



Reports of Cases

Case T-332/22

TotalEnergies Marketing Nederland NV

v

European Commission

Judgment of the General Court (Second Chamber, Extended Composition) of 2 October 2024

(Access to documents – Regulation (EC) No 1049/2001 – Documents relating to a proceeding under Article 101 TFEU – Refusal of access – Exception relating to the protection of the purpose of inspections, investigations and audits – Exception relating to the protection of the commercial interests of a third party – General presumption of confidentiality – Obligation to identify the documents covered by the presumption and to provide a list of them)

1. *Institutions of the European Union – Public access to documents – Regulation No 1049/2001 – Exceptions to the right of access to documents – Strict interpretation and application – Obligation for the institution to conduct a specific and individual examination of the documents – Scope – Exclusion of the obligation – Possibility of relying on general presumptions applying to certain categories of documents – Limits*
(European Parliament and Council Regulation No 1049/2001, Art. 4(2))

(see paragraphs 18-25)

2. *Institutions of the European Union – Public access to documents – Regulation No 1049/2001 – Exceptions to the right of access to documents – Protection of the purpose of inspections, investigations and audits – Protection of commercial interests – Application to administrative files relating to procedures for reviewing concerted practices – Documents exchanged between the Commission and notifying parties or third parties – General presumption of application of the exception to the right of access to all the documents in the administrative file – Whether permissible – Rules of application – Obligation to identify the documents covered by the presumption and to provide a list of them – Scope*
(Art. 101 TFEU; European Parliament and Council Regulation No 1049/2001, Art. 4(2); Council Regulation No 1/2003, Art. 27(2); Commission Regulation No 773/2004, Art. 15(2))

(see paragraphs 26-28, 36-39, 45, 47, 50, 52, 53, 57)

3. *Institutions of the European Union – Public access to documents – Regulation No 1049/2001 – Exceptions to the right of access to documents – General presumption of application of the exception to right of access to all the documents in the administrative file relating to a procedure for reviewing concerted practices – Rebuttal of that general*

presumption – Higher public interest justifying disclosure of documents – Concept – Subjective interest of the person concerned to defend him or herself – Exclusion (European Parliament and Council Regulation No 1049/2001, Art. 4(2))

(see paragraphs 41, 43, 44)

Résumé

Ruling in extended composition, the General Court dismisses the action for annulment brought by the applicant, TotalEnergies Marketing Nederland NV, against the decision of the European Commission¹ rejecting, pursuant to Regulation No 1049/2001,² its confirmatory application for access to documents. By its judgment, the Court explains its case-law in the area of access to documents³ by clarifying the obligations incumbent on the Commission when that institution relies on a general presumption of confidentiality against an application for access to documents in a file relating to a proceeding under Article 101 TFEU.

On 13 September 2006, the Commission adopted a decision relating to a proceeding under Article 101 TFEU⁴ in which it found that various undertakings, including the applicant, had participated in an infringement of Article 101 TFEU ('the Bitumen case'). In June 2021, the applicant submitted five applications for access to documents relating to the Bitumen case.

In its decision of 4 July 2021, the Commission relied on a general presumption of confidentiality concerning the documents in the administrative file relating to a proceeding under Article 101 TFEU to dismiss four of the five applications, on the ground that the requested documents were covered by the exceptions provided for in Regulation No 1049/2001.⁵

Following the dismissal by the Commission of the confirmatory application submitted by the applicant in August 2021, by which it had asked the Commission to reconsider its decision of 4 July 2021, the applicant brought an action before the Court for annulment of the contested decision.

Findings of the Court

As a preliminary point, the Court points out that it is apparent from the system of exceptions established by Regulation No 1049/2001⁶ that the right of access to documents of European Union institutions is subject to certain limits based on reasons of public or private interest. As such exceptions depart from the principle of the widest possible public access to documents, they must be interpreted and applied strictly.

In that regard, the Court recalls that, where an EU institution, body, office or agency that has received a request for access to a document decides to refuse to grant that request on the basis of one of the exceptions laid down in Regulation No 1049/2001, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by that

¹ Decision C(2022) 1949 final of the European Commission of 23 March 2022 ('the contested decision').

² 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 Judgment of 28 May 2020, *Campbell v Commission* (T-701/18, EU:T:2020:224).

⁴ Case COMP/F/38.456 – Bitumen – Netherlands.

⁵ Article 4(2), third indent, and (3) of Regulation No 1049/2001.

⁶ Article 4 of Regulation No 1049/2001.

exception, and the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical. The Court of Justice has acknowledged, however, that it is open to that institution, body, office or agency 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.

