Reports of Cases

JUDGMENT OF THE GENERAL COURT (Tenth Chamber)

15 December 2021 *

(Access to documents – Regulation (EC) No 1049/2001 – 'Horizon 2020' Framework Programme for Research and Innovation (2014-2020) – Regulation (EU) No 1290/2013 – Documents concerning the research project 'iBorderCtrl: Intelligent Portable Border Control System' – Exception relating to the protection of the commercial interests of a third party – Partial refusal to grant access – Overriding public interest)

In Case T-158/19,

Patrick Breyer, residing in Kiel (Germany), represented by J. Breyer, lawyer,

applicant,

v

European Research Executive Agency (REA), represented by S. Payan-Lagrou and V. Canetti, acting as Agents, and by R. van der Hout and C. Wagner, lawyers,

defendant,

APPLICATION based on Article 263 TFEU seeking the annulment of the decision of the REA of 17 January 2019 (ARES (2019) 266593) concerning partial access to documents,

THE GENERAL COURT (Tenth Chamber),

composed of A. Kornezov, President, E. Buttigieg (Rapporteur) and G. Hesse, Judges,

Registrar: L. Ramette, Administrator,

having regard to the written part of the procedure and further to the hearing on 5 February 2021,

gives the following

* Langue of the case: German.

Judgment

I. Background to the dispute

1 On 19 April 2016, the European Research Executive Agency (REA) concluded grant agreement No 700626 ('the grant agreement') with the members of a consortium in order to fund the 'iBorderCtrl: Intelligent Portable Control System' project ('the iBorderCtrl project') in the context of Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020) ('the Horizon 2020 programme') for a period of 36 months from 1 September 2016.

2 The REA describes the iBorderCtrl project as aiming at testing new technologies in controlled border management scenarios that could potentially increase the efficiency of the EU's external borders management, ensuring faster processing for bona fide travellers and quicker detection of illegal activities. However, the REA notes that the project is not a technology development project targeting the actual implementation of a working system with real customers.

3 In the context of funding and implementing the project, the REA received from the members of the consortium certain documents relating to various stages of the development of the iBorderCtrl project, in accordance with the grant agreement.

4 On 5 November 2018, the applicant, Mr Patrick Breyer, submitted, on the basis 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), an application to the European Commission for access to several documents ('the initial application'), first, those relating to authorisation of the iBorderCtrl project and, secondly, those drawn up in the course of that project. That application was registered on the same day under reference ARES (2018) 5639117 and was sent to the REA on 7 November 2018.

5 By letter of 23 November 2018 ('the initial decision'), the REA informed the applicant that one of the requested documents was publicly accessible, that the REA was granting him partial access to another document requested and that it was rejecting his application for access to other documents drawn up in the course of the project, justifying the refusal to grant access by the application of the exceptions aimed at protecting, on the one hand, the privacy and the integrity of the individual within the meaning of Article 4(1)(b) of Regulation No 1049/2001, in so far as the requested documents contained non-public-domain personal data of persons involved in the project, and, on the other hand, the commercial interests of the members of the consortium, for the purposes of the first indent of Article 4(2) of that regulation.

6 On 26 November 2018, the applicant sent to the Commission a confirmatory application for access, registered as ARES (2018) 6073379 ('the confirmatory application'), while accepting that the names of the natural persons involved in the project would be redacted from the documents at issue.

7 By decision of 17 January 2019 (ARES (2019) 266593), the REA granted the applicant partial access to other requested documents and rejected his application for access as to the remainder, relying on the protection of the commercial interests of the members of the consortium for the purposes of the first indent of Article 4(2) of Regulation No 1049/2001 and referring in particular to Article 3 of Regulation (EU) No 1290/2013 of the European Parliament and of the Council of

11 December 2013 laying down the rules for participation and dissemination in 'Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020)' and repealing Regulation (EC) No 1906/2006 (OJ 2013 L 347, p. 81) and to the grant agreement ('the contested decision').

8 The following table summarises the REA's position with respect to the various requested documents drawn up in the course of the iBorderCtrl project ('the requested documents'):

Documents/results	REA's position	Confidential information
D 1.1 Ethics advisor's first report	Refusal to grant access	Ethical and legal assessment of the tools, technical components and methods developed in the context of the project
D 1.2 Ethics of profiling, the risk of stigmatisation of individuals and mitigation plan	Refusal to grant access	Ethical and legal assessment of the tools, technological components and methods developed in the context of the project
D 1.3 Ethics Advisor	Refusal to grant access	Ethics Advisor's data
D 2.1 Requirement Analysis Report	Refusal to grant access	Technological solutions and description of the overall system architecture
D 2.2 Reference Architecture and components specifications	Refusal to grant access	Technological solutions and description of the overall system architecture
D 2.3 EU wide legal and ethical review report	Refusal to grant access	Ethical and legal assessment of the tools, technological components and methods developed in the context of the project
D 3.1 Data Collection Devices – specifications	Partial access	The redacted parts of the document contain information which affects commercial interests
D 7.3 Dissemination and communication plan	Partial access	The redacted parts of the document contain information which affects commercial interests
D 7.6 Yearly communication report including communication material	Note: publicly available document	None
D 7.8 Dissemination and communication plan 2	Partial access	The redacted parts of the document contain information which affects commercial interests
D 8.1 Quality Management Plan	Refusal to grant access	Confidential consortium information relating to the management of the project, from the planning of technical measures to the delivery of results
D 8.3 Periodic Progress Report	Refusal to grant access	Description of technical progress concerning the various work packages
D 8.4 Annual Report	Refusal to grant access	Description of technical progress concerning the various work packages

D 8.5 Periodic Progress Report 2	Refusal to grant access	Description of technical progress concerning the various work packages
D 8.7 Annual Report 2	Refusal to grant access	Description of technical progress concerning the various work packages

II. Procedure and forms of order sought

9 By application lodged at the Court Registry on 15 March 2019, the applicant brought the present action in which the Commission was formally designated as the defendant.

10 By separate document lodged at the Court Registry on 18 June 2019, the Commission raised a plea of inadmissibility pursuant to Article 130(1) of the Rules of Procedure of the General Court. By order of 12 November 2019, the Court decided that the party against whom the present action had been brought was not the Commission but the REA, and that there was therefore no need to rule on the plea of inadmissibility raised by the Commission.

11 By letter lodged at the Court Registry on 20 June 2020, the applicant submitted new offers of evidence and new evidence. The REA submitted its observations on these within the period prescribed.

12 By way of a measure of organisation of procedure adopted on 17 November 2020 under Article 89 of its Rules of Procedure, the Court invited the applicant to produce Annex 1 to the initial decision and to answer a written question. The applicant did not comply with that request within the period prescribed. Notwithstanding that non-compliance with the period prescribed, by decision of 10 December 2021, pursuant to Article 62 of the Rules of Procedure, the President of the Tenth Chamber of the General Court decided that the examination of the present case would be facilitated by the inclusion in the file of the documents submitted out of time. Accordingly, the applicant's response and the requested document have been included in the file.

13 By order of 26 November 2020, adopted pursuant to Article 91(c) of the Rules of Procedure, the Court ordered the REA to produce copies of the grant agreement and confidential versions of all the documents connected with the confirmatory application to which full or partial access was refused. The REA complied with that request within the period prescribed. In accordance with Article 104 of the Rules of Procedure, those documents were not disclosed to the applicant.

14 On 17 February 2021, the oral part of the procedure was closed.

15 By letter lodged at the Court Registry on 23 March 2021, the applicant submitted documents. By order of 21 April 2021, the Court decided to reopen the oral part of the procedure in accordance with Article 113(2)(a) of the Rules of Procedure and, by decision of the same date, it decided to place in the file the documents lodged by the applicant on 23 March 2021 and to invite the REA to submit its observations on those documents. The REA submitted its observations within the period prescribed.

16 By decision of the Court of 16 June 2021, the oral procedure was again closed.

17 The applicant claims that the Court should:

– annul the contested decision;

– order the REA to pay the costs.

18 The REA contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs of the proceedings, including those relating to the submission of new offers of evidence and new evidence.

III. Law

19 In support of his action, the applicant relies on two pleas in law, the first alleging infringement of the first indent and the final phrase of Article 4(2) of Regulation No 1049/2001, and the second alleging infringement of Article 7(1) and Article 8(1) of that regulation.

20 In so far as the second plea concerns the scope itself of the application for access, it must be examined first.

A. The second plea in law, alleging infringement of Article 7(1) and Article 8(1) of Regulation No 1049/2001

21 The applicant argues that the REA infringed Article 7(1) and Article 8(1) of Regulation No 1049/2001 in that the initial decision and the contested decision covered only the requested documents drawn up in the course of the iBorderCtrl project, not those relating to the actual authorisation of the project in question, which were, however, also referred to in the application for access.

22 The applicant states in that regard that the confirmatory application expressly referred to the initial application in which he had referred to the documents relating to authorisation of the project in question, so that it was superfluous to list again in the confirmatory application each of the documents to which access had been requested. He argues that, in the absence of any partial withdrawal of the application for access, the REA could not assume that the confirmatory application no longer covered all the documents referred to in the initial application.

23 The REA notes that, in accordance with Article 8 of Regulation No 1049/2001, the contested decision referred to all the documents to which the applicant had requested access in his confirmatory application. Since that application did not refer to the documents relating to authorisation of the project in question, which were not already referred to or named in the initial decision or referred to in the statement of reasons for that decision, and since those documents were not mentioned, even indirectly, in the reasons for the confirmatory application, the REA presumed that those documents were not the subject matter of the confirmatory application. If the applicant had wished to extend his confirmatory application to those documents, he should have expressly referred to them in his confirmatory application. However, there is nothing to prevent the applicant from submitting an application for access relating to those documents in the future.

24 By the second plea, the applicant argues, in essence, that the REA did not fully examine the application for access in that it failed to take a position on that application in so far as it concerned the documents relating to authorisation of the iBorderCtrl project.

25 It is common ground between the parties that, in the initial application, the applicant had requested access, inter alia, to all the documents relating to authorisation of the iBorderCtrl project. It is also common ground that those documents were not referred to in the initial decision. Indeed, they are not included among the documents listed under heading A of the initial decision as falling within the scope of the initial application. Similarly, under heading B of the initial decision, concerning the examination of the application for access, the REA stated that it considered that the documents listed in Annex 1 to the initial decision were those which formed part of the initial application. However, the documents relating to authorisation of the iBorderCtrl project were not referred to in that annex. Moreover, the statement of reasons for the initial decision made no reference to those documents, which is expressly acknowledged by the REA. That decision systematically referred to the requested documents as previously defined in that decision, which did not include the documents relating to authorisation of the iBorderCtrl project.

26 In that regard, it should be recalled that the purpose of Regulation No 1049/2001, as stated in recital 4 and Article 1 thereof, is to give the public the fullest possible right of access to documents of the institutions, there being, in accordance with Article 6(1) of the regulation, no requirement to state reasons for the application in order to enjoy that right.

27 When an EU institution, body, office or agency is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents of the institutions set out in Article 4 of Regulation No 1049/2001 (see, to that effect, judgment of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 35).

28 Moreover, as stated in recital 13 of Regulation No 1049/2001, a two-stage administrative procedure applies, with the additional possibility of court proceedings or complaints to the European Ombudsman, in order to ensure that the right of public access to documents of the EU institutions is fully respected.

29 Similarly, according to the case-law, Articles 7 and 8 of Regulation No 1049/2001, by providing for a two-stage procedure, aim to achieve, first, the swift and straightforward processing of applications for access to documents of the institutions concerned and, second, as a priority, a friendly settlement of disputes which may arise (judgment of 26 January 2010, *Internationaler Hilfsfonds* v *Commission*, C-362/08 P, EU:C:2010:40, paragraph 53).

