JUDGMENT OF THE COURT (Grand Chamber)

21 September 2010 *

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* Language of the case: English.

In Joined Cases C-514/07 P, C-528/07 P and C-532/07 P,

THREE APPEALS under Article 56 of the Statute of the Court of Justice, lodged on 20 November 2007 (C-514/07 P) and on 27 November 2007 (C-528/07 P and C-532/07 P),

Kingdom of Sweden (C-514/07 P), represented by S. Johannesson, A. Falk, K. Wistrand and K. Petkovska, acting as Agents,

appellant,

supported by:

Kingdom of Denmark, represented by B. Weis Fogh, acting as Agent,

Republic of Finland, represented by J. Heliskoski, acting as Agent,

interveners in the appeal,

the other parties to the proceedings being:

Association de la presse internationale ASBL (API), established in Brussels (Belgium), represented by S. Völcker and J. Heithecker, Rechtsanwälte, F. Louis, avocat, and C. O'Daly, Solicitor,

applicant at first instance,

European Commission, represented by C. Docksey, V. Kreuschitz and P. Aalto, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

and

Association de la presse internationale ASBL (API) (C-528/07 P), established in Brussels (Belgium), represented by S. Völcker, Rechtsanwalt, F. Louis, avocat, and C. O'Daly, Solicitor,

appellant,

the other party to the proceedings being:

European Commission, represented by C. Docksey, V. Kreuschitz and P. Aalto, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

supported by:

United Kingdom of Great Britain and Northern Ireland, represented by E. Jenkinson and S. Behzadi-Spencer, acting as Agents, and by J. Coppel, Barrister,

intervener in the appeal,

and

European Commission (C-532/07 P), represented by C. Docksey, V. Kreuschitz and P. Aalto, acting as Agents, with an address for service in Luxembourg,

appellant

supported by:

United Kingdom of Great Britain and Northern Ireland, represented by E. Jenkinson and S. Behzadi-Spencer, acting as Agents, and by J. Coppel, Barrister,

intervener in the appeal,

the other party to the proceedings being:

Association de la presse internationale ASBL (API), established in Brussels (Belgium), represented by S. Völcker, Rechtsanwalt, F. Louis, avocat, and C. O'Daly, Solicitor,

applicant at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano (Rapporteur), J.N. Cunha Rodrigues, K. Lenaerts, R. Silva de Lapuerta and C. Toader, Presidents of Chambers, A. Rosas, K. Schiemann, E. Juhász, T. von Danwitz and A. Arabadjiev, Judges,

Advocate General: M. Poiares Maduro,
Registrars: H. von Holstein, Assistant Registrar, and B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 16 June 2009,

after hearing the Opinion of the Advocate General at the sitting on 1 October 2009,

gives the following

Judgment

1 By their appeals, the Kingdom of Sweden, the Association de la presse internationale ASBL ('API') and the Commission of the European Communities seek the setting aside of the judgment in Case T-36/04 *API* v *Commission* [2007] ECR II-3201 ('the judgment under appeal'), by which the Court of First Instance of the European Communities (now 'the General Court') annulled in part the decision of the Commission of 20 November 2003 ('the contested decision') refusing an application by API for access to pleadings lodged by the Commission before the Court of Justice and the General Court in certain court proceedings.

I — Legal context

2 Recitals 1, 2, 4 and 11 in the preamble 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) state as follows:

'(1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in

which decisions are taken as openly as possible and as closely as possible to the citizen.

(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

…

(4) The purpose of this Regulation is 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 255(2) of the EC Treaty.

…

(11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities.'

3 Article 1(a) of that regulation provides:

'The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as "the institutions") documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents.'

4 Under paragraphs 1 and 3 of Article 2 of that regulation:

'1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

…

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.'

5 Paragraphs 2, 4 and 6 of Article 4 of Regulation No 1049/2001, concerning exceptions to the right of access, provide:

'2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

— …

— court proceedings and legal advice,

— the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

…

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

…

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.'

6 Under Article 7(2) of Regulation No 1049/2001, '[i]n the event of a total or partial refusal [of his request for access], the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.'

7 Article 8(1) of that regulation provides:

'A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. …'

8 Article 12(2) of Regulation No 1049/2001 provides:

'In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.'

II — Background to the dispute

9 By letter of 1 August 2003, API – a non-profit-making organisation of foreign journalists based in Belgium – applied to the Commission, in accordance with Article 6 of Regulation No 1049/2001, for access to the written pleadings lodged by the Commission before the General Court or the Court of Justice in the proceedings relating to the following cases:

— Honeywell v Commission (T-209/01) and General Electric v Commission (T-210/01);

— MyTravel v Commission (T-212/03);

— Airtours v Commission (T-342/99);

— Commission v Austria (C-203/03);

— *Commission* v *United Kingdom* (C-466/98); *Commission* v *Denmark* (C-467/98); *Commission* v *Sweden* (C-468/98); *Commission* v *Finland* (C-469/98); *Commission* v *Belgium* (C-471/98); *Commission* v *Luxembourg* (C-472/98); *Commission* v *Austria* (C-475/98); and *Commission* v *Germany* (C-476/98) (collectively, 'the *Open Skies* cases');

— Köbler (C-224/01); and

— Altmark Trans and Regierungspräsidium Magdeburg (C-280/00).

10 By letter of 17 September 2003, the Commission granted that application only in respect of the pleadings lodged in *Köbler* (C-224/01) and *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00), which concerned references for a preliminary ruling under Article 234 EC.

11 As regards the remainder, the Commission refused API's application and that refusal was confirmed, under Article 8(1) of Regulation No 1049/2001, by the contested decision.

12 The Commission, first of all, refused access to the pleadings lodged in *Honeywell* v *Commission* (T-209/01) and *General Electric* v *Commission* (T-210/01), essentially because those cases were pending at the time when the contested decision was adopted and, accordingly, the exception relating to the protection of court proceedings, provided for under the second indent of Article 4(2) of Regulation No 1049/2001, applied.

13 Next, on the basis of the same exception, the Commission refused access to the pleadings lodged in *Airtours* v *Commission* (T-342/99) because, whilst that case was closed, it was none the less closely connected with *MyTravel* v *Commission* (T-212/03), a case which was still pending when the contested decision was adopted. As regards

the application for access to the pleadings lodged in the latter case, the Commission decided that it was premature, and API did not challenge that finding in its action.

14 In addition, the Commission refused API's application in respect of the *Open Skies* cases, finding that, although those cases were closed when the contested decision was adopted, they all concerned actions under Article 226 EC for failure to fulfil Treaty obligations ('infringement proceedings'), which meant that the exception relating to protection of the purpose of inspections, investigations and audits, provided for under the third indent of Article 4(2) of Regulation No 1049/2001, applied.

