Reports of Cases

ORDER OF THE PRESIDENT OF THE GENERAL COURT

1 September 2015*

(Application for interim measures — Access to documents of the institutions — Regulation (EC) No 1049/2001 — Documents sent by the authorities to the Commission in accordance with the procedure laid down in Directive 98/34/EC — France's objection to disclosure of the documents — Decision to grant a third party access to the documents — Application for suspension of operation of a measure — Urgency — Prima facie case — Weighing up of interests)

In Case T-344/15 R,

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

applicant,

v

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

defendant,

APPLICATION to suspend operation of Decision GESTDEM 2014/6064 of 21 April 2015 concerning a confirmatory application for access pursuant to 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), by which the Commission granted access to two documents emanating from the French authorities which had been sent to the Commission in accordance with the procedure laid down in 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 and of rules on Information Society services (OJ 1998 L 204, p. 37),

THE PRESIDENT OF THE GENERAL COURT

makes the following

Order

Background to the dispute, procedure and forms of order sought

1 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 and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended, organises a procedure for

* Language of the case: French.

the exchange of information between the Member States and the European Commission relating to national initiatives for technical standards or regulations, on the one hand, and Information Society services, on the other hand.

2 Notification to the Commission of any draft technical regulation which is intended to govern those goods or services that fall within the scope of Directive 98/34 is, as a rule, mandatory (Article 8(1) of Directive 98/34). In practice, the Commission takes responsibility for communicating the draft to each of the Member States and entering it in a public database. Each draft notified may be examined by the Member States, the Commission and the economic operators in order to detect potentially protectionist elements and take action in order to eliminate them. In order to enable that examination to be made, a minimum period of three months must, as a rule, elapse between the communication of the draft technical regulation and its adoption. During that standstill period, the Commission and Member States which take the view that the draft creates unjustified obstacles to the free movement of goods, the free movement of services or the freedom of establishment of service operators may submit comments or detailed opinions to the notifying Member State. The delivery of a detailed opinion extends that standstill period by a certain number of months depending on the subject-matter of the draft technical regulation (see Article 9(1) and (2) of Directive 98/34). The Member State concerned, as a rule, reports to the Commission on the action it proposes to take on its detailed opinions and the Commission comments on that reaction (see Article 9(2) of Directive 98/34).

3 On 21 January 2014, under the procedure for the provision of information laid down by Directive 98/34, the French Republic notified the Commission of a draft law regulating the terms for the distance-selling of books and enabling the French Government to modify by order the provisions of the French Intellectual Property Code dealing with publishing contracts. The aim of the draft law was to control the discounts offered by book retailers in order to prevent a practice that consisted of combining the maximum 5% reduction permitted under French law on books with free delivery.

4 On 27 February 2014, the Commission sent the French Republic a request for further information, to which the French Government responded by letter of 11 March 2014.

5 On 9 April 2014, the Austrian Government delivered a detailed opinion on the draft technical standard, in accordance with Article 9(2) of Directive 98/34. The Commission also delivered a detailed opinion on the draft on 15 April 2014. The French Government replied to both the detailed opinions by letter of 17 June 2014.

6 In the absence of any further communication from either the Commission or the Austrian Government, the French Republic's proposal was adopted in the form of Law No 2014-779 of 8 July 2014 regulating the terms for the distance-selling of books and enabling the French Government to modify by order the provisions of the French Intellectual Property Code dealing with publishing contracts (*JORF*, 9 July 2014, p. 11363).

7 On 15 December 2014, a request for access to the French Government's replies of 11 March and 17 June 2014 referred to above ('the disputed documents') was sent to the Commission. The French Government was consulted by the Commission over the possibility of disclosing the said documents and indicated its objection to this. Consequently, the Commission refused to grant access to the disputed documents.

8 Following a confirmatory application for access under 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), the Commission again consulted the French Government on 3 March 2105. By letter of 13 March 2015, the French Government informed

the Commission that it objected to allowing access to the disputed documents, citing the exceptions set out in the second and third indents of Article 4(2) and (5) of Regulation No 1049/2001, which provide as follows:

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

— …

— court proceedings and legal advice,

— the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

…

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.'

