JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

17 July 2024 (*)

(Access to documents – Regulation (EC) No 1049/2001 – Advance purchase agreements and purchase agreements concluded between the Commission and pharmaceutical companies for the purchase of COVID-19 vaccines – Partial refusal of access – Exception relating to the protection of the commercial interests of a third party – Obligation to state reasons – Existence of a foreseeable and not purely hypothetical risk of the interest relied on being undermined – Principle of good administration – Freedom of expression)

In Case T-689/21,

Margrete Auken,

Tilly Metz,

Jutta Paulus,

Emilie Mosnier, as heir of Michèle Rivasi,

Kimberly van Sparrentak,

represented by B. Kloostra, lawyer,

applicants,

v

European Commission, represented by G. Gattinara and A. Spina, acting as Agents,

defendant,

THE GENERAL COURT (Fifth Chamber),

composed of J. Svenningsen, President, C. Mac Eochaidh (Rapporteur) and J. Martín y Pérez de Nanclares, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written part of the procedure, including:

– the application lodged at the Registry of the General Court on 22 October 2021,

– the Commission's application for a declaration that there is no need to adjudicate lodged at the Court Registry on 22 February 2022,

– the order of 2 March 2022 by which the Court, by way of a measure of inquiry, ordered the Commission to produce in full the contracts to which it had partly refused access,

– the applicants' observations on the application for a declaration that there is no need to adjudicate and the statement of modification of the application, lodged at the Court Registry on 22 March and 21 April 2022 respectively,

– the order of 31 May 2022 by which the Court reserved its decision on the application for a declaration that there is no need to adjudicate until it rules on the substance of the case,

– the Commission's defence, which included its observations on the statement of modification, lodged at the Court Registry on 22 July 2022,

– the reply and the rejoinder lodged at the Court Registry on 21 October and 16 December 2022 respectively,

further to the hearing on 17 October 2023, during which the applicants withdrew the head of claim seeking annulment of the implied decision,

having regard to the death of Ms Rivasi on 29 November 2023,

having regard to the continuance of the proceedings by Ms Mosnier, as heir of Ms Rivasi, lodged at the Court Registry on 26 February 2024,

gives the following

Judgment

1 By their action under Article 263 TFEU, the applicants, Ms Margrete Auken, Ms Tilly Metz, Ms Jutta Paulus and Ms Kimberly van Sparrentak, Members of the European Parliament, and Ms Emilie Mosnier, successor in law to her mother, Ms Michèle Rivasi, Member of the European Parliament (deceased), seek the annulment of Decision C(2022) 1038 final of the European Commission of 15 February 2022, taken pursuant to Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), granting them partial access to the advance purchase agreements and purchase agreements for COVID-19 vaccines concluded between the Commission and the pharmaceutical undertakings concerned ('the contested decision').

I. Background to the dispute

2 On 14 April 2020, the Council of the European Union adopted Regulation (EU) 2020/521 activating the emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the COVID-19 outbreak (OJ 2020 L 117, p. 3). By that regulation, the Council activated the emergency support established by Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union (OJ 2016 L 70, p. 1), as one of the measures to enable the European Union as a whole to address the crisis relating to the COVID-19 pandemic in a spirit of solidarity under the constraints caused by the quick spread of the virus and since the scale and transnational nature of the outbreak and its effects required a comprehensive response.

3 On 17 June 2020, the Commission published the Communication entitled ‘EU Strategy for COVID-19 vaccines’ (COM(2020) 245 final). That strategy, which was aimed at speeding up the development, manufacture and deployment of COVID-19 vaccines, was based on two pillars. The first was to secure sufficient production of vaccines in the European Union and thereby sufficient supplies for its Member States through advance purchase agreements with vaccine producers via the Emergency Support Instrument, as activated by Regulation 2020/521. The second was to adapt the European Union’s regulatory framework to the urgency at that time and to make use of the then existing regulatory flexibility to accelerate the development, authorisation and availability of vaccines, while maintaining the standards for vaccine quality, safety and efficacy.

4 According to the Commission, the proposed framework was to be regarded as an ‘insurance policy’, consisting of transferring some of the risk borne by the pharmaceutical industry to the public authorities, in exchange for which the Member States were assured of equitable and affordable access to a vaccine, should one become available.

5 By letter of 20 January 2021 addressed to the President and to the Secretary-General of the Commission, registered the following day under reference GESTDEM 2021/0389, six Members of the European Parliament (‘the six MEPs’), including the five initial applicants, requested access, under Regulation No 1049/2001, ‘to the different contracts – advance purchase agreements – signed between the Commission and the pharmaceutical companies for the purchase of COVID 19 vaccines’ (‘the initial request’). That letter stated that, to the knowledge of the six MEPs, contracts had already been signed with the companies AstraZeneca, Sanofi-GSK, Johnson and Johnson, BioNTech-Pfizer, CureVac and Moderna, so that the request concerned those contracts as well as the contracts that might be concluded after the date of the request, such as the expected contract with Novavax.

6 By letter of 11 March 2021, the Director-General of the Commission’s Directorate-General (DG) for Health and Food Safety (‘DG Health’) informed the six MEPs that she had identified eight documents corresponding to the initial request, namely six advance purchase agreements and two purchase agreements. She stated that a redacted version of three of those advance purchase agreements had been made public on webpages, namely the agreements concluded with AstraZeneca, Sanofi-GSK and CureVac, and that she was progressing her assessment of the remaining documents and consultations with the third parties concerned with a view to adopting decisions on the disclosure of those documents.

7 By letter of 9 June 2021, the Director-General of DG Health informed the six MEPs that, in response to the initial request, partial access had been granted to nine documents identified as falling within the scope of that request, namely to the eight documents referred to in paragraph 6 above and to an additional purchase agreement concluded with Pfizer-BioNTech. She stated that the redacted versions of those

documents had been made public on a webpage and that the passages had been redacted on the basis of the exceptions relating to the protection of privacy and the integrity of the individual, the protection of commercial interests and the protection of the decision-making process of the institutions, respectively provided for in Article 4(1)(b), the first indent of Article 4(2), and the first subparagraph of Article 4(3), of Regulation No 1049/2001.

8 By letter of 30 June 2021, registered the following day, the six MEPs submitted a confirmatory application, on the basis of Article 7(2) of Regulation No 1049/2001, requesting that the Commission reconsider its position with regard to the nine documents identified and disclose them in their entirety, save for the passages covered by the exception relating to the protection of privacy and the integrity of the individual provided for in Article 4(1)(b) of that regulation ('the confirmatory application'). They relied, inter alia, on the fact that the prices indicated in all the concluded advance purchase agreements and the full versions of the advance purchase agreements concluded with AstraZeneca, Pfizer-BioNTech and Moderna had been leaked on a social network and in the media between December 2020 and April 2021.

9 On 13 August 2021, the Secretariat-General of the Commission informed the six MEPs that it was still not in a position to reply to their confirmatory application. On that date, the absence of a response to the confirmatory application gave rise to an implied decision rejecting that application, in accordance with Article 8(3) of Regulation No 1049/2001.

10 On 15 February 2022, and after consulting the pharmaceutical undertakings concerned in accordance with Article 4(4) of Regulation No 1049/2001 ('the undertakings concerned'), the Commission adopted the contested decision. That decision states that, when assessing the confirmatory application, the Secretariat-General of the Commission had re-examined DG Health's response to the initial request and that, following that re-examination, thirteen documents had been identified as falling within the scope of the request for access to documents, namely the nine documents referred to in paragraph 7 above and four additional documents.

11 By the contested decision, the Commission thus granted partial access to the following documents (together, 'the agreements at issue'):

– the advance purchase agreement concluded between the Commission and AstraZeneca (reference ARES(2020)4849918; 'Document 1');

– the advance purchase agreement concluded between the Commission and Sanofi-GSK (reference ARES(2020)5034184; 'Document 2');

– the advance purchase agreement concluded between the Commission and Janssen Pharmaceutica (reference ARES(2020)5806059; 'Document 3');

– the advance purchase agreement concluded between the Commission and Pfizer-BioNTech (reference ARES(2021)256798; 'Document 4');

– the advance purchase agreement concluded between the Commission and CureVac (reference ARES(2021)256728; 'Document 5');

– the advance purchase agreement concluded between the Commission and Moderna (reference ARES(2021)256592; 'Document 6');

– the purchase agreement concluded between the Commission and Pfizer-BioNTech (reference ARES(2021)1601544; ‘Document 7’);

– the purchase agreement concluded between the Commission and Moderna (reference ARES(2021)1601566; ‘Document 8’);

– Amendment I to the purchase agreement concluded between the Commission and Moderna (reference ARES(2021)7098313; ‘Document 9’);

– Amendment II to the purchase agreement concluded between the Commission and Moderna (reference ARES(2021)5602046; ‘Document 10’);

– the second purchase agreement concluded between the Commission and Pfizer-BioNTech, Parts 1 and 2 (reference ARES(2021)3404228; ‘Document 11’);

– the advance purchase agreement concluded between the Commission and Novavax (reference ARES(2021)6475411; ‘Document 12’);

– the advance purchase agreement concluded between the Commission and Valneva (reference ARES(2021)7403909; ‘Document 13’).

12 More specifically, the Commission granted wider partial access to Documents 1 to 8 and 11, disclosed previously, as well as partial access to Documents 9, 10, 12 and 13, which, until that point, had not been publicly disclosed in a redacted form. The redacted versions of those documents were attached to the contested decision.

13 In the contested decision, the Commission relied on the exception relating to the protection of privacy and the integrity of the individual and the exception relating to the protection of the commercial interests of the undertakings concerned, in order to justify granting only partial access to the agreements at issue.

II. Forms of order sought

14 In the statement of modification of the application initiating proceedings, the applicants claim that the Court should:

– annul the contested decision;

– order the Commission to pay the costs, including the costs relating to the initial version of the application initiating proceedings.

15 In the defence, which, at the Court’s request, included the Commission’s observations on the statement of modification, the Commission contends that the Court should:

– dismiss the action as modified;

– order the applicants to pay the costs of the proceedings.

III. Law

16 In support of their action, as modified, the applicants raise six pleas in law, alleging:

– first, that the exception relating to the protection of commercial interests was wrongly applied to information not covered by that exception, and that there was a failure to state reasons in that regard and an inconsistent application of that exception;

– second, a failure to justify applying the exception relating to the protection of commercial interests to seven categories of provisions;

– third, that there was an inconsistent application of Regulation No 1049/2001 leading to an infringement of that regulation and of the principle of good administration, in that the Commission did not redact, to the same extent, provisions or information of the same kind, and that there was a failure to state reasons in that regard;

– fourth, infringement of Article 4(2) of Regulation No 1049/2001, in that the Commission failed to take into account the overriding public interest in disclosure of the requested information, as well as a failure to state reasons in that regard;

– fifth, infringement of Article 42 and Article 52(3) of the Charter of Fundamental Rights of the European Union (‘the Charter’) and of Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (‘the ECHR’);

– sixth, infringement of Articles 7 and 8 of Regulation No 1049/2001, in that, by the contested decision, the Commission redacted certain information which it had previously disclosed, and a failure to state reasons in that regard.

A. The first plea in law and the first part of the second plea in law, alleging misapplication of the exception relating to the protection of commercial interests to information not covered by that exception, a failure to state reasons in that regard and an inconsistent application of that exception

17 By their first plea and by the first part of their second plea, as modified, the applicants submit that the Commission wrongly applied the exception relating to the protection of commercial interests to information that is not covered by that exception, by redacting, either in whole or in part, the following elements:

– the definitions, in particular, the definitions of the expressions ‘wilful misconduct’ in Document 1 and ‘best reasonable efforts’ in Documents 4 and 7;

– the provisions regarding timelines for audits and data storage;

– the provisions on expenses with regard to post-launch safety and risk management studies;

– the provisions on donations and resales;

– the provisions on the liability regime in the event of a breach of personal data protection.

18 The applicants maintain that the information listed in paragraph 17 above is of no commercial interest, and is thus not within the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001.

19 The applicants submit that the Commission has stated neither the reasons why the exception relating to the protection of commercial interests applied to the information listed in paragraph 17 above, nor how access to that information could, in a reasonably foreseeable manner, specifically and actually undermine the commercial interests of the undertakings concerned. Moreover, the Commission applied that exception inconsistently, by redacting from certain contracts information which was nonetheless accessible in others.

