



## Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber, Extended Composition)

28 May 2020\*

(Access to documents — Regulation (EC) No 1049/2001 — Documents in relation to Ireland’s compliance or non-compliance with its obligations under Council Framework Decisions 2008/909/JHA, 2008/947/JHA, 2009/829/JHA — Refusal to grant access — Article 4(2), third indent, of Regulation No 1049/2001 — Exception relating to the purpose of inspections, investigations and audits — General presumption of confidentiality)

In Case T-701/18,

**Liam Campbell**, residing in Dundalk (Ireland), represented by J. MacGuill, Solicitor, and E. Martin-Vignerte, lawyer,

applicant,

v

**European Commission**, represented by A. Spina and C. Ehrbar, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2018) 6642 final of 4 October 2018 refusing access to documents in relation to Ireland’s compliance or non-compliance with its obligations under Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27), Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (OJ 2008 L 337, p. 102) and Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (OJ 2009 L 294, p. 20).

THE GENERAL COURT (Third Chamber, Extended Composition),

composed of S. Papasavvas, President, A.M. Collins, V. Kreuzschitz, G. De Baere (Rapporteur) and G. Steinfatt, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 17 December 2019,

gives the following

\* Language of the case: English.

## Judgment

### Background to the dispute

- 1 The applicant, Mr Liam Campbell, is an Irish national who was arrested in Ireland on 2 December 2016 on the basis of a European arrest warrant relating to three criminal offences, issued by the Lithuanian authorities on 26 August 2013. The applicant is contesting before the Irish courts the surrender request made by the Lithuanian authorities.
- 2 By letter of 9 August 2018, the applicant submitted to the European Commission a request for access to documents pursuant to 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). That request related to all documents held by the European Commission in relation to Ireland's compliance or non-compliance with its obligations under Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27), Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (OJ 2008 L 337, p. 102) and Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (OJ 2009 L 294, p. 20) (together, 'the Framework Decisions'). As an annex to his request, the applicant enclosed a letter of 18 January 2018 from the member of the Commission with responsibility for justice sent to several members of the European Parliament relating to his personal situation and which mentioned the Framework Decisions.
- 3 By letter of 21 August 2018, the Commission replied to the applicant that there were no documents in its possession corresponding to his request.
- 4 By letter of 22 August 2018, the applicant made a confirmatory application requesting that the Commission reconsider its position. The applicant stated that, since the letter from the member of the Commission with responsibility for justice enclosed as an annex to his initial request mentioned that Ireland had still not transposed the Framework Decisions in national law, that meant that the Commission held at least one document relating to the transposition by Ireland of those Framework Decisions.
- 5 By e-mails of 12 September and 3 October 2018, the Commission twice extended the deadline for replying on the basis of Article 8(2) of Regulation No 1049/2001.
- 6 By decision of 4 October 2018 ('the contested decision'), the Commission refused to grant access to the documents requested. The Commission stated that, following a review of the request, it had identified documents relating to Ireland's transposition of the Framework Decisions falling within the scope of the applicant's request. The Commission stated as follows:

'These documents contain exchanges between the responsible services of the European Commission and Ireland and pertain to the files of the three following EU PILOT procedures:

- EU Pilot procedure with the reference number EUP(2015)8138 concerning Council Framework Decision 2008/909/JHA;
- EU Pilot procedure with the reference number EUP(2015)8140 concerning Council Framework Decision 2008/947/JHA;

