



Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

26 March 2020*

(Access to documents – Regulation (EC) No 1049/2001 – Audit report on human resources in the EACEA – Refusal to grant access – Exception relating to the protection of the purpose of inspections, investigations and audits)

In Case T-646/18,

Laurence Bonnafous, residing in Brussels (Belgium), represented by A. Blot and S. Rodrigues, lawyers
applicant,

v

European Commission, represented by C. Ehrbar and K. Herrmann, acting as Agents,
defendant,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2018) 6753 final of 9 October 2018, refusing the request for access to the final 2018 audit report on human resources in the Education, Audiovisual and Culture Executive Agency (EACEA), dated 21 January 2018, made by the applicant,

THE GENERAL COURT (First Chamber),

composed of H. Kanninen, President, N. Póltorak (Rapporteur) and M. Stancu, Judges,

Registrar: E. Coulon,

gives the following

Judgment

Background to the dispute

- 1 The applicant, Ms Laurence Bonnafous, was a member of the contract staff at the Education, Audiovisual and Culture Executive Agency (EACEA).
- 2 On 30 July 2018, the applicant sent an email to the European Commission's internal audit service, requesting access, pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission

* Language of the case: French.

documents (OJ 2001 L 145, p. 43), to the document identified by that service as ‘Final audit report – IAS Audit on HR Management in the Education, Audiovisual and Cultural Executive Agency (Ares(2018)361356)’ (‘the requested document’).

- 3 By letter of 9 August 2018, the European Commission’s internal audit service refused to grant the applicant access to the requested document. That refusal was based, in essence, on the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001 which provides that an EU institution may 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. It considered that disclosure of the requested document, at that stage, would undermine the protection of the purpose of the inspections, investigations and audits giving rise to the document, because it would hinder the effective implementation of the recommendations contained in the document and because the related follow-up actions had not been fully completed.
- 4 By letter of 29 August 2018, the applicant submitted a confirmatory application for access to the requested document.
- 5 By email of 19 September 2018, the Commission informed the applicant that the time limit prescribed for responding to her confirmatory application for access needed to be extended by 15 working days and that a new deadline of 10 October 2018 therefore needed to be set.
- 6 On 9 October 2018, the Commission adopted Decision C(2018) 6753 final (‘the contested decision’), by which it rejected the applicant’s confirmatory application for access to the document. It found, in essence, first, that the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001, when interpreted in the light of Article 99(6) of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1) (‘the financial regulation’) precluded the premature disclosure of an audit report which risked jeopardising the serenity and independence of the audit and, secondly, that there was no overriding public interest to justify the non-application of that exception.

Procedure and forms of order sought

- 7 By application lodged at the Court Registry on 26 October 2018, the applicant brought the present action.
- 8 By letter lodged at the Court Registry on the same date, the applicant requested that Case T-614/17, *Bonnafous v EACEA*, be joined to the present case. On 5 December 2018, the Commission opposed the joining of the two cases.
- 9 On 21 December 2018, the applicant lodged an offer of further evidence at the Court Registry.
- 10 By decision of 7 January 2019, the President of the Third Chamber of the Court decided not to join the present case to Case T-614/17.
- 11 The Commission lodged the defence at the Court Registry on 31 January 2019.
- 12 The applicant lodged the reply at the Court Registry on 7 March 2019.
- 13 The Commission lodged the rejoinder at the Court Registry on 17 April 2019.

- 14 Following a change in the composition of the Chambers of the Court, pursuant to Article 27(5) of the Rules of Procedure of the General Court, the Judge-Rapporteur was assigned to the First Chamber, to which the present case was accordingly allocated.
- 15 Having regard to the fact that no request for a hearing was submitted by the parties within the prescribed time limit, the Court, considering that it was sufficiently informed by the documents in the file, decided to rule on the action without an oral part of the procedure, pursuant to Article 106(3) of the Rules of Procedure.
- 16 The applicant claims that the Court should:
- annul the contested decision;
 - order the defendant to pay the costs.
- 17 The Commission contends that the Court should:
- dismiss the action as unfounded;
 - order the applicant to pay the costs.

