Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

4 September 2018*

(Appeal — Access to documents of the EU institutions — Regulation (EC) No 1049/2001 — Regulation (EC) No 1367/2006 — Impact assessment report, draft impact assessment report and opinion of the Impact Assessment Board — Legislative initiatives in respect of environmental matters — Refusal to grant access — Disclosure of the documents requested in the course of the proceedings — Continuing interest in bringing proceedings — Exception relating to the protection of the ongoing decision-making process of an EU institution — General presumption)

In Case C-57/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 30 January 2016,

ClientEarth, established in London (United Kingdom), represented by O.W. Brouwer, J. Wolfhagen and F. Heringa, advocaten,

appellant,

supported by:

Republic of Finland, represented by H. Leppo and J. Heliskoski, acting as Agents,

Kingdom of Sweden, represented by A. Falk, C. Meyer-Seitz, U. Persson and N. Otte Widgren, acting as Agents,

interveners in the appeal,

the other party to the proceedings being:

European Commission, represented by F. Clotuche-Duvieusart and M. Konstantinidis, acting as Agents,

defendant at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano (Rapporteur), Vice-President, R. Silva de Lapuerta, T. von Danwitz, J.L. da Cruz Vilaça, A. Rosas and J. Malenovský, Presidents of Chambers, E. Juhász, A. Borg Barthet, D. Šváby, M. Berger, E. Jarašiūnas, C. Lycourgos, M. Vilaras and E. Regan, Judges,

Advocate General: Y. Bot,

* Language of the case: English.

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 July 2017,

after hearing the Opinion of the Advocate General at the sitting on 28 November 2017,

gives the following

Judgment

1 By its appeal, ClientEarth seeks the setting aside of 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) ('the judgment under appeal'), whereby the General Court dismissed its actions for annulment of (i) the decision of the European Commission of 1 April 2014 refusing to grant access to an impact assessment report for a proposed binding instrument setting a strategic framework for risk-based inspection and surveillance in relation to EU environmental legislation and an opinion of the Impact Assessment Board and (ii) the Commission's decision of 3 April 2014 refusing to grant 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 (collectively, 'the decisions at issue').

Legal context

2 Recitals 1, 2 and 6 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), state:

'(1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

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

...

(6) Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity ..., 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.'

3 Under Article 1 of that regulation:

'The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission ... documents ... in such a way as to ensure the widest possible access to documents,

...'

4 Article 4 of that regulation, entitled 'Exceptions', provides, in the first subparagraph of paragraph 3 and in paragraph 6 thereof:

'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.

...

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

5 Article 12 of that regulation, entitled 'Direct access in electronic form or through a register', provides, in paragraph 2 thereof:

'... 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.'

6 Recitals 2 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 on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13), state:

'(2) The Sixth Community Environment Action Programme ... stresses the importance of providing adequate environmental information and effective opportunities for public participation in environmental decision-making, thereby increasing accountability and transparency of decision-making and contributing to public awareness and support for the decisions taken. ...

...

(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. ...'

7 Article 2(1)(d) of Regulation No 1367/2006 defines the concept of 'environmental information' as follows:

'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 [environmental] elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements;

...

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

...'

8 Under Article 3 of that regulation, entitled 'Application of Regulation [No 1049/2001]':

'Regulation [No 1049/2001] shall apply to any request by an applicant for access to environmental information held by Community institutions and bodies ...'

9 Article 6 of Regulation No 1367/2006, entitled 'Application of exceptions concerning requests for access to environmental information', provides, in paragraph 1 thereof:

'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.'

Background to the dispute

10 It is apparent from the judgment under appeal that on 20 January 2014 ClientEarth, which is a non-profit organisation whose purpose is the protection of the environment, submitted to the Commission two requests for access to documents held by that institution, pursuant to Regulation No 1049/2001. The first of those requests concerned 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 regarding that draft ('the impact assessment documents regarding access to justice in environmental matters'). The second request concerned an impact assessment report regarding a proposed binding instrument setting a strategic framework for risk-based inspection and surveillance in relation to EU environmental legislation and an opinion of the Impact Assessment Board regarding that report ('the impact assessment documents regarding inspections and surveillance in environmental matters') (taken together with the impact assessment documents regarding access to justice in environmental matters, 'the documents at issue').

11 By letters of 13 and 17 February 2014, the Commission, relying on the first subparagraph of Article 4(3) of Regulation No 1049/2001, refused to grant those two requests.

12 On 4 March 2014 ClientEarth, pursuant to Article 7(2) of that regulation, lodged two confirmatory applications with the Commission. By the decisions at issue, the Commission confirmed its refusal to grant access to the documents at issue.

13 In those decisions, the Commission noted, in the first place, that those documents related to ongoing impact assessments carried out with a view to the adoption of legislative initiatives relating to inspections and surveillance in respect of environmental matters, on the one hand, and access to justice in such matters, on the other. It explained, in that regard, that impact assessments were intended to help it in preparing its legislative proposals and that the content of those assessments were used to support the policy choices made in such proposals. Therefore, according to the Commission, the disclosure, at that stage, of the documents at issue would seriously undermine its ongoing decision-making processes. Indeed, that disclosure would restrict its room for manoeuvre, reduce its ability to reach a compromise, and might create external pressures which could hinder

those delicate processes, during which an atmosphere of trust ought to prevail. The Commission made reference to Article 17(1) TEU and to the third subparagraph of Article 17(3) TEU in that regard.

14 Concerning the impact assessment documents regarding inspections and surveillance in environmental matters, the Commission stressed, first, that those inspections and that surveillance were a key element in the implementation of public policy — an area in which the EU institutions have, since 2001, been attempting to raise awareness and promote action at EU level — and, second, that no external factors should influence the debate, as such influence would affect the quality of control over the Member States.

15 Concerning the impact assessment documents regarding access to justice in environmental matters, the Commission focused on the sensitive nature of that issue, the possible differences of opinion between Member States, and the fact that 10 years had elapsed since the submission, on 24 October 2003, of its proposal for a directive of the European Parliament and of the Council on access to justice in environmental matters (COM(2003) 624 final) (OJ 2004 C 96, p. 22).

16 Moreover, the Commission added that various documents relating to the two impact assessments in question were already available on the internet and that all the other documents relating to those assessments would be published upon the adoption of the legislative proposals concerned by the College of Commissioners.

17 The Commission concluded from this that access to the documents at issue had to be refused on the basis of the first subparagraph of Article 4(3) of Regulation No 1049/2001, given that the decision-making processes relating thereto were at a very early and delicate stage.

