



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

25 September 2014*

(Access to documents — Regulation (EC) No 1049/2001 — Article 4, paragraph 2, third indent — Requests for information sent by the Commission to Germany in the context of an EU Pilot procedure — Refusal of access — Obligation to carry out a specific, individual examination — Overriding public interest — Partial access — Obligation to state reasons)

In Case T-306/12,

Darius Nicolai Spirlea and **Mihaela Spirlea**, residing in Capezzano Pianore (Italy), represented initially by V. Foerster and T. Pahl, and subsequently by V. Foerster and E. George, lawyers,

applicants,

supported by

Kingdom of Denmark, represented initially by V. Pasternak Jørgensen and C. Thorning, and subsequently by C. Thorning and K. Jørgensen, acting as Agents,

by

Republic of Finland, represented by S. Hartikainen, acting as Agent,

and by

Kingdom of Sweden, represented initially by C. Meyer-Seitz, A. Falk, C. Stege, S. Johannesson, U. Persson, K. Ahlstrand-Oxhamre and H. Karlsson, and subsequently by C. Meyer-Seitz, A. Falk, U. Persson, L. Swedenborg, C. Hagerman and E. Karlsson, acting as Agents,

interveners,

v

European Commission, represented by P. Costa de Oliveira, acting as Agent, assisted initially by A. Krämer and R. Van der Hout, and subsequently by R. Van der Hout, lawyers,

defendant,

supported by

Czech Republic, represented by M. Smolek, T. Müller and D. Hadroušek, acting as Agents,

and by

* Language of the case: German.

Kingdom of Spain, represented initially by S. Centeno Huerta, and subsequently by J. García-Valdecasas Dorrego, abogados del Estado,

interveners,

APPLICATION for annulment of the Commission's decision of 21 June 2012 refusing to grant the applicants access to two requests for information sent by the Commission to the Federal Republic of Germany on 10 May and 10 October 2011 in the context of EU Pilot procedure 2070/11/SNCO,

THE GENERAL COURT (Eighth Chamber),

composed of D. Gratsias, President, M. Kancheva (Rapporteur) and C. Wetter, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 6 March 2014,

gives the following

Judgment

Legal context

Access to documents

- 1 Article 15(3) TFEU provides:

‘Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.

...’

- 2 Article 42 of the Charter of Fundamental Rights of the European Union, entitled ‘Right of access to documents’, provides:

‘Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.’

3 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) defines the principles, conditions and limits governing the right of access to documents of those institutions.

4 Recital 4 of the preamble to Regulation No 1049/2001 states:

‘The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article [15(3) TFEU].’

5 Recital 11 of the preamble to Regulation No 1049/2001 reads:

‘In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities.’

6 Article 1 of Regulation No 1049/2001 provides:

‘The purpose of this Regulation is:

- (a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as “the institutions”) documents provided for in Article [15(3) TFEU] in such a way as to ensure the widest possible access to documents,
- (b) to establish rules ensuring the easiest possible exercise of this right, and
- (c) to promote good administrative practice on access to documents.’

7 Article 2 of Regulation No 1049/2001 provides:

‘1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this regulation.

...

3. This regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.

...’

8 Article 4(2) of Regulation No 1049/2001 provides:

‘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.’

- 9 Article 4(6) of Regulation No 1049/2001 states:

‘If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.’

The EU Pilot procedure

- 10 The EU Pilot procedure is a procedure for cooperation between the European Commission and the Member States aimed at establishing whether EU law is being complied with and correctly applied in the Member States. Its objective is the effective resolution of possible infringements of EU law, as far as possible without having recourse to the formal initiation of infringement proceedings under Article 258 TFEU.
- 11 The operational aspects of the EU Pilot procedure were initially described in the Commission’s communication of 5 September 2007 entitled ‘A Europe of Results — Applying Community Law’ (COM(2007) 502 final). In particular, point 2.2 of that communication, headed ‘Improving working methods’, states the following:

‘... As is the case now, enquiries and complaints raising a question of the correct application of Community law sent to the Commission would continue to be registered and acknowledged ... Where an issue requires clarification of the factual or legal position in the Member State, it would be transmitted to the Member State concerned. ... [T]he Member States would be given a short deadline to provide the necessary clarifications, information and solutions directly to the citizens or business concerned and inform the Commission. When the issue amounts to a breach of Community law, Member States would be expected to remedy, or offer a remedy, within set deadlines. When no solution is proposed, the Commission would follow-up, taking any further action, including through infringement proceedings, in accordance with existing practice. ... The outcome of cases would be recorded to enable reporting on performance and any follow-up, including the registration and initiation of infringement proceedings. This reporting would identify the volume, nature and seriousness of problems remaining unresolved, indicating if additional specific problem-solving mechanisms or more tailored sector initiatives are needed. All of these measures should contribute to a reduction in the number of infringement procedures and improved efficiency in managing them. The Commission suggests a pilot exercise involving some Member States in 2008, which could, after evaluation of the first year of operation, be extended to all Member States ...’

Background to the dispute

- 12 The applicants, Darius Nicolai Spirlea and Mihaela Spirlea, are the parents of 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’).
- 13 By letter of 8 March 2011, the applicants lodged a complaint with the European Commission’s Directorate-General for Health in which they claimed, in substance, that the private clinic had been able to provide therapeutic treatment as a result of the inaction of the German authorities, which had thereby infringed the provisions of Regulation (EC) No 1394/2007 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).

- 14 Following that complaint, the Commission initiated an EU Pilot procedure under the reference 2070/11/SNCO and contacted the German authorities in order to establish to what extent the events described by the applicants in their complaint and relating to the practices of the private clinic might infringe Regulation No 1394/2007.
- 15 In particular, on 10 May and 10 October 2011, the Commission sent the Federal Republic of Germany two requests for information, with which the latter complied on 7 July and 4 November 2011 respectively.
- 16 On 23 February and 5 March 2012, the applicants requested access, under Regulation No 1049/2001, to documents containing information on the processing of the complaint. In particular, they asked to consult the observations lodged by the Federal Republic of Germany on 4 November 2011 and the Commission's requests for information.
- 17 On 26 March 2012, by two separate letters, the Commission refused the applicants' request for access to the documents at issue.
- 18 On 30 March 2012, the applicants lodged a confirmatory application with the Commission, in accordance with Article 7(2) of Regulation No 1049/2001.
- 19 On 30 April 2012, the Commission informed the applicants that, in the light of the information provided in the complaint and the observations submitted by the German authorities following the Commission's requests for information, it had not been able to find that the Federal Republic of Germany had infringed EU law, and in particular Regulation No 1394/2007, as alleged. The Commission also informed the applicants that, in the absence of additional evidence from them, it proposed to bring its investigation to a close.
- 20 By letter of 21 June 2012, the Commission refused, on the basis of Article 4(2), third indent, of Regulation No 1049/2001, to grant access to the documents sought ('the contested decision'). It submitted, in substance, that disclosure of the two requests for information which the Commission had sent to the Federal Republic of Germany on 10 May and 10 October 2011 in the context of EU Pilot procedure 2070/11/SNCO ('the documents at issue') would be liable to affect the proper conduct of the investigation procedure initiated with regard to the Federal Republic of Germany. It also stated that partial access to the documents at issue, under Article 4(6) of Regulation No 1049/2001, was not possible in this case. Finally, it 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.
- 21 On 27 September 2012, the Commission informed the applicants that EU Pilot procedure 2070/11/SNCO had been definitively closed.

