Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

24 January 2024*

(Access to documents – Regulation (EC) No 1049/2001 – Document disclosed in the context of an EU Pilot procedure concerning the repayment of VAT – Document originating from a Member State – Refusal to grant access – Prior agreement of the Member State – Exception relating to the protection of court proceedings – Obligation to state reasons)

In Case T-602/22,

Veneziana Energia Risorse Idriche Territorio Ambiente Servizi SpA (Veritas), established in Venice (Italy), represented by A. Pasqualin, lawyer,

applicant,

v

European Commission, represented by A.-C. Simon and A. Spina, acting as Agents,

defendant,

supported by

Italian Republic, represented by G. Palmieri, acting as Agent, and by S. Fiorentino, avvocato dello Stato,

intervener,

THE GENERAL COURT (Fourth Chamber),

composed of R. da Silva Passos, President, S. Gervasoni (Rapporteur) and N. Półtorak, Judges,

Registrar: V. Di Bucci,

having regard to the written part of the procedure,

having regard to the fact that no request for a hearing was submitted by the parties within three weeks after service of notification of the close of the written part of the procedure, and having decided to rule on the action without an oral part of the procedure, pursuant to Article 106(3) of the Rules of Procedure of the General Court,

* Language of the case: Italian.

having regard to the order of 20 September 2023 instructing the Commission to produce the document to which it had refused access to the applicant and to the production of the document by the Commission on 26 September 2023,

gives the following

Judgment

1 By its action based on Article 263 TFEU, the applicant, Veneziana Energia Risorse Idriche Territorio Ambiente Servizi SpA (Veritas), seeks the annulment of Commission Decision C(2022) 5221 final of 15 July 2022 refusing to grant it access to the letter sent on 17 October 2019 from the Italian authorities in EU Pilot procedure 9456/19/TAXUD concerning the repayment of value added tax (VAT) unduly paid on the Italian Environmental Hygiene Tax (tariffa di igiene ambientale, established by Article 49 of decreto legislativo n. 22 (Legislative Decree No 22) of 5 February 1997; 'the TIAI tax').

Legal context

2 Article 4 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) provides in paragraphs 2, 4 and 5:

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

…

– court proceedings and legal advice,

…

unless there is an overriding public interest in disclosure.

…

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

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

Background to the dispute

3 The EU Pilot procedure is a procedure for cooperation between the European Commission and the Member States which aims to allow the Commission to form an opinion as to whether, on a given matter, EU law is complied with and correctly applied in the Member States. That type of procedure, which replaced the informal phase of the pre-litigation stage of infringement

proceedings under Article 258 TFEU from 2008 onwards, seeks efficiently to resolve any infringements of EU law by avoiding, so far as possible, the opening of an infringement procedure, although it may lead to the initiation of such a procedure (see judgment of 9 October 2018, *Pint* v *Commission*, T-634/17, not published, EU:T:2018:662, paragraph 31 and the case-law cited).

4 In the context of EU Pilot procedure 9456/19/TAXUD which opened in the present case following, inter alia, the applicant's complaint ('the EU Pilot procedure'), the Commission asked the Italian authorities for clarification concerning the arrangements for repayment of VAT unduly paid on the TIAI tax.

5 By letter of 2 August 2021, the Commission informed the applicant that it had received the response from the Italian authorities and had decided not to open an infringement procedure for failure to comply with EU law by those authorities.

6 On 21 October 2021, the applicant asked the Commission for a copy of the Italian authorities' response summarised in the letter of 2 August 2021.

7 The Commission responded, by letter of 15 November 2021 ('the initial response'), first, identifying the requested document as the letter from the Italian authorities of 17 October 2019 sent in the context of the EU Pilot procedure, then refusing to grant access to that letter on the ground that its disclosure would undermine the protection of ongoing court proceedings in Italy, pursuant to the second indent of Article 4(2) of Regulation No 1049/2001.

8 The applicant made a confirmatory application to the Commission on 30 November 2021, asking the Commission to reconsider its position.

9 On 15 July 2022, the Commission confirmed the refusal to grant access to the Italian authorities' letter of 17 October 2019, following their objection to disclosure of that letter under Article 4(5) of Regulation No 1049/2001, on the basis of the exception to the right of access provided for in the second indent of Article 4(2) of that regulation ('the contested decision').

Forms of order sought

10 The applicant claims that the Court should:

– by a measure of organisation of procedure, order the Commission to produce the letter from the Italian authorities of 17 October 2019;

– also by a measure of organisation of procedure, order the Commission to produce the response of those authorities to their consultation prior to the adoption of the contested decision;

– order any other measure of organisation of procedure which may be considered useful;

– annul the contested decision;

– order the Commission to pay the costs.

11 Following the disclosure by the Commission, as an annex to the defence, of its exchanges with the Italian authorities subsequent to the initial response and the applicant's confirmatory application, the applicant limited its request for production of the Italian authorities' response to that prior to that confirmatory application (see the second ident of paragraph 10, above).