18 In the second place, the Commission considered that there was no overriding public interest in disclosure of the documents at issue. In that regard, it observed, in essence, that, although the objective of preserving, protecting and improving the quality of the environment and, as a consequence, of human health could be achieved through non-discriminatory access to justice, nevertheless it did not feel that it was in a position to determine how the disclosure, at that stage, of those documents would help persons living in the European Union indirectly to influence the environment in which they live. Indeed, access to justice was already possible before the national courts and the decision-making processes in question merely sought to improve that access. In addition, the Commission pointed out that a public consultation had been organised in 2013, during which interested parties, including civil society, had been able to help define the broad outlines of the proposals. Furthermore, disclosure, at that stage, of the documents at issue would undermine its decision-making processes and reduce the likelihood of achieving the best possible compromise. The public interest would be better served by the possibility of completing those processes without any external pressure.

19 In the third place, the Commission ruled out the possibility of granting partial access to the documents at issue under Article 4(6) of Regulation No 1049/2001, given that those documents were covered in their entirety by the exception laid down in the first subparagraph of Article 4(3) of that regulation.

The procedure before the General Court and the judgment under appeal

20 By applications lodged at the Registry of the General Court on 11 June 2014, ClientEarth brought two actions for annulment of the Commission's decision of 1 April 2014 (Case T-425/14) and its decision of 3 April 2014 (Case T-424/14), as referred to in paragraph 1 above. In addition, it claimed that the General Court should order the Commission to pay the costs. By order of the President of the Second Chamber of the General Court of 27 April 2015, those cases were joined for the purposes of the oral procedure and the judgment.

21 In those actions, ClientEarth raised a single plea in law, divided, in essence, into two parts. In support of the first part of that plea, alleging infringement of the first subparagraph of Article 4(3) of Regulation No 1049/2001, it put forward three complaints alleging, first, that that provision was not applicable, second, that there was no risk that the Commission's decision-making processes would be seriously undermined and, third, that there was an overriding public interest in disclosure of the documents at issue. ClientEarth expressly withdrew the first complaint at the hearing before the General Court, a note of which was made in the minutes of that hearing. By the second part of that plea, ClientEarth claimed that the Commission had failed to fulfil its duty to provide a statement of reasons.

22 The General Court began by examining that second part and rejected it.

23 Regarding the first part, having found that the Commission had not carried out a specific and individual examination of the documents at issue, the General Court nonetheless verified whether that institution was entitled to refuse to grant access to those documents under the first subparagraph of Article 4(3) of Regulation No 1049/2001 by relying on a general presumption that disclosure of that type of document would, in principle, seriously undermine its ongoing decision-making processes for the purposes of that provision.

24 To that end, the General Court noted, first, in paragraphs 68 to 75 of the judgment under appeal, that the documents at issue, in so far as they were part of the process for completing two impact assessments, belonged to one and the same category of documents.

25 Second, in paragraphs 76 to 84 of that judgment, the General Court examined the rules governing the preparation and development of policy proposals by the Commission, which are derived, in particular, from Article 17(1), (2) and (3) TEU. It concluded from that examination that those rules required that institution, when preparing and developing such proposals, to ensure that it acts in a fully independent manner and exclusively in the general interest. It inferred from this that it was, accordingly, necessary to place that institution in a position to act in that manner.

26 In paragraphs 94 to 96 of the judgment under appeal, the General Court held that, after the public consultation stage organised by the Commission in the context of the impact assessment procedure with a view to gathering the input of interested parties, that institution had to be able to enjoy space for independent deliberation, temporarily distanced from all forms of external pressure or influence, so as to be able to decide, on the basis of the information gathered in the course of that procedure, in a fully independent manner and in the general interest, on the potential policy initiatives to be proposed. Thus, the Commission's power of initiative should be protected from any influences exerted by public or private interests which would attempt, outside of that consultation, to compel that institution to adopt, amend or abandon an initiative and which would prolong or complicate the discussion taking place within that institution. Impact assessment reports contain a comparison of the various policy options examined by the Commission. Therefore, according to the General Court, the disclosure of those reports, even at the draft stage, and of the opinions given by the Impact Assessment Board concerning those reports, brings with it an increased risk that third parties will attempt, outside of that consultation, to exercise a targeted influence on the policy choices made by that institution. In particular, there is a risk that persons who have participated in that consultation may submit further observations to the Commission regarding the options and situations under consideration, or further criticisms thereof, claiming that their point of view has not been sufficiently or properly taken into account.

27 In those circumstances, the General Court held, in paragraph 97 of the judgment under appeal, that, for the purpose of applying the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001, the Commission was 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 disclosure of those documents would, in principle, seriously undermine its decision-making process for developing a policy proposal.

28 Third, the General Court specified, in paragraphs 98 and 99 of that judgment, that that presumption might apply for as long as the Commission had not made a decision regarding a potential policy proposal, that is to say, until that institution decided either to adopt or abandon the initiative envisaged.

29 Fourth, the General Court explained, in paragraphs 100 to 106 of the judgment under appeal, that that presumption applied regardless of the nature, legislative or otherwise, of the proposal envisaged.

30 Fifth, in paragraphs 107 to 110 of that judgment, the General Court held that Article 6(1) of Regulation No 1367/2006 did not preclude the recognition of that presumption.

31 Specifically, regarding the documents at issue, the General Court found, in paragraphs 116 to 124 of the judgment under appeal, that those documents fell within the scope of that general presumption and that ClientEarth had not put forward any argument capable of rebutting that presumption.

32 Lastly, in paragraphs 133 to 163 of that judgment, the General Court held that none of the arguments put forward by ClientEarth allowed the assessment carried out by the Commission, according to which there was no overriding public interest in disclosure of the documents at issue, to be called into question.

33 Consequently, the General Court rejected the first part of the single plea for annulment and, accordingly, dismissed the actions in their entirety.

Procedure before the Court and forms of order sought

34 ClientEarth claims that the Court should set aside the judgment under appeal and order the Commission to pay the costs, including those incurred by any intervening parties.

35 The Commission contends that the Court should dismiss the appeal as unfounded and order ClientEarth to pay the costs.

36 By decisions of the President of the Court of 12 July 2016, the Republic of Finland and the Kingdom of Sweden were granted leave to intervene in support of the form of order sought by ClientEarth. Those Member States claim that the Court should set aside the judgment under appeal. The Kingdom of Sweden also requests that the Commission be ordered to pay the costs which it has incurred in the appeal proceedings.

The appeal

Continuing interest in bringing proceedings

37 At the hearing on 3 July 2017, ClientEarth referred to the publication on the internet of the final version of the Impact Assessment on a Commission Initiative on Access to Justice in Environmental Matters, dated 28 June 2017 (SWD(2017) 255 final), as a working document, which was confirmed by the Commission. In the light of the explanations provided by that institution during that hearing, it appears that that publication followed the adoption by that institution on 28 April 2017 of a Notice on Access to Justice in Environmental Matters (C(2017) 2616 final).

38 By letter of 2 February 2018, the Commission informed the Court that, on 29 January 2018, it had sent ClientEarth the impact assessment documents regarding inspections and surveillance in environmental matters. According to the Commission, that disclosure followed the adoption by that institution on 18 January 2018 of a communication on actions to improve environmental compliance and governance (COM(2018) 10 final) and of a decision setting up a new group of Commission experts (the Environmental Compliance and Governance Forum) (C(2018) 10 final). The Commission argued that, following that disclosure, ClientEarth had gained access to all the documents at issue, which might prompt the Court to declare, in accordance with Article 149 of its Rules of Procedure, that there is no longer any need to adjudicate on the present appeal.

