



## Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

28 March 2017\*

(Access to documents — Regulation (EC) No 1049/2001 — Documents relating to a procedure for the application of the competition rules — Refusal to grant access — Duty to state reasons — Exception relating to the protection of the commercial interests of a third party — Exception relating to the protection of the purpose of inspections, investigations and audits — Overriding public interest — Consultation with third parties — Transparency — No response to a confirmatory request with the time limits)

In Case T-210/15,

**Deutsche Telekom AG**, established in Bonn (Germany), represented by A. Rosenfeld and O. Corzilius, lawyers,

applicant,

v

**European Commission**, represented initially by J. Vondung and A. Buchet, and subsequently by F. Erlbacher, P. Van Nuffel and A. Dawes, acting as Agents,

defendant,

APPLICATION pursuant to Article 263 TFEU seeking annulment of the Commission decision of 17 February 2015 refusing to grant the applicant access to documents relating to the procedure for abuse of dominant position with reference COMP/AT.40089 — Deutsche Telekom,

THE GENERAL COURT (Sixth Chamber),

composed of S. Frimodt Nielsen, President, A.M. Collins and V. Valančius (Rapporteur), Judges,

Registrar: S. Bukšek Tomac, Administrator,

having regard to the written part of the procedure and further to the hearing on 27 October 2016,

gives the following

\* Language of the case: German.

## Judgment

### Background to the dispute

- 1 By decision of 25 June 2013, the European Commission ordered an inspection of the premises of the applicant, Deutsche Telekom AG, in accordance with Article 20 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1).
- 2 According to that decision, the Commission had information that the applicant ‘[might] have a dominant position on one or more relevant markets concerning the supply of internet connectivity services’ and ‘might have implemented practices which restrict[ed] or degrade[ed] the quality of internet connectivity services in the EEA’, with the consequence that ‘independent suppliers of content and/or applications on the internet were placed at a competitive disadvantage.
- 3 From 9 to 11 July 2013, the Commission conducted searches of the applicant’s premises.
- 4 By a press release of 3 October 2014, the Commission announced its decision to end its investigation into the practices of certain European telecommunications operators on the internet connectivity services markets and indicated that it would continue to monitor that sector.
- 5 On 7 October 2014, the applicant submitted a request for access to the documents in the Commission’s file in accordance with Article 2(1) 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), and Article 27(2), second sentence, of Regulation No 1/2003.
- 6 By letter of 14 October 2014 and email of 23 October 2014 to the Commission, the applicant specified that the request for access concerned all the documents in the case file for abuse of a dominant position with reference COMP/AT.40089 — Deutsche Telekom. Furthermore, in that email, the applicant stated that its request could be regarded as a request for access to documents under Regulation No 1049/2001.
- 7 By letter of 13 November 2014, the Commission rejected the applicant’s initial request. For that purpose, it distinguished between two categories of documents: first, the Commission’s internal documents to which it refused access on the basis of Article 4(3) of Regulation No 1049/2001, relating to the protection of the decision-making process, and Article 4(2), first indent, thereof, relating to the protection of the commercial interests of a natural or legal person and, second, the documents exchanged between the Commission and the parties concerned, to which it was refused access on the basis of Article 4(2), first indent, of Regulation No 1049/2001.
- 8 By letter of 26 November 2014, the applicant made a confirmatory request pursuant to Article 8 of Regulation No 1049/2001.
- 9 By letter of 17 December 2014, the Commission informed the applicant that it needed an extension of the time limit for responding until 19 January 2015. On 19 January 2015, the Commission informed the applicant that it was not in a position to take a decision on the request within the given time limits, and that a response would be sent to it as soon as possible.
- 10 By decision of 17 February 2015 (‘the contested decision’), the Commission refused the applicant’s confirmatory request, but in support of that decision, it relied on a different legal basis from the one it had relied on in its response to the initial request.

- 11 First of all, as regards the exception relating to the protection of the decision-making process, the Commission indicated that that exception had become irrelevant, since it had taken a final decision on 3 October 2014 in the proceedings for abuse of a dominant position COMP/AT.40089.
- 12 Next, the Commission relied essentially on the exception relating to the protection of commercial interests and, on that basis, it refused to give access to its internal documents and to the documents exchanged with third parties.
- 13 As the parties acknowledged at the hearing, that distinction between internal documents and documents exchanged with third parties, while it did not assist the General Court in its handling of the case, is, nonetheless, irrelevant in the present case, since it is common ground that the Commission applied the presumption to all the documents in the case file.
- 14 Finally, and on the basis of the same general presumption, the Commission relied on the exception relating to the protection of the purpose of inspections, investigations and audits laid down in Article 4(2), third indent, of Regulation No 1049/2001 with respect to all the documents referred to in the request without, this time, making any distinction between its internal documents and the documents it exchanged with third parties.
- 15 In that connection, it claims that, by analogy with the case-law on cartels, there was a general presumption according to which, in principle, the disclosure of such documents adversely affects the commercial interests of the undertakings concerned and the protection of the purpose of inspections, investigations and audits and that, therefore, it was entitled to refuse access to the documents in the administrative case file created in relation to an abuse of dominant position, without having to examine each of the documents in it individually.
- 16 To conclude, it considered that none of the arguments put forward by the applicant established the existence of an overriding public interest in the disclosure of the documents and, consequently, it refused the confirmatory request,

### **Procedure and forms of order sought**

- 17 By application lodged at the Court Registry on 24 April 2015, the applicant brought the present action.
- 18 The applicant claims that the Court should:
- annul the contested decision;
  - order the Commission to pay the costs.
- 19 The Commission contends that the Court should:
- dismiss the application;
  - order the applicant to pay the costs.

