Reports of Cases

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

5 April 2017*

(Access to documents — Regulation (EC) No 1049/2001 — Documents sent under the procedure laid down in Directive 98/34/EC — Documents originating from a Member State — Access granted — Exception for the protection of court proceedings — Exception for the protection of the purpose of inspections, investigations or audits — Prior agreement of the Member State)

In Case T-344/15,

French Republic, represented initially by F. Alabrune, G. de Bergues, D. Colas and F. Fize, and subsequently by D. Colas and B. Fodda, and then by D. Colas, B. Fodda and E. de Moustier, acting as Agents,

applicant,

supported by

Czech Republic, represented by M. Smolek, T. Müller and J. Vláčil, acting as Agents,

intervener,

v

European Commission, represented by J. Baquero Cruz and F. Clotuche-Duvieusart, acting as Agents,

defendant,

APPLICATION based on Article 263 TFEU and seeking the annulment of Commission Decision Ares (2015) 1681819 of 21 April 2015, granting to a citizen access to documents sent by the French Republic in accordance with the procedure laid down in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37).

THE GENERAL COURT (Third Chamber, Extended Composition)

composed of S. Papasavvas, President, I. Labucka, E. Bieliūnas (Rapporteur), I.S. Forrester and C. Iliopoulos, Judges,

Registrar: G. Predonzani, Administrator,

having regard to the written part of the procedure and further to the hearing on 14 December 2016,

gives the following

* Language of the case: French.

Judgment

Background to the dispute

1 On 21 January 2014, the French authorities notified the European Commission, pursuant to Article 8(1) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37), of a draft law regulating the terms for the distance-selling of books and enabling the French Government to modify by order the provisions of the French Intellectual Property Code dealing with publishing contracts.

2 By letter dated 15 December 2014, the Commission received, on the basis of 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), a request for access to all the documents sent or received by it in the context of handling that notification.

3 The Commission identified five documents that were the object of the request for access, namely:

— its request for additional information, dated 27 February 2014;

— the response given by the French Government to that request, dated 11 March 2014;

— the detailed opinion of the Austrian Government, dated 9 April 2014;

— its detailed opinion of 15 April 2014;

— the response given by the French Government to those two detailed opinions, dated 17 June 2014.

4 In the absence of any further communication from either the Commission or a Member State, the French Republic adopted, on 8 July 2014, loi No 2014-779 encadrant les conditions de la vente à distance des livres et habilitant le gouvernement français à modifier par ordonnance les dispositions du code de la propriété intellectuelle relatives au contrat d'édition (Law No 2014-779 regulating the terms for the distance-selling of books and enabling the French Government to modify by order the provisions of the French Intellectual Property Code dealing with publishing contracts) (JORF, 9 July 2014, p. 11363).

5 In the course of the consultation procedure laid down in Article 4(4) and (5) of Regulation No 1049/2001, the French Republic informed the Commission, by emails of 19 December 2014 and 13 and 14 January 2015, that it opposed access being given, first, to the French Government's response of 11 March 2014 to the Commission's request for additional information and, second, to the French Government's response of 17 June 2014 to the detailed opinions of the Austrian Government and the Commission, referred to in the second and fifth indents of paragraph 3 above ('the documents at issue'), on the basis of the exception provided for in Article 4(2), second indent, of Regulation No 1049/2001 concerning the protection of court proceedings. According to the French authorities, disclosure would undermine the protection of future court proceedings which might be brought under Article 258 TFEU against the French Republic for a failure to fulfil its obligations notwithstanding its compliance with the procedure laid down by Directive 98/34. According to the French authorities, there was a risk that proceedings for a failure to fulfil obligations might be brought since the Commission had adopted a detailed opinion in which it had stated that the proposed French law possibly did not comply with EU law. Concerned not to disrupt the equality of arms between it and the Commission in possible litigation, the French Republic had, therefore, asked that the confidential nature of the exchanges with the Commission be maintained.

6 By letter dated 29 January 2015, the Commission granted access to its request for additional information of 27 February 2014, to the Austrian Government's detailed opinion of 9 April 2014 and to its detailed opinion of 15 April 2014, referred to in the first, third and fourth indents of paragraph 3 above, but refused to grant access to the disputed documents, informing the applicant for access of the French Government's opposition and of the ground that it had advanced in support of its opposition.

7 On 11 February 2015, the applicant for access lodged a confirmatory application with the Commission in accordance with Article 7(2) of Regulation No 1049/2001.

8 By letter of 3 March 2015, the Commission asked the French Republic to reconsider its position, in particular on the basis of the judgments of 21 September 2010, *Sweden and API* v *Commission* and *Commission* v *API* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541), and of 6 July 2006, *Franchet and Byk* v *Commission* (T-391/03 and T-70/04, EU:T:2006:190) regarding the exception for the protection of court proceedings.

