipt by the Commission of the communication referred to in Article 8(1) if, within three months of that date, the Commission announces its intention of proposing or adopting a directive, regulation or decision on the matter in accordance with Article [288 TFEU].'

Regulation No 1049/2001

8. Regulation No 1049/2001 defines the principles, conditions and limits governing the right of access to documents of the EU institutions provided for in Article 15 TFEU.

9. Article 2 of that regulation, entitled 'Beneficiaries and scope', is worded as follows:

'1. Any 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.

2. The institutions may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.

…'

10. Article 4 of that regulation sets out exceptions to the right of access to EU institution documents, those relevant for present purposes being found in paragraph 2, which provides:

'The institutions shall refuse access to a document where disclosure would undermine the protection of:

– commercial interests of a natural or legal person, including intellectual property,

– court proceedings and legal advice,

– the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.'

11. Article 4(6) of that regulation provides as follows:

'If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released'.

12. Article 4(7) of Regulation No 1049/2001 provides as follows:

'The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. …'

The facts

13. On 29 December 2011, the French authorities notified to the Commission, in accordance with Article 8(1) of Directive 98/34, a draft Order relating to the content and submission conditions of the annual declaration of nanoparticle substances, adopted pursuant to Articles R. 523-12 and R. 523-13 of the Environment Code ('the draft Order').

14. In accordance with Article 9(1) of Directive 98/34, the standstill period of three months from the receipt by the Commission of the communication referred to in Article 8(1) of that directive began on 30 December 2011. In March 2012, during that 'standstill' period, the Federal Republic of Germany requested and later received additional information from the French authorities concerning the draft Order.

15. On 30 March 2012, the Commission delivered a detailed opinion, which had the effect, in accordance with the second indent of Article 9(2) of Directive 98/34, of extending the initial 'standstill' period provided for in Article 9(1) of Directive 98/34 ('the detailed opinion') by an additional three months. On 2 April 2012, the United Kingdom of Great Britain and Northern Ireland also submitted its comments on the draft Order, in accordance with Article 8(2) of that directive. The French authorities replied to the United Kingdom's comments on 6 June 2012.

16. By letter of 16 April 2012, that is to say, during the 'standstill' period, Mr Schlyter requested access to the detailed opinion of the Commission referred to in point 15 of this Opinion.

17. By letter of 7 May 2012, the Commission refused the request for access of 16 April 2012, relying on the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001 and taking the view that partial access was not conceivable on the ground that the whole document was covered by the exception relied on. Moreover, it took the view that there was no overriding public interest in disclosure of the document in the circumstances of the present case.

18. On 29 May 2012, on the basis of Article 7(2) of Regulation No 1049/2001, Mr Schlyter sent the Commission a confirmatory application requesting that it reconsider its position.

19. On 27 June 2012, the Commission, by the decision at issue, rejected Mr Schlyter's confirmatory application, on the following grounds.

20. The Commission took the view, in point 3 of the contested decision, headed 'Protection of the purpose of investigations', that disclosure of the detailed opinion in question would undermine the protection of the purpose of investigations, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

21. In point 4 of the contested decision, headed 'Partial access', the Commission stated that the same was true in respect of the whole of the document to which access had been requested, which precluded any partial disclosure pursuant to Article 4(6) of Regulation No 1049/2001.

22. In point 5 of the contested decision, headed 'Overriding public interest in disclosure', the Commission took the view that there was not, moreover, any overriding public interest, within the meaning of Article 4(2) *in fine* of Regulation No 1049/2001, which would, nevertheless, justify disclosure of the document.

23. The 'standstill' period relating to the draft Order ended on 2 July 2012. The French Republic replied to the Commission's detailed opinion on 16 July 2012. On 26 July 2012, the Commission asked the French authorities to submit the amended draft Order, which they did on the same date.

24. On 6 August 2012, the French Republic adopted the Order relating to the content and submission conditions of the annual declaration of nanoparticle substances, adopted pursuant to Articles R. 523-12 and R. 523-13 of the Environment Code (JORF No 0185 of 10 August 2012, p. 13166). That order was notified to the Commission on 22 August 2012.

25. On 25 October 2012, after concluding its examination of the Order and deciding that there was no need to initiate infringement proceedings against the French Republic, the Commission sent the applicant a copy of the detailed opinion at issue.

The judgment under appeal

26. In his action before the General Court, Mr Schlyter[7] relied on three pleas in law.

7 Mr Schlyter was supported by the Republic of Finland and the Kingdom of Sweden. The Commission was supported by the French Republic.

27. Mr Schlyter's first plea alleged errors of law and manifest errors of assessment in the application of the third indent of Article 4(2) of Regulation No 1049/2001 and Article 6(1) of Regulation 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. [8]

28. The first plea concerned, in the first place, 'whether the detailed opinion in question, which was delivered in the context of the procedure laid down by Directive 98/34, is covered by the third indent of Article 4(2) of Regulation No 1049/2001, under which the institutions are to refuse access to a document where its disclosure would undermine the protection of the purpose of inspections, investigations and audits. In the second place, the parties are in dispute as to whether, in view of the nature of that detailed opinion, the Commission could rely, during the standstill period, on a general presumption, under the third indent of Article 4(2) of Regulation No 1049/2001, interpreted in the light of Article 6(1) of Regulation No 1367/2006, that the disclosure of that opinion would undermine such a purpose'. [9]

29. The second plea alleged an error of law, a manifest error of assessment and also failure to state reasons in the application of the overriding public interest criterion required by Article 4(2) *in fine* of Regulation No 1049/2001 and Article 6(1) of Regulation No 1367/2006. [10]

30. The third plea alleged an error of law, a manifest error of assessment and also failure to state reasons in the application of Article 4(6) of Regulation No 1049/2001. [11]

31. As regards the first plea, the General Court considered that the concept of 'investigation' covered all the research carried out by a competent authority in order to establish that an infringement has taken place as well as the procedure by which an administrative authority gathers information and checks certain facts before making a decision. [12] According to the General Court, in the context of the procedure laid down in Directive 98/34, the Commission may issue a detailed opinion in which it takes the view that the draft technical regulation may create obstacles to the free movement of goods, the free movement of services or the freedom of establishment of service operators within the internal market. [13] However, according to the General Court, the detailed opinion issued by the Commission in the context of that procedure is not part of a procedure by which the administrative body gathers information and checks certain facts before taking a decision. [14]

32. In the first place, the General Court held that in the context of the procedure laid down in Directive 38/94 it was not the Commission's place to gather information before delivering a detailed opinion; the Member States must notify it of their projects in the field of technical regulations. [15]

33. In the second place, according to the General Court, although, on the basis of the information sent by the notifying Member State, the Commission checks certain facts, it does not adopt a decision, but, if necessary, issues a non-binding, interim opinion. The delivery of a detailed opinion is merely the outcome of the analysis of the draft technical regulation carried out by the Commission, as a result of which the Commission takes the view that the draft technical regulation may create obstacles to the free movement of goods and services or the freedom of establishment of service operators within the

8 OJ 2006 L 264, p. 13. See paragraph 34 of the judgment under appeal.
9 See paragraph 35 of the judgment under appeal.
10 See paragraph 34 of the judgment under appeal.
11 See paragraph 34 of the judgment under appeal.
12 See paragraph 53 of the judgment under appeal.
13 See paragraph 54 of the judgment under appeal.
14 See paragraph 55 of the judgment under appeal.
15 See paragraphs 56 and 57 of the judgment under appeal.

internal market. Furthermore, that detailed opinion does not necessarily reflect a final position on the part of the Commission, because, following its delivery, the Member State concerned must report to the Commission on the action it proposes to take on such a detailed opinion and the Commission must comment on that reaction. [16]

34. The General Court further pointed out that the detailed opinion delivered by the Commission in the context of the procedure laid down by Directive 98/34 also does not constitute the result of research carried out by a competent authority in order to establish that an infringement has taken place. [17] According to the General Court, by its nature, a draft technical regulation is a preparatory text, which may alter and be amended. As long as that technical regulation is not adopted, it cannot infringe the rules governing the free movement of goods, the free movement of services or the freedom of establishment of service operators within the internal market. [18] Consequently, the General Court held that the Member State to which that opinion is addressed cannot have infringed EU law because, at the time when a detailed opinion under Directive 98/34 is delivered, the national technical regulation exists only in draft form. [19]

35. The General Court held that the fact that Directive 98/34 provides that both the Commission and the other Member States may deliver a detailed opinion on the draft technical regulation of the notifying Member State confirms that the delivery of a detailed opinion by the Commission was not part of the research that it would carry out in order to establish the existence of an infringement, because Member States may only allege infringement of EU rules by another Member State, but may not adopt a reasoned opinion by which the Commission formalises the existence of an infringement. According to the General Court, a detailed opinion, whether it is adopted by the Commission or a Member State, is simply a way of drawing attention to a potential conflict between the draft technical regulation and EU law on the free movement of goods, the free movement of services or the freedom of establishment of service operators within the internal market. [20]

