



Reports of Cases

Case T-761/21

Fabien Courtois and Others

v

European Commission

Judgment of the General Court (Fifth Chamber) of 17 July 2024

(Access to documents – Regulation (EC) No 1049/2001 – Documents relating to the purchase of vaccines by the Commission in the context of the COVID-19 pandemic – Partial refusal of access – Exception relating to the protection of personal data – Exception relating to the protection of the commercial interests of a third party – Obligation to state reasons – Existence of a foreseeable and not purely hypothetical risk of the interest relied on being undermined – Principle of proportionality)

1. *EU institutions – Right of public access to documents – Regulation No 1049/2001 – Failure by the institution concerned to observe the time limits prescribed for responding to a confirmatory application for access – Implicit rejection decision – No replacement by the adoption of an express rejection decision – Application for annulment of a single express decision in both of its language versions – Irrelevant*
(European Parliament and Council Regulation No 1049/2001, Arts 7 and 8)

(see paragraphs 30, 31, 32)

2. *EU institutions – Right of public access to documents – Regulation No 1049/2001 – Scope – Request for access relating to agreements signed for the purchase of COVID-19 vaccines – Preparatory documents – Not included*
(European Parliament and Council Regulation No 1049/2001)

(see paragraphs 40, 41, 44)

3. *EU institutions – Right of public access to documents – Regulation No 1049/2001 – Exceptions to the right of access to documents – Protection of privacy and integrity of the individual – Provisions of Regulation 2018/1725 fully applicable – Obligation on the applicant to demonstrate the need to communicate the personal data in question – Request for access to the declarations of the members of the joint team who negotiated the purchase agreements for COVID-19 vaccines that they had no conflict of interests, justified by the need to verify their impartiality – Obligation on the institution concerned to weigh up the interests affected by the disclosure of those data*
(European Parliament and Council Regulations No 1049/2001, Art. 4(1)(b), and 2018/1725, Arts 3(1) and 9(1)(b))

(see paragraphs 56, 60, 61, 69, 73, 75-79, 81, 82, 84-86)

4. *EU institutions – Right of public access to documents – Regulation No 1049/2001 – Exceptions to the right of access to documents – Protection of commercial interests – Concept – Scope – Application to purchase agreements, for COVID-19 vaccines, concluded by the Commission and private pharmaceutical companies – Included*
(European Parliament and Council Regulation No 1049/2001, Art. 4(2), first indent)

(see paragraphs 99, 100, 103, 105-107)

5. *EU institutions – Right of public access to documents – Regulation No 1049/2001 – Exceptions to the right of access to documents – Protection of commercial interests – Refusal to grant access – Obligation to state reasons – Scope*
(European Parliament and Council Regulation No 1049/2001, Art. 4(2), first indent)

(see paragraphs 97, 101, 115-117, 119, 121-123, 127, 128, 146, 147, 151-153, 163, 164, 168, 169, 171, 172, 178, 186, 193)

6. *EU institutions – Right of public access to documents – Regulation No 1049/2001 – Exceptions to the right of access to documents – Protection of commercial interests – Scope – Interest in avoiding actions for compensation – Precluded*
(European Parliament and Council Regulation No 1049/2001, Art. 4(2), first indent)

(see paragraph 162)

7. *EU institutions – Right of public access to documents – Regulation No 1049/2001 – Exceptions to the right of access to documents – Protection of commercial interests – Scope – Refusal to disclose the provisions on indemnification in the purchase agreements for COVID-19 vaccines – Not permissible*
(European Parliament and Council Regulation No 1049/2001, Art. 4(2), first indent)

(see paragraphs 159-173)

8. *EU institutions – Right of public access to documents – Regulation No 1049/2001 – Exceptions to the right of access to documents – Protection of commercial interests – Scope – Possible damage to the reputation of an undertaking – Included*
(European Parliament and Council Regulation No 1049/2001, Art. 4(2), first indent)

(see paragraph 170)

9. *EU institutions – Right of public access to documents – Regulation No 1049/2001 – Exceptions to the right of access to documents – Protection of commercial interests – Scope – Information on the list of manufacturing network partners and subcontractors – Included*
(European Parliament and Council Regulation No 1049/2001, Art. 4(2), first indent)

(see paragraphs 179-183, 185)