39 In observations submitted to the Court on 20 February 2018, ClientEarth stated its opposition to a potential ruling that there was no need to adjudicate.

40 In that regard, ClientEarth argued, in the first place, that, contrary to the Commission's assertions, it had had access to only three of the four documents at issue and not to all of those documents. The opinion of the Impact Assessment Board regarding the draft impact assessment report on access to justice in environmental matters had not yet been disclosed to it. In the second place, ClientEarth maintained that it had, in any event, retained an interest in having the judgment under appeal set aside and in having the decisions at issue annulled, first, in order to prevent their unlawfulness from recurring in the future and, second, in so far as the Commission had not formally withdrawn those decisions.

41 By letter of 16 March 2018, the Commission informed the Court that it had sent ClientEarth, by a letter dated that same day, the opinion of the Impact Assessment Board regarding the draft impact assessment report on access to justice in environmental matters, dated 21 May 2014.

42 ClientEarth submitted its observations on that letter on 27 March 2018.

43 In that regard, it should be borne in mind that, according to the settled case-law of the Court, the purpose of the action must, like the interest in bringing proceedings, continue until the final decision, failing which there will be no need to adjudicate, which presupposes that the action or, as the case may be, the appeal must be liable, if successful, to procure an advantage for the party bringing it (see, to that effect, judgments of 28 May 2013, *Abdulrahim* v *Council and Commission*, C-239/12 P, EU:C:2013:331, paragraph 61 and the case-law cited, and of 27 June 2013, *Xeda International and Pace International* v *Commission*, C-149/12 P, not published, EU:C:2013:433, paragraph 31).

44 In the present case, it is not disputed that ClientEarth had an interest in bringing proceedings when it brought its actions for annulment before the General Court.

45 Furthermore, despite the publication or disclosure to ClientEarth, in the course of the present appeal proceedings, of the various documents referred to in paragraphs 37, 38 and 41 of this judgment, it should be noted, in the first place, that the decisions at issue have not been withdrawn by the Commission, so that the dispute has retained its purpose (see, to that effect, judgment of 7 June 2007, *Wunenburger* v *Commission*, C-362/05 P, EU:C:2007:322, paragraphs 48 and 49).

46 In the second place, as has been emphasised, in essence, by ClientEarth, it was seeking in the present case to gain access to the documents at issue so as, in particular, to make its views known in the Commission's ongoing decision-making processes and to stimulate debate on the actions planned by that institution prior to the Commission making a decision concerning the initiatives envisaged, either by submitting a proposal, where appropriate, or by abandoning those initiatives.

47 In the light of the considerations set out in paragraph 37 above and the explanations provided by the Commission at the hearing before the Court, it appears that disclosure of the impact assessment report and of the opinion of the Impact Assessment Board concerning access to justice in

environmental matters followed the Commission's decision not to submit a legislative proposal on the matter and to adopt a notice. Concerning the communication to ClientEarth of the impact assessment documents regarding inspections and surveillance in environmental matters, it is apparent from paragraph 38 above that this followed the adoption, by the Commission, of a communication on environmental compliance and governance and of a decision setting up a new group of experts in the field. It therefore seems that disclosure of those various documents did not take place until after the Commission had made a decision regarding the initiatives envisaged. In those circumstances, that disclosure does not appear to have enabled the objectives pursued by ClientEarth in submitting its requests for access to be fully met.

48 In the third place, it follows from the case-law of the Court that an applicant may, in certain cases, retain an interest in seeking annulment of the contested act and, as the case may be, the setting aside of the judgment of the General Court dismissing the action brought against that act in order to induce the author of that act to make suitable amendments in the future, and thereby avoid the risk that the unlawfulness alleged in respect of the act in question will be repeated (see, to that effect, judgment of 28 May 2013, *Abdulrahim* v *Council and Commission*, C-239/12 P, EU:C:2013:331, paragraph 63 and the case-law cited). The continuation of that interest presupposes that that unlawfulness is liable to recur in the future, irrespective of the particular circumstances of the case in question (see, to that effect, judgment of 7 June 2007, *Wunenburger* v *Commission*, C-362/05 P, EU:C:2007:322, paragraph 52).

49 In the present case, ClientEarth complains, in particular, that the General Court considered that the Commission was entitled to refuse to grant access to the documents at issue by relying on the general presumption that the disclosure of documents drawn up in the context of preparing an impact assessment would, in principle, seriously undermine its ongoing decision-making process for developing a policy proposal for the purposes of the first subparagraph of Article 4(3) of Regulation No 1049/2001. One of the illegalities alleged by ClientEarth is therefore, in essence, the application of that presumption.

50 As is asserted by ClientEarth, that unlawfulness is liable to recur in the future, irrespective of the particular circumstances of the present case.

51 In that regard, it should be borne in mind that, according to settled case-law, if an EU institution hearing a request for access to a document decides to refuse to grant that request on the basis of one of the exceptions laid down in Article 4 of Regulation No 1049/2001, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by that exception. Moreover, the risk of the interest being so undermined must be reasonably foreseeable and must not be purely hypothetical (see, to that effect, judgment of 17 October 2013, *Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 31 and the case-law cited). In certain cases, the Court acknowledged that it was however open to that institution to base its decisions in that regard 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 (judgment of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraph 69 and the case-law cited).

52 The objective of such presumptions is thus the possibility, for the EU institution concerned, to consider that the disclosure of certain categories of documents undermines, in principle, the interest protected by the exception which it is invoking, by relying on such general considerations, without being required to examine specifically and individually each of the documents requested (see, to that effect, judgments of 17 October 2013, *Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 73, and of 11 May 2017, *Sweden* v *Commission*, C-562/14 P, EU:C:2017:356, paragraph 47 and the case-law cited).

53 Accordingly, the general presumption recognised by the General Court in the present case is likely to be implemented again in the future by the Commission in response to new requests for access to documents drawn up in the context of preparing an ongoing impact assessment, a likelihood which, moreover, has not been disputed by that institution.

54 Furthermore, ClientEarth is particularly vulnerable to such implementations of that presumption in the future. It is apparent from paragraph 1 of the judgment under appeal that ClientEarth is a non-profit organisation whose aim is the protection of the environment. In that regard, ClientEarth claims, in essence, without being contradicted by the Commission, that one of its tasks is to promote increased transparency and lawfulness in relation to the EU legislative process and that it is therefore likely that it will again request access to documents similar to the documents at issue in the future and that the Commission will once more refuse to grant that request on the basis of that general presumption. ClientEarth would then have to bring a new action for annulment in order to challenge the merits of that presumption.