12 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

13 The Italian Republic contends that the action should be dismissed.

Law

14 The applicant relies on two pleas in law in support of its action. The first alleges, in essence, infringement of Article 4(5) of Regulation No 1049/2001 and of the obligation to state reasons. The second alleges, in essence, infringement of the second indent of Article 4(2) of that regulation, read in conjunction with paragraph 5 of that article, of the obligation to conduct a diligent examination and of the obligation to state reasons.

First plea, alleging, in essence, infringement of Article 4(5) of Regulation No 1049/2001 and of the obligation to state reasons

15 The applicant submits, first, that, in view of the contradiction between the initial response, on the one hand, which makes no reference to Article 4(5) of Regulation No 1049/2001 and the objection of the Italian authorities pursuant to that provision, and the contested decision, on the other hand, which refers to that provision and that objection, it is not in a position to determine which procedure was applied and whether it was correctly applied. It states, in the response, that the Commission is not claiming that there is a difference between the initial response and the contested decision, but that the contested decision is incorrect in that it incorrectly stated that the initial response was based on the combined provisions of Article 4(4) and (5) of Regulation No 1049/2001.

16 The applicant infers from this, secondly, that, in so far as it is not apparent from the procedure before the Commission of any prior manifestation of will on the part of the Italian authorities, a comprehensive examination of the request for access is required, unlike the situation in which a Member State effectively objects, in which the case-law would allow a prima facie examination of the objection by the Commission. In the present case, the Commission did not carry out the thorough examination or independent examination required in the absence of the Italian authorities making use of the possibility provided for in Article 4(5) of Regulation No 1049/2001.

17 It must be pointed out, in the first place, with regard to the claim of infringement of the obligation to state reasons, that the applicant is in fact merely disputing the merits of the Commission's support under Article 4(5) of Regulation No 1049/2001.

18 The obligation to state reasons is an essential procedural requirement which must be distinguished from the question whether the reasoning is correct, which goes to the substantive legality of the contested measure (judgments of 22 March 2001, *France* v *Commission*, C-17/99,

EU:C:2001:178, paragraph 35, and of 15 September 2016, *Philip Morris* v *Commission*, T-796/14, EU:T:2016:483, paragraph 28). A measure which lacks an adequate statement of reasons, for the purpose of the formal obligation to state reasons, is one which does not make it possible to understand why, on what basis or for what reason it was adopted, whereas the reasons for a measure and its justifications may be sufficiently known and comprehensible, but inadequate to justify it in law, in that they are not substantiated, clear or compliant with the relevant provisions.

19 In the present case, the applicant clarified its line of argument in the response, stating that it did not criticise the Commission for a difference between the initial response and the contested decision which prevented it from knowing, understanding and therefore challenging the reasons for that decision, which corresponded to a challenge as to the form, but it did criticise the incorrect reliance on Article 4(5) of Regulation No 1049/2001 in the absence of any effective objection to disclosure by the Italian authorities, in particular before the initial response (see paragraph 15 above). Thus, the applicant disputes that the contested decision does not comply with the relevant provisions.

20 In any event, it may be considered in the present case that the contested decision, in so far as it refers to Article 4(4) and (5) of Regulation No 1049/2001, enables the applicant to know its reasoning and the Court to review its legality, as required by the case-law on compliance with the obligation to state reasons (see judgment of 24 May 2011, NGL v *Commission*, T-109/05 and T-444/05, EU:T:2011:235, paragraph 81 and the case-law cited). It is absolutely clear from the contested decision that the Italian authorities were consulted pursuant to Article 4(4) of that regulation and that they expressed their objection to the disclosure of their letter of 17 October 2019 on the basis of Article 4(5) of that regulation. In particular, the Commission states, in an introductory section (paragraph 1), that it adopted an initial response refusing disclosure following consultation with the Italian authorities, pursuant to Article 4(4) and (5) of that regulation, and devotes part of the contested decision (paragraph 2.1) to the statement of reasons for the Italian authorities' objection.

21 It is true that Article 4(5) of Regulation No 1049/2001 was not referred to in the initial response. However, that fact does not permit the inference that the statement of reasons for the contested decision is inadequate. First, even without citing that provision, the initial response clearly indicates the Italian authorities' objection to the disclosure of their letter of 17 October 2019. Secondly, although the question of whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard to its context, it must be assessed having regard above all to its wording, which is clear in the present case (see paragraph 20 above), and also to all the legal rules governing the matter in question (judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 63, and of 15 September 2016, *Philip Morris* v *Commission*, T-796/14, EU:T:2016:483, paragraph 29). In the present case, as outlined by the Commission and the Italian Republic, Articles 7 and 8 of that regulation provide for a two-step procedure which enables the institution concerned to process initial applications more promptly before adopting, where appropriate, a detailed, and thus more complete, position refusing that application in the event of a confirmatory application (see, to that effect, judgments of 26 January 2010, *Internationaler Hilfsfonds* v *Commission*, C-362/08 P, EU:C:2010:40, paragraph 54, and of 11 December 2018, *Arca Capital Bohemia* v *Commission*, T-440/17, EU:T:2018:898, paragraph 18). It cannot, therefore, be inferred from the failure to mention Article 4(5) of Regulation No 1049/2001 in the initial response that there is doubt as to the actual basis of the contested decision on that provision cited therein.