15 Lastly, the Commission refused API's application in respect of the documents lodged in *Commission* v *Austria* (C-203/03). It found that the exception relating to the protection of court proceedings applied to those documents, just as it did to those lodged in *Honeywell* v *Commission* (T-209/01) and *General Electric* v *Commission* (T-210/01). Even so, the Commission added that that application had also to be refused on the basis of the third indent of Article 4(2) of Regulation No 1049/2001, in so far as that provision excludes access to any document concerning infringement proceedings where its disclosure would undermine the protection of the purpose of the investigations, that purpose being to reach an amicable settlement of the dispute between the Commission and the Member State concerned.

16 As regards the application of the last line of Article 4(2) of Regulation No 1049/2001, the Commission found that there was no overriding public interest in disclosure, for the purposes of that provision, to justify allowing access to the documents applied for.

III — The judgment under appeal

17 API brought an action, which was upheld only in part by the General Court, for annulment of the contested decision.

18 In paragraphs 51 to 57 of the judgment under appeal, after recalling that the purpose of Regulation No 1049/2001 is to give the fullest possible effect to the right of public access to documents held by the institutions, the General Court stated that that right is none the less subject to certain limitations. In that regard, the regulation provides for exceptions which, as such, must be interpreted strictly and the application of which requires, as a rule, a specific case-by-case assessment of the content of the documents covered by the application for access, and the risk that the interest protected by each of those exceptions might be undermined cannot be purely hypothetical.

19 Nevertheless, the General Court added, in paragraph 58 of that judgment, that such an examination is not required in all circumstances. It may not be necessary where, owing to the particular circumstances of the individual case, it is obvious that access must be granted or that it must be refused. Such a situation could arise, for example, if certain documents are manifestly covered in their entirety by one of the exceptions provided for under that regulation.

20 In application of those principles, the General Court first examined the part of the contested decision concerning the pleadings lodged in *Honeywell* v *Commission* (T-209/01), *General Electric* v *Commission* (T-210/01) and *Commission* v *Austria* (C-203/03), all of which were pending cases.

21 According to the General Court, such documents are manifestly covered in their entirety by the exception relating to the protection of court proceedings and that remains the position until the proceedings in question have reached the hearing stage.

22 The reason for this is that, as was stated in paragraphs 78 to 81 of the judgment under appeal, it is vital to prevent disclosure of those documents before the hearing, in order to prevent the Commission's agents from being subjected to outside pressure, particularly from members of the public. Prevention of disclosure also makes it possible to prevent the criticism and objections which could be levelled against the arguments set out in those pleadings – by specialists and by the press and public opinion in general – from having the effect, in breach of the principle of equality of arms, of imposing an additional task on the Commission. The Commission might consider itself obliged to take account of them in the defence of its position before the court, whereas the parties to the proceedings – which are under no obligation to disclose their pleadings – can defend their interests free from all external influences.

23 Thus, according to the judgment under appeal, it is not until after the hearing that the Commission is required to undertake a specific examination, on a case-by-case basis, of any pleadings to which it has been asked to give access.

24 In that regard, the General Court added, first, in paragraphs 84 and 85 of the judgment under appeal, that that conclusion cannot be called into question by the fact that disclosure of procedural documents is possible in a number of Member States and that it is also provided for, as regards documents lodged with the European Court of Human Rights, in the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, since the Rules of Procedure of the European Union ('EU') Courts do not provide for a third-party right of access to procedural documents lodged at their registries by the parties.

25 Next, in paragraphs 86 to 89 of that judgment, the General Court held that the Commission cannot rely on the Rules of Procedure of the EU Courts, under which the pleadings of the parties are in principle confidential, in order to refuse access to those pleadings after the hearing as well. The Court of Justice has made it clear that those rules do not prevent the parties from disclosing their own written submissions.

26 Lastly, in paragraphs 90 and 91 of the judgment under appeal, the General Court added that non-disclosure of those pleadings before the hearing is justified, moreover, by the need to protect the '*effet utile*' (practical effect) of any decision by the Court hearing the matter to hold the hearing *in camera*.

27 The General Court accordingly held, in paragraph 92 of the judgment under appeal, that the Commission had in no way erred in law by not carrying out a concrete assessment of the pleadings relating to *Honeywell* v *Commission* (T-209/01), *General Electric* v *Commission* (T-210/01) or *Commission* v *Austria* (C-203/03), and that it had not made an error of assessment in finding that there was a public interest in the protection of those pleadings.

28 Lastly, the General Court held, in paragraph 100 of the judgment under appeal, that API had also failed to raise overriding public interests capable of justifying, under Article 4(2) of Regulation No 1049/2001, disclosure of the documents in question.

29 Secondly, as regards the application for access to the pleadings relating to *Airtours* v *Commission* (T-342/99), the General Court held, in paragraphs 105 to 107 of the judgment under appeal, that the Commission's refusal – on the basis of the close connection between that case and *MyTravel* v *Commission* (T-212/03), a case which was pending – was not justified. Case T-342/99 had already been closed by the judgment of the General Court of 6 June 2002 (ECR II-2585), which meant that the content of the pleadings had already been made public, not only at the hearing, but also in the

very text of the judgment. Moreover, the nature of the risk of an adverse effect on the proceedings which are still pending in no way emerges from the mere fact that arguments already submitted before the Court in a closed case are likely also to be debated in a similar case.

30 Thirdly and lastly, the General Court held, in paragraphs 135 to 140 of the judgment under appeal, that the Commission's refusal of API's application for access to the pleadings lodged in the *Open Skies* cases could not be justified on the basis of the exception provided for under the third indent of Article 4(2) of Regulation No 1049/2001 concerning the protection of inspections, investigations and audits. The *Open Skies* cases had already been closed by a judgment, so that no investigation to prove the existence of the infringements in question could be jeopardised by disclosure of the documents requested.

31 Consequently, the General Court annulled the contested decision in so far as it refused access to the pleadings submitted by the Commission before the Court of Justice in the *Open Skies* cases and before the General Court in *Airtours* v *Commission* (T-342/99). Under paragraph 2 of the operative part of the judgment under appeal, the remainder of the action brought by API was dismissed.

IV — Procedure before the Court

32 By orders of the President of the Court of 23 April 2008 and 19 May 2008 respectively, the Kingdom of Denmark and the Republic of Finland were granted leave to intervene in Case C-514/07 P in support of the form of order sought by the Kingdom of Sweden.

33 By order of the President of the Court of 23 April 2008, the United Kingdom of Great Britain and Northern Ireland was granted leave to intervene in Cases C-528/07 P and C-532/07 P in support of the forms of order sought by the Commission.

34 Lastly, by order of 7 January 2009, the President of the Court decided to join Cases C-514/07 P, C-528/07 P and C-532/07 P for the purposes of the oral procedure and of the judgment.

V — Forms of order sought

A — *In Sweden and API v Commission (C-514/07 P)*

35 The Kingdom of Sweden claims that the Court should set aside paragraph 2 of the operative part of the judgment under appeal; annul the contested decision in its entirety; and order the Commission to pay the costs.

