Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 17 November 2016 [1]

Case C-562/14 P

Kingdom of Sweden
v

European Commission

(Appeal — Access to documents of the institutions of the European Union — Regulation (EC) No 1049/2001 — Exception to the right of access — Article 4(2), third indent — Protection of the purpose of investigations — Documents in a file in an EU Pilot procedure — Refusal of access — Obligation of the institution concerned to examine individually the documents referred to in the request for access)

1. By this appeal the Kingdom of Sweden asks the Court to set aside the judgment of the General Court of 25 September 2014, *Spirlea* v *Commission*.[2] In that decision, the General Court dismissed the action brought by Mr Darius Nicolai Spirlea and Mrs Mihaela Spirlea ('Mr and Mrs Spirlea') seeking annulment of the European Commission's decision of 21 June 2012 refusing to grant them access to documents in a file concerning an EU Pilot procedure ('the decision at issue').[3]

2. Article 4 of Regulation (EC) No 1049/2001[4] lays down a number of exceptions to the right of public access to documents held by the EU institutions. The Court has established in its case-law that the EU institutions may refuse requests for access on the basis of general presumptions against disclosure where the documents concerned fall within one of five categories.[5] In such cases the institution concerned does not have a duty to inspect the documents in question individually when examining requests for access.[6]

1 — Original language: English.

2 — T-306/12, EU:T:2014:816 ('the judgment under appeal').

3 — See further points 9 to 12 below.

4 — Regulation 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).

5 — Those categories are as follows: (i) documents in an administrative file relating to a procedure for reviewing State aid; (ii) pleadings lodged by an institution in court proceedings; (iii) documents exchanged between the Commission and notifying or third parties in the course of merger control proceedings; (iv) documents concerning infringement proceedings during the pre-litigation phase; and (v) documents relating to proceedings under Article 101 TFEU. See judgment of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486 ('*ClientEarth*'), paragraph 77 and the case-law cited. See further points 38 to 41 below.

6 — See for example, judgment of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738 ('*LPN*'), paragraph 39.

3. The principal issue in this appeal is whether the Court should add a sixth category of documents to which the general presumption of non-disclosure should apply, namely documents held by the Commission in the context of an EU Pilot procedure.[7] To answer that question, it is necessary to decide whether the characteristics of that procedure and infringement proceedings under Article 258 TFEU (particularly the pre-infringement phase of those proceedings) are so similar that the general presumption against disclosure, which applies to the latter, should also encompass documents in an EU Pilot procedure.

Legislation

Treaty on the Functioning of the European Union

4. Article 15(1) TFEU lays down, inter alia, the general principle that the EU institutions must conduct their work as openly as possible. Under the first and second subparagraphs of Article 15(3) TFEU, EU citizens enjoy a right of access to documents of the EU institutions. That right is subject to certain principles and conditions, including limits on grounds of public or private interest determined by the European Parliament and the Council by means of regulations.

The Charter of Fundamental Rights of the European Union

5. The right of access to documents is enshrined in Article 42 of the Charter of Fundamental Rights of the European Union.[8]

Regulation No 1049/2001

6. The recitals of Regulation No 1049/2001 state that the purpose of that regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles of, and limits to, such access in accordance with Article 15 TFEU (recital 4). In principle, all documents of the institutions should be accessible to the public, but certain public and private interests should nonetheless be protected by way of exceptions (recital 11).

7. Article 1 of the regulation defines the principles, conditions and limits on grounds of public or private interest governing the right of access to the institutions' documents provided for in Article 15 TFEU in such a way as to ensure 'the widest possible access to documents'.

8. Article 4 is entitled 'Exceptions'. Under Article 4(2), third indent:

'The institutions shall 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.'

7 — See point 9 below.

8 — OJ 2010 C 83, p. 389 ('the Charter').

EU Pilot procedure

9. The Commission first suggested introducing a pilot exercise to improve the application of EU law in its communication 'A Europe of results – applying [EU] Law'.[9] There is no specific legal basis in the Treaties for the procedure, which has been operating since April 2008. In 2010 the Commission stated that:

'… The idea behind the project is that this system should be used for all questions and problems concerning the application of EU law, where information or explanations are required from the Member State … It is also considered consistent to ensure that at least a minimum opportunity is provided for a quick and positive solution to be identified before any infringement proceeding is initiated, replacing current administrative practices [the so called "pre-Article 258 TFEU letter"] …'[10]

Factual background and the decision at issue

10. Mr and Mrs Spirlea had a child who died in August 2010, allegedly as a result of a therapeutic treatment involving the use of autologous stem cells that was administered in a private clinic in Düsseldorf (Germany) ('the private clinic'). By letter of 8 March 2011, they lodged a complaint with the Commission's Directorate-General for Health in which they claimed, in essence, that the private clinic had been able to provide that treatment as a result of the German authorities' failure to comply with their obligations under Regulation (EC) No 1394/2007[11] concerning advanced therapy medicinal products. The Commission then opened an EU Pilot procedure[12] to establish whether Regulation No 1394/2007 had been infringed. Under that procedure, the Commission sent two requests for information to the German authorities on 10 May and 10 October 2011. The latter responded to those requests on 7 July and 4 November 2011 respectively.