9 By email of 13 March 2015, the French authorities re-stated their position that no access should be granted to the documents at issue. In that regard, as well as repeating their opposition to the disclosure of the documents at issue on the basis of the exception provided for in Article 4(2), second indent, of Regulation No 1049/2001, they considered that the access to the documents at issue should also be refused on the basis of the exception laid down in Article 4(2), third indent, of that regulation, concerning the protection of the purpose of inspections, investigations and audits. According to the French authorities, all of the documents covered by the application for access fall within the context of an investigation procedure which involved the French authorities and which related to a possible breach of EU law by the French law under consideration at that time by the French Parliament. Furthermore, the French authorities stated that they had examined the possibility of granting partial access to the documents at issue, but had reached the conclusion that such access could not be granted since the exceptions covered all of the documents in their entirety.

10 By Decision Ares(2015) 1681819 of 21 April 2015 ('the contested decision'), the Commission decided to grant access to the documents at issue to the applicant for access. In that regard, the Commission assessed the grounds for refusal relied on by the French authorities and concluded, as regards the ground based on the exception laid down in Article 4(2), second indent, of Regulation 1049/2001, that 'the documents to which access [had been] sought [were] not closely linked to existing or reasonably foreseeable proceedings at this stage', that '[it was] therefore clear that the documents in question [did] not fall within the exception relied upon by the French authorities' and that, 'disclosure of those documents should not be prevented by that exception'. As regards the ground for refusal based on the exception provided for in Article 4(2), third indent, of Regulation No 1049/2001, the Commission stated that 'given that there [was] no investigation in progress, the applicability of the exception referred to above [appeared], at [that] stage, to be purely hypothetical and, consequently, an attempt to rely on it [seemed], at first sight, to be unfounded in the circumstances'.

Procedure and forms of order sought

11 By application lodged at the Court Registry on 1 July 2015, the French Republic brought the present action.

12 In the application, the French Republic requested, pursuant to Article 28(5) of the Rules of Procedure of the General Court that the case be decided by a Chamber composed of at least five Judges.

13 By separate document lodged at the Court Registry on the same day, the French Republic made an application for interim measures.

14 That application was granted by order of the President of the General Court of 1 September 2015 and the costs were reserved.

15 By separate document lodged at the Court Registry on 16 September 2015, the Commission applied for the present action to be decided under an expedited procedure in accordance with Article 152 of the Rules of Procedure.

16 By decision of 6 October 2015, the Court (Third Chamber) rejected the application for an expedited procedure.

17 By a document lodged at the Court Registry on 5 October 2015, the Czech Republic applied to intervene in the present proceedings in support of the form of order sought by the French Republic.

18 By order of 6 November 2015, the President of the Third Chamber of the General Court granted that application for leave to intervene. The Czech Republic lodged its statement in intervention and the main parties lodged their observations on that statement within the prescribed periods.

19 On 21 July 2016, the Registrar of the Court informed the parties that the case had been allocated to the Third Chamber in an extended composition.

20 On a proposal from the Judge-Rapporteur, the Court (Third Chamber, Extended Composition) decided to open the oral part of the procedure and, within the framework of measures of organisation of procedure pursuant to Article 89 of its Rules of Procedure, put questions in writing to the main parties. The main parties complied with that request within the time allowed.

21 The main parties presented oral argument and answered the questions put to them by the Court at the hearing on 14 December 2016. The Czech Republic decided not to attend the hearing.

22 The French Republic, supported by the Czech Republic, submits that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

23 The Commission contends that the Court should:

— dismiss the action;

— order the French Republic to pay the costs.

Law

24 In support of its application the French Republic initially raised three pleas in law. It submitted, first and principally, that there was a breach of Article 4(5) of Regulation No 1049/2001, secondly, in the alternative, a breach of the obligation to state reasons as regards the non-application of the exception provided for in Article 4(2), third indent, of that regulation and thirdly, in the further alternative, a breach of Article 4(2), second and third indents, of that regulation.

25 In its response of 19 October 2016 to the Court's questions by way of measures of organisation of the procedure, the French Republic stated that it abandoned its second plea.

First plea in law, alleging infringement of Article 4(5) of Regulation No 1049/2001

26 The French Republic submits that the Commission was wrong to have examined the French authorities' arguments on access to the documents at issue and then authorised access to those documents despite its properly justified opposition on grounds referring to the two exceptions to access to documents provided for in Article 4(2), second and third indents, of Regulation No 1049/2001.

27 Thus, in the context of its first plea, the French Republic submits, in essence, that the Commission exceeded its powers of review and therefore infringed Article 4(5) of Regulation No 1049/2001.

