ECLI:EU:C:2020:330

JUDGMENT OF THE COURT (Fifth Chamber)

30 April 2020 (*)

(Appeal — Access to documents of the institutions — Regulation (EC) No 1049/2001 — Article 4(2), third indent — Exceptions to the right of access — Exception relating to protection of the purpose of investigations — Documents concerning pending infringement proceedings — Detailed opinions issued in the course of a notification procedure under Directive 98/34/EC — Request for access — Refusal — Disclosure of documents requested in the course of the proceedings before the General Court of the European Union — Disclosure — Inadmissibility — Interest in bringing proceedings — Continuation)

In Case C-560/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 3 September 2018,

Izba Gospodarcza Producentów i Operatorów Urządzeń Rozrywkowych, established in Warsaw (Poland), represented by P. Hoffman, adwokat,

appellant,

the other parties to the proceedings being:

European Commission, represented by M. Konstantinidis and A. Spina, acting as Agents,

defendant at first instance,

Kingdom of Sweden, represented by C. Meyer-Seitz, A. Falk, H. Shev, J. Lundberg and H. Eklinder, acting as Agents,

Republic of Poland, represented by D. Lutostańska and M. Kamejsza-Kozłowska, acting as Agents,

interveners at first instance,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, I. Jarukaitis (Rapporteur), E. Juhász, M. Ilešič and C. Lycourgos, Judges,

Advocate General: G. Pitruzzella,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 26 September 2019,

after hearing the Opinion of the Advocate General at the sitting on 5 December 2019,

gives the following

Judgment

1 By its appeal, Izba Gospodarcza Producentów i Operatorów Urządzeń Rozrywkowych ('Igpour'), an organisation representing the interests of manufacturers, distributors and operators of amusement machines in Poland, is seeking to have set aside the order of the General Court of the European Union of 10 July 2018, *Izba Gospodarcza Producentów i Operatorów Urządzeń Rozrywkowych* v *Commission* (T-514/15, not published, 'the order under appeal', EU:T:2018:500), by which the General Court ruled that there was no longer any need to adjudicate on Igpour's action seeking annulment of the Commission's decision, GestDem 2015/1291, of 12 June 2015 refusing Igpour access to the detailed opinion issued by the European Commission in the course of notification procedure 2014/537/PL, and of the Commission's decision, Gestdem 2015/1291, of 17 July 2015 refusing Igpour access to the detailed opinion issued by the Republic of Malta in the course of notification procedure 2014/537/PL (together, 'the decisions at issue').

Legal context

2 Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) provides:

'...

2. The institutions shall 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.

...'

Background to the dispute

3 On 20 November 2013, in the context of infringement proceedings No 2013/4218, the Commission sent to the Republic of Poland and to a number of other Member States a letter of formal notice under Article 258 TFEU in which it asked the recipients to bring their national

legislative frameworks governing services relating to games of chance into conformity with the fundamental freedoms of the TFEU.

4 In its reply, received by the Commission on 3 March 2014, the Republic of Poland informed the Commission that it intended to give notice, on the basis of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37), of draft legislation amending the Polish Law on games of chance, in order to address the Commission's concerns.

5 On 5 November 2014, the Republic of Poland notified the Commission of the proposed draft legislation, in accordance with Article 8 of Directive 98/34. That notification was registered under reference 2014/537/PL.

6 On 3 and 6 February 2015 respectively, the Commission and the Republic of Malta delivered detailed opinions, within the meaning of Article 9(2) of Directive 98/34, on that draft legislation as notified.

7 On 17 February 2015, Igpour requested access to the opinions issued by the Commission and the Republic of Malta, under Article 2(1) of Regulation No 1049/2001.

8 On 10 March 2015, the Commission refused to grant Igpour access to the requested documents.

9 On 16 April 2015, Igpour sent to the Commission a confirmatory application for access to the documents, pursuant to Article 7(2) of Regulation No 1049/2001.

10 In both of the decisions at issue, the Commission explained that disclosure of the documents at issue would undermine the protection of inspections, investigations and audits under the third indent of Article 4(2) of Regulation No 1049/2001 with regard to infringement proceedings No 2013/4218, given that those opinions were inextricably linked to that procedure.