55 Thus, from ClientEarth's perspective, the question of the lawfulness of the general presumption at issue in the present case is relevant in view of future requests for access to such documents (see, by analogy, judgment of 7 June 2007, *Wunenburger* v *Commission*, C-362/05 P, EU:C:2007:322, paragraph 59).

56 In such circumstances, it must be held that ClientEarth has retained an interest in bringing proceedings. Recognition of such an interest is in the interests of the sound administration of justice, having regard to the risk of recurrence of the alleged unlawfulness and in view of the particular circumstances referred to above.

57 Accordingly, there is a need to adjudicate on the present appeal.

The first ground of appeal

58 The first ground of appeal alleges that the General Court erred in law in recognising, in paragraphs 55 to 127 of the judgment under appeal, the existence of a general presumption pursuant to which the disclosure of documents drawn up in the context of preparing an impact assessment, such as the documents at issue, is deemed, in principle, seriously to undermine the Commission's ongoing decision-making process for the purposes of the first subparagraph of Article 4(3) of Regulation No 1049/2001, for as long as that institution has not made a decision regarding the potential submission of a proposal. That ground of appeal is divided into five parts, with the first to fourth parts being the main parts and the fifth part being raised in the alternative. It is necessary to begin by examining the first to fourth parts.

Arguments of the parties

59 By the first part of the first ground of appeal, ClientEarth, supported by the Republic of Finland and the Kingdom of Sweden, claims that, by recognising the existence of that general presumption, the General Court misapplied the case-law of the Court of Justice.

60 Indeed, although the Court has previously recognised the existence of general presumptions of confidentiality in respect of various types of document, it is apparent from that case-law that those presumptions must be interpreted and applied strictly. In addition, the cases in which the Court recognised those presumptions had various characteristics, none of which are present in the case at hand.

61 In particular, those cases all concerned a set of documents which were clearly defined by the fact that they all belonged to a file relating to ongoing judicial or administrative proceedings, which is not the situation in the present case.

62 In addition, in the majority of those cases, the documents in question were governed by a specific set of rules limiting access thereto in one way or another. In the present case, there is a specific set of rules applicable to the documents at issue, which contain environmental information, namely the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted at Aarhus on 25 June 1998 ('the Aarhus Convention') and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1), and by Regulation No 1367/2006. However, that set of rules is intended, by contrast, to extend the right of access to that information.

63 The Commission disputes those arguments. In its view, ClientEarth infers rules from the case-law of the Court that are not reflected in that case-law. Indeed, it follows from that case-law that establishing a general presumption of confidentiality presupposes, first, that the documents requested belong to one and the same category of documents or are of the same nature and, second, that access to those documents risks undermining the proper conduct and the objectives of the processes to which they relate.

64 By the second part of its first ground of appeal, ClientEarth, supported by the Republic of Finland and the Kingdom of Sweden, claims that the General Court erred in law in considering, in paragraphs 55 to 99 of the judgment under appeal, that Article 17(1), (2) and (3) TEU provided a basis for the recognition of a general presumption of confidentiality in respect of documents drawn up in the context of an impact assessment. First, the General Court confuses confidentiality and independence. Indeed, it is opaqueness and not openness which is liable to undermine the Commission's independence. By contrast, openness enhances that independence, by placing the Commission in a position to better resist any external pressures. Second, unless the principle that exceptions to the right of access to documents of the institutions must be interpreted strictly is disregarded, Article 17 TEU cannot constitute a general basis for the Commission to refuse to grant access to such documents.

65 The Commission contends that the General Court correctly examined the rules governing its decision-making process, specifically, those set out in Article 17(1), (2) and (3) TEU, pursuant to which, when the Commission prepares and develops policy proposals, it is to act in a fully independent manner and in the general interest. Contrary to ClientEarth's assertions, those rules do not provide that the Commission is to maintain, in that context, constant multiple dialogues with interested parties. As the General Court correctly recognised in paragraphs 79 to 84 and 96 of the judgment under appeal, it would be impossible in practice for the Commission to have space for independent deliberation and to exercise its power of initiative in a fully independent manner if it were constantly engaged in such dialogues. It would be impossible to preserve the essence of that power if interested parties were to attempt, outside the public consultation organised by that institution, to compel that institution to adopt, amend or abandon an initiative. Moreover, the public interest in understanding its decision-making process should be satisfied by the submission of a proposal or the abandoning of the initiative envisaged, since, in both cases, the final version of all or part of the documents at issue will then be accessible in accordance with the Impact Assessment Guidelines adopted by the Commission on 15 January 2009 ('the 2009 Guidelines').

66 By the third part of its first ground of appeal, ClientEarth, supported by the Kingdom of Sweden, claims that the General Court erred in law by accepting that there was a general presumption of confidentiality covering the documents at issue, without verifying, in particular in paragraph 96 of the judgment under appeal, the risk that disclosure of that type of document would specifically and

actually undermine the interest protected by the first subparagraph of Article 4(3) of Regulation No 1049/2001. The recognition of such a presumption presupposes that the risk of that interest being so undermined has been demonstrated beforehand.

67 The Commission contends, by contrast, that the General Court explained the objective, actual and specific risk that that disclosure would entail for its ongoing decision-making processes in paragraph 96 of that judgment. Moreover, ClientEarth itself adduced evidence of the reality of the external pressures that the Commission could be subject to in the event of such disclosure by stating that the objective of its request for access was to enable it to take part in those processes.

68 By the fourth part of the first ground of appeal, ClientEarth, supported by the Republic of Finland and the Kingdom of Sweden, claims that the General Court erred in law in paragraphs 100 to 106 of the judgment under appeal by not taking account of the fact that the documents at issue are part of a legislative framework and are inherently linked to the decision to pursue, or not to pursue, a legislative initiative.

69 First, when developing impact assessments, the Commission is taking part in the legislative process and the documents drawn up in that context are the basis for potential legislative acts. Those documents should be classified as 'legislative' documents for the purposes of Article 12(2) of Regulation No 1049/2001, with the result that they should be subject to increased transparency. Second, the case-law of the Court does not justify recognising a general presumption of confidentiality covering documents of that nature.

70 The Commission contends, first, that the legislative procedure does not begin until a legislative proposal is submitted. The general presumption recognised by the General Court applies only until the Commission makes a decision regarding the potential adoption of such a proposal, namely at a time when no legislative document yet exists. The Commission adds that citizens will have the possibility to be made aware of the bases for the legislative action of the European Union from the moment the legislative procedure begins with the submission of its legislative proposal, since the documents at issue will be published at that time.

71 Second, as the General Court found in paragraph 105 of the judgment under appeal, even assuming that the documents at issue fall to be described as 'legislative' documents for the purposes of Article 12(2) of Regulation No 1049/2001, that provision nonetheless applies without prejudice to Articles 4 and 9 of that regulation and thus without prejudice to the possibility of recognising a general presumption covering those documents.

72 Third, the case-law of the Court does not exclude the recognition of such a presumption in a legislative context.

Findings of the Court

– Preliminary considerations

73 It should be borne in mind that, in accordance with recital 1 thereof, Regulation No 1049/2001 reflects the intention expressed in the second paragraph of Article 1 TEU to mark a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen (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 34).