36. The General Court considered that a detailed opinion delivered by the Commission in the context of the procedure laid down by Directive 98/34 did not come within the scope of an investigation because it did not constitute a decision finding that there had been an infringement inasmuch as it was an initial, provisional and advisory statement of the Commission's position on the basis of the analysis of a notified draft technical regulation, which thus allowed the notifying Member State every opportunity to amend that draft before its adoption. [21]

37. The General Court decided that the infringement procedure was the classic example of an *ex post* check, which involves monitoring national measures once they have been adopted by the Member States and is designed to restore observance of the legal order. According to the General Court, although it is true that the pre-litigation stage provided for by the infringement procedure also provides for a phase of dialogue between the Commission and the Member State concerned, the objective is to achieve the amicable settlement of a dispute between the Commission and the Member State concerned and, failing that, to contemplate bringing proceedings before the Court of Justice on account of the incompatibilities of a national measure which has entered into force and has legal effects on the internal market. [22]

16 See paragraph 58 of the judgment under appeal.
17 See paragraph 59 of the judgment under appeal.
18 See paragraph 60 of the judgment under appeal.
19 See paragraph 61 of the judgment under appeal.
20 See paragraph 62 of the judgment under appeal.
21 See paragraph 63 of the judgment under appeal.
22 See paragraph 79 of the judgment under appeal.

38. In that regard, the detailed opinion delivered by the Commission in the context of the procedure laid down by Directive 98/34 does not constitute a formal notice inasmuch as there is formally no dispute between the Commission and the Member State concerned at this stage of that procedure. [23]

39. The General Court held, in the alternative, that, even on the assumption that the detailed opinion was part of an investigation for the purposes of the third indent of Article 4(2) of Regulation No 1049/2001, the exception provided for in that provision was designed not to protect investigations as such but to protect the purpose of those investigations. [24] In that regard, disclosure, during the standstill period, of a detailed opinion delivered by the Commission in the context of the procedure laid down by Directive 98/34 would not necessarily adversely affect the purpose of that procedure. According to the General Court, the fact that the Commission discloses its detailed opinion to the effect that aspects of the draft technical regulation may create obstacles to the free movement of goods, the free movement of services and the freedom of establishment of service operators within the internal market does not jeopardise the objective of having a national technical regulation which complies with EU law. On the contrary, such disclosure will be perceived by the Member State concerned as an additional incentive to make sure that its technical regulation is compatible with the EU rules governing such fundamental freedoms. [25]

40. Consequently, the General Court annulled the decision at issue in so far as it refused access to the detailed opinion at issue on the basis of the third indent of Article 4(2) of Regulation No 1049/2001 [26] and decided that there was no longer any need to adjudicate on whether, in view of the nature of the detailed opinion at issue, the Commission could rely, during the standstill period, on a general presumption that disclosure of that opinion would undermine the purpose of the investigations. [27] In addition, the General Court held that there was no longer any need to adjudicate on the second and third pleas put forward by Mr Schlyter. [28]

Procedure before the Court

41. By letter of the President of the Court of 29 October 2015, the Czech Republic was granted leave to intervene in support of the form of order sought by the French Republic.

42. Written observations were submitted by Mr Schlyter, the French Republic, the Czech Republic, the Republic of Finland, the Kingdom of Sweden and the Commission. With the exception of the Czech Republic, they all presented oral argument at the hearing on 8 February 2017.

The appeal

43. The French Republic puts forward a single plea in law in support of its appeal. By this single plea, it maintains that the General Court made a number of errors of law in the interpretation of the third indent of Article 4(2) of Regulation No 1049/2001.

44. This plea is divided into two parts.

23 See paragraph 80 of the judgment under appeal.
24 See paragraph 84 of the judgment under appeal.
25 See paragraph 87 of the judgment under appeal.
26 See paragraph 89 of the judgment under appeal.
27 See paragraph 90 of the judgment under appeal.
28 See paragraph 90 of the judgment under appeal.

45. First, the French Republic submits that the General Court made an error of law in considering that the procedure laid down in Directive 98/34 did not constitute in investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

46. Second, the French Republic maintains that the General Court made an error of law in taking the view, in the alternative, that even on the assumption that the detailed decision delivered by the Commission was part of an investigation for the purposes of the third indent of Article 4(2) of Regulation No 1049/2001, disclosure of that document would not necessarily adversely affect the purpose of the procedure laid down in Directive 98/34.

Analysis

First part of the single plea and the existence of 'investigations'

Observations of the parties

– The French Republic

47. The French Republic maintains, in the first place, that the definition of 'investigation' in the judgment under appeal is not based on any definition laid down in Regulation No 1049/2001, Directive 98/34 or the case-law. It observes that the Court has not thus far provided a general definition of 'investigations' within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001. According to the French Republic, the judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486) demonstrates that the Court does not wish to apply formal conditions to the classification of purpose of investigations within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001. Thus, that judgment contrasts with the excessively restrictive nature of the definition of the concept of 'investigation' established by the General Court in paragraph 53 of the judgment under appeal.

48. The French Republic submits, in the second place, that the definition of the concept of 'investigation' in the judgment under appeal is inconsistent with the solution adopted by the General Court in the judgment of 25 September 2014, *Spirlea* v *Commission* (T-306/12, EU:T:2014:816). According to the French Republic, although the General Court stated in that judgment that it was common ground between the parties that the EU Pilot procedure formed part of an investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001, it nonetheless examined that procedure in order to determine whether it did indeed meet that classification.

49. The French Republic observes that in the judgment of 25 September 2014, *Spirlea* v *Commission* (T-306/12, EU:T:2014:816), the General Court considered that a procedure could come within the classification of investigation provided that the Commission issues requests for information to the Member State concerned, and then evaluates the answers obtained, before setting out its own conclusions, even provisionally. Consequently, contrary to the decision reached in the judgment under appeal, the General Court, in the judgment of 25 September 2014, *Spirlea* v *Commission* (T-306/12, EU:T:2014:816) did not require that the procedure at issue should seek to establish an infringement or that it should result in a definitive decision in order to be classified as an investigation.

50. The French Republic maintains that the purposes and the conduct of the EU Pilot procedure present significant analogies with those set out in Directive 98/34. It points out that the EU Pilot procedure, which was set up on a voluntary basis between the Commission and the Member States, is intended to ascertain whether EU law has been complied with and correctly applied within the Member States, 'upstream' from the initiation of any infringement proceedings by the Commission.

51. In the French Republic's submission, like the EU Pilot procedure, the procedure laid down in Directive 98/34 constitutes a procedure of dialogue between the Commission and the Member State. It observes that during the latter procedure the Commission requests information from the Member State, then evaluates that information in order, where appropriate, to state its position on the compatibility of the draft technical regulation with EU law, by means of the detailed opinion provided for in Article 9(2) of Directive 98/34. The French Republic also observes that it follows from the EU Pilot Guidelines, drawn up by the Commission for the Member States in November 2014, that the EU Pilot procedure cannot be implemented in the case of a text adopted following completion of a procedure laid down in Directive 98/34.

52. The French Republic considers, in the third place, that if the Court should adopt the definition of the concept of investigation in the judgment under appeal, the procedure laid down in Directive 98/34 satisfies that definition in any event, having regard to its purpose and its progress.

53. The French Republic maintains that, by limiting the Commission's role in the context of the procedure laid down in Directive 98/34 to passively receiving the Member State's notification, the General Court misunderstood the purpose, the conduct and the balance of that procedure.

54. In the French Republic's submission, the dialogue provided for in the context of the procedure laid down in Directive 98/34 makes it possible to clarify, alter or adjust positions and to reach an amicable settlement of a dispute between the Commission and the Member State as to the proper application of EU law. It maintains that the purpose of that procedure is to ensure that proposals for national technical regulations are made to conform to the rules governing the internal market, even if it cannot lead to the establishment of an infringement of EU law, since the national technical regulation concerned is not in force when the control is carried out. In the French Republic's submission, the Commission is responsible, during that procedure, for carrying out preventive monitoring in order to protect the free movement of goods and in that context frequently needs to gather facts, check information and ask detailed questions concerning the draft national technical regulation, so that it can assemble evidence with a view to establishing whether an infringement may have been committed.

55. In addition, the French Republic does not agree with the assertion, in paragraph 58 of the judgment under appeal, that the Commission adopts only a non-binding, interim opinion. It contends, on the contrary, that delivery of a detailed opinion is a decision which the Commission takes in the light of its examination of the draft technical regulation and the obstacles to trade between Member States which that regulation may constitute. It adds that such an opinion is binding on the Member State in so far as it extends the initial standstill period.