The proceedings before the General Court and the order under appeal

11 By application lodged at the Court Registry on 1 September 2015, Igpour brought an action for annulment of the decisions at issue. The Kingdom of Sweden was given leave to intervene in the proceedings in support of the form of order sought by Igpour, while the Republic of Poland was given leave to intervene in support of the form of order sought by the Commission.

12 On 7 December 2017, the Commission terminated infringement proceedings No 2013/4218 in respect of the Republic of Poland.

13 On 28 February 2018, it decided to grant Igpour access to the requested documents.

14 The parties presented oral argument and their replies to the questions from the Court at the hearing on 28 September 2017.

15 By document lodged at the Court Registry on 6 March 2018, the Commission applied to the Court for a declaration that the action had become devoid of purpose and that there was no longer any need to rule on it, given that it had decided to grant Igpour access to the two documents

concerned by the decisions at issue. The Commission also asked that Igpour be ordered to pay the costs.

16 By order of 14 March 2018, the General Court decided to reopen the oral part of the procedure and invited the other parties to submit their observations on the Commission's application for a declaration that there is no need to adjudicate. In its observations, Igpour disputed that it no longer had any interest in bringing proceedings. In its observations, the Republic of Poland merely stated that it did not oppose the Commission's application. The Kingdom of Sweden did not submit any observations on the application for a declaration that there is no need to adjudicate.

17 In the order under appeal, first, the General Court stated that it was unlikely that such an atypical situation would arise in the future. Secondly, it found that Igpour had merely relied on the possibility of bringing an action against the Commission to establish the (non-contractual) liability of the European Union without, however, specifying whether it or its members intended to avail themselves of that possibility.

18 Consequently, the General Court held that there was no longer any need to adjudicate on the action and that the parties should bear their own costs.

Procedure before the Court of Justice and forms of order sought

19 By its appeal, Igpour claims that the Court should:

– set aside the order under appeal;

– annul the decisions at issue; and

– order the Commission to pay the costs;

– in the alternative, remit the case to the General Court for a decision on its merits and reserve the costs.

20 The Commission contends that the Court should:

– dismiss the appeal as unfounded and

– order Igpour to pay the costs of the present proceedings.

21 The Kingdom of Sweden asks the Court to set aside the order under appeal and to annul the contested decisions.

22 The Republic of Poland presented its observations at the hearing and asks, in essence, that the appeal be dismissed as unfounded.

The appeal

23 Igpour relies on five grounds in support of its appeal.

First ground of appeal

Arguments of the parties

24 By its first ground of appeal, Igpour claims that paragraphs 30 and 32 of the order under appeal are erroneous in two respects.

25 First, the General Court erred in law when it found that it was unlikely that the unlawfulness alleged by Igpour would recur in the future. Secondly, the General Court erred in law in finding that the relevant question was whether it was possible that a specific situation such as that of the present case would recur in the future, whereas what is in fact relevant is whether, in the future, the Commission will apply those interpretations of Regulation No 1049/2001 or Directive 98/34 which Igpour disputes.

26 According to Igpour, first, the General Court did not consider that it was unlikely that, in the future, the Commission would rely on an interpretation of the third indent of Article 4(2) of Regulation No 1049/2001, according to which documents, whether or not they contain references to letters of formal notice, which are 'inextricably linked' to pending infringement proceedings, are covered by a general presumption of non-disclosure.

27 The General Court did not assess the likelihood of that interpretation recurring in the future, but rather the likelihood of that interpretation being taken up again in a situation similar to the present case, that is to say, when there is a new case in which infringement proceedings are pending, a Member State notifies the Commission of draft legislation addressing the concerns which warranted those proceedings and the Commission issues a detailed opinion concerning that draft legislation, and then refuses to disclose that opinion because of the need to protect the purpose of the infringement proceedings.

28 Secondly, the General Court made the same error as the one identified in paragraphs 26 and 27 above with regard to the Commission's argument that the principle of transparency underlying Directive 98/34, replaced by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1), does not preclude the possibility of relying on general presumptions of non-disclosure in respect of detailed opinions delivered in the context of a non-confidential notification procedure.

29 Furthermore, given the considerable breadth of a Member States' notification obligations under Directive 2015/1535, it is likely that many of the notified draft laws will, at least in part, address the Commission's concerns which warrant pending infringement proceedings and, therefore, that a situation similar to the one in the present case will recur. The General Court did not in any way justify its assertion to the contrary, and it would be impossible to produce such a justification.