36 API claims that the Court should:

— set aside the judgment under appeal in so far as the General Court confirmed that the Commission has a right not to disclose its pleadings in cases in which a hearing has yet to be held;

— annul the parts of the contested decision which were not previously annulled by the judgment under appeal or, in the alternative, refer the case back to the General Court for adjudication in the light of the judgment of the Court of Justice; and

— order the Commission to pay the costs incurred by API in responding to the appeal.

37 The Kingdom of Denmark claims that the Court should set aside paragraph 2 of the operative part of the judgment under appeal and annul the contested decision, in so far as 'the General Court erred in law by failing to impose an unconditional requirement that a specific examination be carried out of each document in respect of which access is requested in order to determine whether the exception provided for under Article 4(2) [of Regulation No 1049/2001] is applicable'.

38 The Republic of Finland requested the Court, at the hearing, to set aside paragraph 2 of the operative part of the judgment under appeal.

39 The Commission contends that the Court should:

— confirm the judgment under appeal in part in so far as it upheld the contested decision refusing access to the documents requested by API;

— order API to pay the costs incurred by the Commission both at first instance and in the appeal proceedings; and

— order the Kingdom of Sweden to pay the costs incurred by the Commission in the appeal proceedings.

B — *In API v Commission (C-528/07 P)*

40 API claims that the Court should:

— set aside the judgment under appeal in so far as the General Court confirmed that the Commission has a right not to disclose its pleadings in cases in which a hearing has yet to be held;

— annul the parts of the contested decision which were not previously annulled by the judgment under appeal or, in the alternative, refer the case back to the General Court for adjudication in the light of the judgment of the Court of Justice; and

— order the Commission to pay the costs.

41 The Commission contends that the Court should:

— confirm the judgment under appeal in part in so far as it upholds the contested decision refusing access to the documents requested by API;

— order API to pay the costs incurred by the Commission both at first instance and in the appeal proceedings; and

— order the Kingdom of Sweden to pay the costs incurred by the Commission in the appeal proceedings.

42 The United Kingdom contends that the Court should dismiss the appeal.

C — *In Commission v API (C-532/07 P)*

43 The Commission claims that the Court should:

— set aside the judgment under appeal in part in so far as it annulled the contested decision refusing access to documents requested by API as from the date of the hearing, concerning all actions save infringement proceedings;

— give final judgment in the matters that are the subject of this appeal; and

— order API to pay the costs incurred by the Commission in relation to Case T-36/04 and to the present appeal.

44 API contends that the Court should:

— declare part of the Commission's first plea inadmissible in so far as it does not indicate precisely the contested elements of the judgment under appeal which the Commission seeks to have set aside;

— declare the Commission's second plea inadmissible;

— in the alternative, dismiss the appeal in its entirety; and

— order the Commission to pay the costs incurred by API in responding to the appeal.

45 The United Kingdom claims that the Court should:

— state that the General Court erred in law in so far as it held, in paragraph 82 of the judgment under appeal, that, after the hearing has been held, the Commission is under an obligation to carry out a case-by-case assessment of each pleading in order to determine whether the exception relating to court proceedings, as provided for under the second indent of Article 4(2) of Regulation No 1049/2001, applies; and

— set aside the judgment under appeal to the extent that the General Court annulled the contested decision in so far as it refused API's application for access to the pleadings lodged by the Commission before the Court in the *Open Skies* cases.

VI — The appeals

46 It is appropriate first to consider the appeal in Case C-532/07 P and then to consider together the appeals in Cases C-514/07 P and C-528/07 P.

A — *The appeal brought by the Commission (Case C-532/07 P)*

47 In support of its appeal, the Commission puts forward three pleas in law, alleging infringements of the second and third indents of Article 4(2) of Regulation No 1049/2001.

1. The first plea in law

48 By its first plea, the Commission submits that the General Court erred in law by interpreting the exception relating to the protection of court proceedings as meaning that the institutions must examine on a case-by-case basis applications for access to pleadings lodged in proceedings other than infringement proceedings, and that they must do so as from the date of the hearing.

(a) Arguments of the parties

49 In support of that plea, the Commission submits, first, that such an interpretation reveals a contradiction in the judgment under appeal. After recognising the existence of a general exception to the right of access, the General Court restricts the application of that exception to the period preceding the hearing, wrongly attributing a decisive importance to that stage in the procedure. In reality, the interests of the proper course of justice, as well as the need to avoid, as regards representatives of the Commission, any external influence – that is to say, the two considerations on which the General Court based its finding that the exception in question applies until the hearing – justify that exception being applicable throughout the proceedings, hence until delivery of the judgment.

50 Secondly, according to the Commission, the General Court did not take into account the interests of the sound administration of justice or the interests of the persons mentioned in the procedure other than the principal parties or interveners. In particular, it failed to take account of the practice developed by the Community Courts, according to which they may, of their own motion, omit the names of a party or of other persons who appear in the procedure, or other information relating to the case which would normally have to be published.

51 Thirdly, in the view of the Commission, the General Court failed, in particular, to have regard not only to Article 255 EC, which does not refer to the Court of Justice, but also to the relevant provisions of the Rules of Procedure of the Community Courts, from which it is apparent that the public does not have access to the documents in the case-file.

52 Fourthly, the General Court did not take into account the interests of parties to the procedure other than the Commission. Given the fact that, particularly in direct actions, the pleadings of one party necessarily refer to the content of the pleadings of the other parties, to which they are a response, if the Commission were under an obligation to disclose the content of its written submissions, that would inevitably have an impact on the right of the other party to control the access, thus opened, to its own pleadings and arguments.

53 Fifthly, it is apparent from the *travaux préparatoires* for Regulation No 1049/2001 that the Community legislature did not wish totally to exclude from the scope of that regulation documents generated and held by the institutions solely for the purposes of court proceedings.

54 Sixthly and lastly, the Commission maintains that the approach ultimately adopted by the General Court runs counter to the case-law of the Court of Justice and, in particular, to Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal* v *Commission* [2000] ECR I-1, in which the Court held that, where the Commission has received an application for access to documents, it may find it necessary to consult the national court prior to any disclosure of those documents, since the above approach would mean that an institution must take a decision alone as to the disclosure of all documents relating to a pending case which are submitted to the Community Courts or generated by them. That would be incompatible with the institution's obligation to respect the rights of the other parties to defend their interests before the Community Courts, while at the same time complying with the Rules of Procedure of those Courts.