20 In addition, the applicants claim that, in view of the context of the COVID-19 pandemic in which the agreements at issue, and in particular the advance purchase agreements, were concluded, and the financing through public funds of significant research and development activities for the purpose of developing, with a then uncertain outcome, a range of vaccines by means of advance payments to the undertakings concerned under advance purchase agreements, there was no commercial market for COVID-19 vaccines. The nature of the agreements at issue thus differs from that of a normal commercial relationship. The Commission was, therefore, wrong to apply, in the contested decision, the exception relating to the protection of commercial interests and to redact the definitions and other information.

21 The Commission disputes those arguments.

22 The Commission maintains that all the agreements at issue were the subject, in their entirety, of individual negotiations, and therefore the specific wording of the various definitions and other contractual provisions reflects the complex trade-offs made in the context of those individual negotiations. It states that the relevant criterion for assessing whether the disclosure of contractual provisions is liable to undermine the interest protected by the first indent of Article 4(2) of Regulation No 1049/2001 is whether the content of the provisions in question touches on the commercial interests of the contracting parties. The definitions clarify the scope of the agreed obligations and determine, from a substantive perspective, the content of the agreement, with the result that those definitions are ‘normative’. Furthermore, in the present case, certain key definitions, such as ‘best reasonable efforts’ or ‘wilful misconduct’, and other mutual obligations touch on the commercial interests of the undertakings concerned, since they could trigger their contractual and non-contractual liability.

23 The Commission states that it set out, in the contested decision, the context and the exceptional nature of the procurement procedure for COVID-19 vaccines in order to explain the relevance of certain information contained in the requested documents from an economic and commercial perspective. That contextual information clarifies the reasons underpinning the process of individual negotiation of the purchase agreements for COVID-19 vaccines and the global dimension of the purchase of those vaccines, emphasising the commercial sensitivity of certain information contained in the agreements concluded between the Commission and the undertakings concerned.

24 Furthermore, the Commission considers that the application of the exception relating to the protection of commercial interests is not contingent on the existence of a market open to free competition for a product. In addition, the particular circumstances in which the purchase of vaccines took place support the fact that the undertakings concerned faced increased competitive pressure to deliver very large quantities of vaccines within a very short timeframe. Moreover, the Commission states that all the undertakings concerned are indisputably undertakings active on a worldwide scale and subject to competitive market forces, whose interests can fall within the scope of the exception

at issue. The commercial nature of their activities, in particular the provision of COVID-19 vaccines, is not altered by the partial public funding of research and development in order to increase the likelihood of having more vaccines and obtaining them more quickly.

1. Preliminary observations

25 The Court notes that the complaints raised in the first plea and in the first part of the second plea as regards the provisions on donations and resales overlap with the complaints raised in the seventh part of the second plea. Accordingly, those complaints will be dealt with in the context of the seventh part of the second plea (see paragraphs 179 to 184 below).

26 As regards the provisions on the timelines for audits and data storage, expenses with regard to post-launch safety and risk management studies and the liability regime in the event of a breach of personal data protection, it must be stated that the applicants refer to these only briefly in paragraphs 32 and 43 of the application and in paragraphs 25 and 33 of the statement of modification.

27 The contested decision does not expressly refer to a refusal of access to those provisions. Furthermore, in the absence of details as to the redactions to which the applicants' line of argument relates, the Court has also been unable to identify such provisions in the documents produced by the Commission in response to the measure of inquiry adopted pursuant to Article 91(c) and Article 104 of the Rules of Procedure of the General Court. Moreover, the Court notes that the provisions on checks and audits are fully disclosed in Documents 1, 2, 3, 5, 6, 8, 12 and 13. In addition, the period during which those checks and audits may be initiated was disclosed in Documents 4, 7 and 11. As regards Documents 9 and 10, they do not refer to such checks and audits.

28 In the light of the foregoing, the examination of the merits of the first plea and of the first part of the second plea can concern only the refusal of access to the definitions of the expressions 'wilful misconduct' and 'best reasonable efforts'.

29 The first indent of Article 4(2) of Regulation No 1049/2001 provides that the EU institutions are to refuse access to a document where disclosure would undermine the protection of the commercial interests of a natural or legal person, including intellectual property, unless there is an overriding public interest in disclosure.

30 In that context, it should be noted that it is apparent from the very wording of Article 4(2) of Regulation No 1049/2001 that any undermining of the interests concerned is capable of justifying the application, as the case may be, of one of the exceptions listed therein, without it being necessary for that interference to reach a particular threshold of seriousness (judgment of 22 January 2020, *PTC Therapeutics International* v *EMA*, C-175/18 P, EU:C:2020:23, paragraph 90).

31 As regards the concept of commercial interests, it must be noted that Regulation No 1049/2001 does not define that concept, except in so far as it states that those interests may cover the intellectual property of a natural or legal person. Moreover, it should be noted that, in order to justify refusal of access to a document the disclosure of which has been requested, it is not sufficient, in principle, for that document to fall within the scope of a commercial activity, but it is for the institution concerned to explain how disclosure of that document could specifically and actually undermine the commercial interests and to demonstrate that the risk of the interest being undermined is reasonably foreseeable and not purely hypothetical (see, to that effect, judgments of 3 July 2014, *Council* v *in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 52 and the case-law cited, and of 27 February 2018, *CEE Bankwatch Network* v *Commission*, T-307/16, EU:T:2018:97, paragraphs 103 to 105

and the case-law cited).

32 Furthermore, the examination which the institution must undertake in order to apply an exception must be carried out in a specific manner and must be apparent from the reasons for the decision (see judgment of 30 January 2008, *Terezakis* v *Commission*, T-380/04, not published, EU:T:2008:19, paragraph 86 and the case-law cited).

33 In that context, it must be noted that that it is not possible to regard all information concerning a company and its business relations as requiring the protection which must be guaranteed to commercial interests under the first indent of Article 4(2) of Regulation No 1049/2001 without frustrating application of the general principle of giving the public the widest possible access to documents held by the institutions (see judgment of 9 September 2014, *MasterCard and Others* v *Commission*, T-516/11, not published, EU:T:2014:759, paragraph 81 and the case-law cited). However, that protection may cover commercially sensitive information, such as information relating to the commercial strategies of the undertakings, their sales figures, market shares or customer relations (see, to that effect, judgments of 28 June 2012, *Commission* v *Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraphs 54 to 56, and of 9 September 2014, *MasterCard and Others* v *Commission*, T-516/11, not published, EU:T:2014:759, paragraphs 82 and 83).

34 In the context of applying the provisions of Regulation No 1049/2001, the obligation on the institution to state the reasons for its decision refusing to grant access to a document is, first, to provide the person concerned with sufficient information to make it possible to determine whether the decision is well founded or whether it is vitiated by an error which may permit its validity to be contested and, second, to enable the Courts of the European Union to review the lawfulness of the decision. The extent of that obligation depends on the nature of the measure at issue and the context in which it was adopted (see judgment of 6 February 2020, *Compañía de Tranvías de la Coruña* v *Commission*, T-485/18, EU:T:2020:35, paragraph 20 and the case-law cited).

35 According to the case-law, the obligation to state reasons does not, however, require the institution concerned to respond to each of the arguments put forward during the procedure preceding the adoption of the contested decision (see judgment of 25 September 2018, *Psara and Others* v *Parliament*, T-639/15 to T-666/15 and T-94/16, EU:T:2018:602, paragraph 134 and the case-law cited).

36 Nevertheless, whilst the context in which a decision is adopted may make the requirements to be satisfied by the institution as regards the statement of reasons lighter, it may, conversely, also make them more stringent in certain circumstances. That is the case where, during the procedure in which application is made for access to documents, the applicant puts forward factors capable of casting doubt on whether the first refusal was well founded. In those circumstances, the requirements governing the statement of reasons mean that the institution is obliged, when replying to a confirmatory application, to state why those factors are not such as might warrant a change in its position. Otherwise, the applicant would not be able to understand the reasons for which the author of the reply to the confirmatory application has decided to confirm the refusal on the same grounds (judgment of 6 April 2000, *Kuijer* v *Council*, T-188/98, EU:T:2000:101, paragraphs 45 and 46).

37 It is in the light of those considerations that the Court must analyse the applicants' arguments that the Commission was wrong to apply the exception relating to the protection of commercial interests to the agreements at issue, in particular to the definitions and, more specifically, to the definitions of the expressions 'wilful misconduct' in Document 1 and 'best reasonable efforts' in Documents 4 and 7.

2. The statement of reasons in the contested decision as regards the partial redaction of the definitions

38 The applicants submit that the definitions in the agreements at issue are not covered by the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001 and they dispute the adequacy of the statement of reasons in the contested decision justifying their partial redaction.

39 The Court notes that a mere reading of the agreements at issue as disclosed by the contested decision shows that, although certain definitions are identical, others, including definitions that appear to be of a technical nature and are possibly uncontroversial, were the subject of individual and specific negotiations, as the Commission states and as is apparent in particular from various additions or supplementary details.

40 It follows that, even if the presence of definitions in the agreements at issue may be regarded as standard, their specific wording cannot be regarded, in all cases, as being ‘general and standard’ within the meaning of paragraph 98 of the judgment of 30 January 2008, *Terezakis* v *Commission* (T-380/04, not published, EU:T:2008:19). Furthermore, in the case which gave rise to that judgment, the institution had refused access to the contract in question in its entirety, and therefore its relevance to the present case, in which the Commission rightly considered the possibility of granting partial access to the agreements at issue, must not be overstated.

41 More specifically, as regards the redaction of the definitions of the expressions ‘wilful misconduct’ in Document 1 and ‘best reasonable efforts’ in Documents 4 and 7, the Court notes that, in the confirmatory application, the six MEPs expressly referred to those terms.

42 That being so, the contested decision, which sets out the reasons which, it is claimed, justify the non-disclosure, in full or in part, of a whole series of categories of information in the agreements at issue, including, for example, the definitions of ‘vaccine’ and ‘adapted vaccine’, as well as the provisions relating to liability and indemnification, does not expressly indicate, even briefly, the reasons why other definitions, in particular the definitions of the expressions ‘wilful misconduct’ in Document 1 and ‘best reasonable efforts’ in Documents 4 and 7, expressly referred to by the six MEPs in their confirmatory application, were redacted.

43 That conclusion cannot be called into question by the arguments put forward by the Commission in its pleadings and at the hearing, to the effect that the definitions set out the scope of the agreed obligations and determine, from a substantive perspective, the content of the agreement, with the result that they are ‘normative’, and to the effect that the definitions of ‘wilful misconduct’ in Document 1 and ‘best reasonable efforts’ in Documents 4 and 7 touch on the commercial interests of the undertakings concerned since they could trigger their contractual and non-contractual liability.

44 Those explanations were not relied on in the contested decision and cannot be inferred from the explanations set out in that decision, including in paragraph 2.1.4 thereof, which relates specifically to the liability of the undertakings concerned. The Courts of the European Union are not required to take into account additional explanations provided by the author of the measure in question only during the proceedings in order to assess whether the obligation to state reasons has been satisfied, since otherwise the division of powers between the administration and the Courts of the European Union would be undermined and the review of the legality of acts of the administration would be weakened (see judgment of 6 July 2023, *EIB and Commission* v *ClientEarth*, C-212/21 P and C-223/21 P, EU:C:2023:546, paragraph 43 and the case-law cited).

45 It follows that the grounds of the contested decision do not enable the applicants to understand the specific reasons which led to those redactions, or the Courts of the European Union to review the legality of those redactions, within the meaning of the case-law referred to in paragraphs 31, 34 and 36 above.

46 Accordingly, the applicants rightly submit that the Commission infringed the first indent of Article 4(2) of Regulation No 1049/2001 by failing to provide sufficient explanations as to how access to the definitions at issue could specifically and actually undermine the commercial interests of AstraZeneca and Pfizer-BioNTech, respectively.

47 As regards the complaint that the Commission applied the exception relating to the protection of commercial interests to the definitions in an inconsistent manner, that complaint overlaps with the third plea, therefore it is appropriate to examine it in the context of the third plea.

B. The second plea in law, alleging failure to justify the application of the exception relating to the protection of commercial interests and infringement of Regulation No 1049/2001 in that the Commission did not keep to a strict interpretation and application of the abovementioned exception

48 By their second plea, the applicants criticise the way in which the Commission applied the exception relating to the protection of commercial interests in redacting, from the agreements at issue, certain parts concerning six categories of information, including:

– the location of the production sites;

– intellectual property rights;

– down payments or advance payments;

– the provisions on liability and indemnification;

– delivery schedules;

– the provisions on donations and resales.