30 It is apparent from paragraphs 25 to 29 above that the institution, body, office or agency concerned is required to carry out a full examination of all the documents referred to in the application for disclosure. Such a requirement applies, in principle, not only when dealing with a confirmatory application, within the meaning of Article 8 of Regulation No 1049/2001, but also when dealing with an initial application, within the meaning of Article 7 of that regulation (judgment of 22 May 2012, *Internationaler Hilfsfonds* v *Commission*, T-300/10, EU:T:2012:247, paragraph 69).

31 However, it is clear from the elements highlighted in paragraph 25 above that, in the present case, the REA failed to decide on the initial application for access in so far as it concerned the documents relating to authorisation of the iBorderCtrl project in breach of its obligation to make

a full examination of that application. Such an omission on its part clearly undermines the objectives pursued by Regulation No 1049/2001 of rapid and easy handling of applications for access and friendly settlement of disputes, as recalled in paragraph 29 above (see, to that effect, judgment of 22 May 2012, *Internationaler Hilfsfonds* v *Commission*, T-300/10, EU:T:2012:247, paragraph 73).

32 The REA argues that it was for the applicant to refer expressly to the documents relating to authorisation of the iBorderCtrl project in his confirmatory application, failing which it could presume that those documents were not covered by that application.

33 In that regard, on the one hand, it is important to note that, in the confirmatory application for access, the applicant expressly stated that that application followed on from his initial application for access. There is nothing in the confirmatory application to suggest that the applicant withdrew his application for access to the documents relating to authorisation of the iBorderCtrl project. The applicant's intention to apply again for access to all the documents referred to in the initial application is also apparent from the fact, emphasised by the applicant, that he expressly agreed to make further concessions following the initial decision, namely to accept that the personal data contained in the documents at issue be redacted. In those circumstances, the REA could not presume that, in the context of his confirmatory application, the applicant had withdrawn his request for access to the documents relating to authorisation of the iBorderCtrl project.

34 On the other hand, in so far as, by such an argument, the REA maintains, in essence, that the applicant should have expressly challenged in the confirmatory application the failure to decide, in the initial decision, on his application for access in so far as it concerned the documents relating to authorisation of the iBorderCtrl project, such an argument cannot succeed. Its failure to decide, in the initial decision, on part of the initial application for access had the consequence that the second stage of the procedure concerning the documents to which that failure relates was not initiated. A contrary approach, as proposed by the REA, would infringe the objectives referred to in Articles 7 and 8 of Regulation No 1049/2001, as recalled in paragraph 29 above.

35 Finally, it is indeed true that, as the REA maintains, a person may make a new application for access relating to documents to which he has previously been denied access and that such an application requires the institution concerned to examine whether the earlier refusal of access remains justified in the light of a change in the legal or factual situation which has taken place in the meantime (judgment of 26 January 2010, *Internationaler Hilfsfonds* v *Commission*, C-362/08 P, EU:C:2010:40, paragraphs 56 and 57).

36 However, as is apparent from the case-law, a failure to give a decision in respect of part of an application for access cannot be equated with a refusal to grant access (see, to that effect, judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraphs 122 and 123). Consequently, such a possibility of submitting a new application for access cannot serve to remedy a failure by the institution concerned to examine fully the first application for access or constitute an argument for depriving the applicant of the possibility of bringing proceedings, a possibility available to the applicant under Article 8(3) of Regulation No 1049/2001 (see, to that effect, Opinion of Advocate General Kokott in *Strack* v *Commission*, C-127/13 P, EU:C:2014:455, point 40).

37 It follows from all the foregoing considerations that the second plea must be upheld and the contested decision must be annulled in so far as the REA failed to decide on the application for access made by the applicant in that it sought to obtain access to documents relating to authorisation of the iBorderCtrl project.

B. The first plea in law, alleging infringement of the first indent of Article 4(2) and the final phrase of Article 4(2) of Regulation No 1049/2001

38 The first plea is divided into two parts, the first part alleging no undermining of the protection of commercial interests, within the meaning of the first indent of Article 4(2) of Regulation No 1049/2001, and the second part alleging the existence of an overriding public interest in disclosure of the documents at issue for the purposes of the final phrase of Article 4(2) of that regulation.

39 As a preliminary point, it is necessary to examine the admissibility, challenged by the REA, of the new evidence and the new offers of evidence submitted by the applicant in his letter of 20 June 2020 and of his complaint that the REA should have granted him at least partial access to the requested documents.

1. Admissibility of the new evidence and the new offers of evidence

40 By letter filed at the Court Registry on 20 June 2020, the applicant submitted some extracts from websites as new evidence and submitted new offers of evidence consisting in references to those websites. In its observations of 9 July 2020 relating thereto, the REA submits, first, that that evidence and those offers of evidence are inadmissible because they were submitted out of time and the delay in their submission was not duly justified by the applicant. Secondly, the REA challenges the presentation of the facts proposed by the applicant on the basis of that evidence.

41 Pursuant to Article 85(3) of the Rules of Procedure, the main parties may, exceptionally, produce or offer further evidence before the oral part of the procedure is closed or before the decision of the General Court to rule without an oral part of the procedure, provided that the delay in the submission of such evidence is justified. However, according to the case-law, evidence in rebuttal and the amplification of the offers of evidence submitted in response to evidence in rebuttal from the opposite party in the rejoinder are not covered by the time-bar laid down by that provision. That provision concerns offers of fresh evidence and must be read in the light of Article 92(7) of those rules, which expressly provides that evidence may be submitted in rebuttal and previous evidence may be amplified (see, to that effect, judgment of 21 April 2004, *M* v *Court of Justice*, T-172/01, EU:T:2004:108, paragraph 44; see also, to that effect and by analogy, judgment of 12 December 2018, *Servier and Others* v *Commission*, T-691/14, under appeal, EU:T:2018:922, paragraph 1460 and the case-law cited). Moreover, it has previously been held that the late submission by a party of evidence or offers of evidence may be justified, in particular, where the belated production of evidence by the opposing party justifies the file being supplemented in order to ensure observance of the rule that the parties should be heard (judgment of 14 April 2005, *Gaki-Kakouri* v *Court of Justice*, C-243/04 P, not published, EU:C:2005:238, paragraph 32).

42 In the present case, the evidence and offers of evidence submitted by the applicant in his letter of 20 June 2020 cannot be declared inadmissible on the ground that they were produced after the lodging of the rejoinder in breach of Article 85(3) of the Rules of Procedure. As the applicant

states in his letter of 20 June 2020, that evidence and those offers of evidence are intended to respond to the REA's argument in paragraph 17 of the rejoinder that only border guards and staff of the iBorderCtrl project could participate in the pilot testing for that project.

43 That conclusion cannot be undermined by the REA's argument based on the fact that the applicant has already argued in the reply that anyone was able to participate in the pilot testing and that he therefore could, at that stage, have produced the evidence or made offers of evidence in support of that assertion.

44 The position expressed by the REA in paragraph 17 of the rejoinder is not apparent from the initial decision, the contested decision or the defence, with the result that the applicant, who only became aware of that view at the stage of the rejoinder, was not required to support his argument in the reply with evidence to the contrary.

45 Consequently, the time-bar rule in Article 85(3) of the Rules of Procedure does not apply to the evidence and offers of evidence submitted by the applicant in his letter of 20 June 2020, with the result that they are admissible.

2. Admissibility of the complaint alleging failure to grant partial access

46 The REA submits that the subject matter of the first plea, as set out in the application, is limited to an infringement of the first indent of Article 4(2) of Regulation No 1049/2001. Accordingly, the complaint alleging failure to comply with Article 4(6) of Regulation No 1049/2001, in that the REA did not grant at least partial access to the requested documents, relied on for the first time at the stage of the reply, is inadmissible.

47 The applicant argues that the complaint that the REA should have disclosed at least some of the requested documents is not new. On the one hand, it is not necessary for Article 4(6) of Regulation No 1049/2001 to be 'cited separately', since the REA itself disclosed the partially redacted documents at issue. On the other hand, the question of at least partial disclosure of the requested documents had already been raised at the application stage.

48 In that regard, it should be noted that, although for a complaint to be admissible it is not essential to refer expressly to a provision alleged to have been infringed, it must nevertheless be clear from the arguments as presented at the application stage that the applicant intended to claim such an infringement.

49 In the present case, as the applicant submits, several passages in the application must be understood as relating to a complaint implicitly but necessarily alleging infringement of Article 4(6) of Regulation No 1049/2001.

50 In paragraph 26 of the application, the applicant argued that various parts of the documents to which he had requested access could be disclosed without undermining the commercial interests of the consortium. Moreover, by arguing, in paragraph 28 of the application, relying on case-law, that the REA failed to examine in detail the requested documents in order to ascertain to what extent they contained essential new information which was not yet known, the applicant referred implicitly, but necessarily, to an obligation on the part of the REA to examine whether partial access to those documents could be granted on the basis that they contained publicly available information not constituting a compilation of such information worthy of protection under the first indent of Article 4(2) of Regulation No 1049/2001.

51 In those circumstances, the more detailed arguments presented in the reply must be regarded as constituting an amplification of the complaint alleging at least partial refusal of access to the requested documents, which was relied on at the application stage. The REA's argument that that complaint is inadmissible must therefore be rejected.

3. The first part of the first plea, alleging no undermining of the protection of commercial interests

52 In their arguments relating to the first part of the first plea, the parties disagree, inter alia, on the issue of the application to the present case of Regulation No 1290/2013, of the clauses of the grant agreement and of Article 339 TFEU, an issue which must be examined at the outset.

(a) The application in the present case of Regulation No 1290/2013, the clauses of the grant agreement and Article 339 TFEU

53 The applicant submits that the legal basis for examining the legality of the contested decision must be Regulation No 1049/2001, not Regulation No 1290/2013, the clauses of the grant agreement or Article 339 TFEU, which were also invoked by the REA in the contested decision in support of the refusal of access. In any event, according to the applicant, Regulation No 1290/2013 cannot take precedence over Regulation No 1049/2001 and it is not possible to derogate from the application of that regulation by means of a contract, such as the grant agreement.

54 The REA submits that the applicant incorrectly asserts that neither Regulation No 1290/2013 nor Article 339 TFEU is relevant for the purposes of assessing his application for access to the documents at issue. According to the REA, even if the more recent provisions of Regulation No 1290/2013 were not expressly identified as more specific as against Regulation No 1049/2001, the two regulations must be complied with and reconciled through being applied consistently, Regulation No 1290/2013, Article 3 thereof in particular, providing in that regard complementary and enhanced protection for access to documents falling within the scope of that provision. Moreover, the grant agreement contains provisions on confidentiality and access to documents created in the context of the iBorderCtrl project for the purposes of Article 3 of Regulation No 1290/2013. Accordingly, pursuant to Article 36.1 of the grant agreement, the requested documents, which were identified as 'confidential', could not be disseminated.

55 Under Article 2(3) of Regulation No 1049/2001, the provisions on public access to REA documents apply to all documents held by that agency, that is to say, all documents drawn up or received by it and in its possession in all its areas of activity. Moreover, although that regulation is intended to give the fullest possible effect to the right of public access to documents of the institutions, that right is nonetheless subject to certain limitations based on grounds of public or private interest (see, to that effect, judgments of 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 88, and of 5 February 2018, *Pari Pharma* v *EMA*, T-235/15, EU:T:2018:65, paragraph 39 and the case-law cited).

56 The system of exceptions laid down in Article 4 of Regulation No 1049/2001 is based on a balancing of the opposing interests in a given situation, that is to say, first, the interests which would be favoured by the disclosure of the documents in question and, secondly, those which would be jeopardised by such disclosure. The decision taken on a request for access to

documents depends on which interest must prevail in the particular case (see judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraph 63 and the case-law cited).