55 In support of the Commission's submissions, the United Kingdom adds, first of all, that the General Court ruled *ultra petita* when it held, in paragraph 82 of the judgment under appeal, that, 'after the hearing has been held, the Commission is under an obligation to carry out a concrete assessment of each document requested in order to ascertain, having regard to the specific content of that document, whether it may be disclosed or whether its disclosure would undermine the court proceedings to which

it relates'. It is apparent from paragraph 75 of that judgment that, by its action for annulment, API did not raise, for assessment by the General Court, the question of applications for access to pleadings submitted between the date of the hearing and the delivery of the judgment, given that, in each of the three cases in question – that is to say, *Honeywell* v *Commission* (T-209/01), *General Electric* v *Commission* (T-210/01) and *Commission* v *Austria* (C-203/03) – the hearing had not yet been held when API requested access to the Commission's pleadings.

56 The United Kingdom maintains, next, that the institutions must be able to rely on general presumptions applying to categories of documents and that the disclosure of pleadings is inherently different from the disclosure of an internal administrative document. Moreover, the truth of this is borne out by the provision made by the Community legislature with regard to documents relating to court proceedings, the special nature of which is reflected in the exception provided for under the second indent of Article 4(2) of Regulation No 1049/2001. Lastly, according to the United Kingdom, it is inappropriate and contrary to the sound administration of justice for court proceedings to be subject to external influences.

57 API responds to each of the arguments raised by the Commission in support of the first plea.

58 First, API maintains that any external influence on the representatives of the Commission is merely a consequence of the public nature of court proceedings and cannot provide justification for the approach adopted by the General Court. In any event, according to API, the argument based on that risk is incompatible with the need to interpret restrictively the exceptions to the right of access to documents and the approach adopted by the General Court is contrary to the principle of the widest possible access to documents of the institutions, in view of the fact that, given their incomplete nature, neither the Report for the Hearing nor the hearing itself is sufficient to ensure transparency.

59 Secondly, API maintains that neither the practice of the Court of Justice of omitting the names of applicants, or other persons mentioned in the procedure, nor the formal expression of that practice in Article 44(4) of the Rules of Procedure of the Civil Service Tribunal can justify a derogation from the obligations under Regulation No 1049/2001 since, in terms of the authority of its rules, the regulation is of a higher rank.

60 Thirdly, the documents to which API wishes to have access clearly fall within the scope of Article 255 EC, since they are documents held by the Commission and of which it is the author. In other words, API does not seek access to documents held by the Court of Justice, to which Article 255 EC does not refer anyway. In any event, the Commission's argument in that regard is, according to API, inadmissible, since it does not identify the elements of the judgment under appeal which the Commission is seeking to have set aside.

61 Fourthly, not only has the Commission failed to identify the third-party interests which could be harmed by the subsequent disclosure of the documents in question, but it does not take into account, in particular, either the possibility of granting partial access to those documents or the procedure expressly laid down in Article 4(4) of Regulation No 1049/2001 for the purposes of safeguarding the interests of third parties.

62 Fifthly, API agrees with the Commission that documents held by the institutions for the sole purpose of court proceedings are not excluded from the scope of Regulation No 1049/2001. In particular, with regard to the principle of equality of arms, API submits that a party to a dispute is not, in reality, placed at a disadvantage by the disclosure of its pleadings and that, to the extent that there is any asymmetry between the parties, this is merely the inevitable and necessary consequence of the very existence of Regulation No 1049/2001. In any event, partial access to the pleadings is always possible, and preferable to the outright refusal of such access.

63 Sixthly and lastly, the judgment in *Netherlands and van der Wal* v *Commission*, to which the Commission refers, is irrelevant in the present case because it is not a *locus classicus* enabling a blanket ban to be imposed on access to a particular category of documents.

(b) Findings of the Court

64 It is appropriate to reject, at the outset, the complaint put forward by the United Kingdom to the effect that the General Court ruled *ultra petita* when it held, in paragraph 82 of the judgment under appeal, that, 'after the hearing has been held, the Commission is under an obligation to carry out a concrete assessment of each document requested in order to ascertain, having regard to the specific content of that document, whether it may be disclosed or whether its disclosure would undermine the court proceedings to which it relates'.

65 In that regard, it should be borne in mind that, although the Court must rule only on the heads of claim put forward by the parties, whose role it is to define the framework of the dispute, the Court cannot confine itself to the arguments put forward by the parties in support of their claims, or it might be forced, in some circumstances, to base its decisions on erroneous legal considerations (order of 27 September 2004 in Case C-470/02 P *UER* v *M6 and Others*, paragraph 69).

66 In the case currently under consideration, it was solely on examining the arguments put forward by API in support of its plea at first instance, alleging infringement of the second indent of Article 4(2) of Regulation No 1049/2001, that the General Court arrived at the finding set out in paragraph 82 of the judgment under appeal. It is thus clear that that paragraph does no more than expand upon the reasoning which led the General Court to reject the plea raised before it by API.

67 However, as the Court of Justice has consistently held, such reasoning by extension does not, of itself, support a finding that the General Court went outside the framework of the dispute and ruled *ultra petita* (see, to that effect, Case C-252/96 P *Parliament* v *Gutiérrez de Quijano y Lloréns* [1998] ECR I-7421, paragraph 34, and the order in *UER* v *M6 and Others*, paragraph 74).

68 That said, it should be borne in mind in relation to the arguments raised by the Commission in support of the present plea, that, in accordance with recital 1 in the preamble to Regulation No 1049/2001, that regulation reflects the intention expressed in the second paragraph of Article 1 EU – inserted by the Treaty of Amsterdam – of marking a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. As is stated in recital 2 in the preamble to Regulation No 1049/2001, the right of public access to documents of the institutions is related to the democratic nature of those institutions (Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraph 34).

69 To that end, Regulation No 1049/2001 is intended, as is apparent from recital 4 in its preamble and from Article 1, to give the fullest possible effect to the right of public access to documents of the institutions (see Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 61; Case C-64/05 P *Sweden* v *Commission* [2007] ECR I-11389, paragraph 53; *Sweden and Turco* v *Council*, paragraph 33; and Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I--5885, paragraph 51).

70 However, that right is none the less subject to certain limitations based on grounds of public or private interest (*Sison* v *Council*, paragraph 62, and *Commission* v *Technische Glaswerke Ilmenau*, paragraph 53).

71 More specifically, and in reflection of recital 11 in the preamble thereto, Article 4 of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision.

72 Thus, if the Commission decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon which it is relying (see, to that effect, *Sweden and Turco* v *Council*, paragraph 49, and *Commission* v *Technische Glaswerke Ilmenau*, paragraph 53).

73 Of course, since they derogate from the principle of the widest possible public access to documents, those exceptions must be interpreted and applied strictly (*Sison* v *Council*, paragraph 63; *Sweden* v *Commission*, paragraph 66; and *Sweden and Turco* v *Council*, paragraph 36).

74 Nevertheless, contrary to the assertions made by API, it is clear from the case-law of the Court of Justice that the institution concerned may base its decisions in that regard on general presumptions which apply to certain categories of document, as considerations of a generally similar kind are likely to apply to applications for disclosure which relate to documents of the same nature (see *Sweden and Turco* v *Council*, paragraph 50, and *Commission* v *Technische Glaswerke Ilmenau*, paragraph 54).