49 The applicants also complain that the Commission did not sufficiently justify, in the contested decision, the application of that exception.

50 The Commission disputes those arguments.

1. The refusal of access to the location of the production sites

51 By the second part of the second plea as adapted, the applicants submit that the exception relating to the protection of commercial interests does not preclude the disclosure of information relating to the location of the production sites and the subcontractors of the undertakings concerned.

52 In addition, the applicants dispute the adequacy and the merits of the reasoning in the contested decision in that regard. That decision does not mention the fact that the information in question was already in the public domain. Nor does it set out the reasons why that information, other information or further information concerning the location of the production sites should be regarded as confidential, or in what respect and how the disclosure of that information, which moreover relates to the first 18 months of the pandemic, is liable to undermine the current commercial interests of the undertakings concerned.

53 The applicants add that they have an interest in the disclosure of the sites referred to in the agreements at issue which are already in the public domain, for the purposes of comparing them with those set out in the agreements at issue. Moreover, the disclosure of those sites is important in order for the public to be able to ascertain where public funds have been invested and under which conditions the first vaccines were developed, produced, stored and transported.

54 The Commission disputes those arguments.

55 In the present case, the applicants' line of argument that, in essence, the disclosure of information regarding the location of the production sites of the undertakings concerned and regarding their commercial relations with their subcontractors is not capable of undermining the current commercial interests of the undertakings concerned, must be rejected at the outset as ineffective.

56 The assessment of the justification for applying one of the exceptions provided for in Article 4 of Regulation No 1049/2001 must be made in the light of the facts existing on the date of adoption of the decision refusing to grant access to the documents on the basis of that exception (see judgments of 11 May 2017, *Sweden* v *Commission*, C-562/14 P, EU:C:2017:356, paragraph 63 and the case-law cited, and of 6 February 2020, *Compañía de Tranvías de la Coruña* v *Commission*, T-485/18, EU:T:2020:35, paragraph 36 and the case-law cited) and in the light of the information available to the institution when the latter adopted that decision (see, to that effect, judgment of 27 February 2018, *CEE Bankwatch Network* v *Commission*, T-307/16, EU:T:2018:97, paragraph 133 and the case-law cited), namely, in the present case, 15 February 2022.

57 Next, the applicants submit, in essence, that certain information regarding the production sites and the subcontractors of the undertakings concerned is already in the public domain by means of an interactive map published on the Commission's website and in public reports of the European Medicines Agency (EMA), and therefore that further information regarding those sites and the commercial relations between those undertakings and their subcontractors, redacted in the present case, is not commercially sensitive information. The applicants complain that the Commission did not address those considerations in the contested decision.

58 In that regard, it should be noted that, in the contested decision, the Commission stated that the decision to have a production site in a given location or to use a given subcontractor was part of the internal business strategy of the undertakings concerned and was the result of a precise economic choice. The identity of those sites and their economic or industrial relationship with the undertaking concerned do not fall within the public domain. It concluded that the disclosure of information regarding the production sites of the undertakings concerned, for example Article I.6.3 of Document 4 and the annexes to all the agreements at issue concerning the subcontractors of those undertakings, would reveal to the competitors of those undertakings significant elements of their industrial capacity and could adversely affect their industrial capacity to produce the vaccine, or even, ultimately, make it more difficult in economic terms to finalise the implementation of the agreements concluded.

59 Having consulted the full versions of the agreements at issue, the Court notes that they set out, with varying detail, the identity and location of production sites of the undertakings concerned and of their various subcontractors or partners and, as the case may be, the allocation of tasks among the listed entities. In addition, in some cases, amendments, such as additions or changes of sites or partners, were made at the stage of the purchase agreement as compared to the advance purchase agreement.

60 Accordingly, the Commission was right to find, in the contested decision, that the information on the location of the production sites and of the subcontractors of the undertakings concerned, redacted in the agreements at issue, fell within the scope of their commercial relations and, ultimately, of their capacity and industrial and business strategy.

61 As stated in paragraph 33 above, the protection which must be guaranteed to commercial interests in accordance with the first indent of Article 4(2) of Regulation No 1049/2001 may cover such information.

62 Moreover, the information set out in the agreements at issue cannot be regarded as historic (see, to that effect, judgment of 7 July 2015, *Axa Versicherung* v *Commission*, T-677/13, EU:T:2015:473, paragraph 154 and the case-law cited, and order of 12 July 2018, *RATP* v *Commission*, T-250/18 R, not published, EU:T:2018:458, paragraphs 55 and 57). That information was less than two years old and, as is apparent from the Commission's response to a question put by way of a measure of organisation of procedure, most of the agreements at issue were still being implemented when the contested decision was adopted.

63 Nor is the conclusion set out in paragraph 60 above invalidated by the publication, on the Commission's website, of an interactive map showing the production capacities of COVID-19 vaccines in the European Union.

64 As the Commission confirmed in response to a question put by the Court by way of a measure of organisation of procedure, the interactive map does not contain information on the location within the European Union of the COVID-19 vaccine production sites set out in the agreements at issue. At most, as the Commission conceded, the application of the 'contracted by APA manufacturer' filter reveals a single production site, located in Germany, which does not appear in the agreements to which the applicants requested access.

65 Therefore, contrary to what the applicants claim, the interactive map does not indicate either the exact location of the production sites of the COVID-19 vaccines that are the subject of the agreements at issue or the names of any subcontractors concerned.

66 Furthermore, although the EMA's public reports on the various COVID-19 vaccines contain information on production sites, that fact is not, per se, of such a nature as to require the Commission to communicate all the information on the location of the production sites and subcontractors of the undertakings concerned (see, to that effect, judgment of 19 December 2019, *ECB* v *Espírito Santo Financial (Portugal)*, C-442/18 P, EU:C:2019:1117, paragraph 56).

67 It follows that the Commission did not err in law in redacting information on the location of the production sites and of the subcontractors of the undertakings concerned.

68 Lastly, given that the information on the location of the production sites and of the subcontractors of the undertakings concerned was not disclosed by the Commission by means of the interactive map, the contested decision is not vitiated by an inadequate statement of reasons

with regard to that map.

69 In the light of the foregoing, the second part of the second plea must be rejected.

70 Finally, in so far as the applicants' argument regarding the interest in the disclosure of the redacted information on the location of the production sites overlaps with arguments raised in the context of the fourth plea, that argument will be dealt with in the context of the fourth plea (see paragraph 210 below).

2. The partial refusal of access to the provisions on intellectual property rights

71 By the third part of their second plea, the applicants dispute the adequacy and the merits of the statement of reasons in the contested decision justifying the partial redaction of the provisions relating to intellectual property on the basis of the exception relating to the protection of commercial interests provided for in the first indent of Article 4(2) of Regulation No 1049/2001.

72 The applicants submit that the considerations, set out in the contested decision, to the effect that disclosure of the redacted information would risk undermining the commercial interests of the undertakings concerned as it would increase the pressure exerted on those undertakings to make part of their know-how available and would have a negative impact on their industrial capacity, are hypothetical. In addition, the applicants maintain that the Commission did not indicate the elements of the provisions on intellectual property rights that would explain the concrete and specific reasons for the non-disclosure of that information.

73 The Commission disputes those arguments.

(a) The statement of reasons in the contested decision

74 The Court notes that, in the confirmatory application, the six MEPs expressly requested disclosure of the provisions on intellectual property rights.

75 In the present case, by the contested decision, the Commission partly redacted the provisions on intellectual property rights in Documents 1, 4, 6, 7, 8, 11, 12 and 13.

76 In the contested decision, the Commission stated that the information redacted under the exception relating to the protection of commercial interests contained commercially sensitive information, such as intellectual property. It also stated, in the part of that decision dealing with the risks relating to the organisation and industrial capacity of the undertakings concerned, that disclosure of the description of the mutual obligations of the parties to the agreements at issue as regards intellectual property would reveal significant elements of their industrial capacity to the competitors of the undertakings concerned and could adversely affect the latter's industrial capacity to produce the vaccine, or even make it more difficult in economic terms to finalise the implementation of the concluded agreements. According to the contested decision, those provisions set out either the exclusive right of the undertaking concerned to benefit from the intellectual property rights resulting from the production of the vaccine, or for the grant of a licence for a part of those rights. The undertaking concerned might receive requests to grant either derogations from exclusivity for further clinical testing, or additional licences, and thus be subject to growing pressure from its competitors to make public part of its know-how. Such requests would become more frequent given the growing demand

for vaccines due to the pandemic's global increase.

77 It follows from those considerations that the Commission provided brief explanations, without disclosing the content of the redacted sentences or parts of sentences in such a way as to deprive the exception relating to the protection of commercial interests of its essential purpose, in respect of the nature of the partly redacted provisions on intellectual property rights. Similarly, it provided detailed explanations as to how the disclosure of those provisions could specifically and actually undermine the commercial interests of the undertakings concerned.

78 Furthermore, the Commission is required to set out the reasons justifying the application to the particular case of one of the exceptions to the right of access provided for by Regulation No 1049/2001, but it is nevertheless not required to provide more information than is necessary in order for the person requesting access to understand the reasons for its decision and for the Court to review the legality of that decision (judgment of 30 January 2008, *Terezakis* v *Commission*, T-380/04, not published, EU:T:2008:19, paragraph 119).

79 It follows that the grounds of the contested decision enable the applicants to understand the specific reasons which led the Commission to redact, in part, the provisions on intellectual property rights in the agreements at issue, and the Courts of the European Union to review the legality of those redactions, within the meaning of the case-law referred to in paragraphs 34, 35 and 78 above.

80 Accordingly, the complaint alleging that the statement of reasons in the contested decision is inadequate must be rejected.

(b) The merits of the statement of reasons in the contested decision

81 As regards the merits of the grounds put forward by the Commission in the contested decision to justify the partial redaction of the provisions on intellectual property, it is necessary to ascertain whether the Commission provided plausible explanations as to how access to the redacted information could specifically and actually undermine the protection of the commercial interests of the undertakings concerned and whether the risk of that undermining might be considered reasonably foreseeable and not purely hypothetical (see, to that effect, judgment of 25 November 2020, *Bronckers* v *Commission*, T-166/19, EU:T:2020:557, paragraph 58).

82 In accordance with the case-law cited in paragraphs 30 and 31 above, the Commission is not required to establish that there is a definite risk of undermining the protection of the commercial interests of the undertakings concerned.

83 It is sufficient for the contested decision to contain tangible elements which would allow the conclusion to be drawn that the risk of the commercial interests of the undertakings concerned would be undermined was, on the date on which that decision was adopted, reasonably foreseeable and not purely hypothetical, and to mention the existence, on that date, of objective reasons on the basis of which it could be reasonably foreseen that those commercial interests would be undermined if the information requested by the applicants were disclosed (see, to that effect, judgment of 7 June 2011, *Toland* v *Parliament*, T-471/08, EU:T:2011:252, paragraphs 78 and 79).

84 In the present case, as stated in paragraph 76 above, it is apparent from the contested decision that the Commission refused full access to the provisions in question, in order not to risk disrupting the possible strategic positions of the undertakings concerned as regards the exploitation of their rights, at a time characterised by a high demand for COVID-19 vaccines and during which it was conceivable that

applications for licences from third-party companies might be made.

85 Having consulted the full versions of the agreements at issue, the Court notes that, although the provisions on intellectual property, whether they appear under the heading ‘Exploitation of results’ of the agreement and/or under the heading ‘Intellectual property rights’, have similarities, they are not identical, as is apparent, where applicable, from various additions. Furthermore, the applicants do not dispute either the context of high demand for COVID-19 vaccines or the fact that requests for licences were conceivable. Nor do they dispute the fact that the risk of the commercial interests of a given undertaking being undermined is specific to that undertaking.

86 Moreover, the Commission’s explanations in the contested decision show that it carried out a concrete and individual examination of the request for access to the agreements at issue and that it relied on circumstances specific to the case and to the undertakings concerned as regards the provisions on intellectual property rights in order to substantiate the existence of a reasonably foreseeable and non-hypothetical risk of the protection of the commercial interests of those undertakings being undermined.

87 It follows from the foregoing that the Commission’s explanations in the contested decision concerning the existence of a reasonably foreseeable and non-hypothetical risk of the protection of the commercial interests of the undertakings concerned being undermined, as regards full disclosure of the provisions on intellectual property, are well founded.