22 Such a doubt is even less permissible given that it is apparent from the applicant's written pleadings that the statement of reasons for the contested decision enabled it to understand that the decision was based on Article 4(5) of Regulation No 1049/2001, since it also disputes the reliance on that provision in the present case, on the ground that the Italian authorities did not make use of the possibility provided for in that provision.

23 Specifically, as regards, in the second place, the allegedly unlawful reliance of the contested decision on Article 4(5) of Regulation No 1049/2001, it has been held that it does not follow either from that provision or from the case-law that, in order to be able to lodge an objection, the Member State which is the author of the document at issue must first make a formal request specifically to the institution concerned, nor is it necessary for the Member State to rely expressly on that provision. There is nothing in the wording of that provision, which is a procedural provision dealing with the process of adoption of an EU decision (judgments of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraphs 78 and 81, and of 21 June 2012, *IFAW Internationaler Tierschutz-Fonds* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 53), to indicate that the Member State must submit a formal request, without which the Member State's objection cannot be taken into account in the adoption of that decision (judgment of 8 February 2018, *POA* v *Commission*, T-74/16, not published, EU:T:2018:75, paragraphs 32 to 34). Thus, contrary to what the applicant claims, the Member State is not required to proceed in two stages in order to object to the disclosure of one of its documents, first by asking the Commission not to disclose the document in question without its prior agreement and then by refusing to give that agreement.

24 It also follows that, contrary to what the applicant claims, the fact that the Member State concerned is consulted under Article 4(4) of Regulation No 1049/2001 does not preclude the subsequent application of Article 4(5) of that regulation. Those two provisions were not considered to be mutually exclusive, but rather, as is apparent from the preparatory work for that regulation (see the amended proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ 2001 C 240E, p. 165, paragraph 2.4)), as a provision relating to third parties in general (paragraph 4) and a provision applying to specific third parties, namely the Member States, and reiterating Declaration No 35 annexed to the Treaty of Amsterdam (paragraph 5) (see, to that effect, judgment of 3 May 2018, *Malta* v *Commission*, T-653/16, EU:T:2018:241, paragraphs 98 and 99, and Opinion of Advocate General Poiares Maduro in *Sweden* v *Commission and Others*, C-64/05 P, EU:C:2007:433, point 48).

25 Furthermore, in order to ensure effective application of Article 4(5) of Regulation No 1049/2001, in particular by giving the Member State concerned the possibility of requiring its prior agreement to disclosea document of which it is the author, it is also necessary for the latter to be informed of the existence of a request for access to that document, which is precisely the subject of the consultation provided for in Article 4(4) of that regulation.

26 Thus, in the present case, it may be considered that the objections expressed by the Italian authorities to the disclosure of their letter of 17 October 2019, following their consultation, and apparent from the emails sent to the Commission on 31 March, 5 April and 6 May 2022, reflect the refusal of those authorities to disclose that letter without their prior agreement and their subsequent disagreement with that disclosure under Article 4(5) of Regulation No 1049/2001. More specifically, those authorities stated on 31 March 2022 that, pending receipt of the required information, they could not grant access to that letter. On 5 April 2022, they confirmed the refusal to grant access and, on 6 May 2022, they provided clarifications concerning that refusal. It follows

that the Italian authorities effectively expressed their intention, in the present case prior to the contested decision, to object to disclosure, which is adequate, in the absence of any specific temporal requirement laid down in Article 4(5) of Regulation No 1049/2001 other than that of an agreement 'prior' to disclosure.

27 It is therefore irrelevant that the Commission did not establish, as it states in the contested decision, without that being confirmed by the Italian Republic in its statement in intervention, that the Italian authorities expressed their objection before the initial response was sent.

28 It follows that the Commission correctly relied on Article 4(5) of Regulation No 1049/2001 and that, in accordance with the review of the grounds for non-disclosure put forward by the Member State involved by that provision (see paragraph 40 below), it was not for the Commission to carry out a comprehensive examination of the reasons for the Italian authorities' decision to object.

29 The first plea must therefore be rejected, without there being any need to ask the Commission to produce its correspondence with the Italian authorities prior to sending the initial response.