74 That core EU objective is also reflected in Article 15(1) TFEU, which provides that the institutions, bodies, offices and agencies of the European Union are to conduct their work as openly as possible, that principle of openness also being expressed in Article 10(3) TEU and in Article 298(1) TFEU, and

in the enshrining of the right of access to documents in Article 42 of the Charter of Fundamental Rights of the European Union (see, to that effect, judgment of 18 July 2017, *Commission* v *Breyer*, C-213/15 P, EU:C:2017:563, paragraph 52).

75 It can be seen from recital 2 of Regulation No 1049/2001 that openness enables the EU institutions to have greater legitimacy and to be more effective and more accountable to EU citizens in a democratic system. By allowing divergences between various points of view to be openly debated, it also contributes to increasing those citizens' confidence in those institutions (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, paragraphs 45 and 59).

76 To those ends, Article 1 of Regulation No 1049/2001 provides that the purpose of that regulation is to confer on the public as wide a right of access as possible to documents of the EU institutions (see, to that effect, judgment of 13 July 2017, *Saint-Gobain Glass Deutschland* v *Commission*, C-60/15 P, EU:C:2017:540, paragraph 61 and the case-law cited).

77 It is also apparent from Article 4 of that regulation, which introduces a system of exceptions in that regard, that that right is, nevertheless, subject to certain limits based on reasons of public or private interest (judgment of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraph 57). Among those exceptions, the first subparagraph of Article 4(3) of Regulation No 1049/2001 provides, inter alia, that access to a document, drawn up by an EU institution for internal use, which relates to a matter where the decision has not been taken by the institution, is to be refused if disclosure of that document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in that disclosure.

78 As such exceptions depart from the principle of the widest possible public access to documents, they must be interpreted and applied strictly (judgment of 13 July 2017, *Saint-Gobain Glass Deutschland* v *Commission*, C-60/15 P, EU:C:2017:540, paragraph 63 and the case-law cited).

79 As has been recalled in paragraph 51 above, if the EU institution concerned decides, on the basis of one of those exceptions, to refuse to grant access to a document it has been asked to disclose, in certain cases it is open to that institution to rely, for that purpose, on general presumptions which apply to certain categories of documents.

80 As can be seen from the case-law referred to in that paragraph, however, recognition of a general presumption in respect of a new category of documents presupposes that it has first been shown that it is reasonably foreseeable that disclosure of the type of document falling within that category would be liable actually to undermine the interest protected by the exception in question. Furthermore, as general presumptions constitute an exception to the rule that the EU institution concerned is obliged to carry out a specific and individual examination of every document which is the subject of a request 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, they must be interpreted and applied strictly (see, to that effect, judgment of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraph 81).

81 As the law stands, the Court has recognised five categories of documents which enjoy general presumptions of confidentiality: the documents in an administrative file relating to a procedure for reviewing State aid; the submissions lodged in proceedings before the courts of the European Union, for as long as those proceedings remain pending; the documents exchanged between the Commission and notifying parties or third parties in the course of merger control proceedings; the documents relating to an infringement procedure during its pre-litigation stage, including the documents exchanged between the Commission and the Member State concerned during an EU Pilot procedure; and the documents relating to a proceeding under Article 101 TFEU (see, to that effect, judgment of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraph 77 and the case-law

cited; regarding submissions lodged before the courts of the European Union, see, to that effect, judgment of 18 July 2017, *Commission* v *Breyer*, C-213/15 P, EU:C:2017:563, paragraph 41 and the case-law cited; regarding documents exchanged during an EU Pilot procedure, see judgment of 11 May 2017, *Sweden* v *Commission*, C-562/14 P, EU:C:2017:356, paragraph 51). In each of those cases, 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 (judgment of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraph 78; see, also, judgment of 11 May 2017, *Sweden* v *Commission*, C-562/14 P, EU:C:2017:356).

82 It is in the light of those preliminary considerations that it is necessary to examine the first to fourth parts of the first ground of appeal, taken together.

83 To that end, it is necessary to determine whether the General Court could, without erring in law, consider, in essence, in paragraphs 68 to 111 of the judgment under appeal, that, for the purpose of applying the first subparagraph of Article 4(3) of Regulation No 1049/2001, the Commission was entitled to presume that, for as long as it had not made a decision regarding a potential proposal, the disclosure of documents drawn up in the context of an impact assessment would, in principle, seriously undermine its ongoing decision-making process for developing such a proposal, regardless of the nature — legislative or otherwise — of the proposal envisaged, on the one hand, and the fact that the documents concerned contained environmental information within the meaning of Article 2(1)(d) of Regulation No 1367/2006, on the other.

– *Context in which the documents at issue were drawn up, and the content of those documents*

84 In the first place, it should be borne in mind that recital 6 of Regulation No 1049/2001 indicates that wider access should be granted to documents in cases where the EU institutions are acting in their legislative capacity. The possibility for citizens to scrutinise and be made aware of all the information forming the basis for EU legislative action is a precondition for the effective exercise of their democratic rights as recognised, in particular, in Article 10(3) TEU (see, to that effect, 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). As is emphasised, in essence, by ClientEarth, the exercise of those rights presupposes not only that those citizens have access to the information at issue so that they may understand the choices made by the EU institutions within the framework of the legislative process, but also that they may have access to that information in good time, at a point that enables them effectively to make their views known regarding those choices.

85 In addition, as was emphasised by the Advocate General in points 64 and 65 of his Opinion, it is apparent from Article 12(2) of Regulation No 1049/2001, which implements the principle derived from recital 6 thereof, that not only acts adopted by the EU legislature, but also, more generally, 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, fall to be described as 'legislative documents' and, consequently, subject to Articles 4 and 9 of that regulation, must be made directly accessible.

86 In that regard, it is true that, as was noted by the General Court in paragraph 103 of the judgment under appeal, when the Commission prepares impact assessment documents, such as the documents at issue, it does not itself act in a legislative capacity. In addition, the impact assessment procedure takes place upstream of the legislative procedure *sensu stricto*, which does not formally begin until a legislative proposal is submitted by the Commission.

87 That being said, it should be noted that, pursuant to Article 17(2) TEU, EU legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. The power of initiative accorded to that institution by that provision includes, first, the power to decide

whether or not to submit a proposal, except in the situations where that institution is obliged to submit such a proposal. In particular, the Commission's decision to abandon, following an impact assessment, the legislative initiative envisaged puts a definitive end to the planned legislative action, which may not be resumed unless that institution withdraws that decision. Second, the Commission's power of initiative includes the power to determine the subject matter, objective and content of a potential proposal, bearing in mind that, under Article 293(1) TFEU, except in the cases referred to in that provision, where, pursuant to the Treaties, the Council acts on a proposal from the Commission, it may amend that proposal only by acting unanimously (see, to that effect, judgment of 14 April 2015, *Council* v *Commission*, C-409/13, EU:C:2015:217, paragraphs 70 and 72).