### **Law**

- 20 In support of its action, the applicant relies essentially on seven pleas in law. First, infringement of Article 4(3), second subparagraph, of Regulation No 1049/2001 and the duty to state reasons; second, infringement of Article 4(2), first and third indents, of Regulation No 1049/2001; third, infringement of Article 4(2), final indent, of Regulation No 1049/2001; fourth, infringement of Article 4(4) of

Regulation No 1049/2001; fifth, infringement of Article 4(6) of Regulation No 1049/2001; sixth, infringement of Article 41(2)(b) and Article 42 of the Charter of Fundamental Rights of the European Union and the obligation of transparency laid down in Article 15(3) TFEU and; seventh, infringement of Article 8 of Regulation No 1049/2001.

- 21 As a preliminary point, it must be determined whether the existence of a general principle relating to a request for access to documents in the administrative case file in a case concerning abuse of a dominant position exists.

***Consideration of the existence of a general principle concerning a request for access to documents in the administrative case file in a case concerning abuse of a dominant position***

- 22 By virtue of Article 15(3) TFEU, and Article 42 of the Charter of Fundamental Rights of the European Union, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, are to have a right of access to the documents of the Union's institutions, bodies, offices and agencies, subject to the principles and conditions to be defined in accordance with Article 15(3) TFEU. In particular, by virtue of the second subparagraph thereof, those principles and conditions are to be determined by the European Parliament and the Council of the European Union, by means of regulations, acting in accordance with the ordinary legislative procedure.
- 23 On that basis, Regulation No 1049/2001 is designed to confer on the public as wide a right of access as possible to documents of the Union's institutions subject, as is apparent in particular from the system of exceptions in Article 4, to certain limits based on reasons of public or private interest (see judgment of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 61 and the case-law cited).
- 24 In particular, it is clear from Article 4(2), first and third indents, of Regulation No 1049/2001, that the institutions are to refuse access to a document where its disclosure would undermine the protection of the commercial interests of a specific natural or legal person or the purpose of inspections, investigations and audits, unless there is an overriding public interest in such disclosure.
- 25 That system of exceptions is based on a balancing of the different interests at stake, that is to say the interests which would be favoured by disclosure of the requested document or documents and those which would be jeopardised by such disclosure (judgments of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 42, and of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 63).
- 26 Since the exceptions laid down in Regulation No 1049/2001 derogate from the principle of the widest possible public access to documents, they must be interpreted and applied strictly (see judgment of 3 July 2014, *Council v in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 48 and the case-law cited).
- 27 Consequently, in order to justify a refusal to grant access to a document whose disclosure has been requested, it is not sufficient, in principle, for the requested document to be covered by an activity mentioned in Article 4(2) of Regulation No 1049/2001. As a rule, the institution to which the request is addressed must also provide explanations as to how access to that document could specifically and actually undermine the interest protected by the exception or exceptions relied on (judgments of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 49, and of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 64). Moreover, the likelihood of that interest being compromised must be reasonably foreseeable and not purely hypothetical (judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 43).

- 28 However, it is possible for the institution concerned to base its decisions on general presumptions which apply to certain categories of documents, as considerations of a generally similar nature are likely to apply to requests for disclosure relating to documents of the same nature (see judgment of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 65 and the case-law cited).
- 29 Thus, where there is a request covering a set of documents, it is open to the institution concerned to base its decision on a general presumption that the disclosure of documents of a certain nature will, in principle, undermine the protection of one of the interests listed in Article 4 of Regulation No 1049/2001 which enables the institution concerned to deal with a global application and to reply thereto accordingly (see judgment of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraphs 67 and 68 and the case-law cited).
- 30 In particular, in the case of requests relating to a set of documents included in the file of a proceeding pursuant to the competition rules, the EU judiciary has held, first of all, that the Commission was entitled to presume, without carrying out an individual and specific examination of each of those documents, that their disclosure would, in principle, undermine the protection of the purpose of inspections and investigations as well as the protection of the commercial interests of the undertakings party to the proceedings, which are closely linked in such a context (see judgment of 7 July 2015, *Axa Versicherung v Commission*, T-677/13, EU:T:2015:473, paragraph 39 and the case-law cited).
- 31 It must be held that that case-law, developed in relation to access to documents in the case file prepared in proceedings relating to cartels, must be applied by analogy and for the same reasons to the access to documents in a case file in a proceeding relating to abuse of a dominant position, whether regarding documents that the Commission has exchanged with parties to the proceedings or third parties or internal documents that the Commission elaborated in order to conduct the proceedings in the present case.
- 32 Such a general presumption may arise, as regards the proceedings for the application of Article 102 TFEU, from the provisions of Regulation No 1/2003 and Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102 TFEU] (OJ 2004 L 123, p. 18), which specifically govern the right of access to documents in the Commission's case files concerning those proceedings.
- 33 In that connection, it must be observed that Regulations Nos 1/2003 and 773/2004 pursue different objectives from those of Regulation No 1049/2001, since they are designed to ensure that the rights of defence of the parties concerned are respected and complaints dealt with diligently, while at the same time ensuring compliance with the duty of professional secrecy in proceedings under Article 102 TFEU, whereas Regulation No 1049/2001 aims to facilitate as far as possible the exercise of the right of access to documents or to promote good administrative practice by guaranteeing the greatest possible transparency in the decision-making process of public authorities and the information on which they base their decisions (see, by analogy, judgments of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 83, and of 13 September 2013, *Netherlands v Commission*, T-380/08, EU:T:2013:480, paragraph 30).
- 34 It is common ground that, in the present case, the applicant made a request for access to documents in the administrative case file at issue under Regulation No 1049/2001 which, moreover, it confirmed in its email of 23 October 2014.
- 35 Furthermore, as regards the contradiction between Regulation No 1049/2001 and another rule of EU Law, it must be recalled that since Regulations Nos 1049/2001 and 1/2003 do not contain a provision expressly giving one regulation primacy over the other, it is necessary to ensure that each of the regulations is applied in a manner which is compatible with the other and enables them to be applied



