Lingua del documento :

ECLI:EU:T:2025:483

JUDGMENT OF THE GENERAL COURT (Grand Chamber)

14 May 2025 (*)

(Access to documents – Regulation (EC) No 1049/2001 – Documents relating to the text messages exchanged between the President of the Commission and the chief executive officer of the pharmaceutical company Pfizer – Refusal to grant access – Presumption of veracity attached to the declaration of non-possession of documents – Lack of plausible explanations making it possible to determine the reasons for the non-existence or non-possession – Retention of documents – Principle of good administration)

In Case T36/23,

Matina Stevi, residing in Brussels (Belgium),

The New York Times Company, established in New York, New York (United States),

represented by B. Kloostra and P.-J. Schüller, lawyers,

applicants,

v

European Commission, represented by P. Stancanelli, A. Spina and M. Burón Pérez, acting as Agents,

defendant,

THE GENERAL COURT (Grand Chamber),

composed of M. van der Woude, President, S. Papasavvas, R. da Silva Passos, J. Svenningsen, L. Truchot, R. Mastroianni, H. Kanninen, J. Schwarcz, P. Nihoul, J. Martín y Pérez de Nanclares, G. Hesse, M. Sampol Pucurull (Rapporteur), M. Stancu, I. Nõmm and K. Kecsmár, Judges,

Registrar: A. Marghelis, Administrator,

having regard to the written part of the procedure, in particular the measure of organisation of procedure of 11 September 2024 and the replies of the parties lodged at the Court Registry on 4 and 7 October 2024,

further to the hearing on 15 November 2024,

gives the following

Judgment

1 By their action under Article 263 TFEU, the applicants, Ms Matina Stevi and The New York Times Company, seek the annulment of Decision C(2022) 8371 final of the European Commission of 15 November 2022 adopted pursuant to Article 4 of the Implementing Rules 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), concerning an application for access to all text messages exchanged between the President of the Commission and the chief executive officer of the pharmaceutical company Pfizer between 1 January 2021 and 11 May 2022 ('the contested decision').

Background to the dispute

2 By email of 11 May 2022, Ms Stevi, who is a journalist employed by the daily newspaper *The New York Times*, applied to the Commission, on the basis of Regulation No 1049/2001, for access to all text messages exchanged between the President of the Commission and the chief executive officer of the pharmaceutical company Pfizer between 1 January 2021 and 11 May 2022. That application was registered, on 12 May 2022, under reference GESTDEM 2022/2678 ('the initial application').

3 On 28 June 2022, not having received any reply from the Commission within the period prescribed by Article 7(1) of Regulation No 1049/2001, the applicants' representative, on the basis of Article 7(4) of that regulation, submitted, 'as the representative of Ms Matina Stevi, acting for The New York Times [Company]' an initial confirmatory application for access to the documents.

4 By letter of 20 July 2022, addressed to Ms Stevi, the Commission responded to the initial application and stated that, since it did not hold any documents corresponding to the description given in the said application, it was not in a position to fulfil her request.

5 By letter of 9 August 2022, the applicants' representative, on the basis of Article 7(2) of Regulation No 1049/2001, submitted, 'on behalf of [Ms] Stevi acting for The New York Times [Company]', a second confirmatory application for access to the documents ('the confirmatory application'), which was registered by the Commission on the same day.

6 By email of 31 August 2022, the Commission informed Ms Stevi that the confirmatory application was still being processed and that, pursuant to Article 8(2) of Regulation No 1049/2001, it was necessary to extend the period for processing it by 15 working days, that is to say until 21 September 2022.

7 By email of 21 September 2022, the Commission informed Ms Stevi that the assessment of her confirmatory application had been finalised, but that its draft decision still had to be approved by its Legal Service, while assuring her that she would receive a reply as soon as possible.

8 On 16 November 2022, the Commission sent Ms Stevi the contested decision, by which it informed her that, since it did not hold any documents corresponding to the description given in the initial application, it was not in a position to grant that application.

