Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 28 November 2017 [1]

**Case C-57/16 P**

**ClientEarth**
v

**European Commission**

(Appeal — Access to documents of the institutions — Regulation (EC) No 1049/2001 — Request for access to a draft impact assessment report, impact assessment report and opinion of the impact assessment board — General presumption of confidentiality — Refusal to grant access — Legislative documents)

## I. Introduction

1. The present appeal relates to an action for annulment brought before the General Court of the European Union by ClientEarth against two decisions of the European Commission refusing to grant it access to documents. Specifically, by decision of 1 April 2014, the Commission refused to grant the appellant access to an impact assessment report for a proposed binding instrument setting a strategic framework for risk-based inspections and surveillance for EU environmental legislation, as well as an opinion of the impact assessment board. Furthermore, by decision of 3 April 2014, the Commission also refused to grant the appellant access to a draft impact assessment report relating to access to justice in environmental matters at Member State level in the field of EU environmental policy and an opinion of the impact assessment board ('the documents at issue').

2. The appellant therefore brought an action against those two decisions, which was dismissed by the General Court by judgment of 13 November 2015, *ClientEarth* v *Commission* (T-424/14 and T-425/14, EU:T:2015:848; 'the judgment under appeal').

3. In that judgment, the General Court essentially found that the documents at issue fell within the same category and that a general presumption of confidentiality applied since their disclosure would undermine the Commission's decision-making process for preparing proposals for legislative acts.

4. The appellant, supported by the Finnish and Swedish Governments, has brought an appeal against that judgment.

5. In the context of that appeal, the primary question on which the Court will have to give a ruling is whether an institution is able to base its refusal to grant access to impact assessments on a general presumption of confidentiality, in the light of the actual nature of those assessments. In doing so, it will have to consider whether, when the Commission prepares acts related to a legislative procedure, it is acting in its legislative capacity. That review will require the Court to adjudicate on the necessary

1 Original language: French.

balance between the principle of openness, the improvement of public debate, the independence of the Commission and the confidentiality of information, as those concepts are formulated in 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]

6. In this Opinion, I will set out the reasons why, in my view, the judgment under appeal should be set aside.

## II. Legal framework

### *A. Regulation No 1049/2001*

7. Recitals 2 and 6 of that regulation state:

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

…

(6) Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.'

8. Article 2(1) and (4) of Regulation No 1049/2001 provide as follows:

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

…

4. Without prejudice to Articles 4 and 9, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register. In particular, documents drawn up or received in the course of a legislative procedure shall be made directly accessible in accordance with Article 12.'

9. Under Article 4(3) and (6) of Regulation No 1049/2001:

'3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

2 OJ 2001 L 145, p. 43.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

…

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

10. Article 12(2) of that regulation states that, 'in particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible'.

### *B. Regulation No 1367/2006*

11. Recitals 7 and 15 of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention[3] on access to information, public participation in decision-making and access to justice in environmental matters to Community institutions and bodies[4] provide as follows:

'(7) … [T]he provisions on access to environmental information should apply to Community institutions and bodies acting in a legislative capacity.

…

(15) Where Regulation … No 1049/2001 provides for exceptions, these should apply subject to any more specific provisions in this Regulation concerning requests for environmental information. The grounds for refusal as regards access to environmental information should be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions in the environment. The term "commercial interests" covers confidentiality agreements concluded by institutions or bodies acting in a banking capacity.'

12. Article 1(1)(a) and (b) of that regulation provides:

'1. The objective of this Regulation is to contribute to the implementation of the obligations arising under [the Aarhus Convention], by laying down rules to apply the provisions of the Convention to Community institutions and bodies, in particular by:

(a) guaranteeing the right of public access to environmental information received or produced by Community institutions or bodies and held by them, and by setting out the basic terms and conditions of, and practical arrangements for, the exercise of that right;

(b) ensuring that environmental information is progressively made available and disseminated to the public in order to achieve its widest possible systematic availability and dissemination. To that end, the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted.'

3 OJ 2005 L 124, p. 1, 'the Aarhus Convention'.

4 OJ 2006 L 264, p. 13.

13. According to Article 2(1) of Regulation No 1367/2006:

‘1. For the purpose of this Regulation:

…

(d) “environmental information” means any information in written, visual, aural, electronic or any other material form on:

…

(iii) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements;

(iv) reports on the implementation of environmental legislation;

(v) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in point (iii);

…’

14. Article 3 of Regulation No 1367/2006 states:

‘Regulation … No 1049/2001 shall apply to any request by an applicant for access to environmental information held by Community institutions and bodies without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

For the purposes of this Regulation, the word “institution” in Regulation … No 1049/2001 shall be read as “Community institution or body”.’

15. Article 6 of that regulation provides:

‘1. As regards Article 4(2), first and third indents, of Regulation … No 1049/2001, with the exception of investigations, in particular those concerning possible infringements of Community law, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment. As regards the other exceptions set out in Article 4 of Regulation … No 1049/2001, the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.

2. In addition to the exceptions set out in Article 4 of Regulation … No 1049/2001, Community institutions and bodies may refuse access to environmental information where disclosure of the information would adversely affect the protection of the environment to which the information relates, such as the breeding sites of rare species.’

## III. Background to the dispute

16. The appellant is a non-profit organisation whose aim is the protection of the environment.

17. On 20 January 2014, it submitted to the Commission two requests for access to documents, pursuant to Regulation No 1049/2001. As mentioned above, the first of those requests sought access to the impact assessment report drawn up by the Commission on the implementation of the 'access to justice' pillar of the Aarhus Convention, while the second sought access to the impact assessment carried out by the Commission on the revision of the EU legal framework on environmental inspections and surveillance at national and EU level.

18. The Commission refused the second request by letter of 13 February 2014. It stated, on that occasion, that the request concerned an 'Impact Assessment Report for a proposed binding instrument setting a strategic framework for risk-based inspections and surveillance for EU environment legislation' and the opinion of the impact assessment board on that report. The refusal was based on the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001.

19. The Commission also refused the first request, by letter of 17 February 2014. It stated, on that occasion, that the request concerned a 'draft Impact Assessment report on Access to justice in environmental matters at Member State level in the field of EU environment policy' and the opinion of the impact assessment board on that draft report. The refusal was based on the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001.

20. On 4 March 2014, the appellant, pursuant to Article 7(2) of that regulation, lodged two confirmatory applications with the Commission.

21. By letters of 24 March 2014, the Commission informed the appellant that, in accordance with Article 8(2) of Regulation No 1049/2001, the time limit for responding to those confirmatory applications had been extended by 15 working days.

22. By letters of 1 and 3 April 2014, the Commission confirmed its refusal to grant access to the documents at issue on the basis of the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001 ('the contested decisions').