9 On 21 April 2015, the Commission decided to disclose the contents of the disputed documents to the third party who had applied for them, despite opposition to this from the French Government ('the contested decision').

10 Following a declaration by the French Government of its intention to bring an action for annulment of the contested decision coupled with an application for suspension of operation, the Commission indicated on 8 May 2015 that it would not disclose the disputed documents until the General Court had ruled on the application for interim measures.

11 By application lodged at the Court Registry on 1 July 2015, the French Republic brought an action for the annulment of the contested decision. As a principal claim, it alleges that the contested decision should be annulled for infringement of Article 4(5) of Regulation No 1049/2001. In the alternative, it alleges that the contested decision should be annulled for infringement of the duty to give reasons justifying the failure to apply the exception set out in the third indent of Article 4(2) of that regulation. In the further alternative, it alleges that the contested decision should be annulled for infringement of the second and third indents of Article 4(2) of Regulation No 1049/2001.

12 By separate document lodged at the Court Registry on the same date, the French Republic made the present application for interim measures, requesting the President of the General Court to suspend operation of the contested decision.

13 In its observations on the application for interim measures, which were lodged at the Court Registry on 16 July 2015, the Commission contends that the President of the General Court should:

— take formal note that the Commission leaves to the Court's discretion the question of whether, in the particular circumstances of the present case, the conditions necessary to grant the suspension of operation applied for are fulfilled;

— reserve the position as to costs of the present interim proceedings until a decision is made on costs in the main proceedings.

Law

General

14 It is apparent from Articles 278 TFEU and 279 TFEU, in conjunction with Article 256(1) TFEU, that the court hearing the application for interim measures may, if he considers that circumstances so require, order that application of an act contested before the General Court be suspended or prescribe any necessary interim measures, pursuant to Article 156 of the Rules of Procedure of the General Court.

15 Article 156(3) of the Rules of Procedure requires applications for interim measures to state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. The judge hearing the application for interim measures may order suspension of operation of an act, or other interim measures, if it is established that such an order is justified, prima facie, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, so that an application for interim measures must be dismissed if either of them is absent (order of 14 October 1996 in *SCK and FNK* v *Commission*, C-268/96 P(R), ECR, EU:C:1996:381, paragraph 30).

16 In the context of that overall examination, the court hearing the application for interim measures enjoys a broad discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those conditions are to be examined, there being no rule of law imposing a pre-established scheme of analysis within which the need to order interim measures must be assessed (orders of 19 July 1995 in *Commission* v *Atlantic Container Line and Others*, C-149/95 P(R), ECR, EU:C:1995:257, paragraph 23, and 3 April 2007 in *Vischim* v *Commission*, Case C-459/06 P(R), EU:C:2007:209, paragraph 25). Where appropriate, the judge hearing such an application must also weigh up the interests involved (order of 23 February 2001 in *Austria* v *Council*, C-445/00 R, ECR, EU:C:2001:123, paragraph 73).

17 Having regard to the material in the case-file, the President of the General Court considers that he has all the information needed to rule on the present application for interim measures without there being any need to first hear oral argument from the parties.

18 As regards the dispute in the present case over the interim protection of information alleged to be confidential, it should be noted from the outset that, in its submissions, the Commission does not contest the fact that it may be necessary to temporarily prevent disclosure of the disputed documents in order to retain the practical effect of the final decision to be made in the main proceedings.

19 With that in mind, the Commission declares that, in order to protect the public interest in access to the disputed documents, it will request the Court to deal with the main proceedings under the expedited procedure in Articles 151 to 155 of the Rules of Procedure.

Prima facie case

20 It should be noted that a number of different forms of wording have been used in the case-law to define the condition relating to the establishment of a prima facie case, depending on the individual circumstances (see, to that effect, order in *Commission* v *Atlantic Container Line and Others*, cited in paragraph 16 above, EU:C:1995:257, paragraph 26).

