Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 3 October 2013 [1]

Case C-365/12 P

European Commission
v

EnBW Energie Baden-Württemberg

(Appeal — Regulation (EC) No 1049/2001 — Access to documents of the institutions — Request for access to the administrative file relating to proceedings under Article 81 EC and Article 53 of the EEA Agreement — Refusal pursuant to Article 4(2) of Regulation (EC) No 1049/2001 — Access to information submitted under a leniency programme — Regulation (EC) No 1/2003 — Holistic interpretation of the regulatory schemes relating to access to documents of the institutions)

1. This appeal has been brought by the Commission against the judgment of 22 May 2012 in *EnBW Energie Baden-Württemberg* v *Commission*, [2] by which the General Court annulled the Commission's decision of 16 June 2008 [3] refusing a request for access to documents 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. [4] More specifically, access had been sought to all the documents generated in the course of the procedure relating to a cartel that had been censured by the Commission under Article 101 TFEU. [5]

2. The issues raised should enable the Court of Justice to address the interrelationship between Regulation No 1049/2001 and the third branch of competition law – concerted practices or cartels – having already ruled on this point in relation to State aid (in *Technische Glaswerke Ilmenau*) [6] and mergers (in *Agrofert*). [7] The substantive issue raised in these proceedings is, essentially, whether the rules developed in relation to those other two branches of competition law are also applicable to concerted practices and, more specifically, in the context of 'leniency programmes'.

I – Legal context

3. Under Article 4(2) of Regulation No 1049/2001, '[t]he institutions shall refuse access to a document where disclosure would undermine the protection' of, inter alia, 'commercial interests of a natural or legal person, including intellectual property, ... [and] the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure'.

1 — Original language: Spanish.

2 — Case T-344/08 *EnBW* v *Commission* [2012] ECR.

3 — Decision SG.E.3/MV/psi D(2008) 4931.

4 — OJ 2009 L 145, p. 43.

5 — Decision C(2006) 6762 final of 24 January 2007 in Case COMP/F/38.899. The producers concerned included ABB Ltd ('ABB') and Siemens AG ('Siemens').

6 — Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-5885 ('TGI').

7 — Case C-477/10 P *Commission* v *Agrofert Holding* [2012] ECR ('*Agrofert*').

4. Under the second subparagraph of Article 4(3) of Regulation No 1049/2001, '[a]ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'.

5. Regulation (EC) No 1/2003,[8] having set out the Commission's powers of investigation in relation to competition proceedings in Articles 17 to 22, goes on to provide, in Article 27(2):

'The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the competition authorities of the Member States, or between the latter, including documents drawn up pursuant to Articles 11 and 14. Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement.'

6. Article 28(1) of Regulation No 1/2003 provides that, without prejudice to the exchange of information between the competition authorities of the Member States and the cooperation of the Commission with the courts of the Member States, 'information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired'.

7. Under Article 28(2), 'the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy. This obligation also applies to all representatives and experts of Member States attending meetings of the Advisory Committee pursuant to Article 14.'

8. The rules on access to the file and the treatment of confidential information in competition proceedings are set out in Articles 15 and 16 of Regulation (EC) No 773/2004.[9]

II – Background

9. EnBW Energie Baden-Württemberg AG ('EnBW') is an energy-distribution company that considers itself to have been adversely affected by concerted practices engaged in by producers of gas insulated switchgear which were censured by the Commission under Article 101 TFEU.

10. On 9 November 2007, relying on Regulation No 1049/2001, EnBW asked the Commission for access to all the documents relating to that procedure.

11. The application was definitively rejected by decision of 16 June 2008 ('the contested decision'). In that decision, the Commission placed the documents requested in the following five categories:

(1) Documents provided in connection with an immunity or leniency application.

(2) Requests for information and parties' replies.

8 — Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1).

9 — Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18).

(3) Documents obtained during inspections at the premises of the undertakings concerned.

(4) Statements of objections and parties' replies.

(5) Internal documents:

(a) Documents relating to the facts (notes on the conclusions drawn from the evidence gathered; correspondence with other competition authorities; consultations with other Commission departments);

(b) Procedural documents (inspection warrants; inspection reports; extracts from documents obtained in the course of inspections; documents concerning the notification of certain documents; notes).

12. The Commission took the view that all the categories were covered by the exception provided for under the third indent of Article 4(2) of Regulation No 1049/2001 (undermining the protection of the purpose of inspections, investigations and audits). It found that the documents in categories 1 to 4 also come under the first indent of Article 4(2) (undermining the protection of commercial interests of a natural or legal person), while documents in category 5(a) are covered by the exception provided for in Article 4(3) (undermining the decision-making process).

13. EnBW brought an action before the General Court for annulment of the decision (Case T-344/08). EnBW was supported by the Kingdom of Sweden.

14. By judgment of 22 May 2012 ('the judgment under appeal'), the General Court upheld the action.

III – The judgment under appeal

15. The General Court found, first, that the Commission had made a manifest error of assessment in holding that EnBW had not requested access to the documents falling within category 5(b) (paragraphs 32 to 37 of the judgment under appeal).

16. The General Court went on to consider whether, in the case before it, the conditions were met for dispensing with the obligation to undertake a concrete, individual examination of the content of the documents requested (paragraphs 44 to 112). On this point, it concluded that the general presumption that access should be refused, on which the Commission had relied, applies only while the procedure concerning the documents in question is ongoing.[10] Once the procedure is closed, as in that case, it was therefore necessary to undertake a concrete, individual examination of each of the documents concerned (paragraphs 56 to 63).

17. The General Court then focussed on the question whether the Commission had acted correctly in examining the documents by category (paragraphs 64 to 112). It found that categories 1, 2, 4 and 5(a) were not useful for the purposes of processing the request for access, since no real difference could be detected between the documents allocated to each category. Only category 3 (documents obtained during inspections of the premises of the undertakings concerned) was useful for the purposes of ascertaining whether the exception laid down in the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audit) applied, since it comprised documents obtained against the will of the undertaking. The General Court therefore annulled the contested decision in so far as it refused access to the documents falling within categories 1, 2, 4 and 5(a).

10 — In accordance with the case-law established in *TGI*, paragraphs 55 to 58.