88 As regards the complaint that the Commission applied the exception relating to the protection of commercial interests in an inconsistent manner, that complaint overlaps with the third plea, and therefore it is appropriate to examine it in the context of the third plea.

89 In the light of the foregoing, the third part of the second plea must be rejected.

3. The partial refusal of access to the provisions on down payments or advance payments

90 By the fourth part of the second plea, the applicants dispute the adequacy and the merits of the statement of reasons in the contested decision justifying the partial redaction of the provisions on down payments or advance payments in ‘some’ of the agreements at issue on the basis of the exception relating to the protection of commercial interests provided for in the first indent of Article 4(2) of Regulation No 1049/2001.

91 The applicants dispute the considerations relied on in the contested decision to the effect that disclosure of the redacted information would risk undermining the commercial interests of the undertakings concerned since it would make it possible to determine the total value of the agreement in question and the price per dose and would reveal the pricing strategies and structures of those undertakings, which could harm their negotiations on the world market and be exploited to their detriment by their competitors. The applicants observe that the Commission disclosed the amount of the down payments or advance payments of ‘some’ of the agreements at issue and that ‘some’ of those amounts were known because of information leaks on a social network and in the media (see paragraph 8 above). The Commission did not confirm that it was actually possible to calculate the price per dose or to draw other commercially sensitive conclusions, in particular as regards the pricing strategies of the undertakings concerned, based on the redacted information on down payments or advance payments. In that context, the applicants submit that the price payable by the Member States was not disclosed. In any event, the Commission did not explain in what respect the risk of the commercial interests of the undertakings concerned being undermined was foreseeable and not hypothetical.

92 The applicants complain that the Commission failed to explain how disclosure of the down payments or advance payments could reveal information on the current situation of the undertakings concerned and the market for COVID-19 vaccines.

93 The applicants maintain that the risk of harm to the commercial interests of the undertakings concerned in relation to their negotiations with purchasers in third countries is not covered by the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001 and is hypothetical.

94 The applicants dispute the considerations, relied on in the contested decision, to the effect that full disclosure of the provisions of the advance purchase agreements regarding the down payments or advance payments would place the undertaking concerned at a disadvantage vis-à-vis its competitors, by revealing the level of financial risk which it accepted upon concluding the agreement in question, and by giving indications of its pricing strategy. According to the applicants, those factors do not explain how disclosure of that information could specifically undermine the commercial interests of the undertakings concerned or reveal sensitive information on their cost structures.

95 In that context, the applicants submit that, even if there were any justification for the redaction of the provisions on down payments or advance payments in the advance purchase agreements when those agreements were in force, that justification no longer existed when the contested decision was adopted. Furthermore, that information is unlikely to be relevant for future negotiations. They submit that they did not request access to the agreements at issue before they were signed and that the purchase agreements had already been signed when the contested decision was adopted.

96 Lastly, the applicants complain that the Commission failed to weigh the interest of the undertakings concerned in maintaining the confidentiality of the provisions on down payments or advance payments against the public interest in transparency and failed to demonstrate that the former interest prevailed over the latter.

97 The Commission disputes those arguments.

(a) The statement of reasons in the contested decision

98 The Court notes that, in the confirmatory application, the six MEPs challenged the reasons, set out in the reply of 9 June 2021 to their initial request, for the partial refusal of access to the information on prices contained in the agreements at issue.

99 In the present case, by the contested decision, the Commission partly redacted the provisions on prices and payment arrangements in all the agreements at issue, with the exception of Document 10; that document does not address prices. It thus redacted the amount of the down payments or advance payments in Documents 2, 3, 4, 12 and 13, but disclosed the amount in Documents 1, 5 and 6. It also redacted various information in the agreements at issue concerning, as the case may be, inter alia, the price per dose, the delivery price, the price or total cost, the amount payable by the Member States and the schedule of payments.

100 In the contested decision, first of all, the Commission stated that the information redacted under the exception relating to the protection of commercial interests contained commercially sensitive elements regarding, inter alia, prices and individual prices per dose, the estimated total costs of the products, and cost methodology. It stated that disclosure of the redacted information could damage the competitive position

of the undertakings concerned on the global market for the production and commercialisation of COVID-19 vaccines.

101 Next, in a section dealing specifically with financial risks, the Commission stated that the provisions on prices and purchase conditions set out in the advance purchase agreements remained relevant for subsequent purchase agreements. It explained that the information on prices had been redacted because disclosure of that information would allow third parties to draw conclusions on the commercial and pricing strategies of the undertakings concerned, which could be used by their competitors in order to plan their own strategies, which would seriously undermine the current and future negotiations of the undertakings concerned with other purchasers at international level.

102 As regards, more particularly, the down payments or advance payments in the advance purchase agreements, namely the contribution from the resources of the emergency support (see paragraphs 2 and 3 above), the Commission stated that it had disclosed that contribution for almost all the agreements concerned. The aggregate amount of those down payments was approximately EUR 2.7 billion. It stated that, in the case of the agreements in which the down payment had been redacted, the undertakings concerned had put forward specific reasons to justify why that amount was commercially confidential. In particular, by providing the amount of the down payment, it would be possible to make an assessment, based on market practice, and to determine the full value of the agreement and ultimately the price per dose, which constitute commercially sensitive information for all undertakings. That could negatively impact the negotiations of the undertakings concerned with other purchasers and could be detrimental to the overall operations of those undertakings in so far as their pricing strategies and structures would be revealed. Such difficulties for the undertakings concerned could, in turn, adversely affect the implementation of the agreements at issue.

103 Furthermore, the Commission set out the reasons for certain specific redactions regarding the down payments, namely in Documents 3 and 6. Those redactions were linked to particular aspects of the agreements regarding the costs associated with the production process of the undertaking concerned or to the fact that deliveries and discussions were ongoing with the undertaking concerned on the date the contested decision was adopted. The purpose of those redactions was to enable the agreement in question to be implemented properly.

104 Next, the Commission stated that, according to the case-law, commercially sensitive information relating, in particular, to the commercial strategies of the undertakings concerned or to their commercial relations was protected by the first indent of Article 4(2) of Regulation No 1049/2001. Moreover, the potential commercial risks, the prices charged and the thresholds of financial covenants concluded in the framework of a sensitive contract could also be commercially sensitive, in particular for contracts which are still being implemented. In this instance, disclosure of such passages from the advance purchase agreements would clearly place the undertaking concerned at a disadvantage vis-à-vis its competitors, since the level of financial risk accepted by that undertaking and information on its pricing strategy would thus be brought to those competitors' attention. In those circumstances, the Commission considered that certain financial aspects of the agreements should remain protected under the exception relating to the protection of commercial interests.

105 Lastly, the Commission dismissed the relevance of the fact that three advance purchase agreements had been leaked in the media.

106 It follows from those considerations that the Commission provided detailed explanations regarding the nature of the redacted information on down payments and advance payments and regarding how disclosure of that information could specifically and actually undermine the commercial interests of the undertakings concerned, whether between them or between them and third-party pharmaceutical companies with which they might be in competition. In addition, those explanations took account of the exchanges between the Commission and the six

MEPs. The Commission set out the reasons why the advance purchase agreements would be relevant to subsequent purchase agreements as well as in the context of negotiations with purchasers from third countries, and the reasons why the information which had been leaked in the media could not justify derogating from the confidentiality of that information.

107 It follows that the grounds of the contested decision enable the applicants to understand the specific reasons which led the Commission to redact, in part, the provisions on down payments or advance payments in the agreements at issue, and the Courts of the European Union to review the legality of those redactions, within the meaning of the case-law referred to in paragraphs 34, 35 and 78 above.

108 Accordingly, the complaint alleging that the statement of reasons in the contested decision is inadequate must be rejected.

(b) The merits of the statement of reasons in the contested decision

109 As regards the merits of the grounds put forward by the Commission to justify the partial redaction of the provisions on down payments or advance payments, it is necessary to ascertain whether, in accordance with the case-law referred to in paragraphs 30, 31, 81 and 83 above, the Commission provided plausible explanations as to why access to the redacted information could specifically and actually undermine the protection of the commercial interests of the undertakings concerned and as to why the alleged risk could be regarded as reasonably foreseeable and not purely hypothetical.

110 In the present case, as stated in paragraphs 100 to 105 above, it is apparent from the contested decision that the Commission refused full access to the provisions in question, including the payment schedules and arrangements, in order not to risk revealing sensitive financial elements of the agreements at issue and, ultimately, elements regarding the commercial and pricing strategies of the undertakings concerned at a time characterised by a high demand for COVID-19 vaccines and during which negotiations with purchasers from third countries were ongoing or, at the very least, conceivable.

111 Having consulted the full versions of the agreements at issue, the Court notes that the provisions on down payments or advance payments, as well as the payment arrangements and schedules, are different. Furthermore, the applicants have not disputed either the context of high demand for COVID-19 vaccines or the fact that negotiations with purchasers from third countries were ongoing or, at the very least, conceivable on the date the contested decision was adopted.

112 Contrary to what the applicants claim, the fact that the undertakings concerned received down payments from public funds in order to develop COVID-19 vaccines does not, as such, preclude the provisions on down payments or on advance payments being commercially sensitive in nature, nor does it permit the inference that their commercial interests cannot be protected.

113 In that regard, according to the case-law, if a publicly-owned undertaking can hold commercial interests that may qualify for protection in the same way as those of a private company (see, to that effect, judgment of 27 February 2018, *CEE Bankwatch Network* v *Commission*, T-307/16, EU:T:2018:97, paragraph 108), the same must a fortiori apply to a private undertaking, even if the latter contributes to the performance of tasks in the public interest (judgment of 5 December 2018, *Falcon Technologies International* v *Commission*, T-875/16, not published, EU:T:2018:877, paragraph 49).

114 Similarly, as the Commission submits, the applicants' argument regarding the fact that information on the prices of vaccines had been leaked in the media must be rejected.

115 The unauthorised disclosure of a document cannot have the effect of granting public access to a document covered by one of the exceptions provided for in Article 4 of Regulation No 1049/2001 (judgment of 25 October 2013, *Beninca* v *Commission*, T-561/12, not published, EU:T:2013:558, paragraph 55).

116 Nor can the Court accept the applicants' argument regarding the fact that, in September and October 2022, that is to say, more than six months after the adoption of the contested decision, two undertakings (AstraZeneca and CureVac) may respectively have stated that public disclosure of their advance purchase agreement would not pose a problem, or revealed 'all the details about prices and the down-payment received', which, according to the applicants, shows that disclosure of the information on the down payments would not pose a risk to the commercial interests of the undertaking concerned.

117 As stated in paragraph 56 above, the merits of the application of the exception relating to the protection of commercial interests must be assessed in the light of the facts existing on the date the contested decision was adopted, and not in the light of any statements made by a limited number of the undertakings concerned more than six months after the date on which that decision was adopted, and whose respective down payments were, in any event, disclosed by the Commission.

118 It follows that the Commission was right to consider, in the contested decision, that full disclosure of the provisions on down payments or advance payments could provide competitors of the undertakings concerned and third-party purchasers with commercially sensitive information on the commercial and pricing strategies of the undertakings concerned.

119 It follows from the foregoing that the Commission's explanations in the contested decision concerning the existence of a reasonably foreseeable and not purely hypothetical risk that the protection of the commercial interests of the undertakings concerned might be undermined, as regards full disclosure of the provisions on down payments or advance payments, are well founded.

120 As regards the complaint that the Commission applied the exception relating to the protection of commercial interests in an inconsistent manner, that complaint overlaps with the third plea, and therefore it is appropriate to examine it in the context of the third plea.

121 In the light of the foregoing, the fourth part of the second plea must be rejected.

4. The partial refusal of access to the provisions on liability and indemnification

122 By the fifth part of the second plea, the applicants dispute the adequacy and the merits of the statement of reasons in the contested decision justifying the partial refusal of access to the provisions on liability and indemnification on the basis of the exception relating to the protection of commercial interests provided for in the first indent of Article 4(2) of Regulation No 1049/2001.

123 First, the applicants submit that the premise that full disclosure of the provisions on liability and indemnification could give rise to multiple unreasonable and unjustified legal actions is not explained and that the Commission has not set out or substantiated how disclosure of those provisions would undermine the commercial interests of the undertakings concerned.

124 Second, the applicants dispute the considerations relied on in the contested decision to the effect that full disclosure of the provisions in question would reveal to competitors of the undertaking concerned the ‘weak points’ of the coverage of its liability and would provide those competitors with a competitive advantage which they could exploit.

