Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

27 February 2018 *

(Access to documents — Regulation (EC) No 1049/2001 — Documents relating to a Commission decision on granting a Euratom loan in support of the Ukraine safety upgrade program of nuclear power units — Partial refusal of access — Exception concerning the protection of the public interest in the field of international relations — Exception concerning the protection of commercial interests — Overriding public interest — Regulation (EC) No 1367/2006 — Application to documents relating to decisions taken under the EAEC Treaty)

In Case T-307/16,

CEE Bankwatch Network, established in Prague (Czech Republic), represented by C. Kiss, lawyer,

applicant,

v

European Commission, represented by C. Zadra, F. Clotuche-Duvieusart and C. Cunniffe, acting as Agents,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, initially represented by M. Holt and D. Robertson, and subsequently by S. Brandon, acting as Agents,

intervener,

APPLICATION based on Article 263 TFEU and seeking annulment of Commission Decision C(2016) 2319 final of 15 April 2016 refusing, on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), access to several documents relating to Commission Decision C(2013) 3496 final of 24 June 2013 on granting a Euratom loan in support of the Ukraine safety upgrade program of nuclear power units,

THE GENERAL COURT (First Chamber),

composed of I. Pelikánová, President, P. Nihoul (Rapporteur) and J. Svenningsen, Judges,

Registrar: E. Coulon,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

Decision C(2013) 3496 final

1 On 24 June 2013, the European Commission, by Decision C(2013) 3496 final ('the granting decision'), granted a Euratom loan to the National Nuclear Energy Generating Company of Ukraine (Energoatom) in support of the Ukraine safety upgrade program of nuclear power units. This loan was secured by the Ukrainian Government.

2 The granting decision was adopted pursuant to Council Decision 77/270/Euratom of 29 March 1977 empowering the Commission to issue Euratom loans for the purpose of contributing to the financing of nuclear power stations (OJ 1977 L 88, p. 9), as amended by Decision 94/179/Euratom of 21 March 1994 (OJ 1994 L 84, p. 41). Under Article 1 of that decision, the Commission is empowered to contract on behalf of the European Atomic Energy Community, and within the limits fixed by the Council, borrowings, the proceeds of which are to be allocated in the form of loans to finance projects to increase the safety and efficiency of the nuclear power stations of various non-member countries listed in an annex, including Ukraine.

The request for access to documents

3 The applicant, CEE Bankwatch Network, is an association of non-governmental organisations established under Czech law. According to its articles of association, the objective of the association is to monitor the activities of international financial institutions operating in that region and promote environmentally, socially and economically sustainable alternatives to their policies and projects, where possible. Its seat is in Prague (Czech Republic).

4 On 6 and 7 November 2015, the applicant, in accordance with Article 6(1) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), applied to the Commission for access to various documents relating to the granting decision.

5 The request for access concerned five documents or categories of documents:

– the Loan Facility Agreement between Ukraine and the European Atomic Energy Community signed on 7 August 2013, in particular the provisions on environmental and social requirements (point 1 of the request for access);

– specific evidence and opinions from the inter-service consultations referred to in recital 12 of the granting decision, which the Commission took into consideration when assessing the implementation of the conditions precedent to the disbursement of the first instalment, relating to Ukraine's main undertakings in the nuclear and environmental area (point 2 of the request for access);

– formal communications between the Commission and Ukraine relating to the latter's undertakings to comply with international environmental agreements, including the Convention on environmental impact assessment in a transboundary context, signed at Espoo (Finland) on 25 February 1991 and approved on behalf of the European Community on 24 June 1997, which entered into force on 10 September 1997, and the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed at Aarhus on 25 June 1998 ('the Aarhus Convention') and approved on behalf of the Community by Council

Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1), in particular in the light of the decision of the Meeting of the Parties to the Espoo Convention of June 2014, where it was established that Ukraine had failed to fulfil its obligations under Article 2(2) of that convention in respect of the general legal and administrative framework applicable in the decision-making for the extension of the lifetime for nuclear reactors (paragraph 69 of Decision VI/2) (point 3 of the request for access);

– the European Investment Bank (EIB) recommendation on the financial and economic aspects of the loan project, issued as part of the loan appraisal process (point 4 of the request for access);

– any communication received from the Ukrainian Government or other parties about the planned lifetime extension of Unit 2 at the South Ukraine nuclear power plant and Unit 1 at Zaporizhia nuclear power plant (point 5 of the request for access).

