Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

7 September 2017 *

(Appeal — Right of public access to documents of the EU institutions — Regulation (EC) No 1049/2001 — Article 4(2), third indent — Exceptions to the right of access to documents — Protection of the purpose of investigations — Directive 98/34/EC — Articles 8 and 9 — Detailed opinion of the European Commission concerning a draft technical regulation — Refusal to grant access)

In Case C-331/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 3 July 2015,

French Republic, represented by D. Colas, G. de Bergues, B. Fodda and F. Fize, acting as Agents,

appellant,

supported by:

Czech Republic, represented by M. Smolek, T. Müller, J. Vláčil and D. Hadroušek, acting as Agents,

intervener in the appeal,

the other parties to the proceedings being:

Carl Schlyter, residing in Linköping (Sweden), represented by S. Schubert, Rechtsanwalt, and O.W. Brouwer, advocaat,

applicant at first instance,

European Commission, represented by J. Baquero Cruz and A. Tokár and by F. Clotuche-Duvieusart, acting as Agents,

defendant at first instance,

Republic of Finland, represented by S. Hartikainen, acting as Agent,

Kingdom of Sweden, represented by C. Meyer-Seitz, N. Otte Widgren, U. Persson and A. Falk and by E. Karlsson, L. Swedenborg, acting as Agents,

interveners at first instance,

* Language of the case: English.

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász (Rapporteur), C. Vajda, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Wathelet,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 8 February 2017,

after hearing the Opinion of the Advocate General at the sitting on 6 April 2017,

gives the following

Judgment

1 By its appeal, the French Republic seeks to have 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') by which the General Court annulled the decision of the European Commission of 27 June 2012, refusing, during the standstill period, access to its detailed opinion concerning a draft Order relating to the content and submission conditions of the annual declaration of nanoparticle substances (2011/673/F, 'the decision at issue'), which had been notified to it by the French authorities pursuant to 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), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) ('Directive 98/34').

I. Legal context

A. Directive 98/34

2 Recitals 3, 6, 7 and 9 of Directive 98/34 state:

'(3) whereas in order to promote the smooth functioning of the internal market, as much transparency as possible should be ensured as regards national initiatives for the establishment of technical standards or regulations;

…

(6) whereas all the Member States must also be informed of the technical regulations contemplated by any one Member State;

(7) whereas the aim of the internal market is to create an environment that is conducive to the competitiveness of undertakings; whereas increased provision of information is one way of helping undertakings to make more of the advantages inherent in this market; whereas it is therefore necessary to enable economic operators to give their assessment of the impact of the national technical regulations proposed by other Member States, by providing for the regular publication of the titles of notified drafts and by means of the provisions relating to the confidentiality of such drafts;

…

(9) whereas, as far as technical regulations for products are concerned, the measures designed to ensure the proper functioning or the continued development of the market include greater transparency of national intentions and a broadening of the criteria and conditions for assessing the potential effect of the proposed regulations on the market;

…’

3 Article 8 of Directive 98/34 states:

‘1. Subject to Article 10, Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; 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.

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 are to 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.

…’

4 Article 9 of that directive provides:

‘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].'

B. Regulation (EC) No 1049/2001

5 Recital 6 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) states: 'wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent'.

6 Article 1 of Regulation No 1049/2001, entitled 'Subject matter', provides:

'The purpose of this Regulation is:

(a) 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(3) TFEU] in such a way as to ensure the widest possible access to documents,

(b) to establish rules ensuring the easiest possible exercise of this right, and

(c) to promote good administrative practice on access to documents.'

7 Article 2 of that regulation, entitled 'Beneficiaries and scope', provides 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.

…

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.

…'

8 Article 4 of that regulation, headed ‘Exceptions’, provides:

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

(a) the public interest as regards:

– public security,

– defence and military matters,

– international relations,

– the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. 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.

…

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

7. 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 exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.’

II. Background to the dispute

9 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.

10 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 by an additional three months (‘the detailed Opinion at issue’).

11 By letter of 16 April 2012, that is to say, during the standstill period, Mr Carl Schlyter requested access to the detailed opinion at issue. The Commission having rejected that request by letter dated 7 May 2012, Mr Schlyter submitted a confirmatory application asking the Commission to reconsider its position.