11. Mr and Mrs Spirlea requested access, under Regulation No 1049/2001, to the documents containing information on the processing of their complaint. On 26 March 2012, by two separate letters, the Commission refused that request. On 30 April 2012, the Commission informed Mr and Mrs Spirlea that it had not been able to find that the German authorities had infringed EU law, in particular Regulation No 1394/2007.

12. On 21 June 2012 by the decision at issue, the Commission refused to grant access to the documents sought on the basis of Article 4(2), third indent, of Regulation No 1049/2001. It considered, in essence, that disclosure of the two requests for information which the Commission had sent to the German authorities on 10 May and 10 October 2011 in the context of Procedure 2070/11 ('the documents at issue')[13] would be liable to affect the proper conduct of the investigation initiated with the German authorities. It also ruled out partial access to those documents under Article 4(6) of Regulation No 1049/2001. The Commission then stated that there was no overriding public interest, within the meaning of the last clause of Article 4(2) of the regulation, in disclosure of the documents at issue. Finally, on 27 September 2012, the Commission informed Mr and Mrs Spirlea that Procedure 2070/11 had been closed definitively.

9 — I refer to below as 'the Communication of 5 September 2007' (COM(2007) 502 final). The initial 15 Member States participating in the exercise were Austria, the Czech Republic, Denmark, Finland, Germany, Hungary, Ireland, Italy, Lithuania, the Netherlands, Portugal, Slovenia, Spain, Sweden and the United Kingdom. All 28 Member States now participate in what has become known as the EU Pilot procedure.

10 — See paragraph 3.1 of the Commission Staff Working document of 3 March 2010 'Facts on the functioning of the system up to the beginning of February 2010 accompanying document to the Report from the Commission EU Pilot Evaluation Report' (COM(2010) 70 final).

11 — Regulation of the European Parliament and of the Council of 13 November 2007 on advanced therapy medicinal products and amending Directive 2001/83/EC and Regulation (EC) No 726/2004 (OJ 2007 L 324, p. 121).

12 — EU Pilot procedure 2070/11/SNCO ('Procedure 2070/11').

13 — The documents at issue comprise only the Commission's two requests for information, not the Member State's reply. See further point 21 below.

Procedure before the General Court and the judgment under appeal

13. On 6 July 2012 Mr and Mrs Spirlea brought proceedings before the General Court seeking annulment of the decision at issue. Denmark, Finland and Sweden intervened in their support. The Czech Republic and Spain intervened in support of the Commission. Pursuant to an order of the General Court, the Commission produced the documents at issue for inspection. The documents were not disclosed to Mr and Mrs Spirlea or to any of the interveners.

14. Mr and Mrs Spirlea maintained by their first plea that the Commission had erred in law in interpreting Article 4(2), third indent, of Regulation No 1049/2001 as meaning that it could refuse to disclose the documents relating to an EU Pilot procedure without examining them specifically and individually. Rejecting that plea, the General Court ruled that the Commission had not erred in law in so interpreting that provision.[14] The General Court held that, contrary to Sweden's argument, the Commission had established that those documents related to an investigation that was still ongoing and that, consequently, the general presumption of non-disclosure did indeed apply to them.[15] The General Court therefore went on to reject Mr and Mrs Spirlea's complaint that the Commission had failed to weigh the opposing interests correctly in determining the existence of an overriding public interest.[16]

15. By their second plea Mr and Mrs Spirlea complained that the Commission had failed to recognise their right to partial access to the documents at issue. The General Court dismissed that plea as inadmissible.[17] The General Court then rejected Mr and Mrs Spirlea's third plea that the Commission had failed to fulfil its duty to state reasons under Article 296 TFEU.[18] Finally, the General Court dismissed the fourth plea that the Commission had infringed the rules on handling complaints made by EU citizens set out in its 20 March 2002 Communication.[19]

The appeal and the procedure before the Court of Justice

16. The Swedish Government asks the Court to:

— set aside the judgment under appeal;

— declare the decision at issue invalid; and

— order the Commission to pay the costs.

17. Sweden advances three grounds of appeal. The first two grounds argue that the General Court misinterpreted Article 4(2), third indent, of Regulation No 1049/2001 in two respects: first, by taking the view that the Commission, when it relies on the exception for investigations, may base its decision on a general presumption that access should be denied in an EU Pilot procedure and second, by ruling that the Commission's assessment that there was no overriding public interest within the meaning of the final part of Article 4(2) of that regulation was not vitiated by any error. The third ground of

14 — Paragraph 80 of the judgment under appeal.

15 — Paragraph 85 of the judgment under appeal.

16 — Paragraph 102 of the judgment under appeal.