Procedure and forms of order sought

- 22 By application lodged at the Registry of the General Court on 6 July 2012, the applicants brought the present action.
- 23 By documents lodged at the Court Registry on 30, 15 and 19 October 2012 respectively, the Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden applied for leave to intervene in the present proceedings in support of the form of order sought by the applicants.
- 24 By documents lodged at the Court Registry on 22 October and 28 September 2012 respectively, the Czech Republic and the Kingdom of Spain applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission.

- 25 By order of 10 December 2012, the General Court (First Chamber) granted those applications for leave to intervene.
- 26 Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Eighth Chamber and the present case was therefore reallocated to that Chamber.
- 27 By order of 5 February 2014, in accordance with Article 65(b), Article 66(1), and the third subparagraph of Article 67(3) of the Rules of Procedure, the Court ordered the Commission to produce the documents at issue, but provided that those documents should be communicated neither to the applicants nor to the interveners in the present proceedings. The Commission complied with that request within the prescribed period.
- 28 On 6 February 2014, by way of measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, the Court invited the applicants and the Commission to submit their observations on the consequences, for the solution of the present dispute, to be drawn from the Court's judgment of 14 November 2013 in *LPN v Commission* (Joined Cases C-514/11 P and C-605/11 P, ECR). The parties complied with that request within the prescribed period.
- 29 Upon hearing the Report of the Judge-Rapporteur, the Court decided to open the oral procedure.
- 30 The parties presented oral argument and replied to questions put by the Court at the hearing on 6 March 2014.
- 31 The applicants, supported by the Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden, claim that the Court should:
- annul the contested decision;
 - order the Commission to pay the costs.
- 32 The Commission, supported by the Czech Republic and the Kingdom of Spain, contends that the Court should:
- dismiss the action as unfounded;
 - order the applicants to pay the costs.

Law

- 33 The applicants put forward, in substance, four pleas in law, alleging infringement of Article 4(2) of Regulation No 1049/2001, infringement of Article 4(6) of that regulation, breach of the duty to state reasons and infringement of the Commission communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law of 20 March 2002 (COM(2002) 141 final) (OJ 2002 C 244, p. 5) ('the 20 March 2002 Communication').

The first plea, alleging infringement of Article 4(2) of Regulation No 1049/2001

- 34 The first plea is divided into two parts. By the first part, the applicants allege misinterpretation of the exception provided for in the third indent of Article 4(2) of Regulation No 1049/2001, relating to investigations. By the second part, they allege an error of assessment regarding the existence of an overriding public interest, within the meaning of the last clause of Article 4(2) of the regulation, in the disclosure of the documents at issue.

The first part of the first plea, alleging misinterpretation of the third indent of Article 4(2) of Regulation No 1049/2001

– Arguments of the parties

- 35 The applicants maintain that the Commission erred in law in interpreting the third indent of Article 4(2) 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. In substance, they submit that there is no justification for presuming that all documents relating to an EU Pilot procedure cannot, as a matter of principle, be communicated to persons requesting access to them without jeopardising the purpose of such procedures. According to the applicants, EU Pilot procedures cannot be compared to infringement procedures under Article 258 TFEU, and therefore the Commission should have examined in this case each of the documents at issue and, in accordance with settled case-law, should have explained the specific reasons for which access to them could not be granted.
- 36 The applicants also allege that, contrary to what is suggested in the contested decision, no general presumption that access should be refused to documents relating to EU Pilot procedures may be based on the case-law which acknowledges the existence of such a presumption in respect of documents relating to procedures for reviewing State aid (Case C-139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885) or on the case-law which acknowledges the existence of such a presumption in respect of documents relating to infringement procedures (Case T-191/99 *Petrie and Others v Commission* [2001] ECR II-3677, and Case T-29/08 *LPN v Commission* [2011] ECR II-6021).
- 37 The Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden support that argument, pointing out in particular that the reasons which led the Court of Justice and the General Court in the judgments cited by the applicants to recognise the existence of a general presumption that access should be refused do not apply by analogy to the present case, having regard, in particular, to the fact that EU Pilot procedures are different in nature in so far as concerns the material content, the scope, the sensitivity of the case and the legitimate interest in having access to the documents in question. Moreover, if such a presumption were to be so widely accepted, the principle of transparency enshrined in Regulation No 1049/2001 would clearly be deprived of purpose. The Kingdom of Sweden alleges, in the alternative, that, in any event, the Commission ought to have ascertained whether that presumption actually applied in the present case.
- 38 The Commission, the Czech Republic and the Kingdom of Spain contest the applicants' arguments. They point out in particular that EU Pilot procedures are intended to bring an end rapidly and effectively to any infringements of EU law, in particular by reaching an amicable settlement. If the exchanges between the Commission and the Member State concerned were disclosed, the willingness, particularly on the part of the Member States, to cooperate in a climate of trust would be compromised. They also argue that the EU Pilot procedure is merely a variant of the procedure for reviewing State aid and of the infringement procedure and that the general presumption recognised in the case-law with regard to documents relating to those procedures should, for that reason, apply to

documents relating to EU Pilot procedures. Finally, the Commission maintains that it verified that the conditions for applying the presumption were met in this case and that, in any event, it even went as far as to carry out a specific, individual analysis of the documents at issue.

