



## Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

19 March 2013\*

(Access to documents — Regulation (EC) No 1049/2001 — Documents relating to the draft international Anti-Counterfeiting Trade Agreement (ACTA) — Negotiating documents — Refusal to grant access — Exception relating to the protection of the public interest with regard to international relations — Manifest error of assessment — Proportionality — Obligation to state reasons)

In Case T-301/10,

**Sophie in 't Veld**, residing in Brussels (Belgium), represented by O.W. Brouwer and J. Blockx, lawyers,  
applicant,

v

**European Commission**, represented initially by C. Hermes and C. ten Dam, and subsequently by Mr Hermes and F. Clotuche-Duvieusart, acting as Agents,

defendant,

APPLICATION, initially, for partial annulment of the Commission Decision of 4 May 2010, reference SG.E.3/HP/psi – Ares(2010) 234950, in so far as it refused access to certain documents relating to the draft international Anti-Counterfeiting Trade Agreement (ACTA),

THE GENERAL COURT (Second Chamber),

composed of N.J. Forwood, President, F. Dehousse (Rapporteur) and J. Schwarcz, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 10 October 2012,

gives the following

\* Language of the case: English.

## Judgment

### Background to the dispute

- 1 On 17 November 2008, the applicant, Sophie in 't Veld submitted, pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), a first request for access to all documents relating to the Anti-Counterfeiting Trade Agreement ('ACTA'). The applicant received a reply to that request.
- 2 Following that first procedure for access, which is not at issue in the present case, the applicant, by e-mail of 1 December 2009, requested access, on the basis of Regulation No 1049/2001, to 'all new documents relating to ACTA since this [first] request, in particular documents from the negotiations which took place in Seoul, South Korea, in November [2009]'.
  - 3 In her reply of 21 January 2010, the Director General of the Directorate-General (DG) for Trade of the European Commission sent to the applicant a list – divided into 13 categories labelled (a) to (m) – of documents held by the Commission relating to ACTA. The Director General granted access to the documents collected in categories (a) to (d) of the list and refused access to the documents collected under the other nine categories ((e) to (m)), on the ground that the latter documents were covered by the exceptions set out in Regulation No 1049/2001.
  - 4 Categories (f), (k) and (l), in particular, of the list contained in the reply of 21 January 2010 were entitled as follows:
    - '(f) EU comments on the chapter Criminal Enforcement - the latest version is dated 30 October 2009. There are also several preparatory and working documents issued by the Council of the European Union on this issue, since the negotiation of the chapter on Criminal Enforcement is done by the rotating Presidency.
    - (k) Transmission notes to the 133 Committee enclosing the abovementioned negotiating documents, as well as the Commission documents with the assessment of the other parties' proposals, including two notes on the draft Digital Enforcement chapter.
    - (l) Day-to-day e-mail correspondence with the other ACTA partners.'
- 5 On 10 February 2010, the applicant submitted a confirmatory application to the Director General of DG TRADE.
- 6 By letter of 3 March 2010, the relevant Head of Unit in the Secretariat-General of the Commission informed the applicant that, in accordance with Article 8(2) of Regulation No 1049/2001, the time-limit for replying to the confirmatory application was being extended by 15 days, that is to say, up to 24 March 2010.
- 7 By letter of 24 March 2010, and subsequently by e-mails of 23 and 30 April 2010, the relevant Head of Unit informed the applicant that it had not yet been possible to take a decision regarding her confirmatory application for access, but that everything was being done to allow the quick adoption of that decision.
- 8 In April 2010, the parties to the ACTA negotiations made public a document entitled 'Consolidated Text Prepared for Public Release – Anti-Counterfeiting Trade Agreement – PUBLIC Predecisional/Deliberative Draft: April 2010' (the 'consolidated draft ACTA text').

- 9 On 4 May 2010, the Secretary General of the Commission adopted and notified to the applicant Decision SG.E.3/HP/psi – Ares(2010)234950 (the 'decision of 4 May 2010'). In the list annexed to that decision, the Commission identified 49 documents, numbered 1 to 49.
- 10 The Secretary General granted full access to one of those documents (document 49 on the list annexed to the decision of 4 May 2010) and partial access to four documents (documents 45 to 48 on that list), on the ground that document 49 and the relevant parts of documents 45 to 48 were not covered by any of the exceptions to the right of access provided for in Regulation No 1049/2001.
- 11 However, as regards Documents 1 to 44 on the list annexed to the decision of 4 May 2010 and the other parts of documents 45 to 48 on that list, the Secretary General confirmed the refusal of access notified by the Director General of DG TRADE, on the basis of the exception to the right of access set out in Article 4(1)(a), third indent, of Regulation No 1049/2001.

### **Procedure and forms of order sought**

- 12 By application lodged at the Court Registry on 14 July 2010, the applicant brought the present action.
- 13 By document lodged at the Court Registry on 25 October 2010, the Kingdom of Denmark requested leave to intervene in support of the form of order sought by the applicant.
- 14 Following the grant of leave to intervene, the Kingdom of Denmark, by letter of 10 February 2011, requested that its intervention be withdrawn.
- 15 By order of 17 March 2011, the President of the Second Chamber of the Court granted that request for withdrawal and, in the absence of observations of the main parties in that respect, ordered the main parties and the Kingdom of Denmark to bear their own respective costs in relation to the application for leave to intervene.
- 16 In her application, the applicant claims that the Court should:
  - annul the decision of 4 May 2010;
  - order the Commission to pay the costs.
- 17 In the application, the applicant criticised, inter alia, the fact that the decision of 4 May 2010, since it did not mention the documents covered in categories (f), (k) and (l) of the reply of 21 January 2010 – with the exception, however, of the two documents identified under Nos 27 and 28 in the list annexed to the decision of 4 May 2010 – had implicitly refused access to those documents without setting out the reasons for that refusal.
- 18 In its defence, the Commission contends that the Court should:
  - dismiss the application in so far as the decision of 4 May 2010 contains an explicit decision refusing to grant access;
  - order the applicant to pay the costs.
- 19 In its defence, the Commission added that, in so far as the decision of 4 May 2010 contains an implicit refusal to grant access to certain documents, the Commission would take, as soon as possible, an explicit decision with regard to those documents and would inform the applicant and the General Court of that decision.

- 20 On 9 December 2010, the Secretary General of the Commission adopted that decision, with the reference SG.E.3/HP/MM/psi – Ares(2010)924119 (the ‘decision of 9 December 2010’).
- 21 The Commission sent the decision of 9 December 2010 to the applicant by e-mail of the same day and notified it to the General Court by letter of 10 December 2010, lodged at the Court Registry on 14 December 2010.
- 22 In the decision of 9 December 2010, the Secretary General of the Commission referred to the applicant’s criticism in relation to the implicit refusal of access contained in the decision of 4 May 2010, with regard to the documents mentioned in categories (f), (k) and (l) of the reply of 21 January 2010.
- 23 The Secretary General then stated that, as the Commission had recognised in its defence, some of the documents coming under those three categories had indeed not been mentioned in the decision of 4 May 2010.
- 24 The Secretary General added that the scope of the decision of 9 December 2010 was therefore limited to those three categories. She stressed the fact that, as already mentioned in the decision of 4 May 2010, the request for access of 1 December 2009 was understood to cover all documents dated after 17 November 2008 containing substantial information on the ACTA negotiations.
- 25 The Secretary General then proceeded to assess the request for access.
- 26 First, the Secretary General excluded from the scope of her assessment various documents coming under one of the three categories, (f), (k) or (l), of the reply of 21 January 2010, on the basis that those documents had already been assessed in the decision of 4 May 2010, or on the basis that they had not been assessed because, as they did not contain substantial information on the ACTA negotiations, they did not come within the scope of the request for access.
- 27 Secondly, the Secretary General identified five additional documents which, although coming under one of the abovementioned categories, had not been assessed in the decision of 4 May 2010.
- 28 Those additional documents were identified, in the list annexed to the decision of 9 December 2010, under Nos 27a, 40a, 50, 51 and 52.
- 29 The Secretary General proceeded to examine the request for access as regards those five additional documents.
- 30 As regards, first, documents 27a and 40a on the list annexed to the decision of 9 December 2010, the Secretary General refused to grant access on the basis of Article 4(1)(a), third indent, of Regulation No 1049/2001.
- 31 As regards, secondly, documents 50 to 52 of the list annexed to the decision of 9 December 2010, the Secretary General granted partial access to those documents, while refusing access to the remaining parts on the basis, once again, of Article 4(1)(a), third indent, of Regulation No 1049/2001.
- 32 In her observations of 19 January 2011 on the decision of 9 December 2010, the applicant took issue with certain refusals to grant access contained in that decision, accepted others, and requested that the Commission produce a document before the General Court.