21 Thus, that condition is satisfied where at least one of the pleas in law put forward by the applicant for interim measures in support of the main action appears, prima facie, not unfounded to the extent that it reveals, at the stage of the interim proceedings, a major legal disagreement whose resolution is not immediately obvious. Since the purpose of the interim proceedings is to guarantee that the final decision to be taken is fully effective, in order to avoid a lacuna in the legal protection ensured by the General Court, the judge hearing the application for interim measures must restrict himself to assessing 'prima facie' the merits of the grounds put forward in the main proceedings in order to ascertain whether there is a sufficiently large probability of success of the action (see, to that effect, orders of 10 September 2013 in *Commission* v *Pilkington Group*, C-278/13 P(R), ECR, EU:C:2013:558, paragraph 67 and the case-law cited, and of 8 April 2014 in *Commission* v *ANKO*, C-78/14 P-R, ECR, EU:C:2014:239, paragraph 15 and the case-law cited).

22 In the present case, in its first plea in law, the French Republic claims that the Commission infringed Article 4(5) of Regulation No 1049/2001. It contends that the French Government provided adequate reasons for its objection to granting access to the disputed documents by making reference to two of the exceptions laid down by Regulation No 1049/2001, namely the protection of court proceedings and legal advice referred to in the second indent of Article 4(2) and the protection of the purpose of inspections, investigations and audits referred to in the third indent of Article 4(2), and by indicating the precise reasons why a disclosure of the disputed documents would infringe the exceptions referred to.

23 It is claimed that the Commission undertook an exhaustive assessment of the grounds on which the French Government objected to disclosure of the disputed documents. The French Government alleges that, in so doing, the Commission failed to observe the limits set by Court of Justice case-law on the powers of review it may exercise over a Member State. Since the French Government had duly provided reasons for its objection to disclosure, by reference to the exceptions in Article 4 of Regulation No 1049/2001, it was not possible for the Commission to regard those arguments as inaccurate without carrying out an analysis that went beyond a mere prima facie examination.

24 The Commission's response is that it was obliged under Article 4(5) of Regulation No 1049/2001 to examine whether, taking into account the circumstances of the case and the applicable rules of law, the grounds given by the French Republic for its objection to disclosure of the disputed documents were such as to justify an initial refusal. The Commission argues that Article 4(5) establishes a decisional process the aim of which is to determine whether access to a document must be refused under one of the substantive exceptions set out in Article 4(1) to (3). The Commission rejects the theory that simply making reference to one or other of the exceptions permitted under Article 4 of Regulation 1049/2001, even where this is unfounded as in the present case, is sufficient to compel the EU institution to refuse a request for access to a Member State's document. In effect, that theory would lead to the Member State having total discretion over the right to object to disclosure of its documents.

25 The Commission adds that, far from undertaking an exhaustive analysis of the French Government's responses, it simply noted that the reasons put forward in terms of the exceptions under Article 4 of Regulation No 1049/2001 were evidently not applicable. The Commission claims to have noted, first, a lack of any current or reasonably foreseeable 'court proceedings' and, secondly, a lack of any 'investigations' still ongoing, since the procedure under Directive 98/34 had been closed. Finally, the Commission noted the lack of any connection between that procedure and another investigative procedure, such as current or reasonably foreseeable infringement proceedings, the procedure under Directive 98/34 having been closed with no further action being taken. The Commission therefore restricted itself to verifying the prima facie existence of the reasons put forward by the French Government and reviewing whether there were any manifest errors of assessment, without analysing in detail the merits of those reasons.

26 In that regard, first, it must be recalled that Article 4(5) of Regulation No 1049/2001 places the Member States in a position that is different from that of other document-holders, by providing that, unlike them, a Member State may request the institution not to disclose a document originating from that Member State without its 'prior agreement'. The requirement for prior agreement would risk becoming a dead letter if, despite a Member State's objection to disclosure of such a document and despite the lack of any 'agreement' of that Member State, the institution were nevertheless free to disclose the document in question. Such a requirement would have no useful effect, and indeed would be meaningless, if the need to obtain prior agreement to disclosure of the document ultimately depended on the discretion of the institution in possession of the document (see, to that effect, judgment of 18 December 2007 in *Sweden* v *Commission*, C-64/05 P, ECR, EU:C:2007:802, paragraphs 43 and 44).

