JUDGMENT OF THE GENERAL COURT (Third Chamber)

9 September 2011 *

In Case T-29/08,

Liga para Protecção da Natureza (LPN), established in Lisbon (Portugal), represented by P. Vinagre e Silva, lawyer,

applicant,

supported by

Kingdom of Denmark, represented initially by B. Weis Fogh, and subsequently by C. Vang, acting as Agents,

by

Republic of Finland, represented initially by J. Heliskoski, A. Guimaraes-Purokoski, M. Pere and H. Leppo, and subsequently by Heliskoski and Guimaraes-Purokoski, acting as Agents,

* Language of the case: Portuguese.

and by

Kingdom of Sweden, represented by A. Falk, S. Johannesson and K. Petkovska, acting as Agents,

interveners,

v

European Commission, represented by P. Costa de Oliveira and D. Recchia, acting as Agents,

defendant,

APPLICATION for annulment of the Commission decision of 22 November 2007 confirming the refusal to grant access to documents contained in the file of an infringement procedure initiated against the Portuguese Republic concerning a dam construction project on the River Sabor (Portugal) which was liable to infringe Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7),

THE GENERAL COURT (Third Chamber),

composed of J. Azizi (Rapporteur), President, E. Cremona and S. Frimodt Nielsen, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 5 October 2010,

gives the following

Judgment

Legal context

Regulation (EC) No 1049/2001

1 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), defines the principles, conditions and limits for the right of access to documents of those institutions laid down by Article 255 EC.

2 According to Article 2 of Regulation No 1049/2001:

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

…

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

…’

3 Paragraphs 2, 3 and 6 of Article 4 of Regulation No 1049/2001 provide, inter alia, as follows:

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

— …

— court proceedings and legal advice,

— the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

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.

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.'

Regulation (EC) No 1367/2006

4 As set out in recital 8 in the preamble to 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):

'The definition of environmental information in this Regulation encompasses information in any form on the state of the environment. This definition, which has been aligned to the definition adopted for Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [(OJ 2003 L 41, p. 26)], has the same content as the one laid down in the Aarhus Convention. The definition of "document" in Regulation … No 1049/2001 encompasses environmental information as defined in this Regulation.'

5 According to recital 15 in the preamble to Regulation No 1367/2006:

'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. …'

6 Article 3 of Regulation No 1367/2006 provides:

'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.

…'

7 Under Article 6(1) of Regulation No 1367/2006, headed 'Application of exceptions concerning requests for access to environmental information':

'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.'

Facts

8 The applicant, Liga para Protecção da Natureza (LPN), an association constituted under Portuguese law established in Lisbon (Portugal), is a member of Plataforma Sabor Livre, which includes a number of non-governmental organisations (NGOs) whose objective is the protection of the environment. In that capacity, it monitors a dam construction project on the Sabor River ('the dam project') in order to ensure, inter alia, that the species and habitats concerned receive appropriate protection in the light of the requirements arising from Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, 'the Habitats Directive').

9 By letter of 22 April 2003, LPN submitted to the Directorate-General for the Environment of the Commission of the European Communities ('DG Environment') a complaint, registered under number 2003/4523, in which it maintained that the dam project was damaging the 'Morais' and 'Sabor and Maças Rivers' sites of Community importance (SCIs).

10 Following that complaint, the Commission initiated an infringement procedure against the Portuguese Republic and contacted the Portuguese authorities in order to establish the extent to which the dam project was liable to infringe Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) and the Habitats Directive.

11 By letter of 27 March 2007, LPN applied to DG Environment for access to information on the processing of the complaint and asked to consult documents drawn up by the 'Commission working group' and those exchanged between the Commission and the Portuguese authorities.

12 By letter of 22 May 2007, DG Environment rejected the application for access to documents made by LPN under Article 4(2), third indent, of Regulation No 1049/2001, on the ground that disclosure of the documents in question would have affected the proper conduct of the infringement procedure initiated under Article 226 EC, in which the Commission and the Member States should cooperate in a climate of mutual trust in order to be able to open negotiations and arrive at an amicable settlement of the dispute. In that letter, it stated inter alia that, on 18 October 2005, the Commission had sent a letter of formal notice to the Portuguese authorities, to which they had replied on 16 December 2005, and that, from then onwards, the bilateral contacts continued with a view to resolving the dispute.

13 By letter of 14 June 2007, addressed to the Commission and registered by it on 22 June 2007, LPN reiterated its application for access and demanded that the Commission reconsider its decision refusing access.

14 By letter of 16 July 2007, the Commission informed LPN of the fact that, in accordance with Article 8(2) of Regulation No 1049/2001, the time-limit for a reply had been extended by 15 working days and therefore expired on 3 August 2007.

15 By letter of 3 August 2007, the Commission informed LPN that unfortunately, due to the volume of documents applied for, it was not possible for it to reply within the time-limit and that the Commission was doing everything in its power to give LPN a final reply as soon as possible.

16 Following a public announcement by the Portuguese Minister for Economic Affairs that the Commission had decided, or was about to decide, to take no further action on the complaint which had given rise to the infringement procedure concerning the dam project, on 27 September and 1 October 2007 LPN sent two further letters to the Commission.

17 By letter of 9 November 2007, DG Environment replied, in essence, that the Commission had not terminated the infringement procedure, but that it had accorded it 'high priority' in order to finalise its assessment soon. In addition, it announced that, in accordance with its 'internal rules', the complainant would be informed of the progress in processing the file and that it would have an opportunity to submit its observations before the Commission took a decision.

18 By letter of 22 November 2007 ('the contested decision'), the Commission replied to LPN's letter of 14 June 2007 and confirmed the refusal of access to the requested documents.

19 In support of the contested decision, the Commission essentially took the view that the documents which were the subject of the correspondence between it and the Portuguese authorities were all covered by the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001, as interpreted in Case T-191/99 *Petrie and Others* v *Commission* [2001] ECR II-3677, paragraph 68, which relates to the protection of the purpose of inspections, investigations and audits.

20 In particular, the Commission stated that, in an infringement procedure, a climate of mutual trust needed to prevail between the Commission and the Member State concerned in order to enable them to start a process of negotiation and compromise with a view to an amicable settlement of the dispute without the need to bring proceedings before the Court of Justice. It also observed that, firstly, the process of negotiation between the Commission and the Portuguese authorities was still in progress and, secondly, several exchanges of views and meetings had taken place or were still due to take place for the purpose of assessing the impact of the dam project. It inferred from this that disclosure of the requested documents would impair the Commission's ability to deal with the alleged infringement, since it could undermine an amicable settlement of the dispute with the Portuguese authorities before the case was brought before the Court of Justice. Furthermore, it took the view that 'partial access' for the purposes of Article 4(6) of Regulation No 1049/2001 was not possible in the case of those documents since the exception invoked applied to all of those documents.

21 Moreover, so far as concerns any 'overriding public interest' within the meaning of the last phrase of Article 4(2) of Regulation No 1049/2001, the Commission considered that there was none. According to it, Article 6(1) of Regulation No 1367/2006, under which an overriding public interest in disclosure must be deemed to exist where the information requested relates to emissions into the environment, did not apply to

investigations relating to possible infringements of Community law, as in this case. It stated that the risk of the existence of a serious infringement of the Habitats Directive did not constitute such an interest, since the Court of Justice alone had jurisdiction to establish that the Member State concerned had failed to fulfil its obligations under the EC Treaty. According to the Commission, disclosure of the requested documents would not provide any clarification in that regard until the Court of Justice had definitively resolved that issue.

22 By letter of 7 January 2008, LPN asked the Commission, pursuant to Regulation No 1049/2001, to send it the 'internal rules' mentioned in a letter from DG Environment dated '22 November 2007', so that it could 'better examine and monitor' the procedure for handling the complaint.

