Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

2 October 2014*

(Appeal — Right to be heard — Right to be heard by a court or tribunal established in accordance with the law — Access to documents held by the institutions — Partial refusal to grant the appellant access to the documents concerned — Initial refusal — Implied decision deemed to exist — Replacement of an implied refusal by express decisions — Interest in bringing proceedings after the adoption of the express refusals — Exceptions to the right of access to documents — Safeguarding the interests of good administration — Protection of personal data and commercial interests)

In Case C-127/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 15 March 2013,

Guido Strack, established in Cologne (Germany), represented by H. Tettenborn, Rechtsanwalt,

appellant,

the other party to the proceedings being:

European Commission, represented by B. Conte and P. Costa de Oliveira, acting as Agents,

defendant at first instance,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça G. Arestis, J.-C. Bonichot (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 22 May 2014,

gives the following

* Language of the case: German.

Judgment

1 By his appeal, Mr Strack seeks to have set aside of the judgment of the General Court of the European Union in *Strack* v *Commission*, T-392/07, EU:T:2013:8 ('the judgment under appeal') in so far as, by that judgment, the General Court did not grant in full his form of order requesting annulment of several Commission decisions relating to his applications for access to various documents based on 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).

2 The European Commission has brought a cross-appeal seeking partial setting aside of the judgment under appeal since, by that judgment, inasmuch as the General Court held, first, that on the expiry of the time-limits laid down in Article 8 of Regulation No 1049/2001 implied refusals of access to documents are deemed to exist which may be the subject of an action for annulment and, second, that the Commission infringed the appellant's right to access to the extract of the register that the Commission should have established under Article 11 of that regulation, which should have contained a list of decisions rejecting confirmatory applications for access adopted before 1 January 2005 ('the extract of the register concerning refusals of confirmatory applications for access to documents').

Background to the dispute

3 By email of 20 June 2007, the appellant lodged an initial application with the Commission for access to documents under Article 7(1) of Regulation No 1049/2001 with respect to three groups of documents.

4 First, the appellant requested access to all the documents relating each of the confirmatory applications for access to documents which had been partly or wholly refused by the Commission since 1 January 2005 ('the documents relating to the refused confirmatory applications').

5 Second, he requested access to the extract of the register concerning the refusals of confirmatory applications for access to documents.

6 Third, he requested access to all the documents relating to the case which gave rise to the judgment in *Sequeira Wandschneider* v *Commission*, T-110/04, EU:T:2007:78 ('the documents relating to Case T-110/04').

7 The initial application for access to the documents at issue, registered by the Commission on 3 July 2007, was the subject of an exchange of correspondence between the Commission and the appellant. In that context, the Commission informed the appellant, by letter of 24 July 2007, that an extract of the register concerning the refusals of the confirmatory applications for access to the documents did not exist.

8 At the end of the time-limits laid down in Article 7 of Regulation No 1049/2001 for the processing of initial applications for access to documents, and following the adoption by the Commission of a decision refusing access to the documents relating to Case T-110/04 on 13 August 2007, the appellant brought a 'confirmatory application' for access on 15 August 2007 in accordance with Article 7(2) and (4) thereof.

9 That application was the subject of several decisions granting partial access to the documents requested, which were adopted after the expiry of the time-limits laid down in Article 8 of Regulation No 1049/2001 and after lodging the application giving rise to the judgment under appeal, on 23 October 2007, 28 November 2007, 15 February 2008 and 9 April 2008. By those decisions, the appellant obtained access to a large number of documents whose content was partially blanked out in order to protect personal data or commercial interests.

The action before the General Court and the judgment under appeal

10 By application lodged at the Registry of the General Court on 12 October 2007, the appellant sought annulment of the implied and express refusals of access to the documents covered by his initial and confirmatory applications for access to those documents. Following the adoption by the Commission of express decisions refusing in part access to the documents requested, after the application had been lodged before the General Court, the appellant extended his action to include those decisions.

11 In the judgment under appeal, the General Court held that, in the absence of any confirmatory decision adopted by the Commission in accordance with Article 8(1) of Regulation No 1049/2001 within the time-limit provided for therein, implicit decisions refusing access were deemed to exist which were capable of being the subject of an action for annulment. However, the General Court dismissed the action in so far as it was directed against those implied decisions on the ground that the appellant no longer had a legal interest in bringing proceedings from the time when the Commission adopted the express decisions partially refusing access which replaced the implied decisions.

12 However, as the action was admissible when it was brought, the General Court allowed its extension to the express decisions.

13 As regards the form of order directed against the Commission's letter of 24 July 2007 informing the appellant that the extract of the register concerning the refusals of the confirmatory applications for access to the documents did not exist, the General Court also held it to be admissible.

14 With respect to the substance of the case, the General Court annulled the Commission decision of 24 July 2007 refusing access to the extract of the register concerning refusals of the confirmatory applications for access to the documents and that of 23 October 2007 relating to documents of the European Anti-Fraud Office (OLAF), in so far as that decision concerned information relating to legal persons and the decisions of 28 November 2007 and 15 February 2008 relating to Commission documents, but not the OLAF documents or the documents relating to Case T-110/04.

15 In addition, the decision of 28 November 2007, in so far as it concerned the documents relating to Case T-110/04, and the decision of 9 April 2008 were annulled in part.