Forms of order sought

9 The applicants claim that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

10 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

Law

Admissibility

Standing of The New York Times Company

11 In the defence, the Commission argues that The New York Times Company has no standing. In that regard, it notes that the initial application was submitted solely by Ms Stevi and that the subsequent confirmatory applications were submitted by Ms Bondine Kloostra, who declared that she was representing '[Ms] … Stevi acting for The New York Times [Company]'. Moreover, the Commission submits that Ms Stevi is the sole addressee of the contested decision.

12 It should be noted that the action is admissible in so far as it is brought by Ms Stevi, a fact which the Commission moreover does not dispute. According to settled case-law, where one application is involved, as soon as one of the applicants has *locus standi*, there is no need to consider whether or not the other applicants are entitled to bring proceedings (see, to that effect, judgments of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C71/09 P, C73/09 P and C76/09 P, EU:C:2011:368, paragraph 37, and of 11 December 2013, *Cisco Systems and Messagenet* v *Commission*, T79/12, EU:T:2013:635, paragraph 40).

13 Consequently, given that Ms Stevi has standing to bring an action against the contested decision, the present action must be declared admissible, without there being any need to examine the standing of The New York Times Company.

Admissibility of the evidence submitted by the applicants for the first time as an annex to the reply

14 The reply lodged by the applicants has annexed to it, under numbers R.1 and R.2, transcripts of the interviews that Ms Stevi conducted separately with the President of the Commission and with the chief executive officer of the pharmaceutical company Pfizer, on 25 April 2021 ('the interview transcripts').

15 In the rejoinder, the Commission contends that the applicants do not justify the delay in submitting the interview transcripts, as is required by Article 85(2) of the Rules of Procedure of the General Court, such that those transcripts are inadmissible. The Commission states that that evidence already existed at the date on which the application was lodged and could therefore have been produced without difficulty as an annex to that pleading.

16 According to Article 85(1) of the Rules of Procedure, evidence produced or offered is to be submitted in the first exchange of pleadings. Under Article 85(2) of the Rules of Procedure, the parties are allowed to produce or offer further evidence in the reply or the rejoinder in support of their arguments, provided that the delay in the submission of such evidence is justified.

17 It should be noted that Ms Stevi met with the President of the Commission and with the chief executive officer of the pharmaceutical company Pfizer on 25 April 2021, that is to say, almost two years before the date on which the applicants brought the present action. Therefore, the applicants could have transcribed those interviews and produced their transcripts before the Court from the application stage.

18 It is thus appropriate to examine whether, in the case at hand, the delay in producing the interview transcripts was justified, in accordance with Article 85(2) of the Rules of Procedure.

19 In that regard, the applicants indicate in footnote 2, appearing on page 3 of the reply, that the application inadvertently attributes to the President of the Commission statements made by the chief

executive officer of the pharmaceutical company Pfizer and that, in order to avoid further confusion, transcripts of the interviews are provided to the Court as an annex to the reply. In addition, in response to a written question put by the Court by way of a measure of organisation of procedure, the applicants claim that, while it is true that they possessed recordings of the interviews on the date on which the application was lodged, they did not, however, transcribe those interviews until they had lodged the reply in order to dispel any ambiguity as to the identity of the person who made the statements at issue.

20 In the light of the foregoing, in the circumstances of the present case, it must be concluded that the late production of the interview transcripts annexed to the reply is justified and, therefore, that that evidence must be declared admissible within the meaning of Article 85(2) of the Rules of Procedure.

Substance

21 In support of their action, the applicants rely on three pleas in law, the first alleging infringement of Article 3(a) of Regulation No 1049/2001 and of Article 11 of the Charter of Fundamental Rights of the European Union ('the Charter'), the second alleging infringement of Article 2(3) of Regulation No 1049/2001, and the third alleging infringement of the principle of good administration.

22 The Court considers that the third plea should be examined first.

23 In the third plea, the applicants dispute, in essence, the legality of the Commission's refusal to disclose the requested documents.

24 In support of this plea, the applicants complain that the Commission breached the principle of good administration by confining itself, in order to refuse their request for access to the documents, to invoking the non-existence of the requested documents without providing any explanation as to why the requested documents could not be found. To that end, the applicants observe that the mere denial by the Commission in the contested decision of the existence of the requested documents is not sufficient.