57 While the EU institution, body, office or agency concerned must provide explanations as to how access to a document, disclosure of which has been requested, could specifically and actually undermine the interest protected by an exception laid down in Article 4 of Regulation No 1049/2001, the Court of Justice has acknowledged that it is open to the EU institution, body, office or agency concerned to base its decisions in that regard on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind 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, paragraphs 64 and 65 and the case-law cited).

58 In the contested decision, as a basis for the partial refusal of access to the requested documents, the REA relied on the protection of the commercial interests of the members of the consortium for the purposes of the first indent of Article 4(2) of Regulation No 1049/2001, but considered that the latter provision had to be interpreted in accordance with the confidentiality provisions contained in Article 3 of Regulation No 1290/2013 and Article 36 of the grant agreement relating to the iBorderCtrl project. Relying on the case-law of the EU Courts, the REA considered that Regulation No 1049/2001 and Regulation No 1290/2013 should therefore be applied in a manner which is compatible with each of those regulations and enables them to be applied consistently.

59 Article 3 of Regulation No 1290/2013, entitled 'Confidentiality', provides that data, knowledge and information communicated as confidential in the framework of an action is to be kept confidential, subject to the conditions established in the implementing agreements, decisions or contracts and taking due account of EU law regarding the protection of and access to classified information. The confidentiality of documents submitted to the REA in the context of the iBorderCtrl project is subject, inter alia, to the conditions laid down in the grant agreement, Article 36.1 of which stipulates that during implementation of the action and for four years after the 36-month period from the start of the action, the parties must keep confidential any data, documents or other material that is identified as confidential at the time it is disclosed. That period had not expired at the time of the applicant's initial application.

60 It should be noted that, in the context of the present action, the REA submits that, since the specific objective of Article 3 of Regulation No 1290/2013 is to limit access by third parties to documents covered by that provision, documents identified as 'confidential' pursuant to Article 36.1 of the grant agreement could not be disseminated to a third party. According to the REA, where protection under Regulation No 1290/2013 and the grant agreement applies, the 'supplementary' or 'enhanced' protection thus established must be guaranteed, as otherwise there would be a risk of undermining the success of the funded projects. That success relies on the availability of researchers to participate in the projects, as that availability could be jeopardised if the documents submitted, often containing innovative solutions and commercially sensitive information, were at risk of being disclosed under Regulation No 1049/2001. The spirit and provisions of Regulation No 1290/2013 and of the grant agreement governing such 'supplementary' protection would be rendered meaningless if the public had access to documents concerning the project in question identified as confidential. The REA therefore states that it 'presumed' that the consortium's documents identified as confidential, pursuant to Article 36.1 of the grant agreement, contained sensitive information, disclosure of which would undermine the commercial interests of the members of the consortium.

61 By such a line of argument, the REA implicitly, but necessarily, supports establishing a general presumption that documents communicated to the REA by a participant in an action as confidential within the meaning of Article 3 of Regulation No 1290/2013 and Article 36.1 of the grant agreement should not be disclosed to a third party without it being necessary to examine specifically whether one of the exceptions to the principle of transparency provided for by Regulation No 1049/2001 applied to those documents.

62 Moreover, by relying on the case-law relating to general presumptions of non-disclosure, the REA invites the Court to examine the application, in the present case, of such a general presumption based on Regulation No 1290/2013.

63 In that regard, it should be recalled that the application of the general presumption of confidentiality is optional for the EU institution, body, office or agency to which a request for access to documents is made (see judgment of 22 January 2020, *MSD Animal Health Innovation and Intervet International* v *EMA*, C-178/18 P, EU:C:2020:24, paragraph 59 and the case-law cited).

64 Thus, even assuming that such a general presumption applied in the present case, it must be noted that, in the contested decision, the REA did not respond to the application for access to the documents at issue by relying on such a general presumption of confidentiality, but examined in a specific and individual manner whether, in particular in view of the protection conferred on those documents by Article 3 of Regulation No 1290/2013 and Article 36.1 of the grant agreement, the exception referred to in the first indent of Article 4(2) of Regulation No 1049/2001 should apply to them. Furthermore, the REA expressly acknowledged both in its written submissions and at the hearing, in response to a question from the Court, that it had carried out a specific and individual examination of the possibility of granting access to the requested documents.

65 Consequently, all the arguments by which the REA implicitly, but necessarily, asserts the existence of a general presumption of non-disclosure of the requested documents based on their confidential nature under Article 3 of Regulation No 1290/2013 and Article 36.1 of the grant agreement are ineffective.

66 However, contrary to what the applicant maintains, it does not follow from such a conclusion that only Regulation No 1049/2001 applies in the present case. It is clear from the case-law that, where regulations do not contain provisions 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 (see, to that effect, judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraph 84 and the case-law cited).

67 In the present case, Article 3 of Regulation No 1290/2013 and Article 36.1 of the grant agreement lay down and implement the rule of confidentiality of information and documents relating to the project in question which have been identified as 'confidential', in the present case in Annex I to that agreement. While that regulation and the grant agreement provide for certain exceptions, in particular as regards making information available to EU institutions, bodies, offices and agencies and Member States in accordance with Article 4 of that regulation and Article 36.1 of that agreement, or relating to the obligation to disseminate results in accordance with Article 43(2) of

that regulation and Article 29.1 and Article 29.2 of the grant agreement, they nevertheless preserve the principle of confidentiality of the information vis-à-vis the general public during the period laid down in the grant agreement.

68 Moreover, as is apparent from Article 38.2.1 of the grant agreement, the REA's right to use the material, documents and information of recipients encompasses granting access in response to individual requests under Regulation No 1049/2001. However, in accordance with that provision, that right does not affect, inter alia, the confidentiality obligations laid down in Article 36 of the grant agreement, which continue to apply.

69 It follows that the REA was entitled to take into account, in the contested decision, the protection of confidentiality provided for in respect of the requested documents under Article 3 of Regulation No 1290/2013 and Article 36.1 of the grant agreement when carrying out the specific and individual examination of the requested documents in the light of the exception referred to in the first indent of Article 4(2) of Regulation No 1049/2001.

70 Contrary to the argument made by the applicant, Article 36.1(e) of the grant agreement, according to which, in essence, the obligations of confidentiality guaranteed under Article 3 of Regulation No 1290/2013 no longer apply if disclosure of the information is required by EU or national legislation, cannot be interpreted as meaning that the principle of access to documents resulting from Regulation No 1049/2001 necessarily prevails over the protection of the confidentiality of documents established by Regulation No 1290/2013. If the applicant's view were adopted, it would have the consequence of rendering ineffective, in essence, the general obligation referred to in Article 3 of that regulation to ensure the confidential treatment of documents identified as such, which, in accordance with Article 18(3) of the same regulation, that agreement is meant to respect by establishing the rights and obligations of the parties. That said, Article 36.1(e) of the grant agreement reflects the need, recalled in paragraph 66 above, to ensure that Regulations No 1290/2013 and No 1049/2001 are applied in a manner which is compatible with the other and enables them to be applied consistently.

71 Accordingly, the fact that the documents submitted to the REA by a participant in an action, such as in the present case the members of the consortium, have been classified by the parties to the agreement as confidential is an indication for the REA, when it examines a third party's application for access to those documents, that their content is sensitive from the point of view of the interests of that participant. However, the classification of the documents communicated to the REA as confidential in the context of a project is not sufficient to justify application of the exception set out in the first indent of Article 4(2) of Regulation No 1049/2001 and does not release the REA, in the context of the specific and individual examination of the application for access to those documents identified as 'confidential', from its obligation to examine whether they are covered partially or wholly by that exception (see, to that effect and by analogy, judgment of 4 May 2012, *In't Veld* v *Council*, T-529/09, EU:T:2012:215, paragraph 21 and the case-law cited).

72 Moreover, the diligent examination by the EU institution, body, office or agency of any request by a third party for access to documents under Regulation No 1049/2001, of the application of the exceptions referred to in Article 4 of that regulation in particular, is intended to ensure that a balance is struck between, on the one hand, the public's right of access to those documents and, on the other hand, the protection of the legitimate interests of the persons concerned, so that the REA's concerns that the application of Regulation No 1049/2001 to documents communicated to

it as confidential would deter researchers from participating in actions financed on the basis of Regulation No 1290/2013, on the ground that those researchers might fear disclosure of confidential information to third parties, are unfounded.

73 Finally, contrary to what the applicant claims, the REA was also right to examine whether the information in the requested documents contained, inter alia, information which might be covered by professional secrecy within the meaning of Article 339 TFEU in order to refuse, where appropriate, to disclose it pursuant to the first indent of Article 4(2) of Regulation No 1049/2001.

74 It is in the light of those clarifications that the first plea of the action must be examined.

(b) The application in the present case of the exception seeking to protect the commercial interests of third parties and the possibility of granting at least partial access

75 The applicant argues that, contrary to what the REA found in the contested decision, the requested documents could be disclosed, in whole or in part, without undermining the commercial interests of the members of the consortium.

76 The REA submits that, in the contested decision, it checked individually all the documents concerned and explained that they contained internal information of the members of the consortium relating to the consortium's intellectual property, on-going research, know-how, methods, techniques and strategies, the disclosure of which would undermine the consortium's commercial interests, since it would give an advantage to potential competitors of the members of the consortium. In so doing, the REA argues that it acted in accordance with Regulation No 1049/2001, the applicable case-law and Title III of Regulation No 1290/2013, and correctly took into account the protection of the confidentiality of information submitted to it in the context of the iBorderCtrl project resulting from Article 3 of the latter regulation. According to the REA, the applicant has not demonstrated that its assessment was incorrect.

77 In that regard, it should be recalled, at the outset, that Article 15(3) TFEU provides that any EU citizen, 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 EU institutions, bodies, offices and agencies, subject to the principles and conditions defined in accordance with the ordinary legislative procedure. The right of access to documents has been enshrined in Article 42 of the Charter of Fundamental Rights of the European Union.

78 Regulation No 1049/2001 seeks, as indicated in recital 4 and Article 1 thereof, to give the public a right of access to documents of the institutions which is as wide as possible (see judgment of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 40 and the case-law cited).

79 The principle that the public should have the widest possible access to the documents is nonetheless subject to certain limits based on reasons of public or private interest. Regulation No 1049/2001, in particular recital 11 and Article 4 thereof, provides for a system of exceptions requiring institutions and bodies not to disclose documents in the event that that disclosure would undermine one of these interests (see, to that effect, judgments of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 40 and the case-law cited, and of 13 January 2017, *Deza* v *ECHA*, T-189/14, EU:T:2017:4, paragraph 51).

80 Since the exceptions provided for in Article 4 of Regulation No 1049/2001 derogate from the principle that the public should have the widest possible access to documents, they must be interpreted and applied strictly (see, to that effect, judgment of 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 75).

81 As is clear from the case-law referred to in paragraph 56 above, the system of exceptions laid down in Article 4 of Regulation No 1049/2001 is based on a balancing of the opposing interests in a given situation, that is to say, first, the interests which would be favoured by the disclosure of the documents in question and, secondly, those which would be jeopardised by such disclosure. The decision taken on a request for access to documents depends on which interest must prevail in the particular case (see judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraph 63 and the case-law cited).

82 In order to justify refusal of access to a document, it is not sufficient, in principle, for that document to come within the scope of an activity or an interest mentioned in Article 4 of Regulation No 1049/2001. The institution concerned must, in principle, also explain how access to that document could specifically and actually undermine the interest protected by an exception laid down in that article (see judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraph 64 and the case-law cited).