125 Third, the applicants do not agree that full disclosure of the provisions in question would have an impact on the general reputation of the undertakings concerned. The reason why the disclosure of those provisions would have such an impact is not explained anywhere by the Commission. If a company is held liable for damage in connection with a defective product, the harm caused to its reputation arises from that damage and not from the terms negotiated with the Commission.

126 Fourth, the applicants submit that three additional considerations relied on in the contested decision, to the effect that disclosure of the redacted information would reveal to competitors of the undertaking concerned the costs which a breach of the agreement at issue might entail as well as the actual profits from that agreement, and would harm the commercial interests of the undertakings concerned, mainly by undermining their competitiveness on global markets, are also unsubstantiated. According to the applicants, the Commission has not adduced sufficient evidence to show that disclosure of the information in question would reveal the content of the commercial strategy of the undertakings concerned or would weaken their competitive position on global markets. In addition, the examples referred to in the contested decision do not illustrate the sensitive nature of the redacted information.

127 Furthermore, the applicants maintain that the Commission’s line of argument that the negotiations on the provisions on liability and indemnification were individual is misleading. According to the applicants, it is apparent from paragraph 76 of Special Report 19/2022 of the European Court of Auditors, entitled ‘EU COVID-19 vaccine procurement’, that those provisions are the same in the agreements at issue, and therefore the disclosure of those provisions could not affect the commercial interests of the undertakings concerned.

128 In their reply, the applicants submit that, even if the Commission had proved that disclosure of the redacted information would specifically and actually undermine the commercial interests of the undertakings concerned, the public interest served by the disclosure of that information would outweigh those commercial interests.

129 The Commission disputes those arguments.

130 The Commission submits that the provisions in question have the same economic and financial relevance as any other cost element for the undertaking concerned and were individually negotiated.

131 First, the Commission submits that it is incorrect to assert that the disclosure of those provisions would not entail a risk of strategic and speculative actions for damages being brought against the undertakings concerned.

132 Thus, according to the Commission, full disclosure of the provisions in question would increase the number of actions for damages, whether well founded or not, against the undertaking concerned, since the disclosure would give the claimant more arguments on which to attempt to establish the defectiveness of the vaccine. Furthermore, that risk is all the more real because the definition of the damages in respect of which the undertaking concerned could be indemnified was already disclosed in certain agreements, namely in Document 5. In addition, disclosure of the details of the indemnification payable by the Member State concerned could have an impact on the burden of proof as regards the

defectiveness of the product. Knowledge of those details could have the effect of simplifying or complicating the task of establishing the vaccine manufacturer's liability. The Commission therefore considers that the risk of massive litigation and of very significant financial consequences for a single undertaking is not abstract.

133 Second, the Commission submits that the contested decision explains, to the requisite legal standard, the reasons why full disclosure of the provisions in question would have negative commercial repercussions for the undertakings concerned. Those provisions are not 'standard clauses', but were individually negotiated, and their final wording represented the undertaking's acceptance of one of several financial risks in the context of a complex agreement. If those provisions were disclosed in their entirety, a comparative assessment could give rise to an unjustified negative perception of some products. In addition, the case-law allows the Commission to rely on the exception relating to the protection of commercial interests on the basis of damage to the reputation of an operator active on a market. Furthermore, the Commission maintains that even a fully applicable indemnification clause does not make good all of the damage caused by an order to pay compensation to a victim, in particular the damage caused to the image and reputation of the undertaking ordered to pay the compensation. Thus, full disclosure of the provisions on liability and indemnification, that is to say of the situations in which an undertaking is or is not indemnified, would undeniably have an impact on its commercial interests.

134 Third, the Commission notes that the applicants submit that, in the present case, the actual and specific undermining of commercial interests resulting from disclosure of those provisions has not been substantiated and that, even if the Commission had demonstrated such harm, there is an overriding public interest justifying their disclosure. According to the Commission, the contested decision explains the negative consequences which disclosure of that information would entail in the present case for the undertakings concerned. The fact that the contested decision relies on the existence of a risk of actual and specific undermining of commercial interests does not mean that that risk is unsubstantiated or that it is speculative. Furthermore, the applicants' line of argument is contradictory in so far as they assert that it is essential to ascertain whether the undertakings concerned will be held liable for damage in the event of the vaccines having adverse effects, while claiming that the consequences for those undertakings of a disclosure of the provisions in question, as advanced by the Commission, are speculative and hypothetical.

(a) The statement of reasons in the contested decision

135 In the present case, in paragraph 2.1.1 of the contested decision, the Commission stated that the information redacted under the exception relating to the protection of commercial interests, provided for in the first indent of Article 4(2) of Regulation No 1049/2001, contained commercially sensitive elements regarding, inter alia, liability and indemnification. It stated that full disclosure of such information could reveal, to the competitors of the undertaking concerned, the precise profit for that undertaking resulting from the negotiation.

136 Next, in paragraph 2.1.4, first of all, the Commission addressed, in essence, the non-contractual liability of the undertakings concerned vis-à-vis third parties, inter alia for adverse drug reactions arising from use of the vaccine, and the provisions on possible indemnification, that is to say the reimbursement, by the Member States, of the undertakings concerned, should those undertakings be ordered to pay damages to third parties on the basis of their non-contractual liability. After that, it addressed various aspects of the contractual liability of the undertakings concerned.

137 Thus, the Commission stated that full disclosure of the provisions in question risked undermining the commercial interests of those

undertakings in three respects.

138 First, precise knowledge of the limits of the liability of the undertaking concerned would allow for strategic behaviour against it, in so far as it could be faced with the economic consequences of multiple sets of legal proceedings, brought unreasonably and without justification with the sole of aim of receiving compensation linked to use of its vaccine. Second, full disclosure of the provisions on the indemnification of the undertakings concerned by the Member States, in particular the provisions defining the exact conditions under which indemnification by the Member State is excluded, would inevitably reveal to competitors of the undertaking concerned, including those not producing vaccines, the 'weak points' of the coverage of its liability and would provide them with a competitive advantage which they could exploit. Third, precise knowledge of the limits of the liability of the undertaking concerned would also have an impact on its general reputation with consumers and potential business partners. According to the Commission, those reasons explain why certain passages relating to derogation from the provision on indemnification, namely the conditions under which a given undertaking will not be indemnified, cannot be disclosed. In that context, it referred, by way of example, to the redactions in Article I.12 of Document 4.

139 Next, the Commission stated that certain provisions regarding contractual liability have a commercial dimension that was assessed and negotiated with the undertaking concerned, the disclosure of which would reveal to that undertaking's competitors information on its internal capacity and strategy, in particular in so far as that information would make it possible to ascertain precisely the costs which a termination of contract could entail for that undertaking. The Commission illustrated its comments with examples of specific provisions.

140 The Commission stated that the redacted information was commercially sensitive. First, disclosure of that information would make it possible to ascertain precisely the costs which a breach of contract could entail for the undertakings concerned. Second, disclosure of that information could be detrimental to the undertakings concerned, since it would give their competitors a very realistic idea of the actual profits generated by the agreement at issue, when, at the time the contested decision was adopted, those undertakings were negotiating agreements with purchasers from third countries for the delivery of COVID-19 vaccines, and competition in that regard was taking place on a global market. The Commission also stated that that potential conflict with the commercial interests of the undertakings concerned would be all the more damaging because certain agreements were on the point of being implemented, as was the case, at the time the contested decision was adopted, for example, with Documents 7 and 11.

141 Lastly, the Commission stated that, in that context, the global market in which the undertakings concerned operated had to be taken into consideration in assessing the effects of disclosing the provisions in question under Regulation No 1049/2001. It stated that, when assessing the applicability of the exception relating to the protection of commercial interests, various factors had been taken into consideration, in particular the specific market situation of each vaccine manufacturer, that manufacturer's characteristics, its relationships with other commercial operators, its market and business strategies and the use that its competitors could make of the information disclosed. It concluded that full disclosure of the agreements concluded with the undertakings concerned would undermine the latter's commercial interests, essentially by undermining their competitiveness on the global markets.

142 It follows from those considerations that the Commission provided explanations as to the commercially sensitive nature of the information contained in the provisions on liability and indemnification. Similarly, the Commission explained, to the requisite legal standard, how, in its view, full disclosure of those provisions could specifically and actually undermine the commercial interests of the undertakings concerned, whether between them or between them and third parties with which they might be in competition.

143 It follows that the grounds of the contested decision enable the applicants to understand the specific reasons which led the Commission to redact, in part, in the agreements at issue, the provisions on both the contractual and non-contractual liability of the undertakings concerned, and the provisions on the possible indemnification by the Member States of any obligations incurred by the undertakings concerned should those undertakings' non-contractual liability be put in issue, and the Courts of the European Union to review the legality of those redactions, within the meaning of the case-law referred to in paragraphs 34, 35 and 78 above.

144 Accordingly, the complaint alleging that the statement of reasons in the contested decision is inadequate must be rejected.

(b) The merits of the statement of reasons in the contested decision

145 As regards the merits of the grounds put forward by the Commission to justify the partial redaction of the provisions on liability and indemnification, it is necessary to ascertain whether, in accordance with the case-law referred to in paragraphs 30, 31, 81 and 83 above, it provided plausible explanations as to why access to the redacted information could specifically and actually undermine the protection of the commercial interests of the undertakings concerned and as to why the alleged risk could be regarded as reasonably foreseeable and not purely hypothetical.

(1) The provisions on contractual liability

146 In the present case, as stated in paragraphs 139 to 141 above, it is apparent from the contested decision that the Commission refused full access to the provisions on the contractual liability of the undertakings concerned in order not to risk revealing allegedly commercially sensitive information regarding the risks identified in respect of the implementation of the agreements at issue and regarding the financial thresholds accepted by those undertakings as regards those risks, at a time characterised by a high demand for COVID-19 vaccines and during which negotiations with purchasers from third countries were ongoing or, at the very least, conceivable.

147 Having consulted the full versions of the agreements at issue, the Court notes that the provisions on the liability of the undertakings concerned in the event of breach, termination or suspension of those agreements, in particular in connection with delays in delivery or shortfalls in deliveries, are different. Furthermore, the applicants have not disputed either the context of high demand for COVID-19 vaccines or the fact that negotiations with purchasers from third countries were ongoing or, at the very least, conceivable.

148 It follows that the Commission was right to find, in the contested decision, that full disclosure of those provisions could provide competitors of the undertakings concerned and third-party purchasers with commercially sensitive information on cost elements, their internal capacity and strategies and on the financial thresholds accepted (see, to that effect, judgment of 12 October 2022, *Saure* v *Commission*, T-524/21, EU:T:2022:632, paragraphs 99 to 102).

149 It follows from the foregoing that the Commission's explanations in the contested decision concerning the existence of a reasonably foreseeable and non-hypothetical risk of the protection of the commercial interests of the undertakings concerned being undermined, as regards full disclosure of the provisions on the contractual liability of those undertakings, are well founded.

150 As regards the complaint that the Commission applied the exception relating to the protection of commercial interests in an inconsistent

manner, that complaint overlaps with the third plea, and therefore it is appropriate to examine it in the context of the third plea.

(2) The provisions on indemnification

151 As a preliminary point, it should be noted that, according to Articles 1 and 12 of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29), a producer is liable for damage caused by a defect in his product and his liability to the injured person may not be limited or excluded by a provision limiting his liability or exempting him from liability. Thus, as acknowledged by the Commission at the hearing, in the absence of an amendment of Directive 85/374, neither the Commission nor the Member States were entitled to derogate from the provisions of that directive.

152 Moreover, no provision of Directive 85/374 prohibits a third party, in this instance a Member State, from reimbursing the damages which a producer has paid on account of his product being defective.

153 In addition, the Court observes that the third paragraph of Article 6 of the agreement of 16 June 2020 on the procurement of COVID-19 vaccines concluded between the Commission and the Member States was published on the Commission's website on 7 September 2020 and was disclosed in full as an annex to the agreements at issue, Document 1 excepted. That provision envisages a mechanism whereby the Member States indemnify the undertakings concerned in respect of the economic costs, that is to say possible damages, which would normally be borne by those undertakings under their liability for their vaccines. Similarly, Communication COM(2020) 245 final, referred to in paragraph 3 above, states that that mechanism was to be regarded as an 'insurance policy', consisting of transferring some of the economic risk borne by the pharmaceutical industry to the public authorities, in exchange for which the Member States were assured of equitable and affordable access to a vaccine, should one become available.