Law

- 18 The applicant raises three pleas in law in support of her action. The first plea alleges a combined infringement of Article 15(3) TFEU, of Article 42 of the Charter of Fundamental Rights of the European Union ('the Charter') and of Regulation No 1049/2001. The second plea alleges infringement of the obligation to state reasons under Article 296 TFEU and Article 41 of the Charter. Lastly, the third plea alleges infringement of the principle of proportionality.
- 19 The Court considers it appropriate to begin by examining the second plea.

The second plea, alleging infringement of Article 296 TFEU and of Article 41 of the Charter

- 20 The applicant submits that the contested decision contains an insufficient statement of reasons. In particular, she submits that the identification of risks is expressed in the conditional, without any reference to the specific reasons which would allow those risks to be defined or even outlined. Thus, she claims that this abstract reasoning is based on very vague considerations. In addition, she maintains that there are contradictions between the reasons given in the decision and the content of the email of 19 September 2018 sent to her by the Secretariat General of the Commission explaining the delay in responding to her confirmatory application. According to the applicant, the email explained that the delay was due to the need to gather all the information necessary to respond to her request for access to the document. However, there is no indication of that information in the decision. In her reply, and still within the context of the second plea, the applicant also submits that, in any event, the Commission failed to fulfil its duty to provide information and assistance to citizens under Article 6(4) of Regulation No 1049/2001.
- 21 The Commission disputes those arguments.
- 22 As a preliminary point, it should be recalled that, according to settled case-law, the statement of reasons required under Article 296 TFEU and under Article 41(2)(c) of the Charter must be appropriate to the measure at issue and must disclose clearly and unequivocally the reasoning followed by the institution which adopted that measure in such a way as to enable the persons

concerned to ascertain the reasons for it and to enable the competent Court of the European Union to exercise its jurisdiction to review legality (see judgment of 29 September 2011, *Elf Aquitaine v Commission*, C-521/09 P, EU:C:2011:620, paragraph 147 and the case-law cited).

- 23 The requirement to state reasons must be assessed by reference to the circumstances of the case. 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 judgment of 29 September 2011, *Elf Aquitaine v Commission*, C-521/09 P, EU:C:2011:620, paragraph 150 and the case-law cited). In the case of a request for access to documents, where the institution in question refuses such access, it must demonstrate in each individual case, on the basis of the information at its disposal, that the documents to which access is sought do indeed fall within the exceptions listed in Regulation No 1049/2001 (judgments of 10 September 2008, *Williams v Commission*, T-42/05, EU:T:2008:325, paragraph 95, and of 7 July 2011, *Valero Jordana v Commission*, T-161/04, not published, EU:T:2011:337, paragraph 49).
- 24 It is therefore, according to the case-law, 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 (see judgment of 4 May 2012, *In 't Veld v Council*, T-529/09, EU:T:2012:215, paragraph 118 and the case-law cited).
- 25 Furthermore, even though the Commission is required to set out the reasons justifying the application to the particular case of one of the exceptions to the right of access provided for by Regulation No 1049/2001, it is not required to provide more information than is necessary in order for the person requesting access to understand the reasons for its decision and for the Court to review the legality of that decision (see, to that effect, judgment of 30 January 2008, *Terezakis v Commission*, T-380/04, not published, EU:T:2008:19, paragraph 119).
- 26 It is in the light of these considerations that it falls to be determined whether, in the present case, the Commission satisfied the requirements under Article 296 TFEU and Article 41 of the Charter.
- 27 In the first place, the applicant submits that, in the contested decision, the risks to which the Commission refers to justify its refusal to disclose the requested document are expressed in a purely hypothetical way, without any reference to the specific reasons which would allow those risks to be defined.
- 28 In that regard, it must be stated that the reasons underlying the contested decision are clearly set out in that decision.
- 29 In the contested decision, the Commission considered, in essence and on the basis of a general presumption of confidentiality, that any disclosure of the requested document would undermine the purpose of the audit in question. It therefore found that there was a risk that such disclosure would jeopardise the serenity and independence of the audit, in particular with regard to its follow-up and the validation thereof by the internal auditor. The Commission therefore found that there was a foreseeable risk of the climate of mutual trust between the EACEA and the internal auditor being undermined by disclosure of the requested document, which could have an adverse effect on the implementation of the appropriate recommendations.
- 30 In the light of the foregoing, it must be held that, in the contested decision, the Commission clearly set out the risks on account of which it considered that the purpose of the audit in question could be jeopardised by disclosure of the requested document.

