ECLI:EU:T:2015:848

JUDGMENT OF THE GENERAL COURT (Second Chamber)

13 November 2015 (*)

(Access to documents — Regulation (EC) No 1049/2001 — Draft impact assessment report, impact assessment report and opinion of the Impact Assessment Board — Refusal to grant access — Exception relating to the protection of the decision-making process — Duty to state reasons — Obligation to carry out a specific and individual examination — Overriding public interest)

In Joined Cases T-424/14 and T-425/14,

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

applicant,

v

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

defendant,

APPLICATIONS for annulment of (i) the Commission's decision of 1 April 2014 refusing to grant access to an Impact Assessment report for a proposed binding instrument setting a strategic framework for risk-based inspection and surveillance in relation to EU environmental legislation and an opinion of the Impact Assessment Board and (ii) the Commission's decision of 3 April 2014 refusing to grant access to a draft Impact Assessment report relating to access to justice in environmental matters at Member State level in the field of EU environmental policy and an opinion of the Impact Assessment Board,

THE GENERAL COURT (Second Chamber),

composed of M.E. Martins Ribeiro, President, S. Gervasoni (Rapporteur) and L. Madise, Judges,

Registrar: L. Grzegorczyk, Administrator,

having regard to the written procedure and further to the hearing on 16 June 2015,

gives the following

Judgment

Background to the disputes

1 The applicant, ClientEarth, is a non-profit organisation whose aim is the protection of the environment.

2 On 20 January 2014 the applicant submitted to the European Commission two requests for access to documents, pursuant to 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). The first of those requests concerned 'the impact assessment carried out by the Commission on the implementation of the access to justice pillar of the Aarhus Convention', while the second concerned 'the impact assessment carried out by the Commission on the revision of the EU legal framework on environmental inspections and surveillance at national and EU level'.

3 By letter of 13 February 2014, the Commission refused to grant the second request mentioned in paragraph 2 above. It stated, on that occasion, that that request concerned an 'Impact Assessment [r]eport for a proposed binding instrument setting a strategic framework for risk-based inspections and surveillance for EU environment legislation' and the opinion of the Impact Assessment Board ('the Board') on that report (collectively, 'the documents requested in Case T-425/14'). That refusal was based on the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001.

4 By letter of 17 February 2014, the Commission refused to grant the first request mentioned in paragraph 2 above. It stated, on that occasion, that that request concerned a 'draft Impact Assessment report on Access to justice in environmental matters at Member State level in the field of EU environment policy' and the Board's opinion on that draft report (collectively, 'the documents requested in Case T-424/14' and together with the documents requested in Case T-425/14 hereinafter referred to as 'the documents requested'). That refusal was based on the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001.

5 On 4 March 2014 the applicant, pursuant to Article 7(2) of Regulation No 1049/2001, lodged two confirmatory applications with the Commission.

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

7 By letter of 1 April 2014 ('the decision of 1 April 2014'), the Commission confirmed its refusal to grant access to the documents requested in Case T-425/14 on the basis of the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001.

8 By letter of 3 April 2014 ('the decision of 3 April 2014' and together with the decision of 1 April 2014 hereinafter referred to as 'the contested decisions'), the Commission confirmed its refusal to grant access to the documents requested in Case T-424/14 on the basis of the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001.

9 In the first place, the Commission stated in the contested decisions at the outset that, in the context of discussions and negotiations concerning the potential adoption by that institution of legislative initiatives relating to inspections and surveillance in respect of environmental matters (the decision of 1 April 2014) and access to justice in such matters (the decision of 3 April 2014), it had launched impact assessments which were still ongoing. The Commission explained in that regard that the impact assessments were intended to help with the preparation of such initiatives and that the policy choices which appear in a legislative proposal are supported by the content of an impact assessment.

10 Next, according to the Commission, the disclosure, at that stage, of the documents requested would seriously undermine its ongoing decision-making processes given that, in essence, such disclosure would restrict its room for manoeuvre and reduce its ability to reach a compromise. In addition, such a disclosure might create external pressures which could hinder those delicate decision-making processes, during which an atmosphere of trust ought to prevail. The Commission also made reference to Article 17(1) TEU and to the third subparagraph of Article 17(3) TEU.

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

12 In the decision of 3 April 2014, the Commission focused on the sensitivity of the issue of access to justice in environmental matters, the possible differences of opinion between Member States, and the fact that 10 years had elapsed since its proposal for a directive of the European Parliament and of the Council on access to justice in environmental matters (OJ 2004 C 96, p. 22; 'the 2003 proposal for a directive').

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

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

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

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

Procedure and forms of order sought

17 By applications lodged at the Registry of the Court on 11 June 2014, the applicant brought the present actions.

18 By order of the President of the Second Chamber of the General Court of 27 April 2015, Cases T-424/14 and T-425/14 were joined for the purposes of the oral procedure and the judgment, in accordance with Article 50 of the Court's Rules of Procedure of 2 May 1991.

19 Acting upon a report of the Judge-Rapporteur, the General Court (Second Chamber) decided to open the oral procedure and, in the context of the measures of organisation of procedure provided for in Article 64 of its Rules of Procedure of 2 May 1991, asked the Commission to lodge a document in Case T-424/14 and put written questions to the parties, asking them to answer those questions at the hearing.

20 The hearing, which was initially scheduled for 9 June 2015, was postponed until 16 June 2015 at the applicant's request.

21 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 16 June 2015.

22 In Case T-424/14, the applicant claims that the Court should:

– annul the decision of 3 April 2014;

– order the Commission to pay the costs.

23 In Case T-424/14, the Commission contends that the Court should:

– dismiss the action as being unfounded;

– order the applicant to pay the costs.

24 In Case T-425/14, the applicant claims that the Court should:

– annul the decision of 1 April 2014;

– order the Commission to pay the costs.

25 In Case T-425/14, the Commission contends that the Court should:

– dismiss the action as being unfounded;

– order the applicant to pay the costs.

Law

26 In support of its actions, the applicant raises a single plea in law which is divided, in essence, into two parts, the first alleging infringement of the first subparagraph of Article 4(3) of Regulation No 1049/2001 and the second alleging a breach of the duty to state reasons.

27 It is appropriate to begin by examining the second part of the single plea in law.

Second part of the single plea in law: Breach of the duty to state reasons

28 The applicant accuses the Commission of having disregarded its duty to provide a statement of reasons for the contested decisions. First, the Commission failed to explain why the first subparagraph of Article 4(3) of Regulation No 1049/2001 was applicable to impact assessment reports and to opinions of the Board. Next, the Commission did not provide specific reasons for concluding that the disclosure of the documents requested

would undermine the decision-making processes within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001. Lastly, the Commission also failed to state, to the requisite legal standard, the reasons for the alleged lack of overriding public interest in the disclosure of the documents requested.

29 The Commission contends that those arguments are unfounded.

30 It is settled case-law that the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons for a measure meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgments of 6 March 2003 in *Interporc* v *Commission*, C-41/00 P, ECR, EU:C:2003:125, paragraph 55; 1 February 2007 in *Sison* v *Council*, C-266/05 P, ECR, EU:C:2007:75, paragraph 80; 10 July 2008 in *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, ECR, EU:C:2008:392, paragraph 166; and 24 May 2011 in *NLG* v *Commission*, T-109/05 and T-444/05, ECR, EU:T:2011:235, paragraph 81).

31 As regards a request for access to documents, the reasons for any decision adopted by an institution on the basis of the exceptions set out in Article 4 of Regulation No 1049/2001 must be stated. If an institution decides to refuse access to a document which it has been asked to disclose, it must explain, first, how access to that document could specifically and actually undermine the interest protected by an exception laid down in Article 4 of Regulation No 1049/2001 and relied on by that institution and, second, in the situations referred to in Article 4(2) and (3) of that regulation, whether there is an overriding public interest that might nevertheless justify disclosure of the document concerned (judgments of 11 March 2009 in *Borax Europe* v *Commission*, T-121/05, EU:T:2009:64, paragraph 37, and 12 September 2013 in *Besselink* v *Council*, T-331/11, EU:T:2013:419, paragraph 96; see also, to that effect, judgment of 1 July 2008 in *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, ECR, EU:C:2008:374, paragraphs 48 and 49).