56. The French Republic adds that, following the procedure laid down in Directive 98/34, the Commission must decide whether it is appropriate to initiate infringement proceedings.

– Mr Schlyter

57. Mr Schlyter contends that the three arguments put forward by the French Republic must be rejected as inadmissible and/or unfounded.

58. He maintains, first, that it is for the General Court to clarify and develop the legal terms at issue; second, that the General Court did not depart from its earlier position, since the EU Pilot procedure is not comparable with the procedure laid down in Directive 98/34, and different treatment is therefore permissible; and, third, that the procedure laid down in Directive 98/34 does not constitute an investigation, as there is no mandate authorising the Commission actively to gather information.

59. Mr Schlyter submits, in the first place, that the General Court was justified in providing clarification of the concept of investigation in the judgment under appeal, since disagreement over that concept was at the heart of the dispute. He observes that the General Court 'analysed the concept of "investigation" as applied in previsions decisions concerning infringement and State aid procedures in order to determine the characteristic elements of the notion of "investigation" on the basis of this case-law, which at the same time allowed the General Court to differentiate those previous cases from the case at hand (i.e. the cases relating to infringement procedures and State aid concerned investigations while the present case which concerns a procedure under Directive 98/34 does not involve an investigation)'. [29]

60. Mr Schlyter contends, in the second place, that the French Republic's observation that the application of the concept of investigation in the judgment under appeal is not consistent with the solution adopted by the General Court in the judgment of 25 September 2014, *Spirlea* v *Commission* (T-306/12, EU:T:2014:816), where the General Court held that the EU Pilot procedure was an investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001, is inadmissible. In his submission, that observation is based on a fresh plea in law that could have been raised before the General Court, although the judgment of 25 September 2014, *Spirlea* v *Commission*, (T-306/12, EU:T:2014:816) was delivered after the judgment under appeal, as the parties in that case had not disputed the existence of an investigation and as the EU Pilot procedure had already been used, since it had been applicable since 2008. Consequently, that comparison and the argument raised by the French Republic could have been submitted to the General Court.

61. In addition, Mr Schlyter maintains that the French Republic's observation is ineffective, since even if such consistency existed between the judgment of 25 September 2014, *Spirlea* v *Commission* (T-306/12, EU:T:2014:816), and the judgment under appeal, *quod non*, that could not constitute a sufficient plea. Mr Schlyter contends that, in any event, that argument is also unfounded, since, contrary to the French Republic's assertion, the EU Pilot procedure (which was classified as an investigation by the General Court in the judgment of 25 September 2014, *Spirlea* v *Commission* (T-306/12, EU:T:2014:816)) is not comparable with the procedure laid down in Directive 98/34, which, owing to those different characteristics, cannot be classified as an investigation. There is thus no inconsistency between the different judgments of the General Court.

62. Mr Schlyter emphasises that, unlike the situation in the EU Pilot procedure, the Commission does not actively gather information in the procedure laid down in Directive 98/34, but receives notification from a Member State which must normally already include all the information and all the documents which the Commission needs in order to determine whether the notified technical standard is compatible with EU law. He adds that the Commission may subsequently put questions to the Member State concerned, but that it does not have the power to gather information from citizens or undertakings. Any dialogue with the Member State before the adoption of a detailed opinion is normally very limited.

63. Mr Schlyter submits that, unlike the EU Pilot procedure, which is based on the principle that there is a presumed infringement, the probability of an infringement procedure after the procedure laid down in Articles 8 and 9 of Directive 98/34 is limited. First, in Mr Schlyter's submission, the procedure laid down in Directive 98/34 is neutral and automatic, and is triggered by the creation of a draft national measure which falls within the scope of the directive, without the premiss that there is a suspicion of a potential infringement. Second, Mr Schlyter maintains that a detailed opinion cannot be a basis for an infringement procedure, since the infringement does not exist and there is no certainty that the threat of an infringement will arise.

29 See paragraph 8 of Mr Schlyter's response.

64. Mr Schlyter contends, in the third place, that the French Republic is wrong to maintain that, in the judgment under appeal, the General Court limited the Commission's role to that of a passive recipient of information.[30] That limitation and that passive role are to be found in the directive itself, which emphasises the role of the information provided by the Member State. In Mr Schlyter's submission, the French Republic's assertion that, in order to assess whether a draft technical regulation is or is not compatible with the rules of the internal market, the Commission 'frequently needs to gather facts',[31] is unfounded. He maintains that that assertion amounts to calling in question a statement of fact, which cannot be assessed in an appeal. That argument is therefore inadmissible. In addition, the French Republic's argument is incorrect, since no subsequent request for substantive clarification by the Commission is required by the directive and cannot therefore give an accurate overview of the nature of the procedure laid down in Directive 98/34. Mr Schlyter observes that, unlike in the EU Pilot procedure, the Commission is not authorised to talk to third parties in order to gather additional information. He further submits that the detailed opinion is not a binding decision.

65. He observes that there is nothing in the judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486), to suggest that the concept of 'investigation' cannot be defined 'restrictively'. Nor does it follow from that judgment that any measure linked with the Commission's function as guardian of the Treaties constitutes an investigation.

– *The Commission*

66. The Commission contends that the definition of 'investigation' in paragraph 53 of the judgment under appeal is unduly restrictive and constitutes an infringement of the third indent of Article 4(2) of Regulation No 1049/2001. It observes that that definition introduces a set of formal requirements that cannot be deduced from the mere term 'investigation' and that there is nothing in the word 'investigation' that would limit that concept to procedures which are aimed at establishing that 'an infringement' has taken place or the adoption of 'a decision'. The Commission emphasises that, contrary to the General Court's dicta concerning the procedure laid down in Directive 98/34, that procedure is a formal set of steps and dialogues with the Member States and not merely a 'soft law' procedure. In the Commission's submission, in accordance with Article 9(2) of Directive 98/34, the Member State concerned is required to postpone the adoption of the draft technical regulation for six months if a detailed opinion is issued and to report to the Commission on the action it proposes to take on the detailed opinion. In that regard, the detailed opinion therefore imposes a binding obligation. The Commission maintains that a detailed opinion cannot be regarded as an interim opinion of the Commission. Under Directive 98/34, it constitutes a formal step that the Commission can take with respect to a draft technical regulation. The detailed opinion is therefore the legal position taken by the Commission within the framework of the procedure laid down in Directive 98/34.

67. The fact that the Commission does not actively gather information, but receives it from the Member States, is clearly irrelevant. The Commission maintains that the General Court ascribes too much importance to the fact that the procedure laid down in Directive 98/34 is an *ex ante* review of the proposed technical regulations and not an *ex post* review of those regulations. The preventive nature of the procedure under Directive 98/34 does not mean that the procedure is not an investigation.

30 See point 53 of this Opinion.

31 See point 54 of this Opinion.

68. The Commission adds that the dialogue and the finding of information by it pursuant to Articles 8 and 9 of Directive 98/34, while 'certainly informal, are nevertheless well present, and in reality, identical to the dialogue between a Member State and the Commission during an EU Pilot procedure or the pre-litigation phase of an infringement procedure, which has been qualified as an investigation'. [32]

– *The Czech Republic*

69. The Czech Republic supports the arguments put forward by the French Republic in its appeal and those relied on by the Commission in its response. It submits that to preclude the applicability of the third indent of Article 4(2) of Regulation No 1049/2001 to a procedure (ongoing or still 'live') under Directive 98/34 would deprive Court's case-law on the procedure under Article 258 TFEU of its effectiveness. [33]

– *The Republic of Finland*

70. The Republic of Finland is of the view that the General Court did not err in holding that the procedure laid down in Directive 98/34 should not be regarded as an 'investigation' within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001. It submits that that regulation is designed to afford the public the widest possible access to documents of the institutions and that the examples listed in Article 4 of that regulation, in derogation from that general rule, must be given a strict interpretation.

71. The Republic of Finland disputes the French Republic's position that any activity associated with the protection of fundamental freedoms and the proper functioning of the internal market is concerned with an investigation within the meaning of that provision. Likewise, the disclosure of documents in connection with the procedure under Directive 98/34 does not in any case prevent the Commission from carrying out the task entrusted to it, namely acting as guardian of the Treaties is not bound up with the definition of an 'investigation' in accordance with Regulation No 1049/2001. [34]

72. The Republic of Finland points out that the procedure laid down in Directive 98/34 is an instrument of cooperation intended to influence, in a preventive manner, the national legislative procedure [35] and that as the measure eventually adopted by the Member State may depart significantly from the initial draft, the Commission, in order to determine whether it may be appropriate to initiate infringement proceedings, must be able to obtain new information about the national legislation. [36] The procedure laid down in Directive 98/34 does not therefore relate to a situation which, as such, might give rise to an infringement procedure. [37] It observes that the procedures which come within the third indent of Article 4(2) of Regulation No 1049/2001 constitute a subsequent control, the purpose of which is to ascertain whether EU law has been respected and correctly applied by the Member States.