12 On 27 June 2012, the Commission rejected Mr Schlyter's confirmatory application by the decision at issue.

III. The procedure before the General Court and the judgment under appeal

13 By application lodged at the Registry of the General Court on 6 September 2012, Mr Schlyter sought annulment of the decision at issue. He raised three pleas in law in support of his action.

14 By his first plea, Mr Schlyter claimed that the Commission had committed errors of law and manifest errors of assessment in applying Article 4(2), third indent of Regulation No 1049/2001 and Article 6(1) of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13). By his second plea, Mr Schlyter claimed that the Commission had made an error of law, a manifest error of assessment and failed to state reasons in the application of the criterion of overriding public interest required by Article 4(2) in fine of Regulation No 1049/2001 and Article 6(1) of Regulation No 1367/2006. By his third plea, Mr Schlyter claimed that the decision at issue was vitiated by 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.

15 In the judgment under appeal, the General Court held, principally, that a detailed opinion delivered by the Commission in the context of the procedure laid down by Directive 98/34 does not come within the scope of an investigation for the purposes of the third indent of Article 4(2) of Regulation No 1049/2001, and, in the alternative, that disclosing such a detailed opinion during the standstill period would not necessarily adversely affect the purpose of that procedure.

16 Consequently, the General Court annulled the decision at issue.

IV. Procedure before the Court and forms of order sought

17 By its appeal, the French Republic claims that the Court should set aside the judgment under appeal, refer the case back to the General Court and order Mr Schlyter to pay the costs.

18 The Commission claims that the Court should set aside the judgment under appeal, dismiss the application made at first instance and order Mr Schlyter to pay the costs.

19 Mr Schlyter contends that the Court should dismiss the appeal and order the French Republic to pay the costs incurred in the present proceedings.

20 The Republic of Finland contends that the Court should dismiss the appeal.

21 The Kingdom of Sweden contends that the Court should confirm the judgment under appeal and dismiss the appeal.

22 By order of the President of the Court of 29 October 2015, the Czech Republic was granted leave to intervene in support of the forms of order sought by the French Republic. The Czech Republic claims that the Court should take a decision along the lines proposed by the French Republic and, where appropriate, by the Commission.

V. The appeal

23 It is appropriate, first, to deal with the objections of inadmissibility raised by Mr Schlyter in respect of certain arguments of the appeal and, second, to examine the substance of the single ground of appeal.

A. The objections of inadmissibility

1. Arguments of the parties

24 Mr Schlyter raises objections of inadmissibility in respect of several arguments of the appeal.

25 First, he takes the view that the French Republic's argument relating to the inconsistency between the definition of the concept of 'investigation' used in the judgment under appeal and the approach taken in judgment of 25 September 2014, *Spirlea* v *Commission* (T-306/12, EU:T:2014:816) concerning EU Pilot procedures is inadmissible, in so far as the argument constitutes a new plea which should have been raised before the General Court. According to Mr Schlyter, EU Pilot procedures had already been in use since 2008 and, therefore, the argument based on a comparison of the different procedures could have been introduced before the General Court.

26 Mr Schlyter also claims that the argument put forward by the French Republic that the Commission frequently needs to gather facts in order to establish whether a draft technical regulation is compatible with internal market rules is inadmissible, since such a challenge to a statement of fact by the General Court can no longer be examined on appeal.

27 Lastly, Mr Schlyter asserts that the argument that disclosure of the detailed opinion at issue would undermine the quality of dialogue between the Commission and the Member State concerned because it was likely to affect negotiations and create public pressure is inadmissible in the context of an appeal, since Mr Schlyter has already sought proof from the French Republic that such an undermining effect existed before the General Court. However, according to Mr Schlyter, that Member State did not provide the proof sought but merely cited Advocate General Kokott's Opinion in the case *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2009:520), without explaining how this was relevant to the present case. As it is, all evidence in support of that argument should have been presented before the General Court.

28 The French Republic maintains that those three arguments are admissible.

2. Findings of the Court

29 In respect of those objections of inadmissibility, it should be noted, first, that according to paragraph 52 of the judgment under appeal, the French Republic claimed before the General Court that the procedure laid down by Directive 98/34 must be classified 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. In the present appeal, that Member State seeks to demonstrate, by invoking the alleged inconsistency between the judgment under appeal and the judgment of 25 September 2014, *Spirlea* v *Commission* (T-306/12, EU:T:2014:816), that the General Court committed an error of law by not categorising the

procedure laid down by Directive 98/34 as an 'investigation' within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001. Such an argument does not constitute a new plea but supplements a plea already set out before the General Court.