27 Secondly, Article 4(5) of Regulation No 1049/2001 should not be taken to mean that the Member State has a general and unconditional right of veto allowing it discretion to object to disclosure of documents that originate from it and that are held by an institution, so that access to such documents would cease to be governed by the provisions of that regulation. Thus, Article 4(5) of Regulation No 1049/2001 allows the Member State in question to object to the disclosure of such documents only on the basis of the substantive exceptions set out in Article 4(1) to (3) (see, to that effect, judgment in *Sweden* v *Commission*, cited in paragraph 26 above, EU:C:2007:802, paragraphs 75 and 99).

28 It follows that an institution which receives a request for access to a document originating from a Member State and that Member State must commence without delay a genuine dialogue concerning the possible application of the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001 and that a Member State wishing to object to disclosure of the document in question is obliged to state reasons for that objection with reference to those exceptions. The institution cannot accept the Member State's objection to disclosure if the reasons are not put forward in terms of the exceptions listed in Article 4(1) to (3) (see, to that effect, judgment in *Sweden* v *Commission*, cited in paragraph 26 above, EU:C:2007:802, paragraphs 86 to 88).

29 In relation to the extent and the degree of review that the institution has over the reasons for non-disclosure put forward by a Member State, it is well-established case-law of the Court of Justice that, prior to refusing access to a document originating from a Member State, the institution in question is responsible for examining whether the Member State has based its objection on the substantive exceptions listed in Article 4(1) to (3) of Regulation No 1049/2001 and whether it has duly provided reasons for its position. Therefore, when taking a decision to refuse access, the institution must make sure that those reasons exist and refer to them in its decision refusing access at the end of the procedure (see, to that effect, judgment in *Sweden* v *Commission*, cited in paragraph 26 above, EU:C:2007:802, paragraph 99).

30 On the other hand, as stated by the Court of Justice in its judgment of 21 June 2012 in *IFAW Internationaler Tierschutz-Fonds* v *Commission* (C-135/11 P, ECR, EU:C:2012:376, paragraphs 63 and 64), the institution to which a request for access to a document has been made does not have to carry out an exhaustive assessment of the decision of the Member State in question to object by conducting a review going beyond the verification of the mere existence of reasons referring to the exceptions in Article 4(1) to (3) of Regulation No 1049/2001. Insisting on such an exhaustive assessment could lead to the institution being able, after carrying out the assessment, to wrongly communicate the document in question to the person requesting access, notwithstanding the objection, duly reasoned, of the Member State from which the document originates.

31 It should be noted that in its judgment of 14 February 2012 in *Germany* v *Commission* (T-59/09, ECR, EU:T:2012:75, paragraphs 51 to 53 and 57), relied on by the Commission, the General Court held that the assessment to be carried out by the institution consisted in determining whether the reasons given by the Member State for its objection to disclosure of the requested document were capable of

justifying prima facie such refusal, in order to be sure that those grounds were not without basis, specifying that that assessment was not limited to checking whether the reasons given by the Member State concerned were incorrect 'beyond all possible doubt' or whether the applicability of the exceptions listed in Article 4(1) to (3) of Regulation No 1049/2001 was so obvious as to leave no room for 'any reasonable doubt'.

32 In the present case, the Commission expressly admits that it verified the prima facie existence of the grounds of objection put forward by the French Republic and also examined whether those grounds indicated any manifest errors of assessment. Paragraph 2.2 of the contested decision, entitled 'Prima facie evaluation by the Commission', states in the fourth to seventh subparagraphs:

'The Commission considers that the refusal expressed by the French authorities on the basis of the second indent of Article 4(2) does not appear, prima facie, to be well-founded, having regard to the reasons relied upon. It appears that the documents to which access is sought are not closely linked to existing or reasonably foreseeable proceedings at this stage. It is therefore clear that the documents in question do not fall within the exception relied upon by the French authorities and that disclosure of those documents should not be prevented by that exception. As for the reasons for objecting to disclosure raised by the French authorities based on the exception concerning protection of the purpose of inspections, investigations and audits, under the third indent of Article 4(2), the Commission points out that the notification procedure was closed with no further action being taken. The Commission did not open an investigation with a view to infringement proceedings following the adoption of the French law resulting from the draft law of which it had received notification or publication of that law in the *Official Journal of the French Republic* of 9 July 2014. According to settled case-law, it would not be sufficient for the Commission to invoke the potential initiation of infringement proceedings in order to justify refusal of access to all the documents covered by an application made by an individual on the grounds of the protection of the public interest … Therefore, given that there is no investigation in progress, the applicability of the exception referred to above appears, at this stage, to be purely hypothetical and, consequently, an attempt to rely on it seems, at first sight, to be unfounded in the circumstances.'

33 It is therefore clear that the Commission based the contested decision on the judgment in *Germany* v *Commission*, cited in paragraph 31 above (EU:T:2012:75).

34 It seems doubtful that the extensive reasoning developed in that General Court judgment, to the extent that it permitted the Commission to examine, if only on a prima facie basis, the merits of the grounds put forward by the French Republic in support of its objection to disclosure of the disputed documents, could be regarded as consistent with the judgment in *IFAW Internationaler Tierschutz-Fonds* v *Commission*, cited in paragraph 30 above (EU:C:2012:376), which states that 'the institution to which the request is made' does not have to conduct a review of the Member State's decision to object 'going beyond the verification of the mere existence of reasons referring to the exceptions in Article 4(1) to (3) of Regulation No 1049/2001'.

35 In that regard, it must be pointed out that even though the judgment in *Germany* v *Commission*, cited in paragraph 31 above (EU:T:2012:75), has acquired the force of *res judicata*, it preceded the judgment in *IFAW Internationaler Tierschutz-Fonds* v *Commission*, cited in paragraph 30 above (EU:C:2012:376). Consequently, in formulating its broad approach, the General Court clearly could not take into account the Court of Justice's apparently more restrictive approach. In addition, the Court of Justice has not had the opportunity in the meantime to take a view on the development of this case-law. In particular, the Court of Justice has not yet examined whether the General Court's approach could possibly be rendered consistent with its own approach by interpretation of the condition set by the Court of Justice that the objection expressed by the Member State must be 'duly reasoned' (judgments in *Sweden* v *Commission*, cited in paragraph 26 above, EU:C:2007:802, paragraph 99, and in *IFAW Internationaler Tierschutz-Fonds* v *Commission*, cited in paragraph 30 above, EU:C:2012:376, paragraph 64).

36 The President of the General Court therefore has no alternative than to find that the argument between the parties reveals, at the stage of the interim proceedings, a major legal disagreement whose resolution is not immediately obvious and which will need to be examined in depth by the court adjudicating on the substance.

37 Moreover, even supposing that the Commission had been permitted to carry out a prima facie examination of the merits of the reasons advanced by the French Republic in support of its objection to disclosure of the disputed documents, it does not seem, at first sight, that the Commission was justified in finding, in the contested decision, that the reasons put forward by the French Republic on the basis of the exceptions listed in the second and third indents of Article 4(2) of Regulation No 1049/2001 were obviously wholly irrelevant.

38 In that regard, it should be noted that, since the President of the General Court must carry out a prima facie review of the contested decision, in which the Commission, in turn, carried out a prima facie examination of the merits of the reasons advanced by the French Republic, the assessment of this issue involves a degree of review that is subject to a twofold restriction. Consequently the existence of a prima facie case could only be excluded in the event of it being so clear and obvious that the exceptions relied upon by the French Republic were inapplicable that reliance upon them amounted to an abuse of procedure on the part of the French Republic (see, by analogy, order of 10 June 2014 in *Stahlwerk Bous* v *Commission*, T-172/14 R, EU:T:2014:558, paragraph 50).