10. *EU institutions – Right of public access to documents – Regulation No 1049/2001 – Exceptions to the right of access to documents – Protection of commercial interests – Overriding public interest justifying the disclosure of documents – Invocation of the principle of transparency – Need to put forward particular considerations in relation to the case*
(European Parliament and Council Regulation No 1049/2001, Art. 4(2))

(see paragraphs 195-198, 201-203, 211, 212)

11. *EU institutions – Right of public access to documents – Regulation No 1049/2001 – Exceptions to the right of access to documents – Protection of commercial interests – Scope – Documents relating to purchase agreements for COVID-19 vaccines – No overriding public interest justifying the disclosure of documents – Time-limited application of the exception*
(European Parliament and Council Regulation No 1049/2001, Art. 4(2) and (7))

(see paragraph 213)

Résumé

In this judgment, the General Court upholds, in part, the action for annulment brought by a number of natural persons against the European Commission decision granting only partial access to the advance purchase agreements and purchase agreements for COVID-19 vaccines and to other documents relating to the purchase of those vaccines.¹

In 2021, two lawyers representing, among others, the applicants, requested access² to certain documents relating to the purchase, by the Commission and on behalf of the Member States, of COVID-19 vaccines, including, in particular, the agreements signed by the Commission, the identity of the EU representatives involved in the negotiation of the agreements and the declarations by those representatives that they had no conflict of interests ('the initial request'). The Commission identified 46 documents corresponding to the request. It granted partial access to four advance purchase agreements and three purchase agreements for vaccines, stating that the redacted versions of those documents had been made public on the Commission's website and that the passages had been redacted on the basis of the exceptions relating to the protection of the privacy and the integrity of the individual, the protection of commercial interests and the protection of the decision-making process of the institutions.³ It granted partial access to the declarations that there was no conflict of interests, of which only one copy was sent to the applicants, those documents differing only with respect to the name of the signatory, the signature and the date of signature. By contrast, it refused access to 17 documents identified as being 'draft memoranda of understanding'.

¹ Decision C(2022) 1359 final of the European Commission of 28 February 2022 ('the contested decision').

² Under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

³ Exceptions provided for in, respectively, Article 4(1)(b), the first indent of Article 4(2), and the first subparagraph of Article 4(3) of Regulation No 1049/2001.

Following a confirmatory application for disclosure of the documents to which access had been refused, either in part or in whole, the Commission stated, in an express decision, notified to the applicants first in English and then in French, that, following a re-examination of the response to the initial request, the list of documents corresponding to the request for access to documents had been amended and now consisted of 66 documents. The 17 ‘draft memoranda of understanding’ had been removed, as the Commission considered that they had been included in error. It granted wider access to the four advance purchase agreements and three purchase agreements to which partial access had already been granted, and partial access to new advance purchase agreements and purchase agreements (together ‘the agreements at issue’). It also granted partial access to other new documents, including correspondence between the Commission and the Member States. It relied on the exception relating to the protection of privacy and the integrity of the individual and the exception relating to the protection of the commercial interests of the undertakings concerned in order to justify granting only partial access.⁴

Findings of the Court

As a preliminary point, the Court examines the head of claim whereby the applicants seek the annulment of the French version of the express decision. It holds that there is only a single express decision, namely the contested decision, adopted in two language versions.

In the first place, the Court rejects the plea alleging that the list of documents identified as corresponding to the request for access to documents is incomplete, in that the Commission removed the 17 ‘draft memoranda of understanding’ from that list. It notes that the applicants requested access only to the ‘agreements signed’ by the Commission. Their request could not be understood as also referring to documents preparatory to the signature of those agreements, which refer to mere drafts or provisional documents relating to the drafting of contractual provisions to be agreed on subsequently. The Commission was thus entitled to remove them from the list.

In the second place, ruling on the first part of the second plea, which alleges that the exception relating to the protection of the privacy and the integrity of the individual is not applicable to the declarations that there was no conflict of interests, the Court annuls the contested decision in so far as the Commission refused wider access to those declarations signed by the members of the joint team who negotiated the purchase of vaccines.

First, the Court considers that the applicants sufficiently indicated the specific public-interest aim which they pursued and also the need to communicate the personal data concerned. It was only by having the names, surnames and professional or institutional roles of the members of the joint negotiating team that the applicants could have ascertained that those members did not have a conflict of interests. Second, it observes that the Commission was correct to take the view that there was a risk that the privacy of the persons concerned would be undermined. It was thus for the Commission to weigh up the interests at issue. The Commission did not take sufficient account of the different circumstances in order to weigh up correctly the interests at issue.