83 As regards the concept of 'commercial interests', it is apparent from the case-law that it is not possible to regard all information concerning a company and its business relations as requiring the protection which must be guaranteed to commercial interests under the first indent of Article 4(2) of Regulation No 1049/2001 without frustrating the application of the general principle of giving the public the widest possible access to documents held by the institutions (see judgment of 13 January 2017, *Deza* v *ECHA*, T-189/14, EU:T:2017:4, paragraph 55 and the case-law cited).

84 Consequently, in order to apply the exception provided for by the first indent of Article 4(2) of Regulation No 1049/2001, it must be shown that the documents at issue contain elements which may, if disclosed, undermine the commercial interests of a legal person. That is the case, in particular, where the requested documents contain commercially sensitive information relating, in particular, to the business strategies of the undertakings concerned, to their commercial relations and to working methods or where those documents contain information particular to that undertaking which reveal its expertise (see judgment of 9 September 2014, *MasterCard and Others* v *Commission*, T-516/11, not published, EU:T:2014:759, paragraphs 82 to 84 and the case-law cited; see also judgment of 13 January 2017, *Deza* v *ECHA*, T-189/14, EU:T:2017:4, paragraph 56).

85 According to the case-law, the examination of partial access to a document of the EU institutions, bodies, offices or agencies must be carried out in the light of the principle of proportionality (see, to that effect, judgment of 6 December 2001, *Council* v *Hautala*, C-353/99 P, EU:C:2001:661, paragraphs 27 and 28).

86 It is clear from the very wording of Article 4(6) of Regulation No 1049/2001 that the EU institutions, bodies, offices or agencies are required to consider whether it is appropriate to grant partial access to requested documents and to confine any refusal to information covered by the relevant exceptions referred to in that article. The institution must grant partial access if the aim pursued by that institution in refusing access to a document may be achieved where all that is required of the institution is to blank out the passages which might harm the public interest to be

protected (judgment of 25 April 2007, *WWF European Policy Programme* v *Council*, T-264/04, EU:T:2007:114, paragraph 50; see also, to that effect, judgment of 6 December 2001, *Council* v *Hautala*, C-353/99 P, EU:C:2001:661, paragraph 29).

87 It is therefore for the EU institution, body, office or agency to assess, first, whether the document to which the request for access relates falls within the scope of one of the exceptions provided for by Article 4 of Regulation No 1049/2001, second, whether the disclosure of that document would specifically and actually undermine the protected interest and, third, if so, whether the need for protection applies to the whole of the document (judgments of 30 January 2008, *Terezakis* v *Commission*, T-380/04, not published, EU:T:2008:19, paragraph 88, and of 22 May 2012, *Internationaler Hilfsfonds* v *Commission*, T-300/10, EU:T:2012:247, paragraph 93).

88 In the contested decision, as a basis for the refusal of access to the documents at issue, the REA relied on the protection of the commercial interests of the members of the consortium for the purposes of the first indent of Article 4(2) of Regulation No 1049/2001, but considered, as noted in paragraphs 58 and 73 above, that the latter provision had to be interpreted in accordance with the confidentiality provisions contained in Article 3 of Regulation No 1290/2013 and Article 36 of the grant agreement relating to the iBorderCtrl project and in the light of the protection conferred by Article 339 TFEU on information which, by its very nature, is covered by professional secrecy.

89 The contested decision states in that regard that the information at issue is 'inside knowledge' of the consortium and reflects the specific intellectual property, ongoing research, know-how, methodologies, techniques and strategies which belong to the consortium. Public disclosure of that information would adversely affect the competitive position of the consortium on the market and, in turn, seriously undermine its commercial interests, including its intellectual property, by giving an advantage to potential competitors of the project in question, who would unduly benefit from it as follows. First, competitors could anticipate the strategies and weaknesses of the members of the consortium, in particular when participating in calls for tenders. Secondly, they could copy or use the consortium's intellectual property, know-how, methods, techniques and strategies to improve their own competing products or services or to gain an unfair advantage when applying for patents, approvals or authorisations for their products or services. Thirdly, disclosure would undermine the possibilities of the members of the consortium to obtain funding from investors in a highly competitive context in which confidentiality is the only way to maintain the commercial value of the information in question. Fourthly, given the sensitive nature of the information, disclosure could cause reputational damage to members of the consortium and to individuals linked to them.

90 The REA concluded that there was a risk that access to the requested documents would undermine the commercial interests of the consortium, including its intellectual property.

91 On the basis of those considerations, the REA granted, in the contested decision, partial access to documents D 3.1, D 7.3 and D 7.8 and refused to grant full access to the other requested documents drawn up in the course of the iBorderCtrl project, as is apparent from paragraph 8 above.

92 It must therefore be ascertained whether, as the applicant claims, the REA wrongly concluded that the requested documents, considered individually and specifically, contained information to justify the application of the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001, so that there was a real and non-hypothetical risk that their disclosure would

actually undermine the commercial interests of the members of the consortium and, if so, whether full or partial access could have been granted. That examination must be carried out in the light of the findings set out in paragraphs 64, 69 and 73 above.

93 In support of his claims, the applicant relies on cross-cutting arguments and more specific arguments concerning the individual assessment of each of those documents or of documents of a similar nature.

(1) The cross-cutting arguments

94 As regards, first of all, the cross-cutting arguments, the applicant submits that the REA errs in referring to the commercial interests of the 'consortium', which does not exist as a legal person and the numerous members of which are, moreover, also scientific institutions or universities which, 'a priori', do not have commercial interests.

95 In that regard, on the one hand, even assuming that, as the applicant argues, it is not the commercial interests of the consortium but, individually or collectively, those of its members which must be considered when examining the application of the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001, the fact remains that, in the contested decision, and despite some references to the commercial interests of the consortium, the REA examined whether the disclosure of the documents at issue would affect the commercial interests of the members of that consortium. In any event, it is important to point out that the applicant draws no conclusions from his argument so far as concerns the legality of the contested decision. On the other hand, the applicant is wrong in arguing that scientific institutions or universities cannot pursue activities which involve commercial interests (see, to that effect, judgment of 21 October 2010, *Agapiou Joséphidès* v *Commission and EACEA*, T-439/08, not published, EU:T:2010:442, paragraphs 124 to 128).

96 Secondly, it should be pointed out that neither the time at which a document was drawn up, relied on by the applicant when he argues that documents prepared at the start of the project are not likely to contain business secrets, nor the time necessary for drawing them up, put forward by the REA, is relevant for establishing whether a document to which access is requested contains information which falls within the scope of the commercial interests of an undertaking. Those arguments of the parties are therefore ineffective.

97 Thirdly, the applicant submits that the results of publicly funded research must benefit the public, including the competitors of the commercial members of the consortium, to the extent in particular that effective competition as regards the best technology is of benefit to the public in the event that the European Union decides to use such technology and to launch calls for tenders relating to it.

98 In that regard, it should be noted that the question whether the commercial interests of the members of the consortium, inter alia those relating to the results of the project, are worthy of protection, in particular in view of any interest which may exist for competitors and the public in having general access to projects financed from the EU budget, falls within the scope of the assessment of the existence of an overriding public interest in the disclosure of the requested documents, notwithstanding the possible existence of legitimate commercial interests, and will therefore, where appropriate, be examined in the context of the examination of the second part of the first plea.

99 Furthermore, according to the applicant, the REA's claim that the system to be developed would be of 'commercial value' only if its mode of operation remained secret is incorrect, both on security grounds, since an information technology can be used with sufficient security only when its mode of operation and code are publicly available and it can therefore be monitored publicly and tested for weaknesses, and on commercial grounds, since it must be possible for the mode of operation of a technology to be monitored and confirmed by independent parties (for example scientists) before a public body spends money in order to acquire it.

100 In so far as those arguments of the applicant must be understood as alleging, in essence, that the members of the consortium do not have commercial interests worthy of protection connected with a project such as iBorderCtrl, it should be noted, as did the REA, that, pursuant to Article 41 of Regulation No 1290/2013, under Title III of that regulation containing rules governing the exploitation and dissemination of results, the 'results' of a project are either to be owned by the project participant generating them or jointly owned by the project participants. Moreover, Article 42 of that regulation provides that, where results are capable of commercial or industrial exploitation, the participant owning those results is to examine the possibility of protecting them and must, if it is possible, reasonable and justified given the circumstances, adequately protect them, having due regard to its legitimate interests, and the legitimate interests, particularly the commercial interests, of the other participants in the action.

101 It follows that the results of projects which are owned by the project participants are likely to be of commercial and financial value to those participants and, therefore, the industrial and commercial exploitation of those results may be protected. Accordingly, the participants in such a project, like the members of the consortium in the present case, may have legitimate commercial interests relating to the results of that project which are capable of being covered by the exception referred to in the first indent of Article 4(2) of Regulation No 1049/2001.

102 The applicant is also wrong to claim, in that context, that the protection conferred by Article 41 of Regulation No 1290/2013 is limited to the ownership of 'tangible' property produced. It follows from Article 2(1)(19) of Regulation No 1290/2013 that 'results' should be understood to mean any tangible or intangible output of the action, such as data, knowledge or information, that is generated in the action, whatever its form or nature, whether or not it can be protected, as well as any rights attached to it, including intellectual property rights.

103 The analogy made in that context by the applicant to market exclusivity which excludes the placing on the market of other medicinal products for ten years as referred to in the judgment of 5 February 2018, *PTC Therapeutics International* v *EMA* (T-718/15, EU:T:2018:66, paragraph 91), cannot call that conclusion into question. First, it is clear from paragraphs 100 and 102 above that an action may produce both results which may be protected and results which may not be protected or to which it is not reasonable or justified, in the circumstances, to afford protection. Moreover, as regards the results of the project which may be protected, inter alia, by intellectual or industrial property rights, such as patents – even though those rights are, contrary to what is maintained in essence by the REA, capable of protecting the results from unjustified industrial and commercial exploitation, and in particular from the marketing of similar products – that fact does not in itself render unfounded a decision refusing access to the requested documents on the basis of an exception intended to protect legitimate commercial interests, which include, in particular, intellectual property rights.

104 That argument of the applicant must therefore be rejected.

(2) The individual assessment of the documents at issue

105 As recalled in paragraph 91 above, by the contested decision, the REA granted partial access to documents D 3.1, D 7.3 and D 7.8. and refused to grant full access to the other requested documents.

106 As a preliminary point, it is necessary, in the first place, to clarify the scope of the applicant's complaints challenging the refusal of access to the requested documents. First, with regard to document D 7.6, it should be pointed out, as did the REA, that that agency responded to the initial application, in so far as it sought access to that document, by stating that document D 7.6 was accessible to the public, which is not disputed by the applicant in the present action. It must therefore be concluded that document D 7.6 does not form part of the subject matter of the present dispute. Secondly, since the applicant agreed, in his confirmatory application, to the redaction of the personal data of the persons involved in the project and also put forward no argument to contest this in the context of the present action, it must be concluded that the refusal of access to the requested documents is not challenged in so far as it relates to those data.

107 In the second place, it should be noted that, in Annex I to the grant agreement, all the requested documents, with the exception of documents D 3.1 and D 8.7, are designated as confidential by the mention 'confidential, only for members of the consortium (including the Commission Services and/or REA Services)'.

108 With regard to documents D 3.1 and D 8.7, it must be noted that the classification of a document may change in the course of the project, which necessitates, given that the decision to classify a document as 'confidential' or 'public' is made – in the present case, in Annex I to the grant agreement – when the agreement is signed, an amendment to the grant agreement pursuant to Article 55 thereof. Thus, on the one hand, under the grant agreement document, D 3.1 was included among those whose 'sensitive' nature had to be assessed before its disclosure in accordance with the internal arrangements of the consortium. The procedure for changing its classification to 'confidential' was underway at the time of the initial application for access. On the other hand, document D 8.7 was identified as confidential when it was submitted, as is apparent from the designation on the first page of that document.

