Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

29 September 2021 *

(Access to documents – Regulation (EC) No 1049/2001 – Documents relating to a procedure for the recovery of State aid following a decision declaring the aid incompatible with the internal market and ordering its recovery – Refusal to grant access – Exception relating to the protection of the purpose of inspections, investigations and audits – Overriding public interest – Principle of non-discrimination – Obligation to state reasons)

In Case T-569/19,

AlzChem Group AG, established in Trostberg (Germany), represented by A. Borsos and J. Guerrero Pérez, lawyers,

applicant,

v

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

defendant,

APPLICATION under Article 263 TFEU seeking annulment of Commission Decision C(2019) 5602 final of 22 July 2019 refusing to grant the applicant access to documents relating to the procedure for the recovery of State aid following a decision declaring the aid incompatible with the internal market and ordering its recovery,

THE GENERAL COURT (Fifth Chamber),

composed of D. Spielmann, President, O. Spineanu-Matei (Rapporteur) and R. Mastroianni, Judges,

Registrar: I. Pollalis, Administrator,

having regard to the written part of the procedure and further to the hearing on 23 March 2021,

gives the following

* Language of the case: English.

Judgment

I. Background to the dispute

1 By its Decision (EU) 2015/1826 of 15 October 2014 on the State aid SA.33797 – (2013/C) (ex 2013/NN) (ex 2011/CP) implemented by Slovakia for NCHZ (OJ 2015 L 269, p. 71), the European Commission found, inter alia, that Novácke chemické závody, a.s. ('NCHZ'), a Slovak chemical company, had received State aid that was unlawful and incompatible with the internal market, in the context of its insolvency proceedings. The Commission decided that that aid had to be repaid by NCHZ and by Fortischem a.s., as economic successor.

2 The applicant, AlzChem Group AG, is a German company which operates in the chemical industry and which intervened as an interested party in the procedure that led to Decision 2015/1826.

3 Decision 2015/1826 was the subject of two actions for partial annulment. By judgment of 24 September 2019, *Fortischem* v *Commission* (T-121/15, EU:T:2019:684), the Court dismissed the action as unfounded. By judgment of 13 December 2018, *AlzChem* v *Commission* (T-284/15, EU:T:2018:950), the Court annulled Article 2 of Decision 2015/1826.

4 By letter of 12 April 2019, the applicant submitted to the Commission a request for access to documents under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43). That request concerned the relevant documents held by the Commission, including, inter alia, Excel spreadsheets, Word documents or internal databases containing information on the state of progress of the recovery procedure and the amount of State aid recovered by the Slovak Republic following Decision 2015/1826 ('the requested documents').

5 The Commission rejected that request by letter of 24 April 2019, on the ground that it came under the exceptions provided for in the first and third indents of Article 4(2), and Article 4(3) of Regulation No 1049/2001. It also stated that no argument had been put forward that was capable of establishing the existence of an overriding public interest in disclosure of the requested documents and that partial access was not possible.

6 By letter of 15 May 2019, the applicant submitted to the Commission a confirmatory application, pursuant to Article 7(2) of Regulation No 1049/2001. It challenged the Commission's refusal, arguing, inter alia, that its request did not concern any document covered by the exceptions relied on by the Commission and that there was an overriding public interest justifying disclosure of the requested documents. It also requested partial access to those documents or access to them at the Commission's premises.

7 On 11 June 2019, the Commission informed the applicant that its confirmatory application was being processed, but that it would not receive a reply within the prescribed period and that the deadline for replying to that request was extended by 15 working days, in accordance with Article 8(2) of Regulation No 1049/2001. On 1 July 2019, the Commission informed the applicant that it had not been possible to gather all the information necessary for the full analysis of its request and for a final decision to be taken, and that that decision would be sent to the applicant as soon as possible.

II. The contested decision

8 By Decision C(2019) 5602 final of 22 July 2019 ('the contested decision'), the Commission refused to grant the applicant access to the requested documents, taking the view that they came under, first, the exception provided for in the third indent of Article 4(2) of Regulation No 1049/2001 relating to the protection of investigations and, secondly, the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001, relating to the protection of commercial interests.

9 In the first place, as regards the exception provided for in the third indent of Article 4(2) of Regulation No 1049/2001, the Commission considered that the requested documents not only formed part of the administrative file relating to the State aid investigation, but also concerned an investigation concerning the implementation of the decision relating to unlawful State aid.

10 First, the Commission observed that, according to case-law, there was a general presumption of confidentiality according to which disclosure of the documents in the administrative file of a State aid procedure undermined the purpose of investigations of such aid, even if the procedure was closed. It considered that the requested documents, which contained information on the state of progress of the State aid recovery procedure in question for which the Slovak authorities were responsible under Decision 2015/1826, formed part of the administrative file in the investigation of that aid, which had not been fully recovered.

11 Secondly, the Commission stated that, during the stage of recovery of unlawful State aid, it verified, with the active cooperation of the Member State concerned, the correct implementation of the decision concerning that aid and, therefore, its actions and the measures taken were intrinsically linked to its investigation of that aid within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001. It also stated that the State aid recovery stage was part of a structured and formalised procedure which constituted an investigation within the meaning of that provision. It considered that, since failure to comply with the decision on State aid could lead to the opening of infringement proceedings, the stage of implementation of that decision had to be regarded as a pre-litigation procedure similar to the procedure laid down in Article 258 TFEU, for which the Court of Justice had acknowledged that there was a general presumption of confidentiality. Disclosure of the requested documents to the public could therefore undermine the dialogue with the Slovak Republic, for which a climate of trust was essential.

12 In the second place, as regards the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001, the Commission stated that the case-law had recognised a general presumption of confidentiality in respect of documents forming part of one of its files, irrespective of whether a request for access concerned a closed or pending investigation procedure. According to the Commission, in the present case, the requested documents reveal detailed information on the state of progress and the various stages of the recovery process carried out by the undertakings concerned. In its view, that commercial information is sensitive. In the light of the bilateral nature of the stage of implementation of the decision on unlawful State aid, premature disclosure of documents relating to the state of progress of the undertakings concerned in the recovery process, before the actual recovery of that aid, would harm those undertakings and would ultimately harm the objectives of the State aid procedure rather than contribute to transparency.

13 In the third place, the Commission refused the request for partial access on the ground that there was a general presumption of confidentiality applicable to the requested documents.

14 In the fourth place, the Commission found that the considerations relied on by the applicant in order to establish the existence of an overriding public interest were rather general. In the Commission's view, the fact that the requested documents related to an administrative investigation and did not concern legislative acts, for which greater transparency had been recognised in the case-law, and the fact that the Commission would publish information on the recovery of the State aid in question after the final completion of the recovery procedure, including the amount repaid, the amount lost and the amount of interest recovered, further supported the conclusion that there was no overriding public interest in the present case.

III. Procedure and forms of order sought

15 By application lodged at the Registry of the General Court on 15 August 2019, the applicant brought the present action.

16 Acting on a proposal from the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral part of the procedure. The parties presented oral argument and answered the questions put by the Court at the hearing on 23 March 2021.

17 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

18 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

IV. Law

19 In support of its action, the applicant relies on two pleas in law alleging, first, an error of law and a manifest error of assessment in the application of the exceptions provided for in the first and third indents of Article 4(2), and Article 4(3) of Regulation No 1049/2001 and, secondly, infringement of the obligation to state reasons for the refusal to grant access to the requested documents in a non-confidential version or at the Commission's premises, in accordance with Article 4(6) and Article 10 of that regulation.

A. Preliminary observations on the identification of the actionable measures and on the time limit for bringing an action

20 The applicant submits that the Court's case-law relating to Regulation No 1049/2001 seems to reveal a number of inconsistencies and contradictions as regards the identification of the actionable measures and the starting point of the time limit for bringing an action. Thus, an analysis of the case-law, in particular the judgment of 10 December 2010, *Ryanair* v *Commission* (T-494/08 to T-500/08 and T-509/08, EU:T:2010:511), supports the conclusion that the starting point of the time limit for bringing an action for annulment of a decision refusing access to

documents under Regulation No 1049/2001 is determined by the last day on which the Commission should have adopted a decision. According to the applicant, even though the contested decision is dated 22 July 2019, the time limit for bringing an action started to run from 5 June 2019, since the absence of a response on that date must be regarded as a negative decision under Article 8(3) of that regulation.