28 The Commission disputes the arguments put forward by the French Republic.

29 It is appropriate to recall at the outset that Regulation No 1049/2001 is intended, as is indicated in recital 4 and in Article 1, to give the public a right of access to documents of the institutions which is as wide as possible (judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 33, and of 3 October 2012, *Jurašinović* v *Council*, T-63/10, EU:T:2012:516, paragraph 28). Pursuant to Article 2(3) of the regulation, that right extends not only to documents drawn up by an institution but also to documents received by an institution from third parties, including the Member States, as is expressly stated in Article 3(b) of the regulation.

30 However, that right of access is nonetheless subject to certain limits based on grounds of public or private interest (judgments of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 62, and of 3 October 2012, *Jurašinović* v *Council*, T-63/10, EU:T:2012:516, paragraph 29). In particular, Article 4(5) of Regulation No 1049/2001 states that a Member State may request an institution not to disclose a document originating from that Member State without its prior agreement (judgments of 21 June 2012, *IFAW Internationaler Tierschutz-Fonds* v *Commission*, C-135/11 P (hereinafter '*IFAW* v *Commission*'), EU:C:2012:376, paragraph 50, and of 25 September 2014, *Spirlea* v *Commission*, T-669/11, EU:T:2014:814, paragraph 41).

31 In that regard, it should be noted that the Court of Justice has already had occasion to clarify, in the judgments of 18 December 2007, *Sweden* v *Commission* (C-64/05 P, EU:C:2007:802), and of 21 June 2012, *IFAW* v *Commission* (C-135/11 P, EU:C:2012:376), the scope of an objection made by a Member State under that provision (judgment of 25 September 2014, *Spirlea* v *Commission*, T-669/11, EU:T:2014:814, paragraph 43).

32 In that regard, the Court emphasised that Article 4(5) of Regulation No 1049/2001 is procedural in nature, since it merely requires the prior agreement of the Member State concerned where that State had made a specific request to that effect, and that it is a provision dealing with the process of adoption of an EU decision (judgments of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraphs 78 and 81; of 21 June 2012, *IFAW* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 53; and of 25 September 2014, *Spirlea* v *Commission*, T-669/11, EU:T:2014:814, paragraph 44).

33 Unlike Article 4(4) of Regulation No 1049/2001, which gives third parties only a right to be consulted, with respect to documents originating from them, by the institution concerned as regards the application of one of the exceptions in Article 4(1) and (2), Article 4(5) of the regulation makes the prior agreement of the Member State a necessary condition for disclosure of a document originating from it, if that State so requests (judgments of 21 June 2012, *IFAW* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 54, and of 25 September 2014, *Spirlea* v *Commission*, T-669/11, EU:T:2014:814, paragraph 45).

34 The Court of Justice thus held that, where a Member State has made use of the option given to it by Article 4(5) of Regulation No 1049/2001 to request that a specific document originating from that State should not be disclosed without its prior agreement, disclosure of that document by the institution requires the prior agreement of that Member State to be obtained (judgments of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 50; of 21 June 2012, *IFAW* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 55; and of 25 September 2014, *Spirlea* v *Commission*, T-669/11, EU:T:2014:814, paragraph 46).

35 It follows, conversely, that an institution which does not have the agreement of the Member State concerned is not entitled to disclose the document in question (judgments of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 44; of 21 June 2012, *IFAW* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 56; and of 25 September 2014, *Spirlea* v *Commission*, T-669/11, EU:T:2014:814, paragraph 47).

36 However, Article 4(5) of Regulation No 1049/2001 does not confer on the Member State concerned a general and unconditional right of veto, such that it might oppose, in an entirely discretionary manner and without having to give reasons for its decision, the disclosure of any document held by an institution simply because it originates from that Member State (judgments of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 58; of 21 June 2012, *IFAW* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 57; and of 25 September 2014, *Spirlea* v *Commission*, T-669/11, EU:T:2014:814, paragraph 48).

37 Indeed, the exercise of the power conferred by Article 4(5) of Regulation No 1049/2001 on the Member State concerned is delimited by the substantive exceptions set out in Article 4(1) to (3), with the Member State merely being given in this respect a power to take part in the institution's decision. The prior agreement of the Member State referred to in Article 4(5) thus resembles not a discretionary right of veto but a form of assent confirming that none of the grounds of exception under Article 4(1) to (3) is present. The decision-making process laid down by that article therefore requires the institution and the Member State involved to confine themselves to the substantive exceptions laid down in Article 4(1) to (3) (judgments of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 76 and 83; of 21 June 2012, *IFAW* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 58; and of 25 September 2014, *Spirlea* v *Commission*, T-669/11, EU:T:2014:814, paragraph 49).

38 Consequently, Article 4(5) of Regulation No 1049/2001 entitles the Member State concerned to object to the disclosure of documents originating from it only on the basis of the substantive exceptions laid down in Article 4(1) to (3) and if it gives proper reasons for its position (judgments of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 99; of 21 June 2012, *IFAW* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 59; and of 25 September 2014, *Spirlea* v *Commission*, T-669/11, EU:T:2014:814, paragraph 50).