109 The REA was entitled to take into account the circumstances referred to in paragraphs 107 and 108 above when examining the applicant's application for access (see paragraph 69 above).

(i) Documents D 1.1 (Ethics advisor's first report), D 1.2 (Ethics of profiling, the risk of stigmatisation of individuals and mitigation plan) and D 2.3 (EU wide legal and ethical review report)

110 The applicant submits that the legitimate protection of commercial interests cannot be extended so far as to include information unrelated to the undertaking and not constituting 'business secrets', such as, in the present case, inter alia, the ethical assessment and the review of the legal framework, which are not concerned with a particular technology but address general questions of ethical and legal assessment which arise irrespective of the actual design of the system and of the specific project of the consortium. According to the applicant, the REA is wrong to maintain that any information which is useful to the competitors of the consortium partners constitutes business secrets and should be protected. He notes that the competitors of the undertakings making up the consortium were involved in testing the system developed by that consortium.

111 Accordingly, the disclosure of documents D 1.1, D 1.2 and D 2.3, which do not, according to the applicant, reflect scientific know-how and do not contain information on methods of production and analysis, is not capable of undermining the commercial interests of the members of the consortium. In any event, even if those documents contained information relating to the scientific know-how of members of the consortium, partial disclosure of those documents should be possible.

112 The REA submits that the ethical and legal assessments contained in documents D 1.1, D 1.2 and D 2.3 are specifically tailored to the iBorderCtrl project in that those documents address and analyse how the various concerns are actually taken into account in the methodology of that project. They also set out safeguards against risks and identified requirements specific to the project. Moreover, the compilation of information contained in document D 2.3 is an 'intellectual endeavour' which is unavailable to persons not forming part of the consortium and therefore contains its members' specific know-how. The ethical assessments contained in documents D 1.1 and D 1.2 contain sensitive information, the dissemination of which could cause reputational damage to members of the consortium, partners and individuals associated with the project. The disclosure of that information would therefore undermine the commercial interests of the members of the consortium and constitute an unfair advantage for competitors.

113 Having consulted documents D 1.1, D 1.2 and D 2.3, the Court notes that they comprise, inter alia, as is apparent from the contested decision, ethical and legal assessments of the tools, technological components and methods developed in the context of the iBorderCtrl project.

114 As the REA points out, document D 1.1 contains, inter alia, a description of the way in which the ethical and legal concerns identified in documents D 1.2 and D 2.3 must be taken into account in practice when developing the various technological components and methods developed in the context of the iBorderCtrl project, both for the research phase and for any operational phase, in order to ensure compliance with the ethical principles and fundamental rights invoked. In the context of the recommendations which it makes, document D 1.1 contains references to, or information making it possible to identify, the know-how, methodologies, techniques and strategies developed by the members of the consortium for the purposes of the project.

115 Document D 1.2, which states that it is linked and partially overlaps with the legal report constituting document D 2.3, presents, as noted by the REA, the methodology according to which the iBorderCtrl project deals specifically with the profiling and risk of stigmatisation of both individuals and groups, the analysis of an IT-tools false-information problem (false positives and false negatives) and an initial description of project risks and relevant safeguards. That review, which is specific to the project, uses information concerning the technological components and methods developed in the context of the project and therefore refers to elements of the know-how, methodologies, techniques and strategies developed by the members of the consortium for the purposes of the project or information making it possible to identify such elements.

116 Document D 2.3, written by a participating university, explains in detail how the requirements of EU law and national law are implemented in the various sub-domains of the technologies developed by the project. That analysis, which examines in detail the infrastructure of the iBorderCtrl project, is therefore concerned, in part, specifically with the technologies, features and tools used by that project and makes it possible to identify the strategy adopted in the light of the identified regulatory framework.

117 The information referred to in paragraphs 114 to 116 above therefore falls within the scope of the commercial interests of the members of the consortium for the purposes of the first indent of Article 4(2) of Regulation No 1049/2001. The REA did not err in considering in the contested decision that the disclosure of that information could specifically and actually undermine the commercial interests of the members of the consortium, including their intellectual property, in that it would allow competitors to take undue advantage of their commercially valuable know-how.

118 However, a reading of documents D 1.1, D 1.2 and D 2.3 reveals that they also contain information other than assessments concerning the specific legal and ethical implications of the iBorderCtrl project or the actual solutions envisaged in developing the technologies or features of that project.

119 Those documents also contain a description of EU policy on border controls and the position in EU law concerning that policy, as well as a discussion of the appropriateness of strengthening those controls through the application of innovative technological means. They also contain a detailed summary of the relevant legal framework under international law, EU law and national law, in particular that concerning the protection of personal data, legal principles and fundamental rights. That information, which is based, inter alia, on publicly available sources identified by references to websites, does not relate to the tools or technologies actually used in the iBorderCtrl project but, as the applicant argues, deals with general questions concerning the ethical and legal assessment of a system which uses innovative technological means, such as 'automatic deception detection' or automated 'risk assessment', that are likely to arise irrespective of the actual design of the system and of the project developed by the members of the consortium.

120 Moreover, while the REA maintains that it checked whether the documents at issue contained publicly available information, it did not argue in the contested decision that the information identified in paragraph 119 above provided added value compared to the publicly available information on which it was based for the purposes of the case-law arising from the judgment of 13 January 2017, *Deza* v *ECHA* (T-189/14, EU:T:2017:4, paragraph 60 and the case-law cited).

121 In the present proceedings, the REA argues only that the compilation of information contained in document D 2.3 is an 'intellectual endeavour' which is unavailable to persons not forming part of the consortium and that that document contains its members' specific know-how. In that regard, it should be pointed out that, while it is certainly true that the work of systematising publicly available information may have some commercial value, it must be shown that the systematisation of that information was accompanied by assessments resulting in new scientific conclusions or relating to an inventive strategy which could give the undertaking a commercial advantage over its competitors and which would, as a result, clearly be of a confidential nature (see, to that effect, judgment of 13 January 2017, *Deza* v *ECHA*, T-189/14, EU:T:2017:4, paragraph 67). However, the REA has failed to show that that intellectual endeavour of compilation provides added value compared to the publicly available information, for the purposes of the case-law referred to in paragraph 120 above, and that the mere task of compiling that information requires a specific know-how on the part of the members of the consortium having for them a commercial interest worthy of protection under the first indent of Article 4(2) of Regulation No 1049/2001 (see, to that effect, judgment of 13 January 2017, *Deza* v *ECHA*, T-189/14, EU:T:2017:4, paragraph 65).

122 It must therefore be concluded that the REA erred in considering, in the contested decision, that the refusal of access to the information contained in documents D 1.1, D 1.2 and D 2.3, identified in paragraph 119 above, was justified by the protection of the commercial interests of the members of the consortium.

123 The REA's argument in the contested decision that competitors of the members of the consortium could take advantage of the disclosure of those documents, in particular by anticipating weaknesses and strategies relating to the project in question in the context of developing similar projects, or use the members' know-how, cannot justify refusal to grant access to the information identified in paragraph 119 above. That information does not form part of the consortium members' own know-how or expertise and, in so far as it does not concern a practical application of legal and ethical principles to the project in question, it does not constitute sensitive commercial information, with the result that its disclosure is not likely to confer an advantage on competitors of the members of the consortium. That information therefore does not fall within the scope of the protection of commercial interests guaranteed by the first indent of Article 4(2) of Regulation No 1049/2001.

124 Moreover, it must be stated, as the applicant points out, that the REA does not explain how disclosure of documents D 1.1, D 1.2 and D 2.3 may, in particular as regards the information identified in paragraph 119 above, specifically and actually damage the reputation of members of the consortium. In any event, if the REA's argument is to be understood as meaning that the fact that the project in question raises ethical and legal concerns is in itself likely to damage the reputation of the members of the consortium who designed it, that argument cannot succeed. It may be inferred from the subject matter and objective of the iBorderCtrl project, which are publicly known, as the applicant notes when referring to information disseminated on the website relating to that project, that the project is based on the use of innovative technological means based, inter alia, on data collection, with the result that it is not possible to regard as a business secret or commercially sensitive information the fact that a system such as iBorderCtrl, like any other system based on such innovative means, is likely to raise certain legal and ethical concerns.

125 It follows from the foregoing that the REA was wrong to consider that all the information contained in documents D 1.1, D 1.2 and D 2.3 fell within the scope of the commercial interests of the members of the consortium and to refuse access to the entirety of those documents. The present complaint is therefore well founded in part.

(ii) Document D 1.3 (Ethics advisor)

126 As regards requested document D 1.3, relating to the appointment of the external ethics advisor, the applicant submits that its publication in an anonymised version from which personal data had been removed could not affect the commercial interests of the members of the consortium.

127 The REA argues that the dissemination of data in document D 1.3 which could be used to identify the ethics advisor and with which almost the entire document is concerned, such as the detailed description of his expertise or his curriculum vitae, may undermine his independence and his commercial interests.

128 In that regard, it should be noted that the REA stated in the contested decision that document D 1.3, like documents D 1.1, D 1.2 and D 2.3, contained ethical and legal assessments of the tools, technological components and methodologies developed in the context of the project. However, a

reading of that document reveals that this is clearly not the case. As the REA states in the context of the present case, document D 1.3 contains the detailed curriculum vitae of the external ethics advisor and his letter of acceptance of the tasks entrusted to him by the consortium.

129 No other reason for the refusal of access to document D 1.3 is given in the contested decision and, in particular, no reason is given for maintaining that disclosure of that document expunged of personal data, to which the applicant consented in the confirmatory application, would not be possible. The reason put forward in that regard by the REA in the present proceedings, to the effect that the disclosure of data making it possible to identify the ethics advisor would undermine his independence and his commercial interests, is not set out in the contested decision, which refers solely to the commercial interests of the members of the consortium. However, as is apparent from document D 1.3, the ethics advisor in question is not employed by any member of the consortium and is a person independent of them. His commercial interests cannot therefore be confused with those of the members of the consortium.

130 Moreover, it is important to note that the contested decision does not state, in response to the confirmatory application in which the applicant agreed to the redaction of the personal data from the requested documents, that document D 1.3 is, in its entirety, covered by the exception referred to in Article 4(1)(b) of Regulation No 1049/2001. The contested decision refers only to the exception referred to in the first indent of Article 4(2) of that regulation. Furthermore, the contested decision makes no mention of the impossibility of granting partial access because a document expunged of personal data would be of no use to the applicant. In any event, even assuming that this was the case for all the information contained in the ethics advisor's curriculum vitae, the REA does not explain, in particular, how such a circumstance applies to other information contained in document D 1.3, inter alia to the description of the tasks entrusted to the ethics advisor by the members of the consortium.

131 It follows that the reasons put forward in the contested decision do not allow the first indent of Article 4(2) of Regulation No 1049/2001 to be relied on as the sole basis for the refusal to grant access to document D 1.3. The present complaint is therefore well founded.

(iii) Document D 2.1 (Requirement Analysis Report)

132 The applicant submits that the border surveillance procedures in the Member States and their requirements, described in document D 2.1, are not business secrets but a public matter. The REA is wrong to regard as a business secret any information which could be of use to competitors of the consortium partners engaged in commercial activities, where it does not argue that that analysis reflects the scientific know-how of a person or that it contains information on methods of production and analysis the publication of which would necessarily result in the interests of a member of the consortium being seriously undermined. In any event, this would justify only the redaction of the relevant passages.