6 By letter of 21 December 2015, the Commission replied to the request for access addressed to it as follows:

– with regard to point 1 of the request for access, it provided two excerpts from the Loan Facility Agreement concerning the environmental and social requirements;

– with regard to point 2 of the request for access, it refused access to the documents in question on the ground that they were covered by the exception laid down in the second subparagraph of Article 4(3) of Regulation No 1049/2001, concerning cases where disclosure would seriously undermine the institution's decision-making process;

– with regard to point 3 of the request for access, it provided the applicant with two letters from the Directorate-General (DG) 'Environment' of the Commission addressed to several Ukrainian authorities;

– with regard to point 4 of the request for access, it refused access on the ground that the document was covered by the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001, concerning cases where disclosure would undermine the protection of commercial interests of a natural or legal person;

– with regard to point 5 of the request for access, it stated that it did not have any such document and referred the applicant to a hyperlink.

7 By letter of 19 January 2016, the applicant, on the basis of Article 7(2) of Regulation No 1049/2001, lodged a confirmatory application with the Commission asking it to reconsider its position on the documents referred to in points 1, 2, 3 and 4 of its request for access. However, the request concerning point 5 was no longer mentioned. In its confirmatory application, the applicant relied on 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 to Community institutions and bodies (OJ 2006 L 264, p. 13).

8 By letter of 9 February 2016, the Commission extended the time limit for reply by 15 working days in accordance with Article 8(2) of Regulation No 1049/2001. By letter of 1 March 2016, it extended the time limit for replying to the confirmatory application once more.

The contested decision

9 By Decision C(2016) 2319 final of 15 April 2016 ('the contested decision'), the Commission replied to the confirmatory application. In the contested decision, the Commission stated, as a preliminary point, that Regulation No 1367/2006 did not apply in the present case.

10 With regard to point 1 of the request for access (Loan Facility Agreement), the Commission confirmed its decision to grant only partial access to the Loan Facility Agreement, limited to the environmental and social provisions set out therein. It took the view that the remainder of the agreement could not be disclosed based on, first, the exception concerning the protection of the public interest as regards international relations in the third indent of Article 4(1)(a) of Regulation No 1049/2001 and, secondly, the exception concerning the protection of commercial interests in the first indent of Article 4(2) of that regulation.

11 With regard to point 2 of the request for access (inter-service consultations and evidence of the assessment prior to the disbursement of the first instalment of the loan), the Commission granted access to three documents: a note from DG 'Environment' to DG 'Economic and Financial Affairs' of the Commission of 24 October 2014 and two letters from Energoatom to DG 'Environment' of 31 July 2014. Based on the exception concerning the protection of privacy and the integrity of the individual in Article 4(1)(b) of Regulation No 1049/2001, the Commission nevertheless refused, for each of those documents, to disclose the names, qualifications and signatures of the persons mentioned.

12 With regard to point 3 of the request for access (official communications between the Commission and Ukraine), the Commission maintained that there were no communications falling under that category other than the two letters from DG 'Environment' already disclosed by letter of 21 December 2015.

13 With regard to point 4 of the request for access (EIB recommendation), the Commission granted access to the EIB recommendation but considered that that access had to be limited. In that regard it relied once more on the exception concerning the protection of commercial interests in the first indent of Article 4(2) of Regulation No 1049/2001. It also contended in the contested decision that certain parts of the document to which it was refusing access reflected provisions of the Loan Facility Agreement in respect of which the Commission had already established that its disclosure would undermine its commercial interests and those of Energoatom.