The second plea, alleging, in essence, infringement of the second indent of Article 4(2) of Regulation No 1049/2001, read in conjunction with paragraph 5 of that article, of the obligation to conduct a diligent examination and of the obligation to state reasons

30 The applicant criticises the Commission for failing to fulfil its obligation, which would still be prima facie an objection to disclosure, to determine and explain how access to the requested document could specifically and effectively undermine the interest protected, in the present case the interest based on the protection of court proceedings under the second indent of Article 4(2) of Regulation No 1049/2001. It relies, in that regard, on the necessary strict interpretation of the exceptions to the right of public access to documents and on the hypothetical terms used in the contested decision, the reference to only one ongoing national court proceeding, which are, moreover, unspecified, and the lack of an explanation concerning the undermining of equality of arms before the court in relation to the applicant, which is the applicant for access in the present case. In its observations on the statement in intervention, the applicant points to the inadequacy of the ground put forward by the Italian authorities to justify the refusal of access, namely that a reference for a preliminary ruling in the national court proceedings at issue is particularly plausible. Furthermore, the reasons given in the contested decision are inadequate, vague and devoid of any substance.

31 The applicant emphasises, in the response, on the basis of the case-law, the need for an actual link between the access requested and the disturbance of the procedural balance in the context of a clearly determined dispute, whereas, in the present case, the only procedure to which it was a party was definitively closed before the adoption of the contested decision. It also points out that, contrary to what the Commission claims in the present proceedings, the Commission warned the Italian authorities of the need to explain how disclosure of the requested document would specifically and effectively undermine the protected interest in question, in particular since, according to its own examination, that document could be disclosed. It adds that, in any event, the Commission failed to fulfil its duty to examine whether the Member State had duly reasoned its position, by ensuring that such a statement of reasons existed and by referring to it in the contested decision.

32 It must be borne in mind that Regulation No 1049/2001 is intended, 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 (judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 33, and of 25 September 2014, *Spirlea* v *Commission*, T-669/11, EU:T:2014:814, paragraph 40). Pursuant to Article 2(3) of that regulation, that right extends not only to documents drawn up by an institution but also to documents received by an institution from third parties, including the Member States, as is expressly stated in Article 3(b) of the regulation.

33 However, that right of access is nonetheless subject to certain limits based on grounds of public or private interest (judgments of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 62, and of 25 September 2014, *Spirlea* v *Commission*, T-669/11, EU:T:2014:814, paragraph 41). In particular, Article 4(5) of Regulation No 1049/2001 provides that a Member State may request an institution not to disclose a document originating from that Member State without its prior agreement.

34 In the present case, as is apparent from the examination of the first plea in law, the Italian Republic made use of the possibility given to it by Article 4(5) of Regulation No 1049/2001 and asked the Commission not to disclose the Italian authorities' letter of 17 October 2019.

35 The exercise of the power conferred by Article 4(5) of Regulation No 1049/2001 on the Member State concerned is subject to the substantive exceptions set out in Article 4(1) to (3), with the Member State merely being given, in that regard, a power to take part in the institution's decision. The prior agreement of the Member State referred to in Article 4(5) thus resembles not a discretionary right of veto, but a form of assent confirming that none of the grounds of exception under Article 4(1) to (3) is present. The decision-making process thus established by Article 4(5) therefore requires the institution and the Member State involved to confine themselves to the substantive exceptions laid down in Article 4(1) to (3) (see judgment of 21 June 2012, *IFAW Internationaler Tierschutz-Fonds* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 58 and the case-law cited).

36 Since the implementation of rules of EU law is thus entrusted jointly to the institution and the Member State which has made use of the possibility granted by Article 4(5) of Regulation No 1049/2001, and such implementation consequently depends on the dialogue to be carried on between them, they are obliged, in accordance with the duty of loyal cooperation set out in Article 4(3) TEU, to act and cooperate in such a way that those rules are effectively applied (judgment of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 85).

37 Nevertheless, the intervention of the Member State concerned does not affect, from the point of view of the person requesting access, the nature of an EU act of the decision subsequently addressed to him or her by the institution in response to the request for access made to it concerning a document in its possession (judgments of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 94, and of 21 June 2012, *IFAW Internationaler Tierschutz-Fonds* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 60).

38 It follows from the case-law set out in paragraphs 32 to 37 above, first, that if, following that dialogue with the institution, the Member State concerned objects to disclosure of the document at issue, it is obliged to state reasons for that objection with reference to the exceptions listed in Article 4(1) to (3) of Regulation No 1049/2001. The institution cannot accept a Member State's

objection to disclosure of a document originating from that State if the objection gives no reasons at all or if the reasons are not framed in terms of those exceptions. Where, despite an express request to that effect from the institution to the Member State concerned, the Member State still fails to provide the institution with such reasons, the institution must, if for its part it considers that none of those exceptions applies, allow access to the document applied for (judgment of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraphs 87 and 88).

39 In addition, as is apparent in particular from Articles 7 and 8 of Regulation No 1049/2001, the institution is itself obliged to give reasons for a decision refusing a request for access to a document. Such an obligation means that the institution must, in its decision, not merely record the fact that the Member State concerned has objected to disclosure of the document applied for, but also set out the reasons relied on by that Member State to show that one of the exceptions to the right of access in Article 4(1) to (3) of the regulation applies. That information will allow the person who has asked for the document to understand the origin and grounds of the refusal of his or her request and the competent court to exercise, if need be, its power of review (judgment of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 89).