17 — Paragraph 107 of the judgment under appeal.

18 — Paragraph 124 of the judgment under appeal.

19 — Commission communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of [EU] law (COM(2002) 141 final). See paragraph 130 of the judgment under appeal.

appeal submits that the General Court misapplied EU law by ruling that in the context of an action for annulment under Article 263 TFEU, the legality of the contested act must, even where it concerns the examination of a request made under Regulation No 1049/2001, be assessed in relation to elements of fact and of law existing at the date on which that act was adopted.

18. Denmark and Finland support Sweden's appeal.

19. Germany has intervened in support of the Commission, which is also supported by the Czech Republic and Spain.

First ground: misinterpretation of Article 4(2), third indent, of Regulation No 1049/2001 – general presumption of non-disclosure for documents in an EU Pilot procedure

20. In support of the first ground of appeal, Sweden submits that the general principle to be applied when examining requests for access to documents is to ensure the widest possible transparency. Accordingly, exceptions to that principle should be interpreted and applied restrictively.

The judgment under appeal

21. First, the General Court ruled that it was clear that the subject of the proceedings was the Commission's refusal to grant access to its requests to the German authorities for information of 10 May and 10 October 2011, rather than that Member State's observations of 4 November 2011.[20] It observed that, at the time when the decision at issue was adopted, the EU Pilot procedure initiated with regard to Germany was still ongoing. It was not in dispute that the documents at issue concerned an 'investigation' within the meaning of the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001. In any event, it was clear from the Communication of 5 September 2007 that the objective of EU Pilot procedures is to establish whether EU law is being complied with and correctly applied in the Member States.[21]

22. The General Court then examined whether the Commission was nevertheless required to carry out a specific assessment of the content of each of the documents at issue or whether, on the contrary, it was entitled to rely on a general presumption that the objectives pursued by the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001 would be undermined by disclosure. In conducting that examination, the General Court observed that this Court has established that, as an exception to the guiding principle of transparency, it is open to the EU institutions to rely on general presumptions which apply to certain categories of documents.[22] An individual and specific examination of each document may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted. In such cases, the institution concerned may base its decision on a general presumption which applies to certain categories of document, where similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature or falling within the same category.[23] The Court of Justice has acknowledged the existence of such general presumptions in relation to the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001 in certain cases.[24]

20 — Paragraph 44 of the judgment under appeal.

21 — Paragraph 45 of the judgment under appeal.

22 — Paragraph 48 of the judgment under appeal and the case-law cited.

23 — Paragraph 49 of the judgment under appeal and the case-law cited.

24 — In paragraph 50 of the judgment under appeal the General Court referred to four categories of general presumption. The Court of Justice has subsequently added a fifth category: see footnote 5 above.

23. The General Court pointed out that it is no insignificant matter to rely on a general presumption of non-disclosure: such presumptions not only restrict the fundamental principle of transparency laid down in Article 11 TEU, Article 15 TFEU and Regulation No 1049/2001, but they also limit in practice access to the documents in question. Accordingly, the use of such presumptions must be founded on reasonable and convincing grounds and any exception to an individual right or to a general principle under EU law, including to the right of access provided for by Article 15(3) TFEU, read together with Regulation No 1049/2001, must be applied and interpreted strictly. [25]

24. The General Court concluded that: '… the arguments put forward by [Mr and Mrs Spirlea] and the Member States intervening in support of them in this case regarding both the informal nature of the EU Pilot procedure and the differences between that procedure and infringement procedures are not sufficient for the Court to find any error in the premiss of the Commission's reasoning in the [decision at issue] according to which, having regard to the purpose of the EU Pilot procedure, the general presumption of refusal of access which the case-law recognises in the case of infringement procedures, including in the pre-litigation stage thereof, should also apply in EU Pilot procedures. The *ratio decidendi* adopted by the Court in [*LPN and Finland* v *Commission* [26]], … and the similarities between the EU Pilot procedure and infringement procedures under Article 258 TFEU militate in favour of the recognition of that presumption'. [27]

25. The General Court considered first, that the common element in this Court's reasoning in relation to the various categories of documents for which a general presumption of refusal of access is recognised is that the proper conduct of the procedures at issue would be likely to be jeopardised. That unifying element applies equally to EU Pilot procedures. The Commission relied on that same premiss in the decision at issue, when it explained that it was necessary in an EU Pilot procedure for there to be an atmosphere of mutual trust between the Commission and the Member State concerned in order to enable them to start a process of negotiation and compromise with a view to reaching an amicable settlement, without it being necessary to initiate infringement proceedings under Article 258 TFEU. [28] That remains the case even though EU Pilot procedures are not in all respects equivalent to procedures for reviewing State aid or mergers or to court proceedings, nor are the latter equivalent among themselves. That fact, however, had not prevented the Court of Justice from recognising in all of those cases the possibility of relying on general presumptions applying to certain categories of documents. [29]

