Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

14 November 2013*

(Appeal — Access to the documents of the institutions — Regulation (EC) No 1049/2001 — Third indent of Article 4(2) — Exception concerning the protection of the purpose of inspections, investigations and audits — Environmental information — Regulation (EC) No 1367/2006 — Article 6(1) — Documents relating to the pre-litigation stage of infringement procedures — Refusal of access — Obligation to examine specifically and individually the documents referred to in the request for access — Overriding public interest)

In Joined Cases C-514/11 P and C-605/11 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, lodged on 25 November 2011,

Liga para a Protecção da Natureza (LPN), established in Lisbon (Portugal), represented by P. Vinagre e Silva and L. Rossi, advogadas,

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

appellants,

supported by:

Republic of Estonia, represented by M. Linntam, acting as Agent,

intervener in the appeal,

the other parties to the proceedings being:

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

defendant at first instance,

supported by:

Federal Republic of Germany, represented by T. Henze and A. Wiedmann, acting as Agents,

intervener in the appeal,

Kingdom of Denmark, represented by V. Pasternak Jørgensen and C. Thorning, acting as Agents,

* Language of the case: Portuguese.

Kingdom of Sweden, represented by A. Falk and C. Meyer-Seitz, acting as Agents,

interveners at first instance,

THE COURT (Fifth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, A. Rosas, E. Juhász, D. Šváby and C. Vajda, Judges,

Advocate General: M. Wathelet,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 May 2013,

after hearing the Opinion of the Advocate General at the sitting on 5 September 2013,

gives the following

Judgment

1 By their appeals, the Liga para Protecção da Natureza ('LPN') (C-514/11 P) and the Republic of Finland (C-605/11 P) seek to have the judgment of the General Court of the European Union in Case T-29/08 *LPN* v *Commission* [2011] ECR II-6021; 'the judgment under appeal') set aside inasmuch as by that judgment that Court dismissed the action brought by LPN seeking the annulment of the Commission's decision of 22 November 2007 confirming the refusal of access to the file in proceedings for failure to fulfil obligations opened against the Portuguese Republic ('the contested decision').

Legal context

2 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) lays down, pursuant to Article 255 EC, the principles, conditions and limits governing the right of access to those documents.

3 Article 4 of that regulation, entitled 'Exceptions', provides:

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

(a) the public interest as regards:

— public security,

— defence and military matters,

— international relations,

— the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

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

— commercial interests of a natural or legal person, including intellectual property,

— 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.

…

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

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

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. …'

4 Recital 15 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) states:

'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 ...'

5 The first paragraph of Article 3 of Regulation No 1367/2006, which forms part of Title II of that regulation, entitled 'Access to environmental information', 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.'

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

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

Background to the case and the contested measures

7 LPN is a non-governmental organisation whose objective is the protection of the environment. During April 2003, it lodged a complaint with the European Commission in which it claimed that the dam construction project on the River Sabor, in Portugal, infringed 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'). 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.

8 During March 2007, LPN applied to the Commission 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. On the basis of the third indent of Article 4(2) of Regulation No 1049/2001, the Commission rejected that application by letter of 22 May 2007.

9 After LPN had repeated its request by letter of 14 June 2007, the Commission, by the contested decision, confirmed its rejection of access to the documents in question, maintaining that all of the documents which were the subject of the correspondence between it and the Portuguese authorities were covered by the exception laid down in the third indent of Article 4(2) of Regulation No 1049/2001, relating to the protection of the purpose of inspections, investigations and audits. The content of that decision is summarised as follows in the judgment under appeal:

'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.'

10 On 18 January 2008, that is to say, the day on which the action against the contested decision was brought, the 'Environment' Directorate General of the Commission 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.

11 In February 2008, LPN reiterated its request for access to the documents contained in the file relating to the infringement procedure.

12 By letter of 3 April 2008, the Commission informed LPN that it had decided, at its meeting of 28 February 2008, to take no further action on the complaint concerning the dam project. As far as the request for access to the documents is concerned, the exception laid down in the third indent of Article 4(2) of Regulation No 1049/2001 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.

13 Subsequently, LPN has been able to consult the Commission files and to have access to the content of a number of documents. In addition, by a letter of 24 October 2008 ('the decision of 24 October 2008'), the Commission granted LPN full or partial access to the content of other relevant documents while continuing to refuse LPN access to certain documents, invoking the exceptions laid down in the second subparagraph of Article 4(3) of Regulation No 1049/2001, concerning the protection of the decision-making process, and in the second indent of Article 4(2) of that regulation, concerning the protection of court proceedings.

The proceedings before the General Court and the judgment under appeal

14 By application lodged on 18 January 2008, LPN asked the Court of First Instance (now the General Court) to annul the contested decision. The Kingdom of Denmark, the Kingdom of Sweden and the Republic of Finland were granted leave to intervene in support of the form of order sought by LPN.