- 33 By order of 9 June 2011 (the 'order of 9 June 2011'), the President of the Second Chamber of the General Court, having noted that the action in the present case sought the partial annulment of the decisions of 4 May and 9 December 2010, ordered the Commission, on the basis of Article 65(b), Article 66(1), and the third subparagraph of Article 67(3) of the Court's Rules of Procedure, to produce all of the documents to which it had refused access in those two decisions.
- 34 The Commission complied with that order by letter lodged at the Court Registry on 8 July 2011.
- 35 In addition, and in response to the Court's request, the Commission, by document of 1 July 2011, lodged its observations on the applicant's observations of 19 January 2011.
- 36 In its observations of 1 July 2011, the Commission submitted that the Court should dismiss the application, as adapted by the applicant's observations of 19 January 2011, and order the applicant to pay the costs.
- 37 By letter of 28 October 2011, lodged the same day at the Registry of the General Court, the Secretary General of the Commission stated that she had discovered that one of the documents sent in confidence to the General Court by letter of 8 July 2011 in pursuance of the order of 9 June 2011, namely, the document identified in that letter, in Table I, as document 47, did not correspond to the document partially disclosed to the applicant by the decision of 4 May 2010 and identified under No 47 in the list annexed to that decision.
- 38 The Commission therefore submitted to the Court, as a corrigendum to its letter of 8 July 2011, the confidential document corresponding to document 47 on the list annexed to the decision of 4 May 2010.
- 39 The Commission added that, upon verification of its file, it appeared that, with regard not only to the sixth round of negotiations of the ACTA – of which document 47 in the list annexed to the decision of 4 May 2010 is a report – but also to the fourth, fifth, and seventh rounds of negotiations of the ACTA, two reports – and not one – existed in the Commission's archives for each round of negotiation.
- 40 The Commission stated that this was due to the fact that, at the end of each round of negotiations, its services prepared a first report with a view to rapidly informing the management of DG TRADE, while a second report was subsequently drafted for the members of the Council Working Party on Trade, formerly known as the 'Article 133 Committee'.
- 41 The Commission, establishing therefore that only one of the two reports for each round of the ACTA negotiations had been identified and examined in the decision of 4 May 2010 (documents 45 to 48 of the list annexed to that decision), announced that it would adopt an additional complementary decision, in which it would assess the request for access as regards the newly identified documents.
- 42 The Commission indicated that it would inform the Court of the outcome of that assessment and would, in accordance with the order of 9 June 2011, provide it with the full versions of those documents.
- 43 Questioned, by letter of the Court of 21 December 2011, on the subject of the adoption of that additional complementary decision, the Commission, by letter of 9 January 2012, stated that its services were currently preparing that decision, which would be adopted within two weeks.
- 44 On 27 January 2012, the Secretary General of the Commission adopted the announced additional complementary decision (the 'decision of 27 January 2012'), which she sent, on 1 February 2012, to the applicant and, on the following day, to the General Court.

- 45 Annexed to that decision were eight documents, one of which (corresponding to document 48 on the list annexed to the decision of 4 May 2010) was without redactions; the seven others were partially redacted.
- 46 Three of the seven latter documents corresponded to documents 45 to 47 on the list annexed to the decision of 4 May 2010. The other four documents were other versions of documents 45 to 48 on that list. Those four other versions are, in what follows, identified as being documents 45a, 46a, 47a and 48a annexed to the decision of 27 January 2012.
- 47 The Secretary General stated that she had assessed the request for access, as regards documents 45a, 46a, 47a and 48a annexed to the decision of 27 January 2012, in light of the circumstances at the time of that decision. She added that, in order to avoid discrepancies, she had re-assessed the other versions of those documents which had already been assessed in the decision of 4 May 2010.
- 48 The Secretary General stated that, for those eight documents, the decision of 27 January 2012 replaces the decision of 4 May 2010.
- 49 The Secretary General based all the redactions, except those relating the names of the delegates and a paragraph entitled 'Details' in document 47 on the list annexed to the decision of 4 May 2010, on the exception to the right of access set out in Article 4(1)(a), third indent, of Regulation No 1049/2001 (Section 4.1 of the decision of 27 January 2012). She based the redaction of the names of the delegates on the exception to the right of access set out in Article 4(1)(b) of Regulation No 1049/2001 (Section 4.2 of the decision of 27 January 2012), and the redaction of the paragraph entitled 'Details' on the exception to the right of access set out in the first subparagraph of Article 4(3) of that regulation (Section 4.3 of the decision of 27 January 2012).
- 50 The Secretary General granted:
- partial access to documents 45 to 47 on the list annexed to the decision of 4 May 2010, which was wider than that granted in that decision;
  - full access to document 48 on the list annexed to the decision of 4 May 2010;
  - partial access to documents 45a, 46a, 47a and 48a annexed to the decision of 27 January 2012.
- 51 By letter of 28 February 2012, the applicant submitted, at the request of the General Court, her observations on the decision of 27 January 2012.
- 52 The applicant claimed that she retained an interest in the annulment of the decision of 4 May 2010. She argued that the legality of the decision of 4 May 2010 could not be based on *ex post factum* exceptions to the right of access which had not been invoked in that decision, and stated that she would therefore not examine those additional exceptions. According to the applicant, the wider partial access granted by the decision of 27 January 2012 threw light on the validity of the Commission's reasoning in support of its redactions of documents covered by the decision of 4 May 2010. The nature of the information disclosed by the decision of 27 January 2012 gave rise to serious doubt regarding the Commission's interpretation of the reasons given for redaction in the decision of 4 May 2010, which had, in concrete terms, been interpreted and applied well beyond their reasonable scope.
- 53 The applicant added that she had found that, because of a computing error in the Commission's transmission by e-mail on 4 May 2010 of the decision of that date, she had in fact received the full versions of documents 45 to 48 on the list annexed to that decision. The applicant, on the basis of her knowledge of those full versions, criticised certain redactions relating to proposals of a negotiating

party likely to go beyond the Community *acquis*, which would infringe the requirements of transparency set out by the Court of Justice in its judgment in Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 59.

54 By order of 15 March 2012, the President of the Second Chamber of the General Court ordered the Commission, on the basis of Article 65(b), Article 66(1), and the third subparagraph of Article 67(3) of the Court's Rules of Procedure, to produce the four documents assessed for the first time in the decision of 27 January 2012.

55 The Commission complied with that order by letter lodged with the Court Registry on 10 April 2012.

56 In addition, by document of the same date, the Commission submitted its observations on the applicant's observations of 28 February 2012.

57 By document lodged at the Court Registry on 13 July 2012, the European Parliament requested leave to intervene in support of the form of order sought by the applicant. That request, submitted after the decision to open the oral procedure, was rejected by order of the President of the Second Chamber of the General Court of 28 August 2012.

## Law

58 At the outset, it is necessary to determine the scope of the present action regarding the decisions adopted by the Commission in response to the request for access and the various documents assessed in those decisions.

### A – *The scope of the action*

#### 1. *The scope of the action with regard to some of the refusals to grant access covered by the decision of 4 May 2010*

59 By the decision of 4 May 2010, the Commission ruled on the request for access regarding documents 1 to 49 in the list annexed to that decision. It granted access with regard to document 49. It refused access totally in relation to documents 1 to 44, and partly in relation to documents 45 to 48.

60 The Commission claims that, notwithstanding the applicant's form of order which seeks the annulment of the 'decision of 4 May 2010', the action does not seek the full annulment of that decision in so far as it contains refusals to grant access.

61 In the application, the applicant claims, as regards documents 30 to 48 on the list annexed to the decision of 4 May 2010, that she 'does not contest the Commission's refusal of access to these documents'. The action, the Commission contends, is therefore directed solely against the refusal to grant access to documents other than documents 30 to 48 in that list.

62 The applicant contests that reading of her action by the Commission. She acknowledges that the Commission may refuse access to information relating to the European Union's aims and aspects of its negotiating strategy in the ACTA negotiations.

63 However, she nevertheless contests the validity of the Commission's assessment as regards the possibility of partially divulging documents 45 to 48 on the list annexed to the decision of 4 May 2010.

- 64 It should be noted that, in the reasoning of the application relating to the third plea, alleging infringement of Article 4(1)(a), third indent, of Regulation No 1049/2001, the applicant, after challenging the refusal to grant access in respect of documents 1 to 29 of the list annexed to the decision of 4 May 2010, indicated, with regard to documents 30 to 48 of that list, that 'the applicant [did] not contest the Commission's refusal of access to these documents'.
- 65 However, it should also be noted that, in the remainder of the application, the applicant argued, in the fourth plea, that, in relation to the documents received by her in a redacted form – specifically documents 45 to 48 of the list annexed to the decision of 4 May 2010 – the Commission had excessively redacted those documents. The applicant added that, although it is impossible to identify the specific parts of the redacted text that should be disclosed, it would appear from some of the Commission's redactions that it adopted an excessively strict and narrow approach.
- 66 In her reply, the applicant continued to allege an infringement of Article 4(1)(a), third indent, of Regulation No 1049/2001 only with respect to documents 1 to 29 of the list annexed to the decision of 4 May 2010. However, in the reasoning relating to the fourth plea, she maintained her arguments in relation to documents 45 to 48 and argued that she had already submitted those arguments in the application.
- 67 It follows from the foregoing considerations that, with respect to documents 30 to 48 of the list annexed to the decision of 4 May 2010, this action does not preclude the application to those documents of the exception referred to in Article 4(1)(a), third indent, of Regulation No 1049/2001, but is limited to challenging, with regard to documents 45 to 48 of that list only, the allegedly excessive restrictiveness of the partial access granted to those documents.
- 68 In conclusion, the present action does not contest, specifically, the decision of 4 May 2010 in respect of, first, documents 1 to 29 of the list annexed to that decision and, secondly, documents 45 to 48 of that list, it being specified, with respect to these documents, that the applicant merely considers that the partial access granted by the Commission for those documents may have been too restrictive.