21 However, as regards the actionable measure, where the Commission has not adopted a decision within the time limit laid down in Article 8(1) of Regulation No 1049/2001, according to the applicant, that measure is, depending on the circumstances, either the implied refusal decision, or both the implied decision and the express decision, or the express refusal decision. Accordingly, the applicant requests that, in so far as the Court might be led to find that the contested decision also includes the implied refusal decision resulting from the Commission's silence until 5 June 2019 inclusive, that decision should be regarded as forming an integral part of the contested decision.

22 In addition, the applicant draws attention to the potentially negative and unforeseen effects of the case-law on the time limit for bringing an action for annulment of an express decision in cases where that decision is adopted after there has been an implied decision. It is apparent from, inter alia, the judgment of 10 December 2010, *Ryanair* v *Commission* (T-494/08 to T-500/08 and T-509/08, EU:T:2010:511), and from the order of 13 November 2012, *ClientEarth and Others* v *Commission* (T-278/11, EU:T:2012:593), that, if the measure against which an action may be brought is the express decision, that time limit starts to run from the date of the implied decision. The applicant therefore had to reformulate its application brought against the implied decision under Article 8(3) of Regulation No 1049/2001 in order to take account of the arguments put forward by the Commission in the contested decision. The initial time limit for bringing an action which it should have had in order to prepare its action was therefore reduced. According to the applicant, the curtailment by the case-law of the statutory time limits within which individuals may exercise their rights in accordance with the FEU Treaty may unjustifiably restrict those rights and infringe Articles 42 and 47 of the Charter of Fundamental Rights of the European Union.

23 Furthermore, the applicant considers that, in the light of the case-law, the Commission's communications of 11 June and 1 July 2019 were entirely misleading, prevented its access to justice and should be criticised.

24 The Commission disputes the applicant's allegations relating to inconsistencies and contradictions in the case-law of the General Court and also those relating to potentially misleading conduct on the part of the Commission.

25 In that context, it must be noted that the Commission did not reply to the applicant's request for access either within the initial time limit or within the time limit for replying following the first extension, on 11 June 2019, which corresponds to the situation referred to in Article 8(3) of Regulation No 1049/2001, but that the Commission subsequently adopted an express refusal decision, which constitutes the contested decision.

26 In a situation such as that in the present case, described in paragraph 25 above, in the first place, the Commission's failure to reply must be regarded as an implied decision refusing access. The second extension of the time limit, on 1 July 2019, could not have validly extended the time limit because, under Article 8 of Regulation No 1049/2001, the Commission can extend the initial time limit only once and, on the expiry of the extended period, an implied decision to refuse access is

deemed to have been adopted (see, to that effect, judgment of 10 December 2010, *Ryanair* v *Commission*, T-494/08 to T-500/08 and T-509/08, EU:T:2010:511, paragraphs 38 and 40, and order of 27 November 2012, *Steinberg* v *Commission*, T-17/10, not published, EU:T:2012:625, paragraph 99). In that regard, it must be noted that the time limit laid down by Article 8(1) of Regulation No 1049/2001 is mandatory (see, to that effect, judgment of 19 January 2010, *Co-Frutta* v *Commission*, T-355/04 and T-446/04, EU:T:2010:15, paragraphs 60 and 70) and cannot be extended other than in the circumstances provided for in Article 8(2) of Regulation No 1049/2001, without rendering that article ineffective, since the applicant could no longer know precisely the date from which it could bring the action or complaint provided for in Article 8(3) of that regulation (see, by analogy, judgment of 21 April 2005, *Housieaux*, C-186/04, EU:C:2005:248, paragraph 26). Such an implied decision refusing access may be the subject of an action for annulment in accordance with the provisions of Article 263 TFEU (see, to that effect, order of 27 November 2012, *Steinberg* v *Commission*, T-17/10, not published, EU:T:2012:625, paragraph 101).

27 Nevertheless, where the Commission subsequently replied expressly and definitively to the confirmatory application by refusing access to the documents in question, it therefore implicitly withdrew the implied decision refusing access (see, to that effect, judgment of 2 October 2014, *Strack* v *Commission*, C-127/13 P, EU:C:2014:2250, paragraphs 88 and 89; order of 27 November 2012, *Steinberg* v *Commission*, T-17/10, not published, EU:T:2012:625, paragraph 101; and judgment of 26 April 2018, *Espírito Santo Financial (Portugal)* v *ECB*, T-251/15, not published, EU:T:2018:234, paragraph 34). That express decision may then be the subject of an action for annulment in accordance with Article 263 TFEU.

28 If the implied decision has been the subject of an action for annulment, the applicant loses its interest in continuing proceedings by reason of the adoption of the express decision, and it will be held that there is no longer any need to give a ruling on that action (see, to that effect, judgments of 2 October 2014, *Strack* v *Commission*, C-127/13 P, EU:C:2014:2250, paragraphs 88 and 89; of 10 December 2010, *Ryanair* v *Commission*, T-494/08 to T-500/08 and T-509/08, EU:T:2010:511, paragraph 48; of 2 July 2015, *Typke* v *Commission*, T-214/13, EU:T:2015:448, paragraph 36; and of 26 April 2018, *Espírito Santo Financial (Portugal)* v *ECB*, T-251/15, not published, EU:T:2018:234, paragraph 36). The applicant may also adapt its claims and pleas in law within the time limit for bringing proceedings laid down for that purpose by the sixth paragraph of Article 263 TFEU (see, to that effect, judgment of 16 December 2011, *Enviro Tech Europe and Enviro Tech International* v *Commission*, T-291/04, EU:T:2011:760, paragraph 94). If the express decision was adopted before the action was brought against the implied decision, any action subsequently brought against the implied decision would then be inadmissible (see, to that effect, judgment of 10 December 2010, *Ryanair* v *Commission*, T-494/08 to T-500/08 and T-509/08, EU:T:2010:511, paragraph 47).

29 In the present case, the Commission adopted an express decision, admittedly regrettably after the expiry of the extended period, but before the expiry of the time limit for bringing an action against the implied decision and before an action was brought against the implied decision. Therefore, by adopting that express decision, the Commission withdrew the implied decision and the decision which may be the subject of an action for annulment in the present case is the express decision of 22 July 2019 refusing access to the requested documents, which is the contested decision.

30 In the second place, contrary to what the applicant argues, the time limit for bringing an action for annulment of the express decision must be calculated in accordance with the provisions of Article 263 TFEU and cannot be counted from the date of the implied refusal decision. The

applicant is also wrong to claim that the facts in the case which gave rise to the order of 13 November 2012, *ClientEarth and Others* v *Commission* (T-278/11, EU:T:2012:593), were comparable to those of the present case. In that case, the action for annulment, which concerned an implied rejection decision of 4 February 2011, was not brought until 25 May 2011 and, therefore, was inadmissible on the ground that it was out of time. It does not therefore follow from that order that an action brought against an express decision must be lodged within the time limit applicable in the case of an action for annulment of the implied decision preceding the express decision.

31 In the present case, the time limit for bringing an action against the contested decision must be counted from 22 July 2019 at 12.00 a.m. Although it is true that, as the applicant submits, it can only be stated that the Commission could not extend the time limit for submitting a response at the end of the first extension, the fact remains that that does not taint the contested decision with unlawfulness justifying its annulment, given that the Commission responded to that request before the applicant had drawn any inferences from the lack of response within the period provided for under Article 8(3) of Regulation No 1049/2001 (see, to that effect, judgment of 28 June 2012, *Commission* v *Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 89, and order of 27 November 2012, *Steinberg* v *Commission*, T-17/10, not published, EU:T:2012:625, paragraph 102). Moreover, contrary to what the applicant claims, it cannot be found that it did not have the statutory period in order to prepare its action, which could have been brought up to 2 October 2019, pursuant to the combined provisions of the sixth paragraph of Article 263 TFEU and Articles 58 and 60 of the Rules of Procedure of the General Court.

B. The first plea in law, alleging an error of law and a manifest error of assessment in the application of the exceptions provided for in the first and third indents of Article 4(2), and Article 4(3) of Regulation No 1049/2001

32 According to the applicant, the Commission's errors of law and manifest errors of assessment must be examined in the light of the fundamental right of access to documents, which meets the objective of strengthening the legitimacy of administrative bodies in the context of their decision-making activities and which is enshrined in Article 42 of the Charter of Fundamental Rights. Any exception to, or limitation of that right should be interpreted restrictively. The applicant relies on the contradictory nature of the positions adopted by the Commission concerning the disclosure of information on the state of progress of the recovery of the State aid.