39 That is not the situation in the present case.

40 Even though it is true that the measure that was subject to the procedure under Directive 98/34 was adopted in July 2014 in the form of French Law No 2014-779 and that neither the Commission nor the Republic of Austria has hitherto taken any steps to initiate infringement proceedings against the French Republic, the possibility cannot be categorically ruled out of that law being the subject of a complaint made by a private individual that could lead to court proceedings for the purposes of the second indent of Article 4(2) of Regulation 1049/2001, either before the EU courts or the domestic courts, and of the request for access to the disputed documents which was granted by the Commission in the contested decision being an attempt to expand on that complaint, particularly since, under Article 6(1) of Regulation No 1049/2001, an applicant is not obliged to state reasons for his application. In this context, the main proceedings raise the important question of whether, and, if applicable, for what period, the French Republic can reasonably require the disputed documents to be treated as confidential in order to avoid them being used in order to bring legal proceedings.

41 Furthermore, that same question seems equally relevant to the exception in the third indent of Article 4(2) of Regulation 1049/2001, in that use of the disputed documents, as feared by the French Republic, could compromise the investigations carried out by the Commission. It is true that, in its judgment of 16 April 2015 in *Schlyter* v *Commission* (T-402/12, ECR, under appeal, EU:T:2015:209, paragraph 53 et seq.), the General Court found that the procedure laid down by Directive 98/34 did not constitute an investigation for the purposes of that exception. However, as the French Republic rightly points out, that judgment has not yet acquired the force of *res judicata* since the French Republic has appealed against it to the Court of Justice (Case C-331/15 P), which will need to be taken into account by the court hearing the main application.

42 In addition, the court hearing the main application will need to examine the consistency of the judgment in *Schlyter* v *Commission*, cited in paragraph 41 above (EU:T:2015:209), with the judgment of 25 September 2014 in *Spirlea* v *Commission* (T-306/12, ECR, under appeal, EU:T:2014:816, paragraph 45). In that latter judgment, the General Court held that a specific procedure for cooperation between the Commission and the Member States, aimed at resolving possible infringements of EU law so as to avoid initiation of infringement proceedings, could qualify as an investigation for the purposes of the third indent of Article 4(2) of Regulation No 1049/2001. According to the French Republic, that procedure for cooperation is broadly similar to that laid down

by Directive 98/34, both procedures bearing a strong similarity to the pre-litigation stage of infringement proceedings. Finally the court hearing the main application will need to rule on the possible relevance, for the outcome of the present proceedings, of the judgment of 16 July 2015 in *ClientEarth* v *Commission* (C-612/13 P, ECR, EU:C:2015:486).

43 In the light of the foregoing, it is clear that the present case raises novel legal issues which cannot, prima facie, be considered to be clearly without relevance and the outcome of which deserves thorough examination within the main proceedings.

44 It must therefore be acknowledged that there is a prima facie case in relation to the confidential nature of the disputed documents.

45 What is more, the Commission itself recognised that, in a situation such as the one in the present case, the decision to disclose the disputed documents should, as a general rule, be suspended unless the prima facie case is totally non-existent and the legal proceedings need to be categorised as manifestly wrongful, which cannot be claimed in the present case.

Weighing up of interests

46 In accordance with settled case-law, the weighing up of the various interests involved requires the judge hearing the application for interim measures to determine whether or not the applicant's interest in obtaining the interim measures sought outweighs the interest in immediate application of the contested measure by examining, more specifically, whether annulment of that measure by the court hearing the main application would allow the situation which would have been brought about by its immediate operation to be reversed, and, conversely, whether suspension of its operation would prevent it from being fully effective in the event of the main application being dismissed (see, to that effect, orders of 11 May 1989 in *Radio Telefis Eireann and Others* v *Commission*, 76/89 R, 77/89 R and 91/89 R, ECR, EU:C:1989:192, paragraph 15, and of 26 June 2003 in *Belgium and Forum 187* v *Commission*, C-182/03 R and C-217/03 R, ECR, EU:C:2003:385, paragraph 142).