23. In the first place, the Commission stated in the contested decisions at the outset that, in the context of discussions and negotiations concerning the potential adoption by that institution of legislative initiatives relating to inspections and surveillance in respect of environmental matters and access to justice in such matters, it had launched impact assessments which were still ongoing. The Commission explained in that regard that the impact assessments were intended to help with the preparation of such initiatives and that the policy choices which appear in a legislative proposal are supported by the content of an impact assessment.

24. Next, according to the Commission, the disclosure, at that stage, of the documents at issue would seriously undermine its ongoing decision-making processes given that such disclosure would restrict its room for manoeuvre and reduce its ability to reach a compromise. Moreover, any such disclosure would be liable to give rise to external pressure which might impede the difficult decision-making processes which should take place in a climate of confidence. The Commission also made reference to Article 17(1) and the third subparagraph of Article 17(3) TEU.

25. In that regard, in the decision of 1 April 2014, the Commission stressed that inspections and surveillance were a key element in the implementation of public policy — an area in which the institutions have, since 2001, been attempting to raise awareness and promote action at EU level — and that no external factors should influence the debate, as such influence would affect the quality of surveillance of the Member States.

26. In the decision of 3 April 2014, the Commission focused on the sensitivity of the issue of access to justice in environmental matters, the possible differences of opinion between Member States, and the fact that 10 years had elapsed since its proposal for a directive of the European Parliament and of the Council of 24 October 2003 on access to justice in environmental matters. [5]

27. Last, the Commission added in both of the contested decisions that various documents relating to the two ongoing impact assessments were already available online and that all the other documents relating to those impact assessments would be made public upon the adoption of the legislative proposals by the College of Commissioners.

28. Having regard to those factors, the Commission concluded, in the contested decisions, that access to the requested documents had to be refused on the basis of the first subparagraph of Article 4(3) of Regulation No 1049/2001, in so far as the decision-making processes were at a very early and delicate stage.

29. In the second place, the Commission considered that no overriding public interest justified disclosure of the requested documents. In that regard, it observed that the European Union was bound to preserve, protect and improve the quality of the environment and, as a consequence, of human health. That aim could be attained through non-discriminatory access to justice in environmental matters. However, the Commission did not feel that it was in a position to determine how the disclosure, at that stage, of the documents requested would help persons living in the European Union indirectly to influence the environment in which they were living, since access to justice was already possible before national courts and the decision-making processes in question merely sought to improve that access. The Commission also added that a public consultation had been held in 2013, at which interested parties, including civil society, had been able to help to define the broad outlines of the proposals. According to the Commission, disclosure at that stage would undermine the decision-making processes and reduce the possibility of achieving the best possible compromise. Moreover, in its view, the public interest would be better served by the possibility of pursuing the decision-making processes in question without any external pressure.

30. In the third place, the Commission ruled out the possibility of granting partial access under Article 4(6) of Regulation No 1049/2001, given that the requested documents were covered in their entirety by the exception in question.

31. In consequence of that refusal to disclose, on 11 June 2014 ClientEarth brought two actions for the annulment, respectively, of the decision of 1 April 2014 (Case T-425/14) and that of 3 April 2014 (Case T-424/14).

32. By the first part of its single plea in law, ClientEarth claimed that the Commission had been wrong to find that there was a risk that its decision-making processes would be seriously undermined and that there was no overriding public interest in disclosure of the documents at issue.

33. By the second part of that plea, ClientEarth submitted that the Commission had infringed its obligation to state reasons.

34. By the judgment under appeal, the General Court dismissed ClientEarth's actions.

## IV. Forms of order sought by the parties

35. By its appeal, ClientEarth claims that the Court should set aside the judgment under appeal and order the Commission to pay the costs, including those incurred by the interveners.

5 COM(2003) 624 final.

36. By order of the President of the Court of 12 July 2016, the Finnish and Swedish Governments were granted leave to intervene in the present proceedings in support of the appellant.

37. The Commission contends that the appeal should be dismissed and ClientEarth ordered to pay the costs.

## V. Examination of the appeal

### *A. Preliminary observations*

38. At the hearing held on 3 July 2017, the Commission stated that it had published a communication on 28 April 2017 indicating that the 'access to justice' initiative in environmental matters had been completed and withdrawn without legislative action. It also explained that, after publishing that communication, it had — on 28 June 2017 — published one of the documents at issue, namely the draft impact assessment report relating to access to justice in environmental matters,[6] in respect of which it had refused ClientEarth's request for access by decision of 3 April 2014.

39. According to settled case-law, the objective of the dispute must, like the interest in bringing proceedings, persist until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be liable, if successful, to procure an advantage for the party bringing it.[7] Since one of the documents at issue, to which ClientEarth seeks access, has been made public, part of the action brought by it has become devoid of purpose; there is no longer any need to adjudicate on the request for access to the draft impact assessment report on access to justice in environmental matters.

40. I therefore take the view that the Court should declare that there is no need to adjudicate on the application for annulment of the decision of 3 April 2014 in so far as it concerns access to the draft impact assessment report relating to access to justice in environmental matters.

### *B. Assessment*

41. In support of its appeal, ClientEarth relies on two grounds. By its first ground, it claims that the General Court erred in law by recognising the existence of a general presumption of confidentiality with respect to the documents at issue.

42. By its second ground, which is submitted in the alternative, it argues that the General Court erred in law by failing to recognise, in paragraphs 133 to 163 of the judgment under appeal, the existence of an overriding public interest in disclosure of the documents at issue.

43. The first ground is divided into five parts, which can be dealt with in the following manner.

6 That document is available at the following internet address: http://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-255-F1-EN-MAIN-PART-1.PDF

7 See judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 26 and the case-law cited).

*1. Fourth part of the first ground of appeal: error of law in so far as the General Court failed to take account of the specific nature of the documents at issue in order to grant the widest access possible to those documents*

*(a) Arguments of the parties*

44. ClientEarth, supported by the Finnish and Swedish Governments, claims that the General Court erred in law by finding, in paragraphs 100 to 106 of the judgment under appeal, that the principle that the public should have the widest possible access to documents of the institutions does not apply to the documents at issue, since the Commission, when it draws up impact assessments with a view to submitting a legislative proposal, does not act in a legislative capacity, regardless of the nature of the documents in question.

45. In the first place, the appellant asserts that the General Court should have taken account of the fact that those documents — the impact assessments — form an integral part of the legislative process and, in particular, of the decision whether or not to submit a legislative proposal. It states that even though the Commission does not formally act in a legislative capacity when it draws up documents of that kind, the fact remains that those documents constitute the basis of a legislative proposal.