33 The first plea in law is divided into five parts. By the first part, the applicant submits that the request for access did not concern any document relating to an investigation or forming part of a file relating to an investigation and that, therefore, the request affected neither the purpose of investigations referred to in the third indent of Article 4(2) of Regulation No 1049/2001 nor the Commission's decision-making process referred to in Article 4(3) of that regulation. By the second part, the applicant submits that the request for access could not be refused either on the basis of the protection of the purpose of investigations provided for in the third indent of Article 4(2) of Regulation No 1049/2001, or on the basis of the protection of the Commission's decision-making process provided for in Article 4(3) of that regulation. By the third part, the applicant claims that the request for access did not concern any information or data of commercial interest requiring protection under the first indent of Article 4(2) of that regulation. By the fourth part, the applicant alleges that, in the contested decision, there was a discriminatory application of the exceptions to the disclosure of information relating to recovery. By the fifth part, the applicant claims that the application of any exception to disclosure is superseded by an overriding public interest.

34 The Commission disputes the applicant's arguments.

35 As a preliminary point, it should be noted that, contrary to what the applicant submits in its pleadings, the refusal of access in the contested decision is based on the first and third indents of Article 4(2) of Regulation No 1049/2001, not on Article 4(3) of that regulation. Moreover, the applicant acknowledged that at the hearing, formal note of which was taken in the minutes of the hearing. Its arguments are therefore irrelevant in so far as they relate to the alleged application of Article 4(3) of Regulation No 1049/2001 and must be rejected.

36 Article 1 of Regulation No 1049/2001 provides that the purpose of that regulation is to confer on the public as wide a right of access as possible to documents of the EU institutions (see judgment of 22 January 2020, *MSD Animal Health Innovation and Intervet international* v *EMA*, C-178/18 P, EU:C:2020:24, paragraph 51 and the case-law cited).

37 In that regard, it must be noted that, according to the case-law, the administrative activity of the Commission does not require such extensive access to documents as that required by the legislative activity of an EU institution (see judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraph 91 and the case-law cited; judgment of 7 September 2017, *AlzChem* v *Commission*, T-451/15, not published, EU:T:2017:588, paragraph 80).

38 It is also apparent from Article 4 of Regulation No 1049/2001, which introduces a system of exceptions in that regard, that that right is, nevertheless, subject to certain limits based on reasons of public or private interest. As such exceptions depart from the principle of the widest possible public access to documents, they must be interpreted and applied strictly (see judgment of 22 January 2020, *MSD Animal Health Innovation and Intervet international* v *EMA*, C-178/18 P, EU:C:2020:24, paragraphs 52 and 53 and the case-law cited).

39 Where an EU institution, body, office or agency that has received a request for access to a document decides to refuse to grant that request on the basis of one of the exceptions laid down in Article 4 of Regulation No 1049/2001, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by that exception, and the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical (see judgment of 22 January 2020, *MSD Animal Health Innovation and Intervet international* v *EMA*, C-178/18 P, EU:C:2020:24, paragraph 54 and the case-law cited).

40 In certain cases, the Court of Justice has recognised that it was however open to that institution, body, office or agency to base its decisions in that regard on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature (see judgment of 22 January 2020, *MSD Animal Health Innovation and Intervet international* v *EMA*, C-178/18 P, EU:C:2020:24, paragraph 55 and the case-law cited).

41 The objective of such presumptions is thus the possibility, for the EU institution, body, office or agency concerned, to consider that the disclosure of certain categories of documents undermines, in principle, the interest protected by the exception which it is invoking, by relying on such general considerations, without being required to examine specifically and individually each of the documents requested (see judgment of 22 January 2020, *MSD Animal Health Innovation and Intervet international* v *EMA*, C-178/18 P, EU:C:2020:24, paragraph 56 and the case-law cited).

42 In the same way that the case-law requires that the exceptions to disclosure referred to in Article 4(2) of Regulation No 1049/2001 be interpreted and applied strictly, inasmuch as they derogate from the principle of the widest possible public access to documents held by an EU institution, body, office or agency (judgments of 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 75, and of 3 July 2014, *Council* v *In 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 48), the recognition and application of a general presumption of confidentiality must be considered strictly (see, to that effect, judgment of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraph 81).

43 According to the case-law, the existence of a general presumption of confidentiality does not exclude the possibility of demonstrating that a given document disclosure of which has been requested is not covered by that presumption, or that there is an overriding public interest justifying the disclosure of the document concerned by virtue of the last sentence of Article 4(2) of Regulation No 1049/2001 (judgments of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 62, and of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 66).

44 It is in the light of the case-law principles set out above that it is necessary to determine whether the Commission wrongly applied the first and third indents of Article 4(2) of Regulation No 1049/2001.

45 It should be recalled that the Commission did not carry out a specific, individual examination of each of the requested documents, but considered, in essence, that they were covered by two general presumptions of confidentiality applying to the documents relating to the state of progress of the State aid recovery procedure and the amounts recovered, following its decision ordering recovery of that aid. The presumptions applied by the Commission are based, first, on the exception relating to the protection of investigations, provided for in the third indent of Article 4(2) of Regulation No 1049/2001 and, secondly, on the exception relating to the protection of commercial interests of third parties, provided for in the first indent of Article 4(2) of that regulation.

1. The first and second parts, alleging, in essence, that the request for access could not be refused on the basis of the protection of the purpose of investigations laid down in the third indent of Article 4(2) of Regulation No 1049/2001

46 In the first part, the applicant submits that its request did not concern any document relating to an investigation or forming part of a file relating to an investigation, whether in relation to the State aid found in Decision 2015/1826 or a future State aid decision. According to the applicant, the request concerned precise factual information on the state of progress of the implementation of Decision 2015/1826 and, therefore, information gathered after the adoption of that decision. In the applicant's view, since its request did not relate to substantive arguments put forward by the Slovak Republic, granting the request could not have been regarded as undermining the willingness of the Member States to cooperate with the Commission in investigations carried out by the latter. Furthermore, the Commission's classification of its request as concerning documents or information in the file of a case or documents relating to an investigation has no basis in the case-law. Therefore, according to the applicant, its request did not affect the purpose of investigations referred to in the third indent of Article 4(2) of Regulation No 1049/2001.

47 In the second part, in the first place, the applicant submits that, even if its request concerned documents or information which were formally part of the relevant file on which the contested decision is based, the Commission was not entitled to rely on the exceptions provided for in the third indent of Article 4(2) of Regulation No 1049/2001 in order to reject the request. According to the applicant, access to the requested documents could not be regarded as undermining the Member States' willingness to cooperate with the Commission, since its request did not concern analyses or internal notes containing the Commission's assessment of a particular case or investigation.

48 In the reply, the applicant states that, according to the Commission, the information requested on the state of progress of the recovery of the State aid is linked to other investigations, in particular that relating to the recovery procedure provided for in Article 16 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9), and the investigation relating to infringement proceedings under Article 258 TFEU, by a reference by analogy to the 'EU-Pilot' procedure. However, the Commission made no reference to those procedures either in the letter of 24 April 2019 or in the contested decision and did not mention the existence of a procedure initiated against the Slovak Republic in that regard. The applicant argues that the Commission cannot now rely on new facts and pleas.

49 In the second place, the applicant rejects the Commission's argument that the requested documents concerning the state of progress of the recovery of the State aid in question cannot be disclosed on the ground that they contain substantive information. Quantitative data could have been produced without disclosing substantive data, for example by submitting a document showing that a certain percentage of the State aid had been recovered or that no amount had been recovered. In any event, the Commission's practice is to send substantive information in its replies to requests for access to documents under Regulation No 1049/2001.

50 In the third place, the applicant claims that the Commission cannot rely on a broad interpretation of the exceptions to the general principle of disclosure of public documents, enshrined in Regulation No 1049/2001, where its own practice states that the reasons on which it relies are not applicable to the request for access. It cites, by way of example, six cases in which the Commission made public, before the opening of infringement proceedings, information comparable to that which the request sought to obtain.

51 The Commission disputes the applicant's arguments.

52 It must be held that, by the first and second parts of the first plea in law, the applicant disputes, in essence, in the first place, the fact that the requested documents are part of an investigation stage, in particular because the State aid investigation was closed by Decision 2015/1826. In the second place, it does not agree that the Commission may rely on the exception relating to the protection of the purpose of investigations provided for in the third indent of Article 4(2) of Regulation No 1049/2001.