– Findings of the Court

- 39 The applicants, supported by the Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden, complain that, in the contested decision, the Commission applied a general presumption according to which the documents relating to an EU Pilot procedure cannot, as a category of documents, be disclosed to the public, in accordance with the third indent of Article 4(2) of Regulation No 1049/2001. They maintain that, in accordance with settled case-law, the Commission was required to carry out a specific, individual examination of each of the documents to which access had been requested and, in the event of refusal, to explain the reasons for which full or partial access might undermine the objective which that provision is intended to serve.
- 40 In accordance with Article 15(3) TFEU, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the Union's institutions, subject to the principles and conditions to be defined in accordance with that paragraph.
- 41 According to settled case-law, Regulation No 1049/2001 is intended, as is indicated in recital 4 of the preamble and in Article 1, to give the public a right of access to documents of the institutions which is as wide as possible. It is also apparent from that regulation, in particular from recital 11 of the preamble and Article 4, which lays down 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, to that effect, *Commission v Technische Glaswerke Ilmenau*, paragraph 51, Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others v API and Commission* [2010] ECR I-8533, paragraphs 69 and 70, and *LPN v Commission*, cited in paragraph 28 above, paragraph 40).
- 42 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 (*LPN v Commission*, cited in paragraph 28 above; paragraph 42).
- 43 However, in accordance with well-established case-law, in order to justify the 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) of Regulation No 1049/2001. The institution concerned must also supply explanations as to how access to that document could specifically and effectively undermine the interest protected by an exception laid down in that article (*Commission v Technische Glaswerke Ilmenau*, paragraph 53; *Sweden and Others v API and Commission*, cited in paragraph 72 above, and *LPN v Commission*, cited in paragraph 28 above, paragraph 44).
- 44 In the present case, it is necessary to point out, first of all, that, under Regulation No 1049/2001, the applicants requested access both to the requests for information which the Commission sent to the Federal Republic of Germany in the context of EU Pilot procedure 2070/11/SNCO and to the observations which that Member State sent to the Commission on 4 November 2011 in response to those requests. However, although, in the contested decision, the Commission refused the applicants' request with regard to all of those documents, it is clear from the applicants' pleadings that the refusal of access to the Federal Republic of Germany's observations of 4 November 2011 is not the subject of the present proceedings.

- 45 Secondly, it must be observed that, at the time when the contested decision was adopted, an EU Pilot procedure initiated with regard to the Federal Republic of Germany was ongoing (see paragraphs 20 and 21 above). Neither the applicants nor the Member States intervening in support of them dispute that the documents at issue concern an ‘investigation’ within the meaning of the exception laid down in the third indent of Article 4(2) of Regulation No 1049/2001. In any event, it is clear from the communication of 5 September 2007 (see paragraph 11 above) that the objective of EU Pilot procedures is to establish whether EU law is being complied with and correctly applied in the Member States. To that end, the Commission habitually addresses requests for information to the Member States concerned as well as to concerned citizens and undertakings. In particular, in the specific context of EU Pilot procedure 2070/11/SNCO, the Commission examined whether the facts described by the applicants in their complaint might indeed constitute an infringement of Regulation No 1394/2007 by the Federal Republic of Germany. In this connection, it first of all sent requests for information to that Member State. It then proceeded to evaluate the answers obtained. Finally, it set out its conclusions, provisionally, in the report dated 30 April 2012 (see paragraph 19 above). All of those circumstances justify the treatment of the EU Pilot procedure in question in this case as an ‘investigation’ within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.
- 46 Thirdly, the Court must immediately reject the allegation, which the Commission makes in the alternative, that it examined specifically and individually each of the documents to which access had been sought and gave specific, individual reasons for its refusal to disclose each of them, in accordance with the case-law cited in paragraph 43 above. Indeed, as the applicants maintain, it is clear from the wording of the contested decision that the Commission did no more than conclude that the documents requested could not be disclosed to the applicants because the effective resolution of the matter of the Federal Republic of Germany’s possible failure to fulfil obligations, without resorting to proceedings under Article 258 TFEU, required there to be an atmosphere of mutual trust. That being so, the Commission did not explain the reasons which prevented it from giving access, either full or partial, to the documents requested by the applicants, in light of the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001. It must also be observed that the Commission failed to identify, even succinctly, the content of the documents requested by the applicants. Moreover, the explanations offered by the Commission in the contested decision were formulated in such a general fashion that, as the Kingdom of Sweden observes, they could apply to any document relating to an EU Pilot procedure.
- 47 It is in the light of those observations that the Court must examine whether the Commission was nevertheless required to carry out a specific assessment of the content of each of the documents at issue or whether, by contrast, it was entitled to rely on a general presumption that the objectives pursued by the exception laid down in the third indent of Article 4(2) of Regulation No 1049/2001 would be undermined. The present case therefore raises the question of the nature and intensity of the examination which the Commission must carry out when applying that provision in the context of a request for access concerning documents relating to an EU Pilot procedure.
- 48 It is important to observe in this connection that the Court has established that, as an exception to the guiding principle of transparency deriving from the case-law referred to in paragraph 43 above, it is open to the institutions of the Union, in exceptional cases, to rely on general presumptions which apply to certain categories of documents (Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 50; *Commission v Technische Glaswerke Ilmenau*, paragraph 54; *Sweden and Others v API and Commission*, paragraph 74; Case C-404/10 P *Commission v Éditions Odile Jacob* [2012] ECR, paragraph 116; Case C-477/10 P *Commission v Agrofert Holding* [2012] ECR, paragraph 57; and *LPN v Commission*, cited in paragraph 28 above, paragraph 45).
- 49 Indeed, 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 (see, to that effect, the Opinion in *LPN v Commission*, cited in paragraph 28 above, paragraph 55).