30 Second, it is clear that the French Republic's argument that the Commission frequently needs to gather facts in order to assess whether a draft technical regulation is compatible with internal market rules does not criticise a statement of fact made by the General Court regarding a specific procedure carried out by the Commission; rather, it concerns the categorisation of the procedure established by Directive 98/34 as an 'investigation' within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001, and thus constitutes a question of law.

31 Third, it must be noted that, according to paragraph 40 of the judgment under appeal, in the decision at issue, the Commission gave reason for the application of the third indent of Article 4(2) of Regulation No 1049/2001 to the present case by taking the view that public disclosure of the detailed opinion concerned during the standstill period would hamper the French Republic's willingness to cooperate with it in a spirit of mutual trust. Moreover, it is clear from the statement in intervention submitted by the French Republic at first instance that it claimed before the General Court, in essence, that the Commission took an inquisitorial approach to the bilateral dialogue, provided for by Directive 98/34, which is subject to a requirement of confidentiality in order to facilitate an amicable resolution of the dispute between the institution and the Member State concerned, without public pressure. It is in that context, by implicitly invoking an analogy between the present case and that giving rise to the judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2010:376), that the French Republic referred to Advocate General Kokott's Opinion in the latter case, with a view to supporting its argument that a certain degree of confidentiality has to be preserved in order to not disrupt the negotiations between the Commission and the Member State concerned. As it is, the amplification of an argument developed before the General Court is admissible on appeal.

32 In those circumstances, the objections of inadmissibility raised by Mr Schlyter must be rejected.

B. Substance

33 In support of its appeal, the French Republic puts forward a single ground of appeal. That single ground is divided into two parts.

1. The first part of the single ground of appeal

(a) Arguments of the parties

34 The French Republic, supported by the Czech Republic and the Commission, claims that the General Court erred in law by taking the view that the procedure laid down by Directive 98/34 does not constitute an 'investigation' within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

35 Mr Schlyter, supported by the Republic of Finland and the Kingdom of Sweden, argues, first, that the French Republic is wrong to criticise the fact that the concept of 'investigation' set out in the judgment under appeal is not based on any definition established by Regulation No 1049/2001, by Directive 98/34 or by case-law.

36 Second, Mr Schlyter takes the view that the French Republic's argument that the application of the concept of 'investigation' in the judgment under appeal is inconsistent with the approach taken in the judgment of 25 September 2014, *Spirlea* v *Commission* (T-306/12, EU:T:2014:816) concerning EU Pilot procedures is ineffective and unfounded.

37 Third, according to Mr Schlyter, the French Republic is wrong to claim that, if the Court were to approve the definition of 'investigation' as defined in paragraph 53 of the judgment under appeal, the procedure referred to by Directive 98/34 would satisfy that definition.

38 Fourth and lastly, Mr Schlyter maintains that nothing in the judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486) suggests that the concept of 'investigation' cannot be defined narrowly. Moreover, he submits that it is not apparent from that judgment that every measure linked to the Commission's function as guardian of the Treaties constitutes an investigation.

(b) *Findings of the Court*

39 The General Court found, in paragraph 83 of the judgment under appeal, that the Commission erred in law by relying on the third indent of Article 4(2) of Regulation No 1049/2001 to refuse access to the detailed opinion at issue, on the ground that disclosing it would undermine the purpose of the investigation, since a detailed opinion delivered by the Commission under the procedure laid down by Directive 98/34, in the light of its content and the context in which it was drawn up, does not come within the scope of an 'investigation' for the purposes of that provision of Regulation No 1049/2001.

40 In order to reach this conclusion, the General Court examined whether or not the procedure laid down by Directive 98/34 and the detailed opinions delivered within the context of such a procedure correspond to the concept of 'investigation', defined in paragraph 53 of the judgment under appeal as covering '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'.

41 If 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.

42 Furthermore, it must be noted that a general definition of this concept has not been established by the case-law of the Court of Justice, either.

