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JUDGMENT OF THE COURT (Tenth Chamber)

4 June 2015 (\*)

(Appeals — Regulation (EC) No 1049/2001 — Access to the documents of the European institutions — Documents relating to the trade negotiations between the European Union and the Republic of India — Full access — Refusal)

In Case C-399/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 10 July 2013,

**Stichting Corporate Europe Observatory**, established in Amsterdam (Netherlands), represented by S. Crosby, Solicitor,

appellant,

the other parties to the proceedings being:

**European Commission**, represented by F. Clotuche-Duvieusart and I. Zervas, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

**Federal Republic of Germany**, represented by T. Henze and J. Möller, acting as Agents,

intervener at first instance,

THE COURT (Tenth Chamber),

composed of C. Vajda, President of the Chamber, E. Juhász (Rapporteur) and D. Šváby, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

## **Judgment**

1 By its appeal, Stichting Corporate Europe Observatory asks the Court to set aside the judgment of the General Court of the European Union in *Stichting Corporate Europe Observatory v Commission* (T-93/11, EU:T:2013:308, ‘the judgment under appeal’), by which the General Court dismissed its application for annulment of the Commission’s decision of 6 December 2010 refusing the appellant full access to several documents relating to the negotiations between the European Union and the Republic of India aimed at concluding a free trade agreement, pursuant to the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) (‘the decision at issue’).

## **Legal context**

2 Regulation No 1049/2001 is intended to ensure greater transparency in the work of the EU institutions, to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 15(2) TFEU.

3 Under the third indent of Article 4(1)(a) of Regulation No 1049/2001, ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards ... international relations’.

4 Article 9(1) of that regulation provides:

‘Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as “TRÈS SECRET/TOP SECRET”, “SECRET” or “CONFIDENTIEL” in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.’

5 Article 9(2) provides that applications for access to sensitive documents are to be handled only by those persons who have a right to acquaint themselves with those documents.

## The judgment under appeal

6 In the judgment under appeal, the General Court made the following findings:

‘1 In 2007, negotiations were started between the European Union and the Republic of India with a view to concluding a free trade agreement.

2 In the context of the *travaux préparatoires* for the establishment of that agreement, and pursuant to Council Decision 98/552/EC of 24 September 1998 on the implementation by the Commission of activities relating to the Community market access strategy (OJ 1998 L 265, p. 31), an advisory committee was created to assist the Commission in its task and, more specifically, to assist it in the identification of barriers to market access in the third State concerned and of measures capable of eliminating those barriers. In accordance with Article 3 of Decision 98/552, that committee is composed of representatives of the Member States and chaired by the representative of the Commission.

3 Representatives of trade associations or companies are involved in this process and participate, as experts, in the work of the advisory committee and of working groups established on the basis of sector-specific expertise.

4 The applicant, Stichting Corporate Europe Observatory, is a foundation governed by Netherlands law. According to its Articles of Association, the applicant is non-profit making (Article 4.2 of the Articles of Association) and its objectives are “to increase general knowledge about the political and economic influence of transnational companies and financial institutions” and to “formulate alternatives and policy proposals to limit these influences in order to contribute to a more democratic and socially and economically just society” (Article 4.1 of the Articles of Association).

5 On 5 June 2009, acting on the basis of Regulation (EC) No 1049/2001 ..., the applicant submitted to the Commission an application for access to [various documents concerning the *travaux préparatoires* for the aforementioned free trade agreement].’

7 The General Court then indicated that the European Commission, by its letter of 29 April 2010, granted the appellant full access to over 100 documents and partial access to more than 50 others. Access to some 30 documents was refused on the basis of a number of exceptions provided for under Regulation No 1049/2001.

8 In paragraph 9 of the judgment under appeal, the General Court noted that, [b]y letter of 21 May 2010, the applicant submitted to the Commission a ... confirmatory application regarding 17 documents to which full access had been refused [“the documents at issue”], pointing out that those same documents had been disclosed, in full and without any indication that they were in any way confidential, to a large number of persons, the number of potential recipients itself being very large. The applicant took the view that, in those circumstances, the documents at issue did not contain any confidential information or had, in any event, entered the public domain. The applicant explained that,

while it had no objection to access being refused on grounds of the protection of the commercial interests of a natural or legal person, it was contesting non-disclosure the justification for which was based on the protection of relations between the European Union and the Republic of India, or any other related interest’.