23 On 18 January 2008, that is, the day on which the present action against the contested decision was brought, DG Environment informed LPN of its intention to propose that the Commission take no further action on its complaint in the infringement procedure relating to the dam project and invited it to submit, within one month of receipt of that letter, any observations which it considered relevant.

24 By letter of 6 February 2008 addressed to DG Environment, LPN reiterated its application for access to the documents contained in the file of the infringement procedure and to the Commission's 'internal rules' as mentioned in that DG's letter of 9 November 2007, knowledge of which was, according to it, necessary in order to exercise its right to be heard effectively and submit 'relevant observations'. It also requested that the period of one month prescribed for its reply should start to run only after it had received the particulars sought and the documents requested.

25 By letter of 19 February 2008 addressed to the Commission, LPN reiterated its request for access to the Commission's specific 'internal rules'.

26 On 27 February 2008, LPN handed in to the Commission a statement in which it set out a number of technical, procedural and legal objections to the decision to take no further action on its complaint.

27 By email of 4 March 2008, LPN provided some further particulars in relation to its observations set out in the statement of 27 February 2008.

28 By letter of 3 April 2008, the Commission informed LPN, in essence, that, firstly, it had decided, at its meeting of 28 February 2008, to take no further action on the complaint concerning the dam project, secondly, in procedures for infringement of Community law, complainants did not enjoy preferential access to the documents and, therefore, they had to rely on the general right of access provided for by Regulation No 1049/2001 and, thirdly, since the Commission had decided to take no further action on the complaint, the exception laid down in Article 4(2), third indent, of that regulation ceased to be applicable, so that the requested documents could now be handed over to it, provided that they were not covered by another exception within the meaning of that regulation. For that purpose, the Commission attached a list of documents headed 'List of the documents in the file'. Finally, the Commission set out the reasons why it considered it appropriate, in the light of the relevant Community environmental legislation, to discontinue the investigation of the complaint.

29 LPN thereafter asked to have access to certain of the documents included in the 'List of the documents in the file' sent by the Commission.

30 By application lodged at the Registry of the General Court on 9 May 2008 and registered as Case T-186/08, LPN brought the present action against, inter alia, the Commission decision of 28 February 2008 to take no further action on the complaint.

31 On 20 June 2008, LPN was able to consult the files of DG Environment and to have access to the content of some of the requested documents.

32 By letter of 11 July 2008, LPN reiterated its application for access to the documents whose content had not been disclosed to it or had been disclosed to it only in part.

33 By letter of 24 October 2008 with the reference SG.E.3/MIB/psi D(2008) 8639 ('the decision of 24 October 2008'), the Commission, first, granted LPN access to the entire content of 21 documents included in a list annexed to that letter. Secondly, it granted LPN partial access to the content of 16 further documents included in that list. Lastly, it refused LPN access to 10 other documents included in that list (see points 2.1 to 2.3 of the decision of 24 October 2008). In support of its refusal to grant access to certain documents or to certain parts of documents, it invoked the exception laid down in the second subparagraph of Article 4(3) of Regulation No 1049/2001, concerning the protection of the decision-making process, except in the case of certain passages of one document, in respect of which it also relied on the exception laid down in Article 4(2), second indent, of the same regulation, concerning the protection of court proceedings (see points 2.4.1 and 2.4.2 of the decision of 24 October 2008).

34 By letter dated 7 November 2008, the Commission sent two further documents to LPN.

35 By order of 7 September 2009 in Case T-186/08 *LPN* v *Commission*, not published in the ECR, the Court dismissed as inadmissible the action brought by LPN, referred to in paragraph 30 above, in so far as it seeks the annulment of the Commission's decision of 28 February 2008 to take no further action on the complaint.

Procedure and forms of order sought by the parties

36 By application lodged at the Registry of the Court on 18 January 2008, LPN brought the present action.

37 By documents lodged at the Registry of the Court on 8, 19 and 20 May 2008 respectively, the Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden applied for leave to intervene in the present proceedings in support of the form of order sought by the LPN. By order of 8 July 2008, the President of the Third Chamber of the Court allowed those interventions. The Republic of Finland submitted its statement in intervention on 27 August 2008 and the Kingdom of Denmark and the Kingdom of Sweden submitted theirs on 22 September 2008. The Commission submitted its observations on those statements in intervention on 5 February 2009.

38 LPN, supported by the interveners, claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

39 In the defence, the Commission contends that the Court should:

— dismiss the action;

— order LPN to pay the costs.

40 By separate document lodged at the Registry of the Court on 25 November 2008, the Commission seeks a declaration that 'the present action has become devoid of purpose as regards the documents disclosed, by virtue of [LPN]'s loss of interest in bringing proceedings', that 'the subject-matter of the present action has been altered as regards the documents refused' and that, 'in those circumstances and in accordance with Article 113 of the Rules of Procedure, there is no need to adjudicate on the present action'.

41 LPN and the interveners lodged their observations on that application within the prescribed periods.

42 In its observations on the Commission's application for a declaration that there is no need to adjudicate, LPN contends that the Court should ask the Commission, as a measure of organisation of procedure within the meaning of Article 64 of its Rules of Procedure, to produce the documents not yet or only partially disclosed to LPN.

43 Acting upon a report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure.

44 By letter of 12 July 2010, by way of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, the Court called on the main parties to lodge certain documents and to reply in writing to some written questions. Those parties complied with that request by producing lists identifying all the requested documents to which full or partial access had been granted to LPN during the proceedings, and replied to those questions within the prescribed periods. In addition, the Court asked all the parties to give their views at the hearing on the possible implications for the outcome of the proceedings which should be drawn from the judgments in Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-5883 and Case C-28/08 P *Commission* v *Bavarian Lager* [2010] ECR I-6051.

45 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 5 October 2010.

46 At the hearing, in reply to the Court's questions, LPN withdrew its application for review of the legality of the decision of 24 October 2008 and its third plea in law, alleging failure to comply with the time-limit laid down in Article 8(1) of Regulation No 1049/2001, provided that the Court takes account of the belatedness of the contested decision in its order as to costs. In addition, LPN agreed that the subject-matter of the proceedings should be limited to the documents and extracts from documents to which it had not yet been given access, provided that the Commission is ordered to pay the costs related to the part of the dispute on which the Court does not adjudicate. Those declarations were recorded in the minutes of the hearing.

47 Following applications for rectification of the minutes of the hearing from the Republic of Finland and LPN, lodged at the Registry of the Court on 19 and 20 October 2010 respectively, the Court decided to reopen the oral procedure by order of 16 November 2010. After hearing the views of the other parties on those

applications, the Court rectified the minutes of the hearing as requested, and the oral procedure was closed.

Law

The application for a declaration that there is no need to adjudicate

Arguments of the parties

48 The Commission points out that, by letter of 3 April 2008, it informed LPN of the fact that the ground for refusal as provided for in Article 4(2), third indent, of Regulation No 1049/2001 had ceased to apply and that it sent it a list of documents contained in the file of the infringement procedure so that it could exercise its right of access to the documents. It also maintains that LPN subsequently had access to certain requested documents and made a confirmatory application as regards the documents in respect of which access had been totally or partially refused. It asserts that, in response to that application, it adopted the decision of 24 October 2008. Finally, it states that, by letter of 7 November 2008, it sent LPN two further documents.

49 The Commission concludes from this, firstly, that the subject-matter of the present action was altered by the fact that access to a large proportion of the requested documents had been granted and, secondly, as regards the documents which were the subject of a total or partial refusal of access, the grounds for refusal were not the same as those invoked in the contested decision. Consequently, so far as concerns the documents or parts of documents disclosed, LPN has lost its legal interest in that

decision being annulled, since such an annulment would not procure any additional advantage to it.

50 LPN, supported by the interveners, claims that the application for a declaration that there is no need to adjudicate should be rejected.