18. Nevertheless, for the sake of completeness, the General Court examined the refusal of access to documents falling within categories 1, 2, 4 and 5(a) (paragraphs 113 to 176) and concluded that the protection of the purpose of investigations could not justify refusing access to documents in categories 1 to 4 and 5(a) because the case concerned a procedure that had already been completed and there was no reason to give special treatment to proceedings relating to competition (paragraphs 113 to 130).

19. Nor, according to the General Court, had the Commission shown that access to the documents was likely to undermine the commercial interests of the undertakings concerned (first indent of Article 4(2)), the particular type of examination carried out at the time of the proceedings not being sufficient for those purposes (paragraphs 131 to 150).

20. Lastly, the General Court found that the Commission was wrong to apply, in a general and abstract way, the exception laid down in the second subparagraph of Article 4(3) (opinions for internal use) to documents in category 5(a) (paragraphs 151 to 170).

IV – The appeal

21. On 31 July 2012, the Commission brought an appeal against the judgment of the General Court.

22. By its appeal, the Commission is seeking a ruling from the Court of Justice on five issues. The first concerns the factors and general principles to be taken into consideration to ensure that Regulation No 1049/2001 is interpreted in keeping with the provisions that apply in areas such as competition and accordingly does not compromise their effectiveness. The second is the question whether access to the documents of proceedings relating to concerted practices may be refused on the basis of a general presumption that such documents require protection. The third and fourth issues relate to the scope of the protection afforded to the purpose of investigations, on the one hand, and to commercial interests on the other. The fifth and last issue concerns the conditions on which the Commission may refuse access to internal documents even after a decision has been taken.

23. Each of those issues is reflected by a corresponding ground of appeal: (1) error of law in failing to have regard for the need for a harmonious interpretation of Regulation No 1049/2001 in order to ensure that legislative provisions relating to other areas remain fully effective; (2) error of law in failing to acknowledge the existence of a general presumption applicable to all documents in concerted practices proceedings; (3) misinterpretation of the scope of the protection afforded to the purpose of investigations; (4) misinterpretation of the scope of the protection afforded to commercial interests; and (5) misinterpretation of the circumstances in which the Commission may refuse access to a document even after the decision-making process has been completed.

24. The fifth ground of appeal is composed of three subsidiary grounds: (A) misinterpretation of the concept of ‘document containing opinions for internal use as part of deliberations and preliminary consultations’ as used in Article 4(3) of Regulation No 1049/2001; (B) incorrect finding as to the Commission’s failure to provide evidence that the documents falling within category 5(a) contained opinions for internal use; and (C) misinterpretation of the duty under the second subparagraph of Article 4(3) to state reasons.

25. The Commission is claiming that the judgment under appeal should be set aside and that the action that gave rise to Case T-344/08 should be dismissed.

V – Proceedings before the Court of Justice

26. Written observations have been submitted by the Swedish Government, in support of the form of order sought by EnBW, and by ABB and Siemens, in support of the form of order sought by the Commission.

27. By order of the President of the Court of Justice of 19 February 2013, applications for leave to intervene lodged by HUK-Coburg Haftpflicht-Unterstützungs-kasse kraftfahrender Beamter Deutschlands, LVM Landwirtschaftlicher Versicherungsverein Münster, VHV Allgemeine Versicherung AG and Württembergische Gemeinde-Versicherung were dismissed for lack of any direct interest.

28. The hearing took place on 13 June 2013 and was attended by the Commission, EnBW, ABB and Siemens.

29. With respect to the first ground of appeal, the Commission, supported by ABB and Siemens, argues that the General Court has disregarded the need to interpret Regulation No 1049/2001 and Regulations Nos 1/2003 and 773/2004 in a manner conducive to overall legislative harmony. It maintains that the General Court gave precedence to Regulation No 1049/2001 in a way that is inconsistent with the case-law established in *Odile Jacob* [11] and *Agrofert*. The Commission believes that EU competition policy merits special treatment when it comes to access to documents. EnBW disagrees with that approach and disputes the relevance of the case-law cited by the Commission. It contends that the approach argued for by the Commission would defeat the purpose of Article 101 TFEU, since it would be impossible to bring actions for damages against undertakings acting in concert if those affected did not have access to the documentation on which to base a claim and this runs contrary to the rule established in *Pfleiderer*. [12]

30. In relation to the second ground of appeal, the Commission, supported by ABB and Siemens, submits that, contrary to the view of the General Court, a general presumption operates in relation to documents in concerted practices proceedings and the fact that the proceedings may already have been concluded is irrelevant, since the nature of the interests being protected is the only matter of concern. In the Commission's view, the presumption that arises in relation to State aid and mergers must extend to cases involving concerted practices. For its part, EnBW contends that once proceedings have been concluded, Regulation No 1049/2001 alone applies and the specific provisions relating to concerted practices are therefore irrelevant. Sweden argues that, if the Commission is to rely on general presumptions, it must verify, in the case of each individual document, that the general considerations normally applicable to a particular type of document actually apply to that document.

31. With regard to the third ground of appeal, the Commission, supported by ABB and Siemens, argues that the judgment under appeal jeopardises the leniency mechanism and the proper implementation of competition law more generally, and, furthermore, that the proceedings can be considered closed only when it is no longer possible to bring an action of any kind challenging the decision bringing them to a conclusion. EnBW responds that the Commission's discretion cannot be treated as outside the ambit of review by the Courts and that the appeal is merely raising abstract and general objections concerning the risks that arise when undertakings cooperate in proceedings commenced by the Commission.

11 — Case C-404/10 P *Commission* v *Éditions Odile Jacob* [2012] ECR ('*Odile Jacob*').

12 — Case C-360/09 *Pfleiderer* [2011] ECR I-5161.

32. Concerning the fourth ground of appeal, the Commission, supported by ABB and Siemens, disputes the General Court's finding that there was no evidence of the alleged harm (undermining of the protection of commercial interests), arguing that the protection of commercial interests is very closely linked to the protection of the purpose of inspections and should therefore be covered by the same type of general presumption. The Commission argues, in particular, that the information in question is information that the undertakings were required to provide to the Commission. EnBW insists that the protection of commercial interests cannot be viewed in the same way in the context of merger proceedings as in the context of Regulation No 1/2003 proceedings, since in the latter the undertaking seeking leniency provides information voluntarily and has in mind not so much commercial interests as the desire to avoid a fine, whereas in merger proceedings undertakings cannot refuse to provide the information requested.