39 With regard, in the present case, to the scope of Article 4(5) of Regulation No 1049/2001 as regards the institution to which a request for access to a document has been made, it must be recalled that the Court of Justice has already held that, from the point of view of the person requesting access, the Member State's intervention does not alter the fact that the decision subsequently addressed to him by the institution in reply to his request for access to a document in its possession is in the nature of a European Union act (judgments of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 94; of 21 June 2012, *IFAW* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 60; and of 25 September 2014, *Spirlea* v *Commission*, T-669/11, EU:T:2014:814, paragraph 51).

40 The institution to which a request for access to a document has been made, as the maker of a decision to refuse access to documents, is therefore responsible for the lawfulness of that decision. The Court of Justice has therefore held that the institution cannot accept a Member State's objection to disclosure of

a document originating from that State if no reasons at all are given for the objection or if the reasons relied on by that State for refusing access to the document in question do not refer to the exceptions listed in Article 4(1) to (3) of Regulation No 1049/2001 (judgments of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 88; of 21 June 2012, *IFAW* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 61; and of 25 September 2014, *Spirlea* v *Commission*, T-669/11, EU:T:2014:814, paragraph 52).

41 It follows that, before refusing access to a document originating from a Member State, the institution concerned must examine whether that State has based its objection on the substantive exceptions in Article 4(1) to (3) of Regulation No 1049/2001 and has given proper reasons for its position. Therefore, when taking a decision to refuse access, the institution must make sure that those reasons exist and refer to them in its decision refusing access at the end of the procedure (judgments of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 99; of 21 June 2012, *IFAW* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 62; and of 25 September 2014, *Spirlea* v *Commission*, T-669/11, EU:T:2014:814, paragraph 53).

42 Lastly, as is apparent in particular from Articles 7 and 8 of Regulation No 1049/2001, the institution is itself obliged to give reasons for a decision refusing a request for access to a document. Such an obligation means that the institution must, in its decision, not merely record the fact that the Member State concerned has objected to disclosure of the document asked for, but also set out the reasons relied on by that Member State to show that one of the exceptions to the right of access in Article 4(1) to (3) of the regulation applies. That information will enable the person who has asked for the document to understand the origin and grounds of the refusal of his request and the competent court to exercise, if need be, its power of review (judgments of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 89, and order of 27 March 2014, *Ecologistas en Acción* v *Commission*, T-603/11, not published, EU:T:2014:182, paragraph 42).

43 On the other hand, according to the case-law, the institution to which a request for access to a document has been made does not have to carry out an exhaustive assessment of the Member State's decision to object by conducting a review going beyond the verification of the mere existence of reasons referring to the exceptions in Article 4(1) to (3) of Regulation No 1049/2001 (judgment of 21 June 2012, *IFAW* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 63, order of 27 March 2014, *Ecologistas en Acción* v *Commission*, T-603/11, not published, EU:T:2014:182, paragraph 44, and judgment of 25 September 2014, *Spirlea* v *Commission*, T-669/11, EU:T:2014:814, paragraph 54).

44 To insist on such an exhaustive assessment could lead to the institution to which a request for access to a document has been made being able, after carrying out the assessment, wrongly to communicate the document in question to the person requesting access, notwithstanding the objection, duly reasoned in accordance with paragraphs 40 and 41 above, of the Member State from which the document originated (judgment of 21 June 2012, *IFAW* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 64; order of 27 March 2014, *Ecologistas en Acción* v *Commission*, T-603/11, not published, EU:T:2014:182, paragraph 45, and judgment of 25 September 2014, *Spirlea* v *Commission*, T-669/11, EU:T:2014:814, paragraph 55).

45 The Commission is also not required to carry out, in respect of the document whose disclosure is refused, an exhaustive assessment of the grounds of opposition relied on by the Member State on the basis of the exceptions laid down in Article 4 of Regulation No 1049/2001 (judgment of 21 June 2012, *IFAW* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 65, and order of 27 March 2014, *Ecologistas en Acción* v *Commission*, T-603/11, not published, EU:T:2014:182, paragraph 47).

46 Finally, in the judgment of 14 February 2012, *Germany* v *Commission* (T-59/09, EU:T:2012:75), the General Court held that the review by the institution does not consist in determining whether the reasons given by the Member State concerned are incorrect beyond all possible doubt, but in determining whether, in the light of the circumstances of the case and of the relevant rules of law, the

reasons given by the Member State for its objection are capable of justifying prima facie such refusal and, accordingly, whether those reasons make it possible for that institution to assume the responsibility conferred on it under Article 8 of Regulation No 1049/2001 (see, to that effect, judgment of 14 February 2012, *Germany* v *Commission*, T-59/09, EU:T:2012:75, paragraphs 52 and 53, and order of 27 March 2014, *Ecologistas en Acción* v *Commission*, T-603/11, not published, EU:T:2014:182, paragraph 46).