51 LPN maintains primarily, in essence, that the disclosed documents were made available to it only belatedly and on the basis of an insufficient reason, namely the fact that the infringement procedure had been terminated, even though access to those documents was necessary during the infringement procedure in order to enable it to put its case properly and to avoid the present action. However, in so far as it has acquainted itself with the content of those documents, it does not object to the subject-matter being limited to the documents not yet or only partially disclosed, provided that the Commission is ordered to pay the costs related to the part of the action which has become devoid of purpose. At the hearing, it confirmed its agreement with such a limitation of the subject-matter of the proceedings, which was recorded in the minutes of the hearing (see paragraph 46 above)

52 Moreover, as regards the documents to which access was completely or partially refused, LPN maintains its application for annulment of the contested decision. In that regard, it disputes that the subject-matter of the proceedings and the grounds for refusal have been altered. According to LPN, the Commission cannot alter, in the course of the proceedings, the grounds for refusal invoked solely in order to avoid the review of legality of the contested decision. Furthermore, it maintains that it continues to have a legal interest in securing disclosure of the documents not yet or only partially disclosed and a duly reasoned reply as to why it was refused access to those documents during the infringement procedure. It submits that, in this case, the ground for refusal relating to protection of the purpose of investigations, invoked in the contested decision, was not justified.

53 In any event, LPN argues that the Commission must bear the costs, firstly, because it did not duly substantiate the refusal to disclose the documents requested during the infringement procedure and, secondly, because it is fully responsible for the situation which gave rise to the present procedural issue.

54 The Republic of Finland disputes that the subject-matter of the proceedings was altered following the adoption of the decision of 24 October 2008. The mere fact that the ground for refusal invoked in that decision differs from the grounds for refusal on which the contested decision is based does not result either in such an alteration or in the action becoming devoid of purpose within the meaning of Article 113 of the Rules of Procedure. According to the Kingdom of Sweden, the fact that the contested decision has become 'devoid of purpose' during the proceedings does not give rise to any obligation for the Court to find that the action has become devoid of purpose as long as that decision has not been formally withdrawn. In those circumstances, LPN still has a legitimate interest in a review of the legality of the contested decision and in its annulment. The interveners point out that the Commission cannot alter the subject-matter of the proceedings by adopting a second decision containing a new or amended statement of reasons, since such an approach does not affect the validity of the original decision and is contrary to the principle of legal certainty. According to them, if such an approach were allowed, an institution could prevent the Court from reviewing the reasons for a contested act by subsequently adopting further acts having the same subject-matter but based on different reasons.

Findings of the Court

55 It must be noted that, in support of its application for a declaration that there is no need to adjudicate, the Commission puts forward, in essence, two arguments. First, the present action has become devoid of purpose and LPN has lost its interest in bringing proceedings in so far as the action relates to documents disclosed to LPN during the proceedings. Secondly, according to the Commission, as a result of the decision of 24 October 2008, the subject-matter of the present action was altered in so

far as that decision is based on two new grounds for refusal which are different from that invoked in support of the contested decision.

56 As has been acknowledged by settled case-law, the objective of the dispute, as determined by the action initiating the proceedings, must continue, like the interest in bringing proceedings, 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 to the party bringing it (Case C-362/05 P *Wunenburger* v *Commission* [2007] ECR I-4333, paragraph 42; Case T-45/06 *Reliance Industries* v *Council and Commission* [2008] ECR II-2399, paragraph 35).

57 In so far as LPN was granted, in the course of the proceedings, access to documents and extracts from documents, it must be held that the action has become devoid of purpose and that, consequently, there is no need to adjudicate (see, to that effect, Case T-84/03 *Turco* v *Council* [2004] ECR II-4061, paragraphs 28 to 30).

58 As regards the documents not yet or only partially disclosed to LPN, it must be pointed out that the mere fact that the Commission adopted a new decision concerning access to part of the documents covered by the contested decision does not, as such, give grounds for concluding that the action has become devoid of purpose.

59 Even if the adoption by the Commission of the decision of 24 October 2008 deprived the contested decision of certain of its legal effects, the action has retained its purpose, since the contested decision has not been formally withdrawn by the Commission (see, to that effect, *Wunenburger* v *Commission*, cited in paragraph 56 above, paragraphs 47 to 49), as acknowledged by the Commission in reply to a written

question put by the Court, with the result that the contested decision continues, in principle, to produce binding legal effects.

60 Furthermore, as regards the loss of interest in bringing proceedings, it must be recalled that, according to settled case-law, an applicant may retain an interest in claiming the annulment of an act in order to prevent its alleged unlawfulness from recurring in the future. That interest in bringing proceedings follows from the first paragraph of Article 266 TFEU, under which the institutions whose act has been declared void are required to take the necessary measures to comply with the judgment. However, that interest in bringing proceedings can only exist if the alleged unlawfulness is liable to recur in the future independently of the circumstances of the case which gave rise to the action brought by the applicant (see, to that effect, *Wunenburger* v *Commission*, cited in paragraph 56 above, paragraphs 50 to 53 and the case-law cited, and *Reliance Industries* v *Council and Commission*, cited in paragraph 56 above, paragraph 43).

61 However, in the present case, it must noted, firstly, that, in the contested decision, the Commission adopted a position of principle as regards the refusal of access to all the documents contained in the file of a current infringement procedure in the field of environmental law and, secondly, that LPN is an association whose main objective is protection of the environment and active participation in the relevant decision-making processes. Consequently, as acknowledged by the Commission at the hearing, there is a sufficiently real risk, independent of the circumstances of this case, that, in the future, in similar situations, that is to say when LPN applies to the Commission for access to documents relating to environmental information related to a current infringement procedure, LPN will find itself exposed to the same alleged unlawfulness.

62 Consequently, it must be concluded that LPN retains an interest in bringing proceedings against the contested decision in so far as that decision refused access to the documents concerned on the basis of the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001 relating inter alia to the protection of the purpose of investigations, as read in the light of the relevant rules in Regulation No 1367/2006.

63 Having regard to that risk of recurrence of the alleged unlawfulness, it matters little that, in the event of annulment of the contested decision, the Commission is not necessarily obliged, under the second paragraph of Article 266 TFEU, to grant LPN access to the documents not yet or only partially released, on the ground that it can continue to invoke the exception concerning the protection of the decision-making process on account of the final and unchallengeable nature of the decision of 24 October 2008. As the Commission itself acknowledged at the hearing, in such an event, it would be obliged to carry out a fresh assessment of the application for access to the documents concerned in the light of any new elements of fact and of law.

64 In the light of all the foregoing considerations, the Commission's application for a declaration that there is no need to adjudicate must be rejected in so far as it relates to the documents concerned which have not yet been or have been only partially disclosed to LPN.

Summary of the pleas in law supporting the claim for annulment

65 Following the limitation of the subject-matter of the present proceedings at the hearing, two pleas in law supporting the claim for annulment, which have been raised, in essence, by LPN, must be examined.

66 First, LPN submits that the contested decision infringes a number of provisions of Regulation No 1367/2006 and, in particular, Article 6 of that regulation.

67 Secondly, LPN pleads infringement of the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001, concerning inter alia the protection of the purpose of investigations.

68 The latter plea is subdivided into three parts. Firstly, LPN alleges that the Commission unlawfully failed to examine and state reasons, in a specific and individual manner, as to whether and to what extent that exception applied to each of the documents to which access had been requested and which had not yet been disclosed. Secondly, the Commission wrongly failed to assess whether, at least, partial access to those documents should be granted. Thirdly, the Commission failed to have regard to the public interests, as invoked in the application for access, requiring disclosure of those documents.