33. In relation to the fifth ground of appeal, the Commission, supported by ABB and Siemens, maintains that the General Court erred in failing to realise that the general presumption extends to all the internal documents involved in proceedings and in concluding that their disclosure would not affect the decision-making process. EnBW responds that the Commission has not explained why all the documents contain opinions and has not adduced prima facie evidence that their disclosure would undermine a decision-making process where the decision was taken five years previously.

34. The Commission claims that EnBW's original action should be dismissed, since it was incumbent upon EnBW to demonstrate that the documents requested were not covered by the general presumption of refusal, failing which, to show that there was an overriding interest in their disclosure. EnBW, on the other hand, maintains that its action before the General Court was well founded; that the appeal should be dismissed; and that the contested decision should be set aside in its entirety, or, in the alternative, that it should be set aside to the extent that it also refused partial access to the information requested.

VI – Analysis

35. Before embarking on my analysis of each of the grounds of appeal, I would like to point out at the outset that, as in *Agrofert*, the party requesting information was not a party in the proceedings which gave rise to the documentation sought. EnBW is, in this respect, a third party vis-à-vis those proceedings. The documentation is of interest to it because it hopes to use it in order to bring a claim for damages against the parties in the proceedings. In any event, as I argued in my Opinion in *Agrofert*,[13] 'this case has to do above all with transparency' rather than – here – concerted practices between undertakings or cartels. As in that case, therefore, it is 'primarily in the light of Regulation No 1049/2001 that we must address the resolution of this case'.[14]

A – *The first ground of appeal*

36. By the first ground of appeal, the Commission alleges that the General Court erred in law in failing to have regard for the need for a 'harmonious interpretation' of Regulation No 1049/2001 in order to ensure that legislative provisions relating to other areas of EU law remain fully effective. At this point, I should mention that the other four grounds of appeal identify the aspects of the judgment under appeal that allegedly reflect this oversight, giving rise to an incorrect interpretation and application of Regulation No 1049/2001.

13 — Delivered on 8 December 2011, point 26.

14 — *Loc. cit.*

37. Thus, the first ground of appeal again raises the question, as in *Agrofert*, of whether, in relation to the right of access to documents of the institutions, Regulation No 1049/2001 constitutes general legislation that must in some respects be harmonised with certain specific rules laid down in other EU legislation, or whether, by contrast, Regulation No 1049/2001 lays down an exhaustive set of rules governing the exercise of that right in every case.

38. It is clear from the case-law of the Court of Justice – and in this I must agree with the Commission – that Regulation No 1049/2001 does not exist in a vacuum, so to speak, but must be reconciled both in terms of its interpretation and its application with the specific regulatory schemes governing access to documents in particular areas. In other words, Regulation No 1049/2001 is not intended to regulate transparency in EU law in an exhaustive way, but, as the legislation laying down the common rules on access to documents of the institutions, it must be interpreted and applied in a manner consistent with the various rules governing access to documents associated with proceedings governed by their own regulatory regimes.

39. In short, I believe that a holistic interpretation of the regulations applicable in the area is necessary.

40. Moreover, that inevitable interaction between, on the one hand, Regulation No 1049/2001 – as the general legislation on institutional transparency – and, on the other, particular EU regulations – as specific legislative instruments concerning access in relation to certain proceedings – has been pointed out by the Court of Justice in the case-law on the subject, which is extensive and has recently been listed in *Agrofert*.[15]

41. Contrary to the Commission's assertions, I take the view that the General Court's interpretation of Regulation No 1049/2001, as it emerges from the judgment under appeal, did not fail to take into consideration the specific rules governing access to the proceedings in which the documents in question were generated.

42. In fact, paragraph 55 of that judgment acknowledges the case-law of the Court of Justice on the general point that disclosure of certain documents may undermine the general interest that the legislature was seeking to protect by creating a special regulatory scheme for access to such documents. In this regard, the General Court goes on to refer to the procedures for access to documents in the areas of State aid, mergers and concerted practices or cartels, which are what concern us here.

43. Admittedly, the General Court concludes that the case-law on the need to interpret Regulation No 1049/2001 in the light of the rules on access established in relation to State aid proceedings is applicable only in cases where the proceedings are ongoing and 'cannot be applied to a situation in which the institution has already adopted a final decision closing the file to which access is sought, as is the case here'.[16]

44. However, the General Court goes on to state that 'a general presumption that the documents in a file in competition proceedings are not to be disclosed ought to arise from Council Regulation (EC) No 1/2003 …, and from the case-law concerning the right to consult the documents of the Commission's administrative file'.[17] Having referred in paragraphs 59 and 60 to the rules on access provided for in Regulation No 1/2003, the General Court concludes by stating that, 'although undertakings that are the subject of cartel proceedings, as well as complainants upon whose complaint the Commission has not acted, have a right to consult certain documents on the Commission's administrative file, that right is subject to certain restrictions which themselves give rise to a need for a case-by-case assessment. Therefore, even on the basis of the reasoning applied by the Court of

15 — *Agrofert*, paragraph 50.

16 — Judgment under appeal, paragraph 57.

17 — Judgment under appeal, paragraph 58.

Justice in *TGI*, …, according to which, for the purpose of interpreting the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001, account must be taken of any restrictions on access to the file that may obtain in particular procedures, such as State aid and cartel procedures, the fact that such matters are taken into account does not give grounds for assuming that, if the Commission's ability to proceed against cartels is not to be undermined, all the documents held in its files in that domain are automatically covered by one of the exceptions laid down in Article 4 of Regulation No 1049/2001'. [18]

45. Ultimately, the judgment under appeal concludes that '[t]he Commission was … not entitled to assume, without undertaking a specific analysis of each document, that all the documents requested were clearly covered by the exception laid down in the third indent of Article 4(2) of Regulation No 1049/2001'. [19]

46. It can be seen from the foregoing that the General Court did not, as the Commission alleges, 'fail to have regard to' the need to interpret Regulation No 1049/2001 in harmony with the legislative provisions relating to other areas of EU law. On the contrary, the judgment under appeal repeatedly interprets Regulation No 1049/2001 in the light of the possible implications for the rules on access to documents generated or used in cartel proceedings.