47 The General Court also stated that it was not a matter, for the institution, of imposing its view or of substituting its own assessment for that of the Member State concerned, but of preventing the adoption of a decision which it does not consider to be defensible. The institution, as author of the decision granting or refusing access, is responsible for the lawfulness of that decision. Before refusing access to a document originating from a Member State, it must examine whether the latter has based its objection on the substantive exceptions provided for in Article 4(1) to (3) of Regulation No 1049/2001 and whether it has provided a proper statement of reasons with regard to those exceptions (judgment of 14 February 2012, *Germany* v *Commission*, T-59/09, EU:T:2012:75, paragraph 54; see also, to that effect, order of 27 March 2014, *Ecologistas en Acción* v *Commission*, T-603/11, not published, EU:T:2014:182, paragraph 43).

48 It is important to point out that that examination must be undertaken in the context of the genuine dialogue which is a feature of the decision-making process established under Article 4(5) of Regulation No 1049/2001, the institution being obliged to allow the Member State to set out its reasons more clearly or reassess those reasons so that they may be regarded, prima facie, as defensible (judgment of 14 February 2012, *Germany* v *Commission*, T-59/09, EU:T:2012:75, paragraph 55).

49 In undertaking that examination, due account must also be taken of the principle that the exceptions listed in Article 4 of Regulation No 1049/2001 to the public right of access to documents of the institutions must be narrowly construed and applied, given the objectives pursued by that regulation and, in particular, the fact noted in recital 2 thereto that that right of access is connected with the democratic nature of the EU institutions and the fact that, as is stated in recital 4 to the regulation and reflected in Article 1 thereof, the purpose of the regulation is to give the public the widest possible right of access (judgment of 14 February 2012, *Germany* v *Commission*, T-59/09, EU:T:2012:75, paragraph 56).

50 In the present case, the French Republic submits that the reasoning in the judgment of 14 February 2012, *Germany* v *Commission* (T-59/09, EU:T:2012:75) was called into question by the judgment of 21 June 2012, *IFAW* v *Commission* (C-135/11 P, EU:C:2012:376), and by the judgment of 25 September 2014, *Spirlea* v *Commission* (T-669/11, EU:T:2014:814). It submits that it is clear from the judgment of 21 June 2012, *IFAW* v *Commission* (C-135/11 P, EU:C:2012:376), that verifying the existence of reasons constituted the outer limit of the review that the institution concerned could make. The Court's use, in paragraph 63 of that judgment, of the adjective 'mere' before 'existence of reasons' clearly shows moreover the limited scope of that review, according to the French Republic.

51 In that regard, it follows in particular from paragraphs 59, 62 and 63 of the judgment of 21 June 2012, *IFAW* v *Commission* (C-135/11 P, EU:C:2012:376), recalled in paragraphs 38, 41 and 43 above, that, while the Court stated that the review by the institution should not go beyond verifying the mere existence of reasons referring to the exceptions in Article 4(1) to (3) of Regulation No 1049/2001, it remains the case that the institution must verify, in so doing, that the Member State's opposition is supported by proper reasons.

52 However, it must be noted that, in the judgment of 21 June 2012, *IFAW* v *Commission* (C-135/11 P, EU:C:2012:376), the Court of Justice examined an appeal brought by the company IFAW Internationaler Tierschutz-Fonds against the judgment of 13 January 2011, *IFAW Internationaler Tierschutz-Fonds* v *Commission* (T-362/08, EU:T:2011:6), in which the General Court did not rule on the question whether the Commission was required to carry out a prima facie review or a full review

of the reasons on which the Member State bases its opposition (judgment of 13 January 2011, *IFAW Internationaler Tierschutz-Fonds* v *Commission*, T-362/08, EU:T:2011:6, paragraph 86). On that question, the appellant in that case, in the context of its first ground of appeal, complained only that the General Court erred in law by not acknowledging that the Commission was required, with respect to the document whose disclosure was refused, to carry out an exhaustive assessment of the reasons for objecting put forward by the Member State on the basis of the exceptions in Article 4 of Regulation No 1049/2001. The Court of Justice held that the General Court had not erred in law in that regard (judgment of 21 June 2012, *IFAW* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 65).

53 It follows that the Court of Justice confined itself to rejecting the option for the institution of carrying out an exhaustive assessment and did not preclude a prima facie review of the Member State's reasons for its opposition.