consistently (judgments of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 84, and of 13 September 2013, *Netherlands v Commission*, T-380/08, EU:T:2013:480, paragraph 31).

- 36 First, while Regulation No 1049/2001 is designed to confer on the public as wide a right of access as possible to documents of the institutions, that right is nonetheless subject to certain limits based on reasons of public or private interest.
- 37 Second, Articles 27(2) and 28 of Regulation No 1/2003 and Articles 6, 8, 15 and 16 of Regulation No 773/2004 lay down restrictive rules for the use of documents in the file relating to a proceeding under Article 102 TFEU by confining access to the file to the ‘parties concerned’ and to ‘complainants’ whose complaints the Commission intends to reject, subject to the protection of the business secrets and other confidential information of undertakings and internal documents of the Commission and the competition authorities of the Member States, and provided that the documents made available are used only for the purposes of judicial or administrative proceedings for the application of Article 102 TFEU (see, by analogy, judgments of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 86, and of 13 September 2013, *Netherlands v Commission*, T-380/08, EU:T:2013:480, paragraph 38).
- 38 It follows that the parties to a proceeding under Article 102 TFEU do not enjoy unlimited right of access to the documents in the Commission’s file and that third parties, with the exception of complainants, do not, under such a proceeding, have any right of access to the documents in the Commission’s file (see, by analogy, judgment of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 87).
- 39 Those considerations must be taken into account in interpreting Article 4(2), first and third indents, of Regulation No 1049/2001. If persons other than those with a right of access under Regulations Nos 1/2003 and 773/2004, or those who enjoy such a right in principle but have not used it or have been refused access, were able to obtain access to documents on the basis of Regulation No 1049/2001, the access system introduced by Regulations Nos 1/2003 and 773/2004 would be undermined (see, by analogy, judgments of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 88, and of 13 September 2013, *Netherlands v Commission*, T-380/08, EU:T:2013:480, paragraph 40).
- 40 It is true that the right to consult the case file in a proceeding under Article 102 TFEU and the right of access to documents pursuant to Regulation No 1049/2001 are legally distinct. However, the fact remains that they lead to a comparable situation from a functional point of view. Whatever the legal basis on which it is granted, access to the file enables the interested parties to obtain the observations and documents submitted to the Commission by the undertakings concerned and by third parties (see, by analogy, judgments of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 89, and of 13 September 2013, *Netherlands v Commission*, T-380/08, EU:T:2013:480, paragraph 32).
- 41 In those circumstances, generalised access on the basis of Regulation No 1049/2001, to the documents exchanged, in a proceeding under Article 102 TFEU between the Commission and the parties concerned by that procedure or third parties would jeopardise the balance which the EU legislature sought to ensure in Regulations Nos 1/2003 and 773/2004 between the obligation on the undertakings concerned to submit to the Commission possibly sensitive commercial information and the guarantee of increased protection, by virtue of the requirement of professional secrecy and business secrecy, for the information so provided to the Commission (see, by analogy, judgments of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 90, and of 13 September 2013, *Netherlands v Commission*, T-380/08, EU:T:2013:480, paragraph 39).