46. In that regard, the Finnish Government cites the case-law of the Court according to which 'openness in that respect contributes to strengthening democracy by allowing citizens to scrutinise all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights'. [8] The Finnish Government argues that, pursuant to that case-law, the key factor to be borne in mind is not so much the legislative capacity of the institution that adopted the document to which access is sought, but rather the actual nature of that document, which is likely to underpin future legislation.

47. The Swedish Government submits that the Commission, when it drafts impact assessments, acts in a legislative capacity in that it prepares and develops proposals for acts of a legislative nature.

48. In consequence, the appellant and the Finnish and Swedish Governments claim that, in accordance with recital 6 of Regulation No 1049/2001 and the Court's case-law, Union citizens should be duly afforded the widest possible access to documents such as the documents at issue.

49. In the second place, the appellant submits that, contrary to the General Court's finding in paragraph 106 of the judgment under appeal, the case-law of the Court does not support the recognition of general presumptions applying to legislative documents or documents relating to possible legislative proposals.

50. In contrast, the Commission contends that since, at the time access to the documents at issue was requested, no legislative proposals had been submitted, no legislative documents were in existence. It notes that when a policy proposal is adopted or withdrawn, that type of document is made public and citizens are therefore able to acquaint themselves with such material so that they can scrutinise all the information which forms the basis for EU legislative action.

8 See judgments of 1 July 2008, *Sweden and Turco* v *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 45 and 46), and of 17 October 2013, *Council* v *Access Info Europe* (C-280/11 P, EU:C:2013:671, paragraphs 32 and 33).

51. The Commission also maintains that, even if the documents at issue fell to be described as 'legislative' documents within the meaning of Article 12(2) of Regulation No 1049/2001, the fact remains that that provision applies subject to Articles 4 and 9 thereof, as the General Court found in paragraph 105 of the judgment under appeal. Thus, there is no bar to the recognition of general presumptions of confidentiality in a legislative context, as the General Court stated in paragraph 106 of the judgment under appeal, citing the judgment of 1 July 2008, *Sweden and Turco* v *Council*.[9]

*(b) Assessment*

52. I recall that Article 15(3) TFEU and Article 42 of the Charter of Fundamental Rights of the European Union ('the Charter') lay down the right of access to documents of the institutions. Article 1 of Regulation No 1049/2001 provides that the purpose of the regulation is to define the principles, conditions and limits governing that right of access. Since access to documents of the institutions is the general rule, all exceptions to that rule must be interpreted strictly.[10]

53. Article 4 of Regulation No 1049/2001 establishes a list of exceptions to the right of access to documents of the institutions, including the exception relied on by the Commission to refuse access to the documents at issue in the main proceedings. If the Commission decides to refuse access to a document where its disclosure would undermine one of the interests protected by that article, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by that provision.[11] It is for the institution to ascertain whether there is any overriding public interest justifying disclosure of the document concerned despite the fact that the interest protected by Article 4(2) and (3) of Regulation No 1049/2001 would be undermined.[12]

54. The Court has, however, accepted that it is open to the institution concerned to base its decisions on general presumptions which apply to certain categories of documents in order to explain how access to those documents could specifically and actually undermine the interest protected by an exception provided for in Article 4 of that regulation. It must nevertheless specify on which general considerations it bases the presumption that disclosure would undermine one of the interests protected by the exceptions laid down in that provision. To that end, it is not under an obligation to carry out a specific assessment of the content of each of those documents.[13]

55. Even so, the application of a general presumption of confidentiality does not exclude the right of the persons who requested access to the document in question to demonstrate that a given document disclosure of which is sought is not covered by that presumption, or that there is an overriding public interest justifying disclosure.[14]

56. To date, the Court has accepted five general presumptions of confidentiality. Thus, a general presumption of confidentiality has been found to exist with respect to (i) access to documents in the administrative file relating to a procedure for reviewing State aid;[15] (ii) access to pleadings lodged by an institution in judicial proceedings;[16] (iii) a request for access to documents exchanged between the

9 C-39/05 P and C-52/05 P, EU:C:2008:374.

10 See judgment of 1 July 2008, *Sweden and Turco* v *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 35 and 36).

11 See judgments of 21 September 2010, *Sweden and Others* v *API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraphs 71 and 72), and of 17 October 2013, *Council* v *Access Info Europe* (C-280/11 P, EU:C:2013:671, paragraph 31).

12 See, to that effect, judgment of 1 July 2008, *Sweden and Turco* v *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 44).

13 See judgment of 17 October 2013, *Council* v *Access Info Europe* (C-280/11 P, EU:C:2013:671, paragraphs 72 and 73 and the case-law cited).

14 See judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2010:376, paragraph 62).

15 Judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2010:376).

16 Judgment of 21 September 2010, *Sweden and Others* v *API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541).

Commission and notifying parties or third parties in a procedure for the control of concentrations between undertakings;[17] (iv) a request from a non-profit organisation for access to an administrative file relating to the pre-litigation stage of infringement proceedings;[18] and (v) a request for access to a set of documents in a file relating to a procedure under Article 81 EC, now Article 101 TFEU.[19]

57. In the context of legislative activities, the principle of openness plays an enhanced role. Although recital 4 and Article 1 of Regulation No 1049/2001 afford the public a right of access to documents of the institutions, to which the fullest possible effect should be given, recital 6 thereof states that wider access should be granted to those documents precisely where the institutions are acting in their legislative capacity. Thus, the Court has held that 'openness in that respect contributes to strengthening democracy by allowing citizens to scrutinise all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights'.[20]

58. The weighing-up of the particular interest to be protected through non-disclosure of the document concerned against, inter alia, the public interest in the document requested being made accessible is of particular relevance where the institution is acting in its legislative capacity.[21]

59. Therefore, in the light of the foregoing, the question that arises in the present case is whether, in view of the nature of the documents at issue disclosure of which is sought, the General Court could validly accept a general presumption of confidentiality with respect to them.

60. It is apparent from the judgment under appeal that, in paragraph 102 thereof, the General Court held that 'while it is true that, under Article 17(2) TEU, the Commission has — in principle and unless otherwise provided — the power to propose the adoption of legislative acts under Article 289(3) TFEU, the fact remains that, under Article 14(1) TEU and Article 16(1) TEU, it is the Parliament and the Council who, jointly, exercise legislative functions. In the same vein, it is stated in Article 289(1) to (3) TFEU that any act adopted by legislative procedure — that is to say, any regulation, directive or decision adopted jointly by the Parliament and the Council, acting upon a Commission proposal, by virtue of the ordinary legislative procedure set out in Article 294 TFEU or any regulation, directive or decision adopted by the Parliament with the participation of the Council or by the Council with the participation of the Parliament, depending on the circumstances, by virtue of a special legislative procedure — is to constitute a legislative act'.