- EU Pilot procedure with the reference number EUP(2015)8147 concerning Council Framework Decision 2009/829/JHA.’
- 7 The Commission informed the applicant that he was refused access to the documents concerned on the basis of the third indent of Article 4(2) of Regulation No 1049/2001 on the protection of the purpose of inspections, investigations and audits.
- 8 First, the Commission stated that the EU Pilot procedures had been closed on 16 March 2018 and that no decision had yet been taken concerning the opening of a formal infringement procedure under Article 258 TFEU, but that its services were still discussing the possibility of opening such a procedure. It took the view that, on those grounds, an infringement investigation against Ireland with regard to the transposition of the Framework Decisions was still ongoing. The Commission considered that public access to the documents requested by the applicant would negatively influence the dialogue between it and the Member State, for which a climate of trust is essential, and would also alter the bilateral nature of the informal and formal stages of the infringement procedure, as laid down in Article 258 TFEU, and would hinder it in taking a decision on those three files free from undue outside influence.
- 9 The Commission therefore found that all the documents in the files were covered by the general presumption of confidentiality based on the exception provided for in the third indent of Article 4(2) of Regulation No 1049/2001 relating to the protection of inspections, investigations and audits, which meant that a specific and individual assessment of the content of each requested document was not necessary.
- 10 Next, the Commission observed that, in his confirmatory application, the applicant did not refer to any particular overriding public interest that would warrant public disclosure of the specific type of information included in the documents in question and that would outweigh the need to protect that information in the light of the exceptions provided for in Regulation No 1049/2001. The Commission added that it had been unable to establish the existence of an overriding public interest in disclosure of the documents in question.
- 11 Finally, the Commission took the view that partial access was not possible since the documents requested were covered in their entirety by the exception invoked.

### **Procedure and forms of order sought**

- 12 By document lodged at the Court Registry on 26 November 2018, the applicant submitted an application for legal aid. By order of 21 March 2019, the President of the Eighth Chamber of the General Court granted the applicant legal aid.
- 13 By application lodged at the Court Registry on 8 April 2019, the applicant brought the present action.
- 14 As a result of changes in the composition of the chambers of the General Court pursuant to Article 27(5) of the Rules of Procedure of the General Court, the Judge-Rapporteur was assigned to the Third Chamber, to which the present case was accordingly allocated.
- 15 Acting on a proposal from the Third Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a chamber sitting in extended composition.
- 16 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 17 December 2019.

17 The applicant claims that the Court should:

- annul the contested decision;
- order each party to bear its own costs or order the Commission to pay the costs if the action succeeds.

18 The Commission contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

### Law

19 In support of its action, the applicant relies, in essence, on two pleas in law alleging, first, the unlawful application of a general presumption of confidentiality and, second, a manifest error of assessment concerning the existence of an overriding public interest.

20 By its first plea, the applicant states that, in the contested decision, the Commission considered that the documents requested contained exchanges falling within the framework of three EU Pilot procedures and refused access to them on the basis of the third indent of Article 4(2) of Regulation No 1049/2001 by applying a general presumption of confidentiality. He does not dispute that, in accordance with the case-law, documents pertaining to an EU Pilot procedure are covered by a general presumption of confidentiality. However, he claims that that presumption is rebuttable, which has the effect of shifting the burden of proof from the institution to the applicant, who must then establish that disclosure of the documents allegedly covered by the presumption does not undermine the purpose of the investigation.

21 The applicant submits that, in the present case, he is under an unfair burden of proof which he cannot discharge, in breach of his right to a fair trial. First, he claims that that burden of proof requires him to establish that the disclosure of some specific documents, the existence of which he was unaware, do not present any risk to the purpose of the EU Pilot procedure and that those documents are not covered by the general presumption of confidentiality. While the letter of 18 January 2018 from the member of the Commission with responsibility for justice suggested that there were documents relating to the non-implementation of the Framework Decisions, the applicant had no certainty about their existence, their nature, their form or their content. It is not realistic to require the applicant to argue on the merit of a document which he does not know exists.

22 Secondly, the applicant submits that it is impossible to rebut the general presumption of confidentiality and to establish that the documents which he requested do not present risks to the purpose of the investigation when he does not know what those documents are or what they contain. By placing on him an impossible burden of proof, which, contrary to the case-law of the Court, leads to the creation of an irrebuttable presumption, the Commission erred in law.