26. Second, EU Pilot procedures and infringement proceedings under Article 258 TFEU, and particularly the pre-litigation phase thereof, present similarities which justify the adoption of a common approach to both. Those similarities outweigh any differences. [30] Both procedures enable the Commission to perform its role as guardian of the Treaties in the best possible way. The purpose of EU Pilot procedures and infringement proceedings is to achieve compliance with EU law while giving the Member State concerned the opportunity to exercise its rights of defence and avoiding judicial proceedings if possible. In both cases, it is for the Commission, when it considers that a Member State has failed to fulfil its obligations, to assess whether it is appropriate to act against that State. [31] The proceedings are also bilateral in nature, between the Commission and the Member State concerned. [32] Finally, even though the EU Pilot procedure is not in all respects equivalent to infringement proceedings, it may nevertheless lead to the Commission starting the process under Article 258 TFEU, since the Commission may, at the conclusion of an EU Pilot procedure, formally

25 — Paragraphs 52 and 53 of the judgment under appeal.
26 — See footnote 6 above.
27 — Paragraph 56 of the judgment under appeal.
28 — Paragraph 57 of the judgment under appeal and the case-law cited.
29 — Paragraph 58 of the judgment under appeal.
30 — Paragraph 59 of the judgment under appeal.
31 — Paragraph 60 of the judgment under appeal.
32 — Paragraph 61 of the judgment under appeal.

commence an infringement investigation by sending a letter of formal notice and may possibly apply to the Court of Justice for a declaration that the Member State concerned has breached its obligations. That being so, the disclosure of documents in the context of an EU Pilot procedure would be prejudicial to the subsequent phase, that is to say the infringement process. Moreover, if the Commission were required to grant access to sensitive information provided by the Member States and to reveal the arguments which the latter put forward in their defence during an EU Pilot procedure, the Member States might be reticent to make those arguments known initially. [33]

27. Thus, the General Court concluded: '… when the institution concerned invokes the exception relating to investigations provided for in the third indent of Article 4(2) of Regulation No 1049/2001, it may rely on a general presumption in order to refuse access to the documents relating to an EU Pilot procedure, that procedure constituing a stage prior to the possible formal initiation of an infringement procedure'. [34]

28. The General Court went on to reject the arguments of Mr and Mrs Spirlea including the submission that a general presumption concerning the documents relating to an EU Pilot procedure could, in any event, be entertained only where the request for access concerned a 'set of documents', and not just two documents, as in the present case. [35]

The parties' submissions

29. The Swedish Government submits that the General Court erred in law in the following respects. First, it allowed the Commission to rely on a general presumption of non-disclosure in order to refuse Mr and Mrs Spirlea's request for access to documents. The General Court should have ruled that the Commission was obliged to examine the individual contents of each document. Second, whilst there is such a general presumption against the disclosure of documents in the pre-litigation phase of infringement proceedings under Article 258 TFEU, that should not form the basis of a common approach for documents in an EU Pilot procedure, as the differences between the two procedures outweigh any similarities. Third, in so far as a general presumption concerning documents relating to an EU Pilot procedure could be entertained, the request for access must concern a 'set of documents' rather than just two, as in the proceedings at issue.

30. Denmark submits in support of those arguments that EU Pilot procedures cover cases other than possible infringement proceedings and are more wide ranging than the pre-litigation phase of such proceedings. Approximately a quarter of EU Pilot procedures involving Denmark have concerned purely factual matters. In such cases, it cannot be assumed that access to correspondence should be refused on the grounds of a general presumption.

31. Finland adds that it should not be assumed that documents in an EU Pilot procedure contain the preliminary views of the Commission and Member States in relation to infringement proceedings, where disclosure would undermine the objective of an action under Article 258 TFEU. Finland also shares Sweden's view that a general presumption against disclosure applies only where many documents are concerned. The General Court wrongly considered that the relevant criterion as to whether a general presumption of confidentiality applied was qualitative rather than quantitative.

32. The Commission contends that the arguments of the Swedish Government are inoperative and argues that, in any event, it follows from this Court's case-law that an institution can reject a request for access to documents based on a general presumption even where such a request concerns only a few documents.

33 — Paragraph 62 of the judgment under appeal.

34 — Paragraph 63 of the judgment under appeal.

35 — Paragraphs 72 to 76 of the judgment under appeal.

33. The Czech Republic and Spain also contend that the General Court's ruling is correct. They consider in particular that all EU Pilot procedures are intended to check whether Member States are complying with EU law. They add that the practical or functional similarities between the EU Pilot procedure and infringement proceedings mean that the two are comparable.

34. Germany also considers that the judgment under appeal is correct. It points out that the number of infringements has diminished since the introduction of the EU Pilot procedure, as cases can be resolved more rapidly and there is no need to open infringement proceedings. It is therefore crucial to maintain that climate of mutual confidence for the future. An obligation to disclose documents in an EU Pilot procedure could impede the proper conduct of the procedure. There are many similarities between the EU Pilot procedure and the pre-litigation phase of infringement proceedings. Germany disagrees with Sweden's contention that EU Pilot procedures have a wider range of application than infringement proceedings. Only issues likely to be raised under Article 258 TFEU are the subject of EU Pilot procedures. Purely factual requests for information (as mentioned by Sweden and Denmark) cannot be the object of EU Pilot procedures unless they relate to a possible breach of EU law.