69 In view of the overlaps between the first and second pleas, the Court finds it appropriate to assess them together.

The first and second pleas in law, alleging infringement of Regulation No 1367/2006 and of Article 4(2), third indent, of Regulation No 1049/2001

Arguments of the parties

— First plea in law: infringement of Regulation No 1367/2006

70 Having regard to the relevant provisions of Regulation No 1367/2006, LPN submits that the documents to which access was requested contain information which must be disclosed to it in view of the environmental interests which it seeks to defend and

protect in the context of the dam project. According to it, even if, under Article 6 of that regulation, the existence of an overriding public interest making it possible to refrain from applying the exceptions invoked could not be presumed in this case, the Commission is not thereby relieved of its obligation to assess specifically whether there is, at the very least, a public interest in disclosure. However, contrary to the requirements arising from the second sentence of Article 6(1) of that regulation, the Commission 'automatically' applied the provisions of Regulation No 1049/2001 and did not discharge its duty to interpret in a restrictive way any ground for refusal based on Article 4(2) of the latter regulation, having regard to the public interest in disclosure.

71 Consequently, the contested decision should be annulled for breach of the obligation to interpret in a restrictive way the provisions of Article 4(2), third indent, of Regulation No 1049/2001, an obligation imposed under Article 6(1) of Regulation No 1367/2006.

72 In the reply, LPN disputes the Commission's argument that Regulation No 1367/2006 does not apply to this case. The Commission itself implicitly admitted not having examined whether or not the documents concerned contained information on emissions into the environment. Consequently, it erred in law in the interpretation of that regulation.

73 The general rules on access laid down by Regulation No 1049/2001 do not have the effect of disapplying the more specific rules laid down by Regulation No 1367/2006 on access to information, public participation in decision-making and access to justice in environmental matters. According to LPN, contrary to what the Commission claims, the concept of 'environmental information' within the meaning of recital 8 in the preamble to Regulation No 1367/2006, which should be read in the light of the Convention on Access to Information, Public Participation in Decision-making and Access

to Justice in Environmental Matters, signed at Aarhus on 25 June 1998 ('the Aarhus Convention'), approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1), must be broadly construed.

74 LPN submits that, under Article 3 of Regulation No 1367/2006, it is not only the form of the exercise of that right of access and the manner in which the information is disclosed by the Commission which are governed by Regulation No 1049/2001. When applying that regulation, in particular exceptions capable of justifying refusal of a request for access to environmental information, the Commission must therefore take account of the specific conditions laid down by Regulation No 1367/2006. That assessment is confirmed by recital 15 in the preamble to that regulation which expressly refers to the exceptions provided for by Regulation No 1049/2001, which should apply subject to any more specific provisions in Regulation No 1367/2006 concerning requests for environmental information.

75 Moreover, even if, as regards the exceptions referred to in Article 4(2), first and third indents, of Regulation No 1049/2001, the first sentence of Article 6(1) of Regulation No 1367/2006 excludes from its scope 'investigations, in particular those concerning possible infringements of Community law', the second sentence of that provision clearly provides that the grounds for refusal based on the other exceptions set out in Article 4 of Regulation No 1049/2001 must 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. Thus, on the one hand, even if the presumption of the existence of an overriding public interest were excluded, the Commission would be obliged to assess concretely whether there was a public interest and, on the other hand, if the requested information related to emissions into the environment, as in this case, the Commission would have to interpret the grounds for refusal in a restrictive way.

76 In that regard, LPN maintains that the Commission cannot legitimately rely on the judgment in *Petrie and Others* v *Commission*, cited in paragraph 19 above, which was given before the entry into force of Regulations Nos 1049/2001 and 1367/2006. It points out that the Code of conduct concerning public access to Council and Commission documents, of 6 December 1993 (OJ 1993 L 340, p. 41), ('the Code of Conduct'), implemented by Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43), and by Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58), which had preceded those regulations, did not require as concrete and reasoned an assessment of situations in which access to documents might impair the proper conduct of an investigation and did not even provide that an overriding public interest could take precedence over the interest in protecting the purpose of investigations. Finally, it states that, in contrast to the situation which gave rise to the judgment in *Petrie and Others* v *Commission*, cited in paragraph 19 above, if the Code of Conduct is applied, only two of the documents duly identified would not have been covered by the 'authorship rule' and that, in the present case, the Commission did not even consult the Portuguese authorities in order to ascertain whether it was possible to disclose documents originating with them.

77 In that regard, LPN claims that, in this case, by virtue of the application of Regulation No 1367/2006, even information relating to an investigation was able to be disclosed, in the light of the result of the public interest assessment which must be carried out pursuant to Article 6 of that regulation.

78 In essence, the interveners argue that, by adopting the contested decision, the Commission infringed Article 6(1) of Regulation No 1367/2006.

79 According to the Republic of Finland and the Kingdom of Sweden, the Community legislature emphasised, in Regulation No 1367/2006, the importance of public access to environmental information as compared with the general rules on access laid down by Regulation No 1049/2001. Consequently, even though Article 6 of Regulation

No 1367/2006 was not directly applicable to an infringement procedure, it contains special rules on the way in which, in the context of the application of Regulation No 1049/2001, the particularly important general interest in the disclosure of environmental information, inter alia that concerning emissions into the environment, must be assessed.

80 Thus, according to the Kingdom of Denmark and the Republic of Finland, when an institution examines an application for access to a document containing environmental information, it must take account of the objectives of Regulation No 1367/2006, as interpreted in the light of the Aarhus Convention, which mentions the particular importance and necessity of improving access for the individual to that information as compared with that provided for by the general rules in Regulation No 1049/2001, given that such access contributes greatly to the protection of the environment. The Commission should therefore take those principles into consideration when examining and applying the exceptions laid down in Article 4 of Regulation No 1049/2001, including in the context of the assessment as to whether an (overriding) public interest in disclosure exists, in order to ensure the greatest possible transparency for citizens of the Union.

81 The Republic of Finland and the Kingdom of Sweden dispute the Commission's argument that the last sentence of Article 6(1) of Regulation No 1367/2006 merely reiterates the principle that the exceptions in Regulation No 1049/2001 must be interpreted in a restrictive way. That sentence also means that, when examining the relevant information, the institution must take particular account of that requirement of strict interpretation and of the public interest in receiving information on emissions into the environment. Consequently, even if the balancing of the divergent interests had to take place formally under Regulation No 1049/2001 alone, in the light of Regulation No 1367/2006, all the more weight should be attached to the general interest in increased transparency in the case of environmental information

82 The Commission contends that the first plea should be rejected.

— Second plea in law: infringement of Article 4(2), third indent, of Regulation No 1049/2001

83 In the first part of the second plea, alleging failure to examine specifically the documents concerned, LPN challenges the validity of the statement of reasons, which it also considers too vague and general, put forward by the Commission in the contested decision in order to justify the refusal of its application for access. According to it, pursuant to the obligation of restrictive interpretation imposed on the Commission by Article 6(1) of Regulation No 1367/2006, the Commission was required to examine specifically each of the documents concerned in order to assess whether or not they fell within the scope of the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001, which it failed to do in this case, contrary to the requirements established by the case-law. Moreover, to accept that all documents relating to inspections, investigations or audits are covered by that exception as long as the actions to be taken to follow up those activities are not decided on would amount to making access to those documents subject to an uncertain, future and possibly distant event dependent on a discretion of the Commission and on the promptness and diligence of the various authorities.

84 Furthermore, the argument that disclosure of all the documents concerned jeopardises the Commission's ability to deal with the infringement and to reach, where appropriate, an amicable resolution is erroneous. According to LPN, its application for access is, on the contrary, aimed at 'helping the Commission to find an agreement which would guarantee and ensure compliance with the strict Community environmental rules which are binding both on the Member States and on the Commission'. However, the latter did not explain the reasons why disclosure of the documents concerned was liable to undermine such an amicable settlement with the Portuguese authorities. It submits that the Commission cannot justify the refusal of the application

for access on the basis of purely hypothetical and unsubstantiated risks. Furthermore, the example of the report of a visit of representatives of DG Environment to the region in which the dam on the Sabor River was to be built, in July 2007, in which it participated, proves that no such risk existed in this case. According to it, the Commission wrongly referred to the judgment in *Petrie and Others* v *Commission*, cited in paragraph 19 above, since it was given at a time when Regulation No 1367/2006 was not yet in force and it was based, to a large extent, on the 'authorship rule' which was not adopted by Regulation No 1049/2001, exempting the Commission from its obligation to examine documents drawn up by third parties. It maintains that, in this case, the Commission was required to carry out such an examination, document by document, which it failed to do. Any other interpretation would be contrary to the requirements established by the case-law concerning Article 4(5) of that regulation.