23 The Commission observes that the existence of a general presumption of confidentiality implies that when an application for access to documents is made on the basis of Regulation No 1049/2001, it is not required to carry out a specific and individual assessment of the content of each requested document. Thus, the argument that it unlawfully relied on a general presumption is unfounded. The applicant does not dispute that, when he submitted his request for access, first, the requested documents were part of the EU Pilot procedures and, second, the Commission had not ruled out

taking a decision to open a formal infringement procedure against Ireland. The Commission did not therefore commit a manifest error of assessment in relying on a general presumption of confidentiality.

- 24 The Commission contends that the applicant has failed to produce any concrete and specific elements which indicate that, in the present case, the disclosure of the documents concerned would not jeopardise the interest in preserving confidentiality during investigations that might lead to the opening of an infringement procedure and permit the general presumption of confidentiality to be rebutted. The Commission observes that, by its very nature, a presumption operates by shifting the burden of proof and that the applicant, who does not contest that the documents requested are part of EU Pilot procedures, does not submit an argument establishing that the presumption is unreasonable or unjustified or that it is 'unfair' to apply it. The applicant cannot refer to the initial request since the request for access gave rise to a new, full examination when the confirmatory application was considered.
- 25 As a preliminary matter, it should be recalled that it is apparent from recital 2 of Regulation No 1049/2001 that openness enables the EU institutions to have greater legitimacy and to be more effective and more accountable to EU citizens in a democratic system (see judgment of 22 January 2020, *MSD Animal Health Innovation and Intervet international v EMA*, C-178/18 P, EU:C:2020:24, paragraph 50 and the case-law cited). To those ends, Article 1 of Regulation No 1049/2001 provides that the purpose of that regulation is to confer on the public as wide a right of access as possible to documents of the EU institutions. It is also clear from Article 4 of that regulation, which introduces a system of exceptions in that regard, that that right is, nevertheless, subject to certain limits based on reasons of public or private interest (see judgments of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 61 and the case-law cited, of 22 January 2020, *MSD Animal Health Innovation and Intervet international v EMA*, C-178/18 P, EU:C:2020:24, paragraphs 51 and 52 and the case-law cited, and of 5 December 2018, *Campbell v Commission*, T-312/17, not published, EU:T:2018:876, paragraph 23 and the case-law cited).
- 26 Nevertheless, since they derogate from the principle of the widest possible public access to documents, those exceptions must be interpreted and applied strictly (see judgments of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 30 and the case-law cited, of 22 January 2020, *MSD Animal Health Innovation and Intervet international v EMA*, C-178/18 P, EU:C:2020:24, paragraph 53 and the case-law cited, and of 5 December 2018, *Campbell v Commission*, T-312/17, not published, EU:T:2018:876, paragraph 23 and the case-law cited).
- 27 Under the exception relied upon by the Commission, namely the third indent of Article 4(2) of Regulation No 1049/2001, the institutions must refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.
- 28 In accordance with well-established case-law of the Court of Justice, in order to justify refusal of access to a document the disclosure of which has been requested, it is not sufficient, in principle, for that document to be covered by an activity mentioned in Article 4(2) and (3) of Regulation No 1049/2001. The institution concerned must also provide explanations as to how access to that document could specifically and actually undermine the interest protected by an exception laid down in that article (see judgments of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 64 and the case-law cited, and of 22 January 2020, *MSD Animal Health Innovation and Intervet international v EMA*, C-178/18 P, EU:C:2020:24, paragraph 54 and the case-law cited).
- 29 However, the Court of Justice has acknowledged that it was open to the EU institution concerned to base its decisions in that regard on general presumptions which apply to certain categories of document, as considerations of a generally similar kind are likely to apply to applications for disclosure which relate to documents of the same nature (see judgments of 27 February 2014,

*Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 65 and the case-law cited, of 22 January 2020, *MSD Animal Health Innovation and Intervet international v EMA*, C-178/18 P, EU:C:2020:24, paragraph 55 and the case-law cited, and of 5 December 2018, *Campbell v Commission*, T-312/17, not published, EU:T:2018:876, paragraph 28 and the case-law cited).