88 In view of that power, the Commission is a key player in the legislative process.

89 In the present case, as is apparent from paragraphs 9 and 33 of the judgment under appeal, the documents at issue relate to impact assessments carried out with a view to the potential adoption of legislative initiatives by the Commission.

90 Against that background, as the General Court explained in paragraphs 86 to 88 of that judgment, the impact assessments carried out by that institution are, according to the 2009 Guidelines, key tools for ensuring that the initiatives of that institution and EU legislation are developed on the basis of transparent, comprehensive and balanced information. It is on the basis of that information that the Commission will be able to assess the appropriateness, the necessity, the nature and the content of such initiatives. Specifically, impact assessment reports contain a presentation of the various policy options under consideration, the study of the impact, advantages and disadvantages of those options, and a comparison of those options. Although those guidelines state that impact assessments are not to replace the taking of a decision by the Commission, it is apparent from paragraph 9 of that judgment that that institution indicated, in the decisions at issue, that the policy choices made in its legislative proposals were supported by the content of those assessments.

91 It follows that, as is maintained, in essence, by ClientEarth and the Republic of Finland, impact assessment reports and the accompanying opinions of the Impact Assessment Board contain, in such a context, information constituting important elements of the EU legislative process, forming part of the basis for the legislative action of the European Union.

92 Although the submission of a legislative proposal by the Commission is, at the impact assessment stage, uncertain, the disclosure of those documents is likely to increase the transparency and openness of the legislative process as a whole, in particular the preparatory steps of that process, and, thus, to enhance the democratic nature of the European Union by enabling its citizens to scrutinise that information and to attempt to influence that process. As is asserted, in essence, by ClientEarth, such a disclosure, at a time when the Commission's decision-making process is still ongoing, enables citizens to understand the options envisaged and the choices made by that institution and, thus, to be aware of the considerations underlying the legislative action of the European Union. In addition, that disclosure puts those citizens in a position effectively to make their views known regarding those choices before those choices have been definitively adopted, so far as both the Commission's decision to submit a legislative proposal and the content of that proposal, on which the legislative action of the European Union depends, are concerned.

93 It follows that, as was noted by the Advocate General in points 67 and 68 of his Opinion, such documents, in view of their purpose, are among those covered by Article 12(2) of Regulation No 1049/2001.

94 Moreover, the importance for citizens of being able to have access to documents drawn up in the context of an impact assessment, even if the Commission's decision-making process is still ongoing, is not called into question by the fact, emphasised by that institution, that, in this instance, ClientEarth had had the possibility to take part in the public consultations organised by that institution in the

context of the impact assessment procedures at issue in the present case and that a certain number of documents relating to those assessments were already publicly available at the time the decisions at issue were adopted. Although such consultations are also intended to ensure the openness of the Commission's decision-making process and the participation of citizens in that process, they are not to replace the possibility for those citizens to be granted access, upon request, to impact assessment reports and to the opinions of the Impact Assessment Board. Indeed, it is apparent from the 2009 Guidelines that consultations organised by the Commission are not necessarily to be open to the public as a whole. In addition, it is not established in the present case that the information disclosed in the context of those consultations and the information contained in the documents that were already publicly available corresponded, in essence, to the information set out in the documents at issue.

95 It follows from the foregoing that the reasons underlying the principle, set out in recital 6 of Regulation No 1049/2001 and implemented in Article 12(2) of that regulation, of wider access to the documents adopted by the EU institutions when acting in their legislative capacity, which are recalled in paragraph 84 above, are also valid for documents drawn up in the context of an impact assessment procedure, such as the documents at issue, drawn up with a view to the potential adoption of legislative initiatives by the Commission. As is asserted by ClientEarth, such access should therefore also be granted in respect of those documents.

96 In the second place, it should also be noted that the documents at issue contain environmental information within the meaning of Regulation No 1367/2006.

97 Under Article 2(1)(d)(v) of that regulation, such information may be, in particular, any information, in written, visual, aural, electronic or any other material form, on cost-benefit and other economic analyses and assumptions used within the framework of measures such as policies, legislation, plans, programmes and environmental agreements. In that regard, it is apparent from paragraph 90 above that impact assessment reports contain, inter alia, the study of the impact, advantages and disadvantages of the various policy options envisaged by the Commission with a view to the potential adoption of an initiative, whether legislative or otherwise. In addition, in the present case, it is established that the documents at issue relate to legislative initiatives envisaged in respect of environmental matters.

98 Regulation No 1367/2006 aims, as provided for in Article 1 thereof, to ensure the widest possible systematic availability and dissemination of environmental information (judgment of 13 July 2017, *Saint-Gobain Glass Deutschland* v *Commission*, C-60/15 P, EU:C:2017:540, paragraph 64 and the case-law cited). It follows, in essence, from recital 2 of that regulation that the purpose of access to that information is to promote more effective public participation in the decision-making process, thereby increasing, on the part of the competent bodies, the accountability of decision-making and contributing to public awareness and support for the decisions taken (judgment of 23 November 2016, *Commission* v *Stichting Greenpeace Nederland and PAN Europe*, C-673/13 P, EU:C:2016:889, paragraph 80).

99 In that regard, although Article 3 of Regulation No 1367/2006 provides that Regulation No 1049/2001 is to apply to any request for access to environmental information, Article 6 thereof adds more specific rules concerning such requests which in part favour and in part restrict that access (judgment of 13 July 2017, *Saint-Gobain Glass Deutschland* v *Commission*, C-60/15 P, EU:C:2017:540, paragraph 65 and the case-law cited).

100 In particular, it is apparent from the second sentence of Article 6(1) of Regulation No 1367/2006, read in the light of recital 15 thereof, in particular, that the ground for refusal set out in the first subparagraph of Article 4(3) of Regulation No 1049/2001 is to be interpreted in a restrictive way as regards environmental information, taking into account the public interest served by disclosure of the requested information, thereby aiming for greater transparency in respect of that information.

101 It follows from the considerations set out in paragraphs 84 to 100 above that the documents at issue in the present case are documents which are part of a legislative process and which, moreover, contain environmental information and that, consequently, the first subparagraph of Article 4(3) of Regulation No 1049/2001 must be interpreted and applied all the more strictly.

– *The general presumption recognised in the judgment under appeal*

102 In order to recognise the existence of a general presumption of confidentiality in respect of documents drawn up in the context of an impact assessment for as long as the Commission has not made a decision regarding a potential proposal, in paragraphs 94 to 96 of the judgment under appeal the General Court relied, as has been recalled in paragraph 26 above, on general considerations based, in essence, on the need to preserve the Commission's space for deliberation and its ability to exercise its power of initiative in a fully independent manner and exclusively in the general interest in accordance with Article 17(1), (2) and (3) TEU, on the one hand, and the risk that disclosure of documents drawn up in the context of an impact assessment relating to an ongoing decision-making process might give rise to external pressures or influences liable to have an adverse effect on the way in which that institution's decision-making process is conducted, on the other.