53 In the contested decision, the Commission refused access to the documents requested on two separate grounds. First, it considered that the requested documents were part of the file concerning the State aid found in Decision 2015/1826 and that, therefore, they were covered by a general presumption of confidentiality covering the investigation concerning the State aid in question. It thus considered that those documents were covered by the general presumption of confidentiality concerning documents in an administrative file relating to a procedure for

reviewing State aid, as recognised in the judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2010:376, paragraph 61), and recalled in particular in the judgments of 14 July 2016, *Sea Handling* v *Commission* (C-271/15 P, not published, EU:C:2016:557, paragraphs 36 to 38); of 13 March 2019, *AlzChem* v *Commission* (C-666/17 P, not published, EU:C:2019:196, paragraph 31); and of 19 September 2018, *Chambre de commerce et d'industrie métropolitaine Bretagne-Ouest (port de Brest)* v *Commission* (T-39/17, not published, EU:T:2018:560, paragraph 62).

54 Secondly, the Commission stated, in essence, that the recovery procedure could lead directly to the initiation of infringement proceedings under the second subparagraph of Article 108(2) TFEU and took the view that the stage of implementation of its decision concerning that aid had to be regarded as a pre-litigation procedure, similar to the procedure laid down in Article 258 TFEU. After noting that the Court of Justice had recognised the existence of a general presumption of confidentiality applicable to documents gathered in an investigation relating to infringement proceedings, the Commission considered that the reasoning followed in recognising such a presumption applied *mutatis mutandis* to a refusal to disclose the requested documents. It thus considered that those documents were covered, as a result of an application by analogy, by the general presumption of confidentiality in respect of the documents relating to the pre-litigation stage of an infringement procedure under Article 258 TFEU, as recognised in the judgment of 14 November 2013, *LPN and Finland* v *Commission* (C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 65), and noted in particular in the judgments of 23 January 2017, *Justice & Environment* v *Commission* (T-727/15, not published, EU:T:2017:18, paragraph 46), and of 5 December 2018, *Campbell* v *Commission* (T-312/17, not published, EU:T:2018:876, paragraph 29).

55 It is therefore necessary to determine whether the Commission erred in law in deciding that the documents relating to the procedure for reviewing the implementation of a decision ordering the recovery of State aid were covered by a general presumption of confidentiality under the third indent of Article 4(2) of Regulation No 1049/2001, then, if such a presumption exists or must be recognised, whether the Commission applied it in the present case without vitiating its decision by an error of assessment.

(a) The existence of a general presumption of confidentiality

56 It must be noted that, according to the case-law (see paragraph 53 above), the general presumption of confidentiality which concerns documents in the administrative file relating to a procedure for reviewing State aid expressly covers documents which are part of the investigation carried out by the Commission in order to find in a decision that, inter alia, there is State aid and order that it be recovered. However, the EU Courts have not yet had to rule on a refusal to grant access to documents relating to the stage of implementation of such a Commission decision by the Member State concerned.

57 Therefore, although it is true that the recognition of the general presumption of confidentiality in the case-law referred to in paragraph 53 above concerns the administrative file in the context of a review procedure initiated in accordance with Article 108(2) TFEU, that general presumption is certain only as concerns documents forming part of the administrative procedure leading to the adoption of a decision by the Commission in which the latter finds that, inter alia, there is State aid and orders its recovery.

58 Furthermore, as regards the documents relating to the implementation phase of a decision in which the Commission orders the recovery of State aid, they may indeed be formally part of the same file containing the documents relating to the investigation conducted by the Commission which led it to adopt that decision, as, moreover, the applicant concedes. All the documents relate to the same national measure or measures. However, as noted in paragraph 42 above, the exceptions to disclosure referred to in the third indent of Article 4(2) of Regulation No 1049/2001 must be interpreted and applied strictly in so far as they derogate from the principle of the widest possible public access to documents held by the EU institutions. Therefore, as the applicant submits, it cannot be held that the general presumption of confidentiality in relation to the review of State aid, as recognised by the case-law (see paragraph 53 above) necessarily covers the documents relating to the stage of implementation of the Commission's decision on the basis that they are supposedly part of the same administrative file.

59 It is therefore necessary to examine whether the documents relating to the stage of implementation of the Commission's decision by the Member State concerned may also be covered by a general presumption of confidentiality, whether it be that relating to the review of State aid, recognised by the case-law, which would then be regarded as also covering those documents, or another general presumption of confidentiality.

60 In that regard, it should be noted that the EU Courts have identified a number of criteria for recognising a general presumption of confidentiality, which relate to the documents concerned and to the undermining of the interest protected by the exception in question.

(1) The documents concerned

61 It is apparent from the case-law that, in order for a general presumption of confidentiality to be validly relied upon against a person requesting access to documents on the basis of Regulation No 1049/2001, it is necessary that the documents in question belong to the same category of documents or be documents of the same nature (judgment of 5 February 2018, *MSD Animal Health Innovation and Intervet international* v *EMA*, T-729/15, EU:T:2018:67, paragraph 25; see also, to that effect, judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 50, and of 17 October 2013, *Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 72).

62 In all the cases which gave rise to the judgments establishing such presumptions, the refusal of access in question related to a set of documents which were clearly defined by the fact that they all belonged to a file relating to ongoing administrative or judicial proceedings (judgment of 5 February 2018, *MSD Animal Health Innovation and Intervet international* v *EMA*, T-729/15, EU:T:2018:67, paragraph 28; see also, to that effect, judgments of 28 June 2012, *Commission* v *Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 128; of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 49 and 50; and of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraphs 69 and 70).

63 In that regard, it should be noted that the Court has indeed held that all the documents in the administrative file relating to a procedure for reviewing State aid formed a single category (see, to that effect, judgment of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 64). Nevertheless, as noted in paragraph 56 above, the EU Courts have not been called upon to rule on whether the documents which led to the adoption of the decision by which the Commission found that there was State aid and that it

should be recovered, and the documents relating to the procedure for reviewing the implementation of that decision belong to the same category of documents. It must be held that, even though they may belong to the same Commission file, the fact remains that, strictly speaking, they come under two different categories of documents.

64 On the other hand, it cannot be disputed that the documents relating to the procedure for reviewing the implementation of a Commission decision ordering the recovery of State aid form a single category, in that they are clearly defined by the fact that they all belong to the file relating to an administrative procedure, subsequent to the procedure which led to the adoption of that decision.

(2) The undermining of the interest protected by the exception relied on

65 According to case-law, the application of general presumptions of confidentiality is dictated by the overriding need to ensure the proper operation of the procedures in question and to ensure that their objectives are not undermined. Accordingly, a general presumption may be recognised on the basis that access to the documents involved in certain procedures is incompatible with the proper conduct of those procedures and that those procedures could be undermined, since the general presumptions of confidentiality ensure that the integrity of the conduct of the procedure can be preserved by limiting intervention by third parties (judgments of 7 September 2017, *AlzChem* v *Commission*, T-451/15, not published, EU:T:2017:588, paragraph 21, and of 5 February 2018, *MSD Animal Health Innovation and Intervet international* v *EMA*, T-729/15, EU:T:2018:67, paragraph 26).

66 Recognition of a general presumption of confidentiality in respect of a new category of documents thus presupposes that it has first been shown that it is reasonably foreseeable that disclosure of the type of document falling within that category would in fact be liable to undermine the interest protected by the exception in question (judgment of 28 May 2020, *Campbell* v *Commission*, T-701/18, EU:T:2020:224, paragraph 39).

67 In that context, it is necessary first of all to determine whether the documents relating to the procedure for reviewing the implementation of a Commission decision ordering the recovery of State aid relate to an investigation stage, which the applicant disputes. If necessary, it will then be appropriate to assess whether the characteristics of such an investigation justify the recognition of a general presumption of confidentiality covering those documents.

(i) The existence of an investigation

68 It must be noted that, although the third indent of Article 4(2) of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where disclosure of the latter would undermine the protection of, inter alia, the purpose of investigations, the concept of 'investigations' within the meaning of that provision is not defined by that regulation.

69 According to case-law, the concept of investigation, appearing in the third indent of Article 4(2) of Regulation No 1049/2001, is an autonomous concept of EU law which must be interpreted taking into account, inter alia, its usual meaning as well as the context in which it occurs (judgment of 7 September 2017, *France* v *Schlyter*, C-331/15 P, EU:C:2017:639, paragraph 45). Since the

concept of 'investigations' relates to an exception to the general rule that all documents must be made accessible, it must be interpreted and applied strictly (Opinion of Advocate General Wathelet in *France* v *Schlyter*, C-331/15 P, EU:C:2017:280, point 101).

70 Without there being any need to identify an exhaustive definition of 'investigation' within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001, a structured and formalised Commission procedure that has the purpose of collecting and analysing information in order to enable the institution to take a position in the context of its functions provided for by the EU and FEU Treaties must be considered to be an investigation. Those procedures do not necessarily have to have the purpose of detecting or pursuing an offence or irregularity. The concept of 'investigation' could also cover a Commission activity intended to establish facts in order to assess a given situation (judgment of 7 September 2017, *France* v *Schlyter*, C-331/15 P, EU:C:2017:639, paragraphs 46 and 47).