35. In reply to Germany's observations, Sweden points to differences between its experience of EU Pilot procedures and those concerning Germany. In Sweden, cases concerning voluminous material and sensitive documents have been the exception. Those differences reflect Member States' differing views of what that procedure entails and they militate against applying a general presumption of confidentiality in all EU Pilot cases. Finland adds that the informal nature of EU Pilot procedures implies that the exchange of information and any discussions between the Commission and a Member State is very different from what happens in infringement proceedings. It follows that a general presumption against disclosure should not apply to EU Pilot documents. [36]

Assessment

Preliminary remarks

36. Article 42 of the Charter guarantees the right of EU citizens to access documents of the institutions. [37] Regulation No 1049/2001 itself expressly states that its purpose is to give the fullest possible effect to the right of public access to documents of the EU institutions. [38] At the same time, certain public and private interests should be protected by way of exceptions to that right and the EU institutions should be in a position to carry out their tasks. [39] Any exceptions must be both appropriate and necessary [40] and, since they derogate from the general principle of the widest possible access to documents, they must be interpreted and applied strictly. [41] It is in principle open to an EU institution to base its decision refusing a request for access to documents under Article 4(2), third indent, of Regulation No 1049/2001 on general presumptions which apply to certain categories of documents, as considerations of a similar kind are likely to apply to requests for disclosure in relation to documents of the same nature. [42]

36 — Finland relies on the Court's judgment in *ClientEarth*, which was delivered after the General Court's decision in the judgment under appeal.

37 — See points 4 and 5 above.

38 — See recital 4.

39 — See recital 11.

40 — See judgment of 6 December 2001, *Council* v *Hautala*, C-353/99 P, EU:C:2001:661, paragraphs 27 and 28.

41 — See judgment of 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 75 and the case-law cited.

42 — See *ClientEarth*, paragraph 69 and the case-law cited.

37. It follows from the General Court's findings in paragraph 45 of the judgment under appeal that Procedure 2070/11 constituted an investigation within the meaning of Article 4(2), third indent, of Regulation No 1049/2001. If there is no general presumption that access to documents generated within that procedure may be refused, it will be for the Commission to inspect each individual document and to decide whether access should be granted. It does not automatically follow that the documents should be disclosed. [43]

General presumptions of non-disclosure

38. The five categories where the Court has refused access to documents on the basis of a general presumption under Article 4(2), third indent, of Regulation No 1049/2001 all concern sets of documents which were clearly defined by the fact that they belonged to a file relating to administrative or judicial proceedings that were pending. Granting a general right of access to documents would thus have been likely to disturb the nature and progress of the procedure at issue. [44]

39. In four of the five categories, the Court examined and interpreted the EU rules governing the procedure at issue together with the provisions concerning access to documents in Regulation No 1049/2001. The State aid rules were at issue in *TGI*; [45] the rules governing proceedings before the EU courts were considered in *API*; [46] the provisions governing merger control proceedings were assessed in *Éditions Odile Jacob*; [47] and the rules relating to cartels were examined in *EnBW*. [48] In so doing, the Court sought to achieve a coherent interpretation of the specific procedural rules at issue and the provisions of Regulation No 1049/2001. The Court's decisions in those cases maintain the balance which the EU legislature intended to subsist between EU rules which governed the procedure at issue and the regulation.

40. There is no legislation governing the EU Pilot procedure and there are no specific procedural rules. Thus, there is no equivalent, in the context of that procedure, to the rules governing procedures for State aid; court proceedings; the merger control procedure; or practices that are incompatible with the common market.

41. As regards the fifth category, the Court ruled that the general disclosure of documents in a file during the pre-litigation phase of infringement proceedings risks altering the nature of that process and changing the way it proceeds and, accordingly, that disclosure would in principle undermine the protection of the purpose of investigations, within the meaning of Article 4(2), third indent, of Regulation No 1049/2001. Disclosure could render even more difficult the process of negotiation and reaching an agreement between the Commission and the Member State concerned putting an end to the infringement alleged, in order to enable EU law to be respected and to avoid legal proceedings before the EU Courts. [49]

42. In so far as there are no specific rules governing the pre-litigation phase of infringement proceedings, the Court was not obliged to examine whether granting general access on the basis of Regulation No 1049/2001 would undermine any particular procedural provisions. That is also the position in relation to the EU Pilot procedure.

43 — See further point 74 below.

44 — See footnote 5 above.

45 — See judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376 ('*TGI*'), paragraphs 55 to 58.

46 — See judgment of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541 ('*API*'), paragraphs 96 to 100.