14 With regard to point 5 of the request for access (communications concerning the lifetime extension for two reactors), the Commission confirmed that it had no documents which, in its view, were relevant for the purpose of replying to the request.

15 Lastly, the Commission took the view that in the present case there was no overriding public interest within the meaning of Article 4(2) of Regulation No 1049/2001 in the full disclosure of the Loan Facility Agreement and the EIB recommendation.

Procedure and forms of order sought

16 By application lodged at the Court Registry on 17 June 2016, the applicant brought the present action.

17 The Commission lodged its defence on 16 September 2016.

18 By document lodged at the Court Registry on 13 October 2016, the United Kingdom of Great Britain and Northern Ireland sought leave to intervene in support of the Commission. Leave was granted by order of the President of the First Chamber of the Court of 17 November 2016.

19 The applicant lodged its reply on 22 November 2016.

20 By letter of 19 December 2016, the United Kingdom informed the Court that it waived the right to lodge its statement in intervention.

21 On 9 January 2017, the Commission lodged its rejoinder.

22 Upon hearing the report of the Judge-Rapporteur, the Court (First Chamber) noted that no application for a hearing was submitted by the parties within the period prescribed in Article 207(1) of its Rules of Procedure and decided to give a ruling without an oral procedure in accordance with paragraph 2 of that provision.

23 In the application, the applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

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

– dismiss the application;

– order the applicant to pay the costs.

25 By order of 24 April 2017, the Court, acting pursuant to Article 91(c) and Article 92 of its Rules of Procedure, ordered the Commission to produce the Loan Facility Agreement and the EIB recommendation in their entirety. The documents were transmitted to the Court on 2 May 2017 and were not notified to either the applicant or the United Kingdom, in accordance with Article 104 of the Rules of Procedure.

Law

26 In the application, the applicant raises four pleas in law, alleging, respectively:

– an error on the Commission's part in the identification of the applicable rules by failing to apply Regulation No 1367/2006 to the request for access addressed to it;

– infringement of the third indent of Article 4(1)(a) of Regulation No 1049/2001, concerning the protection of the public interest as regards international relations;

– infringement of the first indent of Article 4(2) of Regulation No 1049/2001, concerning the protection of commercial interests;

– infringement of Article 4 of Regulation No 1049/2001, in that the Commission failed to examine whether there was an overriding public interest in disclosure.

27 In the reply, the applicant contends that the Commission infringed Article 42 of the Charter of Fundamental Rights of the European Union, in that, in its letter of 21 December 2015, in the contested decision and in the defence, the Commission did not sufficiently take account of the arguments put forward by the applicant during the administrative procedure and the procedure before the Court.

Regulation No 1049/2001

28 As a preliminary point, it should be noted that the general rules on public access to documents held by an institution, that is to say, documents drawn up or received by it and in its possession, were laid down in Regulation No 1049/2001.

29 As appears from recital 1, the regulation reflects the intention expressed in the second paragraph of Article 1 TEU, which was inserted by the Treaty of Amsterdam, to mark a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. As recital 2 of the regulation notes, the right of public access to documents of the institutions is related to the democratic nature of those institutions (judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 34, and of 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 72).

30 To that end, the regulation seeks, as indicated in recital 4 and Article 1 thereof, to give the public a right of access to documents of the institutions which is as wide as possible (judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 33, of and 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 73).

31 That right is nonetheless subject to certain limits based on grounds of public or private interest. More specifically, and in reflection of recital 11 thereof, Article 4 of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision (judgment of 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 74).

32 Thus, the third indent of Article 4(1)(a) of Regulation No 1049/2001 enables the institutions to refuse access to a document where its disclosure would undermine the protection of the public interest as regards international relations.