103 However, in the first place, although the Commission must, under Article 17(1), (2) and (3) TEU, act in a fully independent manner and exclusively in the general interest when carrying out impact assessments, it should be noted that the impact assessment procedure is not a type of procedure which, as such, has features that preclude, in principle, full transparency being granted. On the contrary, as was stated by the General Court in paragraph 93 of the judgment under appeal, that procedure is conducted with the objective of ensuring that the Commission's decision-making process is transparent and open. It follows from paragraphs 84 to 101 above that the same must apply a fortiori where that procedure is part, as in the present case, of a legislative process in respect of environmental matters.

104 In addition, as is argued, in essence, by ClientEarth, by increasing the legitimacy of the Commission's decision-making process, transparency ensures the credibility of that institution's action in the minds of citizens and concerned organisations and thus specifically contributes to ensuring that that institution acts in a fully independent manner and exclusively in the general interest. It is rather a lack of public information and debate which is likely to give rise to doubts as to whether that institution has fulfilled its tasks in a fully independent manner and exclusively in the general interest (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 59).

105 In the second place, as is maintained by ClientEarth and the Member States intervening in support of that party, none of the grounds relied on by the General Court in paragraphs 94 to 96 of the judgment under appeal permits a finding of a risk that the Commission's ongoing decision-making process could be undermined for the purposes of the first subparagraph of Article 4(3) of Regulation No 1049/2001. By recognising, on the basis of such grounds, a general presumption of confidentiality in respect of documents drawn up in the context of an impact assessment for as long as the Commission has not made a decision regarding a potential proposal, the General Court infringed that provision and the principle that it must be interpreted and applied strictly, which, as has been recalled in paragraph 101 above, is particularly relevant as regards documents drawn up in the course of a legislative process and containing environmental information.

106 In that regard, it is true that it cannot be ruled out, as the General Court explained in paragraph 96 of the judgment under appeal, in the event of disclosure of impact assessment reports and the opinions of the Impact Assessment Board regarding those reports before the Commission has made a decision regarding a potential proposal, that third parties may attempt to influence or exert pressure on the policy choices to be made by that institution or that interested parties who have submitted

observations during the public consultation organised by the Commission in the context of the impact assessment procedure may submit further remarks regarding the options and scenarios under consideration by that institution, or further criticisms thereof.

107 However, in so far as the Commission, in essence, argued that, in the event of such disclosure, it would be constantly engaged in multiple dialogues with interested parties, so that it would be impossible in practice for it to have space for autonomous deliberation and to make a decision in a fully independent manner regarding the potential proposals to be adopted, it should be noted that EU law does not, in principle, require that institution to maintain such dialogues in individual cases, which was expressly acknowledged by that institution at the hearing before the Court. In that regard, although Article 11(2) TEU provides that the EU institutions are to maintain an open, transparent and regular dialogue with representative associations and civil society, that provision in no way means that the Commission is required to respond, on the merits and in each individual case, to the remarks it may have received following disclosure of a document under Regulation No 1049/2001.

108 In addition and in any event, the General Court has not established that the external influences or pressures to which the Commission might be subjected in the event of disclosure of documents developed in the context of an impact assessment relating to an ongoing decision-making process would be such as to risk, generally and regardless of the specific context surrounding the impact assessment and decision-making process in question and of the specific content of each of the documents requested, impeding that institution's capacity to act in a fully independent manner and exclusively in the general interest or seriously to affect, prolong or complicate the proper conduct of that institution's internal discussions and decision-making process. As is asserted, in essence, by ClientEarth, the general considerations set out in that regard by the General Court in paragraphs 94 to 96 of the judgment under appeal cannot amount to such a risk. In that regard, as can be seen from paragraphs 92 and 98 above, the expression by the public or the interested parties of their views on the choices made and the policy options envisaged by the Commission in the context of its initiatives, in particular its legislative initiatives in respect of environmental matters, before that institution has made a decision regarding the planned initiative, is an integral part of the exercise by EU citizens of their democratic rights.

109 It follows that, although the Commission must be able to enjoy a space for deliberation in order to be able to decide as to the policy choices to be made and the potential proposals to be submitted, the General Court was wrong to consider, in essence, that the protection of the Commission's power of initiative and the preservation of that institution's ability to exercise that power in a fully independent manner and exclusively in the general interest required, in principle, that documents drawn up in the context of an impact assessment may, generally, remain confidential until that institution has made such a decision.

110 Moreover, in so far as the Commission, at the hearing before the Court, relied on the fact that the documents at issue were only internal, unfinalised drafts, it should be emphasised that, as that institution itself recalled in its response, in order to recognise the general presumption at issue, the General Court did not rely specifically on that fact or on the need to protect the process connected with the drafting of those documents. Indeed, it is apparent from paragraphs 94 to 97 of the judgment under appeal that the General Court, to that end, held more generally that there was a risk that disclosure of impact assessment reports, whether or not they were at the draft stage, and of opinions of the Impact Assessment Board would seriously undermine the Commission's ongoing decision-making process connected with the development and adoption of its proposals.

111 In any event, it should be specified, first, that the first subparagraph of Article 4(3) of Regulation No 1049/2001 concerns access to documents for internal use relating to an issue on which the EU institution concerned has not yet made a decision. However, that provision does not, either by its wording or by reference to the interest that it protects, rule out the possibility of requesting access to documents of a provisional nature. Second, that provisional nature is not, as such, capable of

establishing, generally and independently of a specific and individual examination of each of the documents requested, a risk that the Commission's decision-making process would be seriously undermined. Indeed, such a risk depends on factors such as the state of completion of the document in question and the precise stage of the decision-making process in question at the time when access to that document is refused, the specific context in which that process takes place, and the issues still to be discussed internally by the institution concerned.

112 It follows from all of the foregoing that the General Court erred in law in considering, in paragraphs 94 to 111 of the judgment under appeal, that, for the purpose of applying the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001, the Commission was entitled to presume that, for as long as it had not made a decision regarding a potential proposal, disclosure of documents drawn up in the context of an impact assessment could, in principle, seriously undermine its ongoing decision-making process for developing such a proposal, regardless of the nature, legislative or otherwise, of the proposal envisaged and the fact that the documents concerned contained environmental information within the meaning of Article 2(1)(d) of Regulation No 1367/2006.

113 Accordingly, and without there being any need to examine the other arguments put forward by ClientEarth and by the Member States intervening in support of that party, it must be held that the first to fourth parts of the first ground of appeal are well founded.

114 Since the first ground of appeal must be upheld on that basis, it is necessary to set aside the judgment under appeal, without it being necessary to examine the fifth part of that ground, alleging, in the alternative, that the General Court made the general presumption established irrefutable, or the second ground of appeal, also raised in the alternative, according to which the General Court erred in law in not recognising the existence of an overriding public interest in disclosure of the documents at issue.