32 It is therefore for the institution which has refused access to a document to provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine (judgment of 26 April 2005 in *Sison* v *Council*, T-110/03, T-150/03 and T-405/03, ECR, EU:T:2005:143, paragraph 61; judgment in *NLG* v *Commission*, cited in paragraph 30 above, EU:T:2011:235, paragraph 83; and judgment in *Besselink* v *Council*, cited in paragraph 31 above, EU:T:2013:419, paragraph 99; see also, to that effect and by analogy, judgment in *Interporc* v *Commission*, cited in paragraph 30 above, EU:C:2003:125, paragraph 56 and the case-law cited).

33 In the present cases, it is apparent from the grounds of the contested decisions, as summarised in paragraphs 9 to 16 above, that the Commission based its refusals to grant access on the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001. First, the Commission considered, in essence, that the disclosure at that stage of the documents requested would seriously undermine the decision-making processes connected with the adoption of legislative proposals regarding inspections and surveillance in respect of environmental matters (the decision of 1 April 2014) and access to justice in environmental matters (the decision of 3 April 2014). In that regard, it emphasised (i) the aim and the role of an impact assessment in the context of such a process and the need to protect, in essence, both its 'thinking space' and its room for negotiation and (ii) the fact that the discussions relating to those two areas had been going on for some time. Second, the Commission excluded the possibility that there might be an overriding public interest in disclosure on the ground, in essence, that it was not in a position to determine how disclosure would help persons living in the European Union indirectly to influence the environment in which they were living, explaining that access to justice in environmental matters was already possible before national courts, that the ongoing decision-making processes merely sought to improve that access and that, with a view to taking the viewpoints of interested parties into account, a public consultation had been held in 2013. Instead, according to the Commission, the public interest would be better served by the possibility of completing the decision-making processes in question without any external pressure.

34 Thus, first of all, the contested decisions unambiguously state that, according to the Commission, the documents requested fell within the scope of the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001, given that, in essence, they were connected with the decision-making processes leading to the adoption of the legislative proposals mentioned above and their disclosure would seriously undermine those processes.

35 In that regard, it should be added that the Commission was not required to provide specific reasons regarding the applicability of the first subparagraph of Article 4(3) of Regulation No 1049/2001 to the documents requested. In particular, given that the applicant — as it conceded at the hearing — in no way disputed the applicability of that provision to the documents requested in its confirmatory applications, it must be held that, just as, according to the case-law, Article 296 TFEU cannot be interpreted as requiring the institution concerned to provide a detailed answer to the observations made by the applicant during the administrative proceedings (see judgment of 15 November 2012 in *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, C-539/10 P and C-550/10 P, ECR, EU:C:2012:711, paragraph 141 and the case-law cited), Article 4(3) cannot be interpreted as meaning that the Commission was obliged to exclude, as a precaution, in the grounds of the contested decisions, all possible arguments which might, at a later stage, be put forward to support objections to its analysis. Therefore, the Commission was entitled, in the contested decisions, to confine itself to setting out the positive reasons why it considered that the first subparagraph of Article 4(3) of Regulation No 1049/2001 was applicable, and was not required to reject or to criticise other possible interpretations of that provision (see, to that effect and by analogy, judgment of 10 May 1960 in *Barbara*

and Others v *High Authority*, 3/58 to 18/58, 25/58 and 26/58, ECR, EU:C:1960:18, p. 411).

36 Next, it should be stated that it is apparent from the grounds of the contested decisions that, in line with the case-law cited in paragraphs 31 and 32 above, the Commission provided a clear and comprehensible statement of the reasons why it considered that access to the documents requested would undermine the interest protected by the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001 and that there was no overriding public interest that might nevertheless justify their disclosure.

37 Last, having regard to the case-law cited in paragraph 30 above, it should be added that, as can be clearly seen from the applicant's written pleadings and, more specifically, the arguments which it sets out in the first part of the single plea in law, the statement of reasons in the contested decisions allowed the applicant to understand the reasons why it had been refused access and to prepare its actions. In addition, that statement of reasons is also sufficient to enable the Court to exercise its power of review.

38 In the light of the foregoing, it must be concluded that the contested decisions contain an adequate statement of reasons.

39 Accordingly, the second part of the single plea in law must be rejected as being unfounded.

First part of the single plea in law: infringement of the first subparagraph of Article 4(3) of Regulation No 1049/2001

40 In support of the first part of the single plea in law, alleging infringement of the first subparagraph of Article 4(3) of Regulation No 1049/2001, the applicant initially raised three complaints, the first of which, in essence, alleged, primarily, that the exception laid down in that provision was not applicable to the documents requested, the second of which, in essence, alleged, in the alternative, that there was no risk that the decision-making processes would be seriously undermined, and the third of which alleged, in essence, in the further alternative, that there was an overriding public interest in the disclosure of the documents requested.

41 At the hearing, in response to a question put by the Court, the applicant withdrew the first complaint raised in its written pleadings, that being recorded in the minutes of the hearing.

42 That being the case, it is necessary to analyse in turn the second and third complaints raised by the applicant.

Second complaint: No risk that the decision-making processes would be seriously undermined

43 The applicant submits, in essence, that the contested decisions are vitiated by an error of law in so far as the Commission wrongly concluded that there was a risk that the decision-making processes would be seriously undermined within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001.

44 More specifically, first, the applicant states that the documents requested, which were drawn up by the Commission in its legislative capacity and play an important role in the legislative process, should, as far as possible, be more widely and directly accessible.

45 Second, the applicant submits that the main features of an impact assessment are (i) transparency and (ii) the consultation of interested parties.

46 Third, the applicant considers that the disclosure of the documents requested clearly would not undermine the decision-making processes but is, on the contrary, likely to further such processes. In that regard, first of all, the reasons set out in the contested decisions are merely general and hypothetical. Next, the Commission's arguments that disclosure would restrict its room for manoeuvre and reduce its ability to reach compromises are irrelevant, and its room for manoeuvre in drawing up an impact assessment report is, in any event, less than in the decision-making process itself. Furthermore, besides the fact that public opinion is capable of understanding that a proposal may be amended, the Commission has not shown that disclosure was actually likely to generate public pressure which would be such as to derail the legislative processes. Moreover, the documents requested, which contain information of an essentially factual nature, cannot be classified as sensitive simply because they concern a politically contentious issue. In that regard, the applicant adds in its replies that, in any event, if the documents requested contained sensitive information, partial access could be granted on the basis of Article 4(6) of Regulation No 1049/2001. In Case T-424/14, the political sensitivity of the issue and the possible differences of opinion between Member States have no bearing on a strict interpretation of the exception; in Case T-425/14, the Commission was wrong to maintain that external influencing factors would affect the quality of control over the Member States. Last, the mere fact that the decision-making processes are at a very early stage is insufficient.

47 Fourth, in response to the Commission's arguments, in its replies the applicant opposes recognition of a general presumption, on the ground that such a presumption has no basis in EU law and runs completely counter to the principle of transparency. It also states that, in requesting access to the documents in question, it neither sought to undermine the Commission's decision-making processes nor pursued a private interest, and submits that the interests pursued by its requests for access were recognised by a decision of the European Ombudsman.

48 The Commission contends, in essence, that it is necessary to recognise that there is a general presumption pursuant to which access to the documents requested could be refused in the present cases and that, in any event, it did not err in concluding that there was a risk that the decision-making processes could be seriously undermined.

49 As a preliminary point, it must, first, be noted that, in the contested decisions, the Commission based its refusals to grant access on the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001. Under that provision, 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 is to 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.

50 Secondly, the documents requested fall within the scope of the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001, as is, moreover, no longer contested by the applicant (see paragraph 41 above). Those documents were drawn up in the context of two impact assessments conducted as part of two of the Commission's decision-making processes relating to policy initiatives to be undertaken in the areas of access to justice in environmental matters (Case T-424/14) and inspections and surveillance in respect of such matters (Case T-425/14). It is common ground that those decision-making processes were still ongoing when the Commission adopted the contested decisions.