43 The French Republic and the Commission contest the General Court's definition of this concept and argue that it is excessively restrictive. They claim, in essence, that the definition of 'investigation' should not be limited to searches carried out by an authority in order to establish an offence or irregularity and to procedures aiming to bring together and verify facts and information with a view to taking a decision.

44 That argument must be accepted.

45 In this respect, it must be noted that the concept of investigation, appearing in the third indent of Article 4(2) of Regulation No 1049/2001, is an autonomous concept of EU law which must be interpreted taking into account, inter alia, its usual meaning as well as the context in which it occurs (see, by analogy, judgments of 9 March 2010, *Commission* v *Germany*, C-518/07, EU:C:2010:125, paragraph 18 and of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 50).

46 Without there being any need to identify an exhaustive definition of 'investigation', within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001, a structured and formalised Commission procedure that has the purpose of collecting and analysing information in order to enable the institution to take a position in the context of its functions provided for by the EU and FEU Treaties must be considered to be an investigation.

47 Those procedures do not necessarily have to have the purpose of detecting or pursuing an offence or irregularity. The concept of 'investigation' could also cover a Commission activity intended to establish facts in order to assess a given situation.

48 Similarly, in order for a procedure to be classified as an 'investigation', it is not necessary for the Commission's position in performing its functions to take the form of a decision within the meaning of the fourth paragraph of Article 288 TFEU. Such a position could take the form, inter alia, of a report or a recommendation.

49 In the present case, it should be noted that Articles 8 and 9 of Directive 98/34 determine the sequence of procedures in relation to the notification by a Member State of a draft technical regulation and the issuing by the Commission of a detailed opinion regarding that regulation. It follows that that directive provides for a structured and formalised procedure.

50 Moreover, it is clear from both the title and the provisions of that directive that the procedure referred to in the directive covers the collection and analysis of information. In particular, Article 8(1) of that directive provides that the Member States are to communicate to the Commission not only draft technical regulations but also, where appropriate, the grounds which make the enactment of such a technical regulation necessary as well as the text of the basic legislative or regulatory provisions principally and directly concerned.

51 In this respect it should be noted that, contrary to the findings of the General Court in paragraphs 56 and 57 of the judgment under appeal, whether the Commission itself asks the Member States for the information or whether it receives it on the basis of legislation is not relevant for the purposes of determining whether the procedure should be classified as an 'investigation'.

52 Lastly, a detailed opinion delivered by the Commission in accordance with Article 9(2) of Directive 98/34 constitutes an official measure clarifying the legal position of that institution in relation to the compatibility of the draft technical regulations notified by the Member State concerned, with, inter alia, the free movement of goods and the freedom of establishment of operators.

53 Accordingly, such an opinion falls under an 'investigation' procedure.

54 In those circumstances, the challenge raised by the French Republic in the first part of its ground of appeal, that the judgment under appeal is vitiated by an error in law in so far as the General Court considered the procedure conducted by the Commission in accordance with the provisions of Directive 98/34 and the detailed opinion delivered by that institution not to fall under 'investigation' within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001, is justified.

55 Consequently, the first part of the single ground of appeal must be upheld.

2. The second part of the single ground of appeal

(a) *Arguments of the parties*

56 The French Republic claims that, in paragraphs 84 to 88 of the judgment under appeal, the General Court erred in law by taking the view, 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 the detailed opinion does not necessarily undermine the purpose of the procedure laid down by Directive 98/34.

57 It claims that Mr Schlyter, the applicant at first instance, did not raise the argument that, if the procedure laid down by Directive 98/34 did constitute an investigation, disclosing the detailed opinion would not undermine the purpose of that investigation. According to the Member State, a plea based on such an argument may not be raised by the Court of its own motion; therefore, the General Court was wrong to invoke it in support of its decision.

58 Second, the French Republic claims that, in paragraph 85 of the judgment under appeal, the General Court wrongly made a restrictive interpretation of the purpose of the procedure laid down by Directive 98/34, since that procedure also pursues an objective connected to the quality of dialogue between the Commission and the Member State concerned. The requirement of confidentiality in the procedure laid down by Directive 98/34, which also prevails in the pre-litigation phase of the infringement proceedings, is intended to protect the quality of dialogue in order to reach an amicable resolution.