47. Whether that attempt to interpret the regulation in a harmonious way achieved the desired effect is another matter. That is something that must be decided once we have examined the other grounds of appeal, which relate to alleged errors of law arising out of a misinterpretation of Regulation No 1049/2001. However, it is clear to me that the General Court cannot be accused of having interpreted the regulation without considering it against the background of the totality of rules governing access to certain proceedings.

48. In my opinion, the first ground of appeal should be rejected.

B – *The second ground of appeal*

49. By the second ground of the appeal, the Commission alleges that the General Court erred in law in failing to acknowledge the existence of a general presumption, applicable to all documents in concerted practices proceedings, to the effect that disclosure of such documents is likely to undermine the general interest that such proceedings seek to protect.

50. I will start by stating, at the outset, that, to my mind, the case-law of the Court of Justice allowing *general presumptions* in relation to documents covered by specific accessibility rules because of the type of proceedings in which they are generated is readily applicable to documents generated or used in cartel proceedings.

51. As we know, this case-law states that the existence of those specific rules means that it can be assumed that, in principle, disclosure of such documents may affect the purpose served by such proceedings. The Court of Justice first ruled in *TGI* [20] that a general presumption of that kind may arise from the legislation governing procedures for reviewing State aid. [21] The Court subsequently ruled in *Agrofert* that '[s]uch general presumptions are applicable to merger control proceedings, because the legislation which governs those proceedings also provides for strict rules regarding the treatment of information obtained or established in the context of such proceedings'. [22]

18 — Judgment under appeal, paragraph 61.

19 — Judgment under appeal, paragraph 62.

20 — Paragraphs 55 to 61.

21 — Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 EC (OJ 1999 L 83, p. 1).

22 — *Agrofert*, paragraph 59.

52. It seems to me to follow from the foregoing that the general presumption must also operate in the case of cartel proceedings, which are governed by legislation that also lays down very specific rules on access to and handling of the documentation involved in such proceedings. Thus, Article 27(2) of Regulation No 1/2003 grants the parties concerned a limited right of access to the Commission's file for the sole purpose of exercising their rights of defence, while Article 28 of that regulation provides that information collected in the course of proceedings is to be subject to the obligation of professional secrecy. [23] Similarly, Article 8 of Regulation No 773/2004 grants the complainant a limited right of access.

53. The existence of those specific rules on access means that it can be assumed that, as in the case of State aid and merger proceedings, disclosure of the documents may affect the purpose served by cartel proceedings. As argued in my Opinion in *Agrofert*, [24] 'Regulation No 139/2004 establishes in relation to mergers between undertakings an administrative review procedure which pursues an objective of fundamental importance to the European Union, that is to say to ensure competition in the internal market', [25] the same objective as that pursued by Regulation No 659/1999 in the case of State aid.

54. There is no doubt that Regulation No 1/2003 serves the same purpose. As I have previously stated, '[t]he fact that the legal basis for [Regulations No 659/1999 and No 139/2004] is Chapter I ("Rules on Competition") of Title VII ("Common Rules on Competition, Taxation and Approximation Laws") of the TFEU makes it clear that they serve a common purpose shared by Regulation No 1/2003, which is specifically to facilitate the attainment of one of the objectives underpinning the existence of the European Union. It should not be forgotten that, while the European Union is based on the values set out in Article 2 TFEU, it is also bound by the aims and objectives listed in Article 3 TEU, the most important of which for our purposes here is the establishment of an internal market and the "sustainable development of Europe based … on a highly competitive social market economy …" (Article 3 TEU). To secure the achievement of those aims, Article 3(1)(a) TFEU gives the European Union exclusive competence to "establish … the competition rules necessary for the functioning of the internal market", and it was precisely with a view to enabling mergers to be effectively reviewed from the point of view of competition that the legal instrument enshrined in the Merger Regulation was devised'. [26]

55. Cartel proceedings fall within the same range of purposes. As EnBW noted in its submissions, there are many differences between merger proceedings and cartel proceedings, particularly with regard to the preventative nature of the former and the punitive nature of the latter. Whilst acknowledging this difference – and noting that not all concerted practices are necessarily unlawful, as is apparent from Article 1(1) of Regulation No 1/2003 – the fact is that, albeit using different routes, both seek to ensure that competition in the market is not distorted and that economic operators act lawfully, with basic safeguards in place when they are involved in the procedures set up to prevent or penalise anticompetitive practices. Specifically, their involvement in such proceedings must be on the basis not only that their rights of defence are fully respected but that their commercial interests are not undermined. That must be so both where the proceedings are purely preventative, with no element of penalty, and in cases where a penalty for anticompetitive conduct is imposed, since in the latter case further negative implications should not be added to the penalty imposed by law.

23 — On proceedings under this regulation see Wils, W.P.J., 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights', *Concurrences*, May 2011, and *World Competition*, vol. 34, No 2, June 2011. Accessible at http:// ssrn.com/author=456087.

24 — Delivered on 8 December 2011.

25 — Opinion in *Agrofert*, point 64.

26 — Opinion in *Agrofert*, point 65.

56. Returning to the circumstances of this case, I would once again point out that – as was observed in my analysis of the first ground of appeal – the General Court does not deny that a harmonious interpretation of Regulation No 1049/2001 and Regulation No 1/2003 is necessary.

57. However, according to the General Court, a consequence of that harmonious interpretation is that the general presumption that can be brought into play in the case of documents in State aid proceedings has no place in relation to documents in cartel proceedings.

58. The General Court ultimately takes the view that the presumption in question comes into operation only where the rules governing the proceedings in which the documentation requested has been used or generated do not grant interested parties a right of access to such documentation.