The objective of such general presumptions is the possibility, for the EU institution, body, office or agency concerned, to consider that the disclosure of certain categories of documents undermines, in principle, the interest protected by the exception which it is invoking, by relying on such general considerations, without being required to examine specifically and individually each of the documents requested. The existence of a general presumption of confidentiality does not exclude the possibility of demonstrating that a given document, disclosure of which has been requested, is not covered by that presumption, or that there is a higher public interest justifying the disclosure of the document concerned by virtue of Article 4(2) of Regulation No 1049/2001.

The Court of Justice has recognised the existence of general presumptions of confidentiality for five categories of documents, including the documents in a file relating to a proceeding under Article 101 TFEU. The Court has held that the Commission is entitled to presume,⁷ without carrying out a specific, individual examination of each of those documents, that disclosure of them would, in principle, undermine the protection of the commercial interests of the undertakings involved in such a proceeding and the protection of the purpose of the investigations relating to the proceeding.

In the first place, as regards the applicability of the general presumption of confidentiality relied on by the Commission, the Court notes that it is apparent from Regulation No 1/2003⁸ that, in the context of a Commission investigation relating to the application of the rules relating to the application of Article 101 TFEU, correspondence between the Commission and the competition authorities of the Member States belongs to the internal documents contained in the Commission's file. Moreover, it is apparent from the Commission notice on the matter⁹ that the correspondence maintained between the Commission and other public authorities during an investigation counts among the inaccessible internal documents belonging to the Commission's file. The communications between the Commission and the national authorities relating to the Bitumen case, to which the applicant had requested access, were thus in a file relating to a proceeding under Article 101 TFEU.

The Court infers from this that the Commission was entitled to assert the existence of a general presumption of confidentiality, pursuant to Regulation No 1049/2001,¹⁰ according to which the disclosure of the documents from the administrative file in the Bitumen case would undermine, in principle, on the one hand, the protection of the purpose of inspections, investigations and audits and, on the other hand, the protection of commercial interests.

⁷ For the purposes of the application of the exceptions provided for in the first and third indents of Article 4(2) of Regulation No 1049/2001.

⁸ Article 27(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1).

⁹ Paragraphs 1 and 15 of the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles [101] and [102 TFEU], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ 2005 C 325, p. 7).

¹⁰ Under the first and third indents of Article 4(2) of Regulation No 1049/2001.

In the second place, with regard to the rules for applying the general presumption of confidentiality relied on by the Commission, the Court recalls that it follows from the judgment in *Campbell v Commission* that, where an institution considers that a general presumption of confidentiality is applicable, it is able to reply in a global manner to a request for access, in the sense that that presumption relieves it from providing explanations as to how access to a document covered by that request specifically undermines the interest protected. However, the application of a presumption of confidentiality cannot be interpreted as permitting the institution to reply, in a global manner, that all the documents covered by the application for access are part of a file covered by a general presumption of confidentiality, without having to identify those documents or draw up a list of them. In that judgment, after all, the Court held that it is only once the institution has identified which documents were covered by the request for access that it can classify them into categories according to their common characteristics, their same nature or their belonging to the same file and that it can then apply a general presumption of confidentiality to them. In the absence of such identification, the general presumption of confidentiality would be irrebuttable.

First, the General Court notes that, in the case giving rise to the judgment in *Campbell v Commission*, the request for access had been worded in an abstract and general manner, in that it covered all the documents held by the Commission. Unlike that case, in the case at hand the applicant requested access to documents of a specific type relating to a precisely identified proceeding under Article 101 TFEU. Second, it holds that, unlike the aforementioned case, the Commission identified, in the contested decision, the documents covered by the applications jointly, specifying in its assessment that they were exchanges with the Netherlands authorities in the context of the Bitumen case, and that those documents belonged to the file in that case and were covered by the general presumption of confidentiality. The Commission also set out the parameters of that general presumption of confidentiality and its application to the case at hand.

In that regard, the Court specifies that the institution, body, office or agency responding to an application for access to documents, when it applies a general presumption of confidentiality, is not in every case required to provide the applicant with a list of the documents covered by that presumption. On the contrary, the provision of such a list is but one of the possible ways of identifying the documents requested, in order for the applicant to have the possibility of rebutting the application of that presumption. In particular, the provision of such a list of documents is not necessary where the documents referred to, or at least their type, are already clear from the request for access and the applicant, in principle, has the opportunity of arguing that a document is not covered by the general presumption of confidentiality.

Consequently, the Court finds that the fact that the documents disclosure of which was requested were identified both as regards their nature and as regards their belonging to the administrative file relating to a proceeding under Article 101 TFEU was sufficient to justify the application of the general presumption of confidentiality without the Commission being required to provide the applicant with a list of those documents.