75 As it is, in the present case, none of the parties has disputed the conclusion reached by the General Court in paragraph 75 of the judgment under appeal that the pleadings to which access was requested had been drawn up by the Commission in its capacity as a party in three direct actions which were still pending on the date of adoption of the

contested decision and that, for that reason, each of those sets of pleadings could be regarded as falling within the same category of documents.

76 Accordingly, it must be determined whether general considerations supported a finding that the Commission was entitled to base its decision on the presumption that disclosure of those pleadings would undermine the court proceedings and that, in so doing, it was not under an obligation to carry out a specific assessment of the content of each of those documents.

77 First and foremost in that connection, it should be noted that pleadings lodged before the Court of Justice in court proceedings are wholly specific since they are inherently more a part of the judicial activities of the Court than of the administrative activities of the Commission, those latter activities not requiring, moreover, the same breadth of access to documents as the legislative activities of an EU institution (see, to that effect, *Commission* v *Technische Glaswerke Ilmenau*, paragraph 60).

78 Those pleadings are drafted exclusively for the purposes of the court proceedings, in which they play the key role. It is by means of the application initiating proceedings that the applicant defines the parameters of the dispute and it is, in particular, during the written procedure – the oral procedure not being obligatory – that the parties provide the Court with the information on the basis of which it is to adjudicate.

79 It is clear, both from the wording of the relevant provisions of the Treaties and from the broad logic of Regulation No 1049/2001 and the objectives of the relevant EU rules, that judicial activities are as such excluded from the scope, established by those rules, of the right of access to documents.

80 As regards, first, the relevant provisions of the Treaties, it is quite clear from the wording of Article 255 EC that the Court is not subject to the obligations of transparency laid down in that provision.

81 The purpose of that exclusion emerges even more clearly from Article 15 TFEU, which replaced Article 255 EC and which, while extending the scope of the principle of transparency, specifies – in the fourth subparagraph of paragraph 3 thereof – that the Court of Justice is to be subject to paragraph 3 only when exercising its administrative tasks.

82 It follows that the fact that the Court of Justice is not among the institutions which, in accordance with Article 255 EC, are subject to those obligations is justified precisely because of the nature of the judicial responsibilities which it is called upon to discharge under Article 220 EC.

83 For that matter, that interpretation is also borne out by the broad logic of Regulation No 1049/2001, the legal basis for which is Article 255 EC itself. Article 1(a) of Regulation No 1049/2001, which defines the scope of that regulation, makes no reference to the Court and, by dint of that omission, excludes it from the institutions subject to the obligations of transparency which it lays down, while Article 4 of that regulation devotes one of the exceptions to the right of access to the documents of the institutions precisely to the protection of court proceedings.

84 Thus, it follows both from Article 255 EC and from Regulation No 1049/2001 that the limitations placed on the application of the principle of transparency in relation to judicial activities pursue the same objective: that is to say, they seek to ensure that exercise of the right of access to the documents of the institutions does not undermine the protection of court proceedings.

85 In that regard, it should be noted that the protection of court proceedings implies, in particular, that compliance with the principles of equality of arms and the sound administration of justice must be ensured.

86 With regard, first, to equality of arms, it should be noted that – as the General Court pointed out, in substance, in paragraph 78 of the judgment under appeal – if the content of the Commission's pleadings were to be open to public debate, there would be a danger that the criticism levelled against them, whatever its actual legal significance, might influence the position defended by the Commission before the EU Courts.

87 In addition, such a situation could well upset the vital balance between the parties to a dispute before those Courts – the state of balance which is at the basis of the principle of equality of arms – since only the institution concerned by an application for access to its documents, and not all the parties to the proceedings, would be bound by the obligation of disclosure.

88 Furthermore, it should be borne in mind in that regard that the principle of equality of arms – together with, among others, the principle of *audi alteram partem* – is no more than a corollary of the very concept of a fair hearing (see, by analogy, Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 31; Case C-89/08 P *Commission* v *Ireland and Others* [2009] ECR I-11245, paragraph 50; and Case C-197/09 RX-II *Réexamen M* v *EMEA* [2009] ECR I-12033, paragraphs 39 and 40).

89 As the Court has held, the principle of *audi alteram partem* must apply to all parties to proceedings before the EU Courts, whatever their legal status. It follows that the EU institutions may also rely on that principle when they are parties to such proceedings (see, to that effect, *Commission* v *Ireland and Others*, paragraph 53).

90 API is therefore incorrect in arguing that, being a public institution, the Commission cannot rely on a right to equality of arms because that right is available only to individuals.

91 Admittedly, as API contends, it is Regulation No 1049/2001 itself which imposes obligations of transparency only on the institutions which it lists. Nevertheless, the fact that such obligations are imposed only on the institutions concerned cannot, in the context of pending court proceedings, lead the procedural position of those institutions to be undermined vis-à-vis the principle of equality of arms.

92 As regards, secondly, the sound administration of justice, the exclusion of judicial activities from the scope of the right of access to documents, without any distinction being drawn between the various procedural stages, is justified in the light of the need to ensure that, throughout the court proceedings, the exchange of argument by the parties and the deliberations of the Court in the case before it take place in an atmosphere of total serenity.

93 Disclosure of the pleadings in question would have the effect of exposing judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings.

94 It is therefore appropriate to allow a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings, for the purposes of the second indent of Article 4(2) of Regulation No 1049/2001, while those proceedings remain pending.

95 Such disclosure would flout the special nature of that category of documents and would be tantamount to making a significant part of the court proceedings subject to the principle of transparency. As a consequence, the effectiveness of the exclusion of the Court of Justice from the institutions to which the principle of transparency applies, in accordance with Article 255 EC, would be largely frustrated.

96 In addition, such a presumption is also justified in the light of the Statute of the Court of Justice of the European Union and the Rules of Procedure of the EU Courts (see, by analogy, *Commission* v *Technische Glaswerke Ilmenau*, paragraph 55).

97 Although the Statute of the Court of Justice provides that the hearing in court is to be public (Article 31), it restricts those entitled to receive communication of procedural documents to the parties and to the institutions whose decisions are in dispute (Article 20, second paragraph).

98 Similarly, the Rules of Procedure of the EU Courts provide for procedural documents to be served only on the parties to the proceedings. In particular, Article 39 of the Rules of Procedure of the Court of Justice, Article 45 of the Rules of Procedure of the General Court and Article 37(1) of the Rules of Procedure of the Civil Service Tribunal provide that the application is to be served only on the defendant.

99 It is clear, therefore, that neither the Statute of the Court of Justice nor the above Rules of Procedure provide for any third-party right of access to pleadings submitted to the Court in court proceedings.