- 50 With particular regard to the exception laid down in the third indent of Article 4(2) of Regulation No 1049, which relates to investigations, the Court of Justice has acknowledged the existence of such general presumptions in three specific cases, namely as regards the documents in the administrative file concerning procedures for reviewing State aid (*Commission v Technische Glaswerke Ilmenau*, paragraph 61), the documents exchanged between the Commission and the notifying parties or third parties in the context of merger control procedures (*Commission v Éditions Odile Jacob*, paragraph 123, and *Commission v Agrofert Holding*, paragraph 64), and the pleadings lodged by an institution in proceedings pending before the courts (*Sweden and Others v API and Commission*, paragraph 94). Very recently, the Court of Justice extended the possibility of applying a general presumption to include the documents relating to the pre-litigation stage of infringement procedures under Article 258 TFEU (*LPN v Commission*, cited in paragraph 28 above, paragraph 65).
- 51 Thus, the question which arises in the present case is whether or not an institution may, when invoking the exception relating to investigations provided for in the third indent of Article 4(2) of Regulation No 1049/2001, rely on a general presumption applicable to certain categories of documents in order to refuse access to the documents relating to an EU Pilot procedure, that procedure constituting a stage prior to the possible formal initiation of an infringement procedure.
- 52 In that connection, the Court would point out, first of all, that the possibility of relying on general presumptions applying to certain categories of documents, instead of examining each document individually and specifically before refusing access to it, is no insignificant matter. The effect of such presumptions is not only that they restrict the fundamental principle of transparency laid down in Article 11 TEU, Article 15 TFEU and Regulation No 1049/2001, but also that they limit in practice access to the documents in question. Accordingly, the use of such presumptions must be founded on reasonable and convincing grounds (Opinion in *LPN v Commission*, cited in paragraph 28 above, paragraph 57).
- 53 Next, according to the case-law, 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 in conjunction with Regulation No 1049/2001, must be applied and interpreted strictly (see, to that effect, Case of 15 May 1986 *Johnston* 222/84 ECR 1651, paragraph 36, *Sweden and Turco v Council*, paragraph 36, and *Sweden and Others v API and Commission*, paragraphs 70 to 73).
- 54 Finally, the Court of Justice has established that the system of exceptions laid down in Article 4 of Regulation No 1049/2001, particularly in paragraph 2 thereof, is based on a weighing of the opposing interests in a given situation, that is to say, on the one hand, the interests which would be served by the disclosure of the documents in question and, on the other, those which would be jeopardised by such disclosure. The decision taken on a request for access to documents depends on which interest must prevail in the particular case (*LPN v Commission*, cited in paragraph 28 above, paragraph 42).
- 55 In the present case, the Commission and the interveners describe the EU Pilot procedure as a procedure for cooperation between that institution and certain Member States, including the Federal Republic of Germany, consisting in an informal exchange of information in cases of a possible infringement of EU law. According to the Commission, which refers in this regard to its communication of 5 September 2007 (see paragraph 11 above), it is a procedure which precedes the commencement of the pre-litigation stage of infringement procedures under Article 258 TFEU. It may address the proper application of EU law or the compatibility of national legislation with provisions of EU law. It may be initiated as a result of a complaint made by a citizen or on the Commission's own initiative. If, during an EU Pilot procedure, information comes to light which indicates an infringement of EU law, the Commission may send requests for information to the Member State

concerned and may even call on it to put an end to the irregular situation or indeed request the Member State to adopt appropriate measures to ensure compliance with EU law. The objective of the EU Pilot procedure is to help resolve possible infringements of EU law by the Member States swiftly and effectively and, where possible, without having recourse to infringement proceedings under Article 258 TFEU.

- 56 The Court considers that the arguments put forward by the applicants 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 contested decision 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 v Commission*, cited in paragraph 28 above, and the similarities between the EU Pilot procedure and infringement procedures under Article 258 TFEU militate in favour of the recognition of that presumption.
- 57 It must be observed, in the first place, that the element unifying the Court's reasoning in all of the judgments concerning access to documents in investigation procedures in which a general presumption of refusal of access was recognised is that access is wholly incompatible with the proper conduct of those procedures and is likely to jeopardise their outcome (see, to that effect, the Opinion in *LPN v Commission*, cited in paragraph 28 above, paragraph 68). That unifying element is equally applicable to EU Pilot procedures, in which a general presumption is, essentially, dictated by the need to ensure the proper conduct of such procedures and to ensure that their purpose is not undermined. The Commission relied on that same premiss in the contested decision 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 an amicable settlement of the dispute, without it being necessary to initiate an infringement procedure under Article 258 TFEU, which would be likely to lead to the dispute being brought before the Court.
- 58 Moreover, even though, as the applicants point out, 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 (Opinion in *LPN v Commission*, cited in paragraph 28 above, paragraph 69), a fact which did not prevent the Court from recognising in all of those cases the possibility of relying on general presumptions applying to certain categories of documents. The objective of preserving the integrity of the conduct of the procedure, which led the Court to admit a general presumption in matters of reviewing State aid or mergers or in infringement proceedings, thus militates in favour of the admission of a general presumption of the same kind in the case of EU Pilot procedures.
- 59 In the second place, EU Pilot procedures and infringement procedures 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 the differences referred to by the applicants and by the Member States intervening in support of them.
- 60 The Court would observe, first of all, that both the EU Pilot procedure and the pre-litigation stage of the infringement procedure enable the Commission to perform its role as guardian of the FEU Treaty in the best possible way. The purpose of both procedures is to achieve compliance with EU law while giving the Member State concerned the opportunity to exercise its right 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 (*LPN v Commission*, cited in paragraph 28 above, paragraph 61 and the case-law cited).

- 61 Secondly, the EU Pilot procedure, like the pre-litigation stage of the infringement procedure, is bilateral in nature, between the Commission and the Member State concerned, and that is so despite the fact that, as in the present case, it may have been initiated by a complaint, since in any event a complainant has no rights at a later stage of the infringement procedure (paragraphs 7, 9 and 10 of the 20 March 2002 Communication).
- 62 Thirdly, even though the EU Pilot procedure is not in all respects equivalent to the infringement procedure, it may nevertheless lead to it, since the Commission may, at the conclusion of an EU Pilot procedure, formally commence an infringement investigation by sending a letter of formal notice and may, possibly, apply to the Court for a declaration that the breach of obligations alleged against the Member State concerned has occurred. 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 procedure. Moreover, if the Commission were required to grant access to sensitive information provided by the Member States and to reveal the arguments which they put forward in their defence during an EU Pilot procedure, the Member States might be reticent to make those arguments known initially. Since the preservation of confidentiality during the pre-litigation phase of an infringement procedure has been recognised in the case-law, that same confidential treatment is justified, *a fortiori*, in EU Pilot procedures, the sole purpose of which is to avoid the lengthier and more complex infringement procedure and, where appropriate, the necessity of bringing an action for failure to fulfil obligations.
- 63 Consequently, the Court must conclude that, 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 constituting a stage prior to the possible formal initiation of an infringement procedure.
- 64 The conclusion drawn in paragraph 63 above is not called into question by the other allegations made by the applicants and by the Member States intervening in support of them.
- 65 The applicants argue, in the first place, that, given its informal, unofficial nature and its lack of any legal basis in the treaties, the EU Pilot procedure cannot be compared to the official pre-litigation procedure provided for in Article 258 TFEU.
- 66 It must be observed in this connection that, even though no express provision for the EU Pilot procedure is made in the Treaty, that does not mean that it has no legal basis. Indeed, first of all, the EU Pilot procedure must be understood as a procedure which stems from the powers that are inherent in the Commission's duty to verify compliance by the Member States with EU law (see, to that effect, *Commission v Technische Glaswerke Ilmenau*, paragraph 60). Accordingly, a mechanism or procedure for the exchange of information prior to the initiation of an infringement procedure has always existed and is an indispensable means of carrying out initial factual verification and obtaining the initial evidence of an infringement of EU law. Secondly, the very purpose of the EU Pilot procedure is to provide a formal framework for the initial exchanges of information between the Commission and the Member States concerning possible infringements of EU law. That being so, even though its basis does not lie in Article 258 TFEU, the EU Pilot procedure provides a structure for the steps which the Commission has traditionally taken on receiving a complaint or when acting on its own initiative.
- 67 In the second place, both the applicants and the parties intervening in support of them submit that the case-law cited by the Commission in the contested decision cannot be applied by analogy to the present case. The case-law in question comprises the judgments in *Petrie and Others v Commission*, *Commission v Technische Glaswerke Ilmenau*, *LPN v Commission*, cited in paragraph 28 above, *Commission v Éditions Odile Jacob*, and *Commission v Agrofert Holding*, as well as Case C-64/05 P *Sweden v Commission* [2007] ECR I-11389 and Case T-59/09 *Germany v Commission* [2012] ECR.