9 The General Court observed that, by the decision at issue, the Commission replied to the confirmatory application of 21 May 2010. That decision concerned 17 documents, identified as follows:

- document 1 is a letter dated 18 March 2008 from the member of the Commission responsible for trade to the Secretary-General of BusinessEurope. That letter contained a handwritten note suggesting to the addressee that he make some comments to his counterparts in the Confederation of Indian Industry (CII) in view of the matters set out in that letter;
- documents 2 to 8 are the minutes of the meetings of the working groups on market access;
- documents 9 to 13 are the minutes of the meetings of the Market Access Advisory Committee;
- document 14 is an attachment to an email sent by the Commission’s directorate-general for trade (DG Trade) to the European Tyre and Rubber Manufacturers’ Association (ETRMA), dated 23 July 2008, and
- documents 15 to 17 are other emails from DG Trade to ETRMA, sent on 24 July 2008, 23 March 2009 and 7 July 2009.

10 The General Court noted, in paragraph 15 of the judgment under appeal:

‘15 In the [decision at issue] ... the Commission granted further partial access to documents 11 and 12. By contrast, it confirmed its refusal to grant access to the passages in documents 1 to 13 and 15 to 17 that had been deleted, and also to document 14 in its entirety, on the basis of the third indent of Article 4(1)(a) of Regulation No 1049/2001 ...’

11 In support of its action before the General Court, the appellant invoked two pleas in law, only the first of which is relevant for the purposes of the present appeal. In that first plea in law, the appellant claimed that the Commission had refused to grant it access to the documents at issue in breach of rules derived from the third indent of Article 4(1)(a) of Regulation No 1049/2011.

12 In the judgment under appeal, the General Court dismissed the action.

13 As regards the first plea in law, the General Court first pointed out that the documents at issue had been disclosed ‘within the framework of a consultation process made mandatory’, to ‘a specific group of persons defined according to a predetermined

criterion, in this case membership of a trade association whose expertise is required in connection with the provision of assistance to the Commission for the purpose of deciding upon a strategy for access to the markets of a third State'. The General Court inferred that those documents were not intended to be made 'known to the public, that is to say, to an indeterminate group of persons, considered in general and in the abstract'.

14 The General Court also emphasised that the Commission had never made the documents at issue directly or easily accessible and that the appellant had not produced evidence that those documents had been communicated to legal or natural persons other than their initial recipients.

15 It then held that the absence of one of the designations referred to in Article 9(1) of Regulation No 1049/2001 concerning the secret or confidential nature of the documents at issue did not constitute a conclusive factor for considering that the Commission had, by implication, relinquished all control over the dissemination of the documents at issue.

16 It held, lastly, that the provisions of the document entitled 'Vademecum on access to documents' ('the vade-mecum') and marked 'DG Trade', produced by the appellant at the hearing before the General Court and used by the directorate concerned when dealing with requests for access to documents, could not be relied on against the Commission, since that vade-mecum had not been the subject of any form of publication and therefore had to be regarded as a mere internal service memorandum, which did not create any rights for the benefit of third parties.

### **The appeal**

17 By its appeal, the appellant asks the Court to set aside the judgment under appeal and the decision at issue. It requests, moreover, that the Commission be ordered to pay the costs of the appeal and those incurred at first instance.

18 The appellant relies on a single ground of appeal, alleging the infringement of the third indent of Article 4(1)(a) of Regulation No 1049/2001.

19 That ground of appeal is composed of three parts, alleging, respectively, (i) that the provisions of the vade-mecum may be relied on against the Commission, (ii) that the General Court failed to acknowledge that there was a presumption that the documents at issue had been disseminated to a large number of people and (iii) that the General Court failed to acknowledge that the Commission waived all confidentiality by refraining from marking the documents at issue with the designations referred to in Article 9(1) of Regulation No 1049/2001, concerning the secret or confidential nature of the documents at issue.

*The first part of the single ground of appeal, alleging that the provisions of the vade-mecum may be relied on against the Commission*

20 By the first part of the single ground of appeal, the appellant criticises the General Court for holding that the rules contained in the vade-mecum could not be relied on against the Commission. In particular, the General Court did not take account of the fact that the vade-mecum invoked by the appellant was disclosed to it by the Commission on its own initiative. The appellant therefore argues that the vade-mecum has entered the public domain and, as a result, may be relied on against the Commission.

21 The Commission considers that argument to be inadmissible.

22 It must be pointed out that the appellant's argument that the rules contained in the vade-mecum may be relied on against the Commission is based on the premiss that, by refusing to grant the appellant access to the documents at issue, the Commission departed from the wording of the vade-mecum according to which, if the information contained in a document has already been disseminated to a large number of persons, a refusal to disclose the document is not justified.

23 In paragraph 71 of the judgment under appeal, the General Court made a finding of fact that the documents at issue were sent to a restricted and specific group of persons only, established on the basis of a predetermined criterion consisting of participation in a process of assistance to the Commission.

24 Moreover, it must be noted that the General Court dealt with the argument put forward in the first part of the single ground of appeal and held, in paragraph 76 of the judgment under appeal, that the appellant 'neither alleged nor, still less, established that the document in question had been the subject of any form of publication intended for third parties'.