- 42 In that connection, it must be recalled that, according to settled case-law, the administrative activity of the Commission does not require as extensive an access to documents as that concerning the legislative activity of a Union institution (see, to that effect, judgments of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 60; 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, paragraph 77; and of 21 July 2011, *Sweden v MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 87).
- 43 It follows that, as regards procedures for the application of Article 102 TFEU, a general presumption may arise from Regulations No 1/2003 and No 773/2004 concerning the right to consult documents in the Commission's file relating to those procedures (see, by analogy, judgments of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraphs 55 to 57; of 28 June 2012, *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 117; and of 28 June 2012, *Commission v Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 58), without there being any need, in that regard, to distinguish between internal documents and documents exchanged with third parties, since that distinction is irrelevant where the general presumption applies to the whole case file in the administrative procedure (see paragraph 31 above).
- 44 Having regard to the foregoing, it must be held that the Commission correctly based its decision to refuse the applicant access to the documents in the procedure concerned on a general presumption derived from the exceptions laid down in Article 4(2), first and third indents, of Regulation No 1049/2001, as it took the view that the disclosure of those documents would be likely, in principle, to undermine the protection of the commercial interests of the undertakings involved in such a procedure and the protection of the purpose of inspections, investigations and audits (see, by analogy, judgments of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 61; of 28 June 2012, *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 123; of 28 June 2012, *Commission v Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 64; and of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 64).
- 45 In addition, having regard to the nature of the interests protected, it must be held that the existence of a general principle applies regardless of whether the request for access concerns an investigation which has already been closed or one which is pending. The publication of sensitive information concerning the economic activities of the undertakings involved is likely to harm their commercial interests, regardless of whether an investigation is pending. Furthermore, the prospect of such publication after a procedure is closed runs the risk of adversely affecting the willingness of undertakings to cooperate when such a procedure is pending (see, by analogy, judgments of 28 June 2012, *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 124, and of 28 June 2012, *Commission v Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 66).
- 46 Finally, it is clear from the case-law of the Court that the possibility given to the Commission to rely on a general presumption covering a set of documents means that the documents concerned fall outside the scope of the obligation to disclose their content, in whole or even in part (see by analogy, judgment of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 134).
- 47 Based on those considerations, it is appropriate to examine in turn the pleas alleging infringement of Article 4(2), first and third indents, of Regulation No 1049/2001, infringement of Article 4(2), final indent thereof, infringement of Article 4(3) thereof and the duty to state reasons, infringement of Article 4(4) thereof, infringement of Article 4(6) thereof, infringement of Articles 41 and 42 of the Charter of Fundamental Rights and the obligation of transparency laid down in Article 15(3) TFEU and, finally, infringement of Article 8 of Regulation No 1049/2001.

***The second plea: infringement of Article 4(2), first and third indents, of Regulation No 1049/2001***

- 48 The applicant claims that the Commission infringed Article 4(2), first and third indents, of Regulation No 1049/2001. It asserts that the Commission should have carried out a concrete and individual assessment of the documents and should have explained how their disclosure could actually and specifically undermine the interest protected.
- 49 The applicant considers that the Commission has not established that the disclosure of either the internal documents or the documents exchanged between it and third parties, that is, requests for information, letters and their annexes received by the parties and information transmitted by third parties could specifically and actually undermine the interest protected.
- 50 The applicant takes the view that the Commission incorrectly based its decision on a general presumption which applies only to procedures concerning cartels, and which cannot be transposed to a procedure for abuse of a dominant position. The Commission should have examined, with respect to each document, whether that document contained information relating to its decision ordering an inspection or sensitive commercial information on third parties and, if so, whether it was possible to protect them by deleting those passages from the document.
- 51 The applicant claims that the refusal of access to documents on account of the protection of the purpose of investigations only applies as long as the investigation continues.
- 52 The applicant considers that the Commission's explanation that the investigation might subsequently be reopened cannot justify the refusal of access to the documents, and that the Commission cannot base its decision on the provisions of Article 28 of Regulation No 1/2003 and Article 15 of Regulation No 773/2004 to refuse the applicant access to the documents, or to argue that their possible disclosure would make an undertaking less willing to cooperate in the course of a procedure.
- 53 Having regard to the considerations set out in paragraphs 22 to 44 above, it must be held that the Commission correctly based its decision on a general presumption derived from the exceptions laid down in Article 4(2), first and third indents, of Regulation No 1049/2001, in order to refuse the applicant access to the documents in the procedure concerned, since it took the view that disclosure of those documents would, in principle, be liable to undermine both the protection of the commercial interests of the undertakings involved in such a procedure and the protection of the purpose of the related investigation.
- 54 Furthermore, the recognition that there is a general presumption that the disclosure of documents of a certain nature will, in principle, undermine the protection of one of the interests listed in Article 4 of Regulation No 1049/2001 enables the institution concerned to deal with a global application and to reply thereto accordingly (judgment of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 48).
- 55 It follows that a general presumption indicates that the documents covered by it are not subject to an obligation of disclosure of their content, in full or in part (see, to that effect, judgment of 28 June 2012, *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 133).
- 56 Therefore, the Commission was not required to carry out an individual examination of each document in the administrative case file, or to examine whether, at the very least, partial access to those documents could be granted.
- 57 The applicant's arguments in that regard must therefore be dismissed.



58 Furthermore, as regards the applicant's arguments, first, that the refusal of access to the documents on account of the protection of the purpose of the investigation cannot apply to documents relating to an investigation which has been closed and, second, that the Commission cannot argue that the possibility that the documents might be disclosed would make undertakings less willing to cooperate in the course of a procedure, those arguments cannot be accepted for the reasons set out in paragraph 45 above.

59 It follows that the second plea must be rejected as unfounded.

***The third plea: infringement of Article 4(2), final indent, of Regulation No 1049/2001***

60 The applicant asserts that there is an overriding public interest in disclosing certain essential information regarding the Commission's action in the area of competition and, in particular, the detailed rules for implementing EU competition law.