40 It follows, secondly, that the institution is not required to carry out, with respect to the document to which access is refused, an exhaustive assessment of the reasons for objecting put forward by the Member State on the basis of the exceptions in Article 4 of Regulation No 1049/2001 (judgments of 21 June 2012, *IFAW Internationaler Tierschutz-Fonds* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 65, and of 5 April 2017, *France* v *Commission*, T-344/15, EU:T:2017:250, paragraph 45). Thus, the obligation to carry out a specific and individual examination which stems from the principle of transparency does not apply where the request for access concerns a document originating from a Member State, as referred to in Article 4(5) of Regulation No 1049/2001 (judgments of 25 September 2014, *Spirlea* v *Commission*, T-669/11, EU:T:2014:814, paragraph 81, and of 8 February 2018, *POA* v *Commission*, T-74/16, not published, EU:T:2018:75, paragraph 61). To insist on such an exhaustive assessment could lead to the institution to which a request for access to a document has been made being able, after carrying out the assessment, wrongly to communicate the document in question to the person requesting access, notwithstanding the objection, duly reasoned, of the Member State from which the document originates (judgment of 21 June 2012, *IFAW Internationaler Tierschutz-Fonds* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 64).

41 On the other hand, the institution's obligation to conduct a diligent examination must lead it to check whether the explanations given by the Member State to oppose the disclosure of its documents appear to it, prima facie, to be well founded. It is necessary for the institution to determine whether, in the light of the circumstances of the case and of the relevant rules of law, the reasons given by the Member State for its objection were capable of justifying prima facie such refusal and, accordingly, whether those reasons made it possible for that institution to assume the responsibility conferred on it under Article 8 of Regulation No 1049/2001. It is a matter of preventing the institution from adopting a decision which it does not consider to be defensible since it is the author of that decision and is therefore responsible for its lawfulness (see judgment of 6 February 2020, *Compañía de Tranvías de la Coruña* v *Commission*, T-485/18, EU:T:2020:35, paragraph 70 and the case-law cited).

42 By the present plea, the applicant specifically disputes compliance both with the obligation to state reasons (first complaint) and with the obligation to conduct a diligent examination (second complaint), and the outcome of that examination (third complaint).

43 As regards, in the first place, compliance in the present case with the obligation to state reasons, it should be noted that, in paragraph 2.1 of the contested decision, the Commission stated that the Italian authorities, relying on the second indent of Article 4(2) of Regulation No 1049/2001, had based their refusal to disclose on the integrity of pending court proceedings concerning the repayment of VAT being undermined, the references of which they disclosed, and on the equality of arms being undermined in the event of access by the other party to those proceedings to their letter of 17 October 2019, which had been disclosed on a confidential basis to the EU authorities in the context of the EU Pilot procedure concerning the repayment of VAT unduly paid on the TIAI tax. It also mentioned the possible references to the Court of Justice for a preliminary ruling referred to by the Italian authorities, relying on the fact that the VAT which was the subject of the national proceedings at issue was subject to harmonised European rules.

44 It may be inferred from this that the Commission satisfied itself as to the existence of the reasons for the Italian authorities' objection and set out the grounds relied on in that regard in the contested decision. It thus enabled the applicant to understand the reasons for the refusal to disclose the letter of 17 October 2019 from those authorities.

45 The first complaint alleging infringement of the obligation to state reasons must therefore be rejected.

46 As regards, in the second place, the Commission's compliance with its obligation to conduct a diligent examination of the Italian authorities' refusal to disclose, it should be noted that, in paragraph 2.2 of the contested decision entitled 'Prima facie examination by the Commission', after recalling the relevant provisions, in particular the second indent of Article 4(2) of Regulation No 1049/2001, and the corresponding case-law, the Commission noted that those authorities had stated that their letter of 17 October 2019 contained their position on the question of the repayment of VAT unduly paid on the TIAI tax, that that question was at issue in cases pending before the Italian courts, the references to which were provided, and that there was a high probability of references for a preliminary ruling to the Court of Justice. The Commission then considered that disclosure of that letter would place those authorities at a clear disadvantage by comparison with the other parties, since they would know the position of the authorities at issue in advance and could adjust and refine their arguments, which would lead to a systematic advantage in their favour. It concluded that there was a real and non-hypothetical risk of seriously jeopardising and undermining the ongoing court proceedings in Italy under the second indent of Article 4(2) of Regulation No 1049/2001.

47 Such an analysis corresponds to the prima facie examination required by the case-law cited in paragraphs 40 and 41 above.

48 It is only for the Commission to examine whether the information provided by the Italian authorities makes it plausible that the protection of court proceedings would be undermined within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001. Such an examination of plausibility implies, by its very nature, the use of terms which are not clearly affirmative, and the Commission cannot therefore be criticised for this.