154 It follows from the foregoing that, first, the mechanism whereby the Member States indemnify the undertakings concerned in no way affects the regime for the legal liability of those undertakings under Directive 85/374 and, second, that information was already in the public domain at the time when the initial request for access was made and when the contested decision was adopted.

155 Having consulted the full versions of the agreements at issue, the Court notes that, although the advance purchase agreements and the purchase agreements all contain a provision on indemnification, as envisaged by Article 6 of the agreement of 16 June 2020 on the procurement of COVID-19 vaccines concluded between the Commission and the Member States, the detailed content of those provisions is not identical. In that context, the Court notes that there are differences as regards (i) the precise situations in which it was agreed that the indemnification by the Member State would not be applicable, most of those situations nevertheless remaining broadly similar in the agreements at issue; (ii) the temporal or material scope of any indemnification, and (iii) the arrangements for managing the defence of any actions for damages and implementation of any indemnification.

156 Those clarifications having been made, it remains to be determined whether the Commission was right to refuse the wider, or even full, disclosure of the provisions on indemnification.

157 In that regard, the first ground relied on in the contested decision, namely that precise knowledge of the limits of the liability of the

undertaking concerned would allow for strategic behaviour against it, in so far as that undertaking could be faced with the economic consequences of multiple sets of legal proceedings, brought unreasonably and without justification with the sole aim of receiving compensation for the use of its vaccine, cannot be upheld.

158 Even if the fact that actions for damages brought against a company may undoubtedly entail high costs, whether in terms of economic resources, time or staff, and even if the actions are subsequently dismissed as unfounded, the right of third parties who may have been harmed by a defective vaccine to bring actions for damages against the undertakings concerned is based on national legislation transposing Directive 85/374. That right of action is independent of the existence and content of the provisions on indemnification.

159 Furthermore, the interest of the undertakings concerned in avoiding such actions for damages, should they in fact have produced and put into circulation a defective vaccine, cannot be regarded as a commercial interest and, in any event, does not constitute an interest deserving of protection, having regard, in particular, to the fact that any individual has the right to claim damages for harm caused to him or her by a defective product (see, by analogy, judgment of 15 December 2011, *CDC Hydrogene Peroxide* v *Commission*, T-437/08, EU:T:2011:752, paragraph 49 and the case-law cited). Similarly, the desire to avoid incurring higher costs in connection with court proceedings does not constitute an interest protected under the first indent of Article 4(2) of Regulation No 1049/2001 (see, to that effect, judgment of 28 June 2019, *Intercept Pharma and Intercept Pharmaceuticals* v *EMA*, T-377/18, not published, EU:T:2019:456, paragraphs 55 and 56).

160 Furthermore, there is nothing in the contested decision to support the conclusion that the wider disclosure of the mechanism for indemnification of the undertakings concerned might give rise to actions brought against those undertakings. Such actions will always seek an order that the producer of vaccines pay compensation for the damage suffered, irrespective of the identity of the entity that will ultimately bear the damages paid.

161 In those circumstances, the Court considers that the first ground relied on in the contested decision for refusing the wider disclosure of the provision on indemnification does not demonstrate, as required by the case-law cited in paragraph 31 above, the existence of a foreseeable and not purely hypothetical risk to the commercial interests of the undertakings concerned.

162 The second ground relied on in the contested decision for refusing full disclosure of the provisions on indemnification, in particular those defining the exact conditions under which indemnification by the Member State is excluded, is that such disclosure would inevitably reveal to competitors of the undertaking concerned, including those which do not produce vaccines, the ‘weak points’ of the coverage of its liability, and would provide them with a competitive advantage which they could exploit, for example, in advertisements and comparative advertising.

163 In that regard, it must be noted that the reason why the provisions on indemnification were incorporated into the agreements at issue, namely to compensate for the risks incurred by the undertakings concerned in connection with the shortening of the period for the development of the vaccines, was in the public domain before the adoption of the contested decision.

164 In addition, all the agreements at issue contain a provision on indemnification which, moreover, lists, in a broadly similar manner, the main specific situations in which the indemnification of the undertaking concerned by the Member State is excluded.

165 Since all the undertakings concerned obtained, for an identified and legitimate reason, a provision on indemnification, there is nothing in the contested decision to support the conclusion that, in the event of wider disclosure of the provision on indemnification, the risk of the commercial interests of the undertakings concerned being undermined, in particular through their obtaining a competitive advantage over each other, was, on the date on which the decision was adopted, reasonably foreseeable and not purely hypothetical.

166 In those circumstances, the Court considers that the second ground relied on in the contested decision for refusing the wider disclosure of the provision on indemnification does not demonstrate, as required by the case-law cited in paragraph 31 above, the existence of a foreseeable and not purely hypothetical risk to the commercial interests of the undertakings concerned.

167 As regards the third ground relied on in the contested decision for refusing full disclosure of the provision on indemnification, in particular disclosure of the conditions under which indemnification by the Member State is excluded, namely that precise knowledge of the limits of the liability of the undertakings concerned would have repercussions on their reputations with consumers and with their potential business partners, it should be noted that, contrary to what the applicants claim, damage to the reputation of an undertaking undoubtedly constitutes damage to its commercial interests in so far as the reputation of any operator active on a market is essential for the performance of its economic activities on the market (see, to that effect, judgment of 5 December 2018, *Falcon Technologies International* v *Commission*, T-875/16, not published, EU:T:2018:877, paragraphs 51 and 53).

168 Nevertheless, for the same reasons as those set out in paragraphs 163 to 165 above, there is nothing in the contested decision that could reasonably support the conclusion that, in the event of wider disclosure of the provision on indemnification, the risk of the commercial interests of the undertakings concerned being undermined, in particular their reputation, was, on the date the contested decision was adopted, reasonably foreseeable and not purely hypothetical.

169 In those circumstances, the Court considers that the third ground relied on in the contested decision for refusing the wider disclosure of the provision on indemnification does not demonstrate, as required by the case-law cited in paragraph 31 above, the existence of a foreseeable and not purely hypothetical risk to the commercial interests of the undertakings concerned.

170 In the light of the foregoing, the fifth part of the second plea is well founded as regards the provisions on indemnification in the agreements at issue.

171 It follows that the fifth part of the second plea must be upheld in part as regards the provisions on indemnification and must be rejected in part as regards the provisions on the contractual liability of the undertakings concerned.

5. The partial refusal of access to the delivery schedules

172 By the sixth part of the second plea, the applicants complain that the Commission redacted the vaccine delivery schedules of the undertakings concerned and did not sufficiently justify, in that respect, the application of the exception relating to the protection of commercial interests. In the applicants' view, that information is not commercially sensitive information and the risk of the commercial interests of the undertakings concerned being undermined is hypothetical.

173 The Commission disputes those arguments.

174 In the present case, by the contested decision, the Commission redacted the delivery schedules, in the strict sense, namely the volume of doses and the frequency of deliveries, in Documents 3 and 8 to 13.

175 In the contested decision, the Commission stated that the delivery schedules and the contractual obligations relating to them were commercially sensitive information for the undertakings concerned, the disclosure of which would reveal to their potential competitors information on their internal business capacity and strategies. Included in that category are, for example, Article I.4.7.1 et seq. of Document 12, Article II.14 of Document 13 and Article I.4.7 of Document 8. The Commission also stated that that information would reveal, precisely, the costs which a breach of contract could entail for the undertaking concerned, since that information contains, where applicable, rules on liquidated damages in the event of a delayed delivery or a delivery shortfall. According to the Commission, that information was all the more sensitive in view of the very competitive context in which the undertakings concerned operate, in that those undertakings negotiate and compete at a global level for the supply of COVID-19 vaccines, including for purchasers outside the European Union. That potential conflict with the commercial interests of the undertakings concerned would have been all the more damaging since certain agreements were on the point of being implemented, as was the case, at the time when the contested decision was adopted, for example, with Documents 7 and 11. Furthermore, the Commission stated that, when assessing the applicability of the exception relating to the protection of commercial interests, it had taken into account the particular situation of the undertakings concerned and the stage of implementation of the agreement in question.

176 In that regard, the Court considers that the considerations put forward by the Commission justify regarding the information on the redacted delivery schedules as constituting commercially sensitive information and that they are sufficient to support the conclusion that there is a reasonably foreseeable and not purely hypothetical risk that disclosure of that information could undermine the protection of the commercial interests of the undertakings concerned (see, to that effect, judgment of 3 July 2014, *Council* v *in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 52 and the case-law cited).

177 Having consulted the full versions of the agreements at issue, the Court notes that the redacted information on the delivery schedules gives an overview of relevant and recent information on the internal business capacity and strategies of the undertakings concerned, the delivery conditions, arrangements, volumes and frequency of deliveries, and the consequences for those undertakings in the event of shortfalls in deliveries or delayed deliveries. Thus, at the time when the contested decision was adopted, the possible existence of a reasonably foreseeable and not purely hypothetical risk of the internal business strategies of the undertakings concerned being undermined could not be ruled out.

178 In the light of the foregoing, the sixth part of the second plea must be rejected.

6. The partial refusal of access to the provisions on donations and resales

179 By the seventh part of the second plea, and, as with the first plea (see paragraphs 17 and 25 above), the applicants complain that the Commission largely redacted the provisions on vaccine donations and resales in the agreements at issue and that it did not sufficiently justify the application of the exception relating to the protection of commercial interests in that respect. In the applicants' view, the risk of the

commercial interests of the undertakings concerned being undermined is hypothetical. Moreover, that information is of great interest for public health in third countries. The Commission ought to have weighed the hypothetical undermining of the commercial interests of the undertakings concerned against the public interest in transparency, since worldwide vaccination is of the utmost importance for the protection of human health within the European Union and in third countries.

180 The Commission disputes those arguments.

181 According to the Commission, in view of the context in which the agreements at issue were negotiated, the provisions on donations and resales concern the core of the commercial transactions and their disclosure would undermine the legitimate commercial interests of the undertakings concerned, in particular with regard to their internal business capacity and strategies, as advanced in the contested decision. It submits that the purpose of not disclosing those provisions is to allow the Member State and the undertaking concerned to retain their discretion in assessing resales or donations and in the context of any trilateral agreements with third countries. Full disclosure of those provisions would make such decisions dependent on factors extraneous to commercial interests and could have significant financial consequences for the undertaking concerned, in particular as regards indemnification, and would provide its competitors with useful commercial information which they could use against the undertaking in third countries. Those provisions therefore have a commercial dimension. The Commission disputes the applicants' line of argument that those provisions cannot be regarded as commercially confidential because of the major interest for public health outside the European Union, on the basis that public health considerations cannot be the decisive factor in that regard.

182 In the present case, by the contested decision, the Commission redacted in full the provisions on donations and resales in Documents 7 and 11. It partly redacted those provisions in Documents 3, 4, 6, 8, 9, 12 and 13.

183 However, the contested decision, which sets out the reasons which, it is claimed, justify the non-disclosure, in full or in part, of a whole series of categories of information in the agreements at issue, does not expressly indicate, even briefly, the reasons why the provisions on donations and resales were redacted.

184 That conclusion cannot be called into question by the arguments put forward by the Commission in its pleadings, to the effect that the provisions on donations and resales have an appreciable commercial dimension for the undertakings concerned in connection with any trilateral agreements, in particular as regards pricing, indemnification and responsibility for costs, and, consequently, in connection with their potential future commercial relations. Those explanations were not relied on in the contested decision and cannot be inferred from the explanations set out in that decision.

185 Nor can that conclusion be called into question by the Commission's assertion, at the hearing, that paragraph 2.1.1 of the contested decision contains the initial elements of a statement of reasons with regard to the provisions on donations and resales. It is true that that paragraph states that 'the redacted parts of the contracts [which the applicants] request contain information that, if disclosed, could damage the competitive positions of the companies concerned as business actors on the global market for the production and commercialisation of these pharmaceutical products'. Nevertheless, that sentence is so general that it could refer to almost all the provisions of the agreements at issue and does not indicate the specific concerns of the undertakings concerned, or even of the Member States, relating to the assessment of possible donations or resales in the event of wider disclosure of the provisions in question.

186 It follows that the Commission has not provided sufficient explanations as to how access to the provisions on donations and resales could specifically and actually undermine the commercial interests of the undertakings concerned.

187 In the light of the foregoing, the applicants therefore rightly submit that the Commission infringed the first indent of Article 4(2) of Regulation No 1049/2001 by refusing to grant access to the provisions on donations and resales.