*2. The scope of the action following the decision of 9 December 2010 and in the light of the applicant's observations of 19 January 2011*

- 69 By the decision of 9 December 2010, the Commission ruled on the request for access regarding documents covered by that request, but not assessed in the decision of 4 May 2010, that is, documents 27a, 40a and 50 to 52 on the list annexed to the decision of 9 December 2010. The Commission refused access totally with regard to documents 27a and 40a, and partially with regard to documents 50 to 52.
- 70 In the first place, it should be pointed out that, as the Commission argues in the rejoinder, that institution, by the decision of 9 December 2010, withdrew the implied decision to refuse access to those documents which had been made previously and which resulted from the absence of an express decision of the Commission regarding those documents (see, to that effect, Joined Cases T-355/04 and T-446/04 *Co-Frutta v Commission* [2010] ECR II-1, paragraph 45, and order of 17 June 2010 in Case T-359/09 *Jurašinović v Council*, not published in the ECR, paragraph 40).
- 71 It follows that, after the adoption of the decision of 9 December 2010, the present action has become devoid of purpose in so far as it seeks annulment of an implied decision refusing access that no longer appears in the European Union legal order. There is therefore no need to adjudicate in this regard, without prejudice, however, to the assessment concerning costs.

- 72 In the second place, it should be noted that, in her observations of 19 January 2011 on the decision of 9 December 2010, brought within the period for bringing an action, the applicant challenged certain decisions refusing access contained in that decision.
- 73 It follows that, as is noted, moreover, in the order of 9 June 2011 (see paragraph 33 above), the present action now also seeks partial annulment of the decision of 9 December 2010.
- 74 It should be noted, in that context, that the observations of the applicant of 19 January 2011 do not include a challenge to any of the refusals to grant access set out in the decision of 9 December 2010.
- 75 Thus, with regard to the document of 25 February 2009 entitled 'Note on informal meeting of 4 March 2009' (document 50 of the list annexed to the decision of 9 December 2010), to which full access was granted except for a sentence containing subjective assessments that are likely to be misperceived by the negotiating party in question (Section 2.2.3 of the decision of 9 December 2010), the applicant declared, in essence, that she did not challenge that redaction.
- 76 Moreover, with regard to email correspondence between the negotiating parties, mentioned in Section 2.3 of the decision of 9 December 2010 and regarding the daily exchanges between the negotiating parties on purely administrative matters, it should be noted, which the applicant does not, in essence, dispute, that such documents do not fall within her request for access.
- 77 It follows from the foregoing considerations that, following the adoption of the decision of 9 December 2010 and in the light of the applicant's observations of 19 January 2011, the scope of the present action for annulment extends to the Commission's refusal to grant access, in that decision, to documents 27a, 40a, 51 and 52 of the list annexed to that decision.

*3. Scope of the action following the decision of 27 January 2012 and in the light of the observations of the applicant of 28 February 2012*

- 78 By the decision of 27 January 2012, the Commission considered the request for access with respect to four new documents (documents 45a, 46a, 47a and 48a annexed to the decision of 27 January 2012) and reviewed the request for access to four other versions of those documents that had already been assessed in the decision of 4 May 2010 (documents 45 to 48 of the list annexed to the decision of 4 May 2010).
- 79 The Commission stated that the decision of 27 January 2012 replaced, for those eight documents, the decision of 4 May 2010. In its observations of 10 April 2012, it argued that, as the applicant did not indicate to the Court that she wished to include the decision of 27 January 2012 in the scope of her application for annulment, the present action only sought partial annulment of the decision of 4 May 2010 and the decision of 9 December 2010.
- 80 On the first point, it should be noted that the decision of 27 January 2012 repeals and replaces the decision of 4 May 2010, not for eight documents, as indicated by the Commission, but only for the four documents (45 to 48) already examined by it in May 2010. For the other four documents (45a to 48a), not previously examined, the decision of 27 January 2012 constitutes an original decision.
- 81 On the second point, it should be noted that, in fact, nowhere in her observations of 28 February 2012 did the applicant amend, or even seek to amend, the pleadings of her appeal against the decision of 27 January 2012. As the Commission itself correctly observes in its observations of 10 April 2012, the applicant, in her observations of 28 February 2012, focuses, deliberately, all her criticism on the decision of 4 May 2010 and on the redactions made by that decision in documents 45 to 48.

- 82 Thus, when the applicant mentions the statement of reasons for the decision of 27 January 2012, it is not to request annulment of that decision, but to support her application for annulment of the decision of 4 May 2010. The applicant argues, moreover, in her observations of 28 February 2012, that 'the evidence provided by the decision of 27 January 2012 clearly shows that the decision of 4 May 2010 misapplied Article 4 of Regulation No 1049/2001'.
- 83 It follows from the foregoing considerations that the present action does not seek annulment of the decision of 27 January 2012, but only annulment of the decisions of 4 May and 9 December 2010.
- 84 It should be noted, incidentally, that that absence of an application for annulment of the decision of 27 January 2012 did not in any way result from an omission on the part of the applicant, but rather from her desire to establish the illegalities allegedly committed in the decision of 4 May 2010, without running the risk that those illegalities could be 'covered' by the subsequent assessments of the Commission, made in the decision of 27 January 2012. Accordingly, the applicant expressly refuses to consider the justifications – added, according to her, 'post factum' – invoked by the Commission in its decision of 27 January 2012.

#### 4. *Plea concerning the scope of the application*

- 85 Given the circumstances and the considerations set out in paragraphs 59 to 84 above, it must be concluded that the present action seeks annulment of the following:
- the decision of 4 May 2010, in that it refuses to grant access to documents 1 to 29 and 45 to 48 of the list annexed to that decision;
  - the decision of 9 December 2010, in that it refuses to grant access to documents 27a, 40a, 51 and 52 of the list annexed to that decision.

#### B – *Substance*

- 86 The applicant puts forward five pleas in support of her action. The first alleges infringement of Article 8(3) of Regulation No 1049/2001. The second plea alleges infringement of Article 4(4) of that regulation. The third plea alleges infringement of Article 4(1)(a), third indent, of Regulation No 1049/2001 and manifest errors of assessment. The fourth alleges infringement of Article 4(6) of Regulation No 1049/2001 and of the principle of proportionality. The fifth plea alleges infringement of the obligation to state reasons.

##### 1. *The first plea, alleging infringement of Article 8(3) of Regulation No 1049/2001*

- 87 With regard this plea, by which the applicant complains that the Commission did not consider, in its decision of 4 May 2010, certain documents that were, however, referred to in the reply of 21 January 2010, it has already been found, in paragraph 71 above, that, following the decision of 9 December 2010, the present action has become devoid of purpose in so far as it seeks annulment of an implied decision refusing access to certain documents referred to in the reply of 21 January 2010 and not subsequently assessed by the Commission.
- 88 It follows that the present plea, which is made in support of that application for annulment, has itself become devoid of its purpose and that there is therefore no need to assess it.

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

- 89 In her application, the applicant criticises the Commission for having applied Article 4(4) of Regulation No 1049/2001 as if it consisted in a substantive exception to the right of access, whereas it is merely a procedural rule. According to the applicant, the Commission, disregarding the solely procedural function of that provision, applied it in such a way as to have the practical effect of providing third parties with a veto on the release of documents which they issue.
- 90 The Commission contends that the decision of 4 May 2010 is based exclusively on Article 4(1)(a), third indent, of Regulation No 1049/2001.
- 91 As the Commission has noted, Article 4(4) of Regulation No 1049/2001 was not relied on in the decision of 4 May 2010 as the basis of that decision. The decision of 4 May 2010 is based exclusively on Article 4(1)(a), third indent, of Regulation No 1049/2001.
- 92 It follows from the foregoing that the second plea, as stated in the application, is based on a false premise and must be rejected.
- 93 In the reply, moreover, the applicant no longer contests the fact that the decision of 4 May 2010 is based exclusively on Article 4(1)(a), third indent, of Regulation No 1049/2001. In view of the explanations set out in the defence, the applicant notes and expressly pleads that the decision of 4 May 2010 is based exclusively on that latter provision. She no longer claims, therefore, that the Commission used Article 4(4) of Regulation No 1049/2001 as a substantive exception, to form the basis of its refusal to grant access.
- 94 However, in her reply, the applicant brought a complaint alleging infringement of Article 4(4) of Regulation No 1049/2001, this time considered as a procedural provision.
- 95 The applicant thus submits that, in the case of third-party documents, the Commission must, pursuant to that provision, consult the third party to determine whether an exception to the right of access applies, unless it is clear that the document must or must not be disclosed. It is clear from the wording of Article 4(4) of Regulation No 1049/2001 that the Commission does not enjoy broad discretion in determining whether or not to consult a third party. The Court should, therefore, rule on that issue without taking into consideration the broad discretion granted to the Commission regarding the application of exceptions to the right of access under Article 4(1)(a), of Regulation No 1049/2001. If it should transpire that the Commission was wrong to find that the documents in question were manifestly prejudicial, it would have breached its obligation to consult third parties, which should result in the annulment of the decision of 4 May 2010. The applicant refers in that regard to her pleadings in the reply.
- 96 The Commission contends that this claim is inadmissible or, in the alternative, unfounded.
- 97 Under Article 44(1)(c) and Article 48(2) of the Rules of Procedure, the application initiating the proceedings must indicate the subject-matter of the proceedings and contain a summary of the pleas in law relied on, and new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. However, a plea which constitutes an amplification of a plea made previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible. The same applies to a complaint made in support of a plea in law (see Case T-231/99 *Joynson v Commission* [2002] ECR II-2085, paragraph 156 and the case-law cited).