32 The Commission observes that 'in the framework of Directive 98/34, it is clear that the various steps of the procedure (comments, detailed opinion, obligation to take into account and to report, further comments from the Commission) will often involve a dialogue in which further information and explanations may be requested by the Commission and, pursuant to the principle of sincere cooperation, provided by the Member State concerned'.

33 The Czech Republic and the Commission refer to paragraph 63 of the judgment of 14 November 2013, *LPN and Finland* v *Commission* (C-514/11 P and C-605/11 P, EU:C:2013:738), where the Court held that 'The disclosure of the documents concerning an infringement procedure during its pre-litigation stage would … be likely to change the nature and progress of that procedure, given that, in those circumstances, it could prove even more difficult to begin a process of negotiation and to reach an agreement between the Commission and the Member State concerned putting an end to the infringement alleged, in order to enable EU law to be respected and to avoid legal proceedings'.

34 The Republic of Finland refers to the Opinion of Advocate General Cruz Villalón in *ClientEarth* v *Commission* and *ClientEarth and PAN Europe* v *EFSA* (C-612/13 P and C-615/13 P, EU:C:2015:219, paragraph 43).

35 See judgment of 10 July 2014, *Ivansson and Others* (C-307/13, EU:C:2014:2058, paragraph 41 and the case-law cited).

36 See order of 13 September 2000, *Commission* v *Netherlands* (C-341/97, EU:C:2000:434, paragraphs 17 to 21), where the Court considered that the procedure for amending technical regulations does not correspond to an infringement procedure.

37 The Republic of Finland refers in that regard to paragraphs 80 and 81 of the judgment under appeal.

73. According to the Republic of Finland, the procedure laid down in Directive 98/34 is also to be distinguished from the infringement procedure and the EU Pilot procedure, in that it is the Member State that is required to communicate to the Commission the information referred to in Directive 98/34, whereas in the other two procedures the exchange of information is carried out at the Commission's initiative.

74. As regards the definition of 'investigation' in paragraph 53 of the judgment under appeal, the Republic of Finland maintains that it is not inconsistent with what is stated in paragraphs 61 and 62 of the judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486).

– The Kingdom of Sweden

75. The Kingdom of Sweden maintains that the judgment under appeal is well founded and that the observations which the French Republic formulates against it are based on a misconstruction of the third indent of Article 4(2) of Regulation No 1049/2001.

76. According to the Kingdom of Sweden, the principle of greatest transparency laid down in Article 1 TEU, Article 15 TFEU and Article 42 of the Charter of Fundamental Rights of the European Union is also found in Directive 98/34. Relying on paragraph 37 of the judgment under appeal and the preventive monitoring referred to in Directive 98/34, the Kingdom of Sweden asserts that the purpose of that directive is to ensure that there is no need to initiate an investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

77. The Kingdom of Sweden recalls that the Court held, in the judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486), that the studies at issue were among the instruments available to the Commission, in the context of the obligation imposed on it, under Article 17(1) TEU, to oversee the application of EU law, in order to uncover any failures by Member States to fulfil their obligation to transpose the directives concerned. It observes that the Court also considered that those studies therefore fell within the scope of the concept of 'investigations', within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

78. According to the Kingdom of Sweden, a detailed opinion issued in the context of the procedure laid down in Directive 98/34 cannot be compared to a study such as that examined in the case that gave rise to the judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486), given the difference between their content and their objectives. It adds that, since that judgment does not contain a general definition of the concept of 'investigation', it has no immediate relevance to the present case.

79. As regards the alleged analogy between the procedure laid down in Directive 98/34 and the EU Pilot procedure, the Kingdom of Sweden takes the view that there are indeed certain resemblances between them, but they do not mean that the two procedures are in the nature of investigations, but that they are both distinguished from the infringement procedure laid down in Article 258 TFEU.

80. The Kingdom of Sweden contends that the French Republic is wrong to maintain that there are striking similarities between the procedure laid down in Directive 98/34 and the infringement procedure. It submits that the General Court's conclusion in paragraph 63 of the judgment under appeal is correct and that that conclusion is also supported by the judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486).

81. The Kingdom of Sweden also contends that the French Republic is wrong to consider that, in the event that the Court should approve the definition of the concept of 'investigation' in the judgment under appeal, that definition would apply to the procedure laid down in Directive 98/34. It points out that Directive 98/34 does not lay down any obligations for the Member States to supply, at the

Commission's request, additional information, nor does it provide a basis on which the Commission would be entitled to demand such information. Consequently, the General Court did not err when it stated that it is not for the Commission, in the context of a procedure provided for by Directive 98/34, to gather information before delivering a detailed opinion. Furthermore, according to the Kingdom of Sweden, since the Member State concerned must, after having received the detailed opinion, inform the Commission of the measures which it proposes to adopt following that opinion, and since the Commission must adopt a position on those measures, it is impossible for the Commission to adopt, by that opinion, a definitive position on whether there has been an infringement of EU law.

Admissibility

82. As regards the first plea of inadmissibility raised by Mr Schlyter,[38] it should be noted that it follows from paragraph 52 of the judgment under appeal that the French Republic claimed before the General Court that 'the procedure laid down by Directive 98/34 must be categorised as an investigation' and that 'the delivery of a detailed opinion by the Commission in the context of that procedure is part of an investigation for the purposes of the third indent of Article 4(2) of Regulation No 1049/2001'.

83. The observations of the French Republic which, in the context of the present appeal, relate to the inconsistency between the judgment under appeal and the judgment of 25 September 2014, *Spirlea* v *Commission* (T-306/12, EU:T:2014:816)[39] seek to demonstrate that the General Court erred in law in refusing to categorise the procedure laid down in Directive 98/34 as an 'investigation' within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

84. In fact, the French Republic relies on the judgment of the General Court of 25 September 2014, *Spirlea* v *Commission* (T-306/12, EU:T:2014:816), which postdates the judgment under appeal, which was delivered on 16 April 2015, to reinforce and supplement its argument that the General Court erred in law in its legal categorisation of the detailed opinion provided for in Article 9(2) of Directive 98/34 by taking the view that that opinion does not constitute an investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

85. It follows that the French Republic has not relied on a new plea in law. Consequently, the plea of inadmissibility must be rejected.

86. As regards Mr Schlyter's second plea of inadmissibility,[40] it follows from paragraph 56 of the judgment under appeal that the General Court held that 'in the context of the procedure laid down by Directive 98/34, it [was] not the Commission's task to gather information before delivering a detailed opinion'. To my mind, that finding relates strictly to the wording of Articles 8 and 9 of Directive 98/34 and on that point the General Court therefore did not err in law.

87. However, the French Republic claims that the Commission, which is responsible for preventive monitoring in order to protect the free movement of goods, 'frequently needs to gather facts'.[41] In paragraph 31 of its reply, the French Republic observes, however, that 'its plea in law does not relate to the course of the procedure under Directive 98/34 which led to the decision challenged by Mr Schlyter before the General Court, but to the classification of the procedure under Directive 98/34 as an investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001'. The plea therefore did indeed relate, in the French Republic's submission, to a point of law.

38 See point 60 of this Opinion.

39 See points 48 and 49 of this Opinion.

40 See point 64 of this Opinion.

41 See paragraph 78 of the appeal and paragraph 30 of the French Republic's reply.

88. Mr Schlyter, on the other hand, observes that 'neither the directive *nor practice*[42] as evidenced by the notification by [the French Republic] of its draft measure demonstrate the active role of the Commission'.

89. It must be stated that those diverging views of the Commission's actual practice are not of such a kind as to call in question the General Court's finding in paragraph 56 of the judgment under appeal based on the actual wording of Directive 98/34.

Substance

Preliminary observations

90. It is settled case-law that the aim of Regulation No 1049/2001 is to give the public a right of access to documents of the EU institutions which is as wide as possible.[43]

91. However, that right is subject to certain limits based on public or private grounds. More specifically, and in accordance with recital 11,[44] Regulation No 1049/2001 provides, in Article 4, that the institutions are to refuse access to a document where disclosure would undermine one of the interests protected by that article. Thus, where an institution decides to refuse access to a document disclosure of which has been requested, it must, in principle, explain how access to that document could specifically and effectively undermine the interest protected by the exception provided for in Article 4 of Regulation No 1049/2001 on which it is relying. In addition, since they derogate from the principle of the widest possible public access to documents, those exceptions must be interpreted and applied strictly.[45]

92. I would observe that although the third indent of Article 4(2) of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where disclosure would undermine, in particular, the protection of the purpose of investigations, the concept of 'investigations' within the meaning of that provision is not defined by Regulation No 1049/2001.