59. The General Court acknowledges that, 'like Regulation No 659/1999 concerning aid, Regulation No 1/2003 does not confer a right on persons that are not parties to proceedings to have access to documents on the Commission's administrative file in the context of proceedings concerning cartels'.[27] However, as Article 27 of Regulation No 1/2003 'provides for undertakings which are the subject of proceedings to have access to the file, in the more general context of safeguarding the rights of the defence',[28] the General Court concludes that this potential access, however limited, cannot be ignored when applying Regulation No 1049/2001, and consequently it cannot be accepted that 'all the documents held in its files in that domain are automatically covered by one of the exceptions laid down in Article 4 of Regulation No 1049/2001'.[29]

60. The judgment under appeal bases this conclusion on an interpretation of *TGI* that I consider to be incorrect. In paragraph 58 of *TGI*, it is indeed stated that, since under Regulation No 659/1999 'the interested parties, except for the Member State responsible for granting the aid, do not have a right under the procedure for reviewing State aid to consult the documents on the Commission's administrative file[,] [*a]ccount must be taken of that fact for the purposes of interpreting the exception laid down by Article 4(2), third indent, of Regulation No 1049/2001*'.[30] The reason is that '[i]f those interested parties were able to obtain access, on the basis of Regulation No 1049/2001, to the documents in the Commission's administrative file, the system for the review of State aid would be called into question'.[31]

61. In the case of Regulation No 1/2003 – as noted in the judgment under appeal – parties to the proceedings have a right of access in the context of their defence. Apart from that, however, access to the documentation in the proceedings is in general not available to third parties, who, for these purposes, are in the same position as persons wishing to access documentation in State aid proceedings.

62. In my view, the presumption cannot apply only in cases where the proceedings to which the requested documentation relates provide for no right of access at all, but must also operate, subject to the required adjustments, where access is allowed on a restricted or conditional basis. In that situation, too, '[*a]ccount must be taken of that fact for the purposes of interpreting the exception laid down by Article 4(2), third indent, of Regulation No 1049/2001*',[32] since the ultimate aim is to prevent a literal application of Regulation No 1049/2001 undermining the rules on access to documentation provided for in relation to specific proceedings.

27 — Judgment under appeal, paragraph 59.

28 — *Loc. cit.*

29 — Judgment under appeal, paragraph 61.

30 — Emphasis added.

31 — *Loc. cit.*

32 — *TGI, loc. cit.*

63. In short, the presumption in question must operate in relation to documents the disclosure of which is either ruled out or – in the case of Regulation No 1/2003, as compared with Regulation No 1049/2001– possible only on certain conditions. In other words, the presumption should be fully effective vis-à-vis parties who, in accordance with Regulation No 1/2003 and Regulation No 773/2004, have no right, in principle, to access the documents in cartel proceedings, as in the case of EnBW here; and this must also be the case vis-à-vis parties who have only a limited right of access or a right which is recognised solely for the purposes of safeguarding the right of defence.

64. That conclusion must carry a qualification, however. The abovementioned presumption 'does not exclude the possibility of demonstrating that a given document, of which disclosure is sought, is not covered by that presumption or that there is a higher public interest justifying the disclosure of that document under Article 4(2) of Regulation No 1049/2001 (*Commission* v *Technische Glaswerke Ilmenau*, paragraph 62)'.[33] Consequently, the fact that Regulation No 1/2003 does not provide for access by persons who are not parties to the proceedings means only that, in the event that such persons request access, their requests must be dealt with in accordance with Regulation No 1049/2001 (as the general legislation in the area of transparency), interpreted in the light of the general presumption that disclosure of the documents may undermine the purpose of the proceedings under Regulation No 1/2003. This presumption does not in any way rule out access pursuant to Regulation No 1049/2001: it merely imposes more stringent conditions on the access granted under that regulation.

65. In the light of the foregoing, I believe that the General Court ruled out operation of the presumption in a case in which, because it concerns access requested by a person who was not a party to the cartel proceedings, the default principle on which considerations should be based is that disclosure of the requested document is liable to undermine the general interest protected by the specific rules on access to the documentation generated or used in those proceedings.

66. In my opinion, the second ground of appeal should therefore be upheld.

C – *The third ground of appeal*

67. By the third ground of appeal, the Commission alleges misinterpretation of the scope of the protection afforded to investigations. In particular, the Commission argues that the judgment under appeal jeopardises the leniency mechanism and, more generally, the effective application of competition law.

68. Recently, in *Donau Chemie*,[34] the Court of Justice gave a preliminary ruling on access to documents forming part of the file relating to national leniency proceedings. Even where it refers to competition proceedings rather than to Regulation No 1049/2001, I believe that this case-law is readily applicable to the present case.

69. On the subject of national leniency programmes – but pursuing a line of reasoning which can be transposed to EU competition proceedings – the Court of Justice noted that such programmes 'are useful tools if efforts to uncover and bring an end to infringements of competition rules are to be effective and thus serve the objective of effective application of Articles 101 TFEU and 102 TFEU. The effectiveness of those programmes could be compromised if documents relating to leniency

33 — *Agrofert*, paragraph 68.

34 — Case C-536/11 '*Donau Chemie and Others*' [2013] ECR ('*Donau Chemie*').

proceedings were disclosed to persons wishing to bring an action for damages. The view can reasonably be taken that a person involved in an infringement of competition law, faced with the possibility of such disclosure, would be deterred from taking the opportunity offered by such leniency programmes (*Pfleiderer*, paragraphs 25 to 27)'. [35]

70. The Court goes on to state in *Donau Chemie* that '[i]t is clear, however, that although those considerations may justify a refusal to grant access to certain documents …, they do not necessarily mean that that access may be systematically refused, since any request for access to the documents in question must be assessed on a case-by-case basis, taking into account all the relevant factors in the case (see, to that effect, *Pfleiderer*, paragraph 31)'. [36]

71. In the course of that assessment, it is necessary 'to appraise, firstly, the interest of the requesting party in obtaining access to those documents in order to prepare its action for damages, in particular in the light of other possibilities it may have', [37] as well as to 'take into consideration the actual harmful consequences which may result from such access, having regard to public interests or the legitimate interests of other parties'. [38]

72. More specifically, and in relation to 'the public interest of having effective leniency programmes', the Court of Justice went on to say that 'it should be observed that, given the importance of actions for damages brought before national courts in ensuring the maintenance of effective competition in the European Union ..., the argument that there is a risk that access to evidence contained in a file in competition proceedings which is necessary as a basis for those actions may undermine the effectiveness of a leniency programme in which those documents were disclosed to the competent competition authority cannot justify a refusal to grant access to that evidence'. [39]