- 68 However, it must be observed that that question has already been resolved by the Court, in its judgment in *LPN v Commission*, cited in paragraph 28 above. As explained in paragraph 58 above, the sole purpose of preserving the integrity of the conduct of the procedure, which led the Court to acknowledge a general presumption in matters of reviewing State aid (*Commission v Technische Glaswerke Ilmenau*) or mergers (*Commission v Éditions Odile Jacob* and *Commission v Agrofert Holding*), in judicial proceedings (*Sweden and Others v API and Commission*) and in the pre-litigation stage of an infringement procedure (*LPN v Commission*, cited in paragraph 28 above), pertains also, *mutatis mutandis*, to infringement procedures under Article 258 TFEU. As is clear from paragraphs 59 to 62 above, that conclusion must equally apply to the EU Pilot procedure.
- 69 In the third place, the applicants and the Member States intervening in support of them submit that a general presumption of refusal of access, applicable, in principle, to an entire category of documents, is not justified since the documents in infringement procedures — which include the documents in an EU Pilot procedure — are varied in nature and may include some that are not sensitive and could be disclosed to the public, such as scientific reports or reports clarifying the legal provisions in force.
- 70 However, it must first of all be recalled that, as the Court has already held, where access is refused on the basis of a general presumption, interested parties may, if they wish, demonstrate that a given document disclosure of which has been requested is not covered by that presumption, or that there is a higher public interest justifying the disclosure of the document concerned by virtue of Article 4(2) of Regulation No 1049/2001 (*Commission v Technische Glaswerke Ilmenau*, paragraph 62; *Sweden and Others v API and Commission*, paragraph 103; *Commission v Éditions Odile Jacob*, paragraph 126; and *Commission v Agrofert Holding*, paragraph 68).
- 71 Secondly, it must be observed that, according to the case-law of the Court of Justice, the Commission is not required to base its decision on a general presumption. It may always carry out a specific examination of the documents covered by a request for access and provide such reasons. Moreover, where it finds that the EU Pilot procedure to which a given request for access relates is of a nature which permits the full or partial disclosure of the documents in the file, it is obliged to make that disclosure (see, to that effect, *LPN v Commission*, cited in paragraph 28 above, paragraph 67).
- 72 In the fourth place, at the hearing, the applicants and the Member States intervening in support of them argued that, in the light of paragraph 47 of the judgment in *LPN v Commission*, cited in paragraph 28 above, a general presumption concerning the documents relating to an EU Pilot procedure could, in any event, only be admitted where the request for access concerned a ‘set of documents’, and not just two documents, as in the present case.
- 73 However, that interpretation of the judgment in *LPN v Commission*, cited in paragraph 28 above, cannot be accepted.
- 74 Indeed, the imposition of a condition concerning the minimum number of documents that must be covered by a request for access in order for a general presumption of refusal of access to apply would not only cause practical difficulties in determining what that minimum number should actually be, it would also be irreconcilable with the reasons which underlie the recognition of that general presumption in infringement procedures and EU Pilot procedures, that is to say, the proper conduct of those procedures and the risk of jeopardising their outcome (see paragraph 57 above).
- 75 It is, therefore, a qualitative criterion, namely whether the documents relate to the same EU Pilot procedure, that determines whether a general presumption of refusal of access may apply (*LPN v Commission*, cited in paragraph 28 above, paragraph 45), and not, as the applicants maintain, a quantitative criterion, or in other words the number of documents, larger or smaller, covered by the request for access in question.

- 76 Furthermore, it must be observed that, in *Commission v Éditions Odile Jacob* (at paragraphs 127 and 130), the Court recognised that a general presumption might be applied by the Commission to a category of documents even where the request for access related, as it does in the present case, to two specific documents.
- 77 In the fifth place, the applicants submit that wording such as ‘EU Pilot procedure’ or ‘dialogue conducted in full confidence between the Member State and the Commission’ is nowhere used to define a category in the list of exceptions set out in Article 4 of Regulation No 1049/2001. Nevertheless, it must be observed that the Court has relied on considerations of this kind in its interpretation of the exception under the third indent of Article 4(2) of Regulation No 1049/2001, relating to investigations, and thus to justify the need to apply a general presumption applicable to certain categories of document relating to infringement procedures, such as the EU Pilot procedure.
- 78 In the sixth place, the applicants allege that the Commission could have prevented the private clinic from administering treatments if it had acted immediately upon receiving their complaint. In particular, they assert that the Commission ‘allowed the [private clinic] ... to continue with all impunity to administer illegal treatments and to use unauthorised advanced therapy medicinal products for that purpose’.
- 79 However, it must be observed that, as is clear from the form of order specified in their application, the applicants’ claim in these proceedings is for the annulment of the contested decision. Since these allegations are, first, intended by the applicants to show that the Commission is guilty of an unlawful failure to take action after they lodged their complaint and, secondly, incapable of calling into question the lawfulness of the contested decision, they must be dismissed as devoid of purpose.
- 80 Consequently, in light of the foregoing considerations, it must be held that the Commission did not err in law in interpreting the third indent of Article 4(2) of Regulation No 1049/2001 as meaning that it could reject the request for access to the documents at issue relating to an EU Pilot procedure without examining them specifically and individually.
- 81 In the alternative, the Kingdom of Sweden alleges, in substance, that, in any event, in setting out its reasoning in the contested decision, the Commission should have expressly stated that the general presumption in question did indeed apply to the documents at issue.
- 82 It must be recalled in this connection that, according to the case-law, a EU institution which intends to rely on a general presumption must establish in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to the document which it has been asked to disclose (see, to that effect, *Sweden and Turco v Council*, paragraph 50).
- 83 However, the requirement to ascertain whether the general presumption in question actually applies cannot be interpreted as meaning that the Commission must examine every document requested in the case individually. Such a requirement would deprive that general presumption of its proper effect, which is to permit the Commission to reply to a request for access in a global manner (see, to that effect, *LPN v Commission*, cited in paragraph 28 above, paragraph 68).
- 84 In the present case, suffice it to recall that, in the contested decision, the Commission first of all stated that the documents at issue, to which the applicants had requested access, were two letters which it had sent to the German authorities in the context of EU Pilot procedure 2070/11/SNCO. Next, the Commission stated that that procedure was an investigation aimed at establishing whether, in light of the facts reported by the applicants in their complaint, the Federal Republic of Germany had infringed EU law. It also explained that the investigation was a preliminary to the possible opening of an infringement procedure under Article 258 TFEU. Finally, it concluded that, since the investigation was still ongoing and had not yet been closed, disclosure of the documents at issue would threaten and undermine the objectives of the investigation.