- 30 The objective of such presumptions is thus the possibility, for the EU institution, body, office or agency concerned, to consider that the disclosure of certain categories of documents undermines, in principle, the interest protected by the exception which it is invoking, by relying on such general considerations, without being required to examine specifically and individually each of the documents requested (see judgment of 22 January 2020, *MSD Animal Health Innovation and Intervet international v EMA*, C-178/18 P, EU:C:2020:24, paragraph 56 and the case-law cited).
- 31 As a general rule, in the cases which gave rise to decisions establishing general presumptions of confidentiality, the refusal of access at issue concerned a set of documents which was clearly defined by the fact that they all belonged to a file relating to ongoing administrative or judicial proceedings (see judgment of 16 July 2015, *ClientEarth v Commission*, C-612/13 P, EU:C:2015:486, paragraph 78 and the case-law cited; judgment of 4 September 2018, *ClientEarth v Commission*, C-57/16 P, EU:C:2018:660, paragraph 81).
- 32 In that regard, the Court of Justice, in paragraph 51 of the judgment of 11 May 2017, *Sweden v Commission* (C-562/14 P, EU:C:2017:356), recognised the existence of a general presumption of confidentiality in respect of documents relating to an EU Pilot procedure.
- 33 According to the Court of Justice, the EU Pilot procedure constitutes a cooperation procedure between the Commission and the Member States which makes it possible to ascertain whether EU law has been complied with and correctly applied within those States. That type of procedure seeks efficiently to resolve any infringements of EU law by avoiding, so far as possible, the formal opening of an infringement procedure under Article 258 TFEU. The function of the EU Pilot procedure is therefore to prepare or avoid an infringement procedure against a Member State (judgment of 11 May 2017, *Sweden v Commission*, C-562/14 P, EU:C:2017:356, paragraphs 38 and 39).
- 34 The Court of Justice held that, although, in paragraph 78 of the judgment of 16 July 2015, *ClientEarth v Commission* (C-612/13 P, EU:C:2015:486), it had stated that the general presumption of confidentiality did not apply to documents which, at the time of the decision refusing access, had not been placed in a file relating to an ongoing administrative or judicial procedure, that reasoning did not preclude the application of that presumption to documents relating to an EU Pilot procedure, which were clearly restricted by their connection with an ongoing administrative procedure (judgment of 11 May 2017, *Sweden v Commission*, C-562/14 P, EU:C:2017:356, paragraph 44).
- 35 Thus, so long as, during the pre-litigation stage of an inquiry carried out as part of an EU Pilot procedure, there is a risk of affecting the nature of the infringement procedure, altering its progress or undermining the objectives of that procedure, the application of the general presumption of confidentiality to documents exchanged between the Commission and the Member State concerned is justified in accordance with the decision adopted by the Court of Justice in the judgment of 14 November 2013, *LPN and Finland v Commission* (C-514/11 P and C-605/11 P, EU:C:2013:738). That risk exists until the EU Pilot procedure is closed and there is a definitive decision not to open a formal infringement procedure against the Member State (judgment of 11 May 2017, *Sweden v Commission*, C-562/14 P, EU:C:2017:356, paragraph 45).
- 36 All the cases referred to in paragraphs 32 to 35 above were characterised by the fact that the request for access at issue concerned not just one document, but a set of documents. In that type of situation, the recognition that there is a general presumption that the disclosure of documents of a certain nature will, in principle, undermine the protection of one of the interests listed in Article 4 of Regulation No 1049/2001 enables the institution concerned to deal with a global application and to

reply thereto accordingly (see judgments of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 68 and the case-law cited, and of 11 December 2018, *Arca Capital Bohemia v Commission*, T-440/17, EU:T:2018:898, paragraph 31 and the case-law cited).