100 Account must be taken of that fact for the purposes of interpreting the exception provided for under the second indent of Article 4(2) of Regulation No 1049/2001, for if third parties were able, on the basis of Regulation No 1049/2001, to obtain access to those pleadings, the system of procedural rules governing the court proceedings before the EU Courts would be called into question (see, by analogy, *Commission* v *Technische Glaswerke Ilmenau*, paragraph 58).

101 In that regard, it should be noted that API is beside the point in arguing that other national legal systems have adopted different approaches, by providing, inter alia, that courts may permit access to pleadings lodged before them. As the Commission maintains, and as the General Court rightly held in paragraph 85 of the judgment under appeal, the Rules of Procedure of the EU Courts make no provision for a third-party right of access to procedural documents lodged at their registries by the parties.

102 On the contrary, it is precisely the existence of those Rules of Procedure, by which matters concerning the pleadings in question remain governed, and the fact that not only do they make no provision for a third-party right of access to the case-file but, in accordance with Article 31 of the Statute of the Court of Justice, they actually do provide that a hearing may be heard *in camera* or that certain information, such as the names of parties, may be kept confidential, which lend authority to the presumption that disclosure of those pleadings would undermine court proceedings (see, by analogy, *Commission* v *Technische Glaswerke Ilmenau*, paragraphs 56 to 58).

103 It is true that, as the Court has stated, such a general presumption does not exclude the right of an interested party to demonstrate that a given document, disclosure of which has been applied for, is not covered by that presumption (*Commission* v *Technische Glaswerke Ilmenau*, paragraph 62). The fact remains that, in the present case, it does not appear from the judgment under appeal that API availed itself of that right.

104 In the light of all the above considerations, it must be held that the General Court erred in law in holding that, in the absence of any evidence capable of rebutting that presumption, the Commission is under an obligation, after the hearing has taken place, to carry out a concrete assessment of each document requested in order to determine whether, given the specific content of that document, its disclosure would undermine the court proceedings to which it relates.

105 Nevertheless, it should be noted that – as was stated in paragraph 66 above – the considerations set out in paragraph 82 of the judgment under appeal are no more than an extension of the reasoning which led the General Court to reject the plea raised before it by API. However, the operative part of the judgment under appeal is in no way dependent upon that paragraph.

106 It follows that the setting aside of that part of the grounds of the judgment under appeal does not entail the setting aside of the operative part.

2. The second plea in law

107 By its second plea, the Commission, supported by the United Kingdom, submits that the General Court erred in law by holding that the exception relating to protection of the purpose of inspections, investigations and audits, provided for under the third indent of Article 4(2) of Regulation No 1049/2001, did not permit the Commission, after delivery of the judgment in the infringement proceedings under Article 226 EC, to refuse access to the pleadings lodged in those proceedings without first carrying out a specific examination of the content of those documents.

(a) Arguments of the parties

108 According to the Commission, the General Court ignored the fact that enforcement procedures may continue after the judgment delivered in infringement proceedings and may lead not only to a further action under Article 228 EC but also to further discussions between the Commission and the Member State found to be in default, with a view to bringing the latter into conformity with EU law.

109 In that regard, the Commission submits that the arguments of the General Court to the effect that an action under Article 228 EC would have a different subject-matter and would depend on future and uncertain events are formalistic and take no account of the reality of the dialogue between the Commission and the Member States.

110 The Commission adds that, when it refused API access to the pleadings in question in the *Open Skies* cases, the Commission was confronted with an intractable question of principle, in relation to which it was obliged to represent the European Community in negotiations which it had to hold simultaneously with the Member States and with non-member States. The Commission explained at the hearing before the General Court that disclosure of its pleadings after delivery of the judgment in those cases would have endangered those negotiations, which concerned the conclusion of a new international agreement on air transport.

111 According to API, however, the appeal explains neither the reasons for which the 'reality of the dialogue' with the Member States would be compromised if the Commission disclosed its pleadings after the Court has given judgment, nor why its 'role as guardian of the Treaties' would be undermined by that disclosure. Unless the Commission can point to particular circumstances which justify the application of one of the exceptions to disclosure, the pleadings should be disclosed. In any event, that

argument is inadmissible, since it merely repeats arguments which have already been submitted before the General Court.

(b) Findings of the Court

112 By its second plea, which is in two parts, the Commission alleges, in substance, that the General Court erred in holding that documents relating to investigations carried out by the Commission in the context of infringement proceedings under Article 226 EC are no longer covered by the exception provided for under the third indent of Article 4(2) of Regulation No 1049/2001 after the Court of Justice has delivered its judgment closing those proceedings.

113 By the first part of that plea, the Commission submits that the reasons on the basis of which the General Court held, in paragraph 142 of the judgment under appeal, that the Commission had made an error of assessment by refusing access to the documents concerning the *Open Skies* cases are formalistic and take no account of the reality of the dialogue between the Commission and the Member States.

114 In essence, the Commission alleges that the General Court misconstrued the legal relationship between Article 226 EC and Article 228 EC, in that it underestimated the importance of the link between the procedures provided for in those two provisions in the context of two connected cases which follow one upon the other and which relate to the same infringement on the part of the same Member State.

115 Contrary to API's contention, the Commission does not merely repeat the arguments raised at first instance, but seeks to challenge the legal assessment made by the General Court.

116 Where the appellant challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose (Case C-234/02 P *Ombudsman* v *Lamberts* [2004] ECR I-2803, paragraph 75).

117 It follows that the first part of the second plea is admissible.

118 With regard to the substance, it should be noted that although, admittedly, the procedures provided for under Articles 226 EC and 228 EC have the same purpose, that is to say, to ensure the effective application of EU law, the fact remains that they constitute two distinct procedures, each with its own subject-matter.

119 The procedure established under Article 226 EC is designed to obtain a declaration that the conduct of a Member State is in breach of EU law and to terminate that conduct (see Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 27, and Case C-456/05 *Commission* v *Germany* [2007] ECR I-10517, paragraph 25), while the procedure provided for under Article 228 EC has a much narrower ambit, being designed only to induce a defaulting Member State to comply with a judgment establishing a breach of obligations (Case C-304/02 *Commission* v *France* [2005] ECR I-6263, paragraph 80).

120 It follows that, once the Court of Justice has held, by a judgment delivered on the basis of Article 226 EC, that a Member State has failed to fulfil its obligations, the

continuation of negotiations between that Member State and the Commission is no longer designed to establish the existence of the infringement – which is precisely what the Court of Justice has found – but to determine whether the necessary conditions for the bringing of an action under Article 228 EC are met.

121 In addition, as regards the possibility that the infringement proceedings may lead to an amicable settlement, it is clear that, once the infringement has been found by judgment of the Court of Justice delivered on the basis of Article 226 EC, an amicable settlement is no longer possible in the case of that infringement.