16 The General Court dismissed the application as regards the remaining heads of claim and ordered the Commission to bear its own costs and to pay one third of the appellant's costs.

Forms of order sought by the parties

17 Mr Strack claims that the Court should:

— set aside the judgment under appeal, in so far as his form of order was not or was granted only in part;

— grant his form of order set out in the application at first instance;

— dismiss the cross-appeal in its entirety;

— order the Commission to pay all the costs, and

— in the alternative, also annul the decision by which the President of the Court assigned Case T-392/07 to the Fourth Chamber of the General Court.

18 The Commission contends that the Court of Justice should:

— dismiss the appeal in its entirety;

— set aside the judgment under appeal to the extent that it declares the action brought against the alleged implied refusals of access to the documents relating to the referred confirmatory applications;

— set aside the judgment under appeal to the extent that it annulled the Commission decision of 24 July 2007 informing the appellant that the extract of the register concerning the refusals of the confirmatory applications for access to documents did not exist, and

— order the appellant to pay the costs of the proceedings before the General Court and the Court of Justice.

The cross-appeal

19 In its cross-appeal, the Commission puts forward two grounds of appeal, the first of which concerns the admissibility of the original action. In the circumstances, those arguments must accordingly be examined first of all.

The first ground of appeal

Arguments of the parties

20 The first ground of appeal is based on the inadmissibility of the action for annulment of the implied refusals which are deemed to exist by virtue of Article 8(3) of Regulation No 1049/2001 on expiry of the time-limits laid down therein.

21 The Commission claims that no implied refusal could be deemed to exist on expiry of the time-limits laid down in Article 8 of Regulation No 1049/2001 since, first, the appellant refused to find a fair solution in accordance with Article 6(3) thereof and, second, since the application for access to the relevant documents concerned a manifestly disproportionate number of documents, the Commission was not obliged to comply with the time-limits laid down in that regulation in the interests of good administration.

22 The Commission also argues that the judgment under appeal is vitiated by a failure to state reasons to the extent that, in paragraph 45 thereof, the General Court relied on an incorrect interpretation of its own case-law. In addition, the reasoning of that judgment in paragraphs 49 and 144 is contradictory.

23 The appellant maintains that the Commission's first ground of appeal should be dismissed.

Findings of the Court

24 It is clear from Article 8(3) of Regulation No 1049/2001, first, that the failure by the institution concerned to respond to a confirmatory application for access within the time-limit laid down amounts to a decision to refuse access. Second, that implied decision constitutes the starting point for the period within which the person concerned may bring an action for annulment against it. Such time-limits, laid down in the public interest, cannot be varied by the parties.

25 It must be recalled in that regard that Regulation No 1049/2001 does not allow for the possibility of derogating from the time-limits laid down in Articles 7 and 8 thereof and that those time-limits are determinative as regards the conduct of the procedure for access to the documents held by the institutions concerned, which aims to achieve the swift and straightforward processing of applications for access to documents (see, to that effect, judgment in *Internationaler Hilfsfonds* v *Commission*, C-362/08 P, EU:C:2010:40, paragraph 53).

26 In the case of an application relating to a very long document or to a very large number of documents an extension of 15 working days of the time-limit laid down in Article 8(1) of that regulation is authorised in exceptional cases. Although, in such a case, Article 6(3) allows the institution concerned to find a fair solution with the applicant seeking access to documents in its possession, that solution can concern only the content or the number of documents applied for.

27 That finding cannot be undermined by the Commission's argument relating to the possibility for the institutions to reconcile the interests of an applicant for access to documents in their possession with the interest of good administration. It is true, as stated in paragraph 30 of the judgment in *Council* v *Hautala* (C-353/99 P, EU:C:2001:661), that it flows from the principle of proportionality that the institutions may, in particular cases in which the volume of documents for which access is applied or in which the number of passages to be censured would involve an inappropriate administrative burden, balance the interest of the applicant for access against the workload resulting from the processing of the application for access in order to safeguard the interests of good administration.

28 Thus, an institution may, in exceptional circumstances, refuse access to certain documents on the ground that the workload relating to their disclosure would be disproportionate as compared to the objectives set by the application for access to those documents. However, reliance on the principle of proportionality cannot allow the time-limits laid down by Regulation No 1049/2001 to be changed without creating a situation of legal uncertainty.

29 As far as concerns the complaint relating to the reasoning of the judgment under appeal, it must be observed that the fact that the General Court arrived at a different conclusion on the merits from the Commission cannot in itself vitiate the judgment under appeal for failure to state reasons (judgment in *Gogos* v *Commission*, C-583/08 P, EU:C:2010:287, paragraph 35).

30 In addition, the alleged contradiction between paragraphs 49 and 144 of the judgment under appeal is based on an incorrect reading of them, in that the appellant's wish to remain within the time-limits laid down by Regulation No 1049/2001 cannot, in the light of the findings set out in paragraphs 24 to 28 of the present judgment, mean that the Commission had no opportunity to reach a fair solution.

31 It follows that the Commission's first ground of appeal must be rejected.

The second ground of appeal

Arguments of the parties

32 By its second ground of appeal, the Commission complains that the General Court held that it had infringed the appellant's right to be given access to the extract of the register concerning refusals of confirmatory applications for access to documents.