- 31 In that regard, it should be made clear that there is no need, at this stage, to rule on the merits of the reasons given in the contested decision. The examination of the existence and the scope of the reasons on which a Commission decision is based forms part of the review of essential procedural requirements and of the formal legality of that decision. It must therefore be distinguished from the examination of the merits of the grounds of the decision, which forms part of the review of its substantive legality (see judgment of 2 April 1998, *Commission v Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 67 and the case-law cited), and which will, in the present case, be developed as part of the analysis of the first plea raised by the applicant.
- 32 In the second place, the applicant submits that the reasoning contained in the contested decision is too abstract, in that it is based on very vague considerations.
- 33 In that regard, and as is clear from the summary in paragraph 29 above, it must be noted that, in the contested decision, the Commission considered, *inter alia*, that, aside from the risks that disclosure of the requested document would pose to the purpose of the audit in question, another factor precluding disclosure was the need for the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001 to be interpreted in the light of Article 99(6) of the financial regulation. In addition, the Commission recalled the need to distinguish between administrative activities and legislative procedures, the latter requiring greater transparency, which the applicant does not dispute.
- 34 It must be stated that the grounds set out in paragraph 33 above were sufficient to indicate to the applicant whether the contested decision was well founded or whether it was flawed and therefore open to challenge. Those grounds enabled the applicant to understand the specific reasons why the Commission had considered, in the present case, that the requested document fell within the exception in the third indent of Article 4(2) of Regulation No 1049/2001. It must also be noted in that regard that the arguments put forward by the applicant in the context of her first plea centre on the claim that such an interpretation of that exception was impossible. Furthermore, it must also be noted that those grounds are sufficient to allow the Court to exercise its powers of review of the legality of the contested decision.
- 35 Therefore, it cannot be disputed that the contested decision satisfies the conditions established by the case-law, as set out in paragraphs 22 to 25 above. Accordingly, the applicant's claim that the reasons given in the contested decision were too abstract must also be rejected.
- 36 In the third place, the applicant submits that the reasons given in the contested decision are not the same as those set out in an email sent to her on 19 September 2018.
- 37 However, it must be noted that the sole purpose of the email in question was to notify the applicant that the Commission was not in a position to respond to her confirmatory application for access to the requested document within the time limit originally stated. That email was, therefore, in no way intended to set out the reasons why that application might be refused.
- 38 It follows that this argument put forward by the applicant is not capable of calling into question the sufficiency of the statement of reasons in the contested decision and it must be therefore rejected on that ground.
- 39 In the fourth place, the applicant submitted in the reply that the Commission failed to fulfil its duty to provide information and assistance to citizens under Article 6(4) of Regulation No 1049/2001.
- 40 It should be recalled that Article 6(4) of Regulation No 1049/2001 provides that 'the institutions shall provide information and assistance to citizens on how and where applications for access to documents can be made'.