73. On the contrary, the Court of Justice takes the view that 'the fact that such a refusal is liable to prevent those actions from being brought, by giving the undertakings concerned, who may have already benefited from immunity, at the very least partial, from pecuniary penalties, an opportunity also to circumvent their obligation to compensate for the harm resulting from the infringement of Article 101 TFEU, to the detriment of the injured parties, requires that refusal to be based on overriding reasons relating to the protection of the interest relied on and applicable to each document to which access is refused', [40] since '[i]t is only if there is a risk that a given document may actually undermine the public interest relating to the effectiveness of the national leniency programme that non-disclosure of that document may be justified'. [41]

74. Ultimately, what emerges from the foregoing is that it is necessary to strike a balance between, on the one hand, the public interest in leniency programmes as a way of promoting the effectiveness of competition law and, on the other, the right of individuals to bring actions for damages in respect of losses suffered as a result of infringements of competition law, which constitutes another, albeit indirect, way of serving the public interest in preserving the effectiveness of competition law.

35 — *Donau Chemie*, paragraph 42.
36 — *Donau Chemie*, paragraph 43.
37 — *Donau Chemie*, paragraph 44.
38 — *Donau Chemie*, paragraph 45.
39 — *Donau Chemie*, paragraph 46.
40 — *Donau Chemie*, paragraph 47.
41 — *Donau Chemie*, paragraph 48.

75. In the present case, EnBW argues that, in refusing to grant access to documents provided in the context of an application for immunity or leniency, the Commission relied on abstract considerations relating to the harm that might be caused to leniency programmes if the persons and undertakings concerned could not be confident that those documents would not be made widely accessible. EnBW asserts, to the contrary, that without those documents it could not even attempt to bring an action for damages that would have the slightest chance of succeeding in respect of the losses that it claims to have suffered as a result of the cartel censured by the Commission.[42]

76. In short, the Commission did not evoke reasons which related to possible detrimental effects on a specific leniency programme (and it is to *a* leniency programme that paragraph 46 of *Donau Chemie*, which I quoted at the end of point 72 above, expressly refers), but a general and abstract reason relating to generic 'leniency proceedings'. Against this, EnBW puts forward reasons justifying its need for particular documents in order to pursue *a* claim for damages.

77. Here we have a situation involving a refusal *on principle* that makes it impossible for a specific request for access – presented as the only possible basis for a claim for damages – to 'be assessed on a case-by-case basis, taking into account all the relevant factors in the case', as required by *Donau Chemie*,[43] referring to paragraph 31 of *Pfleiderer*.

78. A point of principle seems to me to be relevant in this regard. Against the foregoing it could be argued that the effectiveness of leniency programmes can be safeguarded only if it is guaranteed that, as a general rule, the documentation provided will be used by the Commission alone. This would, of course, be the ultimate safeguard. However, other safeguards should also be considered that are less extensive but still attractive for those wanting to take advantage of those programmes. In the final analysis, the rationale underlying leniency programmes is a calculation as to the extent of the harm that might arise from an infringement of competition law. Considered in those terms, to guarantee that the information provided to the Commission can be passed on to third parties only if they can adequately prove that they need it in order to bring an action for damages could constitute a sufficient safeguard, particularly considering that the alternative might be a penalty higher than that which might ensue were the action for damages to be successful. Admittedly, it is possible that a safeguard of that kind might result in fewer parties deciding to take advantage of leniency programmes. However, the objective of maximum effectiveness for that mechanism should not be regarded as justification for a complete sacrifice of the rights of those concerned to be compensated and, more generally, for an impairment of their rights to an effective remedy under Article 47 of the Charter of Fundamental Rights of the European Union.

79. In the light of the foregoing, I take the view that the judgment under appeal should not be criticised for concluding that the Commission failed to justify its refusal to grant access to the documents provided in relation to an application for immunity or leniency and, accordingly, I believe that the third ground of appeal should be rejected.

D – *The fourth ground of appeal*

80. By the fourth ground of appeal, the Commission alleges misinterpretation of the scope of the protection afforded to commercial interests.

42 — See, specifically, paragraph 20 of its response.

43 — *Donau Chemie*, paragraph 43.

81. The General Court took the view that the Commission had not established, to the required standard, that access to the documents requested would be likely specifically and actually to undermine the commercial interests of the undertakings which took part in the cartel. It was of the opinion that, since the documents requested had been in existence for some time, the Commission was obliged to undertake a concrete, individual examination of the documents for the purposes of the exception relating to the protection of commercial interests and that the examination already undertaken in the course of the proceedings was not sufficient.

82. Furthermore, the General Court's starting point was that 'the interests of the undertakings that had participated in the cartel … in non-disclosure of the documents requested *cannot be regarded as commercial interests in the true sense of those words*. [44] Indeed, taking account in particular of the age of most of the information held on the file in question, the interest which those companies might have in non-disclosure of the documents requested seems to reside not in a concern to maintain their competitive position on the … market … but, instead, in a desire to avoid actions for damages being brought against them before the national courts'.[45] In any event, that would not constitute 'an interest deserving of protection, having regard, in particular, to the fact that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition'.[46]

83. I do not agree.

84. As I argued in my Opinion in *Agrofert*, 'the fact that a document remains "sensitive" for longer is a fundamental element in the architecture of the system of exceptions already established in Article 4 of Regulation No 1049/2001. Thus, documents which have been drawn up for internal use in a procedure (paragraph 3) are protected until the procedure is concluded, but only those documents which contain opinions continue to be protected even after the procedure has come to an end. In the latter case, the exception will apply, in common with all the exceptions contained in Article 4, "for the period during which protection is justified on the basis of the content of the document" [(paragraph 7)]. In accordance with Article 4(7), that period may be extended for a maximum of 30 years. However, that maximum period may be extended, "if necessary", for three types of documents: those "covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents" (paragraph 7)'.[47]

85. It can be seen from this that '[c]ommercial interests … warrant greater protection *ratione temporis* under the rules of access set out in Regulation No 1049/2001. … [Thus], the fact that the merger procedure has been concluded does not necessarily represent, for the documents in that procedure, the turning point with respect to access that it does, on the other hand, for other types of document, in particular legal opinions for internal use'.[48]

86. I do not think that the position is any different in the case of cartel proceedings. The fact that, in the situation under consideration, the information sought relates to commercial activity that took place between 1988 and 2004 does not, of itself, mean that it cannot remain "current" for longer than information contained in documents which are strictly administrative or internal to the procedure.[49]

87. That being so, it cannot be that the mere passage of time transforms the commercial interests of the undertakings concerned into nothing more than a concern to avoid the effects of a claim for damages.