15 The Commission requested the General Court to declare that the action had become devoid of purpose since access to part of the documents in question had been granted and the refusal to disclose the other documents was no longer based on the same ground.

16 By the judgment under appeal, the General Court held, firstly, in paragraph 57 of that judgment that, in so far as LPN was granted, in the course of the proceedings, access to the documents in question, the action had become devoid of purpose and that, consequently, there was no longer any need to adjudicate. Secondly, with regard to the documents not yet or only partially disclosed, the General Court dismissed the action on the ground that the two pleas in law raised by LPN alleging an infringement of Regulation No 1367/2006, in particular Article 6 thereof, and of the third indent of Article 4(2) of Regulation No 1049/2001 respectively were unfounded.

17 In the context of the joint examination of those pleas, the General Court started, in paragraphs 110 to 112 of the judgment under appeal, from the principle that, firstly, the Commission has an obligation to examine specifically and individually the documents to which access has been requested

in order to assess whether its disclosure carries a risk that a protected interest will be undermined and, secondly, that examination must be apparent from the reasons for the decision of the institution in question.

18 In paragraphs 126 et seq. of the judgment under appeal, the General Court accepted, having regard to the judgment in Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraph 50, and by analogy with the procedure for reviewing State aid (Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-5885, paragraphs 54 to 62), a general presumption that disclosure of the documents in the administrative file relating to an infringement procedure would, in principle, undermine protection of the purpose of the investigation. In the view of the General Court, since, at the time of the adoption of the contested decision, the infringement procedure in question was at the pre-litigation stage, the Commission was able to start from the principle that that general presumption applied to all the documents concerned.

19 In that regard, the General Court took as its basis the fact that the review which the Commission is required to carry out in the context of an infringement procedure 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. It took the view that the party which complained to the Commission is 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 enabling them to require the Commission to inform them and hear their views.

20 That presumption 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 an overriding public interest justifying the disclosure of the document concerned by virtue of Article 4(2) of Regulation No 1049/2001. However, the General Court pointed out that neither LPN nor the intervening Member States had 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 the third indent of Article 4(2) of Regulation No 1049/2001.

21 The General Court also took the view, in paragraphs 116, 117 and 122 of the judgment under appeal, that Regulation No 1367/2006 does not affect the Commission's ability to dispense with a specific and individual examination of the documents requested.

22 In paragraphs 132 to 139 of the judgment under appeal, the General Court held that the Commission had not erred in law or in fact in taking the view that, in the present case, there was no overriding public interest, within the meaning of last phrase of Article 4(2) of Regulation No 1049/2001 justifying the disclosure of the documents in question.

23 In that regard, the General Court pointed out that there was no need to adjudicate on whether or not the documents concerned contained information actually relating to 'emissions' into the environment, since the presumption pursuant to the first sentence of Article 6(1) of Regulation No 1367/2006 was not applicable to this case. For the same reason, it considered that it was not possible to deduce from that provision that there was an overriding public interest, within the meaning of last phrase of Article 4(2) of Regulation No 1049/2001.

24 In the view of the General Court, LPN could not rely either on the second sentence of Article 6(1) of Regulation No 1367/2006. It took the view that that sentence concerns only the obligation to interpret restrictively exceptions other than those laid down in the first and third indents of Article 4(2) of Regulation No 1049/2001. It added that the second sentence of Article 6(1) of Regulation No 1367/2006 does not refer to an 'overriding' public interest within the meaning of last phrase of Article 4(2) of Regulation No 1049/2001.

25 Finally, the General Court held that, at the hearing, in reply to questions put by the Court, LPN and the intervening Member States were neither able to identify any overriding public interest other than that of the supposedly increased transparency in environmental matters, 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.

Procedure before the Court of Justice and the forms of order sought by the parties

26 By order of the President of the Court of 27 February 2012, the two appeals were joined for the purposes of the written and oral procedure and the judgment.

27 By order of the President of the Court of 27 April 2012, the Federal Republic of Germany was granted leave to intervene in support of the form of order sought by the Commission. By order of the President of the Court of Justice of 10 July 2012, the Republic of Estonia was granted leave to intervene in support of the form of order sought by the Republic of Finland and to submit its observations during the oral procedure.

28 By its appeal, LPN claims that the Court should:

— set aside in part the judgment under appeal, in so far as it dismisses the claims of the appellant seeking the annulment of the contested decision and ordered it to bear its own costs and pay those incurred by the Commission;

— annul the contested decision in that it relates to the documents and document extracts in respect of which the Commission has maintained its refusal to grant access in the decision of 24 October 2008; and

— order the Commission to bear its own costs and pay the costs incurred by LPN at first and second instance.

29 By its appeal, the Republic of Finland claims that the Court should:

— set aside the judgment under appeal in so far as the General Court thereby dismissed the action brought by LPN;

— annul the contested decision;

— order the Commission to pay the costs incurred by Finland in the present appeal.