- 98 It should be noted that the present complaint, by which the applicant criticises the Commission for infringement of the procedural obligation to consult third parties when it is not clear whether or not the document must be disclosed, does not appear in the application and is, therefore, a new complaint.
- 99 Furthermore, that new complaint is not based on any matter of fact or law which was revealed during the proceedings before the General Court. Indeed, since neither the reply of 21 January 2010 nor the decision of 4 May 2010 mentioned consultation with third parties pursuant to Article 4(4) of Regulation No 1049/2001, the applicant had evidence allowing her, had she so wished, to invoke, from the commencement of the action, the infringement of that procedural provision. With regard to the contention of the Commission in the defence, noted by the applicant and according to which 'there was no doubt in the eyes of the Commission as to the prejudicial nature of such disclosure', this contains no new element of fact or law.
- 100 In addition, this new complaint does not constitute either an amplification of the present plea, which, as stated in the application, concerned a totally different issue (the application of Article 4(4) of Regulation No 1049/2001 as a substantive exception to the right of access), or of any other plea in the application.
- 101 In that regard, it should be noted that that new complaint, far from being closely connected to another plea in the action, falls rather in opposition to the argument of the application (see paragraph 89 above), according to which the Commission is allegedly subject to the position of third parties as if it were a veto. Indeed, that argument, based on the fact that the Commission was aware of the expectations of third parties with regard to the confidentiality of their negotiating documents, makes no mention at all of the subsequent procedural complaint accusing the institution of not having consulted them.
- 102 Moreover, the applicant does not suggest, at any time in the reply, that the failure to consult third parties was the cause of the manifest error of assessment referred to in the third plea. On the contrary, in the reply, the applicant makes a purely procedural argument.
- 103 It follows from the foregoing that the plea alleging infringement of Article 4(4) of Regulation No 1049/2001, considered as a procedural provision, constitutes a new complaint inadmissible under Article 48(2) of the Rules of Procedure.

*3. The third plea, alleging infringement of Article 4(1)(a), third indent, of Regulation No 1049/2001 and manifest errors of assessment*

- a) (a) The first part of the plea, alleging an infringement of Article 4(1)(a), third indent, of Regulation No 1049/2001
- 104 The applicant claims that the public-interest reasons invoked by the Commission to justify its refusal of access are based on an erroneous interpretation of Article 4(1)(a), third indent, of Regulation No 1049/2001. The existence of a confidentiality agreement between the parties to the ACTA negotiations cannot, she argues, justify the Commission's refusal to grant her access. The Commission failed to distinguish the European Union's position in the ACTA negotiations from non-European negotiating positions, even though there was no risk attached to a disclosure of the European Union's positions. Finally, the disclosure of the documents relating to ACTA can only reinforce the public interest as regards international relations.
- 105 The Commission does not accept the applicant's position. It claims that it was justified, under Article 4(1)(a), third indent, of Regulation No 1049/2001, in refusing access to certain documents. The unilateral disclosure of those documents by the European Union, in the context of international

negotiations based on mutual trust between negotiating parties, would have undermined the protection of the public interest as regards international relations. The confidentiality agreement between the ACTA parties was only one of several elements of assessment in the application, in the present case, of the abovementioned provision. The Commission contests the relevance of the distinction made by the applicant between the position of the European Union and the position of the other negotiating parties and it notes that the ACTA negotiations had still not been finalised.

- 106 Under the third indent of Article 4(1)(a) of Regulation No 1049/2001, ‘the institutions are to refuse access to a document where disclosure would undermine the protection [...] of the public interest as regards [...] international relations’.
- 107 It should be noted that the principle is that the public is to have access to the documents of the institutions and the power to refuse access is the exception. A decision denying access is valid only if it is based on one of the exceptions provided for in Article 4 of Regulation No 1049/2001. According to settled case-law, those exceptions must be construed and applied strictly so as not to defeat the application of the general principle enshrined in that regulation (Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429, paragraph 45; see, by analogy, Case T-211/00 *Kuijjer v Council* [2002] ECR II-485, paragraph 55). Furthermore, the principle of proportionality requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view (Case C-353/99 P *Council v Hautala* [2001] ECR I-9565, paragraph 28).
- 108 With regard to the exceptions to the right of access set out in Article 4(1)(a) of Regulation No 1049/2001, the Court has accepted that the particularly sensitive and essential nature of the interests protected by that provision, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would damage those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care. The Court has held that such a decision therefore requires some discretion. (Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 35).
- 109 Consequently, the Court’s review of the legality of decisions of the institutions refusing access to documents on the basis of the exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation No 1049/2001 must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers (Case C-266/05 P *Sison v Council*, paragraph 108 above, paragraph 34, and Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council*, paragraph 107 above, paragraph 47 and the case-law cited).
- 110 It should be noted, finally, that it is clear from the wording of Article 4(1)(a) of Regulation No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would damage the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests (Case C-266/05 P *Sison v Council*, paragraph 108 above, paragraphs 46 to 48; Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council*, paragraph 107 above, paragraphs 51 to 55; Case T-264/04 *WWF European Policy Programme v Council* [2007] ECR II-911, paragraph 44; Case T-300/10 *Internationaler Hilfsfonds v Commission* [2012] ECR, paragraph 124; and Case T-465/09 *Jurašinović v Conseil* [2012] ECR, paragraphs 47 to 49).
- 111 It is in the light of the foregoing considerations that it is necessary to consider whether, as the applicant claims, the Commission infringed Article 4(1)(a), third indent, of Regulation No 1049/2001.

- 112 The applicant claims, in the first place, that the public-interest reasons invoked by the Commission in order to justify its refusal of access are based on an erroneous interpretation of that provision. The existence of a confidentiality agreement between the ACTA negotiation partners cannot, she argues, justify the Commission's refusal to grant her access.
- 113 In the decision of 4 May 2010, the Commission noted that '[w]hile agreeing to release publicly the [consolidated draft ACTA text], the participants have reaffirmed the importance of maintaining the confidentiality of their respective positions in these negotiations'. The Commission indicated that it was 'important to note that in the current state of ACTA negotiations, compromises will still have to be found between different countries and arbitrations have to be made at country level as to the final position to be taken' (Section 4.1, first paragraph, of the decision of 4 May 2010).
- 114 The Commission added that '[o]n a general level, it goes without saying that the success of international negotiations requires cooperation among the parties involved which depends to a large extent on the atmosphere of mutual trust'. It argued that '[t]his is particularly true in the context of on-going trade negotiations, which deal with sensitive subjects and touch upon a wide variety of matters, such as economic policies, business interests and political considerations' (Section 4.1, fourth paragraph, of the decision of 4 May 2010).
- 115 The Commission indicated that, on the basis of a careful assessment of all the documents concerned by the request for access, it was clear that, under the circumstances of the present case, to grant that request in full would have a detrimental effect on the atmosphere of mutual trust between the negotiating parties and would thus reduce the chances of a successful outcome of the negotiations, undermining the efforts of the negotiators, as well as limiting the prospects for future cooperation. The Commission added that if the European Union's negotiating partners had reason to believe that their positions expressed during confidential negotiations could be made public unilaterally by the European Union, this would have an adverse effect in future negotiations (Section 4.1, fifth paragraph, of the decision of 4 May 2010).
- 116 The Commission added that it was important, in that context, to take into account that, during the ACTA negotiations, it had been in favour of releasing the consolidated draft ACTA text as soon as possible and that it had continuously informed the public about the objectives and the general thrust of the negotiations. The Commission indicated that it had released, after every negotiation round, summary reports agreed by all the negotiating parties, as well as a detailed description of the progress of the negotiations. Furthermore, it had organised three public conferences on ACTA, in 2008, 2009 and 2010, to inform the public about the ACTA goals and the progress of the negotiations and to receive any comments from interested parties (Section 4.1, sixth paragraph, of the decision of 4 May 2010).
- 117 The Commission indicated that '[a]s regards documents originating from third parties, [it] has made its own assessment on whether an exception in Regulation 1049/2001 is applicable' and that '[o]ne factor in that assessment is that ignoring the third parties' requests that their documents should not be publicly released would seriously jeopardise the continuation of the negotiations and undermine the protection of the EU's international relations'. The Commission added that '[t]his is all the more so, as one of the issues in discussion within the negotiations has been the acceptable level of transparency related to the negotiating text itself'. The Commission, '[t]aking into account, on the one hand, the recent agreement by the negotiating parties to make the [consolidated draft ACTA text] available to the public and, on the other hand, the reaffirmation related to the confidentiality of the positions of the negotiating parties' considered that 'disclosure by [it] of these positions, as expressed in the context of the ACTA negotiations, would undermine the EU's credibility in the negotiations and their trust' (Section 4.2, second paragraph, of the decision of 4 May 2010).