85 It follows that, contrary to the Kingdom of Sweden's argument, the Commission established that the documents at issue, to which the applicants had requested access, related to an investigation that was still ongoing and that, consequently, the general presumption in question did indeed apply to them.

86 The first part of the first plea must therefore be rejected.

The second part of the first plea, concerning the existence of an overriding public interest

– Arguments of the parties

87 The applicants, supported by the Republic of Finland and the Kingdom of Sweden, allege that the Commission did not correctly weigh the opposing interests in the present case and they therefore take issue with the conclusion that there was no interest outweighing the interests of the EU Pilot procedure such as might justify disclosure of the documents at issue. In substance, they argue that the objective of protecting health ought to have outweighed the Commission's particular interest in pursuing its investigation.

88 The Commission contests the applicants' arguments.

– Findings of the Court

89 The applicants, supported by the Republic of Finland and the Kingdom of Sweden, complain that the Commission made an error of assessment in concluding that disclosure of the documents at issue was not justified by any overriding public interest within the meaning of the last clause of Article 4(2) of Regulation No 1049/2001.

90 It must be observed, as a preliminary point, that, even in cases, such as the present, in which the Commission relies on a general presumption in order to refuse access to the documents requested pursuant to the third indent of Article 4(2) of Regulation No 1049/2001, the possibility of demonstrating that there is an overriding public interest which justifies the disclosure of the documents, in accordance with the last clause of Article 4(2), is not ruled out (see, to that effect, *Commission v Éditions Odile Jacob*, paragraph 126).

91 However, according to the case-law, it is for the person alleging the existence of an overriding public interest to state the specific circumstances which justify the disclosure of the documents concerned (see, to that effect, *Technische Glaswerke Ilmenau*, paragraph 62; *Sweden and Others v API and Commission*, paragraph 103; *Commission v Agrofert Holding*, paragraph 68; and *LPN v Commission*, cited in paragraph 28 above, paragraph 94).

92 Moreover, a statement of purely general considerations is not sufficient to establish that an overriding public interest outweighs the reasons justifying a refusal to disclose the documents in question (see, to that effect, *LPN v Commission*, cited in paragraph 28 above, paragraph 93).

93 Furthermore, the overriding public interest capable of justifying the disclosure of a document need not necessarily be distinct from the principles which underlie Regulation No 1049/2001 (see, to that effect, *Sweden and Turco v Council*, paragraphs 74 and 75, and *LPN v Commission*, cited in paragraph 28 above, paragraph 92).

94 In the present case, the Commission concluded in the contested decision that no overriding public interest justified the disclosure of the documents in accordance with the last clause of Article 4(2) of Regulation No 1049/2001, since the best way of serving the general interest in this case was for it to

complete the EU Pilot procedure with the Federal Republic of Germany. According to the Commission, that would make it possible to check whether EU law had in fact been infringed in the light of the facts put forward by the applicants in their complaint against the German authorities.

95 That assessment by the Commission is not vitiated by any error.

96 Indeed, first of all, several of the arguments which the applicants put forward in the context of this part of the plea are intended to establish a breach of the alleged obligation, arising under the last clause of Article 4(2) of Regulation No 1049/2001, in accordance with which the Commission should have examined specifically and individually the documents requested. Those arguments have already been examined in the context of the first part of the first plea and have been rejected as unfounded. Consequently, they cannot succeed in the context of the second part of the plea.

97 Secondly, it must be observed that, other than their general arguments concerning the gravity of the alleged infringement and the need to protect public health and their assertion that treatments at the private clinic have led to the death of a number of patients in Germany, the applicants do not put forward any specific, substantiated reasons which would justify the disclosure of the documents at issue in this case. In particular, they have not explained in what way the disclosure to them of the documents at issue, that is to say, the two requests for information sent by the Commission to the Federal Republic of Germany, would serve the interest of protecting public health. It must be emphasised in this connection that, as is clear from the case-law cited in paragraphs 91 and 92 above, while the burden of proof, when applying the exception in the third indent of Article 4(2) of Regulation No 1049/2001, rests on the institution invoking that exception, in so far as concerns the last clause of Article 4(2) of the regulation, it is, by contrast, for the party alleging an overriding public interest, within the meaning of that clause, to prove that interest.

98 Thirdly, even if the applicants' general allegations concerning the existence of an overriding public interest in health protection were to be accepted, the disclosure of the documents sought in the present case is unlikely to serve that interest. Indeed, it must be observed that it is not for the applicants to establish to what degree EU law, and Regulation No 1394/2007 in particular, was being complied with by the German authorities, in the light of the factual context set out in their complaint. On the contrary, the Court would confirm the Commission's view that it is in the public interest for it to clarify for itself whether EU law has been complied with by the Federal Republic of Germany, that being the best way to protect public health.