93. Notwithstanding that absence of a definition, the concept of 'investigations' has not given rise to controversy before the Court.

94. In the cases that gave rise to the judgments of 14 November 2013, *LPN and Finland* v *Commission* (C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 43), concerning infringement proceedings pursuant to Article 258 TFEU, and of 28 June 2012, *Commission* v *Éditions Odile Jacob* (C-404/10 P, EU:C:2012:393, paragraph 115), concerning the merger control procedure pursuant to Council

42 Emphasis added.

43 Judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486, paragraph 57). See also recital 4 of Regulation No 1049/2001, which states that 'the purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with [Article 15(3) TEU]', Article 1 of Regulation No 1049/2001, which provides that the purpose of that regulation is, in particular, 'to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission … documents provided for in Article [15 TEU] in such a way as to ensure the widest possible access to documents' and Article 2(1) of Regulation No 1049/2001, which provides that 'any 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'. In addition, Article 42 of the Charter of Fundamental Rights provides that 'any 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 [European Parliament, the Council and the Commission].'

44 This recital states that 'in principle, *all documents of the institutions should be accessible to the public*. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In 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'. Emphasis added.

45 Judgment of 21 September 2010, *Sweden and Others* v *API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraphs 70 to 73 and the case-law cited).

Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings,[46] it was common ground between the parties that the documents covered by the requests for access to documents were in fact part of an investigation, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.[47]

95. In addition, it is apparent from point 21 of the Opinion of Advocate General Sharpston in *Sweden* v *Commission* (C-562/14 P, EU:C:2016:885)[48] and paragraph 45 of the judgment of the General Court of 25 September 2014, *Spirlea* v *Commission* (T-306/12, EU:T:2014:816) on the EU Pilot procedure that neither the applicants nor the Member States intervening in support of them disputed that the documents at issue, relating to an EU Pilot procedure, were part of an investigation within the meaning of the exception laid down in the third indent of Article 4(2) of Regulation No 1049/2001.

96. The EU Pilot procedure was established by the Commission in its communication 'A Europe of Results — Applying [European Union] Law'.[49] That procedure, which involves voluntary cooperation between the Commission and the Member States, precedes any formal initiation of infringement proceedings and is designed to ensure the correct application of EU law and at the same time to resolve at an early stage the questions raised by its application. The EU Pilot procedure replaces the Commission's previous practice of sending administrative letters on the matter to the Member States.[50]

97. The concept of 'investigations' has been specifically examined by the Court only in the case that gave rise to the judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486), although the Court did not find it necessary to define the concept of 'investigation'.

98. In paragraphs 61 to 65 of that judgment, the Court considered that studies[51] which were carried out at the request of and on behalf of the Commission, after the expiry of the period for transposition of a set of directives of the European Union concerning environmental protection, with the specific aim of determining what progress had been made in transposing those various directives in a certain number of Member States, came within the context of an investigation by the Commission, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001. The Court held that such studies were among the instruments available to the Commission, in the context of the obligation imposed on it, under Article 17(1) TFEU, to oversee, under the control of the Court, the application of EU law, *in order to uncover any failures* by Member States to fulfil their obligation to transpose the directives concerned and in order to decide, when necessary, to initiate infringement proceedings against those Member States which it considered to be in breach of EU law.[52]

46 OJ 1989 L 395, p. 1, and corrigendum OJ 1990 L 257, p. 13.

47 See also judgment of 14 December 2006, *Technische Glaswerke Ilmenau* v *Commission* (T-237/02, EU:T:2006:395, paragraph 76) on the State aid procedure.

48 In that appeal, the Kingdom of Sweden asked the Court to set aside the judgment of the General Court of 25 September 2014, *Spirlea* v *Commission* (T-306/12, EU:T:2014:816).

49 COM(2007) 502 final.

50 See, in particular, the Commission's EU Pilot Guidelines of November 2014.

51 According to the Court, 'each of those studies, relating to a single Member State and a single directive, contains a comparison of the national law under consideration and the relevant EU law, accompanied by a legal analysis and conclusions concerning the transposition measures adopted by the Member State concerned'. Judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486, paragraph 61).

52 The Court held that the fact that the task of carrying out the contested studies was entrusted by the Commission to an external service provider rather than being performed by its own staff, and that those studies neither reflect the position of that institution nor cause it to incur any liability, did not mean that the Commission, by instructing that such studies should be carried out, pursued an objective other than that of ensuring that it had available to it, by means of those investigations, in-depth information on the conformity of the legislation of a certain number of Member States with European Union environmental law, so that it was able to *detect the existence of possible infringements of that law and to initiate, when necessary, infringement proceedings against the Member State in breach.* (See judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486, paragraph 63)). In addition, the Court held that the concept of 'investigation' was not dependent on the existence of a formal decision adopted by the Commission as a college to initiate infringement proceedings against Member States. Judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486, paragraph 60).

99. While it is clear that the concept of 'investigations' in Regulation No 1049/2001 covers the infringement procedure [53] and investigations capable of leading to the initiation of that procedure, [54] it is not limited to those procedures and also includes other procedures laid down in EU law for the gathering and systematic and formal verification of information necessary for the adoption by an EU institution of a definitive decision having mandatory legal effects. [55] In that regard, I consider that, contrary to the Commission's observations, [56] the General Court did not limit the concept of investigations to those two examples (namely the infringement procedure and the investigations that may lead to that procedure) when it held in paragraph 53 of the judgment under appeal that 'the concept of investigation covers all the research carried out by a competent authority in order to establish that an infringement has taken place as well as the procedure by which an administrative body gathers information and checks certain facts before making a decision'. Those words of the General Court are purely illustrative and do not preclude other situations. [57]

100. The absence of a definition of the concept of 'investigations' in Regulation No 1049/2001 therefore requires a specific and thorough analysis of the detailed opinion issued pursuant to the second indent of Article 9(2) of Directive 98/34 in the context of the procedure laid down in Articles 8 and 9 of that directive, in the light, in particular, of the two examples set out in point 99 of this Opinion.

101. In addition, it should be borne in mind that since the concept of 'investigations' relates to an exception to the general rule that all documents must be made accessible, it must be interpreted and applied strictly.

53 See, to that effect, judgment of 14 November 2013, *LPN and Finland* v *Commission* (C-514/11 P and C-605/11 P, EU:C:2013:738).

54 See, to that effect, judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486), and Opinion of Advocate General Sharpston in *Sweden* v *Commission* (C-562/14 P, EU:C:2016:885), concerning the EU Pilot procedure.

55 See, to that effect, judgment of 28 June 2012, *Commission* v *Éditions Odile Jacob* (C-404/10 P, EU:C:2012:393, paragraph 115), where the Court held that 'with regard to the documents exchanged between the Commission and notifying parties or third parties [in the context of the merger control procedure in application of Regulation No 4064/89], it is common ground that the documents at issue do in fact relate to an investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001. Furthermore, having regard to the objective of merger control proceedings, which consists of ascertaining whether or not a merger gives the notifying parties a market power which may significantly affect competition, the Commission gathers, in the context of such a procedure, sensitive information about the commercial strategies of the undertakings concerned, their sales figures, their market shares or their business relations, so that access to documents in such a procedure can undermine the protection of the commercial interests of those undertakings. Accordingly, the exceptions relating to the protection of commercial interests and that of the purpose of investigations are, in the present case, closely connected'.

56 According to the Commission, the definition given in paragraph 53 of the judgment under appeal 'is unduly restrictive and in breach of [the third indent of] Article 4(2) … of Regulation No 1049/2001'.

57 See judgment of 21 May 2014, *Catinis* v *Commission* (T-447/11, EU:T:2014:267, paragraph 51) where the General Court held that the documents gathered by the European Anti-Fraud Office (OLAF) '[did] in fact relate to investigations' within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001. However, the report drawn up at the close of an investigation by OLAF and the accompanying recommendations (see Article 11 of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/99 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ 2013 L 248, p. 1) do not constitute a decision and the investigation in question is not an infringement procedure within the meaning of Article 258 TFEU.

Directive 98/34

102. Directive 98/34 is divided into three aspects. First, a number of provisions of Directive 98/34 are devoted to standardisation.[58] Second, Directive 98/34 is intended to increase transparency and to provide an environment favourable to the competitiveness of undertakings.[59] Third, it is settled case-law that Articles 8 and 9 of Directive 98/34 seek, by *preventive monitoring*,[60] to protect, in particular, the free movement of goods,[61] which is one of the foundations[62] of the Union.