51 Thirdly, it is apparent from the contested decisions that the Commission held that the disclosure of the documents requested might seriously undermine the ongoing decision-making processes, which were at a very early and delicate stage. That finding is based on a number of grounds. First, the Commission considered that such disclosure would restrict its room for manoeuvre and reduce its ability to help to seek a compromise. Second, the Commission stated that there was a need to preserve an atmosphere of trust during discussion and negotiation processes concerning the development of policy proposals. According to the Commission, the disclosure of the documents requested would give rise to a risk of external pressures liable to affect those delicate ongoing processes. In that regard, the Commission also emphasised the fact that it was required, under Article 17(1) and (3) TEU, to promote the general interest and to carry out its responsibilities in a completely independent manner. Third, in the decision of 1 April 2014 (Case T-425/14) the Commission focused on the fact that inspections and surveillance in respect of environmental matters were a key element in the implementation of public policy, that no external factors should influence the discussion as such influence would affect the quality of control over the Member States, and that the institutions had been making their views on that issue known since 2001. In the decision of 3 April 2014 (Case T-424/14) the Commission emphasised the political sensitivity of the issue of access to justice in environmental matters, the possible differences of opinion between Member States, and the fact that 10 years had elapsed since the 2003 proposal for a directive.

52 It thus appears, from reading the reasons stated in the contested decisions, that the Commission relied on general considerations which are based, in essence, on preserving its 'thinking space', its room for manoeuvre, its independence and the atmosphere of trust during discussions, on the one hand, and on the risk that external pressures might affect the progress of ongoing discussions and negotiations, on the other. The Commission also relied on more specific considerations relating to the two ongoing decision-making

processes: in particular, the fact that those processes were at a very early and delicate stage, the fact that the issues under discussion had been the subject of deliberation for some time, and the significance of those issues, as well as, in the decision of 3 April 2014 (Case T-424/14), the sensitivity of the issue of access to justice in environmental matters and the existence of possible differences of opinion between Member States. However, there is no indication in the contested decisions that the Commission carried out a specific and individual examination of the documents requested.

53 The applicant claims that the reason stated in the contested decisions are not well founded given that, in essence, they are merely general and hypothetical and are not such as to establish that there is a risk that the Commission's decision-making processes would be seriously undermined. The Commission, by contrast, asks the Court to recognise the existence of a general presumption pursuant to which it was entitled to refuse, in the contested decisions, access to the documents requested.

54 That being the case, it is necessary to examine the arguments whereby the Commission seeks to establish the existence of a general presumption pursuant to which that institution could refuse access to documents which, like the documents requested, relate to an impact assessment connected with an ongoing decision-making process, before assessing the lawfulness of the contested decisions.

– Whether there is a general presumption that access not be granted to the documents requested

55 It should be borne in mind that, in accordance with recital 1 thereof, Regulation No 1049/2001 reflects the intention expressed in the second paragraph of Article 1 TEU of marking a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. As is stated in recital 2 in the preamble to that regulation, the right of public access to documents of the institutions is related to the democratic nature of those institutions (judgment in *Sweden and Turco* v *Council*, cited in paragraph 31 above, EU:C:2008:374, paragraph 34; judgments of 21 September 2010 in *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, ECR, EU:C:2010:541, paragraph 68; 21 July 2011 in *Sweden* v *MyTravel and Commission*, C-506/08 P, ECR, EU:C:2011:496, paragraph 72; 17 October 2013 in *Council* v *Access Info Europe*, C-280/11 P, ECR, EU:C:2013:671, paragraph 27; and 27 February 2014 in *Commission* v *EnBW*, C-365/12 P, ECR, EU:C:2014:112, paragraph 61).

56 To that end, Regulation No 1049/2001 is designed, as is apparent from recital 4 thereof and from Article 1 thereof, to give the fullest possible effect to the right of public access to documents of the institutions (judgment in *Sison* v *Council*, cited in paragraph 30 above, EU:C:2007:75, paragraph 61; judgment of 18 December 2007 in *Sweden* v *Commission*, C-64/05 P, ECR, EU:C:2007:802, paragraph 53; judgment in *Sweden and Others* v *API and Commission*, cited in paragraph 55 above, EU:C:2010:541, paragraph 69; and judgment in *Council* v *Access Info Europe*, cited in paragraph 55 above, EU:C:2013:671, paragraph 28).

57 That right is none the less subject to certain limitations based on grounds of public or private interest (judgment in *Sison* v *Council*, cited in paragraph 30 above, EU:C:2007:75, paragraph 62). More specifically, and in accordance with recital 11 thereof, Article 4 of Regulation No 1049/2001 provides for a number of exceptions enabling the institutions to refuse access to a document where its disclosure would undermine one of the interests protected by that provision (judgments in *Sweden and Others* v *API and Commission*, cited in paragraph 55 above, EU:C:2010:541, paragraphs 70 and 71; *Sweden* v *MyTravel and Commission*, cited in paragraph 55 above, EU:C:2011:496, paragraph 74; and *Council* v *Access Info Europe*, cited in paragraph 55 above, EU:C:2013:671, paragraph 29).

58 As such exceptions derogate from the principle of the widest possible public access to documents, they must be interpreted and applied strictly (see judgments in *Sison* v *Council*, cited in paragraph 30 above, EU:C:2007:75, paragraph 63 and the case-law cited; *Sweden and Turco* v *Council*, cited in paragraph 31 above, EU:C:2008:374, paragraph 36 and the case-law cited; and *Council* v *Access Info Europe*, cited in paragraph 55 above, EU:C:2013:671, paragraph 30 and the case-law cited).

59 In accordance with the principle that derogations are to be interpreted strictly, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by the exception — among those laid down in Article 4 of Regulation No 1049/2001 — upon which it is relying. Moreover, the risk of that interest being undermined must be reasonably foreseeable and not purely hypothetical (see judgments in *Sweden* v *MyTravel and Commission*, cited in paragraph 55 above, EU:C:2011:496, paragraph 76 and the case-law cited, and *Council* v *Access Info Europe*, cited in paragraph 55 above, EU:C:2013:671, paragraph 31). The mere fact that a document concerns an interest protected by an exception is not of itself sufficient to justify application of that exception (judgments of 13 April 2005 in *Verein für Konsumenteninformation* v *Commission*, T-2/03, ECR, EU:T:2005:125, paragraph 69, and 7 June 2011 in *Toland* v *Parliament*, T-471/08, ECR, EU:T:2011:252, paragraph 29; see also, to that effect, judgment in *Commission* v *EnBW*, cited in paragraph 55 above, EU:C:2014:112, paragraph 64).

60 Therefore, the application of the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001 requires it to be established that access to the document in question, drawn up by the institution for its internal use, was likely specifically and actually to undermine the protection of the institution's decision-making process, and that the risk of that interest being undermined was reasonably foreseeable and not purely hypothetical (judgment in *Toland* v *Parliament*, cited in paragraph 59 above, EU:T:2011:252, paragraph 70).

61 In addition, in order to be covered by the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001, the decision-making process has to be 'seriously' undermined. That is the case, in particular, where the disclosure of the documents in question has a substantial impact on the decision-making process. The

assessment of seriousness depends on all the circumstances of the case including, inter alia, the negative effects on the decision-making process relied on by the institution as regards disclosure of the documents in question (judgment of 18 December 2008 in *Muñiz* v *Commission*, T-144/05, EU:T:2008:596, paragraph 75; judgment in *Toland* v *Parliament*, cited in paragraph 59 above, EU:T:2011:252, paragraph 71; and judgment of 9 September 2014 in *MasterCard and Others* v *Commission*, T-516/11, EU:T:2014:759, paragraph 62).

62 It should however be stated that that case-law cannot be interpreted as requiring the institutions to submit evidence to establish the existence of such a risk. According to the case-law, it is sufficient in that regard if the contested decision contains tangible elements from which it can be inferred that the risk that the decision-making process would be undermined was, on the date on which that decision was adopted, reasonably foreseeable and not purely hypothetical, showing, in particular, the existence, on that date, of objective reasons on the basis of which it could be reasonably foreseen that the decision-making process would be undermined if the documents requested by the applicant were disclosed (judgment of 11 December 2014 in *Saint-Gobain Glass Deutschland* v *Commission*, T-476/12, currently under appeal, EU:T:2014:1059, paragraph 71; see also, to that effect, judgment in *Toland* v *Parliament*, cited in paragraph 59 above, EU:T:2011:252, paragraphs 78 and 79).