- 41 In that regard, it must be stated that the applicant has not put forward any evidence to show that, in this case, the Commission failed to fulfil the obligations under Article 6(4) of Regulation No 1049/2001, nor that the supposed insufficiency of the reasons in the contested decision that she alleges amounts to a breach of the duty of assistance and information contained in that provision.
- 42 On that subject, as has already been recalled in paragraphs 2 to 6 above, it should be noted that the applicant first applied for access to the requested document via an email sent to the Commission's internal audit service on 30 July 2018. The internal audit service duly responded to that email by a letter of 9 August 2018. The applicant then disputed the assessment made by the internal audit service by submitting a confirmatory application for access on 29 August 2018. The Commission duly responded to that confirmatory application for access by adopting the contested decision on 9 October 2018, having taken care to notify the applicant, on 19 September 2018, that the time limit for responding to that confirmatory application needed to be extended by 15 days.
- 43 It should also be noted that the applicant does not challenge the regularity of the procedure which culminated in the adoption of the contested decision. It is also clear from the foregoing that the applicant was sufficiently familiar with the procedures for submitting requests for access to documents to be able to submit the request for access in question. Furthermore, it is undisputed that the Commission responded diligently to the request.
- 44 In those circumstances, it must be held that there is nothing in the applicant's arguments to establish that the Commission failed in its duty of assistance under Article 6(4) of Regulation No 1049/2001 or that such a failure was capable of vitiating the legality of the contested decision. In addition, the applicant has not submitted any information to explain the connection she draws between that alleged failure and the statement of reasons in the contested decision, even though that is the subject of this plea.
- 45 Therefore, the applicant's argument claiming that the Commission failed in its duty to provide information and assistance to citizens under Article 6(4) of Regulation No 1049/2001 is unfounded. It must therefore be rejected.
- 46 Accordingly, the second plea must be rejected in its entirety.

The first plea, alleging infringement of Article 15(3) TFEU, of Article 42 of the Charter and of Regulation No 1049/2001

- 47 The applicant submits, in essence, that, in the contested decision, the Commission wrongly refused to disclose the requested document on the basis of the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001. This plea can be divided into four parts.
- 48 In the first part of the plea, the applicant submits that the audit in the context of which the requested document was prepared had been completed by the time she requested access to that document. In that regard, she claims that even the title of the document, namely 'Final audit report – IAS Audit on HR Management in the Education, Audiovisual and Cultural Executive Agency (Ares(2018)361356)', attests to the completion of the audit in question, as does the recital in the contested decision stating that 'on the basis of the final audit report, the [EACEA] accepted to implement the proposed recommendations'. In addition, the document entitled 'HR Annual Plan', drawn up by the EACEA itself, supports these claims since it refers to remedial actions, indicating that the final phase of the audit exercise had been reached. In addition, the HR Annual Plan shows that seven of the actions proposed in the requested document had been fully implemented, while it is reasonable to assume that the final two actions proposed in the requested document were fully implemented, given that they were, respectively, 70% and 80% complete at the time that the HR Annual Plan was drawn up. The applicant submits, in her reply, that ten major actions were thus completely implemented on the basis

of the recommendations of the audit report. In support of those arguments, she prepared a summary note analysing the implementation rates achieved by the EACEA. However, she maintains, in that regard, that, since the exception under Article 4(2) of Regulation No 1049/2001 can be relied on to refuse access to a document only where disclosure would undermine the purpose of the audit, it does not apply in the present case because the audit in question was complete. It would, in any event, be unacceptable to make access to the requested document dependent on a random, future and distant event.