25 By its claim that the vade-mecum entered the public domain, the appellant is in reality contesting a factual assessment made by the General Court.

26 According to the case-law, an appeal lies on points of law only. The General Court has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence thus do not, save where the facts or evidence are distorted, constitute points of law open, as such, to review by the Court of Justice on appeal (see judgment in *Viega v Commission*, C-276/11 P, EU:C:2013:163, paragraphs 28 and 29).

27 Accordingly, and in the absence of any distortion of the facts committed by the General Court, the first part of the single ground of appeal must be rejected as inadmissible.

*The second part of the single ground of appeal, alleging a presumption that the documents at issue were disseminated to a large number of people*

28 By the second part of the single ground of appeal, the appellant claims that, since the documents at issue were sent to collective entities — trade associations, in this

instance — there is a presumption that those documents were actually intended for a large number of persons. The appellant therefore argues that the General Court, in paragraph 45 of the judgment under appeal, erred in law by considering that the appellant had not proved that any of those documents in fact ended up in the possession of, or were made directly accessible to, legal or natural persons other than their initial recipients.

29 The Commission rightly submits that the appellant's argument amounts to contesting a finding of fact made by the General Court, according to which the documents in question had not been communicated to anyone other than their initial recipients.

30 The alleged presumption invoked by the appellant has no basis in EU law. In that respect, the appellant fails to refer to any provision of EU law establishing such a presumption or cite any case-law of the Court from which such a presumption could be inferred. In seeking to invoke such a presumption, the appellant is in reality contesting findings of fact made by the General Court.

31 Accordingly, and in the absence of any distortion of the facts committed by the General Court, the second part of the single ground of appeal must be rejected as inadmissible.

*The third part of the single ground of appeal, alleging that the Commission implicitly waived confidentiality*

32 By the third part of the single ground of appeal, the appellant claims that, by failing to mark the documents at issue with one of the specific designations referred to in Article 9(1) of Regulation No 1049/2001, concerning the confidential nature of the documents at issue, the Commission implicitly waived the confidentiality of those documents. The appellant therefore concludes that the General Court committed an error of law by considering, in paragraph 60 of the judgment under appeal, that an implicit waiver of any restrictions on the dissemination of the documents at issue covered by the request for access cannot be inferred from the mere fact that the Commission did not mark those documents as being confidential.

33 The Commission submits, inter alia, that the third part of the single ground of appeal is inadmissible.

34 As a preliminary point, it must be observed that the appellant criticises the conclusion in paragraph 60 of the judgment under appeal that an implicit waiver of any restrictions on the dissemination of the documents covered by the request for access cannot be inferred from the mere fact that the Commission did not mark those documents as being confidential, a conclusion which was a decisive factor for the rejection of the line of argument put forward by the appellant regarding Article 9(1) of Regulation No 1049/2001. The appellant therefore identifies the elements of the judgment under appeal which are being challenged with sufficient precision to enable the Court to carry

out its review of the lawfulness thereof (see, to that effect, judgment in *Nuova Agricast and Cofra v Commission*, C-67/09 P, EU:C:2010:607, paragraphs 48 and 49).

35 The third part of the single ground of appeal is therefore admissible.

36 As to the substance, it does not follow from either Article 4 or Article 9 of Regulation No 1049/2001 that the fact that a document has not previously been classified pursuant to Article 9(1) prevents an institution from refusing access to that document on the basis of Article 4. Accordingly, the mere fact that a document is not marked with one of the designations referred to in Article 9 of Regulation No 1049/2001 cannot prevent the exceptions provided for in Article 4(1)(a) thereof from applying, unless the latter provision is to be deprived of all practical effect (see, to that effect, judgment in *Jurašinović v Council*, C-576/12 P, EU:C:2013:777, paragraphs 41, 42 and 47).

37 In that regard, the General Court rightly held, in paragraphs 53 to 55 of the judgment under appeal, that the absence of a designation expressly indicating the internal or confidential nature of the documents at issue did not constitute a conclusive factor in the assessment of whether or not those documents must be protected. The General Court also rightly held, in paragraphs 56 to 60 of the judgment under appeal, that, since Regulation No 1049/2001 contains no express provision to that effect, the fact that the Commission did not mark those documents with one of the aforementioned designations cannot be interpreted as constituting an implicit waiver by the Commission of any restrictions on the dissemination of the documents at issue.

38 Consequently, the third part of the single ground of appeal must be rejected as unfounded.

39 As none of the three parts of the ground relied on by the appellant in support of its appeal have been accepted, that appeal must be dismissed in its entirety.

### **Costs**

40 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs.

41 Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has requested that the appellant be ordered to pay the costs and the appellant has been unsuccessful, it must be ordered to pay the costs.

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

1. **Dismisses the appeal;**
2. **Orders Stichting Corporate Europe Observatory to pay the costs.**



[Signatures]

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\* Language of the case: English.

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