63 However, notwithstanding the case-law cited in particular in paragraph 59 above, the Court of Justice has acknowledged that it is possible for the institution concerned to base its decisions on general presumptions which apply to certain categories of documents, as considerations of a generally similar nature are likely to apply to requests for disclosure relating to documents of the same nature (judgment in *Sweden and Turco* v *Council*, cited in paragraph 31 above, EU:C:2008:374, paragraph 50; see also judgments in *Council* v *Access Info Europe*, cited in paragraph 55 above, EU:C:2013:671, paragraph 72 and the case-law cited, and *Commission* v *EnBW*, cited in paragraph 55 above, EU:C:2014:112, paragraph 65 and the case-law cited).

64 Accordingly, the Court of Justice has acknowledged the existence of general presumptions that access to documents is to be refused in five particular situations, namely in cases concerning: the documents in the administrative file relating to a procedure for reviewing State aid (judgment of 29 June 2010 in *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, ECR, EU:C:2010:376, paragraph 61); the documents exchanged between the Commission and the notifying parties or third parties in the context of merger control proceedings (judgments of 28 June 2012 in *Commission* v *Éditions Odile Jacob*, C-404/10 P, ECR, EU:C:2012:393, paragraph 123, and *Commission* v *Agrofert Holding*, C-477/10 P, ECR, EU:C:2012:394, paragraph 64); the pleadings lodged by an institution in court proceedings (judgment in *Sweden and Others* v *API and Commission*, cited in paragraph 55 above, EU:C:2010:541, paragraph 94); the documents relating to an infringement procedure during the pre-litigation stage of that procedure (judgment of 14 November 2013 in *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, ECR, EU:C:2013:738, paragraph 65), and the documents in a

file relating to a proceeding under Article 101 TFEU (judgment in *Commission* v *EnBW*, cited in paragraph 55 above, EU:C:2014:112, paragraph 93).

65 The General Court has acknowledged the existence of general presumptions in three additional situations, namely in cases concerning: the bids submitted by tenderers in a public procurement procedure in the event that a request for access is made by another tenderer (judgment of 29 January 2013 in *Cosepuri* v *EFSA*, T-339/10 and T-532/10, ECR, EU:T:2013:38, paragraph 101); the documents relating to an 'EU Pilot' procedure (judgment of 25 September 2014 in *Spirlea* v *Commission*, T-306/12, ECR, currently under appeal, EU:T:2014:816, paragraph 63), and the documents sent by the national competition authorities to the Commission pursuant to Article 11(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1) (judgment of 12 May 2015 in *Unión de Almacenistas de Hierros de España* v *Commission*, T-623/13, ECR, EU:T:2015:268, paragraph 64).

66 First, it is apparent from the case-law cited in paragraphs 64 and 65 above that, in order for a general presumption to be validly relied upon against a person requesting access to documents on the basis of Regulation No 1049/2001, it is necessary that the documents requested belong to the same category of documents or be documents of the same nature (see, to that effect, judgments in *Sweden and Turco* v *Council*, cited in paragraph 31 above, EU:C:2008:374, paragraph 50; *Council* v *Access Info Europe*, cited in paragraph 55 above, EU:C:2013:671, paragraph 72 and the case-law cited; and *Commission* v *EnBW*, cited in paragraph 55 above, EU:C:2014:112, paragraph 65 and the case-law cited).

67 Secondly, it follows from that case-law that the application of general presumptions is essentially dictated by the overriding need to ensure that the procedures at issue operate correctly and to guarantee that their objectives are not jeopardised. Accordingly, a general presumption may be recognised on the basis that access to the documents involved in certain procedures is incompatible with the proper conduct of such procedures and the risk that those procedures could be undermined, on the understanding that general presumptions ensure that the integrity of the conduct of the procedure can be preserved by limiting intervention by third parties (see, to that effect, Opinion of Advocate General Wathelet in *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, ECR, EU:C:2013:528, paragraphs 66, 68, 74 and 76, and judgment in *Spirlea* v *Commission*, cited in paragraph 65 above, currently under appeal, EU:T:2014:816, paragraphs 57 and 58). The application of specific rules provided for by a legal measure relating to a procedure conducted before an EU institution for the purposes of which the documents requested were produced is one of the criteria for recognising a general presumption (see, to that effect, judgment of 11 June 2015 in *McCullough* v *Cedefop*, T-496/13, EU:T:2015:374, paragraph 91 and the case-law cited; see also, to that effect, Opinion of Advocate General Cruz Villalón in *Council* v *Access Info Europe*, C-280/11 P, ECR, EU:C:2013:325, paragraph 75).

68 In the present cases, in the first place, it is necessary to determine whether the documents requested either belong to one and the same category of documents or are documents of the same nature.

69 In that regard, first, it should be borne in mind that, as the Commission explained at the hearing without being challenged on that point by the applicant, the documents requested consist of draft Impact Assessment reports, a finalised Impact Assessment report following a positive opinion from the Board which has yet to be forwarded for inter-service consultation and an opinion of the Board concerning those drafts. Those documents are part of the process of completing two impact assessments, the first relating to access to justice in environmental matters and the second relating to a revision of the legal framework of inspections and surveillance in respect of such matters.

70 Next, it should be noted that the Impact Assessment Guidelines adopted by the Commission on 15 January 2009 ('the Guidelines') define impact assessment as follows:

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

...

The [Impact Assessment] work is a key element in the development of Commission proposals, and the College of Commissioners will take the [Impact Assessment] report into account when taking its decisions. The [Impact Assessment] supports and does not replace decision-making — the adoption of a policy proposal is always a political decision that is made only by the College.'

71 Last, it is apparent from the Guidelines that an impact assessment is to be carried out in several stages. Those stages include, inter alia: drawing up a draft Impact Assessment report; submitting that draft to the Board so that it may give its opinion thereon; finalising the report in the light of the Board's recommendations; forwarding that finalised report for inter-service consultation within the Commission (at this stage, the draft report may still be subject to substantial amendments requiring a new opinion from the Board) and, last, forwarding the report to the College of Commissioners.

72 In the light of those factors, it must be held that the documents requested, in so far as they are part of the process of completing two Impact Assessments, belong to one and the same category of documents, with the result that the condition set out in paragraph 66 above is met.

73 That finding is not undermined by the applicant's assertion, at the hearing, that its requests for access were not 'global applications' and were not aimed at a set of documents.

74 It is true that the Court of Justice has observed that the cases giving rise to the judgments cited in paragraph 64 above were all characterised by the fact that the request for access in question covered not just one document but a set of documents and stated that, in that type of situation, the recognition of a general presumption that access was not to be granted enabled the institution concerned to deal with a global application and to reply thereto accordingly (see judgment in *Commission* v *EnBW*, cited in paragraph 55 above, EU:C:2014:112, paragraphs 67 to 69 and the case-law cited).

75 However, it is apparent from the case-law that it is both a qualitative and quantitative criterion, namely, the fact that the documents requested relate to one and the same procedure — in the present cases, two procedures for developing impact assessments — that determines whether a general presumption of refusal of access may apply (see, to that effect and by analogy, judgment in *LPN and Finland* v *Commission*, cited in paragraph 64 above, EU:C:2013:738, paragraph 45 and the case-law cited), and not, as the applicant in essence maintains, a purely quantitative criterion, namely, the lesser or greater number of documents sought by its requests for access (see, to that effect, judgment in *Spirlea* v *Commission*, cited in paragraph 65 above, currently under appeal, EU:T:2014:816, paragraph 75).

76 In the second place, it must be stated that there is no legal provision specifically governing the arrangements for access to the documents requested, as was moreover acknowledged by the Commission in response to a question put by the Court at the hearing.

77 However, in view of the findings set out in paragraph 67 above, it must be observed that — contrary to what the applicant claimed at the hearing — that fact is not in itself sufficient to justify ruling out any possibility of recognising the existence of a general presumption on the basis of which access to the documents requested may be refused.

78 On the contrary, in the present cases, it must be held that such a general presumption is necessary, having regard to the rules governing the preparation and development of policy proposals by the Commission, including, where appropriate, proposals for legislative acts.

79 In that regard, first, it should be noted that, under Article 17(1) to (3) TEU:

‘1. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. ...

2. Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.

3. ...

In carrying out its responsibilities, the Commission shall be completely independent. ...'