- 37 That general presumption does not rule out the possibility of demonstrating that a specific document, disclosure of which has been requested, is not covered by that presumption, or that there is an overriding public interest in disclosure of the document by virtue of Article 4(2) of Regulation No 1049/2001 (see judgments of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 100 and the case-law cited, of 11 May 2017, *Sweden v Commission*, C-562/14 P, EU:C:2017:356, paragraph 46 and the case-law cited, and of 19 September 2018, *Chambre de commerce et d'industrie métropolitaine Bretagne-Ouest (port de Brest) v Commission*, T-39/17, not published, EU:T:2018:560, paragraph 103 and the case-law cited).
- 38 However, the requirement to ascertain whether the general presumption in question actually applies cannot be interpreted as meaning that the Commission must examine individually all the documents requested in each individual case. Such a requirement would deprive that general presumption of its proper effect, which is to permit the Commission to reply to a global request for access in a manner equally global (see judgments of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 101 and the case-law cited, and of 19 September 2018, *Chambre de commerce et d'industrie métropolitaine Bretagne-Ouest (port de Brest) v Commission*, T-39/17, not published, EU:T:2018:560, paragraph 120 and the case-law cited).
- 39 Finally, as can be seen from the case-law referred to in paragraphs 29 and 30 above, however, recognition of a general presumption in respect of a new category of documents presupposes that it has first been shown that it is reasonably foreseeable that disclosure of the type of document falling within that category would in fact be liable to undermine the interest protected by the exception in question. Furthermore, as general presumptions constitute an exception to the rule that the EU institution concerned is obliged to carry out a specific and individual examination of every document which is the subject of a request for access and, more generally, to the principle that the public should have the widest possible access to the documents held by the institutions of the European Union, they must be interpreted and applied strictly (see judgment of 4 September 2018, *ClientEarth v Commission*, C-57/16 P, EU:C:2018:660, paragraph 80 and the case-law cited).
- 40 It follows from that case-law that, where an institution considers that a general presumption of confidentiality is applicable, it is able to reply in a global manner to a request for access, in the sense that that presumption relieves it from providing explanations as to how access to a document covered by that request specifically undermines the interest protected.
- 41 However, contrary to the Commission's submission at the hearing, the application of a presumption of confidentiality cannot be interpreted as permitting the institution to reply, in a global manner, that all the documents covered by the request for access are part of a file covered by a general presumption of confidentiality, without having to identify them or draw up a list of those documents.
- 42 In the absence of such identification, the applicant is not able to argue that a document is not covered by the general presumption of confidentiality and cannot therefore rebut that presumption.
- 43 It must be recalled that the Court of Justice has held that, in the field of State aid, the general presumption that the disclosure of documents in an administrative file would, as a general rule, undermine the protection of the purposes of investigations is not irrebuttable and does not rule out the possibility that some of the specific documents contained in the Commission's file relating to a procedure for reviewing State aid may be disclosed (see judgment of 13 March 2019, *AlzChem v Commission*, C-666/17 P, not published, EU:C:2019:196, paragraph 38 and the case-law cited).