71 Finally, as the Commission stated in the contested decision, the concept of 'investigation' in State aid procedures does not only aim to protect the purpose of investigations targeting certain companies (see, to that effect, judgment of 19 September 2018, *Chambre de commerce et d'industrie métropolitaine Bretagne-Ouest (port de Brest)* v *Commission*, T-39/17, not published, EU:T:2018:560, paragraph 70).

72 It must be noted that, as the Commission submits, in the context of the procedure for reviewing the implementation of a decision requiring the recovery of State aid, the Commission collects and assesses the information provided by the Member State concerned in order to determine whether, inter alia, it has taken all necessary measures to recover the aid in full and, where appropriate, in order to decide to refer the matter to the Court of Justice in accordance with Article 108(2) TFEU.

73 It follows that, in accordance with the case-law cited in paragraph 70 above, such an activity constitutes a structured and formalised Commission procedure that has the purpose of collecting and analysing information in order for that institution to take a position in the context of its functions.

74 Moreover, it should be noted that, in the context of the procedure for reviewing the implementation of a Commission decision requiring the recovery of State aid, Article 28(1) of Regulation 2015/1589 provides that 'where the Member State concerned does not comply with conditional or negative decisions, in particular in cases referred to in Article 16 of this Regulation, the Commission may refer the matter to the Court … directly in accordance with Article 108(2) TFEU'.

75 It must be noted that the second subparagraph of Article 108(2) TFEU does not provide for a pre-litigation stage, unlike Article 258 TFEU. As the Commission submits, the stage of reviewing the implementation of its decision requiring the recovery of State aid must be regarded as being comparable to the pre-litigation stage of the procedure laid down in Article 258 TFEU, which corresponds to investigations within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001. As Advocate General Wathelet noted, in essence, in his Opinion in *France* v *Schlyter* (C-331/15 P, EU:C:2017:280, point 99), the concept of 'investigations' in Regulation No 1049/2001 covers infringement proceedings, as is apparent from the judgment of 14 November 2013, *LPN and Finland* v *Commission* (C-514/11 P and C-605/11 P,

EU:C:2013:738, paragraph 70), and investigations that may lead to the initiation of that procedure (see, to that effect, judgment of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraphs 62 and 65).

76 It follows from the foregoing that, contrary to what is claimed by the applicant and as the Commission submits, the procedure for reviewing the implementation of the decision ordering the recovery of State aid is an investigation, carried out by the Commission, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001, as defined in the case-law.

77 That conclusion cannot be called into question by the applicant's argument that, if the justification set out by the Court of Justice in the judgment of 14 November 2013, *LPN and Finland* v *Commission* (C-514/11 P and C-605/11 P, EU:C:2013:738), were applicable to documents which the Commission might use in potential future infringement proceedings, the principle of access to documents and Regulation No 1049/2001 would be rendered meaningless. According to the applicant, almost all the documents gathered by the Commission in any context are likely not to be disclosed, since any document could be used in proceedings which may have an impact on potential investigations carried out by the Commission, regardless of the circumstances in which it was obtained. It is sufficient to note in that regard that this does not concern potential investigations, but a specific administrative procedure, the starting point of which is a Commission decision which defines the purpose of the investigations subsequent to the adoption of the decision, with a view to a new decision being taken by the Commission relating to referring the matter to the Court of Justice in accordance with Article 108(2) TFEU.

78 Furthermore, although it cannot be denied that there is a link between the stage when the decision on State aid is taken and the stage of reviewing the implementation of that decision since the latter stage is the consequence of the former, it cannot be held that, in the light of the application of the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001, there is procedural continuity between those two stages. It must be held that the investigations during each of those stages differ in terms of why they were initiated and their purpose. The Commission's arguments in that regard must therefore be rejected.

(ii) The undermining of the protection of the purpose of investigations

79 According to the case-law, in order to justify refusal of access to a document the disclosure of which has been requested, it is not sufficient, in principle, for that document to fall within an activity mentioned in Article 4(2) of Regulation No 1049/2001. The EU institution, body, office or agency concerned must also explain how access to that document could specifically and actually undermine the interest protected by an exception laid down in that provision (judgments of 28 June 2012, *Commission* v *Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 116; of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 44; and of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraph 68).

80 In that regard, it must be noted that the stage of reviewing the implementation of a decision requiring the recovery of State aid must be regarded as being comparable to the pre-litigation stage of the procedure laid down in Article 258 TFEU (see paragraph 75 above).

81 According to settled case-law, it can be presumed that the disclosure of the documents concerning an infringement procedure during its pre-litigation stage risks altering the nature of that procedure and changing the way it proceeds and, accordingly, that disclosure would in

principle undermine the protection of the purpose of investigations, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001 (judgments of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 65, and of 11 May 2017, *Sweden* v *Commission*, C-562/14 P, EU:C:2017:356, paragraph 40).

82 It has been held that the review which the Commission was required to carry out in the context of infringement proceedings fell within the scope of an administrative duty, in the context of which the Commission had wide discretion and entered into a bilateral dialogue with the Member States concerned. By contrast, parties other than those Member States did not have the benefit of specific procedural safeguards compliance with which is subject to effective judicial review (see judgment of 13 September 2013, *ClientEarth* v *Commission*, T-111/11, EU:T:2013:482, paragraph 74 and the case-law cited).

83 Therefore, according to case-law, the Commission is entitled to maintain the confidentiality of documents assembled in the course of an investigation relating to infringement proceedings where their disclosure might undermine the climate of trust which must exist, between the Commission and the Member State concerned, in order to achieve a mutually acceptable solution to any contraventions of EU law that may be identified (judgment of 13 September 2013, *ClientEarth* v *Commission*, T-111/11, EU:T:2013:482, paragraph 60).

84 As regards the procedure for reviewing the implementation of a decision ordering the recovery of State aid, account must be taken of the fact that that procedure is bilateral, since it is between the Commission and the Member State concerned. In the context of that procedure, interested parties other than that Member State do not have the right to consult the documents in the Commission's administrative file and no special role is reserved to those interested parties.

85 Therefore, if interested parties other than the Member State concerned were able to obtain, on the basis of Regulation No 1049/2001, access to the documents in the Commission's administrative file relating to the procedure for reviewing the implementation of a decision ordering the recovery of State aid, such disclosure would be likely to alter the nature and conduct of such a bilateral procedure, by permitting, as the case may be, third parties to adopt a position on the information provided by the Member State concerned and thus undermine the protection of the purpose of investigations.

86 In the context of the procedure for the recovery of State aid, sincere cooperation and mutual trust between the Commission and the State responsible for granting the aid are essential in order to enable them to express their views freely. If that Member State is required to implement the Commission's decision and if the Commission must ensure that its decision is implemented, the implementation of the recovery decision requires communication between the Commission and the authorities of the Member State concerned, in particular, although not exclusively, when the latter encounters difficulties in recovering the aid.

87 A bilateral dialogue between the Commission and the Member State concerned may make it possible for the Member State to cooperate in good faith, while ensuring that the Commission properly implements its decision as quickly as possible. As the Commission submits, disclosure of the documents relating to the procedure for reviewing the implementation of a decision ordering the recovery of State aid would jeopardise the review of that procedure and the Member States' willingness to provide detailed explanations regarding, inter alia, the state of progress of the recovery and the difficulties encountered during the recovery. It could thus prove even more difficult for the Commission to obtain such information and, as the case may be, to begin a

process of negotiation and to reach an agreement with the Member State concerned, putting an end to an infringement alleged against that Member State consisting of the failure to implement the Commission's decision, in order to enable EU law to be respected and to avoid legal proceedings under Article 108(2) TFEU (see, to that effect and by analogy, judgment of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 63).

88 Accordingly, for the same reasons as those put forward in the context of infringement proceedings, and in particular the pre-litigation phase of those proceedings, referred to in paragraphs 81 and 83 above, and in view of the particular position of the Member State concerned in the procedure for reviewing the implementation of a decision ordering the recovery of State aid, it must be accepted that, in principle, disclosure of documents relating to that procedure would undermine the dialogue and, therefore, the cooperation between the Commission and that Member State.