133 The REA argues that document D 2.1, drafted in 2016, sets out in detail the border surveillance procedures in the pilot Member States and summarises requirements concerning users for the period prior to their arrival on EU territory and the stages of the background check and border control. That document contains the method of assessing the investigation and the conclusions. The compilation of the information contains the specific know-how of the members of the consortium. According to the REA, competitors would also take advantage of the disclosure of

such information because they would learn which approach is used by one of the members of the consortium. Contrary to the applicant's claims, the protection afforded by Regulation No 1049/2001 goes far beyond 'business secrets' alone.

134 Having consulted the document in question, the Court notes that it sets out, inter alia, as is apparent from the contested decision, technological solutions (for example biometric identification technologies) and the definition of the overall architecture of the iBorderCtrl project, thus providing the general framework for the various modules, including the features of the hardware and software making up the final integrated system.

135 That information forms part of the know-how of the members of the consortium and concerns methodologies, techniques and strategies which they have developed for the purposes of the project. Consequently, the REA did not err in considering in the contested decision that disclosure of that information could specifically and actually undermine the commercial interests of the members of the consortium in that it would allow competitors to take undue advantage of their commercially valuable know-how.

136 However, a reading of that document reveals that it also contains information other than that relating to the methodologies, techniques and strategies specific to the iBorderCtrl project.

137 It is apparent from the document itself that the analysis which it contains is conducted in three stages, the first of which consists in a description and analysis of the concepts underlying border management and provides an overview of the operational problems of end-users in their geographical context. In that context, inter alia, border surveillance procedures in the Member States concerned by the research phase of the project are set out in detail. As the applicant argues, those procedures and their requirements are not business secrets of the members of the consortium, but are a public matter. The second stage consists in an overview of the 'state of the art' of the various technologies, part of which is a presentation of what is, as the title of that part of the document suggests, the current state of technological development in the fields concerned by the project.

138 Even though those analyses are preliminary stages in the examination of the specific requirements for the iBorderCtrl project, having regard, inter alia, to the concepts thus identified and in comparison with existing technologies, and undoubtedly constitute a premiss for carrying out the analysis of the architecture of that system, its methodologies and its tools identified in paragraphs 134 and 135 above, large parts of those analyses do not contain information relating to the know-how of the members of the consortium, to their inside knowledge or to their expertise. The mere fact that those elements might make it possible to determine what are the pre-existing technologies whose application or development was taken into account in the discussion on the design of the system in the context of the iBorderCtrl project is not, in itself, capable of demonstrating that those elements form part of the know-how of the members of the consortium. Moreover, the applicant states that the 'approach' used in the project can already be inferred from publicly available information, which is accepted by the REA when it confirms that the information publicly available, through a communication from the consortium on the functioning of the system, makes it possible to know how the pilot system is supposed to work.

139 The fact that the information contained in document D 2.1 and identified in paragraph 137 above does not form part of the scientific know-how of the members of the consortium or their inside knowledge is confirmed by the fact that those parts of the analyses are based on publicly available sources, including academic publications and information disseminated on the internet, listed in the 'References' section of the document.

140 Moreover, it is certainly true, as maintained by the REA, that the formulation of the methodology of the investigations or that of the assessment of the data thus obtained and the conclusions drawn therefrom with regard to the development of the iBorderCtrl project contain the specific know-how of the members of the consortium. However, that is not true of the information referred to in paragraph 137 above, since no specific methodology for compiling it was highlighted in the contested decision or is apparent from the document itself. In the course of the present proceedings, the REA has argued that the compilation of the information contained in document D 2.1 contained the specific know-how of the members of the consortium. While it is certainly true, as pointed out in paragraph 121 above, that a work of systematising publicly available information could have some commercial value, the REA has not demonstrated that, in the present case, a compilation of publicly available information provides added value within the meaning of the case-law referred to in paragraph 120 above and that the mere task of compiling that information requires specific know-how on the part of the members of the consortium which would be of commercial interest to them and worthy of protection under the first indent of Article 4(2) of Regulation No 1049/2001.

141 Finally, it must be noted that, as the REA itself points out, in the context of partial access to document D 3.1, information of a similar nature, namely that concerning a general description of the pre-existing techniques and technologies (for example biometric sensors) relating to data collection devices, was disclosed to the applicant.

142 It follows from the foregoing that the REA was wrong to consider that all the information contained in document D 2.1 fell within the scope of the commercial interests of the members of the consortium and to refuse to grant access to the entire document. The present complaint is therefore well founded in part.

(iv) Document D 2.2 (Reference Architecture and components specifications)

143 According to the applicant, the contested decision is unfounded as regards the refusal to disclose document D 2.2 in so far as it cannot be inferred from the 'technical nature' of a document that it necessarily contains 'sensitive information'. The REA therefore failed to put forward any factual evidence from which it follows that disclosure of that document would undermine the commercial interests of a member of the consortium.

144 The REA notes that document D 2.2 describes in detail how the technical requirements are implemented in seven technologies developed by the project. Moreover, the overall functional architecture of the hardware and software is presented in detail. Finally, use cases for different types of travellers are identified for future testing procedures. On account of its technical nature, that document contains sensitive information, as competitors who do not have such information would take advantage of its disclosure. While the applicant correctly states that information which is publicly available, through a consortium communication on the operation of the system, makes it possible to ascertain how the pilot system is supposed to operate, that information nevertheless does not encompass the technical requirements, including the specifications and related architecture and methodologies, which are of commercial interest.

145 Having consulted the document in question, the Court notes that it, like document D 2.1, sets out, as the REA noted in the contested decision, technological solutions and the definition of the overall architecture of the iBorderCtrl project, thus providing the general framework for the various modules, including the functionalities of the hardware and software making up the final integrated system.

146 That information forms part of the know-how of the members of the consortium and concerns methodologies, techniques and strategies which they have developed for the purposes of the project. Consequently, the REA did not err in considering in the contested decision that the disclosure of that information could specifically and actually undermine the commercial interests of the members of the consortium in that it would allow competitors to take undue advantage of their commercially valuable know-how.

147 However, it is clear from that document that, in the context of the examination which it contains, account was taken of the analyses carried out in the report constituting document D 2.1 and of certain legal assessments forming the subject matter of document D 2.3. Consequently, the refusal to grant partial access to the information contained in documents D 2.1 and D 2.3, referred to in paragraphs 137 and 119 above, which was reproduced or summarised for the purposes of document D 2.2, or to information of the same scope or nature, is not justified by the protection of the commercial interests of the members of the consortium. The present complaint is therefore well founded in part.

(v) Document D 3.1 (Data Collection Devices – specifications)

148 Document D 3.1 has been disclosed in so far as it concerns the general description of the techniques and technologies (for example biometric sensors) relating to data collection devices (see also paragraph 141 above). A partially redacted version of the document was disclosed to the applicant.

149 According to the applicant, the contested decision is unfounded as regards the refusal to disclose document D 3.1 in its entirety in so far as it cannot be inferred from the 'technical nature' of a document that it necessarily contains 'sensitive information'. The REA therefore failed to put forward any factual evidence from which it follows that disclosure of the document would undermine the commercial interests of a member of the consortium.

150 The REA argues that the parts of document D 3.1 describing in detail the techniques and technologies used in the project have not been made available because, due to their technical nature, they concern sensitive information from which competitors not possessing such information would take advantage in the event of disclosure.

151 Having consulted the undisclosed parts of document D 3.1, the Court finds that they contain a detailed description of various techniques and technologies, as claimed by the REA. However, on the one hand, as the applicant maintains, the more or less technical nature of the information in question, highlighted by the REA to substantiate the refusal to grant access to it, is not in itself decisive in assessing whether it falls within the scope of commercial interests within the meaning of the first indent of Article 4(2) of Regulation No 1049/2001.

152 On the other hand, it is not clear from the information contained in the redacted parts of document D 3.1 that all the techniques and technologies described therein are those actually used in the iBorderCtrl project, contrary to what the REA claims. Those parts contain

descriptions of the techniques and technologies available on the market and potentially useful in the architecture of the iBorderCtrl system. Moreover, the redacted parts also contain recommendations as to which available technologies and techniques would be optimal in the architecture of the iBorderCtrl system in the light of the technical requirements in question. Although the latter assessments reflect the know-how of the members of the consortium – in particular to the extent that, as stated in the document, their experience is combined with the public information collected, or to the extent that the evaluation criteria are specifically formulated by the members, with the result that their disclosure could specifically and actually undermine the commercial interests of the members of the consortium – that is not the case of the objective descriptions of the techniques and technologies available on the market.

153 Those descriptions are, moreover, based, at least in part, on publicly available sources, in particular scientific publications or information disseminated on the internet. The REA does not argue that the compilation of that publicly available information provides added value within the meaning of the case-law referred to in paragraphs 120 and 121 above.

154 It must therefore be concluded that the REA was wrong to consider that all the information contained in the redacted parts of document D 3.1 fell within the scope of the commercial interests of the members of the consortium and to refuse access to those parts. The present complaint, by which the applicant challenges the refusal of access to the redacted parts of document D 3.1, is therefore well founded in part.

(vi) Documents D 7.3 (Dissemination and communication plan) and D 7.8 (Dissemination and communication plan 2)

155 In the contested decision, partial access was granted to documents D 7.3 and D 7.8, partially redacted versions of which were therefore disclosed to the applicant.

156 As a preliminary point, it should be noted that, by letter of 23 March 2021, the applicant informed the Court that he had, by his own efforts, 'restored' the redacted parts of document D 7.3, which was accordingly attached to his letter. On the basis of the text thus obtained, he made certain observations in support of the first plea and repeated his argument that, in any event, there was an overriding public interest in full disclosure of that document.

157 By letter of 20 May 2021, the REA submitted its observations on the applicant's arguments in which it noted, inter alia, that the applicant had disseminated on his website the full version of document D 7.3, including the redacted parts as restored by the applicant himself.

158 In that regard, it must be pointed out that the fact that the applicant obtained, by his own efforts, access to the redacted parts of document D 7.3. and accordingly became aware of the information to which the REA had refused to grant him access in the contested decision, and that he published that document on his website does not support the conclusion that he does not have, or no longer has, an interest in seeking the annulment of the contested decision in that respect. Admittedly, the applicant, by acting in that way, failed to comply with the procedures laid down by EU law relating to access to documents and did not await the outcome of the present proceedings in order to ascertain whether or not he could lawfully obtain access to the full version of the document at issue. Nevertheless, that circumstance alone, however open to criticism, does not call into question the applicant's interest in having the contested decision annulled in that respect, since the body responsible for disclosing the information at issue is not the REA, which would thereby acknowledge the public interest in having such information disclosed. The applicant is entitled,

therefore, to obtain a ruling from the Court on the lawfulness of that decision, which adversely affects him, since the REA did not formally withdraw it and granted him only partial access to the requested document on the basis of the exception referred to in the first indent of Article 4(2) of Regulation No 1049/2001. The applicant's conduct with regard to the document in question is not relevant for the purposes of assessing his interest in having such a decision annulled (see, to that effect, judgments of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 45 and the case-law cited; of 21 January 2021, *Leino-Sandberg* v *Parliament*, C-761/18 P, EU:C:2021:52, paragraphs 33 and 45 to 48; and of 22 March 2011, *Access Info Europe* v *Council*, T-233/09, EU:T:2011:105, paragraphs 33 to 36 and the case-law cited).

159 It follows from the foregoing that, even though he was able to acquaint himself with the information to which the REA had refused to grant him access, the applicant has an interest in securing the annulment of the contested decision in so far as the REA refused to grant him access to the redacted parts of document D 7.3.

160 However, it must also be pointed out that the fact that the applicant was able, by his own efforts, to 'restore' the redacted parts of document D 7.3 has no bearing on the lawfulness of the contested decision in that respect or on the Court's judicial review of it.