80 It should also be borne in mind that, in areas such as EU environmental policy which, under Article 192(1) TFEU and subject to the exceptions established in Article 192(2) TFEU, are covered by the ordinary legislative procedure as defined in Article 289(1) TFEU and Article 294 TFEU, the Commission is to submit, in accordance with Article 294(2) TFEU, a proposal to the European Parliament and the Council of the European Union. It is through that proposal that that legislative procedure begins.

81 The power of legislative initiative accorded to the Commission by those provisions means that it is for that institution to decide whether or not to submit a proposal for a legislative act, except in a situation where it would be obliged under EU law to submit such a proposal. By virtue of that power, if a proposal for a legislative act is submitted, it is also for the Commission, which, in accordance with Article 17(1) TEU, is to promote the general interest of the European Union and take appropriate initiatives to that end, to determine the subject-matter, objective and content of that proposal (see, to that effect, judgment of 14 April 2015 in *Council* v *Commission*, C-409/13, ECR, EU:C:2015:217, paragraph 70).

82 Thus, the Commission, which is to promote the general interest and to be completely independent in carrying out its responsibilities, has been made responsible for discerning the general interest of all the Member States and proposing solutions capable of furthering that general interest (see, to that effect, Opinion of Advocate General Jääskinen in *Council* v *Commission*, C-409/13, ECR, EU:C:2014:2470, paragraph 43).

83 Consequently, when the Commission prepares and develops policy proposals, it must ensure that it acts in a fully independent manner and that its proposals are made exclusively in the general interest.

84 Correspondingly, that institution must be placed in a position to act, at that stage, in a fully independent manner and in the service of the general interest.

85 Secondly, it should be observed that, when preparing and developing policy proposals, the Commission may rely, as in the present cases, on impact assessments drawn up concerning the preparation and development of such proposals.

86 In that regard, first, an impact assessment, which is, according to the Guidelines, 'a key tool to ensure that Commission initiatives and EU legislation are prepared on the basis of transparent, comprehensive and balanced evidence', forms part, as is clear, moreover, from its definition in those Guidelines as set out in paragraph 70 above, of the preparation of policy proposals — including legislative proposals — by the Commission.

87 In particular, an impact assessment enables information to be gathered on the basis of which the Commission will be able to assess, inter alia, the appropriateness, the necessity, the nature and the content of such proposals.

88 To that end, according to the Guidelines, an Impact Assessment report is to contain — inter alia — sections on ‘Policy options’, ‘Analysis of impacts’ and ‘Comparing the options’.

89 It follows that, contrary to the applicant’s assertions, an Impact Assessment report cannot be regarded as being limited merely to determining the factual context in which the process of preparing and developing policy proposals takes place.

90 Secondly, it should be added that the completion of impact assessments enables the Commission to ensure compliance with Article 11(3) TEU, pursuant to which, ‘[that institution] shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent’.

91 An impact assessment is to be drawn up, as is stated in the Guidelines, by following a procedure consisting of several stages. In particular, following a stage of preparation, the completion of such an assessment calls for consultation of interested parties and experts.

92 Thus, it is stated in the Guidelines that an impact assessment ‘takes into account input from a wide range of external stakeholders, in line with the Commission’s policy of transparency and openness towards other institutions and the civil society’, with the Impact Assessment report setting out the results of the consultation and, in particular, the different opinions expressed and the way in which those opinions have been taken into consideration. It is on the basis of the results of that consultation that a draft Impact Assessment report is drawn up, which is then forwarded to the Board for its opinion and, following any observations made by that body, finalised before being submitted for inter-service consultation, after which it is submitted to the College of Commissioners.

93 Accordingly, it is true that, through the organisation of a public consultation, an impact assessment contributes — as is moreover agreed on by the parties — to the objective of ensuring that the Commission’s decision-making process for the preparation and development of policy proposals is transparent and open and to the objective of having interested parties participate in that process.

94 However, in view, in particular, of the findings set out in paragraphs 79 to 84 above, it should be noted that, once the interested parties have been consulted and the necessary information has been gathered in the context of the completion of an impact assessment, the Commission must, as it essentially contends, be placed in a position to decide — on the basis of that information, wholly independently, in the general interest and free from any external pressure or third-party influence — on the policy initiatives to be proposed.

95 This is all the more important in order to preserve the essence of the power of initiative conferred on the Commission by the Treaties and its capacity to assess, wholly independently, the appropriateness of a policy proposal. More specifically, it is important to protect that power of initiative from any influences exerted by public or private

interests which would attempt, outside of organised consultations, to compel the Commission to adopt, amend or abandon a policy initiative and which would thus prolong or complicate the discussion taking place within that institution.

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

97 In the light of the foregoing, it must be concluded that, for the purposes of applying the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001, the Commission is entitled to presume, without carrying out a specific and individual examination of each of the documents drawn up in the context of preparing an impact assessment, that the disclosure of those documents would, in principle, seriously undermine its decision-making process for developing a policy proposal.

98 In that regard, first, as concerns the period during which that general presumption may apply, it should be noted that, according to the Guidelines, the Impact Assessment report and the opinion of the Board are to be published online, together with the policy proposal, following their adoption by the College of Commissioners. In addition, it is stated in the Guidelines that, even in the event that the conclusion reached is that it is not appropriate to submit a policy initiative, an Impact Assessment report, explaining the reasons why a decision was made not to act, is to be drawn up, examined by the Board and published online as a working document.

99 Having regard to those factors, it must be held that the general presumption accepted in paragraph 97 above may apply for as long as the Commission has not made a decision regarding a potential policy proposal, that is to say, until a policy initiative has been, depending on the circumstances, either adopted or abandoned.

100 Secondly, the general presumption recognised in paragraph 97 above applies regardless of the nature — legislative or otherwise — of the proposal envisaged by the Commission.

101 It is true that, as the applicant observes, the considerations deriving from the principle that the public should have the widest possible access to documents of the

institutions and, correspondingly, the narrow interpretation of the exceptions laid down by Regulation No 1049/2001 are, according to the case-law, of particular relevance where the institution concerned is acting in its legislative capacity, as is apparent from recital 6 of Regulation No 1049/2001, according to which wider access must be granted to documents in precisely such a situation. Openness in that respect contributes to strengthening democracy by enabling citizens to scrutinise all the information which has formed the basis of a legislative act. That citizens have the opportunity to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights (judgment in *Sweden and Turco* v *Council*, cited in paragraph 31 above, EU:C:2008:374, paragraph 46, and judgment of 22 March 2011 in *Access Info Europe* v *Council*, T-233/09, ECR, EU:T:2011:105, paragraph 57).

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

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

104 Next, to the extent that the applicant makes reference to Article 12(2) of Regulation No 1049/2001, it should be observed that it is true that that provision acknowledges the specific nature of the legislative process by providing that ‘legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should ... be made directly accessible’ (judgment in *Sweden and Turco* v *Council*, cited in paragraph 31 above, EU:C:2008:374, paragraph 47).

105 However, even on the assumption that the documents requested fall to be described as ‘legislative documents’ within the meaning of Article 12(2) of Regulation No 1049/2001, it should be stated that that provision applies only ‘subject to Articles 4 and 9’ of that regulation (see, to that effect, judgment in *Sison* v *Council*, cited in paragraph 30 above, EU:C:2007:75, paragraph 41). As has been stated in paragraphs 97 and 99 above, when applying the first subparagraph of Article 4(3) of Regulation

No 1049/2001, the Commission is entitled to presume that the disclosure of the documents requested would, in principle, seriously undermine the decision-making process for developing a policy proposal, for as long as it has not made a decision in that regard.

106 Last, and in any event, it should be observed that, contrary to what the applicant claimed at the hearing in response to a written question put by the Court and requiring an oral response, the case-law relating to access to documents does not preclude the recognition of general presumptions in a legislative context. Indeed, it was on the subject of a decision refusing to grant access to an opinion of the Council's legal service concerning a proposal for a Council directive that the Court of Justice, having recalled the case-law cited in paragraph 101 above and the specific nature of the legislative process in the light of Article 12(2) of Regulation No 1049/2001, declared for the first time that it was possible for an institution to base such a decision on general presumptions (judgment in *Sweden and Turco* v *Council*, cited in paragraph 31 above, EU:C:2008:374, paragraphs 46, 47 and 50).

107 Thirdly, it must be held that, contrary to what the applicant claimed at the hearing, Article 6(1) of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13) also does not preclude the recognition of the general presumption referred to in paragraph 97 above.