89 It follows from the foregoing considerations that, in the light of the application of the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001, the documents relating to the procedure for reviewing the implementation of a decision ordering the recovery of State form part of the Commission's administrative file relating to the national measure or measures at issue, which must be distinguished from the part of the file concerning the classification phase of the State aid measure or measures (see paragraph 63 above). Likewise, the investigation stage preceding the adoption of a decision on State aid must be distinguished from the stage of reviewing the implementation of that decision (see paragraph 78 above). Accordingly, it must be held that, contrary to what the Commission stated in the contested decision, the documents relating to the procedure for reviewing the implementation of a decision ordering the recovery of State aid are not covered by the general presumption of confidentiality which concerns the documents in the administrative file relating to a procedure for reviewing State aid, as recognised by the case-law (see paragraph 53 above).

90 By contrast, the reasons which led to the recognition of a general presumption, under the third indent of Article 4(2) of Regulation No 1049/2001, being applicable to documents gathered in an investigation relating to potential infringement proceedings justify the recognition of a general presumption, under that provision, being applicable to documents relating to the procedure for reviewing the implementation of a decision ordering the recovery of State aid (see paragraph 88 above).

91 Accordingly, it must be held that the Commission did not err in law in finding that the documents relating to the procedure for reviewing the implementation of a decision ordering the recovery of State aid were covered by a general presumption of confidentiality under the third indent of Article 4(2) of Regulation No 1049/2001.

92 It is therefore necessary to examine whether the Commission made an error of assessment in applying, in the present case, the general presumption of confidentiality referred to in paragraph 91 above.

(b) The application of the general presumption of confidentiality to the requested documents

93 In the contested decision, the Commission stated, inter alia, as the applicant acknowledges, that failure by the Member State concerned to comply with the Commission's decision ordering recovery of the aid could lead to the initiation of infringement proceedings. The Commission

therefore considered that the reasoning followed in order to recognise the existence of a general presumption of confidentiality applicable to documents gathered in an investigation relating to infringement proceedings applied *mutatis mutandis* to the refusal to disclose the documents at issue in the present case.

94 In that regard, while it is true that, as the applicant submits, the Commission did not, in the contested decision, refer to the State aid recovery procedure referred to in Article 16 of Regulation 2015/1589, the recovery procedure is nevertheless referred to in a sufficiently clear manner and it is therefore irrelevant that the Commission did not cite that provision.

95 Moreover, as noted in paragraph 4 above, the applicant requested access to the relevant Commission documents containing information on the state of progress of the recovery and the amount of the State aid recovered by the Slovak Republic following Decision 2015/1826.

96 Accordingly, it must be held that the Commission was entitled, without making an error of assessment, to consider that the requested documents were covered by a general presumption of confidentiality, based on the exception relating to the protection of the purpose of investigations provided for in the third indent of Article 4(2) of Regulation No 1049/2001, which applies to documents relating to the procedure for reviewing the implementation of a decision ordering the recovery of State aid (see paragraph 91 above).

97 That conclusion cannot be called in question by the applicant's arguments.

98 In the first place, according to the applicant, if its request for access to the requested documents were granted, that could not undermine the Slovak Republic's willingness to cooperate with the Commission in its investigation. Even if, as it submits, its request does not concern substantive arguments put forward by that State, that is true only in so far as those arguments relate to the classification of the national measures examined in Decision 2015/1826. On the other hand, its request may concern that State's substantive arguments relating to the implementation of that decision.

99 In the second place, the applicant submits that, although reference is made to numerous precedents in the contested decision, none of them is applicable in the present case. According to the applicant, the judgment of 11 December 2001, *Petrie and Others* v *Commission* (T-191/99, EU:T:2001:284); the order of 13 November 2012, *ClientEarth and Others* v *Commission* (T-278/11, EU:T:2012:593); and the judgment of 19 September 2018, *Chambre de commerce et d'industrie métropolitaine Bretagne-Ouest (port de Brest)* v *Commission* (T-39/17, not published, EU:T:2018:560), concerned requests for access to 'substantive documents' drawn up by the Commission in relation to a potential infringement of EU law and not specific information relating to the state of progress of the repayment of State aid.

100 In that regard, it must be noted that the Commission cited the third judgment referred to in paragraph 99 above in order to support its assertion that the actions which it took at the stage of implementing a decision which had found State aid to be unlawful constituted 'investigations' referred to the third indent of Article 4(2) of Regulation No 1049/2001. The same is true of the judgment of 7 September 2017, *France* v *Schlyter* (C-331/15 P, EU:C:2017:639), to which the applicant intended to refer in its pleadings, as it stated at the hearing, although it had wrongly referred to the 'judgment in *France* v *Commission*'. Lastly, the Commission cited the first two judgments referred to in paragraph 99 above in support of its assertion that the reasoning followed in relation to the existence of a general presumption of confidentiality covering

documents relating to investigations which might lead to infringement proceedings applied *mutatis mutandis* to documents such as those at issue in the present case. It has been held that those arguments on the part of the Commission were not vitiated by errors of law.

101 In the third place, the applicant claims that, even if it were accepted, as suggested by the Court of Justice in the judgment of 14 November 2013, *LPN and Finland* v *Commission* (C-514/11 P and C-605/11 P, EU:C:2013:738), that information relating to infringement proceedings could be covered by the exception relating to the protection of the purpose of investigations, it was not aware of any infringement proceedings initiated against the Slovak Republic after the adoption of Decision 2015/1826. In that regard, it must be noted that, in so far as that State is required to recover the State aid in question under Decision 2015/1826 and that, in accordance with Article 108(2) TFEU, the Commission may refer the matter to the Court of Justice directly in the event of non-compliance with the obligation to recover the aid, there is no need for a new procedure within the meaning of Article 108(2) TFEU to be 'initiated' or for proceedings to be 'brought' under Article 258 TFEU against that State. Furthermore, contrary to what the applicant also submits, the Commission makes no reference in its pleadings to infringement proceedings brought against the Slovak Republic in respect of the implementation of Decision 2015/1826.

102 In the fourth place, the applicant claims that the Commission cannot rely on a broad interpretation of the exceptions to the general principle of disclosure of public documents, enshrined in Regulation No 1049/2001, where its own practice states that the reasons on which it relies are not applicable to the request for access. The applicant cites, by way of example, six cases in which the Commission, before the initiation of infringement proceedings, published press releases containing information comparable to that which the applicant sought to obtain by its request. In those press releases and in its letter of June 2015 informing AlzChem Trostberg AG of the state of progress of the recovery of certain cartel fines by third parties, the Commission thus demonstrated that it was possible to produce quantitative data without disclosing substantive information. In the applicant's view, in the present case, the Commission could therefore have exclusively disclosed the quantitative information relating to the state of progress of recovery of the State aid in question.

103 In that regard, first, it should be noted that, in the six cases cited by the applicant, the Commission decided to publish, by means of press releases, certain information, such as its decision to bring proceedings before the Court against each of the six Member States concerned. However, as the Commission submits, the publication of such press releases does not affect the applicability of the general presumption of confidentiality to documents concerning the implementation phase of Decision 2015/1826 (see, to that effect, judgment of 5 December 2018, *Campbell* v *Commission*, T-312/17, not published, EU:T:2018:876, paragraph 38). That is all the more true, as the Commission argues, where it has not yet decided to bring an action before the Court of Justice.

104 Secondly, in so far as the applicant's argument could be interpreted as a request for partial access to the documents at issue, by having access to only certain information, that argument must be rejected. The concept of a document must be distinguished from that of information. The public's right of access to the documents of the institutions covers only documents and not information in the wider meaning of the word and does not imply a duty on the part of the institutions to reply to any request for information from an individual (judgment of 25 April 2007, *WWF European Policy Programme* v *Council*, T-264/04, EU:T:2007:114, paragraph 76).

105 Moreover, in so far as the applicant claims that the Commission could have sent to it a document showing that a certain percentage of the unlawful and incompatible State aid had been recovered, that would amount to providing the applicant with substantive information, contrary to what the applicant infers. In any event, as regards access to the documents with respect to which the general presumption is applicable, such as the requested documents, the effect of that presumption is that the documents covered by it do not fall within an obligation of disclosure, in full or in part, of their content (see, to that effect, judgments of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 68, and of 7 September 2017, *AlzChem* v *Commission*, T-451/15, not published, EU:T:2017:588, paragraphs 93 and 94 and the case-law cited).

106 In the light of all the foregoing considerations, the first and second parts of the first plea in law must be rejected.