25 More specifically, the applicants claim that the article published in *The New York Times* on 28 April 2021 and Ms Stevi's interviews with the President of the Commission and the chief executive officer of the pharmaceutical company Pfizer prove the material existence of the requested documents. Thus, once the presumption of veracity attaching to the Commission's declaration that it does not hold the requested documents is rebutted, it is for the Commission to prove the non-existence or non-possession of those documents by providing plausible explanations allowing the reasons for such non-existence or non-possession to be determined.

26 The applicants maintain, however, that the statement in the contested decision according to which a 'renewed, thorough search' for the requested documents was made in no way clarifies whether that search related solely to documents registered in the Commission's records management system or whether it also included a search for documents not registered in that management system. Moreover, the contested decision continues to be imprecise as to which storage locations were consulted, does not indicate whether the mobile phone(s) of the President of the Commission were searched and does not explain why the requested text messages were not found.

27 The Commission disputes the applicants' arguments.

28 As a preliminary point, the Commission notes, in the rejoinder, that the applicants' line of argument according to which there has been a rebuttal of the presumption of veracity attaching to its declaration that it does not hold the requested documents and according to which, consequently, it is for it to provide plausible explanations to prove the non-existence or non-possession of those documents was raised for the first time at the reply stage. The Commission thus submits that it is a new plea, the late introduction of which is barred by Article 84 of the Rules of Procedure.

29 In any event, even if that new plea were admissible, the Commission considers, in essence, that the applicants have not put forward any evidence capable of calling into question the presumption of veracity attaching to its declaration that it does not hold the requested documents. The Commission notes in that regard that there is only one mention of an exchange of messages between its President and the chief executive officer of the pharmaceutical company Pfizer, which appears at page 15 of the document produced by the applicants in Annex R.2 to the reply, in a statement attributed to that individual. Furthermore, according to the Commission, it is apparent only from that statement that the text messages exchanged between its President and the chief executive officer of the pharmaceutical company Pfizer played only a peripheral role in the conversations which took place between them.

30 In addition, the Commission maintains that, even assuming that the statement made by the chief executive officer of the pharmaceutical company Pfizer is sufficient to rebut the presumption of veracity attaching to the declaration that it does not hold the requested documents, it is still possible for it to provide plausible explanations capable of confirming its allegations. In that regard, it submits that the contested decision provides those explanations by indicating, first, that a new, thorough, but alas unsuccessful search was made and, second, that text messages would have been registered – and therefore identified – had they not been short-lived or had they involved action or follow-up by the Commission or one of its departments.

Plea of inadmissibility raised by the Commission

31 Under Article 84(1) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. However, a submission or argument which may be regarded as amplifying a plea made previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (see judgment of 11 July 2013, *Ziegler* v *Commission*, C439/11 P, EU:C:2013:513, paragraph 46 and the case-law cited).

32 In the case at hand, the applicants have taken the view, in the application, that the President of the Commission and the chief executive officer of the pharmaceutical company Pfizer had exchanged text messages and have submitted evidence to prove the existence of the requested documents. They have also criticised the Commission for failing to provide any explanation as to why it did not hold those text messages.

33 In that regard, it must be held that the legal elements on which the third plea is based, namely the existence of a presumption of veracity attaching to the institutions' statements and the alleged lack of reasons capable of explaining the non-existence of the text messages requested, were already present in the application.

34 Therefore, while it is true that, in response to the Commission's observations in the defence, the applicants, in the reply, inserted those legal elements into a corrected factual context, the fact remains that the line of argument in the reply is closely linked to the one raised in the application.

35 Consequently, the plea of inadmissibility raised by the Commission must be rejected.

Merits of the plea

– *Preliminary observations*

36 It should be recalled, as is apparent from Article 1 of Regulation No 1049/2001, read, in particular, in the light of recital 4 thereof, that the purpose of the regulation is to give the fullest possible effect to the right of public access to documents held by the institutions and that, in accordance with recital 11 of that regulation, 'in principle, all documents of the institutions should be accessible to the public'.