49 On the other hand, it is not for the Commission to ascertain whether the protection of legal proceedings in Italy has been specifically and effectively undermined in practice. In that regard, contrary to what the applicant claims, by reminding the Italian authorities of the need to explain

how disclosure of the requested document would specifically and effectively undermine the protected interest at issue, the Commission merely reminded those authorities of their obligation to carry out such an examination, but did not consider itself obliged to carry out that examination.

50 Lastly, the fact that the Commission informed the Italian authorities, after the confirmatory application, that it considered that their letter of 17 October 2019 could be disclosed also attests to the diligent examination carried out in the present case, since that statement was accompanied by a request for further explanations and a reminder of the criteria laid down in the case-law for the protection of the interest at issue, in accordance with the case-law referred to in paragraph 41 above and the dialogue to be entered into between the Commission and the Member State concerned pursuant to the duty of loyal cooperation (see paragraph 36 above).

51 It follows that the second complaint, alleging that the Commission failed to fulfil its obligation to conduct a diligent examination of the Italian authorities' objection, must also be rejected.

52 As regards, in the third place, the grounds for the refusal to disclose the letter from the Italian authorities of 17 October 2019 on the basis of the protection of court proceedings under the second indent of Article 4(2) of Regulation No 1049/2001, it must be recalled, as a preliminary point, that where a Member State relies on Article 4(5) of that regulation and puts forward grounds for refusal listed in Article 4(1) to (3) thereof, it is within the jurisdiction of the EU judicature to review, on application by a person to whom the institution has refused to grant access, whether that refusal could have been validly based on those exceptions, regardless of whether the refusal results from an examination of those exceptions by the institution itself or by the Member State concerned (judgments of 21 June 2012, *IFAW Internationaler Tierschutz-Fonds* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 72, and of 24 May 2011, *Batchelor* v *Commission*, T-250/08, EU:T:2011:236, paragraph 67). Where access is refused on the basis of Article 4(5) of the regulation at issue, the Courts of the European Union therefore carry out a full examination of the Commission's decision to refuse, which is based on the substantive assessment by the Member State concerned of the applicability of the exceptions laid down in Article 4(1) to (3) of that regulation, even if the Commission has refused access to a document originating from a Member State after finding, on the basis of a prima facie examination, that, in its view, the reasons for objection put forward by that Member State were not relied on in a manifestly inappropriate manner (see, to that effect, judgment of 21 June 2012, *IFAW Internationaler Tierschutz-Fonds* v *Commission*, C-135/11 P, EU:C:2012:376, paragraphs 70 to 72).

53 It should be borne in mind that, pursuant to the second indent of Article 4(2) of Regulation No 1049/2001, the institutions are to refuse access to a document where disclosure would undermine the protection of court proceedings, unless there is an overriding public interest that would justify disclosure of the document at issue.

54 The protection of court proceedings requires, in particular, that the principle of equality of arms is observed and that the sound administration of justice and the integrity of court proceedings are guaranteed (judgment of 6 February 2020, *Compañía de Tranvías de la Coruña* v *Commission*, T-485/18, EU:T:2020:35, paragraph 38).

55 First, as regards compliance with the principle of equality of arms, it must be noted that, if the content of documents setting out an institution or a Member State's position in a dispute were to be the subject of public debate, criticism of them could unduly influence the position taken by the institution or the Member State before the courts in question. In addition, the granting of access to documents pertaining to an institution or a Member State's position in ongoing court

proceedings to another party could upset the vital balance between the parties to a dispute, a state of balance which is at the root of the principle of equality of arms, inasmuch as only the institution or Member State concerned by a request for access to documents, and not all the parties to the proceedings, would be bound by the obligation of disclosure. Compliance with the principle of equality of arms is, however, essential, since it is a corollary of the very concept of a 'fair hearing' (see, to that effect, judgments of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraphs 86 and 87 and the case-law cited, and of 28 June 2012, *Commission* v *Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 132).

56 Secondly, as regards the sound administration of justice and the integrity of court proceedings, it must be borne in mind that the exclusion of judicial activities from the scope of the right of access to documents is justified in the light of the need to ensure that, throughout the court proceedings, the exchange of argument by the parties and the deliberations of the court concerned in the case before it take place in an atmosphere of total serenity, without any external pressure on judicial activities. Disclosure of documents setting out the position taken by an institution or a Member State in pending court proceedings would have the effect of exposing judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings (see, to that effect, judgment of 21 September 2010, S*weden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraphs 92 and 93).

57 Thus, pursuant to the second indent of Article 4(2) of Regulation No 1049/2001, the public interest precludes disclosure of the content of documents drawn up solely for the purposes of specific court proceedings. Those documents include the pleadings or other documents lodged during court proceedings, internal documents concerning the investigation of a pending case, correspondence concerning the case between the Directorate-General concerned and the Legal Service or a law firm (see, to that effect, judgment of 6 February 2020, *Compañía de Tranvías de la Coruña* v *Commission*, T-485/18, EU:T:2020:35, paragraph 41 and the case-law cited).