- 49 In the second part of the plea, the applicant submits that the Commission's argument that, once the recommendations contained in the requested document had been implemented by the EACEA, the Commission could not authorise its disclosure to the public until it had classified those recommendations, is contrary both to the objective of Regulation No 1049/2001 and to the right to transparency under Article 15 TFEU and Article 42 of the Charter. That has, furthermore, already been upheld by the Court in its judgment of 9 June 2010, *Éditions Jacob v Commission* (T-237/05, EU:T:2010:224). In any event, the applicant claims that the general scope assigned by the Commission to the concept of the purpose of investigations results from the Commission's neutralising interpretation of the right to transparency, which is not acceptable. In addition, the ability to rely on certain general presumptions cannot, according to the applicant, be systematically inferred for all investigations or audits, because the exceptions to the principle of transparency must be interpreted restrictively and confined to the specific circumstances of the procedure in question, as can be seen from paragraph 123 of the judgment of 9 June 2010, *Éditions Jacob v Commission* (T-237/05, EU:T:2010:224).
- 50 In the third part of the plea, the applicant submits that a provision derived from secondary legislation may not, without justification, restrict a fundamental right the legal value of which is equivalent to that of the primary legislation. Accordingly, the Commission's argument that the exception under the third indent of Article 4(2) of Regulation No 1049/2001 must be interpreted in the light of Article 99(6) of the financial regulation which provides that 'the reports and findings of the internal auditor ... shall be accessible to the public only after validation by the internal auditor of the action taken for their implementation' must be rejected. In her reply, the applicant acknowledged that the exception must be capable of being interpreted in a manner consistent with Article 99(6) of the financial regulation. However, she maintains that the ability to rely on that obligation of confidentiality could not, in the present case, exempt the Commission from carrying out a specific and individual examination of the requested document in that, since the document had been completed, the Commission was not entitled to apply either the exception under that provision or a general presumption of protection of audit activities.
- 51 In the fourth part of the plea, the applicant submits that the contested decision did not satisfy the test of a reasonably foreseeable risk. The risk of jeopardising the serenity and independence of the investigation in question was referred to in that decision in a purely hypothetical manner. By contrast, she claims, the contested document does not establish either a need to apply the exception in question or a need to apply the exception in the third indent of Article 4(2) of Regulation No 1049/2001 to the whole of the requested document. Therefore, a general presumption of non-disclosure cannot be relied on to justify the contested decision. With those considerations in mind, the applicant maintains that, in the present case, there was no need to assert the existence of an overriding public interest to justify disclosure of that document. However, she claims, in any event and in the alternative, that the contested decision was vitiated by a manifest error of assessment. She claims that it was wrong to find, in the contested decision, that her arguments in favour of obtaining access to the document were 'rather of a private nature'. The Commission should have identified what those private considerations were and examined whether reliance on general principles of transparency was sufficient to preclude the need for the document to be protected.
- 52 The Commission disputes those arguments.

53 The Court considers it appropriate to examine first the first to third parts of the plea together, followed by the fourth part.

The first to third parts of the plea

54 As a preliminary point, with regard to the right of public access to documents of the EU institutions, it should be recalled that, under Article 42 of the Charter, ‘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’. Equally, under the first sentence of 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, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium’.

55 At the same time, Regulation No 1049/2001, adopted on the basis of Article 255(2) EC, seeks, as indicated in Article 1, when read in the light of recital 4, to give the public a right of access to documents of the institutions which is as wide as possible (judgment of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 40).

56 However, it should be recalled that, in specific circumstances, limits can be placed on that right of access. Thus, Article 15(3) TFEU provides that ‘general principles and limits on grounds of public or private interest governing [the] 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’. It is therefore clear from this wording that such limits can be set by means of regulations.

57 Regulation No 1049/2001 lays down, in Article 4, a series of exceptions authorising the institutions to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision (see judgment of 22 March 2018, *De Capitani v Parliament*, T-540/15, EU:T:2018:167, paragraph 59 and the case-law cited).

58 In that regard, it has also been recalled in the case-law that the right of access to documents is subject to certain limitations based on grounds of public or private interest, while specifying that, as they derogate from the principle of the widest possible public access to documents, such exceptions must be interpreted and applied strictly (judgment of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraphs 62 and 63).

59 Among the exceptions to the right of access to documents is that set out in the third indent of Article 4(2) of Regulation No 1049/2001, according to which the institutions are to 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 of the document in question.

60 The series of exceptions laid down in Article 4 of Regulation No 1049/2001, and more particularly in paragraph 2 thereof, is based on a balancing of the opposing interests in a given situation, that is to say, first, the interests which would be favoured by the disclosure of the documents in question and, secondly, 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 (judgment of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 42).

61 Furthermore, when an institution is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents of the institutions set out in Article 4 of Regulation No 1049/2001 (see, to that effect, judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 35).