37 Any refusal of access to the documents requested from an EU institution may be subject to challenge by way of court proceedings. That is so whatever the reasons relied on to refuse access. Any other outcome would make impossible review by the EU 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. 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 the principle of transparency and the right of access to documents inapplicable. 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 judgment of 20 September 2019, *Dehousse* v *Court of Justice of the European Union*, T433/17, EU:T:2019:632, paragraph 35 and the case-law cited).

38 Moreover, the exercise of the right of access for any interested person necessarily presupposes that the documents requested exist and are held by the institution concerned, even if the right of access to documents cannot be relied on in order to oblige the institution to create a document which does not exist. Furthermore, it must be borne in mind that, according to settled case-law, where an institution states that a document does not exist in the context of an application for access, the non-existence of that document is presumed, in accordance with the presumption of veracity attaching to that statement (see, to that effect, judgments of 20 September 2019, *Dehousse* v *Court of Justice of the European Union*, T433/17, EU:T:2019:632, paragraph 36 and the case-law cited; of 24 March 2021, *BK* v *EASO*, T277/19, not published, EU:T:2021:161, paragraph 60 and the case-law cited; and of 15 March 2023, *Basaglia* v *Commission*, T597/21, not published, EU:T:2023:133, paragraph 25 and the case-law cited).

39 Nevertheless, such a presumption may be rebutted in any way, on the basis of relevant and consistent evidence produced by the applicant for access. That presumption must be applied by analogy where the institution declares that it is not in possession of the documents requested (see judgment of 20 September 2019, *Dehousse* v *Court of Justice of the European Union*, T433/17, EU:T:2019:632, paragraph 37 and the case-law cited).

40 If that presumption is rebutted and the Commission may no longer rely on it, it is for the Commission to prove the non-existence or lack of possession of the documents requested by providing plausible explanations enabling the reasons for such non-existence or lack of possession to be established (see, to that effect, judgment of 20 September 2019, *Dehousse* v *Court of Justice of the European Union*, T433/17, EU:T:2019:632, paragraph 49 and the case-law cited).

41 In addition, the right of access to documents requires the institutions to do what is necessary to facilitate the effective exercise of that right. Such exercise requires that the institutions concerned, in so far as possible and in a non-arbitrary and predictable manner, draw up and retain documentation relating to their activities (see judgment of 20 September 2019, *Dehousse* v *Court of Justice of the European Union*, T433/17, EU:T:2019:632, paragraph 38 and the case-law cited).

– *Rebuttal of the presumption of non-existence*

42 In the case at hand, the Commission indicated in the contested decision that, since it did not hold any documents corresponding to the description given in the application for access to documents, it was not in a position to grant that application.

43 Nevertheless, it must be pointed out that it is apparent from the explanations provided by the Commission in response to a question put to it by the Court in the context of a measure of organisation of procedure that it '[did] not deny that text messages [had] been exchanged between the President of the Commission and the Chief Executive Officer of [the pharmaceutical company] Pfizer in the course of their contacts in the early months of 2021', going so far as to assert that it had 'never denied this fact'.

44 At the hearing, the Commission neither confirmed nor denied the existence of that exchange of text messages in the past and could only surmise that that exchange could have taken place. In that regard, the Commission maintained that it did not know whether the requested documents had actually existed, since it did not hold them. In addition, the Commission also stated that, as its President and the chief executive officer of the pharmaceutical company Pfizer had busy schedules and meetings usually planned by their secretariats, assistants or colleagues, they had, with that option being unavailable in the particular context of the COVID19 pandemic, exchanged text messages in order to organise and plan their oral exchanges.

45 In those circumstances, it must be held that the Commission's replies are based either on assumptions or on changing or imprecise information.

46 However, the fact remains that the Commission, despite those imprecisions, maintains that it does not possess the requested documents, with the result that it is for the applicants to produce relevant and consistent evidence capable of rebutting the presumption of non-possession of those documents, in accordance with the case-law cited in paragraphs 38 and 39 above.

47 In that regard, the expression 'possession' or 'holding' cannot be limited to the possession or holding of documents by the institution at the time when it responds to the confirmatory application, since the exercise of the right of access to a document would be rendered devoid of purpose if the institution concerned could, in order to escape its obligations, simply claim that the requested documents could not be found.