30 The Kingdom of Denmark, the Republic of Estonia and the Kingdom of Sweden support the forms of order sought by the appellants. The Kingdom of Sweden also contends that the Commission should be ordered to pay its costs.

31 The Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs.

32 The Federal Republic of Germany supports the form of order sought by the Commission.

The appeals

33 LPN and the Republic of Finland put forward three main grounds in support of their appeals. Those grounds of appeal allege infringement of the third indent of Article 4(2) of Regulation No 1049/2001, infringement of the second sentence of Article 6(1) of Regulation No 1367/2006 and infringement of the last phrase of Article 4(2) of Regulation No 1049/2001 respectively.

34 In addition, LPN puts forward a fourth ground of appeal, alleging that the General Court committed several errors of law in ordering it to pay the costs. LPN also requests the Court of Justice to correct the operative part of the judgment under appeal, which does not correctly identify the contested decision.

The first ground of appeal, alleging an infringement of the third indent of Article 4(2) of Regulation No 1049/2001

Arguments of the parties

35 The first ground of appeal of LPN and the Republic of Finland alleges that the General Court erred in law in interpreting the third indent of Article 4(2) of Regulation No 1049/2001 as meaning that the Commission is entitled to refuse to disclose all documents relating to an infringement procedure opened pursuant to Article 226 EC without making a specific and individual examination of those documents. There is no justification for presuming that no document or no part of a document relating to such a procedure could be disclosed without jeopardising the purpose of that procedure, which consists in leading the Member State concerned to comply with European Union law.

36 The reasoning which accepts recourse to a general presumption as regards the refusal of access to the documents concerning State aid review procedures, followed in the judgment in *Commission* v *Technische Glaswerke Ilmenau* (paragraphs 56 to 59), cannot be transferred to documents concerning an infringement procedure. In particular, with regard to the latter procedure, there are no specific rules concerning confidentiality and the access to information. LPN adds that it is defending not its own interests, but public interests. In addition, the documents relating to an infringement procedure do not form a homogenous category of documents.

37 The Kingdom of Denmark and the Kingdom of Sweden support that argument, pointing out in particular that the reasons which led the Court of Justice in earlier cases (*Commission* v *Technische Glaswerke Ilmenau*, and Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others* v *API and Commission* [2010] ECR I-8533), to recognise the existence of a general presumption are not, in the present case, applicable by analogy, having regard, in particular, to the fact that infringement procedures differ as regards the material content, the scope, the sensitivity of the case and the legitimate interest in having details thereof. The Kingdom of Sweden alleges, in the alternative, that, in any event, the Commission ought to have ascertained whether that presumption actually applied to the present case.

38 However, the Commission and the Federal Republic of Germany are of the opinion that the first ground of appeal is unfounded. In particular, they submit that the procedure for reviewing State aid is a variant of the infringement procedure and that the latter procedure provides for a dialogue to be established between the Commission and the Member State concerned, in which individuals do not have any procedural rights. In addition, infringement procedures are intended to bring to an end rapidly and effectively any infringements of European Union law, in particular by reaching an amicable settlement of the dispute during the administrative procedure. If the exchanges between the Commission and the Member State concerned were disclosed, the willingness, particularly on the part of the Member States, to cooperate in a climate of trust would be compromised.

Findings of the Court

39 By the first ground of appeal, the appellants complain that the General Court accepted that the Commission may reject a request for access to a set of documents, identified globally, of the administrative file relating to an infringement procedure under Article 226 EC, during the pre-litigation stage thereof, without carrying out a specific and individual examination of each document, basing its decision on a general presumption that the disclosure of the documents in question would undermine the protection of the purposes of investigations, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

40 As a preliminary point, it is necessary to bear in mind that, under paragraphs 1 and 2 of Article 255(1) and (2) EC, any citizen of the Union, and any natural or legal person residing or having its office in a Member State, is to have a right of access to documents of the Union's institutions, subject to the principles and the conditions to be defined in accordance with the procedure laid down in Article 251 EC. Regulation No 1049/2001 seeks, as indicated in recital 4 of the preamble and Article 4, to give the public a right of access to documents of the institutions which is as wide as possible. It is also apparent from that regulation, in particular from recital 11 of the preamble and Article 4, which lays down a system of exceptions in that regard, that that right is, nevertheless, subject to certain limits based on reasons of public or private interest (see *Commission* v *Technische Glaswerke Ilmenau*, paragraph 51; *Sweden and Others* v *API and Commission*, paragraphs 69 and 70; Case C-404/10 P *Commission* v *Éditions Odile Jacob* [2012] ECR, paragraph 111; and Case C-477/10 P *Commission* v *Agrofert Holding* [2012] ECR, paragraph 53).