- 62 It is in the light of the foregoing considerations that it is necessary, in the present case, to rule on the question of whether it was justifiable, as the Commission maintains, to refuse the applicant access to the requested document on the basis of the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001, interpreted in the light of Article 99(6) of the financial regulation, essentially on the ground that there was a foreseeable risk that disclosure of the requested document would undermine the purposes of the audit in question by hindering the implementation, by the EACEA, of the recommendations contained within it.
- 63 In essence, it is apparent from the applicant's arguments that she disputes that the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001, and its interpretation in the light of Article 99(6) of the financial regulation, should apply to the requested document, on the ground that the audit in the context of which the document was prepared had been completed by the time she requested access to the document. According to the applicant, it would be contrary to both the objective of Regulation No 1049/2001 and to the principle of transparency to wait for the recommendations set out in a final audit report to be implemented before the documents relating thereto could be disclosed without fear of hindering the purpose of that audit.
- 64 First, with regard to the status of the audit at the time that the contested decision was adopted, it must be borne in mind that the requested document is a final report of the Commission's internal audit service and forms part of an administrative file relating to an audit of human resources management within the EACEA.
- 65 In that regard, it must be stated from the outset that the present case differs from the case which gave rise to the judgment of 12 May 2015, *Technion and Technion Research & Development Foundation v Commission* (T-480/11, EU:T:2015:272), relied on by the Commission in the contested decision, by way of example. The Court found, in paragraph 66 of that judgment, that, 'at the date on which the [decision in question] was adopted, the final report on the audit procedure had not yet been adopted and that additional investigations concerning this audit remained possible and could have been contemplated'. It is not disputed that, in the present case, the final report had been adopted when the contested decision was adopted.
- 66 However, as is clear from the information on file, in particular the summary note prepared by the applicant herself, only certain recommendations contained in the requested document had been put into place by 24 October 2018, meaning that the recommendations contained in that document had not all been put into place when the contested decision was adopted.
- 67 It therefore follows from the foregoing considerations that, even though the final report which brought the audit procedure to an end had indeed been adopted at the time when the request for access to documents at issue was made, implementing measures relating to that audit procedure were, however, still underway when the contested decision was adopted.
- 68 Secondly, with regard to the applicant's claim that having to wait for the Commission to classify the recommendations in the requested document before its disclosure to the public can be authorised is contrary both to the objective of Regulation No 1049/2001 and to the transparency recognised by Article 15 TFEU and Article 42 of the Charter, the following must be stated.
- 69 In the contested decision, the Commission found that the exception to the right of access to documents set out in the third indent of Article 4(2) of Regulation No 1049/2001 had to be interpreted in the light of Article 99(6) of the financial regulation. In any event, it should be pointed out that Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1), which,

in accordance with Article 281(1) thereof, repealed the financial regulation with effect from 2 August 2018, contains, in Article 118(9) thereof, a provision which, in essence, reproduces Article 99(6) of the financial regulation.

- 70 In that regard, it should be noted that Article 99(6) of the financial regulation provides that ‘the reports and findings of the internal auditor, as well as the report of the institution, shall be accessible to the public only after validation by the internal auditor of the action taken for their implementation’.
- 71 It must also be stated that Regulation No 1049/2001 and the financial regulation have different objectives. Regulation No 1049/2001 is designed to facilitate as far as possible the exercise of the right of access to documents, and to promote good administrative practices (judgment of 28 June 2012, *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 109). The financial regulation, for its part, is designed to define the financial rules applicable to the general budget of the European Union. More precisely, Chapter 9 of the financial regulation defines the tasks and specific operating procedures applicable to the internal auditor which each EU institution is obliged to have.
- 72 At the same time, it must be pointed out that Regulation No 1049/2001 and the financial regulation do not contain any provision expressly giving one regulation primacy over the other. It follows from settled case-law that it cannot be excluded, as a matter of principle, that the exceptions under Article 4(2) of Regulation No 1049/2001 may be interpreted in the light of certain specific rules of EU law. In such a case, it is appropriate to ensure that each of those regulations is applied in a manner which is compatible with the other and which enables a coherent application of them (see, to that effect, judgments of 28 June 2012, *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 123; of 29 January 2013, *Cosepuri v EFSA*, T-339/10 and T-532/10, EU:T:2013:38, paragraph 85; and of 21 September 2016, *Secolux v Commission*, T-363/14, EU:T:2016:521, paragraph 43).
- 73 The very purpose of Article 99(6) of the financial regulation is to restrict access to the reports and findings of the internal auditor, by safeguarding those documents from public disclosure until the internal auditor has validated the action taken for their implementation. In those circumstances, to permit general access, on the basis of Regulation No 1049/2001, to the reports of the internal auditor where the latter has not yet validated the action taken for their implementation would be likely to jeopardise the balance which the EU legislature sought to achieve in the financial regulation between the right of the public to access the documents of the institutions as widely as possible and the ability for the internal auditor to conduct audits properly.
- 74 Therefore, for the purposes of interpreting the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001, it is necessary to apply a general presumption that disclosing the reports and findings of an internal auditor before he or she has validated the action taken for their implementation would undermine the purpose of the audits he or she carries out (see, to that effect, judgments of 28 June 2012, *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 123; of 29 January 2013, *Cosepuri v EFSA*, T-339/10 and T-532/10, EU:T:2013:38, paragraph 85; and of 21 September 2016, *Secolux v Commission*, T-363/14, EU:T:2016:521, paragraph 43), although that presumption of harm does not rule out the possibility of the parties concerned demonstrating that a specific document disclosure of which has been requested is not covered by that presumption (see, to that effect, judgment of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 100 and the case-law cited).
- 75 In any event, it must be noted that the fact that internal audit documents are covered by the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001, for as long as the action for implementing the audit in question remains to be validated by the internal auditor, restricts the fundamental right of the public to access the documents only in two limited respects.