103. It is common ground that, in the present case, the detailed opinion, based on the second indent of Article 9(2) of Directive 98/34, was issued by the Commission after it had been notified by the French Republic of a draft Order, in application of Article 8(1) of that directive. Consequently, the first part of the single plea in the appeal concerns the legal nature of the procedure laid down in Articles 8 and 9 of Directive 98/34 and in particular the legal nature of the detailed opinion. It is therefore the third aspect of Directive 98/34 that concerns us in the present case, as the aspects relating to standardisation and the participation of economic operators in the improvement of competitiveness are of no relevance in the present appeal.

– Articles 8 and 9 of Directive 98/34

104. The aim of the procedure laid down in Articles 8 and 9 of Directive 98/34 is to *foresee and prevent* the adoption of technical regulations[63] that could create obstacles to trade. According to the Court, the preventive control provided for in Articles 8 and 9 of Directive 98/34 serves a useful purpose in that technical regulations falling within the scope of that directive may constitute obstacles to trade in goods between Member States, such obstacles being permissible only if they are necessary to satisfy compelling requirements relating to the public interest.[64]

58 See, in particular, Articles 2 to 4 of that directive. These provisions were repealed by Article 26(2) of Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council (OJ 2012 L 316, p. 12).

59 In paragraph 82 of the judgment of 4 February 2016, *Ince* (C-336/14, EU:C:2016:72), the Court held that Directive 98/34 'seeks to allow economic operators to make more of the advantages inherent in the internal market by ensuring the regular publication of the technical regulations proposed by Member States and thus enabling those operators to give their assessment of the impact of those regulations'. In that regard, the Court held that it is important 'that the economic operators of a Member State be informed of draft technical regulations adopted by another Member State and of their temporal and territorial scope, so as to enable them to be apprised of the extent of the obligations that may be imposed on them and to anticipate the adoption of those texts by adapting, if necessary, their products or services in a timely manner'. (See judgment of 4 February 2016, *Ince* (C-336/14, EU:C:2016:72, paragraph 83). In fact, according to the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee — The Operation of Directive 98/34/EC from 2011 to 2013, of 17 July 2015 (COM(2015) 0338 final), the notification procedure for national technical regulations 'allows economic operators, including small and medium-sized enterprises (SMEs), to make their voices heard and to adapt their activities in good time to future technical regulations. This right of scrutiny is used extensively by economic operators, helping the Commission and national authorities to detect any barriers to trade'.

60 Emphasis added. See judgment of 4 February 2016, *Ince* (C-336/14, EU:C:2016:72, paragraph 82).

61 Directive 98/34 is intended not only to prevent the emergence of obstacles to the free movement of goods but also the emergence of obstacles to freedom to provide services or freedom of establishment within the internal market.

62 See recital 2 of Directive 98/34, which states that 'the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured; … therefore, the prohibition of quantitative restrictions on the movement of goods and of measures having an equivalent effect is one of the basic principles of the [Union]'.

63 See point 11 of the Opinion of Advocate General Sharpston in *UNIC and Uni.co.pel* (C-95/14, EU:C:2015:270), which states that 'the aim of Directive 98/34 is to help to avoid the creation of new barriers to trade within the internal market. It introduces a mechanism for transparency and preventive control by requiring Member States to notify technical regulations in draft form before adoption and then, generally, to observe a standstill period of at least three months … before adopting the regulation concerned, in order to allow *other Member States and the Commission* an opportunity to raise any concerns about potential barriers to trade'. Emphasis added. It should be observed that not only the Commission but also the Member State may issue detailed opinions under the second indent of Article 9(2) of Directive 98/34 and that *no legal distinction* between the detailed opinions issued by the Commission and those issued by the Member States is provided for in that directive. However, none of the parties claims that, in the context of the procedure laid down in Articles 8 and 9 of Directive 98/34, the Member States investigate each other.

64 See judgment of 31 January 2013, *Belgische Petroleum Unie and Others* (C-26/11, EU:C:2013:44, paragraph 49 and the case-law cited).

105. Consequently, Article 8 of Directive 98/34 lays down a procedure of information under which Member States are, in principle, required to notify to the Commission any draft technical regulation falling within the scope of that directive. [65]

106. In that regard, in accordance with Article 8(1) of Directive 98/34, in order to permit preventive control, Member States are required to communicate to the Commission, before they enter into force, the draft provisions whereby technical specifications will be given binding effect. [66] In addition, Member States are to take any observations of the Commission and the other Member States into account as far as possible in the subsequent preparation of the technical regulation. [67]

107. In fact, according to Article 9 of Directive 98/34, the adoption of a draft technical regulation notified pursuant to Article 8 must be postponed for three months from the date of receipt by the Commission of the draft technical regulation. That article provides, in particular, that that period is to be extended to six months [68] if [69] *the Commission or another Member State delivers a detailed opinion* to the effect that the measure envisaged may create obstacles to the free movement of goods. [70]

108. Pursuant to Article 9(2) *in fine* of Directive 98/34, the Member State concerned is to report to the Commission on the action it proposes to take on a detailed opinion and the Commission is to comment on that reaction.

109. It follows that the objective of Directive 98/34 is not merely to inform the Commission, but specifically to eliminate or restrict barriers to trade that might be created by the draft technical regulation, to inform the other States of the technical regulations contemplated by a State, to allow the Commission and the other Member States the necessary time to react and propose an amendment that would reduce, eliminate or justify the restrictions on the free movement of goods resulting from the contemplated measure and to allow the Commission the time necessary to propose a harmonisation directive. [71]

– Articles 8 and 9 of Directive 98/34 and the pre-litigation stage of the infringement procedure under Article 258 TFEU

110. The preventive or *ex ante* action provided for in Articles 8 and 9 of Directive 98/34 does not in my view seem to be comparable with the infringement procedure laid down in Article 258 TFEU, the EU Pilot procedure or the procedure at issue in the case that gave rise to the judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486) which are aimed at uncovering and resolving

65 It should be noted that, under Article 8(4) of Directive 98/34, information supplied under Article 8 of that directive is not to be treated as confidential except at the express request of the notifying Member State. Conversely, Article 9 of Directive 98/34 makes no reference to the question of confidentiality. It follows that the question of access to the detailed notice provided for in Article 9(2) of Directive 98/34 is governed by the provisions of Regulation No 1049/2001. Consequently, as regards the question of access to the detailed notice, Directive 98/34 does not constitute a *lex specialis* by comparison with Regulation No 1049/2001, as was suggested at the hearing.

66 See judgment of 15 October 2015, *Balázs* (C-251/14, EU:C:2015:687, paragraph 43).

67 See Article 8(2) of Directive 98/34.

68 That period is four months for drafts relating to services if the Commission or another Member State delivers a detailed opinion to the effect that the measure envisaged may create obstacles to the free movement of goods within the internal market.

69 I consider, in accordance with the observations put forward by the French Republic at the hearing, that a detailed opinion under Article 9(2) of Directive 98/34 is not issued automatically but if 'the measure envisaged may create obstacles to the free movement of goods within the internal market'.

70 The period of suspension is extended to 12 months if, within three months following the date of receipt of the communication, the Commission announces its intention to propose or adopt legislation concerning the matter covered by the draft technical regulation. (See Article 9(3) of Directive 98/34). In addition, in the event of non-compliance with the obligations to communicate and to suspend, the technical regulation remains unenforceable against individuals. (See judgment of 8 November 2007, *Schwibbert* (C-20/05, EU:C:2007:652, paragraph 38)).

71 See, by analogy, judgment of 30 April 1996, *CIA Security International* (C-194/94, EU:C:1996:172, paragraph 50). Recital 13 of Directive 98/34 states that 'the Commission and the Member States must also be allowed sufficient time in which to propose amendments to a contemplated measure …' and recital 16 of that directive makes clear that 'the Member State in question must … defer implementation of the contemplated measure for a period sufficient to allow either a joint examination of the proposed amendments or the preparation of a proposal for a binding act of the Council or the adoption of a binding act of the Commission …'.

any infringements by Member States and clearly fall within the scope of an *ex post* control of the application of and compliance with EU law, three procedures which have been characterised by the Court as investigations within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

111. While it is true that, like those *ex post* control procedures, the preventive procedure laid down in Articles 8 and 9 of Directive 98/34 is intended to ensure that the Member State complies with its obligations under EU law, it is not intended to ascertain or establish that a Member State has failed to fulfil its obligations under the Treaties. [72]

112. Since the notified draft technical regulation forming the subject of a detailed opinion has not yet been adopted and since, consequently, no new technical regulation is yet in force, it could not at this stage constitute an infringement of EU law and be the subject of the infringement procedure laid down in Article 258 TFEU [73] or other procedures upstream from the latter procedure designed to uncover and resolve any infringements of the obligations imposed on Member States under the Treaties. [74] The French Republic's observation that 'the Directive 98/34 procedure enables the Commission to gather information and to check certain facts with a view to establishing an infringement, before it takes a decision' therefore seems to me to be incorrect and must be rejected.