48 Therefore, in the case at hand, it is necessary to ascertain whether the applicants have submitted relevant and consistent evidence showing that the Commission was, at a given time, in possession of the requested text messages, which amounts, in the light of the assertions made by the Commission, to ascertaining whether such documents could have existed.

49 In that respect, in the first place, the applicants observe that the existence of the requested documents was revealed by the article published in *The New York Times* on 28 April 2021 and authored on the basis of the interviews that Ms Stevi had conducted with the President of the Commission and the chief executive officer of the pharmaceutical company Pfizer.

50 It is apparent inter alia from the abovementioned press article that, 'for a month, [the President of the Commission] had been exchanging texts and telephone calls with … the chief executive [officer] of [the pharmaceutical company] Pfizer'.

51 Moreover, it also follows from that press article that '[the President of the Commission] and [the chief executive officer of the pharmaceutical company Pfizer] first connected in January [2021], when the [chief executive officer of the pharmaceutical company Pfizer] had to explain why his company had to cut vaccine supplies [in the European Union] temporarily while it upgraded manufacturing facilities in Belgium'. That press article further specifies that, 'as the improvements at the Belgium plant moved along with relative ease, the discussions between the [President of the Commission] and the [chief executive officer of the pharmaceutical company Pfizer] continued, both recounted in interviews with *The New York Times*'. In addition, it is apparent from the same press article that '[those] calls resulted in a string of deals between the European Union and the [pharmaceutical companies Pfizer and BioNTech]'. Last, it also follows from the abovementioned press article that the chief executive officer of the pharmaceutical company Pfizer stated that he had 'built a bond with [the President of the Commission]'.

52 In the second place, the applicants submit that the existence of the requested documents is also corroborated by the interviews that Ms Stevi conducted with the President of the Commission and the chief executive officer of the pharmaceutical company Pfizer.

53 In that regard, it is apparent in particular from the transcript of the interview that Ms Stevi had with the chief executive officer of the pharmaceutical company Pfizer that the latter stated that, 'through the adversity … [the President of the Commission and he had] started working more and more', that '[the President of the Commission had] sent [him] her phone [number]', that '[they could] exchange if [the Commission had] any concerns' and that '[they had] exchanged text messages, if there was something that [they had] needed to discuss'. Furthermore, the chief executive officer of the pharmaceutical company Pfizer noted that the fact 'that [they were] approachable [and that the President of the Commission could contact him had] provided to [the President of the Commission] a very high comfort level [and] that [she could approach him with her requests]'. Last, the chief executive officer of the pharmaceutical company Pfizer stated that 'what was very different with [the President of the Commission] was that [they had] developed a deep trust [allowing them to have] deep discussions'.

54 In addition, it follows from the interview that Ms Stevi had with the President of the Commission that, in response to a question from Ms Stevi as to whether there had been 'one phone call or … one email from [that] entire period that [had] really stuck in [her] mind as a turning point in how [she had] dealt with [the situation]', the President of the Commission mentioned the existence of contacts with the chief executive officer of the pharmaceutical company Pfizer, whose 'hands-on reaction' she had appreciated.

55 In the third place, the applicants submit that the special report of the European Court of Auditors on the procurement of vaccines by the European Union in the context of the COVID19 pandemic confirms the informal negotiation process that was conducted during the negotiation of vaccine contracts in the context of the COVID19 pandemic, as described by the President of the Commission and the chief executive officer of the pharmaceutical company Pfizer in their interviews with Ms Stevi. In that regard, the applicants note that the Court of Auditors carried out an assessment of the negotiation of those contracts and found that the Commission had not provided any information on the preliminary negotiations for the abovementioned contracts, such as the timing of the talks, the records of the discussions and the details of the terms and conditions agreed.

56 It is apparent in particular from the abovementioned report that, 'during March 2021, the President of the Commission conducted preliminary negotiations for a contract with Pfizer/BioNTech.' Furthermore, the Court of Auditors states in its report that it 'did not receive any information on the preliminary negotiations for the [European Union's] biggest contract'.