30 Igpour notes that another order with which it is concerned, that is to say, the order of 19 July 2018, *Izba Gospodarcza Producentów i Operatorów Urządzeń Rozrywkowych* v *Commission* (T-750/17, not published, EU:T:2018:506), demonstrates that the Commission persists in applying its interpretation of the third indent of Article 4(2) of Regulation No 1049/2001 and of the principle of transparency laid down in Directives 98/34 and 2015/1535 and confirms that it is likely that such an interpretation will recur in the future.

31 Igpour claims, furthermore, that it is highly likely that it will in the future submit requests for access to documents to which the Commission will reply by relying on the interpretation of EU law disputed in the present case. In that regard, it states that, in its capacity as an association of business

people, its activities concern all aspects of the business operations of its members and not only those aspects directly related to the specific sector which it represents or which are affected by the national legislation on games of chance.

32 The Swedish Government observes that even though Igpour now has access to the documents at issue, the decisions at issue were not formally withdrawn by the Commission, so that the dispute has retained its purpose.

33 According to the Swedish Government, Igpour had deliberately applied for access to the detailed opinions in the context of a notification procedure while the infringement proceedings were still pending. Given that the disclosure of the requested documents did not take place until after the notification procedure and the infringement proceedings had been closed, it did not fully achieve the objectives pursued by the request for access.

34 The Swedish Government shares Igpour's view that the General Court ought to have considered whether the general presumption rule applied by the Commission in the contested decisions might be relied upon by that institution in the future. That conclusion is directly confirmed by the judgment of 4 September 2018, *ClientEarth* v *Commission* (C-57/16 P, EU:C:2018:660), from which it is clear that what must be considered is whether the unlawfulness relied upon is liable to recur in the future.

35 The Swedish Government, like Igpour, argues that it is highly likely that such a repetition will recur in the future. In the first place, there is an imminent risk that the Commission will be able to justify decisions refusing to grant future requests for access to documents submitted in the context of notification procedures provided for under Directive 2015/1535 by reference to the disputed general presumption rule. In the second place, it is a matter of fact that, after adopting the decisions at issue, the Commission used the disputed general presumption as a reason for rejecting a further request from Igpour for access to the Commission's observations and a detailed opinion in the context of a notification procedure under Directive 2015/1535. In the third place, the fact that Igpour is at great risk of the disputed general presumption being relied on again in the future stems from the fact that Igpour is an organisation which represents the interests of manufacturers, distributors and operators of amusement machines in Poland, whose activities concern all aspects of the business operations of its members, and not only those aspects which are directly related to the specific sector which it represents or which are affected by the national legislation on games of chance. Lastly, that risk concerns not only Igpour's requests for access to documents, but also requests from other persons.

36 The Commission contends that the first ground of appeal is unfounded.

Findings of the Court

37 By its first ground of appeal, Igpour, supported by the Swedish Government, claims in essence that the General Court erred in law when it held in paragraphs 30 and 32 of the order under appeal that it was doubtful that the unlawfulness which Igpour alleged would recur in the future and that therefore it had no interest in pursuing the action. In its submission, the relevant issue in this context was not whether it was possible that a specific situation similar to the one in the present case would recur, but whether there was a risk in general that the unlawfulness claimed would recur in the future and, in particular, that the Commission would, in the future, use the same interpretation of Regulation No 1049/2001, according to which it is entitled to apply a general presumption of confidentiality in pending infringement proceedings.

38 In that regard, it should be recalled that, according to settled case-law, the subject matter of the dispute, like the interest in bringing proceedings, must continue until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be liable, if successful, to procure an advantage for the party bringing it (judgment of 4 September 2018 *ClientEarth* v *Commission*, C-57/16 P, EU:T:2018:660, paragraph 43 and the case-law cited).

39 An applicant may, in certain cases, retain an interest in seeking annulment of the contested act in order to induce the author of that act to make suitable amendments in the future, and thereby avoid the risk that the unlawfulness alleged in respect of that act will be repeated (judgments of 28 May 2013, *Abdulrahim* v *Council and Commission*, C-239/12 P, EU:C:2013:331, paragraph 63 and the case-law cited, and of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 48).