113. Nor does it follow from paragraph 62 of the judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486), that any initiative taken by the Commission in order to ensure, in accordance with Article 17(1) TEU, the application of the Treaties constitutes an investigation. The Commission investigations at issue in that judgment were specifically carried out in order to uncover any failures by Member States to fulfil their obligation to transpose the directives concerned and, where necessary, to adopt a decision to initiate infringement proceedings against those Member States which it considered to be in breach of EU law. [75]

114. In addition, although the Commission's detailed opinion was delivered following the communication by the French Republic of a draft Order and although that exchange between the Commission and a Member State might give the impression of the gathering and systematic and formal verification of information, that detailed opinion constitutes only an 'initial, provisional and advisory statement' [76] of the Commission on a national legislative draft which is capable of being amended, in particular in the light of the reservations expressed in that opinion.

72 See Article 258 TFEU.

73 See, to that effect, paragraphs 59 to 61 of the judgment under appeal. At the hearing, Mr Schlyter observed that, as regards the procedure laid down in Articles 8 and 9 of Directive 98/34, which concerns proposed technical regulations, the existence of an infringement of EU law was purely hypothetical, remote and speculative.

74 As the Republic of Finland observed, 'the definitive legislation which a Member State eventually adopts under the procedure laid down by Directive 98/34 may diverge considerably from its original version. For the purpose of determining the necessity of bringing an infringement action the Commission must, in any event, obtain the latest information about the situation with regard to national legislation, and the procedure under Directive 98/34 cannot in itself be used to bring an action before the [Court]'. (See paragraph 8 of the Republic of Finland's response to the statement in intervention of the Czech Republic). In fact, 'the monitoring carried out under the procedure under Directive 98/34 is preventive and its purpose is to avoid possible incompatibility with EU law, whereas the infringement procedure is an *ex post* control, which is intended to put an end to acts of the Member States which may be contrary to EU law'. See paragraph 11(a) of the Republic of Finland's response to the statement in intervention of the Czech Republic.

75 See point 98 of this Opinion.

76 See paragraph 63 of the judgment under appeal. In fact, although the procedure referred to in Articles 8 and 9 of Directive 98/34 is compulsory, the position adopted by the Commission in the detailed opinion is not binding and the Member States are free to modify their proposed technical regulations or to leave them unaltered. As the Commission observed, 'at the end of the procedure [laid down in] Directive 98/34, it is the Member State concerned who decides whether to adopt the draft regulations as notified, to amend them, or to withdraw them …'. (See paragraph 21 of the Commission's response). According to the Republic of Finland, 'the final legislation which the Member State approves, having regard to the observations submitted to it, may differ noticeably from the original plan. In order to assess the need for the possible initiation of infringement proceedings, the Commission will thus in every case have to obtain new information on the national legislative position as regards those elements which the Member State was required to report on the basis of Directive 98/34'. See paragraph 11 of the Republic of Finland's response.

115. It follows that the Commission's detailed opinion constitutes only an interim decision or position on a draft technical standard, the only legal effect of which is that the adoption of the technical standard by the Member State must be postponed by six months [77] even though, in accordance with the Commission's observations, 'detailed opinions are adopted by the College of Commissioners and therefore do constitute decisions of the Commission in the same way as a letter of formal notice or a reasoned opinion adopted in the framework of an infringement procedure'. [78]

116. To my mind, an interpretation to the effect that any procedure involving an exchange of information or dialogue between the Member States and the Commission on the application of the Treaties was an investigation would constitute an inappropriate extension of that concept that would not be consistent with either the objective of Regulation No 1049/2001 or Article 42 of the Charter of Fundamental Rights of promoting access to documents of the institutions. [79]

117. Consequently, I consider, as does the Kingdom of Sweden, [80] that a clear distinction must be drawn between, on the one hand, the infringement procedure laid down in Article 258 TFEU, the EU Pilot procedure and the procedure at issue in the case that gave rise to the judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486), the purpose of which is to uncover and resolve any infringements by Member States, and, on the other hand, the preventive procedure referred to in Articles 8 and 9 of Directive 98/34, which means that the detailed opinion delivered by the Commission must be precluded from the concept of investigations. [81]

118. That conclusion is not affected by the fact that, following the procedure laid down in Articles 8 and 9 of Directive 98/34, and in particular following the delivery of a detailed opinion pursuant to Article 9(2) of that directive, the technical regulations subsequently adopted may result in the initiation of infringement proceedings by the Commission.

119. Nor can the Commission's Guidelines of November 2014 on the EU Pilot procedure support the argument that the procedure laid down in Articles 8 and 9 of Directive 98/34 entails investigations within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

120. While it is true that, according to those Commission guidelines, the EU Pilot procedure cannot be implemented where a Member State has not complied with its obligation to react to the detailed opinion delivered pursuant to Article 9(2) of Directive 98/34 and/or the Member State has adopted a technical regulation that is not compatible with EU law, which would suggest that both procedures are of the same nature, that does not in fact seem to be the case.

77 See the second indent of Article 9(2) of Directive 98/34.

78 See paragraph 21 of the Commission's response.

79 See, by analogy, point 43 of the Opinion of Advocate General Cruz Villalón in *ClientEarth* v *Commission* and *ClientEarth and PAN Europe* v *EFSA* (C-612/13 P and C-615/13 P, EU:C:2015:219), where it is stated that '"investigation", within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001, [could not] be confused with the general "overseeing" activity which Article 17(1) TEU attributes to the Commission with regard to the "application of Union law". There is, indeed, a clear difference of degree between the investigation referred to in the third indent of Article 4(2) of Regulation No 1049/2001 and the information gathering necessary to enable the Commission to fulfil its role as guardian of the Treaties.'

80 See paragraph 19 of the Kingdom of Sweden's response, which states that 'there must be a link to an assertion by the Commission of an infringement of EU law so that the exception of confidentiality for the protection of the purpose of investigations within the meaning of the third indent of Article 4(2) of [Regulation No 1049/2001] [may] be invoked. A line is thereby drawn excluding various preventive and preliminary measures which the Commission adopts.'

81 According to the Kingdom of Sweden, 'since the Member State concerned, after having been informed of the detailed opinion, is to notify the Commission of the measures it plans to adopt on the basis of the opinion and the Commission is to give its observations on those measures, it is quite simply impossible for the Commission, by of that opinion, to take any definitive position on whether there has been an infringement of EU law'.

121. It is apparent from point 1.15, entitled 'Follow-up to the notification procedure', of the Report from the Commission to the European Parliament, the Council and the European Social Committee that 'for all other cases where the potential breaches of the EU internal market law have not been entirely cleared within the framework of the 98/34/EC procedure, *the Commission conducted further investigations which in some cases, eventually led, to EU Pilots or to infringement proceedings (Article 258 [TFEU*]) …'.[82]

122. It follows that, in the light of the contradictory documents of the Commission itself on the interaction between those two procedures, the assertion that it is impossible for the procedure laid down in Articles 8 and 9 of Directive 98/34 to be followed by the EU Pilot procedure is not established.

123. It should be added, in accordance with the observations of the Republic of Finland,[83] that it is the Member State that is required to communicate the material referred to in Directive 98/34,[84] while, in cases involving infringement proceedings and the EU Pilot procedure, the exchange of information is triggered by the Commission.

124. In any event, if, as the Republic of Finland indicates, the Commission has sufficient information, following the preventive procedure laid down in Articles 8 and 9 of Directive 98/34, concerning the 'content of the national legislation before sending a letter of formal notice … the EU Pilot phase may be omitted as being [superfluous and serving no useful purpose]'.[85] However, such a factual and random situation in connection with a specific file or case does not, contrary to the observations of the French Republic and the Commission, mean that the procedure laid down in Articles 8 and 9 of Directive 98/34 and the EU pilot procedure pursue similar objectives.

125. Consequently, I consider that the General Court did not err in law when it considered that the procedure laid down in Directive 98/34 does not constitute an investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

126. It follows that the first part of the single plea must be rejected.

Second part of the single plea and the existence of an 'undermining' effect on the purpose of the procedure laid down in Directive 98/34

127. By the second part of its single plea, the French Republic claims that, in paragraphs 84 to 88 of the judgment under appeal, the General Court erred in law in considering, in the alternative, that even if the detailed opinion delivered by the Commission does form part of an investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001, disclosure of that document does not undermine the purpose of the procedure laid down in Directive 98/34.