41 Under the exception relied upon by the Commission, namely the third indent of Article 4(2) of Regulation No 1049/2001, the institutions must refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

42 It follows that the system of exceptions laid down in Article 4 of that regulation, particularly in paragraph 2 thereof, is based on a balancing of the opposing interests in a given situation, that is to say, firstly, the interests which would be favoured by the disclosure of the documents in question and, secondly, those which would be jeopardised by such disclosure. The decision taken on a request for access to documents depends on which interest must prevail in the particular case.

43 In the present case, it is not in dispute that the documents covered by LPN's application in fact relate to an 'investigation', within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

44 In accordance with well-established case-law, in order to justify refusal of access to a document the disclosure of which has been requested, it is not sufficient, in principle, for that document to be covered by an activity mentioned in Article 4(2) of Regulation No 1049/2001. The institution concerned must also supply explanations as to how access to that document could specifically and effectively undermine the interest protected by an exception laid down in that article (*Sweden and Turco* v *Council*, paragraph 49; *Commission* v *Technische Glaswerke Ilmenau*, paragraph 53; *Sweden and Others* v *API and Commission*, paragraph 72; *Commission* v *Éditions Odile Jacob*, paragraph 116; and *Commission* v *Agrofert Holding*, paragraph 57).

45 However, the Court has acknowledged that it is open to the institution concerned 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 (*Sweden and Turco* v *Council*, paragraph 50; *Commission* v *Technische Glaswerke Ilmenau*, paragraph 54; *Sweden and Others* v *API and Commission*, paragraph 74; *Commission* v *Éditions Odile Jacob*, paragraph 116; and *Commission* v *Agrofert Holding*, paragraph 57).

46 As the Advocate General noted in points 57 to 62 of his Opinion, the Court has expressly acknowledged the existence of such general presumptions in three specific circumstances, namely as regards the documents in the administrative file concerning procedures for reviewing State aid (*Commission* v *Technische Glaswerke Ilmenau*, paragraph 61), the documents exchanged between the Commission and the notifying parties or third parties in the context of merger control procedures (*Commission* v *Éditions Odile Jacob*, paragraph 123, and *Commission* v *Agrofert Holding*, paragraph 64), and the pleadings lodged by an institution in proceedings pending before the courts (*Sweden and Others* v *API and Commission*, paragraph 94).

47 All these cases shared the characteristic that the request for access in question covered not just one document but a set of documents (see *Commission* v *Technische Glaswerke Ilmenau*, paragraph 50; *Sweden and Others* v *API and Commission*, paragraph 9; *Commission* v *Éditions Odile Jacob*, point 10, setting out paragraphs 1 and 2 of the judgment of the General Court under appeal in the appeal which gave rise to that judgment of the Court of Justice; and *Commission* v *Agrofert Holding*, paragraph 7, setting out paragraph 2 of the judgment of the General Court under appeal in the appeal which gave rise to that judgment of the Court of Justice).

48 In that type of situation, the recognition that there is a general presumption that the disclosure of documents of a certain nature will, in principle, undermine the protection of one of the interests listed in Article 4 of Regulation No 1049/2001 enables the institution concerned to deal with a global application and to reply thereto accordingly.

49 It is this type of situation which pertains in the present case. Like the application made by the interested party in the *Commission* v *Technische Glaswerke Ilmenau* case, which covered all the administrative file relating to the State aid which had been granted to it, LPN applied for access to a set of documents, described as a whole, appearing in the file relating to the infringement procedure opened against the Portuguese Republic regarding a dam construction project.

50 In addition, it is necessary to bear in mind that that application was made when that infringement procedure was still at the pre-litigation stage and that the procedure had neither been closed by the Commission nor brought before the Court of Justice when the contested decision was adopted.

51 It is therefore necessary to examine whether it is appropriate to recognise the existence of a general presumption that disclosure of the documents in the administrative file relating to an infringement procedure at the pre-litigation stage would undermine protection of the purpose of the investigation.

52 In that regard, it is necessary, first of all, to take into consideration the first sentence of Article 6(1) of Regulation No 1367/2006.

53 Although, pursuant to Article 3 thereof, Regulation No 1049/200, and in particular Article 4 thereof, is to apply to any request by an applicant for access to environmental information held by Community institutions and bodies, Article 6 of Regulation No 1367/2006 adds more specific rules concerning such request for access which in part favour and in part restrict the access to the documents.

54 The first sentence of Article 6(1) of Regulation No 1367/2006, which lays down a rule intended to facilitate access to documents containing environmental information, provides that that rule does not apply to ‘investigations, in particular those concerning possible infringements of Community law’.

55 It follows that infringement procedures are regarded, by that European Union legislation, as a type of procedure which, as such, has characteristics precluding full transparency being granted in that field and which therefore has a special position within the system of access to documents.

56 In addition, the infringement procedure has characteristics which are comparable to those of a State aid review procedure, which led the Court of Justice to recognise the existence of a general presumption in that regard in the *Commission* v *Technische Glaswerke Ilmenau* case.