- 76 First, out of inspections, investigations and audits, that interpretation relates only to the specific category of audits carried out by the internal auditor. Secondly, the interpretation is limited in time, since it permits the EU institutions to refuse access to the reports and findings of those internal audits only until the internal auditor has validated the action taken for their implementation. In other words, the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001 as interpreted in the light of Article 99(6) of the financial regulation is limited to the duration of the procedure at the end of which the internal auditor validates the follow-up actions from those reports.
- 77 In the light of all of the foregoing, and given the need to ensure a coherent application of Regulation No 1049/2001 and the financial regulation, the applicant is therefore incorrect in claiming that the Commission applied a neutralising interpretation of the right to transparency in refusing her access to the requested document on the ground that the follow-up actions to the audit in question had not yet been validated by the internal auditor.
- 78 Thirdly, in relation to the applicant's claim that the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001 was inapplicable in the present case, on the basis that disclosure of the requested document could not jeopardise the purpose of the audit since the audit had already been completed, it should be recalled that, as stated in paragraph 66 above, the recommendations contained in that document had not all been put into place when the contested decision was adopted.
- 79 In that regard, it must be noted that, when the judgment of 6 July 2006, *Franchet and Byk v Commission* (T-391/03 and T-70/04, EU:T:2006:190), relied on by the applicant in her pleadings, was delivered, the relevant provisions of the financial regulation relating to access to internal audit documents had not yet come into force at the time of the facts in the case that gave rise to that judgment, and that the financial regulation, in the version applicable at that time, did not contain any rules restricting public access to audit reports. Since Article 99(6) of the financial regulation in its 2012 version came into force, its provisions must necessarily be taken into account for the purposes of assessing the legality of the contested decision, for the reasons set out in paragraphs 68 to 77. Therefore, the implementing action in question in the present case cannot be regarded as a random, future and distant event on which access to the requested document depends, within the meaning of the case-law cited by the applicant.
- 80 In the light of the foregoing, the first to third parts of the first plea must be rejected.

The fourth part of the plea

- 81 The applicant submits, first, that it does not appear from the contested decision that the Commission carried out a specific assessment of the requested document prior to concluding that it was 'confidential'. Secondly, she submits that the Commission made a manifest error of assessment in finding that her interest in obtaining disclosure of the requested document was rather of a private nature.
- 82 In that regard, it must be borne in mind, first, that, where an institution receives a request for access under Regulation No 1049/2001, it is required, in principle, to carry out a specific and individual assessment of the content of the documents referred to in the request (judgment of 13 April 2005, *Verein für Konsumenteninformation v Commission*, T-2/03, EU:T:2005:125, paragraph 74).
- 83 However, that approach, to be adopted in principle, does not mean that such an examination is required in all circumstances. Since the purpose of the specific and individual examination which the institution must in principle undertake in response to a request for access made under Regulation No 1049/2001 is to enable the institution in question to assess, on the one hand, the extent to which an exception to the right of access is applicable and, on the other, the possibility of partial access, such an examination 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. Such could be the case, inter alia, if certain documents were either, first, manifestly covered in their entirety by an exception to the right of access or, conversely, manifestly accessible in their entirety, or, finally, had already been the subject of a specific and individual assessment by the Commission in similar circumstances (judgment of 13 April 2005, *Verein für Konsumenteninformation v Commission*, T-2/03, EU:T:2005:125, paragraph 75).