54 Furthermore, it follows from paragraphs 69, 81, and 83 to 85, read together, of the judgment of 25 September 2014, *Spirlea* v *Commission* (T-669/11, EU:T:2014:814), that, while the institution is not required to carry out a specific and individual examination of the documents to which access has been requested in relation to the exceptions provided for in Article 4(1) to (3) of Regulation No 1049/2001, an examination which is required by the settled case-law in that matter (judgments of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 53; of 21 September 2010, *Sweden and API* v *Commission* and *Commission* v *API*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 72; and 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, while it is not required to carry out an exhaustive assessment of the reasons put forward by the Member State to justify its opposition to disclosure of the documents requested, its obligation to conduct a careful examination must nevertheless lead it to check whether the explanations given by the Member State appear to it, prima facie, to be well founded.

55 Thus it was that, in *Spirlea* v *Commission*, the Commission had considered that the opposition of the Federal Republic of Germany, based on the exception of the protection of the purpose of the investigation, appeared, at first sight, to be well founded because the pilot procedure EU 2070/11/SNCO, which preceded the possible opening of the formal stage of infringement proceedings, in which the document requested — namely the response of the German authorities to a request for information by the Commission — had been drafted, was still ongoing. The Commission was still examining the response of the Federal Republic of Germany and in that regard the further action to be taken (judgment of 25 September 2014, *Spirlea* v *Commission*, T-669/11, EU:T:2014:814, paragraphs 70, 84 and 103).

56 The Commission had therefore held that, at first sight, the exception relating to the purpose of inspections, investigations and audits could validly be relied on by the Federal Republic of Germany to the extent that the procedure was ongoing, a finding which required it to check that the facts relied on by the Federal Republic of Germany were not manifestly incorrect.

57 Hence, contrary to the submissions made by the French Republic, the General Court should not be regarded as having abandoned, in the judgment of 25 September 2014, *Spirlea* v *Commission* (T-669/11, EU:T:2014:814), the approach that it had taken in the judgment of 14 February 2012, *Germany* v *Commission* (T-59/09, EU:T:2012:75), nor, furthermore, of opposing that judgment or the judgment of 21 June 2012, *IFAW* v *Commission* (C-135/11 P, EU:C:2012:376).

58 It follows from all the foregoing that the institution must carry out a prima facie review of whether the grounds for refusing the disclosure raised by the Member State concerned are well founded.

59 Finally, the French Republic's argument that the Commission carried out, wrongly, an exhaustive assessment of the reasons for opposition that it had expressed, contrary to the limits on the scope of its review, must be rejected. In the present case, as recalled in paragraph 10 above, the Commission

evaluated the grounds for refusal relied on by the French authorities and concluded, as regards the ground based on the exception laid down in Article 4(2), second indent, of Regulation No 1049/2001, that 'the documents to which access [had been] sought [were] not closely linked to existing or reasonably foreseeable proceedings at this stage', that '[it was] therefore clear that the documents in question [did] not fall within the exception relied upon by the French authorities' and that, 'disclosure of those documents should not be prevented by that exception'. As regards the ground for refusal based on the exception provided for in Article 4(2), third indent, of Regulation No 1049/2001, the Commission stated that 'given that there [was] no investigation in progress, the applicability of the exception referred to above [appeared], at [that] stage, to be purely hypothetical and, consequently, an attempt to rely on it [seemed], at first sight, to be unfounded in the circumstances'.

60 First, the brevity of that analysis and the use of key terms and expressions such as 'manifest' or 'at first sight' lead to the conclusion that it was not an exhaustive review of the reasons advanced by the French Republic, but in fact a prima facie review.

61 Second, the Commission's duty of care required it to check, prima facie, whether there was litigation or an investigation in the context of which the documents at issue were drawn up since it is specifically the existence of such litigation or such an investigation that would justify the application of the exceptions provided for in Article 4(2), second and third indents, of Regulation No 1049/2001.

62 Consequently, the Commission did not exceed its powers of review, as defined by Article 4(5) of Regulation No 1049/2001. The first plea must therefore be rejected.

The second plea in law, alleging infringement of the second and third indents of Article 4(2) of Regulation No 1049/2001

63 In the context of its third plea, the French Republic claims that the Commission was wrong to consider that it could not rely on the exception regarding the protection of court proceedings or the exception regarding the protection of the purpose of investigations in order to oppose access to the documents at issue.

64 Hence, it is necessary to determine whether the Commission was entitled to conclude that the reasons given by the French Republic as justification for its objection to disclosure of the documents at issue were not, prima facie, valid.

65 In that regard, the third plea subdivides into two branches, the first alleging infringement of the second indent of Article 4(2) of Regulation No 1049/2001 and, the second, alleging infringement of the third indent of Article 4(2) of that regulation.

The first branch: infringement of the second indent of Article 4(2) of Regulation No 1049/2001

66 The French Republic, supported by the Czech Republic, submits, in essence, that, having regard to its objective and the manner in which it operates, the procedure provided for by Directive 98/34 presents strong similarities with the pre-litigation stage of infringement proceedings, and observes that, in the event of a disagreement remaining between the Commission and the Member State concerned, the procedure laid down by Directive 98/34 can be resolved by the commencement of infringement proceedings.