40 The continuation of that interest presupposes that that unlawfulness is liable to recur in the future, irrespective of the particular circumstances of the case in question (judgments of 7 June 2007, *Wunenburger* v *Commission*, C-362/05 P, EU:C:2007:322, paragraph 52, and of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 48).

41 It also follows from the case-law of the Court of Justice that the continuation of an applicant's interest in bringing proceedings must be assessed in the light of the specific circumstances, taking account, in particular, of the consequences of the alleged unlawfulness and of the nature of the damage claimed to have been sustained (judgment of 28 May 2013, *Abdulrahim* v *Council and Commission*, C-239/12 P, EU:C:2013:331, paragraph 65).

42 In the present case, in paragraph 30 of the order under appeal, the General Court found that, in so far as Igpour's action is brought against a refusal to grant access to detailed opinions issued on the basis of Directive 98/34 concerning draft legislation notified by a Member State on the basis of that directive and that the Commission justified its refusal to disclose those opinions by the need to protect the purpose of the pending infringement proceedings, it is doubtful that such an atypical situation would arise in the future.

43 It is true that the Commission based its refusal to grant access to the requested documents on the basis of the third indent of Article 4(2) of Regulation No 1049/2001 and in particular on the alleged existence of an inextricable link between the detailed opinions and the infringement proceedings in question against the Republic of Poland, and therefore on a general presumption of confidentiality applicable to documents relating to the pending infringement proceedings.

44 Thus, as Igpour maintains, it is conceivable that, in order to refuse access to any document intrinsically linked to pending infringement proceedings, the Commission may, in the future, base its reasoning on that general presumption of non-disclosure.

45 However, the Court of Justice has already recognised that documents relating to pre-litigation stage infringement proceedings, including documents exchanged between the Commission and the Member State concerned in the context of an EU Pilot procedure, enjoy a general presumption of confidentiality (see, to that effect, judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 81 and the case-law cited).

46 Therefore, by basing its interest in bringing proceedings on the argument that the unlawfulness which it claimed is likely to recur in the future, irrespective of the particular circumstances of the case in question, Igpour is in fact disputing that there is a general presumption of confidentiality which has already been confirmed by the Court of Justice.

47 Although an interpretation at such a level of abstraction of 'the unlawfulness liable to recur in the future' was adopted, it has paradoxical consequences, as was observed by the Advocate General in point 73 of his Opinion. In any action concerning access to documents, the applicant's interest in bringing proceedings would automatically continue simply because the institution in question might, in the future, interpret a given legislative provision in the disputed manner.

48 In addition, contrary to what Igpour claims, and as the Advocate General also observed, in essence, in point 115 of his Opinion, in the present case, there is no particular reason to think that Igpour will be 'particularly vulnerable to such implementations of that presumption in the future'.

49 The circumstances of the present case are different from those of the case giving rise to the judgment of 4 September 2018, *ClientEarth* v *Commission* (C-57/16 P, EU:C:2018:660). In that case, first, the request for access concerned documents linked to the legislative process of the European Union in environmental matters. Secondly, the Court acknowledged in that case the existence of the applicant's interest in continuing the proceedings despite the disclosure of the documents requested, on the ground that the appeal sought to have a judgment set aside, which had for the first time recognised the application of a general presumption of confidentiality to a certain category of documents on that legal basis. The use of such a presumption, the lawfulness of which was disputed, might therefore have actually recurred in the future, irrespective of the particular circumstances of that case, while in the present case the unlawfulness claimed concerns the implementation of a presumption already accepted by the Court of Justice in particular circumstances, so that such unlawfulness could not recur outside those circumstances.

50 Consequently, it must be held that the General Court was correct in carrying out a specific assessment of the particular circumstances in which the alleged unlawfulness occurred and in considering that such circumstances, in view of their particular characteristics, were not likely to recur, so that the unlawfulness was not likely to recur outside of the particular circumstances of the present case.

51 Furthermore, with regard to the arguments set out in paragraphs 28 to 31 above, it must be held that, in those paragraphs, Igpour alleges, in essence, that the General Court made the same error in law as the one already analysed in paragraphs 42 to 50 above. Those arguments therefore must be rejected on the same grounds.