122 Accordingly, it must be held that the General Court did not err in law by holding that it cannot be presumed that disclosure of pleadings lodged in a procedure which ultimately led to the delivery of a judgment on the basis of Article 226 EC undermines investigations which could lead to proceedings being brought under Article 228 EC.

123 In the light of the above, the first part of the second plea must be rejected as unfounded.

124 By the second part of this plea, the Commission submits that disclosure of the documents relating to the *Open Skies* cases, even after the Court of Justice has given judgment in those cases, would have endangered the negotiations for a new international agreement on air transport which, at the time when the contested decision was adopted, the Commission was conducting in the name of the Community with the Member States and with non-member States.

125 It is sufficient to note in that regard that, even though the Commission submits in its appeal that it had emphasised that fact at the hearing before the General Court, it is

in no way apparent from the judgment under appeal – which the Commission has not challenged on that point – that the Commission had raised, either in the contested decision or before the General Court, the need to keep the documents in question confidential so as not to compromise the negotiations in which it was engaged with a view to concluding that agreement.

126 As it is, in accordance with settled case-law, to allow a party to put forward for the first time before the Court of Justice a plea and arguments which it did not raise before the General Court would be to authorise 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. In an appeal, the jurisdiction of the Court of Justice is thus confined to review of the findings of law on the pleas argued before the General Court (see Case C-266/97 P *VBA* v *VGB and Others* [2000] ECR I-2135, paragraph 79; and Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 114; and, to that effect, the order of 21 January 2010 in Case C-150/09 P *Iride and Iride Energia* v *Commission*, paragraphs 73 and 74).

127 Since, accordingly, this part of the plea must be held inadmissible, the second plea must be rejected as, in part, unfounded and, in part, inadmissible.

3. The third plea in law

(a) Arguments of the parties

128 By its third plea, the Commission submits that the General Court erred in law by interpreting the exception relating to the protection of court proceedings as meaning

that the institutions must examine, on a case-by-case basis, even applications for access to pleadings lodged in closed cases where those cases are connected to proceedings which are still pending. Since the General Court decided that the Commission could refuse disclosure of its pleadings so long as they had not been discussed at the hearing before the Court, it should have applied the same reasoning to applications for the disclosure of documents lodged in cases which were closed, but linked to cases still pending. That is justified a fortiori where the parties to the closed proceedings and those to the connected proceedings, which remain pending, are not the same.

129 In that regard, API contends that total or partial access to pleadings lodged in a closed case does not affect the Commission's ability to defend itself in a later case which is still pending, even if those two cases are connected.

(b) Findings of the Court

130 It must be noted from the outset that, although, for the reasons set out in paragraphs 68 to 104 above, the disclosure of pleadings lodged in pending court proceedings is presumed to undermine the protection of those proceedings, because of the fact that the pleadings constitute the basis on which the Court carries out its judicial activities, that is not the case where the proceedings in question have been closed by a decision of the Court.

131 In the latter case, there are no longer grounds for presuming that disclosure of the pleadings would undermine the judicial activities of the Court since those activities come to an end with the closure of the proceedings.

132 Admittedly, the possibility cannot be ruled out that – as the Commission alleges – disclosure of pleadings relating to court proceedings which are closed but connected to other proceedings which remain pending may create a risk that the later proceedings might be undermined, especially where the parties to the pending case are not the same as those to the case which has been closed. In such a situation, if the Commission were to use the same arguments in support of its legal position in both sets of proceedings, disclosure of its arguments in the pending proceedings could give rise to the risk that they might be undermined.

133 Nevertheless, such a risk depends on a number of factors, such as the degree of similarity between the arguments put forward in the two cases. If the Commission's pleadings are repeated only in part, partial disclosure could be sufficient to prevent any risk of undermining the pending proceedings.

134 Accordingly, only a specific examination of the documents to which access is requested, undertaken in accordance with the criteria referred to in paragraph 72 above, can enable the Commission to establish whether their disclosure may be refused on the basis of the second indent of Article 4(2) of Regulation No 1049/2001.

135 It follows that the General Court was fully entitled to hold, in substance, that the risk that a protected interest might be undermined – a condition for the application of that provision – cannot be presumed on the basis of a mere link between the two sets of court proceedings concerned.

136 Accordingly, since the third plea cannot be upheld, the Commission's appeal in Case C-532/07 P must be dismissed in its entirety.

B — *The appeals lodged by the Kingdom of Sweden (Case C-514/07 P) and by API (Case C-528/07 P)*

137 Whereas Case C-532/07 P concerns, on the one hand, access to pleadings lodged in court proceedings in which, at the time of the Commission's decision, a hearing has already been held and, on the other, access to pleadings lodged in closed court proceedings which are either infringement proceedings following which the defendant Member State has not yet complied with EU law, or which are closely connected to other proceedings, which remain pending, Cases C-514/07 P and C-528/07 P concern access to pleadings lodged in court proceedings in which, at the time of the Commission's decision, a hearing has not yet taken place.

138 The Kingdom of Sweden – supported by the Kingdom of Denmark and the Republic of Finland – and API base their respective appeals on the same two pleas in law, alleging infringement of the second indent of Article 4(2) of Regulation No 1049/2001 and infringement of the last line of Article 4(2) of that regulation.

1. The first plea in law

(a) Arguments of the parties

139 By this plea, the Kingdom of Sweden and API submit, in substance, that the General Court misinterpreted the second indent of Article 4(2) of Regulation No 1049/2001,

providing for the exception relating to the protection of court proceedings, inasmuch as it held that, where an application is made for access to pleadings lodged by the Commission before the EU Courts in court proceedings which have not yet reached the stage of the hearing, the Commission is entitled to base its refusal of disclosure on that exception, without being under an obligation to undertake a specific examination of the content of each document to which access has been requested.

140 In support of that plea, the Kingdom of Sweden and API submit, first of all, that the General Court interpreted broadly an exception which, as such, must always be interpreted narrowly. The Swedish Government adds that such an interpretation is also incompatible with the objective of Regulation No 1049/2001, which is to ensure the widest possible public access to documents held by the EU institutions.

141 The Kingdom of Denmark additionally submits that the above argument put forward by the Swedish Government is especially persuasive in the light of *Sweden and Turco* v *Council*, in which the Court of Justice, setting out the criteria with which the institutions must comply when refusing access to documents on the basis of the exceptions provided for under Article 4 of Regulation No 1049/2001, stated in paragraph 35 that a specific examination of the documents to which access has been requested is always necessary.

142 Next, according to API, the General Court was wrong in holding that access to the Commission's pleadings gives rise to the risk that its agents – and not the representatives of the other parties to the proceedings – might be exposed to external 'criticism and objections'. In any event, the Commission – contrary to the statement made in paragraph 80 of the judgment under appeal – has no right to defend its interests 'independently of any external influence'. Furthermore, the General Court disregarded the importance of the fact that other legal systems permit access, at any stage of the proceedings, to pleadings lodged before their courts. Lastly, the General Court was

wrong in referring to the need to protect the *effet utile* (practical effect) of any decision to hold the hearing *in camera*.