61 The applicant takes the view that there is also an overriding public interest in the disclosure of the documents in the procedure at issue for a number of reasons relating to the promotion of best administrative practices by the Commission, the improvement of compliance measures by companies, compensation for damage suffered resulting from the investigation, and the need for judicial review of the action of the administration.

62 According to the case-law, the existence of a general presumption does not exclude the possibility of demonstrating that a given document disclosure of which has been requested is not covered by that presumption, or that there is an overriding public interest justifying disclosure of the document concerned by virtue of the last clause of Article 4(2) of Regulation No 1049/2001 (judgment of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 66).

63 It is, however, for the party requesting access to refer to specific circumstances to establish an overriding public interest which justifies the disclosure of the documents concerned (judgments of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 94, and of 16 July 2015, *ClientEarth v Commission*, C-612/13 P, EU:C:2015:486, paragraph 90).

64 As regards the existence of an overriding public interest, it must be recalled that the public must be in a position to ascertain the actions taken by the Commission in the field of competition in order to ensure, on the one hand, that it is possible to identify in a sufficiently precise manner conduct for which economic operators are liable to be penalised and, on the other hand, that the Commission's decision-making practice is understood, since the latter is of crucial importance to the functioning of the internal market, which affects all European Union citizens, both as economic operators and as consumers (judgment of 7 October 2014, *Schenker v Commission*, T-534/11, EU:T:2014:854, paragraph 80).

65 There is, therefore, an overriding public interest in the public being able to ascertain certain essential elements of Commission action in the field of competition. However, contrary to what is claimed, in essence, by the applicant, the existence of that public interest does not require the Commission to grant generalised access, on the basis of Regulation No 1049/2001, to all the information collected in the context of a proceeding under Article 102 TFEU (judgment of 7 October 2014, *Schenker v Commission*, T-534/11, EU:T:2014:854, paragraphs 81 and 82).

66 Indeed, it should be noted that such generalised access would jeopardise the balance which the EU legislature sought to ensure, in Regulation No 1/2003, between the obligation on the undertakings concerned to submit to the Commission possibly sensitive commercial information and the guarantee

of increased protection, by virtue of the requirement of professional secrecy and business secrecy, for the information so provided to the Commission (judgment of 7 October 2014, *Schenker v Commission*, T-534/11, EU:T:2014:854, paragraph 83).

67 Moreover, it should be pointed out that it follows from recital 6 of Regulation No 1049/2001 that the interest of the public in obtaining access to a document pursuant to the principle of transparency does not carry the same weight in the case of a document drawn up in an administrative procedure as in the case of a document relating to a procedure in which the EU institution acts in its capacity as legislator (judgment of 7 October 2014, *Schenker v Commission*, T-534/11, EU:T:2014:854, paragraph 84).

68 Furthermore, having regard to the general principle of access to documents laid down by Article 15 TFEU and recitals 1 and 2 of Regulation No 1049/2001, that interest must be objective and general in nature and must not be indistinguishable from individual or private interests (judgment of 20 March 2014, *Reagens v Commission*, T-181/10, not published, EU:T:2014:139, paragraph 142).

69 In the present case, it must be stated that, apart from the promotion of best practices and the improvement of compliance measures by companies, in respect of which the applicant makes only vague assertions, the interests relied on essentially by the applicant are only of concern to it, and do not present the general character and objectivity required by the case-law. Therefore, such interests may be regarded as individual or private interests and cannot be considered as constituting an overriding public interest in the disclosure of the documents requested.

70 In that connection, the applicant's argument that the refusal of access to documents amounts to depriving the right to an effective remedy of its effectiveness cannot be accepted.

71 On that point, it must be recalled, first, that remedies exist against a decision ordering an investigation and that the applicant, who in the present case did not exercise them against that decision, fails to establish that it had been deprived of or prevented from exercising them in good time. Second, should the case arise, the exercise by the applicant of those remedies with the aim of asserting its rights also has a subjective character and therefore cannot be regarded as an overriding public interest within the meaning of Article 4(2), final subparagraph, of Regulation No 1049/2001.

72 The same is true as regards the applicant's arguments relating to the interest in compensation for damage suffered as a result of the investigation, which clearly constitutes a private interest.

73 In those circumstances, the complaint based on an alleged infringement of Article 4(2), final indent, of Regulation No 1049/2001, cannot be accepted.

74 The third plea must therefore also be rejected as unfounded.

***The first plea in law: infringement of Article 4(3) of Regulation No 1049/2001 and the duty to state reasons***

75 The applicant claims essentially that the Commission committed an error of law by failing to base the contested decision on Article 4(3) of Regulation No 1049/2001 relating to the ongoing decision-making process that it had relied on its response to the initial request. According to the applicant, since the decision-making process was finished, that new situation should have led to a change in its position and, therefore, to the grant of access to the file. According to the applicant, the Commission, in order to refuse its request for access to the documents, merely relied on the provisions of Article 4(2), first and third indents, of Regulation No 1049/2001, which are less strict than the provisions of Article 4(3), second subparagraph, thereof.