57 In the case at hand, it follows from all of that evidence that the applicants submitted relevant and consistent evidence which describes the existence of exchanges – text messages in particular – between the President of the Commission and the chief executive officer of the pharmaceutical company Pfizer, in the context of the procurement of vaccines by the Commission from that undertaking in connection with the COVID19 pandemic.

58 It follows from the foregoing that the applicants have succeeded in rebutting the presumption of non-existence and, consequently, as is apparent from paragraph 48 above, of non-possession of the requested documents.

– *Explanations provided by the Commission*

59 It is important to recall that the effective exercise of the right of access to documents, which stems from the requirement of transparency, requires that the institutions concerned, in so far as possible and in a non-arbitrary and predictable manner, draw up and retain documentation relating to their activities. In other words, it follows from the right of access to the documents held by the institution concerned that that institution is also under an obligation to ensure their retention over time, linked to the obligation of good administration enshrined in Article 41 of the Charter, without prejudice, of course, to other applicable legal conditions, such as those relating to data protection (see, to that effect, judgment of 20 September

2019, *Dehousse* v *Court of Justice of the European Union*, T433/17, EU:T:2019:632, paragraph 47 and the case-law cited). Likewise, the duty to act diligently, which is inherent in the principle of good administration and which requires the EU administration to act with care and caution in its relations with the public, implies that that administration should conduct searches for the documents to which access is requested with all possible care, in order to dispel the doubts which exist and to clarify the situation (see, by analogy, judgment of 4 April 2017, *Ombudsman* v *Staelen*, C337/15 P, EU:C:2017:256, paragraphs 34 and 114).

60 Consequently, as is apparent from paragraph 40 above, where the Commission can no longer rely on the presumption of veracity attaching to its declaration that it is not in possession of the requested documents, it is obliged, in accordance with the principle of transparency and the duty to act diligently which underpin the right of access to documents and require the EU administration to act with care and caution, to provide plausible explanations enabling the applicant for access – as well as the Court – to understand why the requested documents could not be found.

61 In the case at hand, it is apparent from the contested decision that the Commission indicated that it was not in possession of the requested documents despite its having carried out a renewed, thorough search. It noted, in that regard, that Regulation No 1049/2001 could not be relied on in order to oblige an institution to create a document which does not exist. In addition, the Commission referred to point (a) of Article 3 of that regulation, which defines the concept of 'document' within the meaning of that regulation, as well as to Article 7(1) of Commission Decision (EU) 2021/2121 of 6 July 2020 on records management and archives (OJ 2021 L 430, p. 30), which provides that '[Commission] documents shall be registered if they contain important information which is not short-lived or if they may involve action or follow-up by the Commission or one of its departments'. The Commission noted that the text messages would have been registered had they met the criteria set out in Article 7(1) of Decision 2021/2121. It indicated that no documents falling within the scope of the request for access to documents could be identified. The Commission therefore concluded that, since it did not hold any documents corresponding to the request for access, it was not in a position to grant access to the requested documents.

62 In the first place, the Commission confined itself, in the contested decision, to stating that, despite a renewed, thorough search, it had been unable to identify any documents covered by the application for access to documents, without specifying the scope or methodology of that search. It did not specify in the contested decision which types of searches had allegedly been carried out or which document storage locations might have been consulted.

63 In response to a written question put by the Court, the Commission indicated that the statement in the contested decision according to which it had performed 'a new in-depth search' meant that it had carried out a search additional to the one conducted following the initial application. In addition, it noted that searches had first been conducted within the files relating to the negotiation of contracts concerning the procurement of vaccines by it in connection with the COVID19 pandemic, but that, given that those searches had yielded no results, its Secretariat-General had entered into contact with the cabinet of its President. The cabinet had first checked whether the requested documents had been registered in any relevant file before verifying whether such documents might still exist outside the Commission's records management system.

64 Moreover, in an annex to the rejoinder, the Commission submitted a statement from the Head of Cabinet of its President to the effect that '[that cabinet] … [did] not hold any documents which would fall within the scope of the applicant's request for public access to documents'.