52 It follows from all the foregoing that the first ground of appeal must be rejected as unfounded.

Second ground of appeal

Arguments of the parties

53 By its second ground of appeal, Igpour maintains that the General Court erred in law when it found, in essence, in paragraph 33 of the order under appeal that closing the case without ruling on the substance would not allow the Commission to escape effective judicial review. The Commission could still decide to give access to the documents requested where it realises that it is at risk of losing in a dispute.

54 Igpour claims that the General Court's reasoning that 'to accept [the] argument that [closing proceedings without judgment allows the Commission to escape effective judicial review] would be to consider that, without the need to establish the specific circumstances of each particular case, any applicant whose request for access to documents was initially refused could seek a ruling against

the institution concerned by the request, even though its request had been granted after bringing an action before the EU Courts' is based on a misreading of that argument.

55 In the first place, the interest in pursuing the action exists in the present case because, first, the refusal to grant access to the documents at issue is based on an alleged 'inextricable link' between the documents requested and the infringement proceedings, and secondly, the infringement proceedings are closed, and the documents were supplied after the closure of both the written phase and the oral phase of the proceedings. Where those conditions have been met, it is necessary for the EU institutions to rule on the action. Given that it is solely for the Commission to decide whether and when to close the infringement proceedings, it might take such a decision if, after the hearing and the end of the oral procedure, it perceives a risk that it will lose the dispute. Thus, it might decide to avoid an outcome that would have been unfavourable to it. In practice, if closing infringement proceedings leads to there being no need for the General Court to adjudicate, such an approach could allow the Commission to postpone access to any document for a few years without facing judicial review of such a decision.

56 In the second place, the reasoning followed by the General Court is plainly inconsistent with the case-law of the Court of Justice set out in paragraphs 78 and 79 of its judgment of 28 May 2013, *Abdulrahim* v *Council and Commission* (C-239/12 P, EU:C:2013:331), according to which the interest in pursuing the action after a contested act ceased to produce legal effects may be justified by the fact that recognition of the alleged illegality might procure an advantage for the applicant.

57 In the third place, Igpour claims that the General Court did not actually challenge the substance of its assertion that the Commission evaded any judicial review and that that assertion is sufficient to establish that Igpour has an interest in continuing its action. The right of access stems directly from Article 155 TFEU and Article 42 of the Charter of Fundamental Rights of the European Union. Thus, it is of particular importance to ensure effective judicial control of the Commission's decisions refusing to grant access to documents.

58 The Commission contends that that ground of appeal is unfounded.

Findings of the Court

59 By its second ground of appeal, Igpour maintains, in essence, that the fact that the General Court closed the case without ruling on the substance allows the Commission to escape effective judicial control and that, since the General Court held that that was not the case, paragraph 33 of the order under appeal is vitiated by an error of law.

60 In that respect, it should be observed that it is apparent from the case-law cited above in paragraph 39 that, although in certain circumstances an applicant retains its interest in bringing an annulment action, even where the act in respect of which annulment is sought ceased producing effects after its action was brought, that is not the case in every instance.

61 It is apparent from the analysis of the first ground of the appeal that Igpour did not manage to establish that the circumstances of the present case were such that, in the light of that case-law, the General Court ought to have found that its interest in bringing proceedings continued, notwithstanding the fact that, during the proceedings before the General Court, the Commission had granted access to the two documents covered by the decisions at issue.

62 Furthermore, since Igpour, by that ground, claims in essence that, by the order under appeal, the General Court deprived it of any effective judicial protection, in breach of Article 47 of the

Charter of Fundamental Rights, it should be borne in mind that, in accordance with settled case-law of the Court of Justice, that provision is not intended to change the system of judicial review laid down by the Treaties, particularly the rules relating to the admissibility of direct actions brought before the Courts of the European Union (judgments of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 97, and of 25 October 2017, *Romania* v *Commission*, C-599/15 P, EU:C:2017:801, paragraph 68 and the case-law cited) and, therefore, it similarly does not change the conditions for assessing the interest in bringing proceedings.

63 Therefore the General Court did not err in law in paragraph 33 of the order under appeal when it held that to admit Igpour's argument would be to consider that, without the need to establish the specific circumstances of each particular case, an applicant whose request for access to documents was initially refused could seek a ruling against the institution concerned by the request in question, even though its request had been granted after it brought an action before the EU Courts.