- 44 More generally, although the application of a general presumption of confidentiality permits the institution to dispense with carrying out an individual examination of each document, it cannot, however, exempt it from indicating to the applicant which documents it identified as being part of a file covered by that presumption and from providing him or her with the list of those documents.
- 45 It must be held that it is only once the institution has identified which documents were covered by the request for access that it can classify them into categories according to their common characteristics, their same nature or their belonging to the same file and that it can then apply a general presumption of confidentiality to them.
- 46 In the absence of such identification, as the applicant claims, the presumption of confidentiality would be irrebuttable.
- 47 In the present case, it must be borne in mind that, in its initial reply, the Commission had stated that it did not hold any documents corresponding to the applicant's request for access. In the contested decision, the Commission stated that its Secretariat-General had finally identified documents relating to the implementation of the Framework Decisions in Ireland, thus falling within the scope of the applicant's confirmatory application. The Commission stated merely that 'these documents contain exchanges between [its] services and Ireland and pertain to the three [...] EU Pilot procedures'. It inferred from this that the documents requested were covered by the exception laid down in the third indent of Article 4(2) of Regulation No 1049/2001.
- 48 It follows that, in the contested decision, the Commission did not identify the documents covered by the applicant's request. Indeed, although the Commission claims to have identified the documents covered by the applicant's request for access, it does not specify which types or categories of documents were identified by its services, or their number or date.
- 49 The Commission maintained at the hearing that the identification of each document would risk undermining the trust between the Member States and the Commission and would be detrimental to the protection of the informal dialogue which takes place between them in the context of EU Pilot procedures.
- 50 It is true that it follows from the case-law that the application of general presumptions is essentially dictated by the overriding need to ensure that the procedures at issue operate correctly, and to guarantee that their objectives are not jeopardised. Accordingly, a general presumption may be recognised on the basis that access to the documents involved in certain procedures is incompatible with the proper conduct of such procedures and the risk that those procedures could be undermined, it being understood that general presumptions ensure that the integrity of the conduct of the procedure can be preserved by limiting intervention by third parties (see judgment of 4 October 2018, *Daimler v Commission*, T-128/14, EU:T:2018:643, paragraph 139 and the case-law cited).
- 51 However, it must be observed, first, that the Commission cannot be unaware that by relying, in the contested decision, on the application of the general presumption of confidentiality linked to the existence of an EU Pilot procedure, it informed the applicant of the existence of the procedure itself and therefore of the existence of a dialogue between its services and the Member State concerned with regard to the failure to transpose the Framework Decisions. It also mentioned that those proceedings closed on 16 March 2018, and the possibility of opening a formal infringement procedure against Ireland.
- 52 Second, contrary to the Commission's assertion at the hearing, the provision of a list of documents identified as being the documents requested, indicating, for example, their date, their nature and the institution or administration which drafted them, without disclosing their content, would not constitute disclosure of confidential information.

- 53 It should be borne in mind that, according to the case-law cited in paragraph 35 above, the existence of a risk of altering the nature of the infringement procedure, altering its conduct and undermining the purpose of that procedure concerns only the risk associated with the disclosure of the content of the documents and not the risk associated with their identification alone.
- 54 In that regard, it is apparent from the judgments of 11 May 2017, *Sweden v Commission* (C-562/14 P, EU:C:2017:356, paragraphs 11 and 12), and of 4 October 2018, *Daimler v Commission* (T-128/14, EU:T:2018:643, paragraph 14), that the Commission had identified the documents covered by the requests for access to documents, before applying the general presumption of confidentiality linked to the existence of an EU Pilot procedure.
- 55 Lastly, it cannot be held that the obligation for the Commission to identify, in its reply to the request for access, the documents which it considers fall within a category covered by a general presumption of confidentiality would deprive that presumption of its effectiveness within the meaning of the case-law cited in paragraph 38 above. Should the Commission take the view that the requested documents relate to an EU Pilot procedure, the identification of those documents does not preclude it from deciding to refrain from carrying out a specific and individual examination of those documents.
- 56 Furthermore, it should be noted that in the contested decision the Commission stated merely that the documents identified as corresponding to the applicant's request 'contain[ed] exchanges between [its] services and Ireland and pertain to the files of the three [...] EU Pilot procedures'. However, such wording did not enable the applicant to assess whether there were other documents which might be covered by his request or whether all the documents covered by that request related to those procedures.
- 57 Moreover, by virtue of its purpose, a file in an EU Pilot procedure necessarily contains exchanges between the Member State concerned and the Commission's services. It would appear that, as regards the examination of the applicant's confirmatory application, the Commission merely stated that EU Pilot procedures had been opened in relation to the transposition by Ireland of the Framework Decisions, and that it concluded that a presumption of confidentiality applied. Such a reply from the Commission is not sufficient to establish that it had first carried out a specific examination of the applicant's request or that it actually identified the documents covered by the request for access.
- 58 It follows that the wording used by the Commission in the contested decision is not sufficient to enable the documents covered by the applicant's request for access to be identified.
- 59 It should also be noted that, in the present case, the applicant's request for access did not concern 'the documents relating to those EU Pilot procedures', but rather 'all documents in relation to Ireland's compliance or non-compliance with its obligations under the Framework Decisions'. Contrary to the Commission's contention, the applicant did not accept that the documents covered by his request were part of the administrative files relating to the three EU Pilot procedures.
- 60 Thus, the applicant's request for access did not relate solely to the documents relating to the procedure seeking to establish Ireland's failure to transpose those Framework Decisions, but was broader than the interpretation given to it by the Commission.
- 61 Furthermore, the Commission relied, at the hearing, on the judgment of 25 March 2015, *Sea Handling v Commission* (T-456/13, not published, EU:T:2015:185), in order to argue that the question of the application of a general presumption of confidentiality was identical to that raised in the present case and that, in that case, the Court had validated its refusal to send a list of correspondence between it and a complainant that was exchanged in the context of a State aid investigation procedure.