61. The General Court goes on to hold, in paragraph 103 of its judgment, that 'it follows that, when preparing and developing a proposal for an act, even a legislative act, the Commission does not itself act in a legislative capacity, given that, first, the process of preparation and development is of necessity one which precedes the actual legislative procedure itself, during which, moreover, the very nature of the act to be proposed must be determined, and, second, it is the Parliament and the Council who exercise legislative functions'.

62. In paragraph 105 of the judgment under appeal, the General Court — in reply to one of the appellant's arguments — makes clear that 'even on the assumption that the documents requested fall to be described as "legislative documents" within the meaning of Article 12(2) of Regulation No 1049/2001, it should be stated that that provision applies only "subject to Articles 4 and 9" … As

17 Judgment of 28 June 2012, *Commission* v *Éditions Odile Jacob* (C-404/10 P, EU:C:2012:393).

18 Judgment of 14 November 2013, *LPN and Finland* v *Commission* (C-514/11 P and C-605/11 P, EU:C:2013:738).

19 Judgment of 27 February 2014, *Commission* v *EnBW* (C-365/12 P, EU:C:2014:112).

20 See judgments of 1 July 2008, *Sweden and Turco* v *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 46), and of 17 October 2013, *Council* v *Access Info Europe* (C-280/11 P, EU:C:2013:671, paragraph 33).

21 See, to that effect, judgment of 17 October 2013, *Council* v *Access Info Europe* (C-280/11 P, EU:C:2013:671, paragraphs 32 and 33).

has been stated in paragraphs 97 and 99 [of that judgment], when applying the first subparagraph of Article 4(3) of Regulation No 1049/2001, the Commission is entitled to presume that the disclosure of the documents requested would, in principle, seriously undermine the decision-making process for developing a policy proposal, for as long as it has not made a decision in that regard'.

63. While it is true that the Commission cannot strictly be described as having a 'legislative' capacity, I nonetheless take the view that its role in the legislative process has the effect, as a matter of fact, that, if it is not acting in a quasi-legislative capacity, then it is a key legislative actor without whose impetus the EU's legislative activity would be non-existent. As the Court recalled in its judgment of 14 April 2015, *Council* v *Commission*,[22] 'by virtue of Article 17(2) TEU, EU legislative acts may be adopted only "on the basis of a Commission proposal", except in the situation … where the Treaties provide otherwise'.[23] It is for the Commission 'to decide whether or not to submit a proposal for a legislative act, except in the situation … where it would be obliged under EU law to submit such a proposal. By virtue of that power, if a proposal for a legislative act is submitted it is also for the Commission, which, in accordance with Article 17(1) TEU, is to promote the general interest of the European Union and take appropriate initiatives to that end, to determine the subject matter, objective and content of that proposal'.[24]

64. Furthermore, in the light of the wording of Article 12(2) of Regulation No 1049/2001, as well as the scheme of that regulation and the objective it pursues, I think that it is not so much the capacity of the institution which is decisive for the purpose of a wider right of access to EU documents, but rather the very nature of those documents.

65. That article, which calls to mind recital 6 of the regulation — which, I should point out, provides for wider access to documents where the institutions are acting in a legislative capacity — provides that 'legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible'.

66. As noted in point 57 of this Opinion, openness in legislative matters contributes to strengthening democracy by enabling citizens to scrutinise all the information which has formed the basis of a legislative act. The possibility open to citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.

67. Since the Commission is at the source of legislative acts, the documents it prepares and develops in the context of the legislative process are precisely the basis for the legislative actions which citizens are entitled to acquaint themselves with. It is therefore with respect to these documents that wider access must be granted, under Article 12(2) of Regulation No 1049/2001, read in conjunction with recital 6 thereof.

68. The impact assessments and the subsequent reports fall squarely within that category of documents. In order to determine the subject matter, purpose and content of a legislative proposal, the Commission uses, among other tools, impact assessments which enable a specific and well-researched appraisal to be conducted of the relevant data as well as an evaluation of the likely consequences of the adoption, as the case may be, of such legislation. As is apparent from the impact

22 C-409/13, EU:C:2015:217.

23 See paragraph 68 of that judgment.

24 See paragraph 70 of that judgment.

assessment guidelines,[25] 'impact assessment is a set of logical steps to be followed when you prepare policy proposals. It is a process that prepares evidence for political decision-makers on the advantages and disadvantages of possible policy options by assessing their potential impacts. The results of this process are summarised and presented in the [impact assessment] report'.[26]

69. Consequently, I have no doubt that wider access in accordance with the provisions of Regulation No 1409/2001 must be granted to the impact assessments and the impact assessment reports. The general presumption of confidentiality cannot, therefore, be applied to them.

70. All the documents with respect to which the Court has recognised a general presumption of confidentiality related to either ongoing administrative or to ongoing judicial proceedings.[27]

71. The situation in the present case is quite different.

72. What we are dealing with here is neither administrative nor judicial proceedings but a legislative process, which the EU legislature itself wants to be more open.[28] That gives rise to precisely the right of access to documents of the institutions without which that desired openness would not exist. The Court drew attention to the reasons for this in its judgment of 1 July 2008, *Sweden and Turco* v *Council*,[29] where it states that 'it is precisely openness in [the legislative process] that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole'.[30]

73. The Member States were conscious of the importance of that principle when the Treaty of Maastricht was adopted and called on the Commission to submit a report to the Council in early course on measures designed to improve public access to the information available to the institutions.[31] This was followed by the insertion of Article 255 TEC in the Treaty of Amsterdam, now Article 15 TFEU, and, especially, the recognition expressed in Article 42 of the Charter, which establishes the right of access to documents of the institutions as a fundamental right.

74. The existence of a general presumption of confidentiality is an exception to that fundamental right and must therefore be interpreted restrictively, as the Court has pointed out on several occasions, particularly in its judgment of 1 July 2008, *Sweden and Turco* v *Council*.[32]

75. In addition, we have seen that, under the provisions of Regulation No 1049/2001, the Commission retains the right to refuse access to its documents if it shows in a specific case that there is a risk that its decision-making processes would be seriously undermined and if it determines that there is no overriding public interest in disclosure of those documents. However, the decision to apply a general presumption of confidentiality in a case such as the present case would, in actual fact, upset the balance of the system established by that regulation. Indeed, the Commission could avoid having to justify its refusal to grant access to the documents specifically and individually and base its refusal on considerations of a general nature. Furthermore, it would be for the person seeking access to the

25 Impact assessment guidelines of the Commission of 15 January 2009 (SEC(2009) 92).

26 See p. 4 of those guidelines.

27 See judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486, paragraph 78).

28 See Article 12(2) of Regulation No 1049/2001, read in conjunction with recital 6 thereof.

29 C-39/05 P and C-52/05 P, EU:C:2008:374.

30 See paragraph 59 of that judgment.

31 See Declaration No 17 on the right of access to information, annexed to the Treaty of Maastricht.

32 C-39/05 P and C-52/05 P, EU:C:2008:374.

documents of the Commission to prove that such an overriding public interest existed. That, as a matter of fact, would result in the reversal of the burden of proof, all of which seems to be incompatible with Article 42 of the Charter, with the case-law of the Court cited above in this Opinion, and with the intention of the EU legislature as regards legislative documents.