188 It follows that the seventh part of the second plea must be upheld.

7. Conclusion on the second plea

189 For the reasons set out in paragraphs 151 to 171 and in paragraphs 182 to 187 above, the fifth and seventh parts of the second plea must be upheld and the contested decision annulled as regards the provisions on indemnification, and on donations and resales, and the second plea must be rejected as to the remainder.

C. The third plea in law, alleging an inconsistent application of Regulation No 1049/2001 leading to an infringement of that regulation, and infringement of the principle of good administration, in that the Commission did not redact, to the same extent, provisions or information of the same nature

190 By their third plea, the applicants complain that the Commission redacted, in an inconsistent manner, certain provisions and information of the same, or even identical, nature, in some of the agreements at issue but not in others. Furthermore, the Commission has explained neither the reason for such discrepancies nor how disclosure of the redacted information would have undermined the commercial interests of the undertakings concerned. The applicants submit that the inconsistencies in the redactions show that the Commission simply followed the opinion of the undertaking concerned and the applicants argue, in the reply, that those inconsistencies constitute a breach of the principle of good administration.

191 In that context, the applicants highlight, first, the provisions on intellectual property rights and the provisions on down payments or advance payments.

192 The applicants put forward similar complaints in the context of the first plea concerning the definitions and in the context of the third to fifth parts of the second plea, concerning the provisions on intellectual property, down payments and advance payments and the provisions on liability and indemnification.

193 The Commission disputes those arguments.

194 In this connection, the Court notes that Article 41(2)(c) of the Charter provides that the right to good administration includes the obligation of the administration to give reasons for its decisions.

195 Furthermore, as regards documents originating from third parties, Article 4(4) of Regulation No 1049/2001 states that the EU institution is to consult the third party with a view to assessing whether an exception in Article 4(1) or (2) is applicable, unless it is clear that the document is or is not to be disclosed. If the institution concerned considers that it is clear that access to a document originating from a third party must

be refused on the basis of the exceptions laid down in paragraphs 1 or 2 of that article, the institution is to refuse the applicant access without even having to consult the third party from which the document originates, whether or not that third party has previously refused a request for access to the same documents made on the basis of that regulation.

196 As regards the discretion enjoyed by the EU institutions when dealing with requests for access to documents originating from third parties, it should be stated that the provisions of Regulation No 1049/2001 establishing, subject to the exceptions which it lists, a right of access to all documents held by an institution must be implemented effectively by the institution to which the request for access is addressed (judgment of 14 February 2012, *Germany* v *Commission*, T-59/09, EU:T:2012:75, paragraph 48).

197 Therefore, in the case of documents originating from a third party, although it is true that it is mandatory to consult that party before the document which originates from it is disclosed, it is for the Commission to assess the risks that may result from disclosure. In particular, the Commission cannot take the view that that third party's opposition automatically means that disclosure may not take place due to a risk that the commercial interests might be undermined, but must independently examine all the relevant circumstances and take a decision within its margin of discretion.

198 Thus, under Article 8 of Regulation No 1049/2001, ultimate responsibility for the proper application of that regulation lies with the EU institution which is also responsible for defending, before the Courts of the European Union or the European Ombudsman, the validity of the decision refusing access to documents originating from a third party. If, in the case of documents originating from third parties, the institution were required to accept automatically the reasons given by the third party concerned, that institution would be forced to defend, vis-à-vis the person making the request for access and, in some cases, before those review bodies, positions which it does not itself consider to be defensible (see, to that effect and by analogy, judgment of 14 February 2012, *Germany* v *Commission*, T-59/09, EU:T:2012:75, paragraph 47).

199 In the present case, the contested decision states that, in accordance with Article 4(4) of Regulation No 1049/2001, the Commission conducted further consultations, described as 'extensive', with the undertakings concerned concerning the possibility of a wider disclosure of the agreements at issue following the confirmatory application. That decision explains that it followed from those consultations that parts of the agreements at issue still required protection because they were commercially sensitive and their disclosure could undermine the legitimate commercial interests of the undertakings concerned. The contested decision states that wider partial access was granted to the agreements at issue after the institution had taken into consideration the replies of the undertakings concerned and the Commission's assessment. The contested decision also states that the extent of the redactions varied, inter alia, depending on the particular situation of each undertaking concerned, its characteristics, its relations with other commercial operators, its market and business strategies, the use that its competitors could make of the information disclosed and the stage of implementation of the agreement in question.

200 It follows that the applicants were well-placed in a position to understand the reasons for the differences in the redactions of the agreements at issue and in what respect, according to the Commission, full disclosure of the various redacted parts of those documents risked having a different impact on the commercial interests of the undertakings concerned. The contested decision is, therefore, not vitiated by a failure to state reasons in that regard.

201 Furthermore, it is apparent from the contested decision and from reading the agreements at issue that, although it is true that those

documents all share the same substantive purpose, namely the purchase of COVID-19 vaccines, and contain provisions on the mutual obligations of the contracting parties to that end, the legal subject matter of each of the agreements at issue differs, since the undertaking concerned and the particular vaccine differ. Thus, each agreement at issue is an independent document.

202 As it is, the applicants have, in essence, merely taken the view that it is implausible that a particular piece of information is sensitive for one undertaking but not for another. Nevertheless, they have not provided any relevant material capable of refuting the explanations, provided by the Commission in the contested decision, that in refusing access to the redacted information, the Commission relied on an analysis of the information relating to the specific content of each agreement in question and on an analysis of the individual situation of each undertaking concerned.

203 In the light of the foregoing considerations, the third plea must be rejected as unfounded.

D. The fourth plea in law, alleging infringement of Article 4(2) of Regulation No 1049/2001, in that the Commission failed to take into account the overriding public interest in disclosure of the requested information

204 By their fourth plea, as adapted, the applicants dispute, in essence, the merits and adequacy of the reasons put forward by the Commission in the contested decision regarding the absence of an overriding public interest in the full disclosure of the agreements at issue, within the meaning of the final limb of Article 4(2) of Regulation No 1049/2001.

205 According to the applicants, there is an overriding public interest in full disclosure of the agreements at issue in order to establish public trust in the role played by the Commission in the joint procurement of COVID-19 vaccines, and the use of public funds in that regard, and in order to establish public trust in the vaccines themselves, so as to combat vaccine hesitancy and disinformation.

206 Similarly, the applicants submit that there is a link between the phenomenon of vaccine hesitancy and the public's mistrust of the institutions and the failure to disclose certain information contained in the agreements at issue, namely the structure of the costs of producing the various vaccines, prices, production locations, intellectual property agreements, provisions on liability and indemnification and provisions on access to the vaccine.

207 The applicants dispute that they put forward only arguments of a general nature to justify the disclosure of the redacted information. They complain that the Commission failed to weigh the commercial interests of the undertakings concerned against the overriding public interest in health as it is promoted by transparency. The Commission simply rejected the applicants' arguments without clearly stating the reasons why there was no overriding public interest in disclosing the information at issue.

208 Lastly, in their statement of modification, the applicants set out the reasons why disclosure of certain specific redacted information in the agreements at issue is necessary. First, they maintain that disclosure of the definitions is a prerequisite for understanding the agreements at issue and, consequently, for transparency and trust, and therefore the disclosure is of overriding public interest. Second, disclosure of the location of the vaccine production sites is necessary for the organisation of vaccination campaigns in the Member States and for the public to be able to assess whether any delivery delays are to be expected and to ascertain whether capacity is sufficient to deliver vaccines in a timely manner. Third, disclosure of the provisions on donations and resales is necessary in order to know how the European Union and the Member

States contribute to combating COVID-19 worldwide. Fourth, disclosure of the prices per dose and the delivery schedules is necessary in order to restore public trust in the joint procurement of vaccines and to explain the different vaccine choices of the Member States and the difficulties encountered with deliveries, in particular by AstraZeneca. Fifth, disclosure of the provisions on down payments and advance payments is important for the public to have trust in the vaccines and in the Commission's investments of public funds and so that the public can analyse them and draw conclusions on the joint procurement of vaccines and possible profits made by the undertakings concerned. Sixth, disclosure of the provisions on liability and indemnification is essential in order to increase trust in vaccines, to combat disinformation and to know who is liable and who will be indemnified in the event of side effects from vaccination.

209 The Commission disputes those arguments.

210 In this connection, as a preliminary point, the Court recalls that the first plea, the first part of the second plea and the fifth and seventh parts of the second plea must be upheld in so far as the Commission did not provide sufficient explanations as to how access to the definitions of the expressions 'wilful misconduct' in Document 1 and 'best reasonable efforts' in Documents 4 and 7 and to the provisions on donations and resales could specifically and actually undermine the commercial interests of the undertakings concerned, and in so far as the grounds for refusing the wider disclosure of the provisions on indemnification do not demonstrate the existence of a foreseeable and not purely hypothetical risk of the commercial interests of the undertakings concerned being undermined, in breach of the first indent of Article 4(2) of Regulation No 1049/2001. It follows that the examination of the fourth plea does not concern those aspects of the contested decision.

211 In accordance with the final limb of Article 4(2) of Regulation No 1049/2001, the institutions are to refuse access to a document where disclosure would undermine, inter alia, the protection of the commercial interests of a natural or legal person 'unless there is an overriding public interest in disclosure'. It follows that the EU institutions cannot refuse access to a document where its disclosure is justified by an overriding public interest, even if such disclosure could undermine the protection of the commercial interests of a natural or legal person.

212 In that respect, it is necessary to weigh, on the one hand, the particular interest to be protected by non-disclosure of the document concerned against, on the other hand, inter alia, the public interest in the document being made accessible, having regard to the advantages resulting from increased openness, as described in recital 2 of Regulation No 1049/2001, in so far as it 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 (see judgment of 21 October 2010, *Agapiou Joséphidès* v *Commission and EACEA*, T-439/08, not published, EU:T:2010:442, paragraph 136 and the case-law cited; judgment of 5 February 2018, *PTC Therapeutics International* v *EMA*, T-718/15, EU:T:2018:66, paragraph 107).

213 It is for the party requesting access to refer to specific circumstances to establish an overriding public interest which justifies the disclosure of the documents concerned (see judgments of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 94 and the case-law cited, and of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraph 90 and the case-law cited). Indeed, it is for the party alleging an overriding public interest, within the meaning of the last sentence of Article 4(2) of Regulation No 1049/2001, to prove that interest (judgment of 25 September 2014, *Spirlea* v *Commission*, T-306/12, EU:T:2014:816, paragraph 97).

214 The overriding public interest which may justify the disclosure of a document need not necessarily be distinct from the principles which

underlie Regulation No 1049/2001. However, general considerations cannot be used to justify access to the requested documents; access requires that the principle of transparency should, in the given situation, raise an issue of particularly pressing concern which prevails over the reasons justifying the refusal to disclose the documents in question (see, to that effect, judgments of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 92 and 93 and the case-law cited, and of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraphs 92 and 93).

215 In the present case, in the confirmatory application, the six MEPs invoked an overriding public interest which, in their view, justified the disclosure of the agreements at issue, in essence, comprising five parts, namely (i) transparency for the purposes of establishing public trust in the Commission's actions concerning the acquisition of COVID-19 vaccines and in view of the use of public funds in that regard; (ii) transparency for the purposes of public trust in the vaccines themselves and to counter vaccine hesitancy; (iii) various statements by the Parliament calling for greater transparency; (iv) the global dimension of the pandemic; and (v) the Charter and the six MEPs' dual role as EU citizens and Members of the Parliament.

216 In the contested decision, by which the Commission granted wider partial access to Documents 1 to 8 and 11, which had previously been disclosed, as well as partial access to Documents 9, 10, 12 and 13, which until then had not been disclosed publicly in a redacted form, the Commission indicated that it agreed with the importance of public confidence in its actions with regard to the purchase of vaccines and recognised the high level of transparency required. It stated that it had regularly communicated information on the progress of negotiations with the undertakings concerned and the various steps taken, including with the Parliament, in order to ensure transparency. It stated that it had consulted the undertakings concerned with a view to granting the widest possible access to the agreements at issue. However, it pointed out that, on the date of the contested decision, the health crisis was ongoing and that the right of access to documents was not a general and absolute right. Next, it noted the general nature of the arguments set out in the confirmatory application concerning possible vaccine hesitancy, the various statements of the Parliament, the Charter and the global dimension of the pandemic, and stated that general considerations, including on the protection of human health, were not sufficient to substantiate an overriding public interest, in the absence of specific reasons justifying the extent to which the disclosure would serve that public interest. It indicated that it had not been able to identify any public interest capable of overriding the public and private interest protected by the first indent of Article 4(2) of Regulation No 1049/2001. It rejected the relevance of considerations based on the fact that three concluded advance purchase agreements had been leaked in the media. Lastly, it considered that the fact that the agreements at issue related to an administrative procedure and not to any legislative act further supported the conclusion that there was no overriding public interest in disclosure of the redacted passages.