85 In the second part of the second plea, LPN claims that the Commission's refusal to grant it, at the very least, partial access to the documents concerned infringes the principle of proportionality.

86 It is apparent from the contested decision that the Commission failed to carry out a specific assessment of the information contained in those documents by merely quoting the letter of formal notice and the reply of the Portuguese authorities without examining their specific content in the light of Article 4(2), third indent, of Regulation No 1049/2001. Moreover, LPN submits that the Commission wrongly made reference to very general categories of documents on the file without even specifying their number and to the existence of alleged 'reasoned opinions requested' of which it is unaware. However, a specific and individual examination of those documents was essential in order to determine whether a partial disclosure was possible.

87 In the reply, LPN submits, in the light of all the foregoing, that the Commission infringed the principles of cooperation, transparency and proportionality.

88 In the third part of the second plea, LPN rejects the finding that there was no public interest justifying disclosure of the documents concerned on the ground that the damage to the environment concerned could be established only by the Court of Justice in the event that the matter was brought before it by the Commission. That finding is, firstly, incompatible with the fundamental right of any individual to participate in procedures relating to the environment, as recognised by Regulation No 1367/2006. According to LPN, the public interest aimed, in particular, at protecting the environment does not need to be confirmed beforehand by the Courts of the European Union. Secondly, that finding disregards the fact that the Commission had assured it that it had the right to put forward its observations before a final decision on the infringement procedure initiated in response to its complaint was taken. In that regard, it argues that the documents to which access had been requested enabled it to exercise more effectively its right to be heard in that context for the purposes of protection of the environmental public interests affected by the dam project.

89 Moreover, the assumption of a finding by the Court of Justice of an infringement of Community law committed by the Portuguese Republic is irrelevant and cannot affect the right of any individual to participate, in a concrete and preventive way, in the protection of the environment, particularly as the adverse consequences for the environment of such an infringement of Community law can no longer be repaired by the Member State *a posteriori*.

90 According to the interveners, the Commission misinterpreted and misapplied the exception relating to the protection of the purpose of inspections, investigations and audits provided for by Article 4(2), third indent, and (6) of Regulation No 1049/2001.

91 The interveners point out that an institution must assess specifically, in every case, whether a document falls within the scope of the exceptions set out in Article 4 of Regulation No 1049/2001. That specific and individual examination should in principle be carried out in respect of any information contained in each of the documents referred to in the application for access and be apparent from the reasons given for the decision. However, the statement of reasons on which the contested decision is based does not indicate that the Commission carried out such a specific and individual examination of the content of the documents concerned. In that decision, the documents disclosure of which was refused by the Commission are not even identified, the list of those documents having only been sent to LPN during the proceedings. The Kingdom of Sweden adds that the drawing up of that list is not, in any event, equivalent to an examination of whether the disclosure of each of those documents, in whole or in part, was liable to undermine, specifically and actually, a protected interest.

92 Contrary to what the Commission claims, the conditions under which it may, exceptionally, be exempted from its obligation to examine specifically and individually the documents concerned, namely the situations in which access must obviously be either refused or granted, are not met in this case. Individual and specific examination of the documents to which access has been requested is a fundamental principle of interpretation of Regulation No 1049/2001, from which there can be no derogation except for overriding reasons which the Commission did not invoke. According to the interveners, the mere fact that the documents concerned refer to a current investigation is not sufficient on its own to justify application of the exception referred to in Article 4(2), third indent, of that regulation.

93 The interveners point out that, pursuant to Article 6(1) of Regulation No 1367/2006 (see paragraphs 80 and 81 above), the exceptions laid down in Article 4 of Regulation No 1049/2001 are to be restrictively interpreted and applied. According to the Kingdom of Denmark and the Kingdom of Sweden, the principle of transparency is designed to ensure, through the right of access to documents, that decisions by the institutions are taken as openly as possible and that the institutions enjoy greater legitimacy and are more accountable to the citizen (recitals 1 to 4 in the preamble to Regulation No 1049/2001) and thus determines the interpretation to be given both to

the general principles and to the specific provisions of Regulation No 1049/2001, and that applies to any activity of those institutions, including infringement procedures conducted by the Commission.

94 Furthermore, the risk of undermining a protected interest must be reasonably foreseeable and not purely hypothetical. More specifically, the disclosure of the documents concerned must be actually capable of compromising the protection of the purpose of the investigation into the infringements in question. However, the statement of reasons for the contested decision refers, in a general way, to the pre-litigation stage of a current infringement procedure and to the interest of the Member States in confidentiality being guaranteed, yet without stating the reasons why the investigation in question would be specifically undermined as a result of disclosure of the content of each of those documents. However, those reasons effectively admit that any infringement procedure, at least until the completion of its administrative stage, must be conducted in absolute secrecy, which is incompatible with the purpose of Regulation No 1049/2001 of ensuring the widest possible access to documents. That assessment is confirmed by the abolition of the authorship rule, the Community legislature's objective having been to limit the author's power to prevent disclosure of a document written by him by invoking, in abstract terms, his interest in the confidentiality of the content of that document being respected. Thus, the Commission did not comply with its obligation to examine specifically and individually each of the documents concerned in order to determine whether or not their content was confidential and, accordingly, to interpret and apply in a restrictive way the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001. The Kingdom of Denmark adds that, in so doing, the Commission also infringed its obligation to state reasons arising from that regulation.

95 Similarly, according to the interveners, the Commission infringed Article 4(6) of Regulation No 1049/2001, pursuant to which the onus is on it to assess whether the interest protected by the exception in question justifies refusing access to the whole or to only certain parts of the document concerned, where the remaining parts of that

document must be disclosed. However, in the absence of a specific and individual examination of the documents concerned, the Commission necessarily failed to have regard to the possibility of a partial disclosure of their content. In that regard, the Kingdom of Denmark and the Kingdom of Sweden dispute the argument of the general and absolute confidentiality of the content of all documents and all information concerning an infringement procedure. Even assuming that those documents contain confidential information, the Commission should have examined specifically whether parts of those documents concerned separable non-confidential information which could be disclosed.

96 The interveners maintain that, in this case, the Commission also failed to have regard to the existence of a public interest in disclosure of the documents concerned. Contrary to the requirements recognised by the case-law, the Commission did not balance, in the contested decision, on the one hand, the need to protect the investigation and, on the other, the public interest associated with the disclosure of information on the environment, the importance of which is emphasised by Regulation No 1367/2006. According to them, such a balancing exercise should have led to the conclusion that the interest in disclosure overrode the interest in protecting confidentiality. In that regard, the possible inapplicability of the presumption of the existence of an overriding public interest within the meaning of Article 6(1) of that regulation does not exempt the Commission from ascertaining whether such an overriding public interest in disclosure exists. That is true *a fortiori* since, on the one hand, in that balancing exercise, the Commission must take account of the objectives of Regulation No 1367/2006 and of the Aarhus Convention, which attach particular importance to public access to environmental information (see paragraphs 80 and 81 above) and, on the other, it did not, in any event, examine whether disclosure of the information contained in each of the documents concerned was liable to undermine the purpose of the investigation, which is protected by Article 4(2), third indent, of Regulation No 1049/2001.

97 Finally, according to the Republic of Finland, the Commission was not justified in merely finding that there was an overriding public interest in proceeding against a

serious infringement of the Habitats Directive, but was required to examine of its own motion all the circumstances which could be relevant in that regard. The Commission therefore misapplied Article 4(2) of Regulation No 1049/2001 and Article 6(1) of Regulation No 1367/2006.