2. The fourth part, alleging a discriminatory application of the exceptions to the disclosure of information relating to recovery

107 The applicant claims that, in the contested decision, the Commission applied in a discriminatory manner, in breach of Article 20 of the Charter of Fundamental Rights, exceptions to the disclosure of information relating to the recovery of State aid. In the first place, it submits that, in six State aid cases, the Commission made public information relating to amounts which had not been recovered, and did so before the commencement of infringement proceedings against the Member States concerned, even though legal proceedings relating to the underlying State aid decision were ongoing. The alleged interest in safeguarding ongoing investigations or commercial interests therefore did not prevent the Commission from disclosing the names of the beneficiaries, who were identified or identifiable.

108 In the second place, the applicant relies, in the reply, on the Commission's disclosure of quantitative and substantive information on the progress of the recovery of cartel fines, whereas some of the decisions imposing the fines were the subject of proceedings before the EU Courts.

109 The Commission disputes the applicant's arguments.

110 It should be recalled that Article 20 of the Charter of Fundamental Rights provides that 'everyone is equal before the law'. Before Article 6 TEU conferred legally binding force on the Charter of Fundamental Rights, the Court of Justice had already held that the principle of equality was one of the general principles of EU law which had to be observed by all courts and tribunals (see, to that effect, judgment of 19 October 1977, *Ruckdeschel and Others*, 117/76 and 16/77, EU:C:1977:160, paragraph 7). Observance of that principle requires that comparable situations must not be treated differently and different situations must not be treated alike unless such treatment is objectively justified (see, to that effect, judgment of 11 July 2006, *Franz Egenberger*, C-313/04, EU:C:2006:454, paragraph 33 and the case-law cited).

111 In the first place, as the applicant submits, in the letter of 24 April 2019, the Commission refused to grant it access to the requested documents on the ground that Decision 2015/1826 was the subject of pending proceedings and that, therefore, the third indent of Article 4(2) of Regulation No 1049/2001 applied. However, it must be stated that that consideration was not repeated in the contested decision and that the Commission, in the decision it adopted in response to the confirmatory request, was not in any way required to retain the legal basis adopted in response to the initial request (judgment of 28 March 2017, *Deutsche Telekom* v *Commission*, T-210/15,

EU:T:2017:224, paragraph 83). Therefore, the fact that, in four of the six cases concerning State aid cited by the applicant in respect of which a press release was issued, the Commission decisions pursuant to which the Member State concerned was under an obligation to recover the State aid at issue were the subject of an action pending before the EU Courts, as in the present case with regard to Decision 2015/1826, is irrelevant.

112 Moreover, it is necessary to reject the applicant's argument that it cannot be understood how the Commission was able to take the view that the investigation regarding the recovery of the aid had been terminated in the six cases which the applicant cites, whereas the concept of ongoing investigations, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001, covers the periods during which the proceedings continue before the EU Courts. The situation was therefore the same in those six cases and in the present case. In addition to the considerations set out in paragraph 103 above, it must be stated that, although a Commission decision finding that State aid has been granted implies that that institution considers that its investigation to determine the existence of State aid has led it to a conclusion, by contrast, the consequence of the fact that that decision is the subject of an action pending before the EU judicature is that the documents relating to that investigation remain covered by a general presumption of confidentiality. The same is true of the documents relating to the State aid recovery stage where the Commission decides to refer the matter to the Court of Justice, taking the view that its decision requiring recovery of the State aid in question has not been implemented. Therefore, even if the Commission was entitled to take the view that the investigation into the recovery of the aid had been completed in the six cases which the applicant cites, there is no difference between those cases and the present case as regards the applicability of the general presumption of confidentiality in respect of documents relating to the procedure for reviewing the implementation of a decision ordering the recovery of State aid.

113 However, as regards the six cases cited by the applicant, it must be noted that the Commission did not grant access to documents, but informed the public, through press releases, of its decision to bring proceedings before the Court of Justice against the Member States concerned on the ground that, in the Commission's view, they had not implemented decisions requiring recovery of State aid. Therefore, as the Commission asserts, the situation in those six cases differs from that in the present case in that the applicant requested the Commission to grant access to documents under Regulation No 1049/2001. Moreover, there is nothing to suggest that the Commission took the decision to bring proceedings before the Court of Justice against the Slovak Republic by relying on the failure to implement Decision 2015/1826 (see paragraph 101 above).

114 In the second place, as regards the cases relating to the payment of fines cited by the applicant, it must be noted that, as the Commission submits, the evidence submitted is new in that it was produced at the reply stage. The applicant has not put forward any evidence to show that the documents produced, which are, on the one hand, AlzChem Trostberg's request for access to documents under Regulation No 1049/2001 as regards the amount of the fines actually paid by the addressees of a number of Commission decisions in EU competition law cases (Annex C.1 to the reply) and, on the other, the Commission's response to that request (Annex C.2 to the reply), were not in the applicant's possession when the action was brought, nor has it put forward information to establish why that evidence was not submitted with the application. Consequently, the submission of that evidence or information at the reply stage is out of time and Annexes C.1 and C.2 to the reply are inadmissible under Article 85(1) of the Rules of Procedure.

115 In any event, apart from the fact that, unlike the recovery procedure following Decision 2015/1826, three of the seven cases cited were closed and that the Commission, by its letter of 11 June 2005, set out in Annex C.2, did not grant access to documents, but provided information, the recovery of State aid is, as the Commission submits, in a different legal context from that of the payment of a fine imposed in a decision which it adopts pursuant to Article 7 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1). As the Commission states, the obligation to recover State aid is not a penalty imposed on the beneficiary of the aid, or, moreover, on the Member State concerned, and the recovery procedure takes place exclusively with that State, which is the addressee of the recovery decision, as the only party which has infringed EU law (Article 108(3) TFEU), whereas a fine imposed on an undertaking penalises its infringement of competition rules. All those differences mean that these are not comparable situations.

116 It follows from all of the foregoing that the Commission cannot be criticised as having breached the principle of non-discrimination. The fourth part of the first plea in law must therefore be rejected.

3. The fifth part, alleging the existence of an overriding public interest

117 The applicant submits that, even if the Commission was entitled to conclude that the applicant's request concerned documents covered by the exceptions laid down in Article 4(2) of Regulation No 1049/2001, in the first place, it should have disclosed them on the basis of the existence of an overriding public interest, consisting of guaranteeing the right to an effective remedy in accordance with Article 47 of the Charter of Fundamental Rights.

118 In the second place, the applicant relies on the importance of transparency and public control scrutiny of the Commission's actions. Thus, the applicant argues, the exception provided for in the third indent of Article 4(2) of Regulation No 1049/2001 must be interpreted in the light of the objective of protecting the purpose of investigations and the Commission should not be authorised to use that exception for the sole purpose of evading public scrutiny. Even though the applicant does not criticise the Commission for not initiating infringement proceedings against the Slovak Republic under Article 258 TFEU, since that decision is within the Commission's discretionary power, that institution is, according to the applicant, nevertheless answerable to EU citizens for its failure to act.

119 According to the applicant, the protection of the budget of the Member States against the devastating effects of the race for State aid and the implementation of the Commission's relevant Commission decisions each constitute an overriding public interest, and not the applicant's private interest. As the Commission noted in its study on the enforcement of State aid law at national level, two German institutions have emphasised the public interest associated with the recovery of unlawful State aid.

120 The applicant adds that the EU Courts have interpreted and applied Regulation No 1049/2001 restrictively, both of which have been criticised by the European Parliament, whereas any exception to the right of access to documents or any limitation of that right should be interpreted strictly. Since its request does not concern a document or information in the Commission's file on the State aid implemented by the Slovak Republic in favour of NCHZ, the Commission should not be authorised to restrict even further EU citizens' fundamental right of access to documents.

121 The Commission disputes the applicant's arguments.

122 It should be noted that, under Article 4(2) of Regulation No 1049/2001, 'the institutions shall refuse access to a document where disclosure would undermine the protection of', inter alia, 'the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure'.

123 As noted in paragraph 43 above, a general presumption of confidentiality based on the exception relating to the protection of the purpose of investigations provided for in the third indent of Article 4(2) of Regulation No 1049/2001 does not exclude the possibility of demonstrating that there is an overriding public interest justifying disclosure of the documents concerned.

124 According to settled case-law, it is for the person arguing that there is an overriding public interest to show that there are specific circumstances justifying the disclosure of the documents concerned (see judgment of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 94 and the case-law cited; see also, to that effect, judgment of 14 July 2016, *Sea Handling* v *Commission*, C-271/15 P, not published, EU:C:2016:557, paragraph 40).

125 Accordingly, the system of exceptions laid down in Article 4 of Regulation No 1049/2001, and particularly in Article 4(2), 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 promoted 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 what interest must prevail in the particular case (see judgment of 7 September 2017, *AlzChem* v *Commission*, T-451/15, not published, EU:T:2017:588, paragraph 66 and the case-law cited).