The actions before the General Court

115 According to the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court may, in the event of the setting aside of the decision of the General Court, refer the case back to the General Court for judgment, or give final judgment itself in the matter, where the state of the proceedings so permits.

116 In the present case, it is appropriate for the Court to give final judgment in the matter, as the state of the proceedings so permits.

117 As has been indicated in paragraph 21 above, at first instance, ClientEarth argued, inter alia, that the decisions at issue infringed the first subparagraph of Article 4(3) of Regulation No 1049/2001 on the ground that the Commission wrongly considered that disclosure of the documents at issue risked seriously undermining its ongoing decision-making processes for the purposes of that provision.

118 In that regard, it is apparent from those decisions, the content of which has been recalled in paragraphs 13 to 17 above, that, in order to establish the existence of such a risk, the Commission relied on general considerations based, first of all, on the fact that impact assessments helped to support the policy choices made by that institution in its legislative proposals, next, on the need to preserve its discretion, its independence, its ability to reach compromises and to act exclusively in the general interest, and the atmosphere of trust that ought to prevail during its internal discussions and, lastly, on the risk of external pressures liable to have a serious adverse effect on the way in which those discussions are conducted.

119 It also relied on more specific considerations relating to the two ongoing decision-making processes concerning, in particular, their being at an early and sensitive stage, the fact that the issues under discussion had been the subject of deliberations for some time, and the importance of those issues. Concerning the impact assessment documents regarding access to justice in environmental matters, it also emphasised the sensitive nature of the issues involved and the existence of possible differences of opinion between Member States. Concerning the impact assessment documents regarding inspections and surveillance in environmental matters, it also focused on the need for the discussion to be shielded from external influencing factors, as such influence would affect the quality of control exercised over the Member States.

120 Concerning, first, the general grounds referred to in paragraph 118 above, these correspond, in essence, to those relied on by the General Court in paragraphs 78 to 97 of the judgment under appeal. However, it follows from the considerations set out in paragraphs 84 to 112 above that the Commission could not rely on such grounds in order to presume that access to documents drawn up in the context of an impact assessment would, in principle, seriously undermine its ongoing decision-making processes for the purposes of the first subparagraph of Article 4(3) of Regulation No 1049/2001, without carrying out a specific and individual assessment of the documents at issue.

121 Concerning, second, the grounds specific to the two ongoing decision-making processes, which are summarised in paragraph 119 above, as was asserted by ClientEarth at first instance, they do not permit a finding of a specific, actual and reasonably foreseeable risk that access to the documents at issue would seriously undermine those processes either.

122 First, the fact, assuming it to be established, that the documents at issue were requested at an early stage of the decision-making process is not, as such, sufficient to establish such a risk (see, by analogy, judgment of 17 October 2013, *Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 60).

123 Although, in its statements in defence at first instance, the Commission argued that it could not be required to disclose to the public the impact assessment reports at the preliminary draft stage and possible subsequent amendments thereto, it follows from the considerations set out in paragraph 111 above that the provisional nature of a document is also not capable, as such, of demonstrating that risk. The Commission has not established, in detail, the reasons why, taking into account, in particular, the precise stage of the impact assessment procedures at issue in the present case and having regard to the specific issues yet to be discussed internally when the decisions at issue were adopted, disclosure of each of the documents at issue, taken in isolation, would have seriously undermined its ongoing decision-making processes.

124 In that regard, the argument put forward by the Commission that there is a risk that the disclosure, before the end of the impact assessment procedure, of those documents to certain interested parties, who would attempt to influence the works of that institution, would lead to the interests of those parties being over-represented and having a disproportionate influence and would thus distort that institution's decision-making process, cannot succeed. Indeed, it is for the Commission to ensure that such a situation is prevented, not by refusing to grant access to those documents, but by taking into consideration all the interests involved, including those of persons or interest groups who have not requested such access. That institution's argument that it would not be in the public interest to have access to different versions of draft impact assessment reports and subsequent amendments thereto on the ground that such access would spread confusion among the addressees of those documents must also be rejected. Although it cannot be excluded that such a fact, assuming it to be established, may be taken into account in order to rule out the existence of an overriding public interest in disclosure of the document concerned, it is nonetheless not such as to demonstrate the risk of the Commission's decision-making process being seriously undermined. The question whether such an interest exists does not arise where that risk is not established.

125 Second, the Commission did not establish, in the decisions at issue, how the importance of the issues dealt with in the documents at issue and the fact that those issues have been the subject of deliberations for some time mean that disclosure of those documents would seriously undermine its ongoing decision-making processes.

126 Third, concerning the Commission's arguments based on the sensitive nature of those issues and of the ongoing negotiations and the existence of possible differences of opinion between Member States, those arguments are completely unsubstantiated and remain too abstract to establish such a risk, with the result that they cannot succeed.

127 Fourth, regarding the grounds based on the need to shield the discussion from external influencing factors, they must, having regard to the considerations set out in paragraphs 106 to 109 above, be rejected. In addition, the Commission has not explained how such an influence could, as it contends, affect the quality of control exercised over the Member States.

128 It follows from the foregoing that the Commission infringed the first subparagraph of Article 4(3) of Regulation No 1049/2001 by refusing to disclose the documents at issue on the basis of that provision. Accordingly, the decisions at issue must be annulled, without it being necessary to examine the other arguments raised by ClientEarth in support of its actions for annulment.

Costs

129 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to the costs. According to Article 138(1) of those Rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 140(1) of those Rules, also applicable to appeal proceedings by virtue of Article 184(1) thereof, the Member States which have intervened in the proceedings are to bear their own costs.

130 As the Commission has been unsuccessful in the present appeal and ClientEarth has requested that it should be ordered to pay the costs, and as the Court has upheld the actions brought by ClientEarth before the General Court, the Commission must be ordered to bear its own costs and to pay those incurred by ClientEarth both at first instance and in the present appeal proceedings.

131 The Republic of Finland and the Kingdom of Sweden are to bear their own costs in relation to the present appeal proceedings.

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

1. **Sets 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);**

2. **Annuls the decision of the European Commission of 1 April 2014 refusing to grant access to an impact assessment report for a proposed binding instrument setting a strategic framework for risk-based inspection and surveillance in relation to EU environmental legislation and an opinion of the Impact Assessment Board;**

3. **Annuls the decision of the European Commission of 3 April 2014 refusing to grant 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;**

4. Orders the European Commission to bear its own costs and to pay those incurred by ClientEarth at first instance and on appeal;

5. Orders the Republic of Finland and the Kingdom of Sweden to bear their own costs in relation to the appeal proceedings.

Lenaerts	Tizzano	Silva de Lapuerta
von Danwitz	Da Cruz Vilaça	Rosas
Malenovský	Juhász	Borg Barthet
Šváby	Berger	Jarašiūnas
Lycourgos	Vilaras	Regan

Delivered in open court in Luxembourg on 4 September 2018.

A. Calot Escobar	K. Lenaerts
Registrar	President