76. In addition, contrary to the Commission's assertions, my view is that the General Court erred in law in paragraph 106 of the judgment under appeal by stating that, in the judgment of 1 July 2008, *Sweden and Turco* v *Council*,[33] 'the Court of Justice … declared for the first time that it was possible for an institution to base such a decision on general presumptions' with respect to legislative documents. The General Court refers specifically to paragraphs 46, 47 and 50 of that judgment. However, those paragraphs form part of the explanations provided by the Court regarding the conduct of the examination to be carried out by an institution that has received a request for access to documents and the content of the statement of reasons that must follow. It is only subsequently that the Court begins its examination of the grounds of appeal put forward by the appellants. The mere reminder by the Court in paragraphs 46, 47 and 50 cannot therefore be construed as establishing the possibility for an institution to rely on general presumptions in such a case.

77. Consequently, in the light of the foregoing, I am of the opinion that the General Court erred in law by finding, in paragraphs 100 to 106 of the judgment under appeal, that the Commission could validly base its decision to refuse to grant access to the documents at issue on a general presumption of confidentiality.

*2. First part of the first ground of appeal: misapplication of the case-law of the Court*

*(a) Arguments of the parties*

78. ClientEarth, supported by the Finnish and Swedish Governments, claims that, in paragraphs 55 to 127 of the judgment under appeal, the General Court misapplied the case-law of the Court concerning the recognition of general presumptions of confidentiality. Accordingly, the General Court failed to take account of the fact that the Court had previously held it had erred in law by accepting the extension of the scope of the general presumption of confidentiality to cover studies on the conformity of the legislation of various Member States with EU environmental law, The Court had focused on 'the requirement that such a presumption must be interpreted and applied strictly, since that presumption is an exception to the rule that the institution concerned is obliged to make a specific and individual examination of every document which is the subject of an application for access … and, more generally, to the principle that the public should have the widest possible access to the documents held by the institutions of the European Union'.[34]

79. By conferring on those impact assessments the benefit of a general presumption of confidentiality, the General Court did not, according to the appellant, take that requirement into account and disregarded the fundamental nature of the principle of openness enshrined in the Treaty and Regulation No 1049/2001.

80. The appellant also complains that the General Court inferred from the case-law of the Court, in paragraph 67 of the judgment under appeal, that a general presumption of confidentiality could be recognised where required to ensure the 'proper conduct' of the procedures in question, even though (i) the cases in which such a presumption has been recognised exclusively concerned documents relating to ongoing judicial or administrative proceedings (in the latter case, where the Commission was acting in its capacity as guardian of the Treaties and as enforcer of EU law), and (ii) such

33 C-39/05 P and C-52/05 P, EU:C:2008:374.

34 See judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486, paragraphs 80 and 81).

presumptions were recognised on the basis of the principle of equality of arms or similar considerations, or because access to the documents in question was liable to undermine directly the interests of the institution concerned, by impairing its ability to defend itself effectively, or the interests of third parties in maintaining the confidentiality of the information sent to the Commission.

81. In addition, the appellant and the Finnish Government submit that, in the cases in which the Court has recognised a general presumption of confidentiality, the reason given by the Court for that recognition was that the application of such a presumption was expressly justified by the existence of specific rules restricting access in some way to documents or preventing third parties from gaining access to those documents. [35]

82. According to the appellant, the General Court also misapplied the case-law of the Court since (i) the documents at issue do not relate to either administrative proceedings, in which the onus is on the Commission to ensure compliance with EU law, or judicial proceedings; (ii) access to those documents would not undermine interests that are typically protected by the Court's case-law by means of a general presumption, such as equality of arms; and (iii) access does not favour the interests of a third party in particular, since ClientEarth is a non-governmental organisation that aims to protect the environment and does not seek to promote private interests.

83. The Commission contends that it cannot, under any circumstances, be inferred from the case-law of the Court concerning the recognition of general presumptions of confidentiality that there is a rule requiring the Commission to act as enforcer of EU law in order for those presumptions to be applied. It argues, instead, that the General Court correctly applied the case-law by finding, in paragraphs 68 to 75, 78 and 97 of the judgment under appeal, that the recognition that documents such as those at issue enjoy a general presumption of confidentiality presupposes, first, that the documents fall within the same category of documents and, secondly, that in the light of the rules governing the preparation of policy proposals by the Commission, access to the requested documents would seriously undermine that specific procedure for as long as it lasts.

84. Furthermore, contrary to the appellant's suggestions, the Commission states that Article 4(3) of Regulation No 1049/2001 precisely provides that the effectiveness of the institutions' decision-making process is a specific interest the protection of which may warrant exceptions to the public access to documents.

*(b) Assessment*

85. The appellant claims that the General Court misapplied the case-law relating to general presumptions of confidentiality.

86. In paragraph 66 of the judgment under appeal, the General Court states that 'it is apparent from the case-law [of the Court] that, in order for a general presumption to be validly relied upon against a person requesting access to documents on the basis of Regulation No 1049/2001, it is necessary that the documents requested belong to the same category of documents or be documents of the same nature'. Thereafter, in paragraph 67 of that judgment, the General Court holds that 'it follows from that case-law that the application of general presumptions is essentially dictated by the overriding need to ensure that the procedures at issue operate correctly and to guarantee that their objectives are not jeopardised. Accordingly, a general presumption may be recognised on the basis that access to the documents involved in certain procedures is incompatible with the proper conduct of such procedures and the risk that those procedures could be undermined, on the understanding that general

35 ClientEarth cites, in that respect, judgment of 27 February 2014, *Commission* v *EnBW* (C-365/12 P, EU:C:2014:112). The Finnish Government cites, among others, judgments of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2010:376); of 28 June 2012, *Commission* v *Éditions Odile Jacob* (C-404/10 P, EU:C:2012:393); of 28 June 2012, *Commission* v *Agrofert Holding* (C-477/10 P, EU:C:2012:394); and of 14 November 2013, *LPN and Finland* v *Commission* (C-514/11 P and C-605/11 P, EU:C:2013:738).

presumptions ensure that the integrity of the conduct of the procedure can be preserved by limiting intervention by third parties'. The General Court goes on to state that 'the application of specific rules provided for by a legal measure relating to a procedure conducted before an EU institution for the purposes of which the documents requested were produced is one of the criteria for recognising a general presumption'.