59 According to the Commission, the confidential nature of the negotiations between the Commission and the Member State concerned, after the issue of a detailed opinion, is inherent in the procedure under Directive 98/34, and is essentially the same as the confidential nature of negotiations in other similar procedures, particularly in the context of infringement proceedings. It takes the view that the argument raised in paragraph 87 of the judgment under appeal is misconceived and that those negotiations must be protected from any external pressure, for the Commission is trying to convince the Member State concerned that its draft national legislation could be incompatible with EU law and, often, suggests alternative solutions. If that institution had to wait for the formal introduction of infringement proceedings before the dialogue could enjoy confidential treatment, that would undermine the use of preventative control and there could be a negative impact on the internal market. Moreover, the Commission alleges that such a situation would harden the position of the parties and would make the prospect of a favourable resolution in respect of EU law more remote.

60 Mr Schlyter, the Republic of Finland and the Kingdom of Sweden contest these arguments.

(b) *Findings of the Court*

61 According to the Court's well-established case-law, in order to justify refusal of access to a document the disclosure of which has been requested, it is not sufficient, in principle, for that document to be covered by an activity mentioned in Article 4(2) and (3) of Regulation No 1049/2001. The institution concerned must also provide explanations as to how access to that document could specifically and actually undermine the interest protected by an exception laid down in that article (judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraph 64 and the case-law cited).

62 In the present case, as is clear from paragraphs 14 and 40 of the judgment under appeal, the Commission justified the application of the third indent of Article 4(2) of Regulation No 1049/2001 to the present case by stating that public disclosure of the detailed opinion concerned during the

standstill period would diminish the French Republic's willingness to cooperate with it in a spirit of mutual trust. Such publication would, therefore, undermine the protection of the purpose of investigations under the third indent of Article 4(2) of Regulation No 1049/2001.

63 First, contrary to the French Republic's contention, by considering in paragraphs 84 to 88 of the judgment under appeal that, should the procedure laid down by Directive 98/34 constitute an investigation, the disclosure of the detailed opinion at issue would not necessarily undermine the purpose of that procedure, the General Court responded to an argument that had been put forward for its assessment.

64 Indeed, as the Advocate General noted in point 132 of his Opinion, it is clear from paragraph 76 of the judgment under appeal that the French Republic claimed before the General Court 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.

65 With this argument, the French Republic intended to support the Commission's position cited in paragraph 77 of the judgment under appeal and referred to in paragraph 3 of the decision at issue, that disclosure of the detailed opinion in question during the standstill period could adversely affect subsequent discussions between the parties.

66 It follows that it cannot be claimed that the argument in question was raised by the General Court of its own motion.

67 Second, the argument put forward by the French Republic in the context of the present appeal, that disclosing the detailed opinion would necessarily harm the quality of dialogue between the Commission and the Member State concerned so that it would no longer be possible to reach an amicable resolution cannot be accepted either.

68 As the General Court noted in paragraph 85 of the judgment under appeal, the purpose of the procedure laid down by Directive 98/34 and, in particular, the detailed opinion delivered by the Commission in the context of that procedure is to prevent the adoption, by a national legislature, of a technical regulation that constitutes an obstacle to the free movement of goods or services or the freedom of establishment of service operators within the internal market.

69 As regards that objective of Directive 98/34, the General Court recalled, in paragraphs 37 and 85 of the judgment under appeal, the settled case-law of the Court of Justice according to which that directive protects, by means of preventive monitoring, the free movement of goods and services and the freedom of establishment of service operators, which form part of the foundations of the European Union, and that this control 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 (see, to that effect, judgment of 10 July 2014, *Ivansson and Others*, C-307/13, EU:C:2014:2058, paragraph 41 and the case-law cited).

70 In paragraph 87 of the judgment under appeal, the General Court considered that the fact that the Commission discloses its detailed opinion to the effect that aspects of a draft technical regulation notified by a Member State 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 necessarily adversely affect the purpose of that procedure.

71 The elements relied on by the French Republic and by the Commission do not demonstrate that that statement is wrong in law.

72 Instead, it should be noted that the system provided for by Directive 98/34 establishes a requirement of transparency which confirms the validity of that statement.

73 It must be noted that the system established by Directive 98/34 seeks to allow, as recital 7 of that directive indicates, economic operators to make more of the advantages inherent in the internal market by ensuring the regular publication of the titles of the technical regulations proposed by Member States and thus enabling those operators to give their assessment of the impact of those regulations.