67 However, in a case where infringement proceedings are brought with regard to a technical standard that was the object of the procedure provided for by Directive 98/34, the letter of formal notice and the reasoned opinion are procedural documents which may not be disclosed in particular for the protection of court proceedings.

68 The Commission disputes the arguments put forward by the French Republic.

69 According to the second indent of Article 4(2) of Regulation No 1049/2001, the institutions are to refuse access to a document where disclosure would undermine the protection of court proceedings and legal advice, unless there is an overriding public interest in its disclosure.

70 It should be recalled that it has been held that the expression 'court proceedings' is to be interpreted as meaning that the protection of the public interest precludes the disclosure of the content of documents drawn up solely for the purposes of specific court proceedings (see judgment of 3 October 2012, *Jurašinović* v *Council*, T-63/10, EU:T:2012:516, paragraph 66 and the case-law cited).

71 Similarly, it has been held, in a case concerning the Commission, that the words 'documents drawn up solely for the purposes of specific court proceedings' must be understood to mean the pleadings or other documents lodged, internal documents concerning the investigation of the case, and correspondence concerning the case between the Directorate-General concerned and the Legal Service or a lawyers' office, the purpose of the definition in that case of the scope of the exception being to ensure, on the one hand, the protection of work done within the Commission and, on the other, confidentiality and the safeguarding of professional privilege for lawyers (see judgment of 3 October 2012, *Jurašinović* v *Council*, T-63/10, EU:T:2012:516, paragraph 67 and the case-law cited).

72 However, in the present case, the documents at issue are neither pleadings nor documents lodged in the context of court proceedings and, generally, were not drawn up for the purpose of specific court proceedings.

73 As regards the French Republic's argument, supported by the Czech Republic, that the Member State must consider that, for a certain period, there is a risk of infringement proceedings regarding the text adopted after the conclusion of the procedure provided for by Directive 98/34, which is all the more so where the Commission has not adopted a formal decision closing the procedure, it must be recalled that, according to settled case-law, the risk of the protected interest being undermined must be reasonably foreseeable and not purely hypothetical (see the judgment of 3 July 2014, *Council* v *in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 52 and the case-law cited).

74 In that regard, while it is true that the Commission, when it considers that a Member State has failed to fulfil its obligations, remains free to assess whether it is appropriate to act against that State and to choose when it will open the infringement procedure against it (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 61), it remains the case that the documents at issue and, in particular, the response of the French Government of 17 June 2014 to the detailed opinions of the Austrian Government and the Commission, referred to in the fifth indent of paragraph 3 above, did not lead, at the date of adoption of the contested decision, namely more than nine months after the adoption of Law No 2014-779, to the Commission sending a letter of formal notice, pursuant to the first paragraph of Article 258 TFEU.

75 That being so, even if, as the French Republic submits, the Commission had intended to bring infringement proceedings against the French Republic and, to that end, had repeated some elements of its detailed opinion in its letter of formal notice or, even, in a pleading that might be lodged before the Court, whose disclosure could undermine the protection of court proceedings (see, to that effect, judgment of 11 December 2001, *Petrie and Others* v *Commission*, T-191/99, EU:T:2001:284, paragraphs 68 and 69), the risk of the commencement of the pre-litigation stage of infringement proceedings against the French Republic, in the present case, was not reasonably foreseeable and was therefore purely hypothetical.

76 In that regard, it is noteworthy in the present case that the French authorities only mentioned 'future' court proceedings in the context of a 'potential' infringement action. It follows that, even for the French authorities, the commencement of such proceedings was not reasonably foreseeable and they sought to protect themselves in case the Commission intended to open such infringement proceedings.

77 Finally, since the documents at issue were not in fact drawn up in the context of court proceedings, but in the context of a procedure laid down by Directive 98/34 and, moreover, the opening of the pre-litigation stage of an infringement action against the French Republic was not reasonably foreseeable and remained purely hypothetical, the Commission was fully entitled to consider that the refusal of access to the documents at issue raised by the French authorities, on the basis of Article 4(2), second indent, of Regulation No 1049/2001, did not appear, prima facie, to be well founded.

78 Consequently, the first branch of the third plea must be rejected.

The second branch: infringement of the third indent of Article 4(2) of Regulation No 1049/2001

79 The French Republic submits that the Commission should have found that the documents that the French Government sent in the context of the procedure laid down by Directive 98/34 were covered by a general presumption of harm to the purpose of investigations and that it could therefore refuse access to them. The reasons that led the Court to consider that there was a general presumption of harm to the purpose of investigations as regards the pre-litigation stage of infringement proceedings (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) are equally applicable to the procedure laid down by Directive 98/34.