87. It is apparent from the foregoing that the General Court appears to consider that, for the purpose of applying a general presumption of confidentiality, three criteria must be taken into account, namely that (i) the documents belong to the same category or are of the same nature; (ii) access to those documents would impede the proper conduct of the procedure concerned; and (iii) there is legislation specifically governing the arrangements for access to the requested documents, although this last criterion is not decisive for the General Court. [36]

88. It is undeniable that the case-law of the Court shows that, for the purpose of applying a general presumption of confidentiality, the documents in question must be of the same nature. [37] However, while it is true that what was in issue in the five cases in which the Court recognised such presumptions [38] was the proper conduct of a specific procedure, I do not think that those presumptions could be applied in all kinds of procedures, including legislative procedures. As the Court held in its judgment of 16 July 2015, *ClientEarth* v *Commission*, [39] 'in all the cases [in which a general presumption of confidentiality was accepted], the refusal of access in question related to a set of documents which were clearly defined by the fact that they all belonged to a file relating to ongoing administrative or judicial proceedings'. [40]

89. In that judgment, which was delivered shortly before the judgment under appeal, the Court appears, instead, to have clearly limited the application of general presumptions of confidentiality to cases in which the documents the disclosure of which is sought are part of ongoing administrative or judicial proceedings. As ClientEarth points out, the Court expressly ruled out extending the scope of the presumption of confidentiality to cover studies on the conformity of the legislation of various Member States with EU environmental law, carried out by an undertaking at the request of and on behalf of the Commission, which, on the date on which the decision to refuse access to them was sent, did not relate to the pre-litigation stage of infringement proceedings. [41]

90. Moreover, as I have explained in points 72 to 75 of this Opinion, it is apparent not only from primary and secondary legislation, but also from the case-law of the Court, that the right of access to documents of the institutions, which is an expression of the principle of openness, is a right the exceptions to which must be interpreted all the more strictly because a fundamental right is involved and we are dealing here with legislative documents.

91. Therefore, although the General Court correctly recalled, in paragraphs 58 to 61 of the judgment under appeal, the case-law of the Court concerning the requirement that exceptions to the right of access to documents of the institutions must be interpreted strictly, it did not, in my view, draw the appropriate conclusions in view of the specific nature of the documents at issue.

92. Accordingly, the General Court erred in law by misapplying the case-law of the Court in paragraphs 55 to 127 of the judgment under appeal.

36 See paragraphs 76 and 77 of the judgment under appeal.

37 See, in particular, judgment of 1 July 2008, *Sweden and Turco* v *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 50).

38 See point 56 of this Opinion.

39 C-612/13 P, EU:C:2015:486.

40 See paragraph 78 of that judgment.

41 See paragraphs 77 to 82 of that judgment.

*3. Second part of the first ground of appeal: error of law in so far as the General Court found that Article 17(1) to (3) TEU provides a legal basis for a general presumption of confidentiality with respect to the documents at issue*

*(a) Arguments of the parties*

93. By the second part of the first ground, ClientEarth, supported by the Finnish and Swedish Governments, claims that the General Court was not entitled to rely on Article 17(1) to (3) TEU as a basis for a general presumption of confidentiality with respect to the documents at issue. It argues, in the first place, that greater openness in the decision-making process strengthens the independence of the Commission and, contrary to the General Court's findings in paragraphs 55 to 99 of the judgment under appeal, does not have the effect of making the Commission more vulnerable to all kinds of external pressure and influence, thus preventing it from discharging in a wholly independent manner and in the public interest the functions entrusted to it under Article 17(1) to (3) TEU.

94. The appellant instead maintains that, as the Court pointed out in paragraph 45 of its judgment of 1 July 2008, *Sweden and Turco* v *Council*,[42] greater openness strengthens legitimacy, effectiveness and accountability with respect to citizens in a democratic system. Therefore, public access to documents such as the documents at issue not only ensures that the Commission is better placed to withstand external pressure, in so far as the openness of the impact assessment process increases the visibility of such pressure to the outside world, but also provides citizens with a better understanding of the issues involved in the decision-making process and, where appropriate, generates debate without undermining the independence of the Commission or interfering with the space for reflection which it must be able to enjoy.

95. In addition, ClientEarth submits that the Court clearly stated in paragraphs 62 and 63 of its judgment of 1 July 2008, *Sweden and Turco* v *Council*,[43] that an institution may not refuse access and maintain that its independence would be undermined on the sole ground that access to the documents might trigger a risk of external pressure.

96. In the second place, the appellant asserts that Article 17 TEU cannot constitute a general basis allowing the Commission to object to access being granted to its documents on the ground that their disclosure would seriously undermine the decision-making process. It claims that such an approach might result in the exception to the right of access to documents of the institutions being unreasonably extended, in so far as the Commission could simply invoke Article 17 TEU to deny such a right. In that regard, ClientEarth refers to points 43 to 45 of the Opinion of Advocate General Cruz Villalón in *ClientEarth* v *Commission* and *ClientEarth and PAN Europe* v *EFSA*.[44] The appellant also states that such an approach, if it were confirmed by the Court, would be at odds with the principle that any exceptions to the right of access must be interpreted strictly.

97. The Commission replies that, contrary to what is asserted by the appellant, the rules governing the preparation and development of policy proposals by the Commission do not require it to perform that task in constant dialogue with the interested parties. It contends that, instead, as the General Court rightly pointed out in paragraphs 79 to 84 and 96 of the judgment under appeal, if such permanent dialogue were in place, particularly following the publication of documents such as the documents at issue, the Commission would not have sufficient space for independent deliberation and would therefore be unable to take decisions on a completely independent basis, as required by Article 17(3) TEU.

42 C-39/05 P and C-52/05 P, EU:C:2008:374.

43 C-39/05 P and C-52/05 P, EU:C:2008:374.

44 C-612/13 P and C-615/13 P, EU:C:2015:219.

98. As regards the appellant's argument that an understanding of the decision-making process does not adversely affect the independence of the Commission, the Commission replies that if the aim of the request for access to the documents at issue is to obtain a sound understanding of that process, the appellant or any other interested party can easily wait for the documents to be published once the process has been completed, either because a legislative proposal has been submitted or because the initiative has been withdrawn.