47 As regards more particularly the condition that the legal situation created by an interim order must be reversible, it must be recalled that the purpose of the procedure for interim measures is to guarantee the full effectiveness of the future decision in the main action (see, to that effect, the order of 27 September 2004 in *Commission* v *Akzo and Akcros*, C-7/04 P(R), ECR, EU:C:2004:566, paragraph 36). Consequently, those proceedings are necessarily an adjunct to the main proceedings to which they are attached (order of 12 February 1996 in *Lehrfreund* v *Council and Commission*, T-228/95 R, ECR, EU:T:1996:16, paragraph 61), so that the decision of the judge hearing the application for interim measures must be provisional in the sense that it cannot either prejudge the future decision in the main proceedings or deprive it of all practical effect (orders of 17 May 1991 in *CIRFS and Others* v *Commission*, C-313/90 R, ECR, EU:C:1991:220, paragraph 24, and of 12 December 1995 in *Connolly* v *Commission*, T-203/95 R, ECR, EU:T:1995:208, paragraph 16).

48 It necessarily follows that the interest defended by a party to proceedings for interim measures does not merit protection where that party's request is that the judge hearing the interim application should adopt a decision which, far from being a merely interim measure, serves to prejudge the future decision in the main action and to render it illusory by depriving it of its effectiveness.

49 In the present case, the General Court will be required to rule in the main action on whether the contested decision — by which the Commission dismissed the French Republic's request for confidentiality and declared its intention to disclose the disputed documents to a third party — must be annulled for failure to respect the confidentiality of the disputed documents under Article 4(5) of Regulation No 1049/2001. In that regard, it is obvious that, in order to retain the practical effect of a judgment annulling the contested decision, the French Republic must be able to ensure that the

Commission does not prematurely disclose the documents in question. A judgment ordering annulment would be rendered illusory and deprived of effectiveness if the present application for interim measures were to be dismissed, since the consequence of that dismissal would be that the Commission would be free to immediately disclose the disputed documents and therefore *de facto* to prejudge the future decision in the main action, namely that the action for annulment would be dismissed.

50 Consequently, the interest defended by the French Republic must prevail over the interest in the dismissal of the application for interim measures, *a fortiori* where the grant of the interim measures requested amounts to no more than maintaining the status quo for a limited period, whereas there is nothing to indicate a compelling need requiring premature disclosure.

Urgency

51 It has consistently been held that the urgency of an application for interim measures must be assessed in relation to the necessity for an interim order to prevent serious and irreparable damage to the party applying for those measures. It is for that party to adduce solid evidence that it cannot wait for the outcome of the main proceedings without having to suffer personally harm of that kind (see order of 19 September 2012 in *Greece* v *Commission*, T-52/12 R, ECR, EU:T:2012:447, paragraph 36 and the case-law cited).

52 Given that the present application for interim measures has been made by the French Republic, it should be noted that the Member States are responsible for those interests which are regarded as general interests at national level. Consequently they may defend them in proceedings for interim measures and seek the grant of interim measures by asserting, inter alia, that the contested measure could seriously jeopardise performance of their State tasks (see, to that effect, order in *Greece* v *Commission*, cited in paragraph 51 above, EU:T:2012:447, paragraph 37 and the case-law cited).

53 It is therefore necessary to examine whether the French Republic has successfully proven that an immediate enforcement of the contested decision would be likely to cause it serious and irreparable damage by seriously jeopardising performance of its State tasks.

54 In this regard, the French Republic submits that, if the application for interim measures were to be dismissed, the judgment delivered by the General Court at the end of the main proceedings would be rendered totally ineffective, causing it serious and irreparable damage. In effect, as soon as the disputed documents were made public, there would be no means of restoring the situation to its previous state.

55 As to the seriousness of the damage caused by a disclosure of the documents exchanged during the procedure under Directive 98/34, the French Republic maintains that, even after closure of the procedure, the publicity would be such as to bar the way to a sensible solution to the dispute under the law, making it difficult for the policy-makers to relinquish a position already taken and rendering an amicable solution impossible. In addition, according to the French Republic, it would not be possible to re-establish the trust necessary for a dialogue between the Commission and the Member States if the confidentiality expected by a Member State were irretrievably lost. The effect of the growing number of requests from the business community for access to documents exchanged between the Commission and Member States under Directive 98/34 would be to exert irresistible pressure on the discussion forum laid down under that directive and would deprive that procedure of its effectiveness.