- 118 Firstly, all those considerations indicate that, whereas the Commission did make reference to the agreement of the negotiating parties to protect the confidentiality of the negotiating positions, it did not in any way invoke that agreement in opposition to the access request as a legally binding agreement that required it, by law, to refuse that request. On the contrary, the Commission legally based its refusal of access solely on Article 4(1)(a), third indent, of Regulation No 1049/2001.
- 119 Secondly, it cannot be denied, and the applicant herself admits in the reply, that the negotiation of international agreements can justify, in order to ensure the effectiveness of the negotiation, a certain level of discretion to allow mutual trust between negotiators and the development of a free and effective discussion. As the Commission points out, any form of negotiation necessarily entails a number of tactical considerations of the negotiators, and the necessary cooperation between the parties depends to a large extent on the existence of a climate of mutual trust.
- 120 It should be noted, moreover, that the Court held that initiating and conducting negotiations in order to conclude an international agreement fall, in principle, within the domain of the executive, and that public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations (Case T-529/09 *in 't Veld v Council* [2012] ECR, paragraph 88; see also paragraph 57 and the end of paragraph 59 of the judgment).
- 121 It follows from the foregoing that, considered as such, the reasons given by the Commission in its decision of 4 May 2010 as a basis for its refusal of access neither disregard nor misinterpret Article 4(1)(a), third indent, of Regulation No 1049/2001.
- 122 The applicant claims, in the second place, that, in any event, the public disclosure of specific positions adopted by the European Union would not pose a risk to third parties. According to the applicant, there should be no difficulty making public documents and information that the European Union has already communicated to its negotiating partners.
- 123 Regardless of the fact that that position is difficult to reconcile with the admission elsewhere (see paragraph 119 above) of the necessity of a degree of confidentiality, it should be noted that, contrary to what the applicant suggests, it is possible that the disclosure of European Union positions in international negotiations could damage the protection of the public interest as regards international relations.
- 124 First, it is possible that the disclosure of the European Union's positions in the negotiations could reveal, indirectly, those of other parties to the negotiations. This may be the case, in particular, when the European Union's position is expressed when referring to that of another negotiating party, or when an examination of the position of the European Union or of its evolution during the negotiations allows the position of one or more other negotiating parties to be inferred, more or less accurately.
- 125 Secondly, it should be noted that, in the context of international negotiations, the positions taken by the European Union are, by definition, subject to change depending on the course of those negotiations, and on concessions and compromises made in that context by the various stakeholders. As has already been noted, the formulation of negotiating positions may involve a number of tactical considerations of the negotiators, including the European Union itself. In that context, it is possible that the disclosure by the European Union, to the public, of its own negotiating positions, even though the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating position of the European Union.
- 126 As to the applicant's argument that, in essence, it should have been possible for the Commission to disclose the various positions taken in the negotiations without identifying the negotiating parties defending those positions, it must be held that, in the context of international negotiations, unilateral

disclosure by one negotiating party of the negotiating position of one or more other parties, even if this appears anonymous at first sight, may be likely to seriously undermine, for the negotiating party whose position is made public and, moreover, for the other negotiating parties who are witnesses to that disclosure, the mutual trust essential to the effectiveness of those negotiations. As the Commission emphasises, establishing and protecting a sphere of mutual trust in the context of international relations is a very delicate exercise.

127 Moreover, the applicant is wrong to suggest that, following the disclosure of the consolidated draft ACTA text, it could be considered that the negotiations before this disclosure were completed and should, therefore, be disclosed. Without prejudice to the question whether the protection of the public interest in international relations can justify maintaining the confidentiality of the negotiating documents for a certain period after the end of those negotiations, it should be noted that the consolidated draft ACTA text was only a draft agreement and that the negotiations were continuing at the time of its disclosure.

128 It follows from the foregoing considerations that the applicant is wrong to argue that disclosure of the positions of the European Union or other parties to the ACTA negotiations could not damage the interest protected by Article 4(1)(a), third indent, of Regulation No 1049/2001.

129 In the third place, as regards the argument that the disclosure of documents relating to the ACTA could only have reinforced the public interest with regard to international relations and avoid controversy arising from the leaked publication of certain proposals, it should be noted that, while it is true that the purpose of Regulation No 1049/2001 is to ensure maximum transparency by giving the fullest possible effect to the right of public access to documents of the European Union (recital 4 of the regulation), it nevertheless provides exceptions to the right of access to protect certain public or private interests, and in the present case, the public interest as regards international relations.

130 It is clear from the foregoing that, in the present case, the reasons given by the Commission to restrict access did not entail, as such, and regardless of the issue of being specifically invoked in the decisions of 4 May and 9 December 2010, any misinterpretation of Article 4(1)(a), third indent, of Regulation No 1049/2001.

131 In addition, and in so far as the applicant's argument seeks, in essence, to invoke, in the present case, an overriding public interest in disclosure, it should be noted that the exceptions to the right to access under Article 4(1)(a) of Regulation No 1049/2001 are mandatory exceptions, unlike other exceptions to the right to access, and do not make any reference to the consideration of such an interest. In the context of an action for annulment of a decision to refuse access under Article 4(1)(a), third indent, of Regulation No 1049/2001, any argument based on an overriding public interest in disclosure must be rejected as ineffective (see, to that effect, the case-law cited in paragraph 110 above).

132 It follows from the foregoing considerations that the first part of this plea must be rejected.

b) (b) The second part, alleging manifest errors of assessment in the application of Article 4(1)(a), third indent, of Regulation No 1049/2001

133 The applicant claims that the Commission made manifest errors of assessment in its specific application of the exception set out in Article 4(1)(a), third indent, of Regulation No 1049/2001 to the documents at issue on the list annexed to the decision of 4 May 2010 and to some of the documents covered by the decision of 9 December 2010.

134 The Commission takes issue with the applicant's position and contends that the exception to the right of access invoked in the decisions of 4 May 2010 and of 9 December 2010 did indeed apply to the documents at issue.

The consolidated draft ACTA text, its chapters and the draft proposal on technical cooperation (documents 1 to 22 of the list annexed to the decision of 4 May 2010)

- 135 With regard to documents 1 to 21 in the list annexed to the decision of 4 May 2010, the applicant's position is that if the views and suggestions that these documents contained were incorporated in the consolidated draft ACTA text, then they were no longer likely to be reviewed and their disclosure should not pose any difficulty. Furthermore, and in any event, to the extent that those documents contained views of the Commission, which it has shared with its negotiating partners, there would have been no reason not to grant her access to those views. With regard to document 22 in the list annexed to the decision of 4 May 2010, which had not been included in the consolidated draft ACTA text, the applicant submits that the disclosure of a document which merely relates to technical cooperation was unlikely to prejudice the negotiations.
- 136 It is clear, both from the decision of 4 May 2010 (Section 5.1) and the examination of the documents submitted by the Commission pursuant to the order of 9 June 2011, that documents 1 to 20 of the list annexed to the decision of 4 May 2010 concern various draft ACTA chapters and contain, in particular by the use of the track changes function, the positions and suggestions of the various negotiating parties expressed in the negotiations. Document 21 is a list of questions for discussion. Document 22 expresses the proposals of a negotiating party in the field of technical cooperation.
- 137 It should be pointed out, as the Commission noted in its decision of 4 May 2010 (Section 5.1), that the ACTA negotiations were in progress when that decision was adopted and that the consolidated draft ACTA text made public was no more than a draft agreement.
- 138 In those circumstances, the Commission did not commit a manifest error of assessment in finding, at Section 5.1 of the decision of 4 May 2010, that the disclosure of documents 1 to 20 and 22 to the applicant and, therefore, of the negotiating positions of the negotiating parties and of the European Union, would have compromised the sphere of mutual trust necessary for each of the negotiating parties to freely express its position, and would have affected the negotiating position of the European Union.
- 139 The fact that document 22 is a proposal concerning technical cooperation does not detract from the fact that it was a negotiating document from a negotiating party and that its disclosure was, therefore, likely to damage the climate of mutual trust necessary for the negotiations.
- 140 However, with regard to document 21 of the list annexed to the decision of 4 May 2010, it should be noted that this is not a document expressing a negotiating position of one or more parties, but at most a list of questions for discussion, without indirect implications. In those circumstances, it must be considered that the refusal of the request for access with respect to that document is vitiated by a manifest error of assessment, as the Commission wrongly held that the disclosure of that document would compromise the protection of the public interest in international relations.
- 141 It follows that whereas, contrary to what the applicant maintains, the Commission did not, in the exercise of its margin of discretion in respect of the exceptions to the right of access under Article 4(1)(a) of Regulation No 1049/2001, commit a manifest error by refusing access to documents 1 to 20 and 22 of the list annexed to the decision of 4 May 2010, for the reasons stated in Section 5.1 of that decision, it is appropriate, however, to uphold the present part of the third plea regarding document 21 of the list annexed to that decision.

The documents relating to the line to be taken on requests for joining the negotiations (documents 23 and 24 of the list annexed to the decision of 4 May 2010)

- 142 The applicant contests the refusal to grant access on the ground that those documents relate, primarily, to options for consideration by the negotiating parties, in relation to the inclusion of new parties to those negotiations. Accordingly, those documents appear to be of a general nature in that they merely consider various possible approaches to accession and requests to join the negotiations by other countries.
- 143 It is clear both from the decision of 4 May 2010 (Section 5.2) and from the examination of the documents submitted by the Commission pursuant to the order of 9 June 2011, that documents 23 and 24 of the list annexed to that decision concern the issue of the position to be taken with regard to requests to join ACTA negotiations or to accede to the ACTA once it has been negotiated and concluded. Document 23 comes from a negotiating party and presents options in that regard, while document 24, based on the text of document 23, is a document common to all the negotiating parties, including replies to requests from third parties to join the negotiations. The decision of 4 May 2010 indicates that these are discussion papers.
- 144 In these circumstances, it must be considered that the Commission did not commit a manifest error of assessment in finding that the disclosure of those documents would damage the protection of the public interest as regards international relations.
- 145 Given the purpose and content of those documents and, as the Commission noted, in essence, in its decision of 4 May 2010 (Section 5.2), such disclosure was likely to affect both the credibility of the Commission as a negotiating partner vis-à-vis the other negotiating parties, and the relationship of all the negotiating parties – and thus of the European Union – with any third countries wishing to join the negotiations.
- 146 It follows that this part of the third plea must be rejected as regards documents 23 and 24.