65 In that regard, it should be noted that, at the hearing, the Commission stated that it was unable to specify which document storage locations had been examined by the cabinet of its President. Nor did the Commission provide any indication as to which locations outside the records management system had been consulted. Last, the Commission did not specify whether the cabinet of its President had conducted a

search for the requested documents in the mobile phone(s) made available to her or whether those documents had been taken into account in the searches carried out following the initial application and the confirmatory application.

66 When questioned on that point at the hearing, the Commission stated that it was not in a position to provide any new information concerning the searches that had been carried out, or even to specify how they had been carried out and whether the President of the Commission had been asked about the existence of the requested documents.

67 The Commission, however, submits that the methodology of search for the requested documents has no bearing on the question of whether or not it held those documents. Nevertheless, in the absence of a precise explanation of how the requested documents were sought, the institution concerned fails in its duty to provide plausible explanations for the non-possession of documents which existed in the past (see, to that effect, judgment of 28 October 2020, *Dehousse* v *Court of Justice of the European Union*, T857/19, not published, EU:T:2020:513, paragraph 97).

68 Consequently, the explanations given by the Commission both in the contested decision and in the present proceedings as regards the searches carried out to find the requested documents do not suffice to provide a credible explanation of why those documents could not be found.

69 In the second place, the Commission notes in the contested decision that Regulation No 1049/2001 cannot be relied on in order to oblige an institution to create a document which does not exist, thus raising the possibility that those documents do not exist or no longer exist, without, however, specifying the reasons for such non-existence.

70 In reply to a written question from the Court, the Commission stated, with regard to text messages, that that type of communication, unlike emails which were exchanged within the Commission, were not automatically deleted after a reasonable period, but that the individual concerned could delete them manually. The Commission did not, however, indicate whether or not the requested text messages had been deleted.

71 In addition, in reply to another written question addressed to it by the Court, the Commission noted that the mobile phones of its members were mandatorily replaced, for security reasons, after a reasonable period of use. However, the Commission did not confirm whether the mobile phone(s) made available to its President had been replaced since the submission of the application for access to documents or whether they had been replaced between the searches carried out following the initial application and the confirmatory application. When questioned on that point at the hearing, the Commission stated that it assumed that its President's mobile phone had been replaced since the submission of the initial application, as it was a mandatory rule for security reasons. Furthermore, it indicated that it assumed that the mobile phone currently made available to its President was not the same as the one that she had in April 2021, but that it could not confirm whether or not the content of that new mobile phone corresponded to that of the old one.

72 Thus, it remains impossible to know with certainty, first, whether the requested text messages still exist or whether they have been deleted and, if so, whether such a deletion took place deliberately or automatically and, second, whether the mobile phones of the President of the Commission were replaced and, in that case, what has become of those devices, or indeed whether they underwent searches carried out following the initial application and the confirmatory application.

73 In those circumstances, the Commission's explanations, which are based on assumptions, cannot be considered plausible.

74 In the third place, the contested decision refers to Article 7(1) of Decision 2021/2121, followed by the finding that 'text messages would have been registered if they contained important information which is not short-lived or if they may involve action or follow-up by the Commission or one of its departments in accordance with the document registration rules'.

75 It is worth noting that the contested decision does not specify explicitly whether the requested documents are not in the Commission's possession because they were not registered in its records management system. Nor does it state unequivocally whether the requested documents were not registered because they were short-lived and unimportant and did not need to be followed up by the Commission or one of its departments.

76 It is only in its written pleadings and at the hearing that the Commission noted that the requested text messages did not contain important or non-short-lived information or involving follow-up by it or its services, which explains why, in the searches carried out following the initial application and the confirmatory application, no text message covered by Ms Stevi's request for access to documents had been identified.

77 The Commission contends that it is materially impossible to register and retain all of the documents that it draws up and receives in view of the large number of digital files generated by its daily activities and that, therefore, in accordance with its internal policy on record management, documents will be registered and retained only if they contain important information which is not short-lived or if they involve follow-up.