128. It follows that the second part of the single plea is based on the premiss that the procedure laid down in Articles 8 and 9 of Directive 98/34 constitutes an investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

129. I shall therefore analyse this second part in case the Court should find, contrary to my conclusions concerning the first part, that the procedure at issue constitutes an investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

82 Emphasis added.

83 See point 73 of this Opinion. See also point 3(a) of the Commission's EU Pilot Guidelines of November 2014, which explains the main stages in the EU Pilot procedure.

84 At the hearing, Mr Schlyter emphasised the multilateral nature of the procedure laid down in Articles 8 and 9 of Directive 98/34, whereas the EU Pilot procedure is bilateral in nature.

85 See paragraph 14 of the Republic of Finland's response to the statement in intervention of the Czech Republic.

130. In the first place, the French Government observes that Mr Schlyter did not at any time, in his initial application, his reply or his observations on the statements in intervention, raise the argument that, if the procedure laid down in Directive 98/34 were to constitute an investigation, disclosure of the contested document would not undermine the purpose of that investigation. Consequently, it submits that in so far as the plea raised in the alternative by the General Court was not raised by Mr Schlyter (the applicant before the General Court) and goes to the substantive legality of the decision at issue, the General Court erred in law in paragraphs 84 to 88 of the judgment under appeal by raising that plea of its own motion.

131. I consider that this argument must be rejected.

132. In paragraph 76 of the judgment under appeal, the General Court observed that 'there has been no substantiation of the French Republic's claim, made at the hearing, that the destabilising aspect of informing the public of the Commission's potential criticisms with regard to a notified draft technical regulation before the Member State has had the opportunity to respond to them should not be underestimated'. Next, the General Court held that 'the French Republic did not, inter alia, state what would be unjustifiably destabilised as a result of the fact that an opinion of the Commission on the compliance of a draft technical regulation with certain aspects of EU law is made public'.[86]

133. It follows that, contrary to the French Republic's observations, the General Court did not raise of its own motion the argument that access to the detailed opinion would adversely affect the purpose of the procedure laid down in Articles 8 and 9 of Directive 98/34, but was merely responding to the arguments raised before it by the French Republic itself and the Commission.

134. In the second place, the French Republic observes that in paragraph 85 of the judgment under appeal the General Court recalled that the purpose of the procedure laid down in Directive 98/34 was to prevent the adoption, by a national legislature, of a national technical standard which constituted an obstacle to the free movement of goods, the free movement of services or the freedom of establishment of service operators within the internal market. In the French Republic's submission, the General Court thus placed a restrictive interpretation on the purpose of the procedure laid down in Directive 98/34.

135. The French Republic maintains that the purpose of the procedure laid down in Directive 98/34 is also to prompt the Member State, if necessary, to amend a draft national regulation in order to bring it into conformity with the rules governing the internal market, by means of a dialogue and an amicable settlement of the dispute between the Commission and the Member State concerned. Thus, the French Republic claims that, alongside the purpose of conformity of the national regulations, the procedure laid down in Directive 98/34 also pursues a purpose related to the quality of the dialogue between the Commission and the Member States concerned. It observes that the Court held in paragraph 63 of the judgment of 14 November 2013, *LPN and Finland* v *Commission* (C-514/11 P and C-605/11 P, EU:C:2013:738) that disclosure of the documents concerning an infringement procedure during its pre-litigation stage would be likely to change the nature and progress of that procedure, given that, in those circumstances, it could prove even more difficult to begin a process of negotiation and to reach an agreement between the Commission and the Member State concerned in order to enable EU law to be respected and to avoid legal proceedings.

86 See also paragraph 77 of the judgment under appeal, where the General Court stated that 'it is also necessary to reject the Commission's argument that the disclosure during the standstill period of the detailed opinion which it had delivered in the context of the procedure laid down by Directive 98/34 could adversely affect subsequent discussions between the parties (point 3, ninth paragraph of the contested decision), inasmuch as that procedure could potentially result in infringement proceedings against the notifying Member State'. It should also be noted that the ninth paragraph of point 3 of the decision at issue is in the part entitled 'Protection of the purpose of Investigations'.

136. The French Republic adds that, as is apparent from point 109 of the Opinion of Advocate General Kokott in *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2009:520), 'protection of the purpose of investigations also extends to the freedom to hold smooth discussions of a complaint alleging infringement of [EU] law. Such freedom is useful to enable the Member State concerned, as well as the Commission, to seek an amicable agreement without excessive public pressure. If every step in a controversial Treaty infringement procedure were to be made public, it would be difficult for the political decision-makers to relinquish a position already taken. This might possibly even bar the way to a sensible resolution of a dispute under the law'.

137. According to the French Republic, the amicable settlement of a dispute between the Commission and the Member State concerned before the matter is brought before the Court justifies the refusal of access to the documents at issue.

138. Mr Schlyter maintains that 'to forward for the first time an argument now, at this stage of the proceedings, regarding the alleged undermining of the dialogue between the Commission and Member States, invoking an Opinion of Advocate General Kokott [in *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2009:520)], is inadmissible. The [French Republic] had the opportunity to bring its argument during in the earlier stages of the proceedings. [Mr Schlyter] as well as the General Court asked for the substantiation of the argument concerning the alleged undermining effect, but the [French Republic] did not respond and persisted in citing the Opinion of Advocate General Kokott without explaining how it is applicable to the dispute at hand.'

139. In Mr Schlyter's submission, neither the case-law[87] nor Directive 98/34 itself provide any support for the French Republic's claim that Directive 98/34 would also pursue, as a separate and self-standing objective, the purpose of improving the dialogue between the Commission and the Member State concerned. He maintains that although such dialogue might be helpful in achieving the objective of Directive 98/34, that does not alter the fact that that directive has only one ultimate aim, namely to ensure that national technical regulations conform to EU law, and that the question whether disclosure of the documents may undermine the purpose of the procedure must be assessed by reference to that objective.

140. To my mind, the plea of inadmissibility raised by Mr Schlyter[88] must be rejected. It is apparent from paragraph 83 et seq. of the French Republic's statement in intervention in the case that gave rise to the judgment under appeal that the French Republic relied on the arguments at issue before the General Court[89] and is not raising them for the first time before the Court in the context of this appeal.

141. As regards the substance, I do not think that the General Court placed a restrictive interpretation on the objective of the procedure laid down in Articles 8 and 9 of Directive 98/34 and that the amicable settlement of the dispute between the Commission and the Member State concerned before the matter is brought before the Court justifies the refusal of access to the documents at issue. As I pointed out in my findings on the first part of the single plea, the objective of the procedure laid down in Articles 8 and 9 of that directive is to foresee and prevent the adoption of technical regulations that would create obstacles to trade. Contrary to the French Republic's observations, the

87 See judgments of 8 September 2005, *Lidl Italia* (C-303/04, EU:C:2005:528, paragraph 22; of 15 April 2010, *Sandström* (C-433/05, EU:C:2010:184, paragraph 42); and of 9 June 2011, *Intercommunale Intermosane and Fédération de l'industrie et du gaz* (C-361/10, EU:C:2011:382, paragraph 10).

88 See point 138 of this Opinion.

89 See paragraphs 83 and 84 of the French Republic's statement in intervention before the General Court in the case that gave rise to the judgment under appeal: 'Thus, it is settled case-law that the Member States are entitled to expect the Commission to observe confidentiality as regards investigations which may lead to an infringement proceeding … As observed by Advocate General Kokott [in] her Opinion in *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2009:520), protection of the freedom to hold smooth discussions of a complaint alleging infringement of EU law is useful to enable the Member State concerned, as well as the Commission, to seek an amicable agreement without … pressure'.

amicable settlement of the dispute between the Commission and the Member State concerned before the matter is brought before the Court is not the objective of the procedure laid down in Articles 8 and 9 of Directive 98/34. Consequently, disclosure of the detailed opinion could not adversely affect the objective of those articles.

142. Consequently, I propose that the Court should also reject the second part of the single plea.

Costs

143. Under Article 184(2) of its Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of the Rules of Procedure, which is applicable to the procedure on appeal pursuant to Article 184(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In accordance with Article 140(1) of the Rules of Procedure, which is also applicable to the procedure on appeal pursuant to Article 184(1), the Member States and institutions which have intervened in the proceedings are to bear their own costs. Under Article 184(4) of the Rules of Procedure, the Court may decide that an intervener at first instance who participates in the procedure on appeal is to bear his own costs.

144. I consider that the French Republic should be ordered to pay the costs, in accordance with the form of order sought by Mr Schlyter. The Republic of Finland, the Kingdom of Sweden, the Czech Republic and the Commission must bear their own costs.

Conclusion

145. Having regard to the foregoing considerations, I propose that the Court should:

– dismiss the appeal;

– order the French Republic to bear its own costs and to pay the costs incurred by Mr Schlyter; and

– order the Czech Republic, the Republic of Finland, the Kingdom of Sweden and the Commission to bear their own costs.