161 In order to challenge the refusal of access to the redacted parts of documents D 7.3 and D 7.8, the applicant argues that the legitimate protection of commercial interests cannot be extended to include information unrelated to the undertaking which does not constitute 'business secrets', such as, in particular, the communication strategy. Accordingly, mere discussions for promotional purposes, including discussions with public institutions and elected representatives, as contained in the redacted parts of documents D 7.3 and D 7.8, do not constitute business secrets.

162 According to the REA, document D 7.3, which seeks to determine how the project is disseminated and communicated to the public, has been disclosed in large part. Only certain sections of the document, in which the members of the consortium provided detailed information on their specific relationships with selected commercial or academic partners, were redacted, in so far as they constituted sensitive information which competitors could use to their advantage (for example, by contacting those partners).

163 Since document D 7.8, to which partial access was also granted, is a revised version of document D 7.3 drawn up a year later, the reasons for non-disclosure of the information in question are the same as those which apply to document D 7.3.

164 Having consulted the redacted parts of documents D 7.3 and D 7.8, the Court finds that, on the one hand, they contain a strategy for communication with commercial partners with a view to possible future collaboration. Such information falls within the scope of the commercial interests of the members of the consortium in so far as it concerns their commercial strategy and also makes it possible to infer which tools or technologies are envisaged in practice in the context of the iBorderCtrl project. The REA did not err in considering in the contested decision that the disclosure of such information could specifically and actually undermine the commercial interests of the members of the consortium.

165 On the other hand, the redacted information concerns the dissemination and promotion of the iBorderCtrl project itself and of its results to interested parties other than potential commercial partners. In that regard, it should be noted that the REA does not explain in what respect the

information redacted from documents D 7.3 and D 7.8 is more 'sensitive' than the information of the same nature disclosed to the applicant. Nor does the REA explain how the 'sensitive' nature of the information in question, even if it were established, is capable of demonstrating that that information falls within the scope of the commercial interests of the members of the consortium, while it acknowledges that the relationships covered by the promotional and information activities in question do not concern negotiations relating to the sale or granting of licences. Moreover, having consulted the redacted parts in question, the Court finds that the promotional and information activities referred to in the disclosed parts and in the majority of the redacted parts appear to pursue the same objective, namely the most extensive dissemination of information about the project and the technological solutions which it proposes. The mere fact, put forward by the REA, that competitors would be likely, taking into account the information thus disclosed, to promote their systems to the same parties concerned is not sufficient to conclude that that information falls within the scope of the commercial interests of the members of the consortium.

166 Furthermore, the Court notes that some of the information contained in the redacted parts of documents D 7.3 and D 7.8 follows on from the ethical and legal assessments made in documents D 1.2 and D 2.3. Thus, in so far as those redacted parts reproduce or summarise the information referred to in paragraph 119 above, they cannot be covered by the exception referred to in the first indent of Article 4(2) of Regulation No 1049/2001.

167 It must therefore be concluded that the REA was wrong to consider that all the information contained in the redacted parts of documents D 7.3 and D 7.8 fell within the scope of the commercial interests of the members of the consortium and to refuse access to those parts. The present complaint, by which the applicant challenges the refusal of access to the redacted parts of documents D 7.3 and D 7.8, is therefore well founded in part.

(vii) Document D 8.1 (Quality Management Plan)

168 The applicant argues that the REA does not state that document D 8.1 contains the business secrets of a consortium partner, that it reflects the scientific know-how of a person or that it contains information on methods of production and analysis the publication of which would necessarily result in the interests of a member of the consortium being seriously undermined. Accordingly, the document should have been disclosed at least in part.

169 The REA submits that document D 8.1 contains information concerning the internal organisation of the consortium and its *modus operandi* for the duration of the project, including, in particular, the organisation of the project and of responsibilities, the quality control procedure, the decision-making process and the communication flow between the partners. That document also explains the IT tools used by the project for its management. Finally, it contains as attachments the model documents used by the consortium for the results of the work, the interim reports, the meeting agenda and the meeting minutes. The disclosure of that information would undermine the protection of the commercial interests of the persons concerned and give an advantage to competitors wishing to set up a similar project in the future, since they would benefit from the results of the work of the members of the consortium.

170 Having consulted document D 8.1, the Court finds that it contains, as highlighted in the contested decision, information concerning the management structure of the project and the planning of technical activities up to the final delivery of results, and defines the quality control procedures for the project and the roles and responsibilities for developing each technological element.

171 In order to present the quality management plan, the document in question describes in detail, inter alia, the structure of quality management for the project and the allocation of responsibilities between different persons and bodies within the consortium, the methodologies, criteria and procedures designed to assess the quality of the project's results in the light of its various components, such as key performance indicators, as well as risk management. All of that information forms part of the know-how of the members of the consortium and highlights their expertise in the project's quality management. Moreover, the descriptions of the various scientific and technological outputs include references to the techniques and functionalities with which that project is specifically concerned and thus reflect the general architecture of the system, as conceived by the members of the consortium. That information therefore forms part of their scientific know-how.

172 It follows that all of the information contained in document D 8.1 falls within the scope of the commercial interests of the members of the consortium for the purposes of the first indent of Article 4(2) of Regulation No 1049/2001. The REA did not err in considering in the contested decision that the disclosure of that information could specifically and actually undermine the commercial interests of the members of the consortium in that it would allow competitors to take undue advantage of their commercially valuable know-how.

173 Accordingly, the present complaint must be rejected.

(viii) Documents D 8.3 (Periodic Progress Report), D 8.4 (Annual Report), D 8.5 (Periodic Progress Report 2) and D 8.7 (Annual Report 2)

174 The applicant argues that the REA does not state that the 'descriptive' documents D 8.3, D 8.4, D 8.5 and D 8.7 contain the business secrets of a consortium partner, that they reflect the scientific know-how of a person or that they contain information on methods of production and analysis the publication of which would necessarily result in the interests of a member of the consortium being seriously undermined. Accordingly, those documents should have been disclosed at least in part.

175 The REA contends that documents D 8.3, D 8.4, D 8.5 and D 8.7 contain information on the progress of the project against the relevant work packages, with the technical results described by reference to performance indicators specific to the project. Moreover, project risks and safeguards are set out and future technical steps are summarised. Finally, those documents contain a very detailed overview of the use of resources per partner and work package, in which completed tasks are also set out. In summary, the content of those documents is technical and financial and competitors would take advantage of having access to them, since those competitors could draw lessons from the measures taken and avoid steps which proved to be irrelevant or unnecessary, thereby allowing them to estimate investment costs, reduce costs and accelerate testing or development of a comparable technology.

176 Having consulted documents D 8.3, D 8.4, D 8.5 and D 8.7, the Court finds that they describe, as is apparent from the contested decision, the technical progress of the project against the relevant work packages after 6, 12, 18 and 24 months, by reference to the various scientific and technological outputs of that project.

177 In order to present the technical progress of the project, the documents at issue describe in detail the strategy developed by the members of the consortium for carrying out the project in question, including a detailed description of the tasks carried out during the period concerned and the

allocation of tasks between the members, as well as the methodologies designed to monitor the technical progress of the project, which falls within the scope of their know-how. Moreover, the descriptions of the various scientific and technological outputs include references to the techniques, tools and functionalities with which that project is specifically concerned and which thus reflect the general architecture of the system, as conceived by the members of the consortium. That information therefore forms part of their scientific know-how.

178 All of the information contained in documents D 8.3, D 8.4, D 8.5 and D 8.7 therefore falls within the scope of the commercial interests of the members of the consortium for the purposes of the first indent of Article 4(2) of Regulation No 1049/2001. The REA did not err in considering in the contested decision that the disclosure of that information could specifically and actually undermine the commercial interests of the members of the consortium in that it would allow competitors to take undue advantage of their commercially valuable know-how.

179 Accordingly, the present complaint must be rejected.

(3) Conclusion on the first part of the first plea

180 In the light of the foregoing, it is necessary to uphold the first part of the first plea as regards the refusal to grant full access to document D 1.3, and the refusal to grant partial access to documents D 1.1, D 1.2, D 2.1, D 2.2 and D 2.3, as well as more extensive access to documents D 3.1, D 7.3 and D 7.8, and to reject that part of the first plea as regards the refusal to grant access to documents D 8.1, D 8.3, D 8.4, D 8.5 and D 8.7. It must be recalled, however, that it is not for the Court to substitute itself for the REA and to indicate specifically the parts of the documents to which partial access should have been granted, the agency being required, when giving effect to this judgment, to take into account the reasoning set out in it (see, to that effect, judgment of 9 September 2014, *MasterCard and Others* v *Commission*, T-516/11, not published, EU:T:2014:759, paragraph 95 and the case-law cited).

C. The second part of the first plea, alleging the existence of an overriding public interest justifying disclosure of the documents at issue

181 The applicant argues that there are several public interests in full disclosure of the requested documents. First, there is a need to ensure general access by society to the results of publicly funded research. Secondly, there is a scientific interest in disclosure, since only research results which are discussed, criticised, tested and replicable by others can be regarded as scientific. Thirdly, there is also a public interest in disclosure in that, from an ethical and fundamental rights perspective, the iBorderCtrl project is particularly debatable. Fourthly, there is a media interest in the disclosure of the documents, as evidenced by the large number of media reports on the iBorderCtrl project. Fifthly, there is a political and democratic interest in the disclosure of the iBorderCtrl project documents, the practical use of which would require, as a next step, the creation of an appropriate legal basis. Sixthly, there is a budgetary interest in not investing funds in research relating to a technique the use of which may be unlawful as the law now stands and which, for political reasons, should not be used.

182 As regards the balancing of the opposing interests, the applicant argues, on the one hand, that the commercial interests of the members of the consortium ‘do not weigh particularly heavily’: first, much of the information on the iBorderCtrl project is already publicly known or has been disclosed; secondly, it is doubtful whether the requested documents even contain business

secrets, other than on account of the way in which the iBorderCtrl system is designed, since the project seems to be intended more to test and combine existing technologies than to develop a new technology; thirdly, disclosure of the project documents does not affect the legal protection of the system components used or of the system as a whole, which is already protected by patents, and the legislation relating to any intellectual property in the programming codes which may have been developed in the course of the project is not affected by disclosure of the reports on the project, with the result that their disclosure would not devalue their inventions, even if it could weaken the competitive position and profit expectations of some of the members of the consortium. On the other hand, the public interest in transparency 'by contrast weighs heavily' in the assessment of the opposing interests, since, first, the project is entirely financed by public funds and, secondly, it is particularly questionable and disputed and thus raises questions of principle concerning the use of artificial intelligence.

183 In any event, considered together, the various public interests in disclosure 'outweigh' the commercial interests in confidentiality.

184 The REA challenges the applicant's arguments and submits that he has not demonstrated the existence of an overriding public interest in disclosure.

185 In accordance with the final phrase of Article 4(2) of Regulation No 1049/2001, the institutions are to refuse access to a document where disclosure would undermine, inter alia, the protection of commercial interests of a natural or legal person, 'unless there is an overriding public interest in disclosure.' It follows that EU institutions must not refuse access to a document where its disclosure is justified by an overriding public interest, even if it could undermine the protection of a particular natural or legal person's commercial interests.

186 In that respect, it is necessary to weigh, on the one hand, the particular interest to be protected by non-disclosure of the document concerned against, on the other hand, inter alia, the public interest in the document being made accessible, having regard to the advantages of increased openness, as described in recital 2 of Regulation No 1049/2001, in so far as it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (see judgment of 21 October 2010, *Agapiou Joséphidès* v *Commission and EACEA*, T-439/08, not published, EU:T:2010:442, paragraph 136 and the case-law cited; see also judgment of 5 February 2018, *PTC Therapeutics International* v *EMA*, T-718/15, EU:T:2018:66, paragraph 107).