108 It is true that Article 6 of Regulation No 1367/2006, which adds specific rules concerning requests for access to environmental information to Regulation No 1049/2001 (judgment in *LPN and Finland* v *Commission*, cited in paragraph 64 above, EU:C:2013:738, paragraph 79), reaffirms and reinforces the obligation to interpret the exceptions laid down in Article 4(1), the second indent of Article 4(2), and Article 4(3) and (5) of the latter regulation strictly. The second sentence of Article 6(1) of Regulation No 1367/2006 states that those exceptions must be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment (see, to that effect, judgment of 9 September 2011 in *LPN* v *Commission*, T-29/08, ECR, EU:T:2011:448, paragraph 107).

109 However, first, there is no need to determine whether, in the present cases, the documents requested contain information relating to emissions into the environment, since it must be observed that the fact that the second sentence of Article 6(1) of Regulation No 1367/2006 adds further detail relating to the interpretation in a restrictive way of the exceptions to the right of access to documents laid down by Regulation No 1049/2001, the consequence of which may be that greater access is granted to environmental information than to other information contained in documents held by the institutions, has no decisive bearing on the question whether the institution concerned is or is not required to carry out a specific and individual examination of the documents or information requested (see, to that effect, judgment in *LPN* v *Commission*, cited in

paragraph 108 above, EU:T:2011:448, paragraphs 107 and 117). Indeed, in accordance with those principles enshrined in case-law, all the documents requested are capable of being protected as a category.

110 Secondly, to the extent that the applicant referred, in that context, to the determination of whether there is an overriding public interest, it is necessary to refer to the analysis as set out below of the third complaint raised by the applicant.

111 It follows that none of the arguments put forward by the applicant is capable of undermining the conclusion reached in paragraph 97 above regarding the existence of a general presumption.

112 Accordingly, it is in the light of that general presumption that the lawfulness of the contested decisions must be examined, in so far as the Commission considered that the disclosure of the documents requested would seriously undermine its decision-making processes.

– The lawfulness of the contested decisions, in so far as the Commission finds that there is a risk that the decision-making processes could be seriously undermined

113 As is apparent from paragraphs 97 and 99 above, for the purposes of applying the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001, the Commission is entitled to presume, without carrying out a specific and individual examination of each of the documents drawn up in the context of preparing an impact assessment, that the disclosure of those documents would, in principle, seriously undermine its decision-making process for developing a policy proposal, for as long as it has not made a decision in that regard.

114 According to the case-law, the recognition of a general presumption does not rule out the possibility of demonstrating that a specific document in respect of which disclosure has been requested is not covered by that presumption, or that there is an overriding public interest in the disclosure of that document, pursuant to the first subparagraph of Article 4(3) of Regulation No 1049/2001 (see, by analogy, judgment in *Commission* v *EnBW*, cited in paragraph 55 above, EU:C:2014:112, paragraph 100 and the case-law cited).

115 In the present cases, as is apparent from paragraphs 51 and 52 above, the refusals in the contested decisions to grant the applicant access are based, in addition to the grounds specific to each of those decisions, on grounds of a general nature relating to the need to preserve the Commission's 'thinking space', room for manoeuvre, and independence, the need to preserve the atmosphere of trust during discussions, and the risk of external pressures liable to affect the conduct of the ongoing discussions and negotiations. Those grounds of the contested decisions are thus based, in essence, on the same considerations which justified recognition of the existence of the general presumption referred to in paragraph 113 above.

116 In that regard, in the first place, it is common ground that, as has already been stated in paragraph 50 above, the documents requested are part of the completion of two impact assessments which were ongoing at the time of the adoption of the contested decisions and related to potential policy initiatives regarding access to justice in environmental matters on the one hand and a revision of the legal framework of inspections and surveillance in respect of such matters on the other.

117 In particular, the explanations provided by the Commission at the hearing, the factual accuracy of which is not contested by the applicant, show that, at the time the contested decisions were adopted, no decision had been made as regards potential policy initiatives likely to be taken in the areas covered by the two impact assessments in question. While it is true that, regarding access to justice in environmental matters, the Commission has confirmed that it withdrew the 2003 proposal for a directive on 21 May 2014, the fact remains that that withdrawal postdates the decision of 3 April 2014, with the result that there is no need to take the former into account in order to assess the lawfulness of the latter: in an action for annulment based on Article 263 TFEU, the lawfulness of the European Union measure concerned must be assessed on the basis of the elements of fact and of law existing at the time when that measure was adopted (judgments of 7 February 1979 in *France* v *Commission*, 15/76 and 16/76, ECR, EU:C:1979:29, paragraph 7; 25 June 1998 in *British Airways and Others* v *Commission*, T-371/94 and T-394/94, ECR, EU:T:1998:140, paragraph 81; and 14 January 2004 in *Fleuren Compost* v *Commission*, T-109/01, ECR, EU:T:2004:4, paragraph 50).

118 Accordingly, the documents requested fall within the scope of the general presumption recognised in paragraph 97 above.

119 In the second place, first, it must be stated that the applicant does not put forward any argument capable of rebutting that general presumption.

120 First, the arguments summarised in paragraph 46 above, concerning the general and hypothetical nature of the grounds of the contested decisions, the Commission's reduced room for manoeuvre, the lack of evidence of a real risk of public pressure, the non-sensitive nature of the documents requested, and the irrelevance of the fact that the decision-making processes are at a very early stage, are in no way capable of rebutting the general presumption pursuant to which the Commission was entitled, in the present cases, to refuse to grant access to the documents requested without having to carry out a specific and individual examination of those documents. Thus, on the one hand, to the extent that those arguments seek, in essence, to criticise the general nature of the grounds relied on in the contested decisions, it should be observed that the reliance on grounds for refusal of a general nature is justified by the application of a general presumption which specifically enables the Commission to dispense with a specific and individual examination of the documents requested. On the other hand, although the applicant questions the reality of external pressures affecting the Commission's room for manoeuvre, it must be stated that the applicant has failed to adduce specific evidence permitting the rebuttal of that general presumption in the present cases.

121 Next, it should be stated that the intentions and interests pursued by the applicant's requests for access also have no relevance to the application, in the present cases, of a general presumption pursuant to which the Commission was entitled to refuse to grant access to the documents requested. In any event, it must be added that the conclusion that the Commission was entitled to refuse to grant access to those documents is based on the existence of an objective risk that its decision-making processes might be undermined. Further, it is apparent from the case-law that the right of access to documents does not depend on the nature of the particular interest which the applicant for access may or may not have in obtaining the information requested (judgment in *LPN* v *Commission*, cited in paragraph 108 above, EU:T:2011:448, paragraph 137, and order of 27 March 2014 in *Ecologistas en Acción* v *Commission*, T-603/11, EU:T:2014:182, paragraph 74; see also, to that effect and by analogy, judgment in *Sison* v *Council*, cited in paragraph 30 above, EU:C:2007:75, paragraphs 43 and 44).

122 Last, regarding the reference in paragraph 47 above to the decision of the Ombudsman, it should be borne in mind that it has already been held, on the subject of a finding by the Ombudsman of an 'act of maladministration', that the Ombudsman's findings as such were not binding on the Courts of the European Union, but could constitute nothing more than an indication of infringement, by the institution concerned, of the principle of sound administration. Proceedings before the Ombudsman, who does not have the power to make binding decisions, are for EU citizens an extrajudicial alternative remedy to an action before those Courts, which meets specific criteria and does not necessarily have the same objective as legal proceedings (judgment of 25 October 2007 in *Komninou and Others* v *Commission*, C-167/06 P, EU:C:2007:633, paragraph 44).

123 *A fortiori*, interpretations of EU law by the Ombudsman cannot be such as to bind the Courts of the European Union.

124 Furthermore, and in any event, it should be noted that the considerations set out in the Ombudsman's decision, cited by the applicant, are irrelevant in so far as that decision concerns a request for access distinct from the requests at issue in the present cases and cannot, therefore, permit a rebuttal of the general presumption.

125 Secondly, by contrast, in the third complaint, the applicant puts forward arguments concerning the existence of an overriding public interest. At this stage, the examination of those arguments must be deferred (see paragraphs 128 to 163 below).

126 In the light of the foregoing, it must be concluded that the Commission was right to consider, in the contested decisions, that the disclosure of the documents at issue might seriously undermine its decision-making processes.