47 — See judgment of 28 June 2012, *Commission* v *Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393('*Éditions Odile Jacob*'), paragraphs 118 to 121. See also judgment of 28 June 2012, *Commission* v *Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraphs 60 and 64 to 66.

48 — See judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112 ('*EnBW*'), paragraphs 86 to 90 and 93.

49 — See *LPN*, paragraphs 55 to 65.

43. Are the similarities between EU Pilot procedures and infringement proceedings, in particular the pre-litigation phase thereof, such that there should also be a general presumption against disclosure of documents in the former?

44. In my view, whilst there is some overlap between those two procedures the circumstances are not entirely the same.

45. There is no formal definition of an EU Pilot procedure. In its communication 'A Europe of results – applying [EU] law', the Commission distinguishes between inquiries and complaints. Inquiries require clarification of the factual or legal position in a Member State. Complaints concern an alleged breach of EU law which the Member State concerned is expected to remedy within certain deadlines. In the absence of a solution, the Commission may take further action, which may include infringement proceedings.[50] More recently the Commission has stated: 'Before starting formal infringement procedures, the Commission works in partnership with the Member States to solve problems efficiently and in accordance with Union law, through a process of structured dialogue with clear deadlines that was introduced for this purpose. This process is referred to as "EU Pilot".'[51]

46. There is some common ground amongst the Member States involved in the present proceedings in so far as all accept that the EU Pilot procedure has replaced the pre-litigation phase of infringement proceedings. However, Sweden (supported by Denmark and Finland) submits that the EU Pilot procedure is wider in scope than the pre-litigation phase of Article 258 TFEU proceedings and that it also covers other investigations relating to the application of EU law. They state that some EU Pilot procedures concern factual inquiries rather than constituting the pre-litigation phase of infringement proceedings. The differences between the two procedures therefore outweigh any similarities. Denmark points out that a quarter of the EU Pilot procedures in which it has been involved have concerned purely factual matters. Sweden adds that in its experience of the EU Pilot procedure, exchanges of sensitive material are the exception.

47. The Commission and the Czech Republic, Germany and Spain disagree with that view.

48. Whilst it is clear to me that the EU Pilot procedure indeed 'replaces the cumbersome "pre-258 [TFEU] letter procedure" [transmitted] through the Permanent Representations of the Member States with a more structured clear system',[52] the EU Pilot procedure can also be used to establish the factual or legal position in Member States as regards the application of EU law outside the context of infringement proceedings. The Danish Government expressly confirms that it has precisely such experience of the EU Pilot procedure.

49. In the judgment under appeal the General Court also recognised that not all EU Pilot procedures are equivalent to the infringement proceedings.[53] The general aim of monitoring the application of EU law in the former encompasses the more specific objective of the latter, the purpose of which is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under EU law and, on the other hand, to avail itself of its right to defend itself against the objections formulated by the Commission.[54]

50. It is therefore necessary to draw a distinction between EU Pilot procedures which in effect replace the pre-litigation phase of infringement proceedings under Article 258 TFEU and those that do not.

50 — See the Communication of 5 September 2007, paragraph 2.2, p. 7 (see footnote 9 above).

51 — See the report from the Commission monitoring the application of Union law 2014 annual report (COM(2015) 329 final), p. 5.

52 — As stated by the European Parliament's Directorate-General for internal policies, Citizens' rights and constitutional affairs, 'Tools for ensuring implementation and application of EU law and evaluation of their effectiveness', 2013, paragraph 5.3.1.

53 — See paragraph 62 of the judgment under appeal.

54 — See *LPN*, paragraph 62 and the case-law cited.

51. As the scope of the EU Pilot procedure goes beyond that of infringement proceedings, it is not possible to identify precisely in what respects the purpose and progress of EU Pilot procedures would be undermined by disclosure. [55] Furthermore, the absence of specific rules governing the EU Pilot procedure means that the scope of any exception to the general principle of transparency would be particularly uncertain.

52. I therefore do not accept that the EU Pilot procedure in general constitutes a new sixth category of documents to which a general presumption against disclosure should apply. I believe that conclusion to be consistent with the requirement that such a general presumption must be interpreted and applied strictly, since it is an exception to the rule that the institution concerned is obliged to make a specific and individual examination of every document which is the subject of an application for access under Regulation No 1049/2001 and, more generally, to the principle (underpinned by Article 15 TFEU and Article 42 of the Charter) that the public should have the widest possible access to the documents held by the EU institutions.

53. It follows that by concluding, in paragraph 63 of the judgment of appeal, that a general presumption against disclosure applies to documents in a file in an EU Pilot procedure the General Court erred in law.

54. However, the position will be different where an EU Pilot procedure replaces the pre-litigation phase of infringement proceedings. In such circumstances a general presumption of confidentiality would indeed apply, as full disclosure might jeopardise the possibility of negotiations between the Commission and the Member State concerned in that phase of proceedings under Article 258 TFEU being conducted in a climate of mutual trust and, consequently, undermine the protection of the purpose pursued by the institution's investigations. [56]

55. Does a general presumption against disclosure relating to documents in the pre-litigation phase of infringement proceedings apply to Mr and Mrs Spirlea's request under Regulation No 1049/2001?