58 The second indent of Article 4(2) of Regulation No 1049/2001 also precludes the disclosure of documents that were not drawn up solely for the purposes of specific court proceedings, but whose disclosure is liable, in the context of specific proceedings, to compromise the principle of equality of arms. However, in order for the exception to apply, it is necessary that the documents requested, at the time of adoption of the decision refusing to grant access to those documents, have a relevant link with pending court proceedings. In that case, although those documents have not been drawn up in the context of specific court proceedings, the integrity of the court proceedings concerned and the principle of equality of arms between the parties could be seriously compromised if parties were to benefit from privileged access to internal information belonging to the other party and closely connected to the legal aspects of pending or potential, but imminent, proceedings (see, to that effect, judgment of 6 February 2020, *Compañía de Tranvías de la Coruña* v *Commission*, T-485/18, EU:T:2020:35, paragraph 42 and the case-law cited).

59 In the present case, it is not disputed that the letter from the Italian authorities of 17 October 2019 was not drawn up solely for the purposes of particular proceedings. It is a response from those authorities to a request for information from the Commission in the context of the EU Pilot procedure initiated against them following complaints concerning the arrangements for repayment of the VAT unduly paid on the TIAI tax. It is recalled that the purpose of EU Pilot procedures is to establish whether EU law is being complied with and correctly applied in the Member States (see paragraph 3 above). To that end, the Commission habitually addresses requests for information to the Member States concerned as well as to concerned citizens and

undertakings (judgment of 25 September 2014, *Spirlea* v *Commission*, T-669/11, EU:T:2014:814, paragraph 64). It is therefore an administrative procedure which may lead to the initiation of proceedings for failure to fulfil obligations, including an action for failure to fulfil obligations before the Court, which was not, however, the case here, since the Commission decided not to initiate such proceedings (see paragraph 5 above).

60 The Italian authorities nevertheless argued to the Commission that disclosure of the letter from the Italian authorities of 17 October 2019 could undermine the position of the competent authorities as parties in a series of actions pending before the Italian courts, by disclosing a table summarising all the court proceedings concerned ('the table'), a table which the Commission annexed to the defence.

61 It is important, first of all, to note that, contrary to what the applicant claims, it is apparent from the table that several sets of proceedings are pending and not just one. In view of the table and the reference, several times in the contested decision, to a number of national court proceedings (the fourth, eighth and ninth subparagraphs of paragraph 2.1, one of which refers to the table, and the twelfth and fourteenth subparagraphs of paragraph 2.2), the reference to a single set of proceedings in the last two subparagraphs of paragraph 2.2 of the contested decision may be regarded as a clerical error. It may be added that, in any event, the exception relating to the protection of court proceedings may justify a refusal to grant access, even if only one set of court proceedings is concerned (see, to that effect, judgment of 15 September 2016, *Philip Morris* v *Commission*, T-796/14, EU:T:2016:483, paragraph 98).

62 Furthermore, in so far as the applicant relies on the fact that it is a party to only one of the proceedings referred to in the table, which, moreover, was closed when the decision on the request for access was adopted, it may be noted that disclosure of the letter from the Italian authorities of 17 October 2019 could give it extensive publicity, allowing, inter alia, the parties to the other proceedings still pending to rely on it against the Italian authorities in the context of those proceedings (see, to that effect, judgment of 6 February 2020, *Compañía de Tranvías de la Coruña* v *Commission*, T-485/18, EU:T:2020:35, paragraph 56).

63 Next, it is necessary to determine whether the Italian authorities' letter of 17 October 2019 has a relevant link with the national court proceedings listed in the table, other than the one to which the applicant was a party and which was closed at the time the decision on the request for access was adopted.

64 As is apparent from the table, of the 12 proceedings referred to, with the exception of that involving the applicant, 9 were pending at the time when the decision on the request for access was adopted, as required by the case-law relating to the second indent of Article 4(2) of Regulation No 1049/2001 (see judgment of 6 February 2020, *Compañía de Tranvías de la Coruña* v *Commission*, T-485/18, EU:T:2020:35, paragraph 42 and the case-law cited), and concerned actions brought by or against the Italian tax authorities concerning the repayment of VAT on the TIAI tax pursuant to Article 30b(2) of decreto n. 633 del Presidente della Repubblica – Istituzione e disciplina dell'imposta sul valore aggiunto (Decree No 633 of the President of the Republic introducing and regulating VAT) of 26 October 1972 (Ordinary Supplement to GURI No 292 of 11 November 1972).

65 There is therefore a clear link between those proceedings, which concern disputes between the Italian tax authorities and taxpayers concerning the repayment of VAT on the TIAI tax, and the letter from the Italian authorities of 17 October 2019, produced pursuant to a measure of

organisation of procedure, which, as is clear from its wording, constitutes a statement by the Italian ministerial authorities on the arrangements for that repayment. That letter discloses the position of the Italian authorities on the matter at issue raised in the proceedings pending before the Italian courts, thereby establishing the relevant link and the close connection with the legal aspects of the pending disputes required by the case-law (see, to that effect, judgment of 26 July 2023, *Troy Chemical Company* v *Commission*, T-662/21, not published, EU:T:2023:442, paragraph 57 and the case-law cited).