56 Finally, the French Republic considers that damage to be necessarily irreparable, in that it would not lend itself to monetary compensation.

57 In that regard, it must be recalled that the damage alleged in the present case is the result of the disclosure of information said to be confidential. In order to assess the serious and irreparable nature of that damage, the President of the General Court is necessarily required to start from the premise that the information alleged to be confidential is in fact confidential, as claimed by the French Republic in its action in the main proceedings and in its application for interim measures (see, to that effect, orders in *Commission* v *Pilkington Group*, cited in paragraph 21 above EU:C:2013:558, paragraph 38, and of 28 November 2013 in *EMA* v *AbbVie*, C-389/13 P(R), EU:C:2013:794, paragraph 38).

58 Consequently, for the purposes of the present examination of urgency, the disputed documents should be regarded as being of a confidential nature, in accordance with the French Republic's reasoning that to disclose them would infringe Article 4(5) of Regulation No 1049/2001, in that it referred properly to the exceptions under the second and third indents of Article 4(2) of the regulation. According to this reasoning advanced by the French Republic, the relevance of which must be accepted as a premise, the procedure laid down under Directive 98/34, which falls within the scope of an investigation for the purposes of the third indent of Article 4(2) of the regulation, bears a strong similarity to the pre-litigation stage of infringement proceedings, in that it involves a dialogue phase between the Member State and the Commission, the objective of which is to allow negotiation and, where applicable, an amicable convergence of differing opinions as to the correct application of EU law. That objective can only be attained in a climate of strict mutual trust between the Commission and the State concerned. Disclosure of the documents exchanged during this process would ruin the mutual trust and reduce to almost zero the chance of reaching agreement. Under these circumstances, a disclosure of the disputed documents, which were issued by the French Republic with the legitimate expectation that the Commission would treat them with the required confidentiality, would be likely to compromise the defence strategy that that Member State might need to adopt in legal proceedings potentially initiated following the immediate enforcement of the contested decision by the third party applicant before the domestic courts or the EU courts in relation to the conformity of French Law No 2014-779 with EU law (see paragraph 40 above).

59 It appears that defending the law in question in this way forms part of the State tasks vested in the French Republic and that disclosing the disputed documents would seriously compromise that task. The President of the General Court, who must work on the premise that has just been set out, cannot deny the seriousness of the damage that the French Republic would suffer in terms of performance of its State tasks being impeded.

60 The same goes for the irreparable nature of that damage.

61 As the French Republic has rightly pointed out, in relation to the disclosure of information presumed to be confidential, it is clear that a later annulment of the contested decision by the General Court would not eliminate the harm already suffered through that disclosure and thereby restore the situation to its former state. Since the damage alleged in the present case is not pecuniary damage, it could not be recouped by damages obtained through a compensation action brought against the Commission (see, to that effect, order in *EMA* v *AbbVie*, cited in paragraph 57 above, EU:C:2013:794, paragraphs 45 and 46).

62 Taking into account the above considerations, the condition relating to urgency must be found to be satisfied in the present case since the risk of the French Republic suffering serious and irreparable damage has been proven to the required legal standard.

63 In addition, the Commission itself recognises that, taking into account the particular procedural circumstances of the present case — namely, the immediate disclosure of the disputed documents should the application for interim measures be dismissed — serious and irreparable damage would be

caused to the French Republic's procedural position. Disclosure of those documents would deprive the main proceedings of their object and would necessarily have ultimate effects exceeding the normal, provisional, purpose of proceedings for interim measures.

64 Therefore, since all the conditions are met, the application to suspend operation of the contested decision must be granted.

On those grounds,

THE PRESIDENT OF THE GENERAL COURT

hereby orders:

1. **The operation of European Commission decision GESTDEM 2014/6064 of 21 April 2015 concerning a confirmatory application for access pursuant to 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, by which the Commission granted access to two documents emanating from the French authorities which had been sent to the Commission in accordance with the procedure laid down in 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 and of rules on Information Society services, is suspended.**

2. **Costs are reserved.**

Luxembourg, 1 September 2015.

E. Coulon
Registrar

M. Jaeger
President