44 — Emphasis added.

45 — Judgment under appeal, paragraph 147.

46 — Judgment under appeal, paragraph 148.

47 — Opinion in *Agrofert*, point 78.

48 — Opinion in *Agrofert*, point 79.

49 — To this effect, see my Opinion in *Agrofert*, point 77.

88. The General Court was therefore mistaken, in my view, in declining – simply because of the age of the documents – even to consider the possibility that there might be a commercial interest worthy of protection. As a consequence, it also erred in failing to apply the presumption that, owing to the fact that the documents were generated or used in cartel proceedings, their disclosure might undermine the interest protected by such proceedings.

89. This is all irrespective of the fact that the documents were provided voluntarily, unlike the situation where documentation is collected by the Commission in merger proceedings. I do not think that this distinction, which was an argument put forward by EnBW against the Commission's challenge, is relevant.

90. As I explained in response to the second ground of appeal, cartel proceedings share with State aid and merger proceedings the same purpose of safeguarding competition in the EU market. To that end, each has its own tools, such as, in the case of cartel proceedings, leniency programmes based on the voluntary cooperation of undertakings involved in the proceedings.

91. Such programmes, as we have seen in the analysis of the third ground of appeal, are regarded by the Court of Justice as useful tools in combating infringements of competition rules and as such they deserve the protection of the system as a whole.

92. It is true that the Commission did not adequately substantiate the actual harm that might be caused to the leniency programme being applied in the proceedings in question, and for that reason I have proposed that the third ground of appeal be rejected. Nevertheless, that does not mean that the complaint relating to the harm that might be caused to the commercial interests of those participating in the leniency programme must also be dismissed, as the fourth ground of appeal is not concerned so much with the protection of that programme, per se, as with actually protecting those interests, the undermining of which would only indirectly harm the leniency mechanism.

93. In truth, the possibility that disclosure of the information provided by the undertakings in question might objectively undermine their commercial interests cannot be ruled out. The fact that the information was provided voluntarily and with a view to avoiding or minimising a penalty is, in my opinion, no basis for regarding the commercial interests involved as unworthy of protection. Otherwise, undertakings that have cooperated with the Commission would suffer a further penalty, in addition to whatever penalty is ultimately considered appropriate, in the form of the damage caused to their commercial interests.

94. I therefore take the view that the fourth ground of appeal should be upheld. I do so not because of the failure to apply the presumption that disclosure of the information relating to commercial interests might undermine the interest protected by the cartel proceedings, but rather because of the failure to acknowledge that there are commercial interests at stake here at all.

E – *The fifth ground of appeal*

95. By the final ground of appeal, the Commission alleges that the General Court misinterpreted the circumstances in which the Commission may refuse access to a document even after the decision-making process has come to an end.

96. On this point I must mention the case-law established in *Sweden* v *MyTravel and Commission*[50] on the issue of whether the fact that the procedure to which the document at issue related had or had not been concluded in the form of the adoption of the relevant decision was capable of affecting the outcome of a request for access.

50 — Case C-506/08 P *Sweden* v *MyTravel and Commission* [2011] ECR I-6237.

97. As I explained in my Opinion in *Agrofert*,[51] it is apparent from this case-law that 'the fact that the procedure had been concluded did not *per se* mean that the document had to be disclosed, although there had to be special grounds for refusing disclosure in such circumstances'. I go on to say that '[o]nce the procedure is closed, access to the documents which were produced during the course of that procedure with a view to progressing it towards the adoption of a final and definitive decision cannot then, by definition, jeopardise the outcome of the procedure or, therefore, the decision in which that procedure has culminated. It is from this perspective, therefore, that the legal opinions and internal documents to which access was refused by the Commission must be considered'.[52] Lastly, with regard to 'documents relating to legal advice and those drawn up by the Commission as part of deliberations and consultations in connection with the procedure (Article 4(2), second indent, and (3) of Regulation No 1049/2001), the ruling given by the Court in *Sweden* v *MyTravel and Commission* is readily applicable to this case'.[53]

98. Returning to the facts of the present case, the General Court's assumption was that '[i]t is … only for part of the documents for internal use, namely those containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned, that the second subparagraph of Article 4(3) [of Regulation No 1049/2001] allows access to be refused even after the decision has been taken, where disclosure of the documents would seriously undermine the decision-making process of that institution'.[54]

99. Having clarified that point, the General Court found in the judgment under appeal that the Commission had not established 'that all the documents falling within category 5(a) contained opinions for internal use as part of deliberations and preliminary consultations, within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001',[55] rejecting the Commission's contention that 'that term encompassed (i) all documents containing or seeking an appraisal or a view from its officials or its departments, (ii) all documents used in the preparation of its decision and (iii) all documents securing the participation of other departments in the proceedings'.[56]

100. The General Court nevertheless concluded that, even accepting that 'the grounds put forward by the Commission in the proceedings before the Court, … are admittedly capable of rendering plausible the premiss that many of the category 5(a) documents contain such opinions, the fact remains that those grounds … were not relied on by the Commission in the contested decision and therefore cannot be considered a reason that was decisive in the adoption of that decision. Consequently, ... the conclusion must be that the Commission has failed to establish that all the documents falling within category 5(a) had the status of opinions within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001'.[57]

101. The Commission acknowledges that the explanations given during the proceedings before the General Court were not made explicit in the contested decision.[58] According to the Commission, however, that does not mean that it was not a reason that was decisive in refusing access, as the wording of the decision itself indicates. This was accepted by the General Court, which stated in paragraph 88 of the judgment under appeal that 'it follows implicitly from point 3.2.5 of the contested decision and is explicit in the Commission's reply of 9 November 2011 to the Court's written questions that the Commission considers all the category 5(a) documents to contain opinions for internal use within the meaning of that provision'.

51 — Opinion in *Agrofert*, point 74, citing *Sweden* v *MyTravel and Commission*, paragraphs 113 to 119.