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

Third and fourth grounds of appeal

Arguments of the parties

65 By its third ground of appeal, Igpour maintains, in essence, that the General Court erred in law when it found in paragraph 34 of the order under appeal that the fact that, in any action for compensation brought against the Commission, it would have to establish the unlawfulness of the decisions at issue would not constitute an unjustifiable burden, given that it could then rely on the arguments already submitted in the annulment action.

66 According to Igpour, that reasoning is erroneous in two respects. First, the annulment of an act by the EU courts binds the national or EU courts hearing an action for compensation or may constitute the basis for out-of-court negotiations with the EU institutions in order to make good the damage sustained. In other words, the binding nature of a judgment of the General Court procures an advantage for the applicant. Secondly, in view of the stage of the proceedings before the General Court when the order under appeal was made, that is to say, after the close of the written and oral procedures, the burden placed on Igpour, if all that had to be repeated in a future action for compensation, would by every account be unjustified.

67 By the fourth ground of appeal, Igpour maintains, in essence, that the General Court erred in law when, in paragraph 34 of the order under appeal, it rejected its argument that the annulment of the decisions at issue could procure an advantage for Igpour in its discussions with the Commission and in the course of any action for compensation brought against the Commission, simply because it had not stipulated whether it 'truly' intended to bring such an action and because it had not provided precise, specific and verifiable evidence of the effects of the decisions at issue. In addition, Igpour criticises the General Court for ordering it to bear its own costs which amounted to a specific and certain loss caused by the decisions at issue.

68 According to Igpour, contrary to what the General Court held, it is not under any obligation to convince the General Court that it 'truly' intends to bring an action for compensation. It is its interest in, and not the possibility of, bringing an action for compensation which must not be purely hypothetical. It is sufficient for it to provide a statement of the reasons why the decisions at issue caused it to sustain material damage. It is not necessary to make the claims of fact that are the basis

of that statement specific or verifiable, because it is not the task of the General Court to verify them. Such a requirement would thus not serve any purpose. It would also conflate the conditions of an annulment action and an action for compensation, complicating them unnecessarily.

69 In any event, there is a causal link between, on the one hand, the decisions at issue and, on the other, the costs of an annulment action. In addition, although the General Court's decision on costs is taken into consideration, those costs became irrecoverable after the order under appeal was made. Igpour maintains that, by using that argument, it does not challenge the General Court's decision on costs, but solely its decision as to the need to adjudicate in so far as it did not take into account the fact that the costs which it incurred constitute specific damage caused by the decisions at issue.

70 The Commission contends that both those grounds are unfounded.

Findings of the Court

71 By both those grounds of appeal, which should be examined together, Igpour maintains, in essence, that the General Court erred in law when it found that the fact that, in any action for compensation, it would have to repeat the arguments already submitted in the annulment action would not constitute an unjustifiable burden, such as to establish its interest in bringing proceedings in the present case. In addition, it criticises the General Court for taking the view that it had not specified whether it 'truly' intended to bring such an action or provided precise, specific and verifiable evidence concerning the effects of the decisions at issue, and for having inferred from that that the possibility of such an action was not of such a nature as to establish that its interest in bringing proceedings continued.

72 In that regard, it should be recalled that it is for the applicant to prove its interest in bringing proceedings, which is an essential and fundamental prerequisite for any legal proceedings (judgment of 7 November 2018, *BPC Lux 2 and Others* v *Commission*, C-544/17 P, EU:C:2018:880, paragraph 33).

73 Although it is apparent from the case-law of the Court of Justice that the possibility of an action for compensation suffices to justify an interest in bringing proceedings, that is nevertheless conditional on that action not being hypothetical (see, to that effect, judgment of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraphs 69 and 79 and the case-law cited, and of 7 November 2018, BPC *Lux 2 and Others* v *Commission*, C-544/17 P, EU:C:2018:880, paragraph 43). In that respect, as was observed in paragraph 41 above, the continuation of such an interest in bringing proceedings must be assessed in the light of the specific circumstances, taking account, in particular, of the consequences of the alleged unlawfulness and of the nature of the damage claimed to have been sustained.