33 The Commission argues that the General Court wrongly held that its letter of 24 July 2007, informing the appellant that such an extract did not exist, constituted a refusal of access to that document. It submits in that regard, first, that it is impossible to furnish the extract of a register which, despite the

obligation laid down in Article 11 of Regulation No 1049/2001, does not exist and, second, that that regulation applies only to existing documents. An application for access cannot give rise to an obligation to create a document which does not exist.

34 The Commission also argues that the General Court ruled *ultra petita*, first, by annulling an explicit refusal even though the appellant had requested the annulment of an implied refusal and, second, when it ruled on the scope of the Commission's obligation deriving from Article 11 of Regulation No 1049/2001.

35 The appellant submits that the Commission's second ground of appeal should be rejected as it is based on the Commission's own infringements of Regulation No 1049/2001 and, in particular, Article 11. In addition, he argues that the Commission should have provided more evidence in order to support its assertion that the extract of the register concerning refusals of confirmatory applications for access to documents had not been created. Finally, if that register did not exist, the Commission should have created it, or have provided the documents to be registered themselves, which results from its duty to assist.

Findings of the Court

36 It is clear from the case-law of the Court that the procedure for access to documents held by the institutions is carried out in two stages and that the response to an initial application, within the meaning of Article 7(1) of Regulation No 1049/2001 is only the first position adopted which, in principle, cannot be subject to an appeal (see order in *Internationaler Hilfsfonds* v *Commission*, EU:C:2012:76, paragraphs 30 and 31). However, exceptionally, where an institution adopts a definitive position with such a response, it may be subject to an action for annulment (see judgment in *Internationaler Hilfsfonds* v *Commission*, EU:C:2010:40, paragraph 62).

37 It follows from the judgment under appeal that the appellant applied for access to part of the register whose creation is provided for by Regulation No 1049/2001 and that he was refused access on the ground that such a register had not been created.

38 In that connection, as the Advocate General noted in point 65 of her Opinion, the right of access to documents held by the institutions within the meaning of Article 2(3) of Regulation No 1049/2001 applies only to existing documents in the possession of the institution concerned.

39 However, pursuant to Article 8(1) and (3) of Regulation No 1049/2001, which is the specific expression of the principle of judicial protection, any refusal of access to the documents requested from the administration may be subject to challenge by way of court proceedings. That is so whatever the reason relied on to refuse access.

40 Thus, it is irrelevant to the right of challenge of the parties concerned that it is argued that access to a document must be refused for one of the reasons laid down in Article 4 of Regulation No 1049/2001 or that it is argued that the document requested does not exist. Any other outcome would make impossible review by the European Union judicature of the merits of decisions refusing access to documents held by the institutions, since it would suffice for the institution concerned to state that a document does not exist to avoid judicial review altogether.

41 Therefore, it must be stated that the fact that a document to which access has been requested does not exist or the fact that it is not in the possession of the institution concerned does not make Regulation No 1049/2001 inapplicable.

42 On the contrary, the institution concerned is under a duty to respond to the applicant and if necessary to justify its refusal of access for that reason before the courts (see, by analogy, judgment in *Heylens and Others*, 222/86, EU:C:1987:442, paragraph 15).

43 However, in the present case, it is clear from the explanations given by the Commission before the General Court, and the documents in the file submitted to it, that the register concerned was not created. It follows that the Commission could not meet the appellant's request for access to an extract of the register concerning refusals of confirmatory applications for access to documents.

44 As the Advocate General noted in point 67 of her Opinion, Regulation No 1049/2001 does not directly link the obligation under Article 11 thereof to the right to access to documents under Article 2(1). Compliance with the duty to register documents cannot therefore be enforced by means of an application for access to documents.

45 In the light of the foregoing considerations, it must be held that, by annulling the express decision refusing access to an extract of the register concerning refusals of confirmatory applications for access to documents of 24 July 2007, the General Court erred in law.

46 Neither Article 11 of Regulation No 1049/2001 nor the obligation of assistance in Article 6(2) thereof, can oblige an institution to create a document for which it has been asked to grant access but which does not exist.

47 In the light of all of the foregoing, the judgment under appeal must be set aside in so far as, by that judgment, the General Court held that the Commission was obliged to create a non-existent document and thereby annulled the Commission decision of 24 July 2007 refusing access to the extract of the register concerning refusals of confirmatory applications for access to documents.

The main appeal

The first ground of appeal

Arguments of the parties

48 By his first ground of appeal, alleging lack of jurisdiction of the formation to which the case was assigned, the appellant claims that, by reassigning the consideration of his case to a Chamber other than the one originally contemplated, the General Court breached the principle of the right to be heard by a court or tribunal established in accordance with the law, the rights enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 and by Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and a number of provisions of the Rules of Procedure of the General Court. In addition, the appellant raises an argument based on an infringement of his right to be heard before the reassignment of the consideration of his action.

49 The Commission considers that that ground of appeal must be rejected.

Findings of the Court

50 Contrary to the appellant's submissions, the General Court correctly applied its Rules of Procedure. In that connection it must be observed that, under Article 12 thereof, the General Court is to lay down criteria by which cases are to be allocated among the Chambers and the decision is to be published in the *Official Journal of the European Union*. The decision laying down the criteria for assigning cases to

Chambers, in force on the date the originating application was lodged (OJ 2007 C 269, p. 42) and that in force when it was reassigned (OJ 2011 C 232, p. 2), are worded in identical terms. It follows that the President of the General Court may derogate from the method of allocating cases by rota on the ground that cases are related or with a view to ensuring an even spread of the workload.