57 In both cases, it is a procedure initiated in respect of the Member State responsible, either for granting the aid (see *Commission* v *Technische Glaswerke Ilmenau*, paragraph 57), or for the alleged infringement of European Union law.

58 The Court of Justice also based its findings on the fact that the interested parties, except for the Member State responsible for granting the aid, do not have a right under the procedure for reviewing State aid to consult the documents on the Commission's administrative file and that, if those interested parties were able to obtain access, on the basis of Regulation No 1049/2001, to those documents, the system for the review of State aid would be called into question (see *Commission* v *Technische Glaswerke Ilmenau*, paragraphs 58 and 61).

59 Nor, with regard to infringement proceedings, does European Union law, in particular Article 226 EC, provide for the right for an individual to consult the file, even if the procedure has been brought about by that individual's complaint. The Commission has merely conceded, in its internal rules of procedure relating to the administrative measures in favour of the complainant, that it will inform the complainant of the decisions adopted and of the proposal to close the file without further action (see Commission communication to the European Parliament and the European Ombudsman of 20 March 2002 on relations with the complainant in respect of infringements of Community law (COM/2002/0141 final; OJ 2002 C 244, p. 5, paragraphs 7, 9 and 10)).

60 Furthermore, in accordance with well-established case-law, a complainant in the context of an infringement procedure does not have the right to require the Commission to take a specific position and to bring an action against its refusal to take action against a Member State (see, to that effect, in particular, the judgments in Case 247/87 *Star Fruit* v *Commission* [1989] ECR I-291, paragraph 11, and Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981, paragraph 6, and the order of 14 July 2011 in Case C-111/11 P *Ruipérez Aguirre and ATC Petition* v *Commission*, paragraphs 11 and 12). In that regard, it is irrelevant whether the complainant is acting to defend a personal interest or a public interest.

61 It is for the Commission, when it considers that a Member State has failed to fulfil its obligations, to assess whether it is appropriate to act against that State, to ascertain the provisions which it has infringed and to choose when it will open the infringement procedure against it (see, in particular, Case C-33/04 *Commission* v *Luxembourg* [2005] ECR I-10629, paragraph 66 and the case-law cited, and the judgment of 7 October 2010 in Case C-154/09 *Commission* v *Portugal*, paragraph 51). The subject-matter of an action for failure to fulfil obligations is determined by the Commission's reasoned opinion (Case C-171/08 *Commission* v *Portugal* [2010] ECR I-6817, paragraph 25 and the case-law cited).

62 What is more, it is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under European Union law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission (see, inter alia, Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraph 22, and Case C-522/09 *Commission* v *Romania* [2011] ECR I-2963, paragraph 15).

63 The disclosure of the documents concerning an infringement procedure during its pre-litigation stage would, in addition, be likely to change the nature and progress of that procedure, given that, in those circumstances, it could prove even more difficult to begin a process of negotiation and to reach an agreement between the Commission and the Member State concerned putting an end to the infringement alleged, in order to enable European Union law to be respected and to avoid legal proceedings.

64 Finally, contrary to the appellants' submissions, the documents relating to the pre-litigation stage of an infringement procedure constitute a single category of documents for the purposes of applying the abovementioned general presumption. Firstly, the exception laid down, as regards investigations relative to possible infringements of Community law, in the first sentence of Article 6(1) of Regulation No 1367/2006 does not draw any distinction on the basis of the type of document forming part of the file relating to such investigations or of the author of the documents in question. Secondly, with regard to documents related to State aid review procedures, the Court of Justice has held that all the documents in the administrative file relating to such a procedure form a single category to which a general presumption that disclosure of documents in the administrative file in principle undermines protection of the objectives of investigations applies (*Commission* v *Technische Glaswerke Ilmenau*, paragraph 61).

65 It follows from the foregoing considerations that it can be presumed that the disclosure of the documents concerning an infringement procedure during its pre-litigation stage risks altering the nature of that procedure and changing the way it proceeds and, accordingly, that disclosure would in principle undermine the protection of the purpose of investigations, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

66 That general presumption does not exclude the possibility of demonstrating that a given document disclosure of which has been requested is not covered by that presumption, or that there is an overriding public interest justifying the disclosure of the document concerned by virtue of Article 4(2) of Regulation No 1049/2001 (see, to that effect, *Commission* v *Technische Glaswerke Ilmenau*, paragraph 62; *Sweden and Others* v *API and Commission*, paragraph 103; *Commission* v *Éditions Odile Jacob*, paragraph 126; and *Commission* v *Agrofert Holding*, paragraph 68).

67 In addition, the Commission is not required to base its decision on that general presumption. It may always carry out a specific examination of the documents covered by a request for access and provide such reasons. What is more, where it finds that the infringement procedure involved in a given request for access is of a nature which permits the full or partial disclosure of the documents in the file, it is obliged to make that disclosure.