- 76 The applicant therefore challenges the conditions in which the Commission applied Article 4 of Regulation No 1049/2001. It takes the view that, where access to documents is refused, the Commission must explain how that access could specifically and actually undermine the interest protected and the risk must be reasonably foreseeable, not purely hypothetical.
- 77 As regards the internal documents, the applicant states that it is insufficient that the decision-making process is simply undermined, but that process must be seriously undermined according to the case-law.
- 78 The applicant also considers that the Commission, by failing to explain why it did not base its decision on Article 4(3), second subparagraph, of Regulation No 1049/2001, breached the duty to state reasons laid down in Article 296, second paragraph, TFEU and that, pursuant to Article 7(2) of Regulation No 1049/2001, it should have carried out a full re-examination of the initial decision and indicated, in the confirmatory decision the reasons why the exception laid down in Article 4(3), second subparagraph, of Regulation No 1049/2001 did not apply.
- 79 First, as regards the supposed infringement of Article 4(3) of Regulation No 1049/2001, it must be stated that, it is true that in order to refuse the applicant's request for access to documents the Commission, in the answer to the original request, first based its decision on the exception laid down in that provision relating to the likelihood of undermining the decision-making process as regards its internal documents.
- 80 However, it must be recalled that, according to settled case-law, by virtue of Article 8 of Regulation No 1049/2001, the response to the initial request is only an initial statement of position, conferring on the applicant the right to request the Secretary-General of the Commission to reconsider the position in question (see judgment of 24 May 2011, *NLG v Commission*, T-109/05 and T-444/05, EU:T:2011:235, paragraph 101 and the case-law cited).
- 81 Consequently, only the measure adopted by the Secretary-General of the Commission, which is a decision and which entirely replaces the previous statement of position, is capable of producing legal effects such as to affect the interests of the applicant and, in consequence, capable of being the subject of an action for annulment (judgment of 24 May 2011, *NLG v Commission*, T-109/05 and T-444/05, EU:T:2011:235, paragraph 102 and the case-law cited).
- 82 Furthermore, the Court has consistently held that an EU institution, when assessing a request for access to documents held by it, may take into account more than one of the grounds for refusal set out in Article 4 of Regulation No 1049/2001 (judgments of 28 June 2012, *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 113, and of 28 June 2012, *Commission v Agrofert Holdings*, C-477/10 P, EU:C:2012:394, paragraph 55).
- 83 In the decision it adopted in response to the confirmatory request, the Commission was not, therefore, in any way required to retain the legal basis adopted in response to the initial request.
- 84 Furthermore, although the institution is entitled to take into account a number of grounds for refusal set out in Article 4 of Regulation No 1049/2001, there is no requirement to adopt all the grounds which might apply, or to take a position in respect of them.
- 85 In the present case, the Commission based the contested decision solely on the exceptions set out in Article 4(2), first and third indents, of Regulation No 1049/2001 and did not rely on Article 4(3) thereof.
- 86 Therefore, the complaint based on the supposed infringement of the provisions of Article 4(3), second subparagraph, of Regulation No 1049/2001 must be dismissed, in any event, as irrelevant.

- 87 Second, as regards the supposed obligation to state reasons, it must be recalled that, according to settled case-law, the reasoning required by Article 296, second paragraph, TFEU must be adapted to the nature of the act concerned and must show clearly and unequivocally the reasoning of the institution, the author of the act, to enable persons concerned to be apprised of the justifications for the measure adopted and the court with jurisdiction to exercise judicial review.
- 88 It must be held that, in the contested decision, the Commission explained the reasons why it no longer relied on Article 4(3) of Regulation No 1049/2001 in order to justify its refusal to give access to the documents in the administrative case file, namely the closure of the investigation by the final decision of 3 October 2014.
- 89 Furthermore, the Commission also examined whether there was any overriding public interest in disclosure of the documents requested and concluded that they were covered by the exceptions laid down in Article 4(2), first and third indents, of Regulation No 1049/2001. Therefore, the applicant was informed of the grounds for which the Commission refused its request for access to the documents in the procedure at issue.
- 90 In those circumstances, the applicant's arguments alleging breach of the duty to state reasons cannot be accepted.
- 91 Third, as regards the applicant's arguments that the Commission should have carried out a re-examination of the decision pursuant to Article 7(2) of Regulation No 1049/2001 and should have stated the reasons why the exception laid down in Article 4(3) of Regulation No 1049/2001 did not apply, it must be recalled that Article 7(2), concerning the handling of initial requests, provides that in the event of a total or partial refusal the applicant may make a confirmatory application asking the institution to reconsider its position within 15 working days of receiving the institution's reply.
- 92 It must be held that the applicant sent a confirmatory request to the Commission and the latter responded to it.
- 93 The first element of the third part of the plea therefore has no basis in fact and the second element is indistinguishable from the second part of the plea, so that it must be dismissed for the reasons set out in paragraphs 87 and 88 above.
- 94 It follows that the first plea must be dismissed as being partly irrelevant and partly unfounded.

***The fourth plea: infringement of Article 4(4) of Regulation No 1049/2001***

- 95 By its fourth plea, the applicant submits that according to Article 4(4) of Regulation No 1049/2001 the institution is to consult third parties, in the present case the other telecommunications undertakings which were the subject of the procedure at issue, in order to determine whether an exception laid down in Article 4(1) or (2) should have been applied, and that it is possible to avoid that consultation only if it is clear that the document must or must not be disclosed, which has not been established in the present case. It points out that no consultation took place in the present case.
- 96 Pursuant to Article 4(4) of Regulation No 1049/2001, as regards third-party documents, the institution must consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed
- 97 It is clear that Article 4(4) of Regulation No 1049/2001 does not impose an obligation on the institutions to consult third parties in all circumstances.