127 It follows that the second complaint raised by the applicant in support of the first part of the single plea in law must be rejected as being unfounded.

Third complaint: overriding public interest in the disclosure of the documents requested

128 The applicant accuses the Commission of having disregarded the first subparagraph of Article 4(3) of Regulation No 1049/2001 by having wrongly excluded the existence of an overriding public interest in the disclosure of the documents requested.

129 First, the applicant states that the mere fact, mentioned in the contested decisions, that access to justice in environmental matters is already possible and that the decision-making processes merely seek to improve that access, does not mean that there is no overriding public interest in the disclosure of the documents requested. Second, the transparency necessary to understand the legislative process constitutes in itself a public interest which must be protected, particularly in the areas with which the two impact assessments in question are connected. Third, the Commission neglected to take that public interest into account and made its decisions exclusively on the basis of the risk — which, moreover, is contested by the applicant — that its decision-making processes would be undermined. Fourth, the public has an interest in understanding and following the development of impact assessments, which form the basis of legislative proposals, in order to be in a position to exercise its right to participate in democratic processes by generating public debate. The mere disclosure, upon the Commission's adoption of the legislative proposal concerned, of studies supporting that institution's decision is insufficient in that regard, especially in the event that the Commission does not take any initiative following the impact assessment. The applicant also adds, in its replies, that, first, contrary to what the Commission contends in its written pleadings, it neither serves nor represents any private interest but serves and represents the general interest, and consequently its requests for access cannot be regarded as reflecting a mere private interest, and, second, the Ombudsman has recognised that the public has a particular interest in understanding and examining the policy options that were not chosen.

130 In addition, in Case T-424/14, first, the applicant adds that the public interest based on transparency and participation in public debate is all the more important given that the legislative process in question concerns access to justice in environmental matters. It can be seen from Regulation No 1367/2006, which recognises the interest in initiating legal proceedings concerning the environment, that there is always a public interest in the disclosure of information relating to the environment. Second, the public's interest in being informed of the implementation of obligations resulting from the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, concluded 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) ('the Aarhus Convention') is all the greater given that: (i) the Commission has withdrawn the 2003 proposal for a directive; (ii) in 10 years, no measure has yet been adopted, and (iii) although the Commission announced in 2013 that work was ongoing, it has not provided any information regarding the lines of action contemplated. Third, the fact that, apparently owing to a lack of consultation of stakeholders, the Board has issued two negative opinions in respect of the initial versions of the Impact Assessment report relating to access to justice in environmental matters, shows that there is a public interest, in so far as the stakeholders could provide additional information and become acquainted with any shortcomings of the impact assessment.

131 Lastly, in its reply lodged in Case T-425/14, the applicant observes that the fundamental importance of access to information in respect of environmental matters is emphasised by Article 5(7)(a) of the Aarhus Convention.

132 The Commission contends that those arguments are not well founded.

133 It should be borne in mind that, under the first subparagraph of Article 4(3) of Regulation No 1049/2001, the application of the exception enshrined therein is to be excluded if there is an overriding public interest in the disclosure of the document in question.

134 In that respect, it is for the institution concerned to weigh the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible, having regard to the advantages of increased openness, as described in recital 2 of Regulation No 1049/2001, in that it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (judgment in *Sweden and Turco* v *Council*, cited in paragraph 31 above, EU:C:2008:374, paragraph 45; judgment in *Council* v *Access Info Europe*, cited in paragraph 55 above, EU:C:2013:671, paragraph 32; and judgment of 3 July 2014 in *Council* v *in 't Veld*, C-350/12 P, ECR, EU:C:2014:2039, paragraph 53).

135 The overriding public interest capable of justifying the disclosure of a document does not necessarily have to be distinct from the principles which underlie Regulation No 1049/2001 (judgments in *Sweden and Turco* v *Council*, cited in paragraph 31 above, EU:C:2008:374, paragraphs 74 and 75, and *LPN and Finland* v *Commission*, cited in paragraph 64 above, EU:C:2013:738, paragraph 92).

136 Nevertheless, a statement of considerations of a purely general nature is not sufficient for the purposes of establishing that an overriding public interest prevails over the reasons justifying the refusal to disclose the documents in question (see, to that effect, judgments in *Sweden and Others* v *API and Commission*, cited in paragraph 55 above, EU:C:2010:541, paragraph 158; *LPN and Finland* v *Commission*, cited in paragraph 64 above, EU:C:2013:738, paragraph 93; and *Commission* v *EnBW*, cited in paragraph 55 above, EU:C:2014:112, paragraph 105).

137 Furthermore, the requirement that an applicant for access refer to specific circumstances to show that there is an overriding public interest in the disclosure of the documents concerned is in accordance with the case-law of the Court of Justice (judgment in *LPN and Finland* v *Commission*, cited in paragraph 64 above, EU:C:2013:738, paragraph 94; see also, to that effect, judgments in *Commission* v *Technische Glaswerke Ilmenau*, cited in paragraph 64 above, EU:C:2010:376, paragraph 62; *Sweden and Others* v *API and Commission*, cited in paragraph 55 above, EU:C:2010:541, paragraph 103; *Commission* v *Éditions Odile Jacob*, cited in

paragraph 64 above, EU:C:2012:393, paragraph 126; and *Commission* v *Agrofert Holding*, cited in paragraph 64 above, EU:C:2012:394, paragraph 68).

138 In the present cases, it is apparent from the contested decisions that, in the Commission's view, there was no overriding public interest in the disclosure of the documents requested. In essence, first, the Commission stated that, while the objective of preserving, protecting and improving the quality of the environment and, as a consequence, of human health could be achieved through non-discriminatory access to justice in environmental matters, nevertheless it was not in a position to determine how the disclosure of the documents requested would help persons living in the European Union indirectly to influence the environment in which they were living. Indeed, according to the Commission, access to justice was already possible before national courts, the aim of the decision-making process in question being merely to improve that access. The Commission also added that a public consultation had been held in 2013, at which interested parties, including civil society, had been able to help to define the broad outlines of the proposals. Second, according to the Commission, the disclosure at that stage of the documents requested would undermine the decision-making processes and reduce the possibility of achieving the best possible compromise. Instead, the public interest would be better served by the possibility of completing the decision-making processes in question without any external pressure. Furthermore, the Commission indicated that several documents relating to those decision-making processes had already been made available.

139 None of the arguments put forward by the applicant as summarised in paragraphs 128 to 131 above allows that assessment to be called into question.

140 In the first place, regarding the argument that, especially in the light of the areas with which the two impact assessments in question are connected, the transparency necessary to understand the legislative process constitutes in itself a public interest which must be protected and which the Commission neglected to take into account, it must be held that, having regard to the case-law cited in paragraph 136 above, such a general consideration cannot provide an appropriate basis for establishing that, in the present cases, the principle of transparency was of especially pressing concern and capable, therefore, of prevailing over the reasons justifying the refusals to grant access to the documents requested (see, to that effect and by analogy, judgment in *Sweden and Others* v *API and Commission*, cited in paragraph 55 above, EU:C:2010:541, paragraphs 157 and 158).

141 In any event, first of all, it should be added that, as is apparent from the material in the case-file and, in particular, from the contested decisions, as is not disputed by the applicant, several documents relating to the two impact assessments in question had been made public prior to the adoption of the contested decisions by the Commission.

142 It must be held that that publication ensured that the public interest in being kept informed of the Commission's decision-making processes was taken into account without undermining those processes.

143 Next, it is common ground between the parties that the impact assessments at issue in the present cases will be made public once the Commission has adopted policy proposals in the areas concerned by the present cases.

144 Such publication, which will take place at the same time as the adoption of policy proposals, is — contrary to the applicant's assertions — sufficient to enable the public to understand the (possibly legislative) process which will begin with those proposals.

145 Last, in so far as the applicant claims that the mere disclosure, upon the Commission's adoption of the legislative proposal, of studies 'supporting' that institution's decision, is insufficient, it should be explained that, as is stated in the Guidelines, an Impact Assessment report is to list the various policy options contemplated and rank them according to the assessment criteria used. In addition, even after the publication by the Commission of an Impact Assessment report, there is nothing to prevent the applicant from submitting a request for access to earlier versions of that report in order, where appropriate and subject to the exceptions specified in Article 4 of Regulation No 1049/2001 which may be relied on by the Commission, to acquaint itself with the successive amendments to which the report has been subject.