*(b) Assessment*

99. The appellant complains that the General Court essentially found that the Commission's reliance on a general presumption of confidentiality to refuse access to the documents at issue was justified since 'such a general presumption is necessary, having regard to the rules governing the preparation and development of policy proposals by the Commission, including, where appropriate, proposals for legislative acts'. [45]

100. After drawing attention in paragraphs 79 to 82 of the judgment under appeal to the Commission's role in the legislative process, the General Court stated that the Commission had to be able to act in a fully independent manner and in the public interest when it prepares and develops policy proposals. [46] Following its explanation of the function performed by impact assessments, and after conceding that such assessments contribute to the objective of ensuring that the Commission's decision-making process for the preparation and development of policy proposals is transparent and open and to the objective of having interested parties participate in that process, [47] the General Court concluded that once the interested parties have been consulted and the information gathered, the Commission must be able to enjoy space for reflection for the purpose of deciding, in a fully independent manner and free from any external pressure or third-party influence, on the policy initiatives to be proposed. [48] Specifically, the General Court held in paragraph 95 of its judgment that 'it is important to protect th[e] power of initiative [of the Commission in legislative matters] from any influences exerted by public or private interests which would attempt, outside of organised consultations, to compel the Commission to adopt, amend or abandon a policy initiative and which would thus prolong or complicate the discussion taking place within that institution'.

101. Thus, in paragraph 96 of the judgment under appeal, the General Court considered that 'since an Impact Assessment report contains, as stated in paragraph 88 [of that judgment], a comparison of the various policy options contemplated at that stage, the disclosure of that report, even at the draft stage, together with the opinions given by the Board in that regard brings with it an increased risk that third parties will attempt, outside of the public consultation organised by the Commission, to exercise targeted influence on the Commission's choice of policy option and the content of the policy proposal which that institution is led to adopt. The very persons or bodies who had submitted observations during the public consultation, if they were to have direct access to the Impact Assessment documents, would be able to submit further observations or criticisms regarding the options and situations under consideration, by claiming that their point of view had not been sufficiently or properly taken into account, whereas the Commission must be able to enjoy, after the public consultation stage, space for independent deliberation, temporarily remote from all forms of external pressure or influence'.

102. First of all, as indicated above, I do not think that an institution can rely on a general presumption of confidentiality with respect to legislative documents such as the documents at issue.

45 See paragraph 78 of the judgment under appeal.

46 See paragraphs 83 and 84 of that judgment.

47 See paragraphs 85 to 93 of that judgment.

48 See paragraph 94 of the judgment under appeal.

103. As the appellant points out, that assessment is, moreover, confirmed by the case-law of the Court. In its judgment of 1 July 2008, *Sweden and Turco* v *Council*,[49] the Court held, in a case concerning a refusal to grant access to a legislative document, that 'it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole'.[50]

104. Next, the Court found that 'as regards … the … argument that the independence of [the Council's] legal service would be compromised by possible disclosure of legal opinions issued in the course of legislative procedures, it must be pointed out that that fear lies at the very heart of the interests protected by the exception provided for in the second indent of Article 4(2) of Regulation No 1049/2001. … [T]hat exception seeks specifically to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice'. The Court went on to state that 'however, in that regard, the Council relied before both the Court of First Instance and the Court on mere assertions, which were in no way substantiated by detailed arguments. In view of the considerations which follow, there would appear to be no real risk that is reasonably foreseeable and not purely hypothetical of that interest being undermined'.[51]

105. Last, in paragraph 64 of that judgment, the Court held that 'as regards the possibility of pressure being applied for the purpose of influencing the content of opinions issued by the Council's legal service, it need merely be pointed out that even if the members of that legal service were subjected to improper pressure to that end, it would be that pressure, and not the possibility of the disclosure of legal opinions, which would compromise that institution's interest in receiving frank, objective and comprehensive advice and it would clearly be incumbent on the Council to take the necessary measures to put a stop to it'.

106. In my view, it is clear from the above decision that, whilst it is true that the Commission, like the Council, must be able to enjoy a space for reflection remote from all external pressures in order to maintain its independence in legislative matters, and that, in this respect, the Commission may justify a refusal to grant access to a legislative document on the basis of Article 4 of Regulation No 1049/2001, it is nevertheless for the Commission to demonstrate that there is a real risk which is reasonably foreseeable and not purely hypothetical of the decision-making process being undermined.

107. Therefore, it seems to me to be inconsistent with that decision to accept that an institution may rely on a general presumption of confidentiality in order to refuse access to a legislative document even though, as I have already shown, it is entitled to justify that presumption by reference to considerations of a general nature. In any case, I think that the Court, in its judgment of 1 July 2008, *Sweden and Turco* v *Council*,[52] specifically ruled out the possibility of relying on a general presumption of confidentiality with respect to legal opinions — legislative documents — since it found in paragraph 57 of the judgment that 'the Court of First Instance erred in holding that there was a general need for confidentiality in respect of advice from the Council's legal service relating to legislative matters'.

49 C-39/05 P and C-52/05 P, EU:C:2008:374.

50 See paragraph 59 of that judgment.

51 See paragraphs 62 and 63 of that judgment.

52 C-39/05 P and C-52/05 P, EU:C:2008:374.

108. Consequently, the General Court erred in law by holding in paragraph 97 of the judgment under appeal that 'the Commission is entitled to presume, without carrying out a specific and individual examination of each of the documents drawn up in the context of preparing an impact assessment, that the disclosure of those documents would, in principle, seriously undermine its decision-making process for developing a policy proposal'.

*4. Third part of the first ground of appeal: error of law in so far as the General Court failed to ascertain that there was specific, real and actual harm to the interest protected by Article 4(3) of Regulation No 1049/2001*

*(a) Arguments of the parties*

109. By the third part of the first ground, ClientEarth, supported by the Swedish Government, claims that the General Court erred in law by recognising a general presumption of confidentiality with respect to the documents at issue without ascertaining that there was a risk that disclosure of documents of that kind would cause specific, real and actual harm to the interest protected by the first paragraph of Article 4(3) of Regulation No 1049/2001.

110. The appellant argues that, in accordance with the case-law of the Court, the EU institutions can refuse access to their documents only if they provide explanations as to how access to the documents could specifically and actually undermine the interest protected by an exception,[53] even if the institution concerned relies on a general presumption with respect to a category of document. It submits that this prerequisite is necessary to ensure that citizens are able to understand why their request for access has been denied, and to ensure that solely where access to the requested documents would specifically and actually undermine the interest protected by Article 4(3) of that regulation is an exception to the principle of widest possible access justified.

111. ClientEarth maintains that the General Court erred in law by finding, in paragraph 96 of the judgment under appeal, that the Commission was entitled to base its decision to refuse access to the documents at issue on general and hypothetical considerations. The appellant states that it is not sufficient to assert, as the General Court did, that disclosure would specifically and actually undermine the decision-making process of the institution concerned because a third party could attempt to exert influence over the policy decisions set out in the impact assessment report. A general and hypothetical justification of that kind could be misused by the Commission in order to justify a refusal to grant access to all of its documents.