98 In the present case, it must be stated that the Commission refused the applicant's request for access to the documents on the basis of a general presumption derived from the exceptions laid down in Article 4(2), first and third indents, of Regulation No 1049/2001 and that the Commission considered that none the documents in the procedure at issue should be disclosed.

99 In those circumstances, in the procedure at issue, the Commission was under no obligations to consult third parties, in the present case the telecommunications undertakings which were the subject of the investigation, contrary to the applicant's assertions.

100 Therefore, the complaint alleging the infringement of Article 4(4) of Regulation No 1049/2001 cannot be accepted.

101 It follows that the fourth plea must be rejected as unfounded.

***Fifth plea: infringement of Article 4(6) of Regulation No 1049/2001***

102 The applicant submits that the Commission incorrectly applied Article 4(6) of Regulation No 1049/2001, in that it refused to grant even partial access to the documents.

103 It takes the view that the Commission should have considered the possibility of granting partial access to certain documents by deleting certain passages or by drafting a non-confidential version, without which the right of partial access to documents would be deprived of its effectiveness.

104 Pursuant to Article 4(6) of Regulation No 1049/2001, if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document are to be released.

105 It must be recalled that the general presumption relied on by the Commission does not exclude the possibility of demonstrating that a given document whose disclosure has been requested is not covered by that presumption (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, paragraph 66 and the case-law cited). However, the requirement to ascertain whether the general presumption in question actually applies cannot be interpreted as meaning that the Commission must examine individually each document requested in the case. Such a requirement would deprive that general presumption of its proper effect, which is to permit the Commission to reply to a global request for access in a manner equally global (judgment of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 68).

106 In the present case, it suffices to state that the Commission rejected the request for access to the documents in the administrative case file at issue relying on a general presumption based on the exceptions laid down in Article 4(2), first and third indents, of Regulation No 1049/2001.

107 In those circumstances, the documents covered by the presumption fall outside the scope of the obligation to disclose their content, in full or in part (see, to that effect, judgments of 28 June 2012, *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 133, and of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 134).

108 Therefore, the complaint based on the alleged infringement of Article 4(6) of Regulation No 1049/2001 cannot be accepted.

109 It follows that the fifth plea must be dismissed as unfounded.

***The sixth plea: infringement of Articles 41 and 42 of the Charter of Fundamental Rights of the European Union and the obligation of transparency laid down in Article 15(3) TFEU***

- 110 By that plea, submitted in the alternative, the applicant submits essentially that, if its arguments based on the infringement of Regulation No 1049/2001 are not accepted, it must be held that its fundamental right to access to the documents in the Commission's administrative case file guaranteed by Article 42 of the Charter of Fundamental Rights, its right to access to the that file guaranteed by Article 41(2)(b) of the Charter of Fundamental Rights and the principle of transparency in Article 15(3) TFEU have been infringed.
- 111 Moreover, the applicant considers that, although the protection of confidentiality and professional and commercial secrecy is an objective of public interest recognised in Article 339 TFEU and defined more precisely in the provisions of secondary law, the restriction of the right of access to documents with the aim of protecting those interests or the purpose of investigations is disproportionate in the present case.
- 112 As a preliminary point, it must be recalled that the present dispute concerns a request for access to the documents in the case file relating to the administrative procedure on the basis of Regulation No 1049/2001, as is clear, in particular from the applicant's email of 23 October 2014, and not a request for access to the administrative case file based on the specific provisions of Regulations Nos 1/2003 and 773/2004, which aim to ensure the respect for the rights of defence enjoyed by the parties involved in a procedure for infringement of competition law rules.
- 113 First, as regards, the alleged infringement by the Commission of Article 42 of the Charter of Fundamental Rights, relating to the right of access to documents, and Article 15(3) TFEU, it must be recalled that, according to the latter provision, the right of access to documents is subject to the principles and the conditions determined by the European Parliament and the Council by means of regulations, acting in accordance with the ordinary legislative procedure. Thus, Regulation No 1049/2001, adopted on the basis of Article 255 EC, the contents of which was enshrined in Article 15(3) TFEU, lays down the general principles and limits with regard to the right of access to documents held by the Commission. Furthermore, according to Article 52(2) of the Charter of Fundamental Rights, the rights recognised by the Charter which are based on the Treaties must be exercised under the conditions and within the limits defined by those treaties.
- 114 Therefore the General Court must review the legality of the decision to refuse access exclusively by reference to Regulation No 1049/2001, and not the legality of the latter in the light of Charter of Fundamental Rights, having regard to the fact that no plea of illegality was raised in the present case. As is clear, in particular, from the examination of the second plea, the Commission refused access to the documents requested in accordance with Regulation No 1049/2001 (see, to that effect, order of 2 September 2014, *Verein Natura Havel and Vierhaus v Commission*, T-583/13, not published, EU:T:2014:738, paragraphs 69 and 70).
- 115 Second, as regards the alleged breach of the right to good administration, which includes, in alia, the right of any person to access the file which concerns him, recognised in Article 41(2)(b) of the Charter of Fundamental Rights, it suffices to state that the contested decision concerned a request for access to documents and not a request for access to the file. It is clear from the email of 23 October 2014, that the applicant expressly indicated to the Commission that its request could be considered as a request for access to documents on the basis of Regulation No 1049/2001, which is confirmed by a reading of the confirmatory request as a whole.
- 116 In any event, it must be observed that the right of access to the file recognised by the Charter of Fundamental Rights is laid down in Regulations Nos 1/2003 and 773/2004 as regards the investigations covered by Article 101 and 102 TFEU. Furthermore, the applicant has not raised any plea of illegality regarding Regulations Nos 1/2003 and 773/2004 alleging an infringement of the