217 It follows from those considerations that the Commission provided brief explanations enabling the applicants to understand the reasons which had led it to rule out the existence of an overriding public interest in the full disclosure of the agreements at issue, within the meaning of the last sentence of Article 4(2) of Regulation No 1049/2001.

218 Accordingly, the complaint alleging that the statement of reasons in the contested decision is inadequate must be rejected.

219 As regards the merits of the statement of reasons in the contested decision, the Commission's assessment is not vitiated by any error of law having regard to the first indent of Article 4(2) of Regulation No 1049/2001.

220 In the present case, the fact that the undertakings concerned participated in the performance of tasks in the public interest, in particular the

development of COVID-19 vaccines, through down payments or advance payments, from public funds, made under the agreements at issue negotiated by the Commission on behalf of the Member States, is, in principle, capable of revealing the existence of a genuine public interest in access to information relating to those vaccines and agreements (see, to that effect, judgment of 7 September 2023, *Breyer* v *REA*, C-135/22 P, EU:C:2023:640, paragraph 77).

221 Furthermore, the transparency of the process followed by the Commission during the negotiations with the COVID-19 vaccine manufacturers and when the agreements at issue were concluded on behalf of the Member States is likely to contribute to increasing the trust of EU citizens in the vaccination strategy promoted by that institution and, consequently, inter alia, to combating the dissemination of false information concerning the conditions surrounding the negotiation and conclusion of those agreements (see, to that effect, judgments of 7 September 2022, *Saure* v *Commission*, T-448/21, EU:T:2022:525, paragraph 45, and of 7 September 2022, *Saure* v *Commission*, T-651/21, not published, EU:T:2022:526, paragraph 46).

222 In that context, it should be noted that the Commission did not deny the existence of a public interest in receiving information relating to the purchase of the vaccines and the agreements at issue, but it took the view, in the contested decision, that that interest was satisfied by the various steps taken to ensure transparency, including the publication of up-to-date information on the progress of the negotiations and the communication of information to the Parliament orally and in writing. It should also be noted that the redacted information does not contain any scientific information as to the effectiveness and the safety of the vaccines that might address possible concerns, on the part of the public, as regards the use of vaccines.

223 However, considerations as general as those relied on by the applicants, namely the need to establish public trust in the Commission's actions concerning the purchase of COVID-19 vaccines and the need to establish trust in the vaccines themselves in order to counter vaccine hesitancy, cannot provide an appropriate basis for establishing that the interest in transparency was, in the present case, of particularly pressing concern and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the redacted parts of the agreements at issue.

224 That conclusion is not called into question by the applicants' more detailed arguments set out in their statement of modification.

225 First, the applicants have not in any way substantiated in what respect disclosure of information on the location of the production sites of the undertakings concerned, to themselves and, ultimately, to the public, was necessary for the organisation of vaccination campaigns in the Member States, since those campaigns are implemented by the competent national authorities. Similarly, they have not explained how disclosure of that information would allow the public to reach an informed opinion as to the risk of possible delays in delivery and as to the production capacity of those sites.

226 Second, in so far as the applicants claim that disclosure of the prices per dose and the delivery schedules would make it possible to bolster public trust in the purchase of vaccines and to explain the Member States' different vaccine choices and the delivery difficulties encountered, the applicants have clearly not substantiated their claims. In particular, they have not explained in what respect public trust in the joint procurement of COVID-19 vaccines would be strengthened by the disclosure of sensitive financial elements of the agreements at issue, which are liable to be used against the undertakings concerned in their negotiations with purchasers from third countries, and even against the Commission and the Member States in subsequent purchase agreements. The applicants have also failed to explain how, on their own, the

prices per dose are capable of indicating the reasons underlying the Member States' decisions as to the vaccines used in their COVID-19 vaccination campaigns. Those decisions are apt to be influenced by various considerations, besides the Member State's choice as to whether or not to participate in the agreement in question and the price, such as the vaccine's characteristics, its availability and the delivery period. Furthermore, as the Commission submits, disclosure of the delivery schedules would not in any way explain the causes of any difficulties encountered with deliveries.

227 Third, in so far as the applicants claim that disclosure of the provisions on down payments and advance payments would strengthen public trust in the vaccines and in the investment of public funds by enabling the public to analyse and to draw conclusions regarding the Commission's negotiations and investments, and on the possible profits of the undertakings concerned, it must be noted that the sensitive financial elements of the agreements at issue have no connection with the effectiveness or the safety of the COVID-19 vaccines. Furthermore, even if wider disclosure of the provisions redacted in Documents 2 to 4, 12 and 13 were in fact to make it possible to draw conclusions regarding to the negotiation of those agreements, the use of public funds and the profits of the undertakings concerned, as stated in paragraph 226 above, the applicants have not explained in what respect public trust would be strengthened by the disclosure of the redacted information when that information would be liable to have a negative effect on ongoing or subsequent negotiations.

228 Fourth, since the mechanism whereby the Member States indemnify the undertakings concerned does not in any way affect the regime of legal liability of those undertakings under Directive 85/374 and since that information was already in the public domain at the time when the initial request for access was made, the applicants have failed to explain how disclosure of the provisions on the contractual liability of the undertakings concerned in the event of breach, termination or suspension of the agreements at issue, in particular in connection with delivery delays or shortfalls in deliveries, would serve to increase trust in vaccines and combat disinformation.

229 Lastly, and as the Commission stated in the contested decision, its administrative activity does not require such extensive access to documents as that required by the legislative activity of an EU institution (see, by analogy, judgments of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 60, and of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraph 91).

230 In the present case, the agreements at issue form part of an administrative activity.

231 In those circumstances, the Commission did not err in law when, on the date the contested decision was adopted, it relied on the exception relating to the protection of the commercial interests of the undertakings concerned, bearing in mind, however, that, as is apparent from Article 4(7) of Regulation No 1049/2001, that exception does not apply for an unlimited period, but only for as long as that protection is justified on the basis of the content of the document at issue (see, to that effect, judgment of 26 January 2010, *Internationaler Hilfsfonds* v *Commission*, C-362/08 P, EU:C:2010:40, paragraphs 56 and 57).

232 It follows that the fourth plea must be rejected as unfounded.

E. The fifth plea in law, alleging infringement of Article 42 and Article 52(3) of the Charter and of Article 10(1) ECHR

233 By their fifth plea, the applicants submit that the Commission is required to take into account both the right to freedom of expression,

guaranteed by Article 11(1) of the Charter, and the right of access to documents, protected by Article 42 of the Charter. They complain that the Commission failed to examine whether and to what extent the only partial access granted to the agreements at issue constituted an interference with the exercise of their right to freedom of expression, provided for in Article 11(1) of the Charter, and which includes the freedom to receive information, contrary to Article 52(3) of the Charter and Article 10(1) ECHR. In their reply, they add that, by failing to respect the limits to the exception relating to the protection of commercial interests, the Commission also infringed Article 42 of the Charter.

234 The Commission disputes those arguments.

235 First, according to the Commission, the claim relating to Article 42 of the Charter, raised in the reply, is new and inadmissible in the absence of any argument put forward to support it, and, in any event, it is unfounded. Second, the right of access to documents enshrined in Article 42 of the Charter is not unconditional, but is exercised, in accordance with Article 52(2) of the Charter, under the conditions and within the limits defined by the Treaties. Therefore, by refusing to grant access to certain parts of the agreements at issue under the exceptions provided for in Article 4 of Regulation No 1049/2001, the Commission did not infringe the applicants' freedom of expression.

236 The applicants' fifth plea must be understood as alleging, in essence, that the Commission infringed both Article 11(1) and Article 42 of the Charter in so far as, as follows from the examination of the other pleas relied on in support of the present action, the Commission did not sufficiently examine whether and to what extent the partial refusal of access to the agreements at issue was liable to constitute an interference with their right of access to documents and with their freedom of expression and information.

237 In addition, it must be noted that the applicants have not put forward specific arguments to demonstrate how, in practice, the partial refusal of access infringes their fundamental right and freedom, but they essentially make the finding of such an infringement dependent on the pleas examined above being upheld.

238 In those circumstances, for the same reasons as those set out in paragraphs 39 to 46, 151 to 171 and 182 to 188 above, it must be held that there has been an infringement of Article 11(1) and Article 42 of the Charter as regards the redaction of the definitions of the expressions 'wilful misconduct' and 'best reasonable efforts' in Documents 4 and 7 and as regards the redaction of the provisions on donations and resales and as regards the provisions on indemnification in the agreements at issue.

239 By contrast, since the applicants have not put forward any argument independent of those put forward in the first to fourth pleas examined above in order to challenge the refusal to grant access to information other than that referred to in paragraph 238 above, the fifth plea must be rejected as regards such information.

240 In the light of the foregoing considerations, the fifth plea must be upheld in part.

F. The sixth plea in law, alleging infringement of Articles 7 and 8 of Regulation No 1049/2001, in so far as, by the contested decision, the Commission redacted certain information that it had previously disclosed

241 By their sixth plea, the applicants submit that the Commission infringed Articles 7 and 8 of Regulation No 1049/2001 by redacting, in Documents 7 and 11, certain information that it had nevertheless disclosed in response to the initial request. In their view, the Commission is

not entitled to disclose less information in response to the confirmatory application.

242 The Commission disputes those arguments.

243 In that regard, without there being any need to decide on the question of whether, in response to a confirmatory application, the Commission may withdraw access to certain information that it had disclosed in its initial position, suffice it to note that, in the present case, the Commission did not intend to withdraw access to the information in Documents 7 and 11 that it had disclosed in its initial position.

244 First, it is true that the Commission redacted certain information in Documents 7 and 11 that it had nevertheless disclosed in response to the initial request. However, the contested decision makes no mention at all of such a withdrawal of information. Second, before the General Court, the Commission expressly relied on the fact that the applicants did not have an interest in raising such a plea on the ground that they '[had] already obtained legally access … to the parts of the documents disclosed at [the] initial stage'. Lastly, the Commission has not asked the applicants to undertake to delete the information communicated to them.

245 In those circumstances, it must be held that the applicants retained access to certain information in Documents 7 and 11 obtained in response to their initial request.

246 Consequently, the sixth plea must be rejected as ineffective.

247 In the light of all of the foregoing considerations, the contested decision must be annulled in so far as it refuses wider access, first, to the definitions of the expressions 'wilful misconduct' in Document 1 and 'best reasonable efforts' in Documents 4 and 7, second, to the provisions on donations and resales and, third, to the provisions on indemnification.

248 In that context, it should be noted that it is not for the Court to substitute itself for the Commission and to indicate the parts of the documents to which total or partial access should have been granted, the institution being required, when giving effect to this judgment and in accordance with Article 266 TFEU, to take into account the reasoning set out in it (see, to that effect, judgment of 6 July 2006, *Franchet and Byk* v *Commission*, T-391/03 and T-70/04, EU:T:2006:190, paragraph 133).

IV. Costs

249 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 largely 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 (Fifth Chamber)

hereby:

1. **Annuls Decision C(2022) 1038 final of the European Commission of 15 February 2022 in so far as the Commission refused wider access, first, to the definitions of the expressions 'wilful misconduct' in the advance purchase agreement concluded between it and AstraZeneca and 'best reasonable efforts' in the advance purchase agreement concluded between the Commission and Pfizer-BioNTech and in the purchase agreement concluded between the Commission and Pfizer-BioNTech, second, to the provisions on donations and resales and, third, to the provisions on indemnification in the advance purchase agreements and purchase agreements concluded between it and the relevant pharmaceutical companies for the purchase of COVID-19 vaccines on the basis of the first indent of Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents;**

2. **Dismisses the action as to the remainder;**

3. **Orders the Commission to pay the costs, including the costs relating to the initial version of the application initiating proceedings.**

Svenningsen Mac Eochaidh Martín y Pérez de Nanclares

Delivered in open court in Luxembourg on 17 July 2024.

V. Di Bucci S. Papasavvas

Registrar President

Table of contents

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* Language of the case: English.