98 The Commission contends that the second plea should be rejected.

Findings of the Court

— Preliminary observations

99 The first and second pleas concern, in essence, the interpretation and application of the exception relating inter alia to the protection of the 'purpose of … investigations', laid down by Article 4(2), third indent, of Regulation No 1049/2001, as read in the light of Article 6(1) of Regulation No 1367/2006.

100 In that regard, it must be recalled first of all that, in the context of an application for annulment under Article 230 EC, the legality of the contested measure falls to be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (judgment of 11 March 2009 in Case T-121/05 *Borax Europe* v *Commission*, not published in the ECR, paragraph 48).

101 However, in this case, at the time of the adoption of the contested decision, an infringement procedure initiated against the Portuguese Republic under Article 226 EC was in progress. Consequently, the Commission was, in principle, entitled to invoke the exception laid down by Article 4(2), third indent, of Regulation No 1049/2001, relating to the protection of the purpose of investigations (see, to that effect, Joined Cases T-391/03 and T-70/04 *Franchet and Byk* v *Commission* [2006] ECR II-2023, paragraph 113, and Case T-36/04 *API* v *Commission* [2007] ECR II-3201, paragraphs 121, 133 and 134).

102 When it refuses access to the documents concerned on the basis of that exception, the Commission must nevertheless, firstly, satisfy its obligation to examine whether those documents were in fact covered, in their entirety, by that exception and, secondly, correctly balance the possible overriding public interests in their disclosure and the interest in the protection of their confidentiality (see, to that effect, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraph 33 and seq., and Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-1121, paragraph 69 and seq.).

103 Thus, given that LPN and the interveners allege primarily that the Commission did not carry out a specific and individual examination of the documents concerned and did not take sufficient account, in that context, of the provisions of Regulation No 1367/2006, it is necessary to consider, first, the extent to which the latter regulation is capable of modifying the scope of the Commission's obligation to examine pursuant to Regulation No 1049/2001.

104 In that regard, it must be recalled that the contested decision was adopted under both Regulation No 1049/2001 and Regulation No 1367/2006.

— The effects of Regulation No 1367/2006 on the Commission's obligation to examine

105 It is apparent from recitals 8 and 15 in the preamble to Regulation No 1367/2006, and, in particular, from the phrase 'subject to any more specific provisions in this Regulation concerning requests for environmental information', read in conjunction with Articles 3 and 6 of that regulation, that that regulation constitutes a *lex specialis* in relation to Regulation No 1049/2001 by replacing, amending or clarifying certain of the provisions of the latter regulation where the request for access relates to 'environmental information' or information 'which relates to emissions into the environment'.

106 Firstly, under Article 3 of Regulation No 1367/2006, Regulation No 1049/2001 constitutes the legislation applicable to any request by an applicant for access to environmental information held by the institution concerned.

107 Secondly, as regards the right of access to documents containing such information, the second sentence of recital 15 in the preamble to and the second sentence of Article 6(1) of Regulation No 1367/2006, the respective wordings of which are largely the same, reaffirm the principle that any exception to an individual right or to a general principle under European Union law, including to the right of access provided for by Article 255 EC, read in conjunction with Regulation No 1049/2001, must be applied and interpreted in a restrictive way (see, to that effect, Case 222/84 *Johnston* [1986] ECR 1651 paragraph 36, and *Sweden and Turco* v *Council*, cited in paragraph 102 above, paragraph 36). So far as concerns the right of access to documents containing environmental information, that obligation to interpret the exceptions laid down by Regulation No 1049/2001 strictly is reinforced, on the one hand, by the need for the institution concerned to take account of the public interest in disclosure of such information and by the reference to whether that information relates to emissions into the environment and, on the other hand, by the fact that Regulation No 1049/2001

does not contain any similar details regarding the application of those exceptions in that field.

108 Thirdly, Article 6(1) of Regulation No 1367/2006 does not call in question the principle laid down in the last phrase of Article 4(2) of Regulation No 1049/2001 that the institution concerned must take account of any overriding public interest in disclosure, but merely modifies and clarifies the conditions under which that institution will examine whether there is an overriding public interest in disclosure in the context of a request for access to documents containing environmental information. Thus, the first sentence of Article 6(1) of Regulation No 1367/2006 lays down a presumption of law that an overriding public interest in disclosure exists where the requested information relates to emissions into the environment, except where that information concerns an investigation, in particular one concerning possible infringements of Community law. It follows that, as LPN and the interveners submit, even though that presumption of law does not apply to documents relating to investigations initiated in the context of infringement procedures, that provision does not thereby relieve the Commission of its obligation to take account, in each individual case, of any overriding public interests in disclosure, in particular those relating to environmental information in a wider sense than that of 'emissions into the environment', and to carry out the balancing exercise required by the case-law (see, to that effect, *Sweden and Turco* v *Council*, cited in paragraph 102 above, paragraphs 44, 45 and 67).

109 It is in the light of those considerations that it must be established whether, in this case, the Commission satisfied its obligation to examine whether the documents concerned were in fact covered, in their entirety, by the exception provided for under Article 4(2), third indent, of Regulation No 1049/2001, read in conjunction with Article 6(1) of Regulation No 1367/2006.

— The requirements governing the Commission's obligation to examine

110 As has been acknowledged by settled case-law, in view of the need to interpret and apply any exception to the right of access strictly, the fact that a document concerns an investigation within the meaning of Article 4(2), third indent, of Regulation No 1049/2001 cannot in itself justify application of that exception, since the latter applies only if disclosure of the documents concerned is actually likely to undermine the protection of the purpose of the Commission's investigations concerning the infringements in question (see, to that effect, *Franchet and Byk*, cited in paragraph 101 above, paragraphs 105 and 109, and *API* v *Commission*, cited in paragraph 101 above, paragraph 127). Indeed, that risk of the protected interest being undermined must be reasonably foreseeable and not purely hypothetical (*Sweden and Turco* v *Council*, paragraphs 43 and 63). Moreover, as is clear from its wording, the aim of that exception is not to protect the investigations as such, but rather their purpose, which, in the context of an infringement procedure, is to induce the Member State concerned to comply with Community law (see, to that effect, *API* v *Commission*, cited in paragraph 101 above, paragraphs 127 and 133 and the case-law cited; see also, to that effect, Opinion of Advocate General Kokott in *Commission* v *Technische Glaswerke Ilmenau*, cited in paragraph 44 above, points 109 to 115).

111 Accordingly, in the context of an infringement procedure initiated under Article 226 EC, where disclosure of a document is liable to harm the proper conduct of that infringement procedure and, in particular, the negotiations between the Commission and the Member State, that institution may, in principle, refuse to grant access to that document, since its disclosure would undermine the protection of the purpose of the investigation, namely to induce the Member State to comply with Community law.

112 Moreover, as has been acknowledged in the case-law, when an institution is asked to disclose a document, it must assess, in each individual case, whether that document

falls within the exceptions to the right of access set out in Article 4 of Regulation No 1049/2001 (*Sweden and Turco* v *Council*, cited in paragraph 102 above, paragraph 35). In that regard, it has been stated, on the one hand, that the examination of a request for access to documents must be specific and individual in nature and relate to the content of each document referred to in that request and, on the other, that that examination must be apparent from the reasons for the institution's decision, as regards all the exceptions mentioned in Article 4(1) to (3) of that regulation, on which that decision is based (see, to that effect, *Verein für Konsumenteninformation* v *Commission*, cited in paragraph 102 above, paragraphs 69 to 74; see also, to that effect, Opinion of Advocate General Kokott in *Commission* v *Technische Glaswerke Ilmenau*, cited in paragraph 44 above, points 73 to 80).

113 There are however a number of exceptions to the Commission's obligation to examine specifically and individually the documents to which access has been requested.