In the third place, the Court upholds, in part, the second part of the second plea, which takes issue with the way in which the Commission applied the exception relating to the protection of commercial interests in order to redact certain information from the agreements at issue.

⁴ Exceptions provided for in, respectively, Article 4(1)(b) and the first indent of Article 4(2) of Regulation No 1049/2001.

It rejects the applicants' line of argument that that exception could not be applied because of the context in which the agreements at issue had been concluded. It observes that the pharmaceutical undertakings with which those agreements were concluded are all private companies pursuing commercial activities in the context of which they are subject to competition within the internal market and on the international markets. That context means that they have to preserve their interests on those markets. The mere fact that, by means of down payments or advance payments from public funds, they participated in carrying out tasks in the public interest, namely the development of COVID-19 vaccines, does not as such support the view that their commercial interests cannot be protected.

As regards the partial refusal of access to the provisions on the properties of the vaccines and quality control, and on contractual liability, and also the refusal of access to the list of the manufacturing network partners and subcontractors of the undertakings concerned, the Court finds that the explanations provided by the Commission in the contested decision on the existence of a reasonably foreseeable and not purely hypothetical risk that the protection of the commercial interests of the undertakings concerned would be undermined with respect to the full disclosure of that information are valid.

By contrast, the Court does not endorse the Commission's position regarding the refusal to grant wider access to the provisions on indemnification. In that context, it observes, first, that the mechanism whereby the Member States indemnify the undertakings concerned, set out in the agreements at issue, does not in any way affect the regime of legal liability of those undertakings under Directive 85/374.⁵ According to that directive, a producer is liable for damage caused by a defect in its product and its liability to the injured person may not be limited or excluded by a provision limiting its liability or exempting it from liability. Second, it observes that the information on the indemnification mechanism was already in the public domain at the time when the initial request for access was made and when the contested decision was adopted.⁶

The Court finds that, although the agreements at issue all contain a provision on indemnification, the detailed content of those provisions is not identical.

Nevertheless, the Court finds that the three grounds relied on by the Commission to refuse wider access to those provisions do not demonstrate the existence of a foreseeable and not purely hypothetical risk to the commercial interests of the undertakings concerned.

First, as regards the ground that precise knowledge of the limits of the liability of the undertaking concerned could expose it to multiple actions for damages, the Court notes that the right of third parties who may have been harmed by a defective vaccine to bring actions for damages is based on the national legislation transposing Directive 85/374. It is therefore independent of the existence and content of the provisions on indemnification. Furthermore, the interest of the undertakings concerned in avoiding such actions for damages and the costs associated with those proceedings cannot be regarded as a commercial interest and does not constitute an interest deserving of protection under Regulation No 1049/2001. Moreover, there is nothing in the contested decision to support the conclusion that the wider disclosure of those provisions could give rise to such actions.

⁵ According to Articles 1 and 12 of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29).

⁶ See, in particular, the third paragraph of Article 6 of the agreement of 16 June 2020 on the procurement of COVID-19 vaccines concluded between the Commission and the Member States, and the Commission Communication of 17 June 2020, entitled 'EU Strategy for COVID-19 vaccines' (COM(2020) 245 final).

Second, as regards the ground that full disclosure would inevitably reveal to the competitors of the undertaking concerned the ‘weak points’ of the coverage of its liability, giving them a competitive advantage which they could exploit, for example in advertisements, the Court notes that the reason why those provisions were incorporated into the agreements at issue, namely to compensate for the risks associated with the shortening of the period for the development of vaccines, was in the public domain before the contested decision was adopted. Moreover, all the undertakings concerned obtained a provision on indemnification.

Third, the Court rejects, for the same reasons, the ground that full disclosure would have repercussions for the reputations of the undertakings concerned.

Lastly, the Court rejects the applicants’ plea alleging that the Commission failed to take into account the overriding public interest in disclosure of the requested information. The Court states that general considerations relating to transparency and good governance cannot establish that the interest in transparency was of particularly pressing concern and capable of prevailing over the reasons justifying the refusal to disclose the redacted parts of the agreements at issue. It also points out that the agreements at issue form part of an administrative, not legislative, activity.