51 Since that derogation is not limited to the time the originating application is lodged, nothing prevents a case from being reassigned at another time.

52 That interpretation is all the more appropriate since the reassignment of a case, in the interests of the good administration of justice, with a view to ensuring an even spread of the workload, pursues the objective of processing cases within a reasonable time, in accordance with the second paragraph of Article 47 of the Charter.

53 Furthermore, as regards the appellant's argument alleging an infringement of his right to be heard before the reassignment of his case, that argument is also unfounded. In the same way as the initial assignment of a case, its reassignment to a formation other than that initially contemplated does not confer a right on the parties to express their view on that measure of administration of justice.

54 Furthermore, it must be observed in the present case that the appellant has not raised any doubts as to the impartiality of the formation which heard his application for annulment.

55 Therefore, the first ground of appeal must be rejected.

The second ground of appeal

Arguments of the parties

56 By his second ground of appeal, the appellant submits that the judgment under appeal is vitiated by various procedural irregularities.

57 In the first place, the appellant (i) criticises the General Court for having dismissed his request for an expedited procedure and (ii) claims that the length of the proceedings was unreasonable and that, as a result, the General Court should have awarded him compensation or transferred that claim to the competent court.

58 The appellant submits, in the second place, that the General Court infringed his right to be heard. It did not take account of the two supplementary pleadings or his request for rectification of the report for the hearing. Additionally, at the hearing his speaking time was limited to 30 minutes and the Court entertained a new argument from the Commission based on Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1) without giving him the opportunity to submit a written reply. Finally, the appellant submits that the General Court did not give him the opportunity of properly expressing his views on the documents provided by OLAF pursuant to the decision of 23 October 2007.

59 In the third place, he asserts that the General Court did not examine each document provided to him by the Commission in order to determine whether the deletion by it of data under Article 4 of Regulation No 1049/2001 was justified.

60 In the fourth place, the appellant claims that the General Court did not establish to the requisite legal standard that the Commission had in fact sent him all the documents relating to the refused confirmatory applications.

61 The Commission contends that the second ground of appeal is inadmissible or manifestly unfounded.

Findings of the Court

62 It must be observed that, where there are no indications that the excessive length of the proceedings before the General Court affected their outcome, failure to deliver judgment within a reasonable time cannot lead to the setting aside of the judgment under appeal (judgment in *Groupe Gascogne* v *Commission*, C-58/12 P, EU:C:2013:770, paragraph 73).

63 In the present case, the appellant does not claim that the length of the proceedings before the General Court had any effect on the outcome of the dispute. Therefore, neither the General Court's refusal to adjudicate under an expedited procedure nor the allegedly excessive length of the proceedings may lead to the setting aside of the judgment under appeal.

64 The argument alleging that the rejection of the appellant's claim for compensation, based on the same grounds as those relating to the length of the proceedings, must also be rejected. It is clear from the case-law of the Court of Justice that it is for the General Court, which has jurisdiction under Article 256(1) TFEU, to determine such claims for damages, sitting in a different composition from that which heard the dispute giving rise to the procedure whose duration is criticised (judgment in *Groupe Gascogne* v *Commission*, EU:C:2013:770, paragraph 90).

65 It follows that the General Court was right to dismiss the claim for compensation based on the length of the proceedings as inadmissible, holding in paragraph 93 of the judgment under appeal that it should have been brought by way of a separate action.

66 The argument based on the rejection of the two supplementary pleadings and the refusal of the General Court to extend the appellant's speaking time beyond 30 minutes must also be rejected, since it is clear from the judgment under appeal that the appellant had sufficient opportunity to express his view on the grounds for annulment he relied on in his application.

67 As to the OLAF documents, it is clear from the judgment under appeal that the decision of 23 October 2007 granted the appellant partial access to those documents. However, the appellant stated that he received all the documents concerned by the decision granting access only after his reply had been lodged and that, as a result, he did not have the opportunity to express his views on their content during the written phase of the proceedings before the General Court.

68 However, it is clear from the documents in the file that the appellant received the documents concerned sufficiently in advance of the hearing, that is in October 2008 at the latest, to allow him to examine them and adopt a position on their content (see, to that effect judgment in *Corus UK* v *Commission*, C-199/99 P, EU:C:2003:531, paragraph 21).

69 The appellant's claim that the General Court took into consideration an argument relating to Regulation No 45/2001, raised by the Commission for the first time at the hearing, must also be rejected.

70 It is clear from the case-law of the Court that, where a request based on Regulation No 1049/2001 seeks to obtain access to documents including personal data, the provisions of Regulation No 45/2001 become applicable in their entirety (judgment in *Commission* v *Bavarian Lager*, C-28/08 P EU:C:2010:378, paragraph 63).

71 It follows that the Commission's argument based on Regulation No 45/2001 to justify the exception relating to the protection of personal data provided for in Article 4(1)(b) of Regulation No 1049/2001 constitutes the development of a ground already contained by implication in the decisions by which

the Commission granted access to a certain number of documents whose contents were partially blanked out in order to protect personal data, as the Advocate General noted in point 123 of her Opinion, and that the General Court was accordingly right to take it into consideration.

72 Additionally, the appellant claims that the General Court was required to examine each document for which access was refused wholly or in part, which it failed to do.