56. In my view the answer is 'no'.

57. In *ClientEarth* this Court clarified its case-law relating to general presumptions of non-disclosure where the institutions rely on Article 4(2), third indent, of Regulation No 1049/2001 in order to refuse requests for access to documents. The Court upheld in part ClientEarth's appeal against the judgment of the General Court which had rejected its application for annulment of the Commission's decision refusing to grant full access to certain studies on the conformity of the legislation of various Member States with EU environmental law.

58. The Court divided the studies there at issue into two categories. It drew a distinction between, on the one hand, studies which, when the Commission decision refusing to grant full access was adopted, had already been placed in a file relating to the pre-litigation phase of infringement proceedings opened by sending a letter of formal notice to the Member State concerned. For that category, disclosure would have undermined the protection of the purpose of investigations in the context of infringement proceedings. [57] On the other hand, this Court held that the General Court had erred in law by accepting that the Commission could extend the scope of the presumption of non-disclosure to the second category of studies, namely those which, when the Commission decision was adopted,

55 — See for example point 9 above.

56 — See *ClientEarth*, paragraphs 74 to 76 and the case-law cited.

57 — See *ClientEarth*, paragraphs 71 to 76.

had *not* led to a letter of formal notice being sent. At that point it still remained unclear whether those studies would lead the Commission to open the pre-litigation phase of infringement proceedings. The Commission was therefore obliged to examine each request for access to those studies individually. [58]

59. That reasoning applies by analogy with greater force to Mr and Mrs Spirlea's case. When the decision at issue was adopted on 21 June 2012, the Commission had already informed them (on 30 April 2012) that it considered that there had *not* been a breach of Regulation No 1394/2007 and that infringement proceedings against Germany would not ensue. It therefore seems to me that a general presumption against disclosure could not apply to the documents in the EU Pilot procedure when that decision was adopted. Not only had Procedure 2070/11 not yet led to a letter of formal notice being sent to the German authorities: the Commission had in fact decided *not* to open the pre-litigation phase of infringement proceedings.

60. I therefore consider that, by accepting, in the judgment under appeal, that the Commission could lawfully extend the scope of the general presumption against disclosure to the two documents at issue in Procedure 2070/11, the General Court erred in law.

61. In reaching that conclusion, I do not accept the view of Sweden and Finland that a general presumption against disclosure can apply only where a request for access concerns a large number of documents. Here Mr and Mrs Spirlea sought access to just two documents. In my view the number of documents that form the subject of a request for access is immaterial. Where the exception in Article 4(2), third indent, of Regulation No 1049/2001 is invoked the decisive question, in determining whether a general presumption against disclosure applies, is whether the purpose of the procedure at issue would be undermined by granting a general request for access. That is a qualitative, not a quantitative, criterion. I add that, given the general right of access conferred by the EU legislator, administrative inconvenience in examining a large number of documents is not in general a valid reason for an institution not to comply with its legal obligations concerning transparency. [59]

62. By failing to rule that the Commission was obliged to make a specific and individual examination of each of the two documents requested by Mr and Mrs Spirlea, the General Court erred in law. I therefore consider that the first ground of appeal is founded.

Second and third grounds of appeal: misinterpretation of the last clause of Article 4(2) of Regulation No 1049/2001 – overriding public interest and the facts to be taken into account in the decision at issue

63. If the Court agrees with my conclusion concerning the first ground of appeal, there is no need to consider the second and third grounds. However, I shall examine them briefly for the sake of completeness.

Second ground of appeal

64. By its second ground of appeal, Sweden submits that the General Court erred in its interpretation of the concept of the overriding public interest within the meaning of the last clause of Article 4(2) of Regulation No 1049/2001.

58 — See *ClientEarth*, paragraphs 77 to 82.

59 — That is the position in relation to the interpretation of the exception in Article 4(2), third indent, of Regulation No 1049/2001, notwithstanding the fact that, in cases which concern very long documents or a very large number of documents, Article 6(3) of that regulation permits the institution concerned and the applicant to reach an informal arrangement with a view to finding a fair solution. See the Opinion of Advocate General Kokott in *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2009:520, points 63 to 69.

65. It follows from paragraph 94 of the judgment under appeal that the Commission considered the best way of serving the public interest was for it to complete the EU Pilot procedure without inspecting the documents at issue, or granting Mr and Mrs Spirlea's request. The General Court endorsed the Commission's view that it was in the public interest for that institution to clarify for itself, in the context of the EU Pilot procedure, whether the German authorities had complied with EU law. [60]

66. However, the Commission had already decided not to find that there had been a breach of EU law by the time that it adopted the decision at issue. It seems to me that the public interest had therefore already been served by that stage. The balance of interest had shifted, at least to the extent that the Commission ought to have inspected the documents at issue to determine whether disclosure should be made. I therefore consider that the General Court erred in its assessment of the public interest in the last clause of Article 4(2) of Regulation No 1049/2001.