114 It has repeatedly been held that, since the purpose of the concrete, individual examination which the institution must in principle undertake in response to a request for access made under Regulation No 1049/2001 is to enable the institution in question to assess, on the one hand, the extent to which an exception to the right of access is applicable and, on the other, the possibility of partial access, such an examination may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted. Such could be the case, inter alia, if certain documents were either, first, manifestly covered in their entirety by an exception to the right of access or, conversely, manifestly accessible in their entirety, or, finally, had already been the subject of a concrete, individual assessment by the Commission in similar circumstances (*Verein für Konsumenteninformation* v *Commission*, cited in paragraph 102 above, paragraph 75, and *API* v *Commission*, cited in paragraph 101 above, paragraph 58).

115 In addition, it has been ruled that it was, in principle, open to the institution concerned to base its decisions in that regard, including in the statement of reasons for

the decision refusing access, 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, provided that it establishes in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose (see, to that effect, *Sweden and Turco* v *Council*, cited in paragraph 102 above, paragraph 50).

116 Moreover, contrary to what LPN and the interveners submit, although the recitals in the preamble to and the provisions of Regulation No 1367/2006 reaffirm the principle that all the exceptions laid down in Article 4 of Regulation No 1049/2001 to the right of access provided for by Article 255 EC must be interpreted in a restrictive way where the request for access relates to environmental information (see paragraphs 105 to 108 above), they contain nothing to support the conclusion that the general considerations set out in paragraphs 114 and 115 above are not applicable to a request for access to environmental information.

117 Admittedly, Article 6(1) of Regulation No 1367/2006, as a special rule in relation to the provisions of Article 4(2) of Regulation No 1049/2001, contains points of clarification relating to the strict interpretation of the exceptions laid down in those provisions and to the balancing of the divergent interests (see paragraphs 105 to 108 above), a consideration which may result in fuller access to environmental information than to other information contained in documents held by the institutions. However, that finding has no bearing on the question whether the institution concerned is or is not required to carry out a specific and individual examination of the documents or information requested. Consequently, the conditions recognised by the case-law, under which that institution may, exceptionally, dispense with such a specific and individual examination, apply *mutatis mutandis* where the documents concerned obviously fall within a single category capable of being covered by one of the exceptions laid down in Article 4 of Regulation No 1049/2001. Indeed, under those principles enshrined in case-law, even though it follows from the first sentence of Article 6(1) of Regulation

No 1367/2006 that the presumption of the existence of an overriding public interest in the disclosure of information on emissions into the environment does not apply in the context of a current infringement procedure, all the documents arising from such an infringement procedure are capable of being protected as a category.

— Compliance by the Commission with its obligation to examine the documents concerned

118 As to whether, in this case, the Commission satisfied its obligation to examine the documents concerned, it must be recalled that, according to the contested decision, the documents which were the subject of the correspondence between the Commission and the Portuguese authorities during the infringement procedure were all covered by the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001, relating to the protection of the purpose of inspections, investigations and audits. In support of that conclusion, the Commission relied, in essence, on the case-law referred to in paragraphs 112 and 115 above. According to the Commission, since the exception invoked applies to all the documents concerned, the need to protect the confidentiality of the exchanges of correspondence between it and the Member State concerned, in the context of a current infringement procedure, also precludes partial access to those documents, as provided for in Article 4(6) of Regulation No 1049/2001.

119 It is apparent from that statement of reasons that the Commission essentially relied on the principle allowing the institution concerned to dispense with a specific and individual examination of each of the documents concerned or, at least, with a detailed statement of reasons in the contested decision with regard to that examination, on the ground that all those documents obviously form part of a single category of

documents falling within the scope of the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001.

120 That statement of reasons is not vitiated by any error of law or of fact.

121 Contrary to what LPN and the interveners maintain, due to the particular circumstances of this case, it was obvious, on the one hand, that all the documents concerned fell, so far as concerns the entirety of their content, within the same category of documents and, on the other, that access to that category of documents had to be refused on the basis of the exception invoked (see, to that effect, *Verein für Konsumenteninformation* v *Commission*, cited in paragraph 102 above, paragraph 75). The Commission was fully entitled to refer, in general terms, to the fact that all the documents concerned arose from the correspondence which it exchanged with the Portuguese authorities in the context of the infringement procedure initiated against the Portuguese Republic. In addition, in the light of the list of documents set out in Annex B.6 to the defence, it is inconceivable that the Commission could have granted access to only one of those documents or to part of their content without undermining the ongoing negotiations with the Portuguese authorities. Thus, in accordance with what was held in paragraph 111 above, the disclosure, even if only partial, of the documents concerned could in fact have undermined the purpose of the Commission's investigations concerning the Portuguese Republic's alleged infringements in connection with the dam project (see, to that effect and by analogy, Opinion of Advocate General Kokott in *Commission* v *Technische Glaswerke Ilmenau*, cited in paragraph 44 above, paragraphs 109 to 112 and 118 to 121).

122 Against that background, the interveners' argument that such an approach effectively acknowledges that an infringement procedure can be conducted in 'absolute secrecy' cannot succeed, since that situation is the unavoidable consequence of the acknowledgement of the exception designed to protect investigations, in particular where

they are in progress, and of the fact that, in the circumstances referred to in paragraphs 114 to 117 above, the institution concerned may invoke that exception, in a general way, in order to protect the confidentiality of an entire category of documents. For the same reasons, LPN and the interveners cannot claim that, if the Commission were allowed to dispense with a specific and individual examination of the content of each of the documents concerned, it could not take sufficiently into account the public interest served by disclosure within the meaning of the second sentence of Article 6(1) of Regulation No 1367/2006, *a fortiori* because that provision is not applicable to this case (see paragraph 136 below).

123 That finding is confirmed by the principles recognised in *Commission* v *Technische Glaswerke Ilmenau*, cited in paragraph 44 above, paragraphs 54 to 62, on which the parties expressed their views at the hearing.

124 In that judgment, the Court of Justice acknowledged that it was open to the institution to base its decisions in that regard on general presumptions which apply to certain categories of document, as considerations of a generally similar kind are likely to apply to applications for disclosure which relate to documents of the same nature. According to the Court, as regards the administrative procedures for reviewing State aid, such general presumptions may arise from Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 [EC] (OJ 1999 L 83, p. 1) and from the case-law concerning the right to consult documents on the Commission's administrative file. In that regard, the Court noted that the procedure for reviewing State aid was, in view of its general scheme, a procedure initiated against a Member State, under which only the latter has rights of defence, including the right to have certain documents communicated to it, unlike the interested parties, who do not have, in that context, a right to consult the documents on the Commission's administrative file. The Court also held that account must be taken of that fact for the purposes of interpreting the exception laid down by Article 4(2), third indent, of Regulation No 1049/2001. If those interested parties were able to obtain access, on the basis of Regulation No 1049/2001, to the documents in the Commission's

administrative file, the system for the review of State aid would be called into question (see, to that effect, *Commission* v *Technische Glaswerke Ilmenau*, cited in paragraph 44 above, paragraphs 54 to 59).

125 The Court inferred from this that, where the activities of the institutions fall within the framework of administrative functions specifically allocated to those institutions by Article 88 EC, it was necessary to take account of the fact that interested parties other than the Member State concerned in the procedures for reviewing State aid did not have the right to consult the documents in the Commission's administrative file, and that it was therefore necessary to acknowledge the existence of a presumption that disclosure of documents in the administrative file would in principle undermine protection of the purpose of investigations, with the consequence that the institution concerned could even dispense with its prior specific and individual examination of the documents concerned. The fact nevertheless remains that, according to the Court, in that regard, the interested parties retain the right to demonstrate that a given document is not covered by that general presumption, or that there is a higher public interest justifying its disclosure (see, to that effect, *Commission* v *Technische Glaswerke Ilmenau*, cited in paragraph 44 above, paragraphs 60 to 62).