73 In that connection, it must be observed that the General Court is obliged to order the production of such a document and to examine it only if it is argued that the information concerned by the refusal of access falls within the scope of the exceptions laid down in Article 4 of Regulation No 1049/2001 (judgment in *Jurašinović* v *Council*, C-576/12 P, EU:C:2013:777, paragraphs 27 and 29).

74 Thus, since the appellant disputed the merits of the reasoning in the decisions by which the Commission granted access to a certain number of documents whose content was partially blanked out in order to protect personal data, without claiming that the exceptions provided for in Article 4 were inapplicable to them, the General Court was not obliged to examine those documents (see, to that effect, judgment in *Jurašinović* v *Council*, EU:C:2013:777, paragraphs 28 to 30).

75 However, the appellant again criticises the General Court for failing to verify whether the deletions in the documents carried out by the Commission were in fact limited to information falling within the scope of the exceptions it relied on.

76 In the present case, unlike the cases which gave rise to the judgments in *IFAW Internationaler Tierschutz-Fonds* v *Commission* (C-135/11 P, EU:C:2013:376) and *Jurašinović* v *Council* (EU:C:2013:777), the appellant is in possession of the documents he requested. Therefore, he was in a position to assess whether evidence existed giving rise to reasonable doubts that the material deleted by the Commission concerned information covered by one of the exceptions laid down in Article 4 of Regulation No 1049/2001.

77 In that connection, it must be recalled that the General Court is the sole judge of any need to supplement the information available to it concerning the cases before it. The question whether the procedural documents before it are persuasive is a matter to be appraised by it alone (judgment in *E.ON Energie* v *Commission*, C-89/11 P, EU:C:2012:738, paragraph 115).

78 Thus, having regard to the presumption of validity attached to acts of the European Union in the absence of any indication by the appellant giving rise to reasonable doubts that the deletions made by the Commission concerned information covered by one of the exceptions laid down in Article 4 of Regulation No 1049/2001, the General Court was not obliged either to order the production of the whole documents at issue or to examine them.

79 Finally, as regards the argument relating to the incomplete provision of documents relating to the refused confirmatory applications, it must be recalled that the General Court has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence, save where the facts or evidence are distorted (judgment in *Rousse Industry* v *Commission*, C-271/13 P, EU:C:2014:175, paragraph 81). There will be distortion where, in particular, the General Court has manifestly exceeded the limits of a reasonable assessment of the evidence.

80 In the present case, the appellant argued before the General Court that, in the light of the Commission's own statistics, it had provided only a proportion of the decisions refusing access to the documents concerned. In response, the Commission contended that that discrepancy arose from the fact that a decision refusing access to documents could contain several applications for access and that certain applications for access were pending at the end of the year.

81 It does not appear from the documents in the file submitted to it that the General Court vitiated its assessment of the facts as a whole by any distortion.

82 Having regard to all of the foregoing, the second ground of appeal must be rejected in its entirety.

The third ground of appeal

Arguments of the parties

83 By his third ground of appeal, the appellant puts forward a number of arguments relating to errors of law concerning the assessment of all the Commission's implied and express decisions.

84 First of all, the appellant claims that the General Court should have ruled on the lawfulness of the implied decisions refusing access to the documents concerned. In that connection, he submits that he had an interest in challenging those decisions even after the express decisions were adopted.

85 The appellant next submits that the General Court incorrectly held that the express decisions adopted by the Commission had replaced the implied decisions refusing access to the documents concerned deemed to exist in accordance with Article 8(3) of Regulation No 1049/2001. First, the express decisions do not contain any reference to the implied decisions and, second, specifically as regards the decision of 23 October 2007 relating to the OLAF documents, it was adopted on the basis of Article 7, not Article 8 thereof.

86 Finally, the appellant submits in the alternative that the express decisions only partially replaced the implied decisions.

87 The Commission contends that the third ground of appeal should be rejected as inadmissible or unfounded on the ground that its express decisions replaced the implied decision refusing access to the documents concerned, even if the access they granted is limited.

Findings of the Court

88 As already stated in paragraph 24 of the present judgment, on expiry of the time-limit for replying to the appellant's confirmatory application, in the absence of an express decision, implied decisions refusing access to the documents concerned are deemed to have been adopted which may be the subject of proceedings in accordance with Article 8(3) of Regulation No 1049/2001.

89 However, those decisions were withdrawn by the effect of the decisions taken subsequently by the Commission, by which it granted the appellant partial access to the documents requested. Therefore, the General Court was right to hold that there was no longer any need to give a ruling on the action in so far as it was directed against the implied decisions refusing access to the documents concerned.

90 More specifically, as regards the decision of 23 October 2007 relating to the OLAF documents, the appellant's argument that a decision adopted on the basis of Article 7 of Regulation No 1049/2001 cannot be replaced by an implied decision under Article 8(3) thereof is based on an incorrect interpretation of that decision. It is clear from the case-law of the Court that it is necessary to look to the actual substance of the acts challenged in order to classify them and that the form in which an act or decision is adopted is, in principle, irrelevant in that regard (see, by analogy, judgment in *NDSHT* v *Commission*, C-322/09 P, EU:C:2010:701, paragraph 46).

91 Since the decision of 23 October 2007 relating to the OLAF documents was adopted after a confirmatory application for access to the documents concerned was sent and after the expiry of the time-limits laid down in Article 8 of Regulation No 1049/2001, it must be held that it amounts to an express decision in response to a confirmatory application. The reference to Article 7 of Regulation No 1049/2001 is therefore irrelevant.