146 Furthermore, to the extent that the applicant makes reference to the possibility of the Commission not taking any initiative following the impact assessment, it should be noted that — as was confirmed by the Commission at the hearing in response to a question put by the Court — the Guidelines state that, where, following an impact assessment, the Commission decides not to formulate a proposal, the Impact Assessment report is to be published on the website 'www.europa.eu' in the form of a working document.

147 In that context, it is once again necessary to reject the applicant's arguments in Case T-424/14 that the public interest in being informed of the implementation of obligations resulting from the Aarhus Convention is all the greater given that (i) the Commission withdrew the 2003 proposal for a directive, (ii) no act has been adopted in 10 years, and (iii) although the Commission announced in 2013 that work was ongoing, it did not provide any information regarding the lines of action contemplated.

148 Having regard to the findings set out in paragraphs 76 to 97 above on the subject of the general presumption, it must be held that, at that stage of the decision-making process, the mere lack of any indication regarding the lines of action contemplated by the Commission is not capable of establishing an interest which is such as to prevail over the reasons justifying the refusal to grant access to the documents requested in Case T-424/14.

149 That finding is all the more compelling given that, as has been stated above, the Commission took care not only to carry out a public consultation on the subject of the implementation of the obligations of the European Union in relation to access to justice in environmental matters but also to publish various documents following that consultation, as, moreover, is not contested by the applicant. In addition, as the applicant

acknowledges, the Commission announced, albeit summarily, that work was ongoing in the communication of 2 October 2013 which it produced in Case T-424/14 following a measure of organisation of procedure adopted by the Court. Thus, it announced its intention to withdraw the 2003 proposal for a directive and to reflect on other means of implementing the obligations resulting from the Aarhus Convention and explained that it was conducting an impact assessment and waiting for a judgment from the Court of Justice.

150 In the second place, regarding the argument that the public has an interest in understanding and following the development of impact assessments, which form the basis of legislative proposals, in order to be in a position to exercise its right to participate in democratic processes by generating public debate, it should be borne in mind that it has already been held that the interest of an applicant in supplementing the information held by the institution concerned and in taking an active part in an ongoing procedure did not constitute an overriding public interest, even though that applicant was acting, as a non-governmental organisation, in accordance with the objects stated in its governing documents, which consisted in the protection of the environment (see, to that effect, judgment in *LPN and Finland* v *Commission*, cited in paragraph 64 above, EU:C:2013:738, paragraph 95; see also, to that effect and by analogy, order in *Ecologistas en Acción* v *Commission*, cited in paragraph 121 above, EU:T:2014:182, paragraph 75).

151 By analogy, it must be held that the interest of stakeholders who have taken part in a consultation organised by the Commission as part of the completion of an impact assessment and of any other interested party in supplementing the information held by that institution following such a consultation and in taking an active part in the procedure of developing the Impact Assessment report, or even in the development of a policy proposal, does not constitute an overriding public interest, even where the party in question is, like the applicant, a not-for-profit organisation whose object is the protection of the environment.

152 Having regard to the case-law cited in paragraph 150 above, the fact that the applicant claims in its written pleadings to represent a general interest has no effect on that finding, even assuming that claim to be correct. In addition, it is clear from the case-law cited in paragraph 121 above that the right of access to documents does not depend on the nature of the particular interest which the applicant for access may or may not have in obtaining the information requested.

153 In any event, the applicant's argument, as summarised in paragraph 150 above, must be rejected on the same grounds as those set out in paragraphs 140 to 144 above.

154 It is on those same grounds that the Court must reject the applicant's argument in Case T-424/14 concerning the existence of a public interest, in so far as the stakeholders could provide additional information and become acquainted with any shortcomings of the impact assessment, such as were revealed by the two negative opinions of the Board

regarding the initial versions of the Impact Assessment report relating to access to justice in environmental matters.

155 Furthermore, the applicant's argument that the Ombudsman has recognised that the public has a particular interest in understanding and examining the alternatives that were not chosen must be rejected on grounds analogous to those set out in paragraphs 122 to 124 above.

156 In the third place, to the extent that the applicant accuses the Commission of having neglected to take account of the public interest in understanding decision-making processes and participating in those processes and of having relied solely on the risk that its decision-making processes would be undermined, it is sufficient to point out that, first, the applicant has failed, in the context of the second complaint raised in support of the first part of the single plea in law, to show that the Commission was wrong to consider that the disclosure of the documents requested would seriously undermine its decision-making processes, and, second, it is apparent from paragraphs 140 to 153 above that the interest in understanding and participating in the legislative process cannot constitute an overriding public interest capable of prevailing over the protection of those decision-making processes.

157 In the fourth place, regarding the applicant's arguments in Case T-424/14 that the public interest in transparency and participation in public debate is all the more important given that the legislative process relates to access to justice in environmental matters, having regard to Regulation No 1367/2006, it should be borne in mind that, as has already been stated in paragraph 108 above, Article 6 of Regulation No 1367/2006 adds specific rules concerning requests for access to environmental information to Regulation No 1049/2001. Thus, the first sentence of Article 6(1) of Regulation No 1367/2006 refers to the first and third indents of Article 4(2) of Regulation No 1049/2001 and states that, 'with the exception of investigations, in particular those concerning possible infringements of [EU] law, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment'. That legal presumption relates to the last clause of Article 4(2) of Regulation No 1049/2001, excluding the possibility of refusing access to a document if a public interest overriding the protected interests justifies the disclosure of the document concerned. Next, 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'. That second sentence mentions the 'other exceptions set out in Article 4 of Regulation ... No 1049/2001' and therefore applies to the exceptions set out in Article 4(1), the second indent of Article 4(2) and Article 4(3) and (5) of that regulation (judgment in *LPN and Finland* v *Commission*, cited in paragraph 64 above, EU:C:2013:738, paragraphs 79 to 81 and 83).

158 It follows that, while it is true that the first sentence of Article 6(1) of Regulation No 1367/2006 provides for a legal presumption pursuant to which, with the exception of

investigations, an overriding public interest in disclosure is to be deemed to exist where the information requested relates to emissions into the environment, the fact remains that that presumption concerns only the exceptions set out in the first and third indents of Article 4(2) of Regulation No 1049/2001.

159 In the present cases however, it is common ground that the Commission applied the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001. It follows that there is no need to determine whether the information contained in the documents requested relates to emissions into the environment, since the first sentence of Article 6(1) of Regulation No 1367/2006 is irrelevant in the present cases.

160 Furthermore, as regards the second sentence of Article 6(1) of Regulation No 1367/2006 and to the extent that the applicant means to rely on that provision, it should be observed that the mere reference to 'the public interest served by disclosure' is, by reason of its general nature and in view of the grounds set out in paragraph 140 above, insufficient to establish that there is an overriding public interest capable of prevailing over the protection of decision-making processes.

161 In the fifth place, the argument in the reply lodged in Case T-425/14 that the fundamental importance of access to information in respect of environmental matters is emphasised by Article 5(7)(a) of the Aarhus Convention must be rejected on the same grounds as those set out in paragraph 140 above.

162 Last, in the light of the foregoing, the Court must also reject the applicant's argument that the fact, put forward in the contested decisions, that access to justice in environmental matters is already possible and that the decision-making processes merely seek to improve that access, does not mean that there is no overriding public interest in the disclosure of the documents requested. Even assuming that, as is asserted by the applicant, the mere fact that access to justice in such matters is already available does not mean that there is no overriding public interest, the fact remains that — as is apparent from the foregoing considerations — the applicant has failed to establish the existence of any overriding public interest in the disclosure of the documents requested.

163 In the light of the foregoing, the third complaint must be rejected in its entirety.

164 Therefore, it is also necessary to reject the first part of the single plea in law and to reject that plea in its entirety as being unfounded.

165 It follows that the present actions must be dismissed in their entirety.

Costs

166 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the

successful party's pleadings. As the applicant has been unsuccessful, it must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Dismisses the actions;**

2. **Orders ClientEarth to bear its own costs and to pay those incurred by the European Commission.**

Martins Ribeiro Gervasoni Madise

Delivered in open court in Luxembourg on 13 November 2015.

[Signatures]

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Costs

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* Language of the case: English.