The documents relating to the positions of other negotiating parties on certain issues (documents 25 and 26 of the list annexed to the decision of 4 May 2010)

- 147 The applicant indicates that she understands that those documents reflect the positions of third parties and the European Union's views in that regard, in relation to the future institutional structure of ACTA and the provisions of ACTA regarding the Internet. The applicant does not see how the disclosure of those documents, which the Commission has already distributed to the other negotiating parties, could restrict its room for manoeuvre.
- 148 In Section 5.3 of the decision of 4 May 2010, the Commission stated that documents 25 and 26 of the list annexed to that decision directly reflected the positions of the negotiating parties as well as the European Union's view on those positions with regard to, respectively, the ACTA Internet provisions and the future institutional structure of ACTA.
- 149 It appears from the review of the documents submitted by the Commission pursuant to the order of 9 June 2011 that, while document 26 does in fact reflect, as the Commission states in the decision of 4 May 2010 (Section 5.3), the position of a negotiating party as well as the European Union's view on that position, it does not appear, however, that such is the case with regard to document 25.

150 Document 25 takes the form of a document of the European Union the content of which is essentially descriptive and general, concerning European Union law in the field of intellectual property, in relation to the Internet. It does not refer to the position of any negotiating party and does not express, despite the Commission's claim at the hearing, any specific position of the Commission with regard to a position of such a party.

151 It follows that, whereas the refusal to grant access to document 26 does not, contrary to what the applicant claims, contain any manifest error of assessment, having regard to the content of that document and the views correctly expressed by the Commission in Section 5.3 of the decision of 4 May 2010, it is appropriate, nevertheless, to uphold this part of the third plea regarding document 25 of the list annexed to that decision.

The European Union comments on criminal enforcement (documents 27 to 29 of the list annexed to the decision of 4 May 2010)

152 With regard to documents 27 to 29 of the list annexed to the decision of 4 May 2010, and for the same reasons as those set out in relation to documents 25 and 26 of that list, the applicant claims that the Commission failed to show that the exception to the right of access based on the protection of international relations was satisfied.

153 It is apparent from both the decision of 4 May 2010 (Section 5.4) and from the assessment of the documents submitted by the Commission pursuant to the order of 9 June 2011, that documents 27 to 29 in the list annexed to that decision are negotiating documents of the European Union relating to the provisions of the draft ACTA on criminal enforcement.

154 In those circumstances, it must be found that the Commission did not commit a manifest error of assessment in finding, in Section 5.4 of the decision of 4 May 2010, that the disclosure of those documents would affect the negotiating position of the European Union and would thus damage the protection of the public interest as regards international relations.

155 It follows that this part of the third plea must be rejected as regards to the abovementioned documents 27 to 29.

The comments of the Member States and the working papers and internal reports (documents 30 to 48 of the list annexed to the decision of 4 May 2010)

156 At the outset, it should be noted (see paragraphs 64 to 68 above) that this action does not challenge the refusal to grant access in relation to documents 30 to 44 of the list annexed to the decision of 4 May 2010, but seeks only to establish, in relation to documents 45 to 48 of that list, that the partial access to those documents granted by the Commission could perhaps have been too restrictive and, therefore, in essence, could have breached the principle of proportionality.

157 In her observations of 28 February 2012, the applicant, on the basis of a comparison of the parts of documents 45 to 48 redacted in the decision of 4 May 2010 and subsequently disclosed in the decision of 27 January 2012, argues that the redactions made in May 2010 were not justified, either because they were purely descriptive and could not prejudice relations with other negotiating partners, or because they referred to elements that could not reveal the positions of the negotiating parties or the negotiating strategy of the Commission.

- 158 Finally, the applicant, relying on her knowledge – acquired as a result of a computer error by the Commission – of the entire contents of documents 45 to 48 of the list annexed to the decision of 4 May 2010, criticises the Commission's approach. Thus, in document 47 of that list, the applicant criticises the redaction by the Commission, at the bottom of page 2 and in page 3 of that document, of certain information that the applicant considers both non-confidential and important to the public.
- 159 The applicant concludes that the evidence provided by the decision of 27 January 2012 shows that the Commission, in its decision of 4 May 2010, incorrectly applied Article 4 of Regulation No 1049/2001 and did this to conceal the fact that it had deviated from its transparency commitments.
- 160 The Commission, in its observations of 10 April 2012, disputes the applicant's arguments.
- 161 First, it reiterates its argument, contained in the defence and in the rejoinder, that the application was not directed against the refusal of access set out in the decision of 4 May 2010 in relation to documents 45 to 48 of the list annexed to that decision.
- 162 The fact remains, however, that that argument has already been considered and rejected, in paragraphs 59 to 67 above.
- 163 Secondly, the Commission, after recalling its wide discretion in the context of Article 4(1)(a), third indent, of Regulation No 1049/2001 and its limited legal review arising from this, considers that the applicant, through her detailed examination of the redactions made in documents 45 to 48 by the decision of 4 May 2010 and disclosed in 2012, disregarded the limitations of the said legal review.
- 164 It is clear, however, in the present case, that the fact that the Commission has some discretion in no way precludes the applicant from making a comparison of the decisions of 4 May 2010 and 27 January 2012, to find evidence in support of her argument that the Commission committed, in its decision of 4 May 2010, manifest errors of assessment in the practical application, to the documents in question, of the exception to the right of access provided for in Article 4(1)(a), third indent, of Regulation No 1049/2001. The Commission's discretion is not thereby disregarded by that, nor is the scope of the Court's review modified.
- 165 Finally, the Commission considers that the review thus carried out by the applicant in no way demonstrated that the redactions made in the decision of 4 May 2010 were clearly unjustified; indeed, the opposite is true.
- 166 It should be noted that it is apparent, both from the decision of 4 May 2010 (Section 5.6) and from the examination of the documents submitted by the Commission pursuant to the order of 9 June 2011, that documents 45 to 48 in the list annexed to that decision are four internal working papers of the Commission summarising the negotiations undertaken during the fourth, fifth, sixth and seventh rounds of ACTA.
- 167 In the decision of 4 May 2010, the Commission indicated that the redacted parts of documents 45 to 48 of the list annexed to that decision contained certain elements of the European Union's ambitions and aspects of its negotiating strategy in the ACTA negotiations. The Commission stated that the disclosure of those elements to the public would put it in a very difficult position in the current ACTA negotiations vis-à-vis the other negotiating parties, who would be fully informed about the European Union's aims and political considerations and who would thus be able to assess the measure of the European Union's willingness to compromise. That would reduce considerably the Commission's scope for manoeuvre and compromise the overall conduct of the continuing negotiations and would thus be prejudicial to the European Union's interest in the efficient conduct of such negotiations.

- 168 The Commission added that, in general, it was not possible to be more specific with regard to the concrete content of the redacted elements, since that would have the effect of revealing their content and would, thereby, deprive the applicable exception of its purpose.
- 169 It is apparent from examination of the hidden parts of documents 45 to 48 that, for the most part, they do indeed contain information about the ambitions of the European Union, its negotiating positions and certain aspects of its negotiating strategy, as well as information on the positions and initiatives of the negotiating parties.
- 170 Thus, this is particularly the case, with regard to the redactions specifically challenged by the applicant, for those redactions made to the first and last sentences of paragraph 4 on page 1 of document 45. Indeed, these redactions, contrary to what the applicant maintains, contain information on the positions of the negotiating parties and the progress of negotiations, information that the Commission could, without committing any manifest error of assessment, decide not to disclose.
- 171 This is also the case of the redaction, challenged by the applicant, made in page 3 of document 45, under the indent 'Consultation of stakeholders/Transparency', last sentence. The fact, submitted by the applicant, that the positions of the European Union and the negotiating parties may have been, in some respects, consensual, did not imply that the disclosure of those positions, at that stage of the negotiations and even though no signing had taken place, would not affect the public interest with regard to international relations.
- 172 The same applies, moreover, to the redactions challenged by the applicant, made in document 46, page 1, under the heading 'Summary', fourth and fifth paragraphs, and page 3, first paragraph, and Section 5(a). Those redactions, which described the positions of the parties and of the European Union regarding, first, the accession of new countries to ACTA and, secondly, the future prospects of that agreement, included information that the Commission could, at this stage of the negotiations and in the exercise of its discretion, consider that disclosure of which would compromise the protection of the public interest as regards international relations.
- 173 With regard to the redaction challenged by the applicant and made at page 1, under the heading 'Summary', second paragraph, of document 46, that concerns, like the redaction made at page 1, paragraph 4, last sentence, of document 45 (see paragraph 170 above), the positions of the parties in the negotiations.
- 174 As regards the redacted information on pages 2 and 3 of document 47 ((a) to (c), appearing in the sentence 'EU comments focused on'), the applicant, relying on her knowledge of that document gained in the circumstances mentioned in paragraph 53 above, considers that they could not damage the negotiations as they merely described the content of a proposal exchanged between all the parties. Furthermore, disclosure of that information could not have prejudiced the European Union's position in the negotiations, since the nature of the European Union's commentary on the information was not of interest to the other negotiating parties, although it was likely to be of particular importance for European Union citizens.
- 175 It should be noted, however, that even apart from the fact that the Commission would have been justified in redacting its own comments on the position of a party, the redactions in question were, in fact, not so much comments as a description of the position of a negotiating party. In doing so, those redactions were fully justified by the protection of the public interest as regards international relations. The fact that that position was presented by the negotiating party concerned to all the other negotiating parties cannot call into question that finding.
- 176 With regard to the applicant's argument that the content of those redactions, particularly where it concerned proposals going beyond the Community *acquis*, would have been of particular importance for the European citizen, who might have wished to be informed of the ongoing debate in order to

influence it, it is appropriate, as has already been stated in paragraphs 110 and 131 above, to note that Article 4(1)(a), third indent, of Regulation No 1049/2001 is a mandatory exception which does not include, unlike other exceptions to the right to access, taking into account any overriding public interest justifying disclosure.