92 In the light of all of the foregoing the third ground of appeal must be rejected.

The fourth ground of appeal

Arguments of the parties

93 By his fourth ground of appeal, the appellant submits that the judgment under appeal, to the extent that it concerns the application for access to documents relating to Case T-110/04, is vitiated by a distortion of the facts and contains an insufficient statement of reasons.

94 The Commission contends that this ground of appeal should be rejected.

Findings of the Court

95 By his fourth ground of appeal, the appellant claims essentially that the General Court distorted the facts in paragraphs 151 to 154 of the judgment under appeal.

96 However, the General Court was entitled to hold, without distorting the appellant's pleading and by a judgment which contains a sufficient statement of reasons, that the list of documents which appears in the original application for access to the documents and which is preceded by the words 'to be precise' was exhaustive and that the appellant had not requested other documents.

97 As regards the appellant's allegation relating to the absence of Annexes A1 and A2, it must be held that it does not appear from documents in the file that the alleged absence of those documents was the subject of the proceedings before the General Court. It is clear from settled case-law of the Court of Justice that, in an appeal, the jurisdiction of the Court of Justice is confined to review of the findings of law on the pleas argued before the General Court.

98 It follows that the fourth ground must be rejected.

The fifth ground of appeal

Arguments of the parties

99 By his fifth ground of appeal, the appellant challenges the reasons underlying the Commission's application of the exception relating to the protection of personal data and the lawfulness of the deletion of personal data carried out by the Commission.

100 The Commission takes the view that this ground of appeal should be rejected in its entirety.

Findings of the Court

101 As regards the challenge to the judgment under appeal regarding the ruling by the General Court that the deletion of personal data by the Commission under the exception to the right of access to documents laid down in Article 4(1)(b) of Regulation No 1049/2001was lawful, the case-law of the Court of Justice provides that the provisions of Regulation No 45/2001, of which Articles 8(b) and 18 constitute essential provisions, become applicable in their entirety where an application based on Regulation No 1049/2001 seeks to obtain access to documents containing personal data (judgment in *Commission* v *Bavarian Lager*, EU:C:2010:378, paragraphs 63 and 64).

102 The communication of such data falls within the definition of 'processing', for the purposes of Regulation No 1049/2001 (judgment in *Commission* v *Bavarian Lager*, EU:C:2010:378, paragraph 69).

103 It is clear from Article 5 of that regulation that any processing of personal data must necessarily comply with one of the conditions laid down in that article in order for that processing to be lawful.

104 Furthermore, personal data may be transferred to a third party on the basis of Regulation No 1049/2001 only where that transfer fulfils the conditions laid down in Article 8(a) or (b) of Regulation No 45/2001 and constitutes lawful processing in accordance with the requirements of Article 5 thereof.

105 Having regard to the foregoing, the General Court did not commit any error of law when it verified whether the conditions laid down in Article 8(b) of Regulation No 45/2001 had been fulfilled.

106 Furthermore, contrary to the appellant's assertions, it cannot be inferred from the latter provision that the institutions concerned by an application for access to documents in their possession are obliged to verify themselves whether reasons justifying the transfer of personal data exist.

107 On the contrary, it is for the person applying for access to establish the necessity of transferring that data (see judgment in *Commission* v *Bavarian Lager*, EU:C:2010:378, paragraph 77).

108 The appellant's argument that, in the light of Article 8(a) of Regulation No 45/2001, the Commission was required to transmit personal data to him on the ground that access to documents held by the institutions under Regulation No 1049/2001 is always in the public interest must be dismissed. As the Advocate General noted in point 154 of her Opinion, such an argument runs counter to the obligation on the applicant for access to establish the necessity of transferring personal data set out in the preceding paragraph.

109 Furthermore, it is clear from paragraph 173 of the judgment under appeal that the appellant did not give any reason capable of justifying the necessity for the Commission to transfer personal data.

110 It follows that the appellant's arguments alleging a failure to consult all the persons whose personal data was concerned and a failure to take account of the consent of certain persons to the disclosure of their data must be rejected as irrelevant. Even assuming that the transfer of certain data had been lawful, the Commission could not have transferred it on the ground that the appellant had not established the necessity for the transfer, as provided for in Article 8(b) of Regulation No 45/2001.

111 For the same reasons, the appellant's argument seeking to obtain the names of the officials referred to in the documents related to Case T-110/04 cannot be accepted. The General Court was right to hold, in paragraphs 194 and 197 of the judgment under appeal, that their names were protected data under Article 4(1)(b) of Regulation No 1049/2001. The fact that certain names had been disclosed at the hearing in the case before the General Court does not invalidate that finding. As the General Court held in paragraph 194 of the judgment under appeal, that fact is not able to relieve the other institutions from their obligations.

112 The appellant also claims that the General Court disregarded the Commission's obligation to encode the names it had deleted.

113 In that connection, the General Court was right to dismiss the appellant's plea relating to the encoding of names by holding, in paragraphs 207 and 208 of the judgment under appeal, that a systematic obligation to encode would constitute a particularly heavy burden which serves no purpose. As stated in paragraphs 27 and 28 of the present judgment, the institutions may, in specific cases, rely on the interests of good administration after weighing the interests of the applicant for access to the documents and the workload which would result from processing his application.