99 Fourthly, the applicants argue that the documents at issue could form the basis of a possible action in non-contractual liability which they might bring before the national courts in Germany. In substance, their request is aimed at obtaining documentary evidence to support such an action for damages, using, to that end, the Commission and the powers of investigation which it enjoys as guardian of the FEU Treaty. However, any interest that the applicants might have in producing documentary evidence before a national court cannot be regarded as constituting an overriding public interest for the purposes of the last clause of Article 4(2) of Regulation No 1049/2001, for it is a private interest (see, to that effect, *Commission v Agrofert Holding*, paragraph 86). Indeed, it cannot be accepted that the Commission should be made the instrument by which to obtain access to evidence that is not available through other channels. It is appropriate to observe in this connection that, while the facts which gave rise to the applicants' actions before the German and European Union courts are clearly unfortunate and regrettable, the Commission was right to emphasise that, in so far as they institute legal proceedings, the applicants must pursue legal remedies that are recognised by the national legal order and adhere to the methods for obtaining evidence that are prescribed by that legal order.

100 Fifthly, the applicants complain that the Commission did not allow them access to the documents at issue, in view of the public interest to which they refer, even after the conclusion of EU Pilot procedure 2070/11/SNCO. Suffice it to recall in this context that, 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 (see Case T-432/07 *France v Commission* [2009], not published in the ECR, paragraph 43 and the case-law cited). However, EU Pilot procedure 2070/11/SNCO was brought to a close after the contested decision was adopted. Consequently, the applicants' argument must be rejected.

101 In any event, as is suggested by paragraph 12 of the judgment in *LPN v Commission*, cited in paragraph 28 above, and by the information provided by the Commission at the hearing, it cannot be ruled out that full or partial access to the documents in the present case might be granted to the applicants, since the exception in the third indent of Article 4(2) of Regulation No 1049/2001 would cease to be applicable once the Commission has decided to close the file on the complaint, provided that the documents are not covered by any other exception in that regulation. That could only happen, however, if a fresh application for access were made to the Commission.

102 The second part of the first plea must therefore be rejected.

103 In light of the foregoing, it must be concluded that the Commission did not err in concluding that the exception in the third indent of Article 4(2) of Regulation No 1049/2001 enabled it to refuse to grant the applicants full access to the documents at issue.

104 The applicants' first plea must therefore be dismissed.

The second plea, alleging infringement of Article 4(6) of Regulation No 1049/2001

Arguments of the parties

105 The applicants complain that the Commission failed to recognise their right to partial access to the document at issue.

106 The Commission contests the applicants' arguments.

Findings of the Court

107 Under the first paragraph of Article 21 of the Statute of the Court of Justice, which applies to the procedure before the General Court by virtue of the first paragraph of Article 53 of that statute, and under Article 44(1)(c) of the Rules of Procedure of the General Court, all applications must indicate the subject-matter of the dispute and contain a summary of the pleas in law on which the application is based. The information given must be sufficiently clear and precise to enable the defendant to prepare the defence and the General Court to decide the case. In order to ensure legal certainty and the sound administration of justice, it is necessary for the essential facts and points of law on which the action is based to be apparent from the text of the application itself, even if only stated briefly, provided that the statement is coherent and comprehensible (order in Case T-85/92 *De Hoe v Commission* [1993] ECR II-523, paragraph 20, and order in Case T-294/04 *Internationaler Hilfsfonds v Commission* [2005] ECR II-2719, paragraph 23).

108 It must be observed that, in the present case, other than the abstract statement in the application of a plea alleging infringement of Article 4(6) of Regulation No 1049/2001, the applicants develop no argument in support of that plea.

109 Consequently, the second plea must be dismissed as inadmissible.

The third plea, alleging breach of the duty to state reason

Arguments of the parties

- 110 The applicants maintain, in addition to their complaints regarding the lack of a specific, individual examination, addressed in the context of their first plea, that the Commission breached its duty to state reasons under Article 296 TFEU. In particular, they submit that, contrary to what is required by settled case-law, the contested decision does not make it possible to understand or ascertain the reasons specifically justifying the refusal of their request for access. They also allege that the references to case-law made in support of the contested decision were made in an arbitrary and fragmentary manner.
- 111 Moreover, the applicants take issue with the Commission for having dealt with the requests for access to the documents at issue in a single decision, without drawing any distinction between the contents of the documents. Consequently, they were unable to determine which of the reasons for refusal related to each of the documents to which they had requested access.
- 112 The Commission contests the applicants' arguments.

Findings of the Court

- 113 The applicants maintain, in substance, that the Commission failed to fulfil its duty to state reasons under Article 296 TFEU inasmuch as it offered no reasons to explain in what way access to the documents at issue might have undermined the exceptions laid down in Regulation No 1049/2001.
- 114 According to settled case-law, the reasons for any decision of an institution in respect of the exceptions set out in Article 4 of Regulation No 1049/2001 must be stated (*Sweden and Turco v Council*, paragraph 48; Case T-166/05 *Borax Europe v Commission* [2009], not published in the ECR, paragraph 44; and Case T-331/11 *Besselink v Council* [2013], not published in the ECR, paragraph 96).
- 115 It is for the institution which has refused access to a document to provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, secondly, whether the need for protection relating to that exception is genuine (Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429, paragraph 61).
- 116 The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63 and the case-law cited).
- 117 In the present case, the Commission stated the following in the contested decision:

‘3. Protection of the purpose of investigations Article 4(2)(a), third indent, of Regulation No 1049/2001 provides that “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: ... the purpose of inspections, investigations and audits”. The documents concerned by your requests are two letters which the Commission addressed to the German authorities in order to request their opinion in the context of EU Pilot case 2070/11/SNCO and the German reply to the

request. This EU Pilot case is preliminary to the possible opening of the formal phase of an infringement procedure under Article 258 TFEU. ... In the documents concerned by your requests, the explanations given by the Commission and the questions asked as well as the reply provided by the German Government reveal the main issues at stake in ... EU Pilot case 2070/11/SNCO. In these circumstances, early disclosure of the documents you request will certainly adversely affect the dialogue between the German authorities and the Commission which is still ongoing. In order for the Commission to be able to carry out its tasks and to settle this dispute, preferably without having to refer it to the Court of Justice, there has to be a climate of mutual trust between the Commission and the Member State concerned, throughout the different stages of the procedure until the case has been definitively closed. ...

4. Partial access [The Commission has] also examined the possibility of granting partial access to the requested documents, in accordance with Article 4(6) of Regulation No 1049/2001. However, partial access is not possible given the fact that the documents concerned are, at this stage of the EU Pilot proceedings, entirely covered by the exception under Article 4(2), third indent, of Regulation No 1049/2001. In particular, no element of the three documents concerned by your requests can be disclosed without revealing at least part of the issues at stake in the aforementioned EU Pilot procedure and, therefore, undermining the climate of mutual trust with the German authorities.