126 The applicant's arguments must be examined in the light of those principles.

127 In the present case, in the first place, in the application, the applicant relies on the overriding public interest in guaranteeing the right to an effective remedy in accordance with Article 47 of the Charter of Fundamental Rights. However, it is not necessary to examine that complaint, since, when questioned in that regard at the hearing, the applicant confirmed that there was no direct link between the refusal to grant access to the requested documents and the effectiveness of the judicial review guaranteed by Article 47 of the Charter of Fundamental Rights. The applicant also stated that the Court should not take account of the reference to the existence of an overriding public interest in guaranteeing the right to an effective remedy, as referred to in the title of the fifth part of the first plea in law, which was noted in the minutes of the hearing.

128 In the second place, the applicant relies, referring to recital 2 of Regulation No 1049/2001, on the importance of transparency and public scrutiny of actions by the Commission, which, according to the applicant, should not be authorised to make use of the exception provided for in the third indent of Article 4(2) of that regulation solely in order to cover its inaction and to avoid public scrutiny.

129 It should be noted that the interest in transparency constitutes a public interest, to the extent that it is objective and general in nature (judgment of 11 December 2018, *Arca Capital Bohemia* v *Commission*, T-440/17, EU:T:2018:898, paragraph 76; see also, to that effect, judgment of 12 May 2015, *Technion and Technion Research & Development Foundation* v *Commission*, T-480/11, EU:T:2015:272, paragraph 78 and the case-law cited). However, as noted in

paragraph 37 above, as regards the transparency and public scrutiny of the actions taken by the Commission, the EU Courts have recognised that the Commission's administrative activity does not require the same scope of access to documents as that required by the legislative activity of an EU institution. In the present case, the requested documents clearly form part of an administrative procedure, namely a procedure for the recovery of State aid following a Commission decision.

130 In addition, general considerations relating to the principle of transparency and the public's right to be informed of the work of the institutions cannot justify the disclosure of documents relating to the procedure for reviewing the implementation of the Commission's decision. That procedure may lead to the matter being referred to the Court of Justice in accordance with the second subparagraph of Article 108(2) TFEU and is comparable to the pre-litigation stage of infringement proceedings (see paragraph 75 above) (see, to that effect, judgment of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraphs 91 and 93).

131 In that regard, it must be noted that 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, to ascertain the provisions which it has infringed and to choose when it will open the procedure provided for in the second subparagraph of Article 108(2) TFEU in respect of that State. Consequently, the applicant or a citizen does not have the right to require the Commission to take a specific position and to bring an action against its refusal to take action against the Slovak Republic (see, to that effect and by analogy, judgment of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 60 and 61).

132 Therefore, the objective relied on by the applicant to justify disclosure of the requested documents, namely a review of the Commission's action in the context of the procedure for reviewing the implementation of Decision 2015/1826, amounts to a denial, contrary to what the applicant claims, that that institution has discretion in the procedure provided for in the second subparagraph of Article 108(2) TFEU, whereas the general presumption of confidentiality that applies to all the documents relating to such a procedure is intended precisely to protect, inter alia, the usefulness of the Commission's action in the context of those procedures (see, to that effect and by analogy, judgment of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 61, 63 and 65).

133 In addition, the Commission, as it rightly stated, ensures that the public is informed about the state of progress of specific infringement cases through the publication of press releases (see, to that effect, judgment of 23 January 2017, *Justice & Environment* v *Commission*, T-727/15, not published, EU:T:2017:18, paragraph 60).

134 Furthermore, the applicant relies, in essence, on the public interest in the implementation of Commission decisions on State aid and on the public interest in the protection of the budget of the Member States against the devastating effects of the race for State aid and the public interest in the obligation to return State aid that is unlawful and incompatible with the internal market to the budget of the Member States concerned by a decision on State aid. However, that argument cannot succeed. As the Commission contends, granting the applicant access to the requested documents does not guarantee the public interest in the protection of the budget of the Member States through the recovery of unlawful State aid.

135 Lastly, the applicant submits that the EU Courts have applied Regulation No 1049/2001 restrictively, whereas any exception to the right of access to documents or any limitation of that right should be interpreted strictly, and submits, in essence, that its request was not covered by the exception aimed at the protection of the purpose of investigations. In so far as the applicant disputes the fact that its request for access could be covered by the exception provided for in the third indent of Article 4(2) of Regulation No 1049/2001, its arguments relate to a separate question from that of whether, when there is a possibility of applying that exception, an overriding public interest precludes the application of that exception. That line of argument is therefore irrelevant in the context of this part of the plea in law. It has, moreover, been examined and rejected in the context of the first part of the present plea in law.

136 Accordingly, the fifth part of the first plea in law must be rejected, as must the first plea in law in its entirety, without it being necessary to examine the third part, since the exception aimed at protecting investigations carried out by the EU institutions was an autonomous and sufficient basis to justify the adoption of the contested decision and since any error vitiating the second ground of that decision, relating to the exception aimed at the protection of commercial interests, which is the subject of the third part of the first plea in law, would in any event have no effect on the lawfulness of that decision.

C. The second plea in law, alleging infringement of the obligation to state reasons for the refusal to grant access to the requested documents in a non-confidential version or at the Commission's premises

137 The applicant states that it proposed, in the confirmatory application, access to the documents in a non-confidential version or at the Commission's premises. However, the Commission considered that, because the general presumption of confidentiality applied to partial disclosures, partial access could not be granted. The applicant submits that, since it rejected all the grounds capable of justifying the refusal to disclose the requested documents, including the general presumptions of confidentiality relied on by the Commission, it follows *a contrario* from the Commission's reasoning that it should have granted the applicant's request, at least by granting it partial access or at the Commission's premises, in accordance with Article 4(6) and Article 10 of Regulation No 1049/2001 respectively. However, the Commission did not set out the reasons for its refusal in that regard.

138 The Commission disputes the applicant's arguments.

139 According to settled case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the EU judicature to carry out its review (see judgment of 22 April 2008, *Commission* v *Salzgitter*, C-408/04 P, EU:C:2008:236, paragraph 56 and the case-law cited).

140 It should also be noted that the infringement of the duty to state reasons constitutes a plea alleging infringement of essential procedural requirements, which, as such, differs from a plea alleging errors in the reasoning in the contested decision, the latter plea being a matter to be reviewed by the Court when it examines the validity of that decision (see, to that effect, judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 67, and of 19 June 2009, *Qualcomm* v *Commission*, T-48/04, EU:T:2009:212, paragraph 179). The reasoning of a decision consists in a formal statement of the grounds on

which that decision is based. If those grounds are vitiated by errors, those errors will vitiate the substantive legality of the decision, but not the statement of reasons in it, which may be adequate even though it sets out reasons which are incorrect (see judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 181 and the case-law cited).

141 In the contested decision, the Commission examined the possibility of granting the applicant partial access to the documents concerned, in accordance with Article 4(6) of Regulation No 1049/2001. It stated that the documents requested were, however, covered by a general presumption of confidentiality based on the exceptions provided for in the first and third indents of Article 4(2) of that regulation and that such a presumption precluded the possibility of granting partial access to the file. The Commission referred in that regard to the judgment of 14 July 2016, *Sea Handling* v *Commission* (C-271/15 P, not published, EU:C:2016:557, paragraph 61).

142 Accordingly, it must be held that the Commission set out the reasons why it rejected the applicant's request for access to the documents in a non-confidential version or at its premises. It thus enabled the applicant to understand the reasons why that request was refused and enabled the Court to exercise its power of review. Adequate reasons are, therefore, given in the contested decision in that regard.

143 Furthermore, in so far as the applicant claims that, since it refuted all the reasons capable of justifying the refusal to disclose the requested documents, the Commission should have granted its request for access to those documents in a non-confidential version or at the Commission's premises, it must be stated that the applicant does not claim that the statement of reasons for the contested decision is lacking or inadequate, but that it disputes the merits of the statement of reasons. That line of argument cannot, in any event, succeed. Since the Commission was entitled, without erring in law or in its assessment, to refuse the applicant's request for access to the requested documents by relying on a general presumption of confidentiality, the applicant's argument is based on an incorrect premiss.

144 The second plea in law must therefore be rejected.

145 In the light of all of the foregoing considerations, the present action must be dismissed.

V. Costs

146 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, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders AlzChem Group AG to pay the costs.

Spielmann Spineanu-Matei Mastroianni

Delivered in open court in Luxembourg on 29 September 2021.

E. Coulon S. Papasavvas
Registrar President