114 The appellant claims once again that the General Court was wrong to hold that the reasoning underlying the application by the Commission of Article 4(1)(b) of Regulation No 1049/2001 was sufficient, even though it does not contain any mention of Regulation No 45/2001 and did not mention the reasons which could justify deletion of all the personal data from the documents for which access was applied.

115 However, the General Court was correct to confirm the lawfulness of the application of that provision by the Commission since, as already observed in paragraphs 70 and 71 of the present judgment, reliance on Article 4(1)(b) of Regulation No 1049/2001 necessarily implies the applicability of Regulation No 45/2001 (judgment in *Commission* v *Bavarian Lager*, EU:C:2010:378, paragraph 63).

116 Additionally, as stated in paragraph 106 to 111 of the present judgment, since the appellant had not mentioned any reason justifying the necessity to transfer personal data, the question of the lawfulness of that transfer does not arise. Therefore, the General Court was right to hold, in paragraph 120 of the judgment under appeal, that the Commission did not need to give further reasons to that effect regarding its decision to apply Article 4(1)(b) of Regulation No 1049/2001.

117 The same is true as regards paragraphs 125 and 126 of the judgment under appeal since, in those paragraphs, the General Court was right to hold that the reasoning underlying the Commission's decision to blank out personal data complied with the usual appropriate conditions, as the Advocate General noted in point 145 of her Opinion.

118 Finally, the appellant claims that the judgment under appeal is vitiated by insufficient reasoning in so far as it concerns the lawfulness of the deletion of personal data in the OLAF documents.

119 However, it is clear from settled case-law that a party may not change the subject-matter of the dispute by putting forward for the first time before the Court of Justice a plea in law which he could have raised before the General Court but did not raise, since to do so would be to allow it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court.

120 It follows that that argument must be rejected on the ground that, in the proceedings before the General Court, the appellant did not criticise the reasoning of the decision of 23 October 2007 relating to the OLAF documents in his reply, even though it is common ground that he received that decision at the latest with the Commission's defence.

121 In the light of all of the above, the fifth ground of appeal must be rejected.

The sixth plea

Arguments of the parties

122 By his sixth ground of appeal, the appellant criticises the General Court for accepting an unduly made application of the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001 as regards information contained in the documents relating to Case T-110/04.

123 The appellant further criticises the reasoning in the judgment under appeal relating to the existence of an overriding public interest justifying the disclosure of documents covered by that provision.

124 The Commission considers that that ground of appeal should be rejected.

Findings of the Court

125 The sixth ground of appeal concerns all of the data which was deleted in order to prevent the identification of certain undertakings involved in anti-dumping cases that the applicant in Case T-110/04 processed as an agent of the Commission.

126 Contrary to the appellant's assertions, the General Court was right to hold, in paragraph 228 of the judgment under appeal, that the deletion of the names of the undertakings and the complaints against them was necessary in order to protect their interests on the ground that the names of the undertakings incriminated could have been deduced from all the information deleted.

127 As far as concerns the appellant's arguments seeking to establish that the undertakings mentioned in Case T-110/04 do not enjoy the protection laid down in the first indent of Article 4(2) of Regulation No 1049/2001 on the ground that, in general, anti-dumping decisions are published, it must be stated that the appellant did not raise such arguments in the proceedings before the General Court. Therefore, those arguments must be rejected as inadmissible.

128 Finally, it must be observed that the appellant's criticism relating to paragraph 229 of the judgment under appeal is unfounded. First, it is clear from that paragraph that the Commission did in fact examine the existence of overriding public interests. Second, the case-law of the Court provides that it is for the applicant to show that there is an overriding public interest to justify the disclosure of the documents concerned (see judgment in *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 94).

129 In the proceedings before the General Court and in the present appeal proceedings, the appellant merely relied on the principle of transparency and its importance.

130 It is true that that the overriding public interest capable of justifying the disclosure of a document need not necessarily be distinct from the principles which underlie Regulation No 1049/2001 (judgment in *LPN and Finland* v *Commission*, EU:C:2013:738, paragraph 92).

131 However, as the General Court held, in paragraph 229 of the judgment under appeal, such general considerations cannot provide an appropriate basis for establishing that, in the present case, the principle of transparency was in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question (judgment in *LPN and Finland* v *Commission*, EU:C:2013:738, paragraph 93).

132 In the light of all of the foregoing, the sixth ground of appeal must be rejected.

The seventh ground of appeal

Arguments of the parties

133 By his seventh ground of appeal, the appellant claims that the General Court wrongly failed to award him compensation resulting from the harm caused by the treatment by the Commission of his applications for access to documents held by that institution.

134 The Commission contends that this ground of appeal should be rejected.

Findings of the Court

135 First, the appellant claims that the General Court wrongly rejected the evidence he had submitted.

136 In that connection, it must be recalled that the General Court is the sole judge of any need to supplement the information available to it in respect of the cases before it. The question whether the procedural documents before it are persuasive is a matter to be appraised by it alone, which, according to well-established case-law, is not subject to review by the Court of Justice on appeal, unless the facts or evidence have been distorted.

137 In the present appeal, by merely alleging that the General Court should have formed a more accurate picture of the Commission's liability, the appellant does not criticise the General Court for having distorted the facts or evidence in paragraphs 261 to 267 of the judgment under appeal.