Charter. Moreover, it is clear from the wording of Article 15(1) of Regulation No 773/2004 that the right of access to the file is granted to the parties to whom the Commission has addressed a statement of objections. It is common ground that the Commission has not addressed a statement of objections to the applicant. Thus, in those circumstances, the applicant cannot rely on the infringement of the right of access to the Commission's file in the competition investigation concerned.

117 Therefore, the complaints based on the alleged infringement of Articles 41 and 42 of the Charter of Fundamental Rights and the obligation of transparency laid down in Article 15(3) TFEU must be dismissed.

118 Third, as regards the applicant's arguments relating to the restrictions which may be imposed on the right of access to the documents only if they are in fact public interest objectives, and do not constitute a disproportionate and intolerable interference with regard to the objective pursued, assuming the applicant intended to rely on the infringement of the principle of proportionality, it must be recalled that that principle requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question, it being understood that, when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (judgment of 17 October 2013, *Schable*, C-101/12, EU:C:2013:661, paragraph 29). Thus, regarding access to documents, the case-law establishes that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view (judgment of 20 September 2016, *PAN Europe v Commission*, T-51/15, not published, EU:T:2016:519, paragraph 21).

119 In the present case, it must be observed that the exceptions laid down in Article 4(2), first and third indents, of Regulation No 1049/2001, relied on by the Commission to justify the decision to refuse access to the documents to the applicant aim, first, to protect the commercial interests of the undertakings concerned and, second, those of the purpose of the investigation and that those objectives are public interest objectives which, moreover, do not appear to be disproportionate with regard to the aims pursued.

120 Therefore, the complaint alleging breach of the principle of proportionality must be dismissed.

121 It follows that the sixth plea must be dismissed as unfounded.

#### ***Seventh plea: infringement of Article 8 of Regulation No 1049/2001***

122 The applicant submits that the Commission infringed Article 8(1) and (2) of Regulation No 1049/2001 in that it had not dealt with the confirmatory request for access to the file within the period prescribed by those provisions.

123 The applicant submits that, while the Commission did in fact notify it, on the day on which the applicable time limit expired, of the extension of 15 working days of that time limit, it did not give a fully reasoned explanation for that extension.

124 The applicant takes the view that the fact that the Commission extended the time limit for responding a second time, even though Article 8(2) of Regulation No 1049/2001 did not provide such a possibility, also constitutes an infringement of that provision. It observes that the Commission has also failed to provide a fully reasoned explanation for the second extension.

- 125 It must be recalled that, during the administrative procedure before it, The Commission is required to observe the procedural guarantees provided for by Union law (judgments of 14 May 1998, *Enso Española v Commission*, T-348/94, EU:T:1998:102, paragraph 56, and of 18 June 2008, *Hoechst v Commission*, T-410/03, EU:T:2008:211, paragraph 128).
- 126 In that connection, the period of 15 working days — which may be extended — within which the institution must reply to the confirmatory application, as laid down in Article 8(1) and (2) of Regulation No 1049/2001, is mandatory. However, the expiry of that period does not have the effect of depriving the institution of the power to adopt a decision.
- 127 In the field of access to documents, the legislature specified the consequences of failure to comply with the time limits laid down in Article 8(1) and (2) of Regulation No 1049/2001, by providing, in Article 8(3) thereof, that such failure on the part of the institution is to give the applicant the right to institute judicial proceedings (judgment of 19 January 2010, *Co-Frutta v Commission*, T-355/04 and T-446/04, EU:T:2010:15, paragraph 58).
- 128 In the present case, it must be recalled that the Commission replied to the request for access before the applicant had drawn inferences from the lack of response within the time limits in accordance with Article 8(3) of Regulation No 1049/2001, by seeking judicial redress.
- 129 In those circumstances, however regrettable it is that the time limits were not met, according to the case-law of the Court that delay does not taint the contested decision with unlawfulness justifying its annulment (see, to that effect, judgment of 28 June 2012, *Commission v Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 89).
- 130 Therefore, the complaint based on the alleged infringement of Article 8 of Regulation No 1049/2001 cannot be accepted.
- 131 As a result the seventh plea must be dismissed as unfounded.
- 132 It follows from all of the foregoing that none of the pleas raised by the applicant is well founded.
- 133 Therefore, the present action must be dismissed in its entirety.

### Costs

- 134 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Deutsche Telekom AG is ordered to pay the costs.**



Frimodt Nielsen

Collins

Valančius

Delivered in open court in Luxembourg on 28 March 2017.

[Signatures]