143 In response to those arguments, the Commission contends that Regulation No 1049/2001 does not provide for absolute transparency and that, accordingly, it is not contrary to the purpose of that regulation, which is to give the fullest possible effect to the right of public access, to pay due regard to general principles of law such as the protection of the proper conduct of court proceedings and the sound administration of justice.

144 According to the Commission, supported on this point by the United Kingdom, it is also contrary to that principle to require an institution to carry out a concrete and individual examination of each document to which it has been requested to provide access where it is clear that that document falls within the scope of one of the exceptions provided for under Regulation No 1049/2001, by virtue, in particular, of the nature of that document or the particular context in which it has been drawn up.

(b) Findings of the Court

145 By this plea, the Kingdom of Sweden and API allege that the General Court erred in law in interpreting the second indent of Article 4(2) of Regulation No 1049/2001 as meaning that the institutions are entitled to refuse, without first undertaking a specific examination of each case, access to pleadings lodged in pending court proceedings which have not yet reached the hearing stage.

146 It is sufficient to note, in that regard, that, for the reasons set out in paragraphs 68 to 104 above, the Commission may base its response on the presumption that disclosure of pleadings lodged in pending court proceedings undermines those proceedings for the purposes of the second indent of Article 4(2) of Regulation No 1049/2001 and that, accordingly, the Commission may, throughout such proceedings, refuse an application for access to such documents, without being under an obligation to undertake a specific examination.

147 It follows that, for the same reasons, the interpretation argued for by the Kingdom of Sweden and API in the context of this plea, to the effect that the above provision does not permit the Commission to issue such a refusal before the date of the hearing, is unfounded.

148 In consequence, the first plea raised in Cases C-514/07 P and C-528/07 P must be rejected as unfounded.

2. The second plea in law

(a) Arguments of the parties

149 By this plea, the Kingdom of Sweden and API allege that the General Court infringed the last line of Article 4(2) of Regulation No 1049/2001 in holding that the general public interest in receiving information relating to pending court proceedings cannot constitute an overriding public interest for the purposes of that provision. In addition,

API maintains that, in any event, the General Court did not – as it should have done – weigh that interest against the interest in protecting those proceedings. In that regard, the Kingdom of Sweden submits that, contrary to the findings of the General Court in paragraph 99 of the judgment under appeal, such a balancing exercise must always be undertaken by reference to the actual content of the documents disclosure of which has been requested.

150 However, according to the Commission, the General Court ruled in accordance with settled case-law by affirming that the overriding public interest, in consideration of which documents must be disclosed pursuant to that provision, is, in principle, distinct from the general principle of transparency which underlies Regulation No 1049/2001.

151 The United Kingdom adds that the present plea has its origins in an incorrect understanding of the judgment under appeal, given that it is apparent from paragraphs 97 to 99 of that judgment that, in reality, the General Court not only recognised that it was necessary to weigh the interests at stake, but also carried out that balancing exercise itself.

(b) Findings of the Court

152 It should be noted, first of all, that, after stating that, in principle, the overriding public interest – as referred to in the last line of Article 4(2) of Regulation No 1049/2001 – must be distinct from the principle of transparency, the General Court went on to find in paragraph 97 of the judgment under appeal that the fact that a party requesting access does not invoke a public interest distinct from the principle of transparency does not automatically imply that it is unnecessary to weigh the interests at

stake: according to the General Court, 'the invocation of those same principles may, in the light of the particular circumstances of the case, be so pressing that it overrides the need to protect the documents in question.'

153 Accordingly, the Kingdom of Sweden and API are incorrect in stating that the General Court ruled out the possibility that the interest in transparency could constitute an overriding public interest for the purposes of the above provision.

154 Next, as the Commission and the United Kingdom argue, the General Court – in paragraphs 98 and 99 of the judgment under appeal – weighed the interest in transparency against the interest relating to protection of the aim of preventing all external influences on the proper conduct of court proceedings.

155 Thus, API's argument that the General Court did not undertake that balancing exercise is also unfounded.

156 Lastly, as regards the argument of the Kingdom of Sweden to the effect that the General Court did not carry out that balancing exercise correctly in that it failed to take into account the content of the documents in question, it should be noted that, according to the General Court, it is only where the particular circumstances of the case substantiate a finding that the principle of transparency is especially pressing that that principle can constitute an overriding public interest capable of prevailing over the need for protection of the disputed documents and, accordingly, capable of justifying their disclosure in accordance with the last line of Article 4(2) of Regulation No 1049/2001.

157 As it is, even if it were possible to justify the disclosure of documents on that basis where it is presumed that disclosure will undermine one of the interests protected by the system of exceptions provided for under Article 4(2) of Regulation No 1049/2001, it must be held that it is apparent from paragraph 95 of the judgment under appeal that API merely claimed that the public's right to be informed about important issues of Community law, such as those concerning competition, and about issues which are of great political interest, which is true of the issues raised by infringement proceedings, prevails over the protection of the court proceedings.

158 Nevertheless, such vague 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.

159 In those circumstances, the General Court was fully entitled to find that the interest relied on by API was not such as to justify disclosure of the pleadings in question and that, accordingly, it was unnecessary to carry out a concrete examination of the content of those documents in those circumstances.

160 In the light of all the above, the second plea cannot be upheld either.

161 Accordingly, both the appeal lodged by the Kingdom of Sweden in Case C-514/07 P and the appeal brought by API in Case C-528/07 P must be dismissed in their entirety.

VII — Costs

162 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded the Court of Justice is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 69(4), the Member States and the institutions which intervene in the proceedings are to bear their own costs.

163 Since the Kingdom of Sweden was unsuccessful in its appeal in Case C-514/07 P, it must be ordered to pay the costs of that procedure, in accordance with the form of order sought by the Commission.

164 Since API was unsuccessful in its appeal in Case C-528/07 P, it must be ordered to pay the costs of that procedure, in accordance with the form of order sought by the Commission.

165 Since the Commission was unsuccessful in its appeal in Case C-532/07 P, it must be ordered to pay the costs of that procedure, in accordance with the forms of order sought by API.

166 The Member States which intervened in the appeal proceedings must bear their own costs in that connection.

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

1. **Dismisses the appeals;**

2. **Orders the Kingdom of Sweden to bear its own costs and to pay those incurred by the European Commission in connection with the appeal in Case C-514/07 P;**

3. **Orders the Association de la presse internationale ASBL (API) to bear its own costs and to pay those incurred by the European Commission in connection with the appeal in Case C-528/07 P;**

4. **Orders the European Commission to bear its own costs and to pay those incurred by the Association de la presse internationale ASBL (API) in connection with the appeal in Case C-532/07 P;**

5. **Orders the Kingdom of Denmark, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland to bear their own costs in connection with the appeals.**

[Signatures]