112. The Finnish Government adds that any disclosure of information contained in the documents at issue cannot be automatically considered to 'seriously undermine' the Commission's decision-making processes within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001.

113. The Commission contends, in the first place, that in paragraph 96 of the judgment under appeal the General Court explained the objective, actual and specific risk to its decision-making processes entailed by disclosure of the documents at issue. That risk lies in the fact that disclosure would allow persons who had already submitted observations during the public consultation to submit further observations or criticisms, thereby undermining the space for independent deliberation which the Commission must be able to enjoy. In the second place, the Commission submits that, as the General Court pointed out in paragraph 120 of the judgment under appeal, the appellant ignores the main feature and purpose of the general presumption which, once recognised, properly allows the Commission to rely on general grounds for refusal and to dispense with a specific and individual examination of the requested documents.

53 Judgment of 27 February 2014, *Commission* v *EnBW* (C-365/12 P, EU:C:2014:112, paragraph 64).

*(b) Assessment*

114. My understanding is that the appellant claims that, when an institution refuses access to documents on the basis of a general presumption of confidentiality, it must ascertain whether disclosure of that type of document would cause specific, real and actual harm to the interest protected by the first paragraph of Article 4(3) of Regulation No 1049/2001. What it really argues is that the examination which the institution is to carry out must be the same as that which it is required to conduct in the course of the specific and individual examination of the document.

115. I do not share that view. I recall that, according to settled case-law, 'it is … open to the [institution concerned] to base its decisions [to refuse access to documents] on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature'.[54] The general presumption of confidentiality therefore allows the institution relying on that presumption to justify the refusal to grant access to documents by reference to the harm to which disclosure of that type of document would, as a general rule, give rise. Thus, the Court has recognised that that harm may take the form of harm to the rights of defence or to the principle of equality of arms, or even general harm to court proceedings.

116. Indeed, in its judgment of 21 September 2010, *Sweden and Others* v *API and Commission*,[55] the Court held that 'the Commission may base its response on the presumption that disclosure of pleadings lodged in pending court proceedings undermines those proceedings for the purposes of the second indent of Article 4(2) of Regulation No 1049/2001 and that, accordingly, the Commission may, throughout such proceedings, refuse an application for access to such documents, without being under an obligation to undertake a specific examination'.[56] In the same vein, in its judgment of 14 July 2016, *Sea Handling* v *Commission*,[57] the Court ruled, in relation to documents concerning procedures for reviewing State aid, that 'it was not for the General Court, in the case in point, to consider whether disclosure of the content of the documents requested by Sea Handling was liable to undermine the protected interests, since the General Court is only required to ascertain whether the Commission was entitled to find that those documents formed part of an investigation in connection with a procedure for reviewing State aid'.[58] It held that, 'as the General Court rightly pointed out in paragraph 65 of [its judgment of 25 March 2015, *Sea Handling* v *Commission* (T-456/13, not published, EU:T:2015:185)], the requirement to ascertain whether such a general presumption actually applies in a given case cannot be interpreted as meaning that the institution must individually examine each document in respect of which disclosure is sought, because such a requirement would deprive that general presumption of its proper effect'.[59]

117. The rationale of such a presumption is based precisely on the possibility of presuming that disclosure of a particular type of document would undermine one of the protected interests, without having to conduct a specific and individual examination of those documents. That is also why this exception to the right of access to documents of the institutions should, as shown above, be interpreted all the more strictly.

54 See judgments of 1 July 2008, *Sweden and Turco* v *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 50); of 21 September 2010, *Sweden and Others* v *API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 74); of 14 November 2013, *LPN and Finland* v *Commission* (C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 45); and of 27 February 2014, *Commission* v *EnBW* (C-365/12 P, EU:C:2014:112, paragraph 65).

55 C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541.

56 See paragraph 146 of that judgment.

57 C-271/15 P, not published, EU:C:2016:557.

58 See paragraph 68 of that judgment.

59 See paragraph 69 of the judgment.

118. For those reasons, I take the view that the General Court did not err in law by failing to ascertain that there was specific, real and actual harm to the interest protected by Article 4(3) of Regulation No 1049/2001.

*5. Fifth part of the first ground of appeal: error of law in so far as the recognition by the General Court of a general presumption of confidentiality with respect to the documents at issue renders that presumption non-rebuttable*

119. ClientEarth, supported by the Finnish Government, claims that the General Court erred in law in paragraphs 113 to 127 of the judgment under appeal by establishing criteria that render the general presumption of confidentiality non-rebuttable. Specifically, by finding in paragraph 120 of that judgment that the appellant's arguments — particularly those concerning the failure to demonstrate a real risk of public pressure, the non-sensitive nature of the documents at issue, and the irrelevance of the fact that the decision-making processes are at an early stage — were in no way capable of rebutting that general presumption, because the arguments sought only to criticise the general nature of the grounds relied on in the contested decisions and did not adduce any specific evidence permitting the rebuttal of the general presumption, the General Court rendered the presumption non-rebuttable.

120. The Commission contends that, by its arguments, the appellant misconstrues the very nature of the general presumption of confidentiality with respect to that type of document. Moreover, it submits that, contrary to what is asserted by the appellant, the fact that the General Court stated that there was no specific evidence permitting the rebuttal of the general presumption clearly shows that the presumption is rebuttable, but that, in the present case, it is the appellant who failed to demonstrate how disclosure of the requested documents would not undermine the decision-making processes of the Commission.

121. Since I am of the view that the General Court erred in law by recognising the existence of a general presumption of confidentiality with respect to the documents at issue, there is no need to address the fifth part of the first ground of appeal.

122. In the light of all the above considerations, I consider that the first ground of appeal is well founded and that, in consequence, the judgment under appeal should be set aside.

123. Accordingly, I do not think it is necessary to examine the second ground of appeal, which was submitted by the appellant in the alternative.

## VI. Costs

124. Under Article 138(1) of the Court's 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. In the present case, since ClientEarth has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

125. Furthermore, the Republic of Finland and the Kingdom of Sweden, as interveners, must bear their own respective costs, in accordance with Article 140(1) of the Rules of Procedure.

## VII. Conclusion

126. In view of the foregoing, I propose that the Court should:

(1) declare that there is no longer any need to adjudicate on the application for annulment of the decision of 3 April 2014 by which the European Commission refused access to the draft impact assessment report on access to justice in environmental matters at Member State level in the field of EU environmental policy;

(2) set aside the judgment of the General Court of the European Union of 13 November 2015, *ClientEarth* v *Commission* (T-424/14 and T-425/14, EU:T:2015:848);

(3) order the Commission to pay the costs;

(4) order the Republic of Finland and the Kingdom of Sweden to bear their own costs.