74 The Commission itself pointed out in paragraph 5 of the decision at issue that economic operators as well as civil organisations are likely to play an active role and contribute to the functioning of the system established by Directive 98/34 by issuing their opinions. The Commission also noted in that same paragraph of the decision at issue that, since such participation requires a high level of transparency, it regularly publishes technical regulations proposed by the Member States on its website (called 'TRIS').

75 In addition, according to recitals 3 and 6 of that directive, in order to promote the smooth functioning of the internal market, as much transparency as possible should be ensured as regards national initiatives for the establishment of technical standards or regulations, and all the Member States must be informed of the technical regulations contemplated by any one Member State. Recital 9 of that directive explains that the measures designed to ensure the proper functioning or the continued development of the market include greater transparency of national intentions and a broadening of the criteria and conditions for assessing the potential effect of the proposed regulations on the market.

76 In accordance with the first and fifth subparagraphs of Article 8(1) of Directive 98/34, generally, Member States are immediately to communicate to the Commission any draft technical regulation and the Commission will immediately notify the other Member States of that draft and all documents which have been forwarded to it. Under Article 8(2) of the same directive, the Commission and the Member States may make comments to the Member State which has forwarded a draft technical regulation.

77 In this respect, it is clear from Article 8(4) of that directive that information supplied under that article is not to be treated as confidential except at the express request, supported by reasons, of the notifying Member State.

78 It must be emphasised that none of the provisions of Directive 98/34 provides for the confidentiality of a detailed opinion delivered by the Commission or a Member State under Article 9(2) of that directive. In that context, it must be assumed that the requirement of transparency underlying Directive 98/34 applies to these detailed opinions as a matter of course.

79 This conclusion is supported by the case-law of the Court of Justice according to which Directive 98/34 aims to enable economic operators 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, to that effect, judgment of 4 February 2016, *Ince*, C-336/14, EU:C:2016:72, paragraph 83).

80 Furthermore, enabling those operators to be aware not only of the technical regulations proposed by the notifying Member State but also of the positions in respect of that technical regulation as expressed in the detailed opinions delivered by the Commission and the other Member States contributes generally to achieving the aim of preventing a technical regulation that is incompatible with EU law from being adopted.

81 The requirement of transparency that underlies Directive 98/34 does not, however, prevent the Commission, on the basis of the circumstances of the particular case, from relying on the third indent of Article 4(2) of Regulation 1049/2001 in order to deny access to a detailed opinion delivered by itself or a Member State when it is able to demonstrate that access to the detailed opinion in question would specifically and actually undermine the objective of preventing a technical regulation that is incompatible with EU law being adopted.

82 It follows that the General Court did not make an error in law by rejecting the arguments of the French Republic and the Commission that the risk of less cooperation on the part of the Member States, as it was described in the decision at issue, is sufficient justification, with respect to the third indent of Article 4(2) of Regulation No 1049/2001, for denying the request for access to the detailed opinion at issue.

83 The General Court was therefore right to annul 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.

84 As a result, the second part of the single ground of appeal raised by the French republic must be rejected.

85 Given that the grounds of the judgment under appeal, which were criticised in vain by the second part of the single ground of appeal, are sufficient in themselves to justify the operative part of that judgment, that ground of appeal must be rejected and the appeal must be dismissed in its entirety.

VI. Costs

86 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded the Court shall make a decision as to costs.

87 Under Article 138(3) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) of those Rules, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. It is necessary to apply this provision in the present case as the French Republic, Mr Schlyter and the Commission have all been unsuccessful in part.

88 In accordance with Article 140(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) thereof, the Czech Republic is to bear its own costs.

89 In accordance with Article 184(4) of those Rules, the Republic of Finland and the Kingdom of Sweden are also to bear their own costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. Dismisses the appeal;

2. Orders the French Republic, Mr Carl Schlyter and the Commission to bear their own costs;

3. Orders the Czech Republic to bear its own costs;

4. Orders the Republic of Finland and the Kingdom of Sweden to bear their own costs.

von Danwitz Juhász Vajda

Jürimäe Lycourgos

Delivered in open court in Luxembourg on 7 September 2017.

A. Calot Escobar
Registrar

T. von Danwitz
President of the Fourth Chamber