74 It follows therefore that Igpour could not substantiate an interest in bringing proceedings by relying merely on the possibility of bringing an action for compensation for the damage in the future, without adducing specific evidence concerning the impact of the alleged unlawfulness on its situation and the nature of the damage which it claimed to have suffered and in respect of which such an action would have sought compensation.

75 In its sovereign assessment of the facts and evidence, the General Court found in paragraph 34 of the order under appeal that the appellant had relied on the possibility of bringing such an action for compensation without specifying whether it or its members intended to avail themselves of that possibility, and merely stated, as regards the damage allegedly suffered, that 'actions were dismissed and that the defendants were convicted', without, however, providing the

slightest precise, specific and verifiable evidence. Moreover, it did not in any way claim in that respect that the General Court distorted the facts or the arguments which the appellant submitted to it.

76 In those circumstances, the General Court did not err in law when it held, in essence, that the conditions arising from the case-law referred to in paragraph 73 above, permitting a finding that the possibility of an action for compensation is of such a nature as to justify bringing annulment proceedings, were not satisfied.

77 Moreover, with regard to the argument that Igpour sustained specific damage as a result of the fact that the General Court ordered it to bear its own costs, it should be pointed out that such a situation clearly cannot, in itself, make it possible to establish a continued interest in bringing annulment proceedings, without depriving that condition of all effect.

78 As for the line of argument that the General Court erred in law when it found in paragraph 34 of the order under appeal that the fact that, in any action for compensation, Igpour would have to repeat the arguments already submitted in the annulment action would not constitute an unjustifiable burden for establishing its interest in bringing proceedings in the present case, it should be pointed out that upholding such a line of argument would mean that the General Court would be required to examine the action for compensation, even though it is purely hypothetical. However, as is apparent from paragraphs 74 to 76 above, the General Court rightly held that, in the present case, such a plea is not sufficient to establish a continued interest in bringing proceedings, in the absence of any concrete evidence to that effect advanced by the applicant at first instance.

79 Accordingly, the third and fourth grounds of appeal must be rejected as unfounded.

Fifth ground of appeal

Arguments of the parties

80 By its fifth ground of appeal, Igpour maintains that the General Court erred in law when it held, in paragraph 34 of the order under appeal, that Igpour had no interest in pursuing the action, even though annulment of the contested decisions was necessary to make good the non-material harm which it suffered as a professional organisation, and that there are no other means of making good such harm.

81 The Commission contends that that ground is inadmissible.

Findings of the Court

82 It should be borne in mind that, under Article 170(1) of the Rules of Procedure of the Court of Justice, the subject matter of the proceedings before the General Court may not be changed in the appeal. Thus, the jurisdiction of the Court of Justice in an appeal is confined to a review of the findings of law on the pleas argued before the General Court. Accordingly, a party cannot put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court since that would effectively allow that party to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court (see, to that effect, judgment of 29 September 2011, *Elf Aquitaine* v *Commission,* C-521/09 P, EU:C:2011:620, paragraph 35 and the case-law cited).

83 In the present case, it must be pointed out that Igpour did not submit before the General Court that it retained its interest in obtaining an annulment of the decisions at issue on the ground that that annulment would have constituted compensation for the alleged damage it sustained arising from the alleged unlawfulness of those decisions, but relies on this for the first time in its appeal.

84 It follows that the fifth ground of appeal must be rejected as inadmissible.

85 Accordingly, the appeal must be dismissed in its entirety.

Costs

86 In accordance with Article 138(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

87 Since Igpour has been unsuccessful and the Commission has applied for costs, Igpour must be ordered to bear its own costs and to pay those incurred by the Commission.

88 Pursuant to Article 140 of the Rules of Procedure, the Kingdom of Sweden and the Republic of Poland are to bear their own costs.

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

1. **Dismisses the appeal;**

2. **Orders Izba Gospodarcza Producentów i Operatorów Urządzeń Rozrywkowych to bear its own costs and to pay those incurred by the European Commission;**

3. **Orders the Kingdom of Sweden and the Republic of Poland to bear their own costs.**

Regan Jarukaitis Juhász
Ilešič Lycourgos

Delivered in open court in Luxembourg on 30 April 2020.

A. Calot Escobar
Registrar

E. Regan
President of the Fifth Chamber

* Language of the case: English.