78 In that regard, the Commission stated in support of its line of argument, at the hearing, that, in the case which gave rise to the judgment of 13 November 2024, *Kargins* v *Commission* (T110/23, not published, EU:T:2024:805), the Court had noted that, while the effective exercise of the right of access to documents requires that the institutions concerned, in so far as possible and in a non-arbitrary and predictable manner, retain documentation relating to their activities, internal communications and drafts relating to a document such as a letter could not themselves be of an extraordinary significance or nature justifying registering and retaining them.

79 It is worth reiterating, as is apparent from paragraph 41 above, that the right of access to documents requires that the institutions concerned, in so far as possible and in a non-arbitrary and predictable manner, draw up and retain documentation relating to their activities. Thus, the institutions cannot deprive of all substance the right of access to documents which they hold by failing to register the documentation relating to their activities (see, to that effect, judgment of 25 September 2024, *Herbert Smith Freehills* v *Commission*, T570/22, not published, EU:T:2024:644, paragraph 76).

80 Furthermore, the facts of the present case differ from those of the case which gave rise to the judgment of 13 November 2024, *Kargins* v *Commission* (T110/23, not published, EU:T:2024:805). On the one hand, the applicant in the abovementioned case had not succeeded in rebutting the presumption of non-existence of the requested documents, unlike the applicants in the present case (see paragraph 57 above).

81 On the other hand, in the present case, the Commission has not explained why it reached the conclusion that text messages exchanged between its President and the chief executive officer of the pharmaceutical company Pfizer in the context of the procurement of vaccines by that institution in connection with the COVID19 pandemic had not been deemed to contain important information which was not short-lived or involving follow-up by it or one of its services, concerning a matter relating to the policies, activities and decisions falling within its remit.

82 In any event, even assuming that such messages did not contain important information which was not short-lived or which involved follow-up by it or one of its services justifying their registration – and,

therefore, their retention – the Commission should nevertheless have provided plausible explanations enabling that conclusion to be reached.

83 On that last point, however, it should first be stated that the Commission cannot rely solely on the absence of registration in its system for managing the requested documents to establish that it did not hold those documents, without any other explanation. Second, as is apparent from paragraphs 62 to 73 above, the Commission's explanations as to what has become of documents that existed or were supposed to have existed in the past are based on assumptions or imprecise assertions and cannot, therefore, be regarded as plausible.

– *Conclusion*

84 Consequently, it must be held that the Commission did not provide in the contested decision any plausible explanation as to why it had not been able to find the requested documents. The explanations provided by the Commission in response to the questions put in the context of a measure of organisation of procedure and reiterated during the hearing – assuming that they are relevant to the assessment of the legality of the contested decision – do not satisfy what is required, either, since they do not make it possible to know what has actually become of the requested documents.

85 The presumption of non-existence of the requested documents having been rebutted, it was for the Commission, as is apparent from paragraph 40 above, to provide a plausible explanation as to why it had been unable to find the requested documents, which were said to have existed in the past but no longer existed on the date of the request for access to the documents, or, at the very least, could not be found. As essentially follows from the foregoing examination, however, the Commission merely stated that it did not hold the requested documents. In those circumstances, it is appropriate to conclude that the Commission failed to fulfil its obligations when processing the application for access to documents, as recalled in paragraph 59 above, and thus breached the principle of good administration laid down in Article 41 of the Charter.

86 Accordingly, the third plea in law must be upheld and the contested decision annulled, without its being necessary to rule on the other pleas in the action or on the applicants' request for a measure of inquiry.

Costs

87 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicants.

On those grounds,

THE GENERAL COURT (Grand Chamber)

hereby:

1. **Annuls Decision C(2022) 8371 final of the European Commission of 15 November 2022 adopted pursuant to Article 4 of the Implementing Rules 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;**

2. **Orders the Commission to pay the costs.**

Van der Woude Papasavvas da Silva Passos

Svenningsen	Truchot	Mastroianni
Kanninen	Schwarcz	Nihoul
Martín y Pérez de Nanclares	Hesse	Sampol Pucurull
Stancu	Nõmm	Kecsmár

Delivered in open court in Luxembourg on 14 May 2025.

V. Di Bucci	M. van der Woude
Registrar	President

* Language of the case: English.