177 In this context, the applicant is wrong to rely, in support of her position, on the judgment in *Sweden and Turco v Council*, paragraph 53 above, which concerned a refusal to grant access based on another exception which included taking into consideration such an overriding public interest in disclosure (Article 4(2), second indent, of Regulation No 1049/2001).

178 It is also fruitless for the applicant to refer to that judgment to argue that the European Union judicature has here created a presumption in favour of disclosure of legislative documents.

179 Indeed, in so far as the applicant attempts, by that reference, to assimilate the negotiation documents of ACTA to legislative documents, it is clear that such assimilation, even assuming it to be correct, cannot, as the Court has already held (*Sison v Council*, paragraph 108 above, paragraph 41), have any influence on whether disclosure of those documents was likely to prejudice the interests protected by Article 4(1)(a) of Regulation No 1049/2001 or, therefore, on whether the requested access to such documents should be refused.

180 As the Court noted in *Sison v Council*, Article 12(2) of Regulation No 1049/2001, whilst providing that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States should be made directly accessible, adds, however, that this is so only subject to Articles 4 and 9 of that regulation (*Sison v Council*, paragraph 108 above, paragraph 41).

181 Moreover, and quite incidentally, it should be noted that the conduct of negotiations for the conclusion of an international agreement falls, in principle, within the domain of the executive (*in 't Veld v Council*, paragraph 120 above, paragraph 88) and that those negotiations do not in any way prejudice the public debate that may develop once the international agreement is signed, in the context of the ratification procedure.

182 The Court considers that the Commission, in the exercise of its discretion provided for in Article 4(1)(a), third indent, of Regulation No 1049/2001, has not committed a manifest error in considering that disclosure of the information referred to in paragraph 174 above would have damaged the protection of the public interest in international relations.

183 While the applicant's criticisms regarding the redactions made by the decision of 4 May 2010 in documents 45 to 48 of the list annexed to that decision appear, therefore, for the most part, unjustified, nevertheless the applicant correctly claims that some of the redactions made by the Commission in those documents are manifestly incorrect.

184 That is the case with the redactions made in document 45, page 2, under the heading 'Participants', second paragraph, last sentence; in document 47, page 1, under 'Participants', second paragraph, last sentence; in document 47, page 2, under '1. Digital Environment (including Internet)', second paragraph, last sentence; in document 48, page 2, the paragraph under Section 4, end of sentence.

185 Indeed, it does not appear that those redactions related to the negotiating positions of the Commission or of other negotiating parties, or to other information the disclosure of which would be likely to undermine the public interest in international relations. In particular, and as noted by the applicant, the statement of the Commission, redacted in page 2 of document 48 (paragraph under Section 4, end of sentence) that it would not have been opposed to a disclosure of the negotiation documents if there had been a consensus among the negotiating parties to that effect, was information the disclosure of which was not likely to damage the mutual trust between the negotiating parties.

186 It follows from the above considerations that this part of the third plea must be rejected as regards documents 45 to 48 of the list annexed to the decision of 4 May 2010, except in relation to the redactions referred to in paragraph 184 above.

Documents 27a, 40a, 51 and 52 of the list annexed to the decision of 9 December 2010

– The document of 21 September 2009 entitled ‘Working document “Friends of the Presidency” meeting’ (document 27a of the list annexed to the decision of 9 December 2010)

187 It is apparent both from the decision of 9 December 2010 (Section 2.1, fourth paragraph) and from the examination of the documents submitted by the Commission pursuant to the order of 9 June 2011, that document 27a of the list annexed to that decision is a working paper of the Council, containing a draft text of the criminal provisions of ACTA, prepared for a discussion within the “Friends of the Presidency” group and intended to allow the position of the Presidency to be identified regarding the negotiations on that point.

188 In those circumstances and with regard to a document on the negotiating positions of the European Union and, in some respects, the positions of third parties, the Commission did not commit a manifest error of assessment when, for the reasons set out in the decision of 9 December 2010 (Section 2.1, fourth to seventh paragraphs), it refused the request for access with regard to that document.

189 That conclusion is not called into question by the arguments put forward by the applicant in her observations of 19 January 2011 on the decision of 9 December 2010, which reiterate, in essence, those submitted at the application stage and already rejected by the Court in paragraphs 111 to 127 above.

– The document of 26 October 2009 entitled ‘Draft Position of the Member States on the criminal provisions in chapter 2’ (document 40a of the list annexed to the decision of 9 December 2010)

190 It is apparent both from the decision of 9 December 2010 (Section 2.1, fourth paragraph), and from the examination of the documents submitted by the Commission pursuant to the order of 9 June 2011, that document 40a in the list annexed to that decision is a working document, of 26 October 2009, reflecting the position of the Member States of the European Union in respect of the criminal enforcement provisions in Chapter 2 of ACTA.

191 It should also be pointed out that that document is identical, apart from the title and the headers and footers, to document 28 of the list annexed to the decision of 4 May 2010, for which it has already been noted (see paragraphs 152 to 155 above), that the denial of access was not vitiated by any manifest error of assessment. Therefore, for the same reasons as those set out in those paragraphs, this plea should be rejected with regard to document 40a.

– Document of 8 June 2009 entitled ‘Transmission note with agenda for meeting of 11 June 2009’ (Document 51 of the list annexed to the decision of 9 December 2010)

192 In the decision of 9 December 2010 (Section 2.2, subsection 1), the Commission granted access to that document, with the exception of a paragraph regarding which it raised the exception based on the protection of the public interest in international relations, on the ground that that paragraph contained information about a request from a third State to join the ACTA negotiations and that disclosing that information would damage the European Union’s relations with that third State and with the other negotiating parties.

193 It is clear both from the explanations provided by the Commission in its decision of 9 December 2010 and from the examination of the document submitted to the Court pursuant to the order of 9 June 2011, that the redacted passage of that document actually concerns the processing of an application by a third State concerning the latter's possibly joining the ACTA negotiations. In those circumstances and contrary to what the applicant suggests, it must be considered that the Commission did not commit a manifest error of assessment in finding that the disclosure of the redacted passage of that document would compromise the protection of the public interest as regards international relations.

– The document of 30 September 2009 entitled 'Transmission of an information note for the committee (deputies)' (document 52 of the list annexed to the decision of 9 December 2010)

194 Partial access to that document, which is a briefing note for the committee provided for in Article 133 EC (now Article 207 TFEU) and relating to the chapter of the draft ACTA concerning the Internet, was granted in the decision of 9 December 2010.

195 With regard to the undisclosed extract of that document, it is apparent both from the explanations provided by the Commission in its decision of 9 December 2010 and from the examination of the document submitted to the Court pursuant to the order of 9 June 2011, that that extract contains information provided to the Commission by a negotiating party concerning the position of that party in the negotiation.

196 In those circumstances and contrary to what the applicant maintains, the Commission did not commit a manifest error of assessment when it decided not to grant access to that part of the document.

197 In view of all the foregoing considerations concerning the second part of this plea, that part of the plea must be rejected, save in so far as it challenges the refusal to grant access to documents 21 and 25 in the list annexed the decision of 4 May 2010 and the redactions of documents 45, 47 and 48 of the list referred to in paragraph 184 above.

#### *4. The fourth plea, alleging breach of Article 4(6) of Regulation No 1049/2001 and of the principle of proportionality*

198 The applicant claims that Article 4(6) of Regulation No 1049/2001 was misapplied and that the principle of proportionality was infringed, in that the Commission failed to consider whether it was possible to grant partial access to the documents and to confine refusal to the parts of the documents in respect of which that was appropriate and strictly necessary.

199 The Commission contends that it duly and correctly considered the possibility of granting partial access.

200 It is clear from the terms of Article 4(6) of Regulation No 1049/2001 that, if only parts of the requested document are covered by any of the exceptions to the right of access, the remaining parts of the document are to be released. Moreover, the principle of proportionality requires derogations to remain within the limits of what is appropriate and necessary for achieving the aim in view (*Council v Hautala*, cited in paragraph 107 above, paragraph 28).

201 In the present case, it follows from the decisions of 4 May and 9 December 2010 that the Commission did not simply refuse access in full on the basis of Article 4(1)(a), third indent, of Regulation No 1049/2001, but considered the possibility of a partial disclosure in accordance with Article 4(6) of that Regulation.