80 The Commission disputes the arguments put forward by the French Republic.

81 According to Article 4(2), third indent, of Regulation No 1049/2001, the institutions are to refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

82 First, it must be observed that, as the French Republic acknowledged in its reply to the measures of the organisation of the procedure, the Commission did not contest that the procedure laid down by Directive 98/34 could be regarded as an investigation. In the contested decision, the Commission considered that the exception provided for in Article 4(2), third indent, of Regulation No 1049/2001 could not apply because, in any event, the procedure had been closed before the adoption of that decision and no follow-up action had been reserved for it.

83 Second, the exception provided for by that provision is not designed to protect investigations as such, but the purpose of those investigations (see, to that effect, judgments of 6 July 2006, *Franchet and Byk* v *Commission*, T-391/03 and T-70/04, EU:T:2006:190, paragraphs 105 and 109, and of 14 February 2012, *Germany* v *Commission*, T-59/09, EU:T:2012:75, paragraph 73 and the case-law cited).

84 In the present case, to the extent that the procedure laid down by Directive 98/34 had ended when the Commission adopted the contested decision, the disclosure of documents drawn up in that context would not undermine the purpose of that procedure.

85 In that regard, the Court rejects the French Government's argument, supported in that respect by the Czech Republic, that it was necessary not to disclose the documents at issue for a certain period after the investigation had closed, namely for so long as there was a reasonably foreseeable possibility of the Member State and the Commission needing a free space for an undisturbed discussion in order to resolve a dispute regarding whether a national provision complied with EU law.

86 According to the case-law, the third indent of Article 4(2) of Regulation No 1049/2001 must be interpreted in such a way that this provision, the aim of which is to protect 'the purpose of inspections, investigations and audits', applies only if disclosure of the documents in question may endanger the completion of those activities (judgment of 6 July 2006, *Franchet and Byk* v *Commission*, T-391/03 and T-70/04, EU:T:2006:190, paragraph 109).

87 Certainly, the various acts of investigation or inspection may remain covered by the exception based on the protection of inspections, investigations and audits as long as the investigations or inspections continue, even if the particular investigation or inspection which gave rise to the report to which access is sought has been completed (see judgment of 6 July 2006, *Franchet and Byk* v *Commission*, T-391/03 and T-70/04, EU:T:2006:190, paragraph 110 and the case-law cited).

88 However, to accept that the various documents relating to inspections, investigations or audits are covered by the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001 until the follow-up action to be taken has been decided would make access to such documents dependent on an uncertain, future and possibly distant event, depending on the speed and diligence of the various authorities (judgment of 6 July 2006, *Franchet and Byk* v *Commission*, T-391/03 and T-70/04, EU:T:2006:190, paragraph 111).

89 Such an approach would be contrary to the objective of guaranteeing the widest possible public access to documents emanating from the institutions, with the aim of giving citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers (see, to that effect, judgment of 6 July 2006, *Franchet and Byk* v *Commission*, T-391/03 and T-70/04, EU:T:2006:190, paragraph 112).

90 In the present case, not only was the procedure laid down by Directive 98/34 closed but, as recalled in paragraph 75 above, the commencement of an infringement action was not reasonably foreseeable and remained purely hypothetical. Therefore, the exception provided for in Article 4(2), third indent, of Regulation No 1049/2001, could not be relied on in order to refuse access to the documents at issue.

91 The Commission was therefore fully entitled to consider, prima facie, that the ground of protection of the purpose of investigations was not well founded.

92 In the light of all the foregoing, the second branch of the third plea and, therefore, the third plea in its entirety must be rejected, without it being necessary to rule on the issue of admissibility raised by the Commission, according to which, in essence, the French Republic sought to challenge, by that plea, the legality of the contested decision taken as regards the applicant for access and not compliance with Article 4(5) of Regulation No 1049/2001, which is the only legitimate object of these proceedings (see, to that effect, judgment of 26 February 2002, *Council* v *Boehringer*, C-23/00 P, EU:C:2002:118, paragraph 52).

93 The action must therefore be dismissed in its entirety.

Costs

94 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 French Republic has been unsuccessful, it must be ordered to pay the costs, including those incurred in the proceedings for interim measures, in accordance with the form of order sought by the Commission.

95 Furthermore, in accordance with Article 138(1) of the Rules of Procedure, Member States and institutions which intervene in proceedings are to bear their own costs. Accordingly, the Czech Republic shall bear its own costs.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition),

hereby:

1. **Dismisses the action;**

2. **Orders the French Republic to pay the costs, including those relating to the action for interim measures;**

3. **Orders the Czech Republic to bear its own costs.**

Papasavvas Labucka Bieliūnas

Forrester Iliopoulos

Delivered in open court in Luxembourg on 5 April 2017.

[Signatures]