187 It is for the party requesting access to rely on specific circumstances to show that there is an overriding public interest which justifies the disclosure of the documents concerned (see 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 the case-law cited, and of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraph 90 and the case-law cited). Indeed, it is for the party alleging an overriding public interest, within the meaning of the last clause of Article 4(2) of Regulation No 1049/2001, to prove that interest (judgment of 25 September 2014, *Spirlea* v *Commission*, T-306/12, EU:T:2014:816, paragraph 97).

188 It is true that the overriding public interest capable of justifying the disclosure of a document need not necessarily be distinct from the principles which underlie Regulation No 1049/2001. Nevertheless, general considerations cannot be accepted in order to justify access to the requested documents, which requires that the principle of transparency is, in a particular situation, in some

sense especially pressing and prevails over the reasons justifying the refusal to disclose the documents in question (see, to that effect, judgments of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 92 and 93 and the case-law cited, and of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraphs 92 and 93).

189 In the confirmatory application, the applicant relied on an overriding public interest justifying disclosure of the requested documents consisting, on the one hand, in the legitimate interest of the public in having access to the results of publicly funded research and, on the other hand, in the right of the public to know whether the development of a project involving possible unethical or illegal interference with the right to privacy of citizens is financed from public funds, in order to allow an informed public and democratic debate on the introduction of controversial new systems of mass control such as that proposed in the context of the iBorderCtrl project.

190 In response to that line of argument, the REA states in the contested decision, on the one hand, that the public interest in the dissemination of the results of the project in question is ensured by the establishment of a coherent set of strategies and tools for the dissemination of the results of completed projects, usually through summaries which are approved by the REA and preserve the consortium's intellectual property rights and the other commercial interests of the persons concerned, including as regards documents relating to the legal and ethical assessment of the project in question and referring specifically to technological and scientific developments and to the methods and results of the project. On the other hand, the iBorderCtrl project is an ongoing research project aimed at testing new technologies in the field of EU border control and not at implementing those technologies directly in the field, it being understood that concerns relating to the protection of fundamental rights were duly integrated into the project. The REA concludes in the contested decision that the public interests relied on by the applicant do not prevail over the interests of third parties in protecting their commercial interests.

191 As a preliminary point, it should be noted that the examination of the second part of the first plea concerns only the requested documents or the parts of those documents in respect of which the REA correctly concluded that they fell within the exception referred to in the first indent of Article 4(2) of Regulation No 1049/2001, in accordance with the conclusion set out in paragraph 180 above.

192 In that regard, it should be noted that although, as the applicant rightly claims, there is a public interest in the dissemination of the results of projects financed by EU funds, the EU legislature has put in place rules to ensure the dissemination of the results of projects funded under the Horizon 2020 programme.

193 As noted by the REA, Regulation No 1290/2013 and the grant agreement provide for a balanced approach which seeks to take into account, on the one hand, the interests of the public, the scientific community and the media in the disclosure of the results and, on the other hand, the interests of the members of the consortium in the protection of their commercial interests, including in the field of intellectual property.

194 On the one hand, Article 43(2) of Regulation No 1290/2013, on which the applicant also relies, and Article 29.1 of the grant agreement provide for an obligation on the part of the participants to disseminate by appropriate means, in particular through scientific publications, the results of the project, subject to any restrictions imposed, inter alia, by the protection of intellectual property, safety rules or legitimate interests. Moreover, Article 29.2 of the grant agreement

stipulates that open access to scientific publications of peer-reviewed results must be guaranteed. Furthermore, Article 38.2.1 of the grant agreement provides that the REA, for its communication and publicity activities, may, in a manner which is consistent with the confidentiality of the information, use information concerning the action, documents, including summaries intended for publication, and services intended for the public.

195 In addition, in accordance with Article 20.3(a)(iii) and Article 20.4(a) of the grant agreement, the participants must submit to the REA, together with periodic technical and financial reports, summaries containing, inter alia, an overview of the results and their dissemination, for publication by the REA.

196 On the other hand, Article 4 of Regulation No 1290/2013 and Article 36.1 of the grant agreement provide, in the manner set out therein, for access by the EU institutions, bodies, offices and agencies and by the Member States to information relating to the results of a participant that has received EU funding. Moreover, Article 49 of Regulation No 1290/2013 provides that those institutions, bodies, offices and agencies and the Member States are, for the purpose of developing, implementing and monitoring EU policies or programmes, to enjoy the necessary access rights to the results of a participant that has received EU funding.

197 It follows that the public interest in the dissemination of the results of research financed from public funds in the context of the Horizon 2020 programme is ensured by the relevant provisions of Regulation No 1290/2013 and the grant agreement. The applicant has failed to demonstrate that that system of dissemination of results is not likely to fully satisfy the scientific, media and general public interest in having access to the results of EU-funded projects and that it is thus necessary to disclose, in addition, information contained in the requested documents, even if such disclosure would undermine the legitimate commercial interests of the members of the consortium protected under the first indent of Article 4(2) of Regulation No 1049/2001.

198 Secondly, in so far as the applicant submits that the obligation to disclose all the requested documents arises from the controversial nature of the project in question from an ethical and fundamental rights perspective, it is important to note that, on the one hand, the relevant provisions applicable to research and innovation projects funded under the Horizon 2020 programme, including in particular Article 19 of Regulation (EU) No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020) and repealing Decision No 1982/2006/EC (OJ 2013 L 347, p. 104), Article 14 of Regulation No 1290/2013, read in the light of recital 9 thereof, and Article 34 of the grant agreement seek to impose on participants the obligation to respect the fundamental rights and principles recognised, in particular, by the Charter of Fundamental Rights of the European Union, and to impose on the Commission an obligation to ensure respect for those rights and principles, which is also reflected in the fact that the legal and ethical assessments of the iBorderCtrl project, which are subject to evaluation by the independent ethics advisor, are specifically included in the mandatory stages of the development of that project.

199 On the other hand, as the REA noted, without being contradicted in that respect by the applicant, the project in question was an ongoing research project having the sole aim of testing technologies. The applicant does not claim that the fundamental rights of persons participating in pilot testing in the context of the iBorderCtrl project were not respected. The public interest relied on by the applicant relates, in fact, to the potential future deployment under real conditions of systems based on techniques and technologies developed within the framework of

the iBorderCtrl project. Such an interest would be satisfied by the dissemination of the results as provided for by Regulation No 1290/2013 and set out in the grant agreement (see paragraphs 194 to 196 above).

200 Similarly, the Court considers, as does the applicant, that there is a public interest in participating in an informed and democratic public discussion on the question whether control technologies such as those at issue are desirable and whether they should be financed by public funds and that that interest must be duly safeguarded. In view of the fact that the iBorderCtrl project is, however, only a research project under development, it is entirely possible to hold such an informed public discussion on the various aspects which are the subject matter of the research in question on the basis of the results of that research disclosed in accordance with the rules set out in Regulation No 1290/2013 and the grant agreement, as noted in paragraphs 194 to 196 above.

201 Finally, it should be recalled in that context that, according to the case-law, the general interest in transparency does not carry the same weight in matters involving the administrative activity of the institution concerned, in the context of which the requested documents in the present case were drafted, as it does when the legislative activity of that institution is at issue (see, to that effect, judgments of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 60, and of 25 October 2013, *Beninca* v *Commission*, T-561/12, not published, EU:T:2013:558, paragraph 64).

202 It follows that the applicant has failed to demonstrate that, in the present case, the principle of transparency was, in some sense especially pressing and prevailed over the legitimate interest in the protection of the commercial interests of the members of the consortium as regards the documents or parts of documents which the REA validly considered to fall within the exception referred to in the first indent of Article 4(2) of Regulation No 1049/2001, as listed in paragraph 180 above. The REA did not err in considering that the existence of an overriding public interest in that disclosure could not be established on the basis of the facts relied on by the applicant, having regard, in particular, to the arrangements established by Regulation No 1290/2013 and the grant agreement for dissemination of and access to the research results.

203 In the light of the foregoing considerations, it must be concluded that the applicant has not established the existence of an overriding public interest arising from a consideration of the various interests relied on, whether taken individually or together, which would justify the public disclosure under the final phrase of Article 4(2) of Regulation No 1049/2001 of information covered by the exception provided for in the first indent of Article 4(2) of that regulation.

204 Accordingly, the second part of the first plea must be rejected.

205 It follows from the foregoing that it is necessary to annul the contested decision in so far as the REA failed to decide on the applicant's request for access to the documents relating to authorisation of the iBorderCtrl project and in so far as it refused to grant full access to document D 1.3 and partial or more extensive access to documents D 1.1, D 1.2, D 2.1, D 2.2, D 2.3, D 3.1, D 7.3 and D 7.8 and to dismiss the action as to the remainder.

IV. Costs

206 Under Article 134(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

207 In the present case, the applicant has been successful so far as concerns the second plea and a substantial part of the first part of the first plea. The Court will therefore make an equitable assessment of the case in holding that the applicant is to bear one half of his own costs, and that the REA is to bear its own costs and pay one half of the costs incurred by the applicant.

208 Moreover, under Article 135(2) of the Rules of Procedure, the Court may order a party, even if successful, to pay some or all of the costs, if this appears justified by the conduct of that party, including before the proceedings were brought, especially if that party has made the opposite party incur costs which the Court holds to be unreasonable or vexatious.

209 In the present case, as is clear from paragraphs 156 and 157 above, the applicant obtained, by his own efforts, access to the redacted parts of document D 7.3, thereby became aware of the information to which access had been refused by the contested decision and disseminated on his website the full version of document D 7.3 thus obtained. By acting in that way, the applicant failed to comply with the procedures laid down by EU law on access to documents and did not await the outcome of the present proceedings in order to ascertain whether he could lawfully obtain access to the full version of the document in question. The Court considers that that conduct of the applicant must be taken into account in the allocation of costs. Since the lodging of that document by the applicant in his letter of 23 March 2021 is irrelevant to the resolution of the present dispute, he thereby caused the REA to incur unreasonable costs, consisting in the preparation of written observations on the lodging of that document, which could have been avoided if the applicant had acted in compliance with the present judicial proceedings, by awaiting their outcome and obtaining, where appropriate, lawful access to that information, or some of it, in accordance with the judgment of the Court. Accordingly, pursuant to Article 135(2) of the Rules of Procedure, the applicant should be ordered to pay the costs relating to the lodging of his letter of 23 March 2021 and those relating to the submission of the REA's written observations of 20 May 2021.

On those grounds,

THE GENERAL COURT (Tenth Chamber)

hereby:

1. **Annuls the decision of the European Research Executive Agency (REA) of 17 January 2019 (ARES (2019) 266593), first, in so far as the REA failed to decide on Mr Patrick Breyer's application for access to the documents relating to authorisation of the iBorderCtrl project and, secondly, in so far as the REA refused to grant full access to document D 1.3, partial access to documents D 1.1, D 1.2, D 2.1, D 2.2 and D 2.3, and more extensive access to documents D 3.1, D 7.3 and D 7.8, to the extent that those documents contain information not covered by the exception referred to in the first indent of Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents;**

2. **Dismisses the action as to the remainder;**

3. **Orders Mr Breyer to bear his own costs relating to the lodging of his letter of 23 March 2021 and to pay the costs incurred by the REA in submitting its observations of 20 May 2021;**

4. **Orders Mr Breyer to bear half of his own costs other than those relating to the lodging of his letter of 23 March 2021;**

5. **Orders the REA to bear its own costs, except for those relating to the submission of its observations of 20 May 2021, and to pay half of the costs incurred by Mr Breyer other than those relating to the lodging of his letter of 23 March 2021.**

Kornezov Buttigieg Hesse

Delivered in open court in Luxembourg on 15 December 2021.

[Signatures]

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