202 Thus, in paragraph 3 of the decision of 4 May 2010, the Commission informed the applicant that, after careful consideration of the access request and of the documents concerned, it appeared that full access could be granted to document 49 of the list annexed to the decision of 4 May 2010, and partial access could be granted to documents 45 to 48 of that list, with regard to the parts of these documents that do not fall within the ambit of an exception to the right of access. The Commission stated that the other parts of those documents 45 to 48, and all the other documents mentioned in the list annexed to the decision of 4 May 2010, could not be communicated to the applicant.

203 Furthermore, in the decision of 9 December 2010, the Commission granted partial access to documents 50 to 52 in the list annexed to that decision.

204 The applicant is therefore wrong to claim that the Commission did not consider the possibility of granting partial access.

205 As regards, next, the breach of the principle of proportionality, the applicant submits, in relation to documents 1 to 21 in the list annexed to the decision of 4 May 2010, that partial access should have been granted, since at least certain parts of those documents were reproduced in the consolidated draft ACTA text, so that a refusal to grant access to these parts would not have been necessary. Moreover, the parts of those documents that concerned the positions of the European Union, or those that are less important because they are technical, should have been disclosed.

206 It should be noted, however, as has already been pointed out in paragraph 137 above, that the ACTA negotiations were in progress and that the consolidated draft ACTA text released to the public was no more than a draft agreement. In those circumstances, and without prejudice to the question referred to in paragraph 127 above, it must be held that granting the applicant access to the negotiation positions, even if technical in nature, of the negotiating parties and of the European Union, contained in documents 1 to 20 and 22 in the list annexed to the decision of 4 May 2010 (as the refusal to grant access to document 21 of that list has already been annulled (see paragraph 141 above)) would have compromised the public interest referred to in Article 4(1)(a), third indent, of Regulation No 1049/2001. The Commission did not, therefore, infringe the principle of proportionality by refusing the applicant partial access that would have made her aware of the negotiating positions of the negotiating parties and of the European Union.

207 Finally, as regards the applicant's argument that, in relation to documents 45 to 48 in the list annexed to the decision of 4 May 2010, to which partial access was granted, the Commission excessively redacted those documents and adopted an excessively strict approach to access, thereby infringing the principle of proportionality, it should be noted that that argument has, in essence, already been examined in paragraphs 156 to 186 above and been partially upheld.

208 It follows that the present plea, alleging infringement of Article 4(6) of Regulation No 1049/2001 and the principle of proportionality, in that the Commission did not consider the possibility of a partial access or else gave it too narrow effect, must be rejected, subject, however, to the considerations expressed in the previous paragraph.

##### *5. The fifth plea, alleging failure to state reasons*

209 The applicant claims that the Commission breached its obligation to provide reasons by implicitly refusing to grant access to certain documents covered by the request for access but not assessed in the decision of 4 May 2010.

210 With regard to documents 45 to 48 on the list annexed to the decision of 4 May 2010, the applicant claims that the Commission failed to provide any reasons to explain how granting full access would damage the public interest. The brief reasons provided by the Commission, namely, that the

documents 'contain elements of the European Union's ambitions and aspects of its negotiating strategy' do not appear to bear any relevance to the content of those documents which the Commission partially disclosed.

- 211 The applicant also claims that, as regards documents 1 to 29 on the list annexed to the decision of 4 May 2010, the Commission has tended to rely on general reasons to explain withholding public access to the documents and has mostly dealt with the documents in groups, failing to consider each document individually.
- 212 The Commission points out that, as far as this plea concerns the documents which were not assessed in the decision of 4 May 2010, it acknowledges that it wrongly limited, in that decision, the scope of the request for access.
- 213 For the remainder, the Commission denied that it infringed the obligation to provide reasons.
- 214 It should be noted that the statement of reasons required under Article 296 TFEU must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to carry out its review. Moreover, the duty to state adequate reasons in decisions is an essential procedural requirement which must be distinguished from the question whether the reasoning is well founded, which is concerned with the substantive legality of the measure at issue. 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, the latter 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 Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* [2008] ECR I-4951, paragraphs 166 and 181 and the case-law cited).
- 215 It must first be recalled that, following the adoption by the Commission of the decision of 9 December 2010, the present action has become devoid of purpose in so far as it seeks annulment of an implied decision to refuse access to certain documents referred to in the reply of 21 January 2010 and not assessed in the decision of 4 May 2010. It follows that the present plea, in so far as it criticises the failure to state the reasons for an implied decision to refuse access in relation to documents that the Commission failed to assess in that decision, has itself become devoid of purpose and therefore need not be considered.
- 216 Next, and in so far as the present plea alleges an infringement of the duty to state reasons for the partial refusal of access to documents 45 to 48 in the list annexed to the decision of 4 May 2010, it must be held that the Commission, in Section 5.6 of that decision, but also in Section 4 of that decision, provided sufficient reasons for that partial refusal of access.
- 217 Accordingly, in Section 5.6 of the decision of 4 May 2010, the Commission, after stating that documents 45 to 48 in the list annexed to that decision were reports from different ACTA negotiating rounds and declaring that partial access to those reports was granted (first paragraph of Section 5.6), indicated that the redacted parts of those documents contained certain elements of the European Union's ambitions and aspects of its negotiating strategy in the ACTA negotiations. The Commission stated that the disclosure of those elements to the public would put it in a very difficult position in the current ACTA negotiations vis-à-vis the other parties, who would be fully informed about the European Union's aims and political considerations and who would thus be able to assess the measure of the European Union's willingness to compromise. The Commission indicated that that would reduce considerably the Commission's scope for manoeuvre and compromise the overall conduct of the on-going negotiations, which would thus be prejudicial to the European Union's interest in the efficient conduct of such negotiations (Section 5.6, second paragraph, of the decision of 4 May 2010).

- 218 The Commission added that, in general, it was not possible for it to be more specific with regard to the concrete content of those parts, since that would have the effect of revealing their content and, thereby, would deprive the applicable exception of its purpose (Section 5.6, third paragraph, of the decision of 4 May 2010).
- 219 Moreover, as regards the reason for redaction relating not to the protection of the negotiating positions of the Commission itself, but of the positions of the other negotiating parties, while that reason is not expressly mentioned in Section 5.6 of the decision of 4 May 2010, it is quite apparent from Section 4 of the decision of 4 May 2010, which refers, in particular, to documents 45 to 48 of the list annexed to the decision of 4 May 2010.
- 220 It follows from the foregoing that, contrary to what the applicant maintains, the Commission, even if it could not be very specific, for the justified reasons set out in paragraph 218 above, with regard to the specific content of the redactions made, did not breach its obligation to state reasons as regards the partial refusal to grant access to documents 45 to 48 of the list annexed to the decision of 4 May 2010.
- 221 Finally, in so far as the present plea criticises the fact that, in relation to documents 1 to 29 in the list annexed to the decision of 4 May 2010, the Commission has tended to rely on general reasons to explain the refusal to grant access and has mostly dealt with the documents collectively and not individually, this must be rejected.
- 222 It is clear from the decision of 4 May 2010 that the Commission, having, in Section 4 of that decision, set out in detail the reasons why the access requested to the ACTA negotiation documents would harm the protection of the public interest in international relations, referred, in Section 5 of that decision, to its concrete and individual assessment of the application of the exception to the documents referred to in the request for access and, in particular, to documents 1 to 29 of the list annexed to the decision of 4 May 2010 (see, for those documents, Sections 5.1 to 5.4 of that decision). In doing so, the Commission provided sufficient grounds, enabling the applicant to ascertain the reasons for the measure and the Court to exercise its power of review.
- 223 In view of the foregoing considerations, the present plea must be rejected.

### *C – Conclusions*

- 224 It follows from all the foregoing that the action must be dismissed, except in so far as it challenges the refusal to grant access to documents 21 and 25 in the list annexed to the decision of 4 May 2010 and the redactions mentioned in paragraph 184 above, made in documents 45, 47 and 48 in the list annexed to that decision.

### **Costs**

- 225 Under Article 87(2) 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. Moreover, under Article 87(3) of those rules, the Court may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads or where the circumstances are exceptional.
- 226 In the present case, while the applicant has, for the main part, been unsuccessful, the fact remains, first, that the present action is well-founded with regard to certain documents and redactions and, secondly and more importantly, that the less than diligent processing by the Commission of the

request for access, and the fact that that institution, by its own action, had to supplement its reply to that request twice, made the proceedings before the Court, and therefore the applicant's costs, burdensome.

227 In these circumstances, it must be decided that the applicant should bear only half of her own costs and half of the Commission's costs.

228 The Commission is to bear half of its own costs and half of the applicant's costs.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Annuls Commission Decision of 4 May 2010, reference SG.E.3/HP/psi – Ares(2010)234950, in so far as it refuses to grant access to documents 21 and 25 of the list annexed to that decision and to the following redactions made on other documents of that list:**
  - document 45, page 2, under the heading 'Participants', second paragraph, last sentence;
  - document 47, page 1, under 'Participants' second paragraph, last sentence;
  - document 47, page 2, under '1. Digital Environment (including Internet)', second paragraph, last sentence;
  - document 48, page 2, the paragraph under Section 4, end of sentence;
2. **Dismisses the remainder of the action;**
3. **Orders Sophie in 't Veld to bear half of her own costs and half of the costs of the European Commission;**
4. **Orders the Commission to bear half of its costs and half of Ms in 't Veld's costs.**

Forwood

Dehousse

Schwarcz

Delivered in open court in Luxembourg on 19 March 2013.

[Signatures]

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