68 However, the requirement to ascertain whether the general presumption in question actually applies cannot be interpreted as meaning that the Commission must examine individually each document requested in the case. Such a requirement would deprive that general presumption of its proper effect, which is to permit the Commission to reply to a global request for access in a manner equally global.

69 Furthermore, the General Court has held, in paragraph 121 of the judgment under appeal, that it is inconceivable that the Commission could have granted access to only one of the documents concerned or to part of their content without undermining the ongoing negotiations with the Portuguese authorities. That finding has not been challenged by the applicants, who have, moreover, not alleged any distortion of the facts by the General Court.

70 Having regard to the foregoing considerations, the General Court did not err in law by recognising that it is possible for the Commission to base its decision on the general presumption that public access, even if only partial, to the documents relating to an infringement procedure during the pre-litigation stage thereof jeopardises the achievement of the objectives of that procedure in order to refuse access to those documents on the basis of the third indent of Article 4(2) of Regulation No 1049/2001.

71 In those circumstances, the first ground of appeal must be rejected as unfounded.

The second ground of appeal, alleging infringement of the second sentence of Article 6(1) of Regulation No 1367/2006

Arguments of the parties

72 LPN and the Republic of Finland, supported by the Kingdom of Sweden, submit that the General Court erred in law in holding, in particular in paragraph 136 of the judgment under appeal, that the second sentence of Article 6(1) of Regulation No 1367/2006 does not apply to the exception relating to the protection of investigations. That provision covers all the exceptions laid down in Article 4 of Regulation No 1049/2001 which are not covered by the legal presumption set out in the first sentence of Article 6(1) of Regulation No 1367/2006, as follows from the purpose of that regulation, recital 15 in the preamble thereto and Article 4(4) 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 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1), also providing that the grounds for rejection of requests for environmental information must be interpreted in a restrictive way.

73 In the submission of LPN, the second sentence of Article 6(1) of Regulation No 1367/2006 is incompatible with the recognition of a general presumption of harm in the case of disclosure of documents because of the requirement for strict interpretation laid down by that provision and since that provision makes it necessary to establish, in the light of the specific circumstances, whether or not the information contained in the requested documents relates to emissions into the environment.

74 Finally, LPN submits that the assertion in paragraph 138 of the judgment under appeal, that it was incapable 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 is incorrect. It was impossible for it to give such an explanation, given that it was not aware of the content of the documents not yet disclosed.

75 The Commission submits that, by excluding from the legal presumption laid down in the first sentence of Article 6(1) of Regulation No 1367/2006 investigations relating to possible infringements of Community law, the European Union legislature was manifestly concerned to take account of the particular nature of those investigations. Accordingly, the potential existence of an overriding public interest justifying the disclosure of documents must be examined in the light of Regulation No 1049/2001 and it cannot be deduced from Regulation No 1367/2006 that the infringement procedures in environmental matters should be treated differently from such procedures in other areas, as regards the presumption that the disclosure of the documents would undermine the purpose of investigations.

76 The Federal Republic of Germany contends that the second sentence of Article 6(1) of Regulation No 1367/2006 does not affect the assessment with regard to the refusal of access to documents in a current infringement procedure, in the pre-litigation stage, relating to the environment, which continues to be governed by Regulation No 1049/2001. That provision, it submits, simply reiterates the requirement, developed by the Court of Justice, that the grounds for refusal should be narrowly interpreted and environmental interests should be taken into consideration in the weighing up of opposing interests.

Findings of the Court

77 By the second ground of appeal, the appellants submit that the General Court has erred in law by holding that Article 6(1) of Regulation No 1367/2006 does not prevent the Commission from having recourse to the general presumption that the disclosure of the documents concerning an infringement procedure during its pre-litigation stage would undermine the protection of the purpose of investigations, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

78 In order to rule on the merits of that ground of appeal, it is appropriate to examine whether, and, if appropriate, to what extent Article 6(1), alters, with regard to procedures concerning the environment, the examination which the Commission must make pursuant to Article 4 of Regulation No 1049/2001.

79 Article 6 of Regulation No 1367/2006 adds specific rules concerning requests for access to environmental information to Regulation No 1049/2001.

80 The first sentence of paragraph 1 of Article 6 refers to the provisions of the first and third indents of Article 4(2) of Regulation No 1049/2001 and provides that an overriding public interest in disclosure must be deemed to exist where the information requested relates to emissions into the environment. That legal presumption relates to the last phrase of Article 4(2), excluding the possibility of refusing access to a document if a public interest overriding the protected interests justifies the disclosure of the documents in question. That legal presumption does not apply to 'investigations, in particular those concerning possible infringements of Community law'.

81 The second sentence of Article 6(1) of Regulation No 1367/2006 provides that, '[a]s 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'.