66 First, equality of arms between the parties could be seriously compromised if parties were to benefit from privileged access to that information belonging to the other party which, while being closely connected with the legal aspects of the pending disputes, was disclosed on a confidential basis to the Commission in the context of the EU Pilot procedure (see, to that effect, judgment of 28 September 2022, *Leino-Sandberg* v *Parliament*, T-421/17 RENV, not published, EU:T:2022:592, paragraph 41 and the case-law cited). Furthermore, disclosure of the letter from the Italian authorities of 17 October 2019 would in fact be such as to oblige the Italian authorities to defend themselves against allegations made by the opposing parties against considerations set out in that letter which they may not, in some circumstances, rely on for the purposes of their defence before the Italian courts and, thus, would undermine the effectiveness of their defence, whereas the other parties to the proceedings in question would not be subject to such a constraint (see, to that effect, judgment of 28 September 2022, *Leino-Sandberg* v *Parliament*, T-421/17 RENV, not published, EU:T:2022:592, paragraph 51 and the case-law cited). As the Italian Republic points out, in view of the different nature, on the one hand, of the EU Pilot procedure, intended to resolve a possible infringement of EU law, and, on the other hand, of the pending court proceedings at issue between the Italian tax authorities and taxpayers, the information provided by the Italian authorities to the Commission and the national courts is not necessarily the same.

67 Secondly, disclosure of the letter from the Italian authorities of 17 October 2019 setting out the position taken by those authorities on a question at the heart of a number of pending disputes would have the effect of exposing judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings (see, to that effect, judgment of 21 September 2010, S*weden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraphs 92 and 93). The exclusion of judicial activities from the scope of the right of access to documents is justified in the light of the need to ensure that, throughout the court proceedings, the exchange of argument by the parties and the deliberations of the court concerned in the case before it take place in an atmosphere of total serenity, without any external pressure on judicial activities (see judgment of 6 February 2020, *Compañía de Tranvías de la Coruña* v *Commission*, T-485/18, EU:T:2020:35, paragraph 40 and the case-law cited).

68 Those considerations are not called into question by the applicant's argument, according to which the mere assertion of the particular plausibility of a reference for a preliminary ruling by the Italian courts concerned is not sufficient to justify the refusal to disclose the Italian authorities' letter of 17 October 2019.

69 However, in order for the exception provided for in the second indent of Article 4(2) of Regulation No 1049/2001 to apply to documents which have not been drawn up in the context of specific court proceedings, the documents requested must, at the time of adoption of the decision refusing access to those documents, have a relevant link either with a dispute pending before the courts of the European Union, in respect of which the institution concerned is invoking that

exception, or with proceedings pending before a national court, on condition that they raise a question of interpretation or validity of an act of EU law so that, having regard to the context of the case, a reference for a preliminary ruling appears particularly likely (judgments of 15 September 2016, *Philip Morris* v *Commission*, T-796/14, EU:T:2016:483, paragraphs 88 and 89, and of 7 February 2018, *Access Info Europe* v *Commission*, T-852/16, EU:T:2018:71, paragraph 67).

70 However, the judgments referred to in paragraph 69 above were given in cases involving documents drawn up by the institutions themselves and not, as in the present case, in relation to documents originating from Member States and sent to an institution. In the case of a document drawn up by an institution, the undermining of equality of arms and of the ability of the institution concerned to defend itself can be brought only in the context of proceedings in which it takes part, that is to say, proceedings taking place in principle before the Courts of the European Union.

71 By contrast, in the case of a document originating from a Member State and linked to proceedings pending before the national courts to which the State is a party, as in the present case, it is the guarantee of equality of arms in those national proceedings which is taken into account. It follows that the question whether a reference for a preliminary ruling by the Italian courts hearing the national proceedings at issue was particularly plausible is irrelevant in the present case (see, to that effect, order of 27 March 2014, *Ecologistas en Acción* v *Commission*, T-603/11, not published, EU:T:2014:182, paragraphs 56 to 65).

72 The third complaint, alleging that the protection of court proceedings was not undermined by the disclosure of the letter from the Italian authorities of 17 October 2019, must therefore be rejected.

73 It follows from all the foregoing that the second plea must be dismissed, as must the action in its entirety, without there being any need to order other measures of organisation of procedure.

Costs

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

75 Under Article 138(1) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. The Italian Republic must therefore bear its own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Veneziana Energia Risorse Idriche Territorio Ambiente Servizi SpA (Veritas) to bear its own costs and to pay those incurred by the European Commission;**

3. Orders the Italian Republic to bear its own costs.

da Silva Passos Gervasoni Półtorak

Delivered in open court in Luxembourg on 24 January 2024.

[Signatures]