52 — Opinion in *Agrofert*, point 75.

53 — Opinion in *Agrofert*, point 80.

54 — Judgment under appeal, paragraph 153.

55 — Judgment under appeal, paragraph 156.

56 — *Loc. cit.*

57 — Judgment under appeal, paragraph 160.

58 — Point 119 of the Commission's appeal in the present proceedings.

102. I share the Commission's view. Although the question whether it is apparent from the decision that the Commission regards all the documents in question as containing opinions for internal use is clearly quite different from the question whether the Commission has demonstrated the accuracy of that view in the decision itself, the fact remains that it was in the proceedings before the General Court that this point needed to be demonstrated. The fact that the decision set out, as it did, the reasons for relying on the second subparagraph of Article 4(3) of Regulation No 1049/2001 was therefore sufficient for the purposes of refusing the request for access to all the documents falling within category 5(a).

103. Thus, having accepted as – in its own words – 'plausible the premiss that many of the category 5(a) documents contain ... opinions' for internal use, the General Court needed to confirm that point and accordingly to identify the documents to which the exception relied on by the Commission could, in fact, be applied.

104. Having done so, the next step was to consider whether disclosure of those documents was likely to undermine the decision-making process, which was what the General Court did in paragraphs 162 to 167 of the judgment under appeal. The conclusion reached by the General Court is not, to my mind, correct.

105. The General Court took the view that the reasons put forward by the Commission to demonstrate that harm might be caused by disclosure of the documents were general and abstract. In its opinion, the Commission had not shown how the investigation of the cartel could have been undermined if the decision by which the cartel proceedings were brought to a close had been annulled and it had been necessary to take a new decision.[59] The General Court criticises the Commission for attempting 'to compare, or even equate, the current situation – characterised ... by the fact that the Commission has already adopted a decision – to a situation in which a decision has not yet been taken'.[60]

106. However, the judgment of the Court of Justice in *Odile Jacob*, delivered just over a month after the judgment under appeal, has discredited that approach. In that judgment, the Court emphasised the difference between, on the one hand, a request for access to documents prepared in the context of proceedings that have been brought to a close by a final decision and, on the other, a request relating to documents in proceedings where the decision has been the subject of a legal challenge that is still pending.

107. The Court of Justice took the view that '[i]n a situation … where the institution concerned could, according to the result of the legal proceedings, be called upon to recommence its investigation activities with a view to the eventual adoption of a new decision …, it is appropriate to accept that there is a general presumption that the obligation which is placed on that institution to disclose, during that procedure, internal memoranda such as those referred to in … this judgment would seriously undermine the institution's decision-making process'.[61]

108. In the present case, the Commission stated that, as a result of the partial annulment of other decisions taken in the same cartel proceedings,[62] it had been asked to reset the amount of the penalty imposed on the undertakings to which those decisions related and that, had the internal documents in the proceedings (including those relating to penalties) been disclosed prematurely, this would have jeopardised the decision-making process.

59 — Judgment under appeal, paragraphs 165 to 167.

60 — Judgment under appeal, paragraph 167.

61 — *Odile Jacob*, paragraph 130.

62 — By the judgments in Case T-113/07 *Toshiba* v *Commission* [2011] ECR II-3989, and Case T-132/07 *Fuji Electric* v *Commission* [2011] ECR II-4091.

109. In those circumstances, the possibility that any of the decisions concluding proceedings may undergo review by the Courts – even though the decision specifically relating to the undertakings against which the party requesting the document is seeking to bring an action for damages may be a final decision – means that the proceedings, as such, cannot be considered closed.

110. It follows that the General Court should have found that there was good reason to believe that disclosure of the documents containing internal opinions was likely to undermine the decision-making process in relation to new decisions in those proceedings if pending legal challenges concerning decisions other than those relating specifically to undertakings against which EnBW was proceeding were successful.

111. In the light of the foregoing, I take the view that the final ground of appeal should succeed.

VII – Final judgment in the dispute by the Court of Justice

112. Under Article 61 of the Statute of the Court of Justice, 'if the appeal is well founded, the Court of Justice shall quash the decision of the General Court', and 'may itself give final judgment in the matter where the state of the proceedings so permits'.

113. In my opinion, this is a situation in which it is proper for the Court of Justice to give final judgment in the matter.

114. In its action before the General Court, EnBW raised three pleas in law, alleging: (i) infringement of the first and third indents of Article 4(2) and of the second subparagraph of Article 4(3) of Regulation No 1049/2001; (ii) infringement of the last part of the sentence in Article 4(2) of Regulation No 1049/2001; (iii) infringement of Article 4(6) of Regulation No 1049/2001; and (iv) manifest error of assessment with regard to the scope of the request for access to documents.

115. The fourth plea in law must succeed, for the reasons set out in paragraphs 32 to 37 of the judgment under appeal, no appeal having been made to the Court of Justice on that point.

116. The remaining pleas in law must be dismissed for the reasons given in points 49 to 65 and 80 to 109 above.

VIII – Costs

117. In accordance with Article 184(1) and Article 138(2) of the Rules of Procedure, I would suggest to the Court of Justice that, in the light of the basis on which I propose that the appeal should be allowed, the parties and their interveners should each bear their own costs.

IX – Conclusion

118. In the light of the foregoing considerations, I propose that the Court should:

Allow the appeal in part by upholding the second, fourth and fifth grounds of appeal, alleging misinterpretation of Article 4(2) and (3) of Regulation No 1049/2001 in relation to the conditions for accessing documents in cartel proceedings and the protection of commercial interests and of the decision-making process and, consequently:

(1) set aside the judgment of 22 May 2012 in Case T-344/08 *EnBW Energie Baden-Württemberg AG* v *Commission*, by which the General Court annulled Commission Decision SG.E.3/MV/psi D(2008) 4931 of 16 June 2008 refusing access to the case-file in Case COMP/F/38.899 – Gas insulated switchgear;

(2) annul Commission Decision SG.E.3/MV/psi D(2008) 4931 of 16 June 2008 refusing access to the case-file in Case COMP/F/38.899 – Gas insulated switchgear in so far as it entails a manifest error of assessment with regard to the scope of the request for access to documents;

(3) order the parties and the interveners to bear their own costs.