82 It is clear from the wording and the scheme of Article 6(1) that the 'other exceptions', within the meaning of the second sentence of that paragraph, do not include the protection of infringement procedures.

83 The first sentence of that paragraph 1 lays down a rule concerning the exceptions in the first and third indents of Article 4(2) of Regulation No 1049/2001. The second sentence of that paragraph 1 does not merely refer to the 'other exceptions', but the 'other exceptions set out in Article 4 of Regulation [No 1049/2001]'. That provision thus refers to the exceptions in Article 4(1), (2), second indent, (3) and (5). Given that infringement procedures involve an investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001, which is referred to in the first sentence of Article 6(1) of Regulation No 1367/2006, that activity is not covered by the concept of 'other exceptions' set out in the second sentence of Article 6(1).

84 The manner in which the two sentences of Article 6(1) of Regulation No 1367/2006 and their scheme indicate clearly the express intention of the legislature to remove infringement procedures from the scope of Article 6(1) of Regulation No 1367/2006 as a whole.

85 Accordingly, the General Court did not err in law by holding that Article 6(1) of Regulation No 1367/2006 did not affect the examination which the Commission must carry out pursuant to Regulation No 1049/2001 when a request for access concerns documents relating to an infringement procedure at the pre-litigation stage.

86 Consequently, the second ground of appeal must be rejected as unfounded.

The third ground of appeal, alleging infringement of the last phrase of Article 4(2) of Regulation No 1049/2001

Arguments of the parties

87 The Republic of Finland, whose argument is supported by the Kingdom of Denmark and the Kingdom of Sweden, submits that, irrespective of whether Article 6(1) of Regulation No 1367/2006 applies, the General Court incorrectly interpreted the last phrase of Article 4(2) of Regulation No 1049/2001, in that it failed to assess whether the Commission had ascertained whether there was any overriding public interest justifying the disclosure of the documents in question. In accordance with the judgment in the case *Sweden and Turco* v *Council* (paragraphs 44, 45 and 49), the General Court ought to have required the Commission to compare the interest in the protection of investigations with the public interest in having access to the documents in question, having regard to the interests in greater transparency. When a request for access relates to a document falling within the scope of Regulation No 1367/2006, obtaining environmental information and the importance of the availability of such information for the protection of the environment and human health could constitute an overriding public interest within the meaning of the last phrase of Article 4(2) of Regulation No 1049/2001.

88 The Kingdom of Sweden adds that the General Court erred in law in paragraphs 138 and 139 of the judgment under appeal by requiring the party requesting access to documents to claim and demonstrate the existence of an overriding public interest, having regard, in particular, to the fact that the institution concerned is the only party which is aware of the content of the documents of which disclosure is requested.

89 The Commission submits that the General Court was right to reject, in paragraph 139 of the judgment under appeal, the argument that there had not been a proper balancing of divergent interests within the meaning of the last phrase of Article 4(2) of Regulation No 1049/2001.

Findings of the Court

90 By the third ground of appeal, the Republic of Finland complains, in essence, that the General Court failed to examine whether the Commission had ascertained, pursuant to the last phrase of Article 4(2) of Regulation No 1049/2001, whether an overriding public interest justified the disclosure of the documents in question.

91 In paragraphs 132 and 133 of the judgment under appeal, the General Court held that, according to the wording of the contested decision, there was no overriding public interest in this case and that that finding that there is no overriding public interest was not vitiated by any error of law or of fact. LPN and the Republic of Finland do not rely on a specific interest justifying, in the present case, the disclosure of the documents in question, but merely on the importance generally of the availability of environmental information as regards the protection of the environment and human health.

92 It is true that the overriding public interest capable of justifying the disclosure of a document must not necessarily be distinct from the principles which underlie Regulation No 1049/2001 (see, to that effect, *Sweden and Turco* v *Council*, paragraphs 74 and 75).

93 Nevertheless, such general considerations cannot provide an appropriate basis for establishing that, in the present case, the principle of transparency was in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question (see, by analogy, *Sweden and Others* v *API and Commission*, paragraph 158).

94 The requirement that an applicant rely on specific circumstances to show that there is an overriding public interest to justify the disclosure of the documents concerned is in accordance with the case-law of the Court of Justice (see, to that effect, *Commission* v *Technische Glaswerke Ilmenau*, paragraph 62; *Sweden and Others* v *API and Commission*, paragraph 103; *Commission* v *Éditions Odile Jacob*, paragraph 126; and *Commission* v *Agrofert Holding*, paragraph 68).