5. Overriding public interest in disclosure ... putting an end to a possible infringement of EU law, such as the one dealt with in the EU Pilot case concerned, is a matter of public interest, in particular if the facts at stake are particularly serious, as you assert. It is precisely for that reason that the Commission is conducting this investigation. However it is the Commission's experience, as confirmed by the Courts, that the public interest in clarifying the issues at stake and, if applicable, in reaching conformity of that Member State is better served by maintaining the atmosphere of mutual trust between the Commission and the Member State concerned. This is also true in cases where alleged infringements may have very serious effects, including on the health of citizens. Particularly in such serious cases, it is vital to find a rapid, effective solution to the problem, if the Commission assessment concludes to the existence of an infringement. It is [the Commission's] view that this rapid solution can best be found by maintaining the atmosphere of mutual trust between the Commission and the Member State concerned ...'

118 It is clear from the foregoing that, in the contested decision, the Commission first of all identified the exception on which it based its refusal to grant the applicants' request for access, that is to say, the exception relating to the public interest in the pursuit of investigations laid down in the third indent of Article 4(2) of Regulation No 1049/2001. It also stated, in this connection, that early disclosure of the documents at issue could adversely affect the dialogue between it and the German authorities in the EU Pilot procedure, which was still ongoing. Next, it stated that partial access, in accordance with Article 4(6) of the regulation, could not be granted because the documents to which the applicants' request related could not be disclosed without revealing at least some of the issues involved in EU Pilot procedure 2070/11/SNCO. Lastly, it explained that, in its view, the applicants could not point to an overriding public interest, because a solution to the matters set out in the complaint could best be found by maintaining the atmosphere of mutual trust between it and the Federal Republic of Germany.

119 Consequently, contrary to the applicants' assertion, in the particular circumstances of the case, the information provided by the Commission in the contested decision made it possible for the applicants to understand and the Court to ascertain, first, whether the documents requested did in fact fall within the sphere covered by the exception relied on and, secondly, whether the need for protection relating to that exception was genuine.

120 That finding cannot be called into question by the other allegations made by the applicants.

- 121 First of all, the applicants take issue with the Commission for having dealt in the same confirmatory decision with the question of access raised in two separate applications relating to the requests for information which the Commission sent to the German authorities on 10 May and 10 October 2011 respectively.
- 122 In this connection it must be observed at the outset that the applicants do not explain how the Commission's having dealt with their requests together resulted in a breach of the duty to state reasons. In any event, it must be held, first, that, as the Commission maintains, there is nothing to prevent that institution from dealing with more than one request for access from the same applicant in a single reply, provided that it addresses all the subjects of the various requests and that its reply is sufficiently clear to enable the applicant to understand to which request for access the various parts of the reply relate. In the present case, the Commission distinguished between the documents at issue in the contested decision and, as is clear from paragraph 119 above, it stated the reasons which led it to refuse access to those documents, in accordance with Regulation No 1049/2001. Secondly, as the Commission maintains, proceeding in that way is all the more appropriate where there is a factual relationship between several requests for access, as there is in the present case.
- 123 Secondly, the applicants complain that the Commission referred to decisions of the European Union judicature in a fragmentary manner. However, that argument cannot succeed. Suffice it to recall in this connection that the Commission referred to the decisions of the Court of Justice and of the General Court which were capable of supporting its legal assessment regarding the application of a general presumption in order to refuse access to the documents (*Petrie and Others v Commission*, *Commission v Technische Glaswerke Ilmenau*, *LPN v Commission*, cited in paragraph 28 above). It is clear from the contested decision that the decisions cited by the Commission are part of the case-law on access to documents relating to investigations and that it cited them in the context of stating the reasons for which it refused the applicants' request for access. Moreover, the Commission cited that case-law in a sufficiently precise manner to enable the applicants to identify the judgments in question of the Court of Justice and of the General Court and to dispute their relevance in an action before the European Union judicature, as they have done in the present application for annulment.
- 124 In light of the foregoing, it must be held that the Commission did not breach its duty to state reasons under Article 296 TFEU.
- 125 The third plea must therefore be rejected.

The fourth plea, alleging infringement of the 20 March 2002 Communication

Arguments of the parties

- 126 The applicants allege that the Commission infringed the rules on handling complaints made by Union citizens set out in the 20 March 2002 Communication. They point out that those rules are intended to protect complainants by ensuring that their complaints are handled in accordance with a procedure that is transparent and objective and complies with EU law. In particular, they complain that the Commission failed to inform them of the correspondence which it had exchanged with the German authorities, and that it failed to observe the time-limit for investigating complaints laid down in the communication.
- 127 The Commission argues, in substance, that the fourth plea is ineffective in the context of the applicants' application for annulment.

Findings of the Court

- 128 It is appropriate to recall at the outset that the 20 March 2002 Communication sets out the Commission's internal rules for handling complaints made by Union citizens. According to case-law, the communication contains internal administrative measures with which the Commission must comply when handling a complaint as regards the complainant (order in Case T-186/08 *LPN v Commission* [2009], not published in the ECR, paragraph 55).
- 129 The present action concerns a request for annulment of the Commission's decision to refuse a request, made pursuant to Regulation No 1049/2001, for access to two requests for information sent to the Federal Republic of Germany. Consequently, in this case, it is necessary for the Court to rule solely on the lawfulness of the contested decision in the light of that regulation.
- 130 Moreover, the 20 March 2002 Communication provides no legal basis for assessing the lawfulness of the decision refusing access to the documents at issue. It lays down no rules governing access to documents in the context of infringements procedures or EU Pilot procedures and confers no rights on complainants in that context. On the contrary, it simply states that, in the area of infringement proceedings, access to documents is to be sought in accordance with Regulation No 1049/2001. That being so, the communication can have no effect on the assessment of requests for access to documents made under Regulation No 1049/2001.
- 131 Consequently, the fourth plea must be dismissed as ineffective.
- 132 It follows from all the foregoing that the action must be dismissed in its entirety.

Costs

- 133 Under Article 87(3) of the Rules of Procedure, the Court may order the costs to be shared or the parties to bear their own costs if each party succeeds on some and fails on other heads, or where the circumstances are exceptional.
- 134 In the circumstances of the present case, it is appropriate to decide that each party must bear its own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Dismisses the action;**
2. **Orders each party to bear its own costs.**

Gratsias

Kancheva

Wetter

Delivered in open court in Luxembourg on 25 September 2014.

[Signatures]