126 As regards the review which the Commission is required to carry out in the context of an infringement procedure initiated under Article 226 EC, that review clearly falls within the scope of an administrative function, in the context of which it has wide discretion and enters into a bilateral dialogue with the Member State concerned (see, to that effect, order of 10 July 2007 in Case C-461/06 P *AEPI* v *Commission*, not published in the ECR, paragraph 24, and order of 5 September 2006 in Case T-242/05 *AEPI* v *Commission*, not published in the ECR, paragraphs 28 and 29). Moreover, it has been acknowledged by settled case-law that the procedural position of parties who have submitted a complaint to the Commission, such as that of LPN in this case, is fundamentally different in the context of an infringement procedure initiated under Article 226 EC from that which they have, for example, in the context of a procedure for the application of the Community competition rules, such as that laid down by

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) and by Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18), during which complainants have specific procedural rights, observance of which is subject to genuine judicial review in an action against a decision rejecting their complaint. By contrast, complainants within the meaning of Communication 2002/C 244/03 are not able to bring an action before the Courts of the European Union against any decision to take no further action on their complaint and do not enjoy any procedural rights, comparable to those which they may have in the context of a procedure initiated under the abovementioned regulations, enabling them to require the Commission to inform them and hear their views (see, to that effect, order in *LPN* v *Commission*, cited in paragraph 35 above, paragraph 56 and the case-law cited).

127 Consequently, in the absence of any right for LPN, in the context of such a procedure, to consult the documents in the Commission's administrative file, it must be acknowledged that, by analogy with the situation of the interested parties in the context of the procedure for the review of State aid, there is a general presumption that disclosure of the documents in the administrative file would, in principle, undermine protection of the purpose of the investigation. It was therefore sufficient for the Commission to establish whether that general presumption should apply to all the documents concerned, without its necessarily being required to undertake a prior specific and individual examination of each of those documents. However, since, at the time of the adoption of the contested decision, the infringement procedure in question was in progress, the Commission was necessarily required to start from the principle that that general presumption applied to all the documents concerned..

128 The presumption referred to in paragraph 125 above does not exclude the right of those interested parties to demonstrate that a given document disclosure of which has been requested is not covered by that presumption, or that there is a higher public interest justifying the disclosure of the document concerned by virtue of Article 4(2)

of Regulation No 1049/2001 (*Commission* v *Technische Glaswerke Ilmenau*, cited in paragraph 44 above, paragraph 62).

129 As regards the first aspect, it must be observed that neither LPN nor the interveners have put forward any evidence capable of calling into question the validity of the finding that all the documents concerned were covered by the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001.

130 In those circumstances, the allegations of failure to carry out a specific and individual examination of the documents concerned, of unlawful refusal to grant partial access to those documents and of infringement of Regulation No 1367/2006 must be rejected.

131 Finally, in the light of the third part of the second plea, it must be examined whether, in the contested decision, the Commission correctly concluded that there was no public interest or no overriding public interest in disclosure of the documents concerned.

— Overriding public interest in disclosure

132 As regards the overriding public interest in disclosure within the meaning of the last sentence of Article 4(2) of Regulation No 1049/2001, it must be recalled that, according to the wording of the contested decision, there is no such interest in this case. According to the Commission, Article 6(1) of Regulation No 1367/2006, under which such an overriding public interest in disclosure is to be deemed to exist where the

information requested relates to emissions into the environment, does not apply to investigations relating to possible infringements of Community law.

133 That finding that there is no overriding public interest within the meaning of the last phrase of Article 4(2) of Regulation No 1049/2001 is not vitiated by any error of law or of fact.

134 Firstly, it must be observed that, at the time of the adoption of the contested decision, the infringement procedure initiated against the Portuguese Republic was in progress. Consequently, the presumption of the existence of an overriding public interest in disclosure pursuant to the first sentence of Article 6(1) of Regulation No 1367/2006 was not applicable to this case, with the result that there is not even any need to adjudicate on whether or not the documents concerned contained information actually relating to 'emissions' into the environment.

135 Secondly, in so far as LPN and the interveners argue that Regulation No 1367/2006 aims to improve the transparency in environmental matters as compared with that guaranteed by the rules laid down by Regulation No 1049/2001, it must be pointed out that the first sentence of Article 6(1) of Regulation No 1367/2006, as a *lex specialis* in relation to Regulation No 1049/2001 by replacing, amending or clarifying certain of the provisions of the latter regulation where the request for access relates to 'environmental information' or to information 'relating to emissions into the environment' (see paragraph 105 above), specifically excludes such an improvement for the purposes of the balancing of divergent interests as provided for in Article 4(2) of Regulation No 1049/2001 where the documents concerned are contained in the file of a current infringement procedure. Therefore, they cannot argue that the Commission did not duly take such an overriding public interest in disclosure into account and thus did not correctly balance the divergent interests.

136 Thirdly, in the context of the application of the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001, nor can LPN and the interveners properly rely on the second sentence of Article 6(1) of Regulation No 1367/2006. On the one hand, that provision concerns only the obligation to interpret restrictively exceptions other than those mentioned in the first sentence of Article 6(1) of Regulation No 1367/2006, that is to say, other than those laid down in Article 4(2), first and third indents, of Regulation No 1049/2001. On the other hand, the second sentence of Article 6(1) of Regulation No 1367/2006 refers only to a 'public interest' in disclosure and not to an 'overriding' public interest within the meaning of last phrase of Article 4(2) of Regulation No 1049/2001. Consequently, the argument of LPN and the interveners that, in this case, the principles of increased transparency, of public access to documents, of closer participation by the citizen in the decision-making process and of greater legitimacy nevertheless constitute a public interest, and even an overriding public interest in disclosure of the documents concerned, must be rejected.

137 Fourthly, in so far as LPN referred to its interest in participating actively in the infringement procedure in question in order to promote the public interest in protection of the environment, for which it is responsible as an NGO, it is sufficient to observe that the right of access to documents does not depend on the nature of the particular interest which the applicant for access may or may not have in obtaining the information requested (see, to that effect, Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 44).

138 Moreover, at the hearing, in reply to questions put by the Court, LPN and the interveners were neither able to identify any overriding public interest other than that of the supposedly increased transparency in environmental matters, of which the Commission should have taken account for the purposes of applying the last phrase of Article 4(2) of Regulation No 1049/2001 to this case, nor capable of explaining whether and to what extent the information requested related to emissions into the environment within the meaning of Article 6(1) of Regulation No 1367/2006.

139 Accordingly, the allegation by LPN and the interveners that the Commission failed to take account of a public interest or of an overriding public interest in disclosure of the environmental information in question and to carry out properly the balancing of divergent interests as referred to at the end of Article 4(2) of Regulation No 1049/2001 must be rejected, without there being any need to examine the other arguments advanced by LPN and by the interveners in that context.

140 The first and second pleas in law must therefore be rejected in their entirety as unfounded, and the action must be dismissed.

Costs

141 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since LPN has been unsuccessful in so far as its action relates to documents and parts of documents to which it was refused access, it must be ordered to pay the costs, in accordance with the form of order sought by Commission.

142 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States intervening in the proceedings are to bear their own costs. The Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden must therefore bear their own costs.

143 Furthermore, under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment the costs are in the discretion of the Court. In that regard, it must be held that, if LPN had not obtained, during the proceedings, access to certain documents or extracts from documents, it would have been unsuccessful as regards the whole of its action for the reasons set out in paragraphs 99 to 140 above. It must therefore be ordered to bear all its own costs and to pay all those incurred by the Commission.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. Dismisses the action in so far as it relates to documents and parts of documents to which Liga para Protecção da Natureza (LPN) was refused access in Commission Decision SG.E.3/MIB/psi D(2008) 8639 of 24 October 2008;

2. Declares that there is no need to adjudicate on the remainder of the action;

3. Orders LPN to bear its own costs and to pay those incurred by the European Commission;

4 Orders the Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden to bear their own costs.

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 9 September 2011.

[Signatures]

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