- 84 It is not disputed in the present case that, in the contested decision, for the reasons set out in paragraph 29 above, the Commission considered that there was a risk that disclosure of the requested document would jeopardise the purpose of the audit in question. Those considerations were, furthermore, clearly set out in that decision.
- 85 Therefore, it must be held that it was indeed obvious, in the present case, that a specific and individual examination of the content of the document referred to in the request was unnecessary since the document was covered by a general presumption that disclosing the reports and findings of an internal auditor before he or she has validated the action taken for their implementation would undermine the purpose of the audits concerned.
- 86 The applicant's argument that it does not appear from the contested decision that the Commission carried out a specific assessment of the requested document must therefore be rejected.
- 87 Secondly, in so far as the applicant claims that the Commission made a manifest error in finding that the interests underlying her request for access to the requested document were rather of a private nature, it must be held that the Commission correctly pointed out, when the applicant applied for the present case to be joined to the case that gave rise to the judgment of 6 June 2019, *Bonnafoous v EACEA* (T-614/17, not published, EU:T:2019:381), she expressly put forward private reasons to support her interest in obtaining access to the requested document.
- 88 In the application for the cases to be joined, the applicant submitted in particular that 'a reading [of the requested document] should therefore [enable her] to corroborate and/or to document several of the grievances that she raised in Case T-614/17'.
- 89 The particular interest that may be claimed by a person requesting access to a document concerning him personally cannot be taken into account as an overriding public interest within the meaning of Article 4(2) of Regulation No 1049/2001. It follows that the defence of that person's interests in order to bring an action is not an overriding public interest within the meaning of that provision (see, to that effect, judgment of 24 May 2011, *NLG v Commission*, T-109/05 and T-444/05, EU:T:2011:235, paragraph 148).
- 90 In addition, it must be recalled once again that the refusal to grant disclosure to the applicant and the general presumption on which that refusal was based, namely that disclosing the requested document would undermine the purpose of the audit in question, are temporary. Due to the very nature of that presumption, it applies only until such time as the Commission's internal audit service has validated the action taken to implement the requested document. Therefore, the reference to the judgments of 12 October 2000, *JT's Corporation v Commission* (T-123/99, EU:T:2000:230, paragraph 50), and of 6 July 2006, *Franchet and Byk v Commission* (T-391/03 and T-70/04, EU:T:2006:190, paragraph 112), which appears in the reply in support of the argument that the contested decision deprives citizens of the ability to review the legality of the exercise of public power, is not relevant in the present case.
- 91 Therefore, in the light of the foregoing, it must be held that the applicant has not put forward any argument capable of establishing that there was an overriding public interest to justify disclosure of the requested document in the present case.

92 Accordingly, the fourth part of the plea must be rejected and, therefore, so must the first plea in its entirety.

The third plea, alleging infringement of the principle of proportionality

93 The applicant submits that the general presumption of non-disclosure of the requested document, on which the contested decision is based, is not justified. She considers that the refusal to disclose the document, even in part, should be interpreted as a refusal to carry out a specific and individual examination of the document, which is a clear breach of the principle of proportionality.

94 The Commission disputes those arguments.

95 In that regard, it is sufficient to state that, for the same reasons as those set out in paragraphs 82 to 85 above, the Commission was not required in the present case to carry out a specific and individual examination of the requested document.

96 Consequently, the third plea must be rejected and, therefore, the action must be dismissed in its entirety.

Costs

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

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

1. Dismisses the action;

2. Orders Laurence Bonnafous to pay the costs.

Kanninen

Póltorak

Stancu

Delivered in open court in Luxembourg on 26 March 2020.

[Signatures]