138 Second, the appellant submits that the General Court committed errors of law in the assessment of the existence of a causal link between the Commission's conduct during the processing of his applications for access to the documents in its possession and the deterioration of his health.

139 In determining that the appellant had not proved the existence of such a causal link, the General Court based its decision, in paragraph 264 of the judgment under appeal, on the export report submitted by the appellant and on the information contained in that report by which the General Court was able to infer without distortion that it had not been established that the Commission's conduct had an impact on the deterioration of the appellant's health.

140 Third, as to the alleged infringement of the appellant's right to take part in the public consultation on transparency, the General Court was right to hold, in paragraph 265 of the judgment under appeal, that, in the present case, the Commission's conduct had no impact in that regard, since the end of the consultation period was set for 31 July 2007, while the original application for access to documents was lodged only on 20 June 2007.

141 As the Advocate General noted in point 189 of her Opinion, proper recourse to the extension of the time-limit for replying pursuant to Article 7(3) of Regulation No 1049/2001 would require the Commission to respond to the initial application by 31 July 2007 at the earliest. Participation in the consultation process was no longer possible on that date.

142 Therefore, the seventh ground of appeal must be rejected.

The eighth ground of appeal

Arguments of the parties

143 By his eighth ground of appeal, the appellant submits that the General Court wrongly refused to order the Commission to provide him with the documents to which access was refused contrary to Regulation No 1049/2001.

144 The Commission contends that this ground of appeal should be rejected.

Findings of the Court

145 According to settled case-law, the Courts of the European Union cannot, in principle, issue orders to an EU institution without encroaching upon the prerogatives of the administration (see judgments in *Verzyck* v *Commission*, 225/82, EU:C:1983:165, paragraph 19, and *Campogrande* v *Commission*, C-62/01 P, EU:C:2002:248, paragraph 43).

146 Thus, contrary to the appellant's assertions, the General Court was right to hold, in paragraph 90 of the judgment under appeal, that, in accordance with Article 264 TFEU, it was only open to it to annul the contested act. In so far as the appellant's argument is based on Article 266 TFEU, it must be observed that that provision also does not provide for the possibility of issuing orders to the institutions.

147 That finding cannot be called into question by the appellant's arguments based on Article 47 of the Charter, since that article is not intended to change the system of judicial review laid down by the Treaties (see judgment in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 97).

148 Therefore, the eighth ground of appeal must be rejected.

The ninth ground of appeal

Arguments of the parties

149 By his ninth ground of appeal, the appellant claims that the General Court misconstrued the outcome of the dispute before it when it ordered the Commission to bear its own costs and to pay two thirds of the appellant's costs.

150 The Commission contends that the plea should be rejected.

Findings of the Court

151 It should be recalled that, under the second paragraph of Article 58 of the Statute of the Court of Justice of the European Union, no appeal shall lie regarding only the amount of the costs or the party ordered to pay them. Moreover, according to settled case-law, where all the other pleas put forward in an appeal have been rejected, any plea challenging the decision of the General Court on costs must be rejected as inadmissible by virtue of that provision.

152 Since the appellant has been unsuccessful in his first eight pleas in this appeal, the ninth plea concerning the allocation of costs must be held to be inadmissible.

The action before the General Court

153 Pursuant to the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, if a judgment under appeal is set aside the Court of Justice may give final judgment in the matter where the state of the proceedings so permits. That is so in the present case.

154 Having regard to the foregoing, there is no need to rule on the appellant's plea raised before the General Court seeking annulment of the Commission decision refusing access to the extract of the register concerning refusals of confirmatory applications for access to documents.

155 In that connection, it is clear from paragraph 43 of the present judgment that the register concerned has not been created and that, therefore, the Commission could not fulfil the appellant's request. Therefore, his application must be dismissed as unfounded on that point.

Costs

156 Under the first paragraph of Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

157 Under Article 138(3) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) of those rules, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing his own costs, is to pay a proportion of the costs of the other party.

158 Since the Commission has applied for costs to be awarded against Mr Strack and the latter has been unsuccessful in the appeal and in respect of the second ground of appeal in the cross-appeal, the appellant must be ordered to bear his own costs in the present proceedings and one third of the costs incurred by the Commission in these proceedings.

159 As regards the costs relating to the proceedings at first instance, the costs relating to the proceedings which gave rise to the judgment under appeal are to be born in accordance with the arrangements set out in paragraph 7 of the operative part thereof.

On those grounds, the Court (Second Chamber) hereby:

1. **Sets aside the judgment of the General Court of the European Union in *Strack* v *Commission*, T-392/07, EU:T:2013:8 in so far as, by that judgment, the General Court annulled the decision of the European Commission of 24 July 2007;**

2. **Dismisses the cross-appeal for the remainder;**

3. **Dismisses the appeal;**

4. **Dismisses the action for annulment in so far as it is directed against the decision of the European Commission refusing access to the extract of the register concerning refusals of confirmatory applications for access to documents;**

5. **Orders Mr Guido Strack to bear his own costs in the present proceedings and to pay one third of the costs incurred by the European Commission;**

6. **Orders the European Commission to pay two thirds of the costs relating to the present proceedings;**

7. **Orders the costs relating to the proceedings at first instance which gave rise to the judgment in *Strack* v *Commission* (T-392/07, EU:T:2013:8) to be paid in accordance with the arrangements laid down in paragraph 7 of the operative part thereof.**

[Signatures]