Third ground of appeal

67. Mr and Mrs Spirlea complained in the proceedings before the General Court that the Commission refused them access to the documents at issue in view of the public interest, even after the EU Pilot procedure had closed (on 27 December 2012). In paragraph 100 of the judgment under appeal, the General Court stated: '… according to settled case-law, in an action for annulment under Article 263 TFEU, the legality of the contested measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted … However, [Procedure 2070/11] was brought to a close after the [decision at issue] was adopted. Consequently, [Mr and Mrs Spirlea's] argument must be rejected'. [61]

68. By its third ground of appeal, Sweden challenges that ruling. It submits that, as well as the circumstances which exist at the time when an EU institution adopts a decision refusing access under Regulation No 1049/2001, facts that occur after that decision is adopted should also be taken into account in proceedings under Article 263 TFEU before the EU Courts reviewing the legality of such decisions. In support of that view, Sweden argues that otherwise new circumstances could be considered only by making a new request to the institution concerned. That would lead to a proliferation of procedures and consequent delay. Sweden adds that the principles in the case-law there cited by the General Court in the judgment under appeal concern State aid proceedings. They should not be applied to decisions under Regulation No 1049/2001, because each type of case has its own special features. [62]

69. The Commission, supported by Germany, disputes that view.

70. Under Article 263 TFEU, the review by the Court of Justice and the General Court is limited to examining the legality of the disputed measure. In conducting its review, the EU judicature will not substitute its own reasoning for that of the author of the contested act. [63] It is settled case-law that that act is to be reviewed in the light of the facts and the state of the law at the time when it was adopted. [64]

60 — See paragraph 98 of the judgment under appeal.

61 — In support of its view the General Court referred to its judgment of 30 September 2009, *France* v *Commission*, T-432/07, not published, EU:T:2009:373, paragraph 43 and the case-law cited.

62 — Sweden refers in particular to cases concerning agreements which prevent, restrict or distort competition within the internal market in contravention of Article 101 TFEU, where it is possible to raise new matters even after an application is introduced, such as the judgment of 15 September 2011, *Koninklijke Grolsch* v *Commission*, T-234/07, EU:T:2011:476 ('*Koninklijke Grolsch*'), paragraphs 37 to 41.

63 — See judgment of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 141 and the case-law cited.

64 — See by analogy judgment of 16 April 2015, *Parliament* v *Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 45 and the case-law cited.

71. If the EU Courts were to take account of circumstances that arise after adoption of the contested act (here, the position when the EU Pilot procedure had closed) that would be tantamount to a substitution of reasoning. It would involve considering matters that were not assessed by the author before or at the time that the contested act was adopted.

72. Decisions refusing access to documents under Regulation No 1049/2001 do not require an exception to be made as regards the scope of the assessment relating to the facts and circumstances. Sweden misreads the General Court's judgment in *Koninklijke Grolsch*. The General Court did not there suggest that cases concerning cartels which infringe Article 101 TFEU constitute an exception to the principle that a contested act must be reviewed in the light of the facts which pertain at the time it is adopted. Rather, as Germany correctly points out, the General Court there merely confirms that during the administrative phase of such proceedings, an addressee may contest existing individual matters of fact or law in a statement of objections as well as during subsequent judicial proceedings.

73. I therefore consider the third ground of appeal to be unfounded.

Postscript

74. The present appeal is *not* about the automatic disclosure of communications between the Commission and a Member State in the context of an EU Pilot procedure. It is about whether the existing five categories under article 4 of Regulation No 1049/2001 should be expanded so that the Commission may rely upon a *presumption* of non-disclosure in such cases. If the appeal is upheld – as I have suggested that it should be – the Commission will still be able, after examining the file, to refuse access to the documents in question where refusal is appropriate.

75. Recent events have shown very clearly the dangers of fostering or acquiescing in a situation in which the ordinary citizen feels that government is remote and does not communicate or engage with him. The additional administrative inconvenience for the Commission's services in having to examine individual documents and reach a decision on disclosure is a small price to pay for increased transparency and trust between the EU administration and the EU citizen.[65] I urge the Court to bear these principles in mind when deciding this appeal.

Costs

76. In accordance with Articles 138(1) and 140(1) of the Rules of Procedure, the Commission as the unsuccessful party in this appeal should pay the costs of these proceedings. The Governments of the Czech Republic, Denmark, Finland, Germany and Spain should each bear their own costs.

Conclusion

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

— allow the appeal;

— order the Commission to pay the costs;

— order the Governments of the Czech Republic, the Kingdom of Denmark, the Republic of Finland, the Federal Republic of Germany and the Kingdom of Spain to each bear their own costs.

65 — See point 4 above.