95 In so far as LPN has requested access to those documents in order that it may be in a position to supplement the information held by the Commission concerning the dam construction project which is the subject-matter of the infringement procedure in question and, in consequence, may take an active part in that procedure, that fact does not show that there is an 'overriding public interest' within the meaning of Article 4(2) of Regulation No 1049/2001 (see, to that effect, *Commission* v *Technische Glaswerke Ilmenau*, paragraph 70; *Commission* v *Éditions Odile Jacob*, paragraphs 145 and 146; and *Commission* v *Agrofert Holding*, paragraphs 85 and 86), even though LPN, as a non-governmental organisation, is acting in accordance with its statutory aims, which consist in the protection of the environment.

96 Despite the fact that, in accordance with recital 2 in the preamble to Regulation No 1367/2006, that regulation forms part of a Community action programme for the environment which stresses the importance of providing adequate environmental information and effective opportunities for public participation in environmental decision-making, the fact remains that such participation cannot be relied upon in order to justify access to the documents relating to an infringement procedure. In accordance with Article 9 of that regulation, Community institutions and bodies are to provide opportunities for the public to participate only where they prepare, modify or review plans or programmes relating to the environment. However, infringement procedures are not referred to in that article.

97 Having regard to the foregoing considerations, it appears that the General Court has not failed to examine whether the Commission had ascertained, pursuant to the last phrase of Article 4(2) of Regulation No 1049/2001, whether an overriding public interest justified the disclosure of the documents in question.

98 Accordingly, the third ground of appeal must also be dismissed as unfounded.

The fourth ground of appeal, concerning the order that LPN pay the costs

99 LPN submits that the decision of the General Court, for which the reasons are set out in paragraphs 141 to 143 of the judgment under appeal, to order LPN to pay the costs is vitiated by a number of errors of law.

100 In that regard, suffice it to note that, according to settled case-law, where all the other pleas put forward in an appeal have been rejected, any plea challenging the decision of the General Court on costs must be rejected as inadmissible by virtue of the second paragraph of Article 58 of the Statute of the Court of Justice of the European Union, which provides that no appeal is to lie regarding only the amount of the costs or the party ordered to pay them (see, inter alia, Joined Cases C-57/00 P and C-61/00 P *Freistaat Sachsen and Others* v *Commission* [2003] ECR I-9975, paragraph 124; Case C-301/02 P *Tralli* v *ECB* [2005] ECR I-4071, paragraph 88; and Case C-263/09 P *Edwin* v *OHIM* [2011] ECR I-5853, paragraph 78).

101 Since all of the other grounds of appeal put forward by LPN have been rejected, the last ground of appeal, challenging the allocation of costs, must accordingly be declared inadmissible.

The additional request of LPN seeking the correction of paragraph 1 of the operative part of the judgment under appeal

102 In its appeal, LPN asks the Court of Justice to correct paragraph 1 of the operative part of the judgment under appeal. In its view, the General Court has not correctly identified the contested decision, which was not the decision of 24 October 2008, but that of 22 November 2007. LPN proposes that it be stated expressly, in paragraph 1, that the action was brought 'against the decision of the Commission of 22 November 2007' and that, by the decision of 24 October 2008, the access to the documents in question 'continued to be refused'.

103 The Commission considers that request to be inadmissible.

104 Pursuant to Article 113(1) of the Rules of Procedure of the Court of Justice, in the version in force at the date on which the present appeal was lodged, an appeal is to seek to have set aside, in whole or in part, the decision of the General Court.

105 The additional request of LPN seeks not to have the judgment under appeal set aside, even in part, that is to say the operative part thereof (see Joined Cases C-539/10 P and C-550/10 P *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa* [2012] ECR, paragraph 44 and the case-law cited), but merely the amendment of one of the grounds of that judgment which will not affect its content or the outcome of the dispute at first instance. It is clear from the judgment under appeal, particularly paragraphs 18, 38 and 59 thereof, that the action dismissed in paragraph 1 of the operative part of that judgment referred to the decision of 22 November 2007.

106 Moreover, in so far as a judgment of the General Court contains clerical mistakes or obvious inaccuracies, it is for the General Court alone to correct them, in accordance with paragraph 84 of its Rules of Procedure.

107 It follows that the additional request of LPN must be rejected as inadmissible.

108 It follows from all the foregoing considerations that the appeals of LPN and the Republic of Finland must be dismissed in their entirety.

Costs

109 In accordance with the first paragraph of Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court shall make a decision as to costs.

110 Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) of those rules, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. According to Article 138(2), where there are several unsuccessful parties the Court shall decide how the costs are to be shared. Article 140(1) of those Rules provides that the Member States which have intervened in the proceedings are to bear their own costs.

111 Since LPN and the Republic of Finland were unsuccessful and the Commission applied for costs against them, they must be ordered to pay the costs in equal parts.

112 The Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia and the Kingdom of Sweden, as interveners, must be ordered to bear their own costs.

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

1. Dismisses the appeals;

2. Orders the Liga para a Protecção da Natureza and the Republic of Finland to pay the costs in equal parts;

3. Orders the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia and the Kingdom of Sweden to bear their own costs.

[Signatures]