- 62 However, the case that gave rise to the judgment of 25 March 2015, *Sea Handling v Commission* (T-456/13, not published, EU:T:2015:185), is not comparable to the present case. In that case, the documents referred to, or at least their type, were already clear from the request for access and the applicant, in principle, had the opportunity of arguing that a document was not covered by the general presumption of confidentiality (judgment of 25 March 2015, *Sea Handling v Commission*, T-456/13, not published, EU:T:2015:185, paragraphs 5, 74 and 75).
- 63 It follows from all of the foregoing that, in order to apply the presumption in relation to documents requested that are part of an EU Pilot procedure, the Commission was required, first of all, to identify in the contested decision the documents covered by the request for access, then to classify them by category or as part of a particular administrative file and, finally, to find that they were part of an EU Pilot procedure, hence permitting it to apply a general presumption.
- 64 However, in the present case, the Commission merely observed that there were three EU Pilot procedures concerning the transposition of the Framework Decisions by Ireland and that the applicant's request therefore concerned documents covered by the general presumption of confidentiality. The contested decision merely refuses access to three EU Pilot procedures, but contains no justification with regard to the documents requested by the applicant.
- 65 The applicant is therefore correct to maintain that, in so far as he did not know which documents the Commission had identified as corresponding to his request for access, he was unable to rebut the presumption of confidentiality.
- 66 Furthermore, it must be observed that the identification in the contested decision of the documents covered by the request for access is necessary to enable the Court to exercise its power of review and verify whether the Commission was justified in taking the view that the requested documents were part of an EU Pilot procedure.
- 67 It must therefore be concluded that, by failing to identify the documents covered by the applicant's request for access in the contested decision, the Commission failed correctly to apply the general presumption of confidentiality in respect of documents relating to an EU Pilot procedure and that it therefore erred in law in its application of the third indent of Article 4(2) of Regulation No 1049/2001.
- 68 It follows that the first plea in law must be upheld and the contested decision annulled, without there being any need to examine the second plea in law put forward by the applicant.

### Costs

- 69 Under Article 134(1) of the Rules of Procedure, 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 Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition),

hereby:

- 1. Annuls Decision C(2018) 6642 final of the European Commission of 4 October 2018 refusing access to documents in relation to Ireland's compliance or non-compliance with its obligations under Council Framework Decision 2008/909/JHA of 27 November 2008 on the**

**application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions and Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention;**

**2. Orders the Commission to pay the costs.**

Papasavvas

Collins

Kreuschitz

De Baere

Steinfatt

Delivered in open court in Luxembourg on 28 May 2020.

E. Coulon  
Registrar

M. van der Woude  
President