33 Furthermore, the first indent of Article 4(2) of the regulation enables the institutions to refuse access to a document where its disclosure would undermine the protection of 'the commercial interests of a natural or legal person, including intellectual property'. In that particular case, the provision states that the exception does not apply where there is an overriding public interest in disclosure.

34 Since they derogate from the principle of the widest possible public access to documents, those exceptions must be interpreted and applied strictly (judgment of 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 75; see, to that effect, judgment of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 36).

35 Thus, if the institution concerned refuses access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and actually undermine the interest protected by the exception — among those provided for in Article 4 of Regulation No 1049/2001 — upon which it is relying (judgment of 21 July 2011, *Sweden* v *MyTravel and Commission*, C-206/08 P, EU:C:2011:496, paragraph 76). Moreover, the risk of that interest being undermined must be reasonably foreseeable and not purely hypothetical (judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 43, and of 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 76).

The first plea, alleging an error on the Commission's part in the identification of the applicable rules by failing to apply Regulation No 1367/2006 to the request for access addressed to it

36 By its first plea, the applicant criticises the contested decision in that it failed to take account of all the rules applicable to the present case. In this instance, the applicant claims that the decision was adopted on the basis of Regulation No 1049/2001, without the Commission taking account of Regulation No 1367/2006, which is crucial, however, according to the applicant, since it restricts the possibility for EU institutions to refuse access to documents where the requested information relates to emissions into the environment.

37 The Commission disputes this plea.

38 In that respect, it should be noted that Regulation No 1367/2006, the application of which is sought by the applicant, introduces into the general system of access to documents detailed rules where access to information, public participation in decision-making and access to justice in environmental matters are concerned.

39 Thus, in particular, as regards the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001 and referred to in paragraph 33 above, concerning the protection of commercial interests, which is invoked by the Commission to deny access to certain documents requested by the applicant, the first sentence of Article 6(1) of Regulation No 1367/2006 provides that an overriding public interest in disclosure is deemed to exist and that, consequently, the documents must be communicated where the requested information relates to emissions into the environment.

40 Furthermore, with regard to the exception laid down in the third indent of Article 4(1)(a) of Regulation No 1049/2001, referred to in paragraph 32 above, the second sentence of Article 6(1) of Regulation No 1367/2006 provides that that exception is to be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the requested information relates to emissions into the environment.

41 As a preliminary point, it must be determined whether those specific rules contained in Regulation No 1367/2006 apply to the present case in order to establish the conditions in which access to the requested documents could be refused, as the case may be, by the Commission.

42 In that regard, it should be recalled that the contested decision was adopted following the grant of a loan by the Commission to the Ukrainian enterprise Energoatom, that loan being the subject matter of the granting decision.

43 As stated in paragraph 2 above, the granting decision was taken pursuant to Decision 77/270, as amended by Decision 94/179, those two decisions being based on Articles 1, 2, 172 and 203 EA.

44 Thus, the refused documents concern a measure adopted on the basis of provisions of the EAEC Treaty.

45 The applicant submits that this has no bearing on the application of the abovementioned regulations. In support of its position, it states that Euratom forms part of the European Union. In the reply, it claims that the Commission is a 'Community institution' within the meaning of Article 2(1)(c) of Regulation No 1367/2006. From that assertion, it infers that any document in the possession of that institution is subject to the provisions of the regulation, whether the document was drawn up or obtained in connexion with the powers conferred on it by the EU and FEU Treaties or those stemming from the EAEC Treaty.

46 In that regard, it should be noted, in the first place, that, according to its title, its recitals and its provisions, Regulation No 1367/2006 applies information obligations concluded within the framework of an international convention to which the European Atomic Energy Community is not a party, namely the Aarhus Convention. As is clear from Article 1 of Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Aarhus Convention (OJ 2005 L 124, p. 1), the convention was approved solely on behalf of the European Community, now the European Union. Not being a party to the convention, the European Atomic Energy Community, in the absence of any indication to the contrary, cannot be subject to the obligations contained in the regulation applying that convention.

47 In the second place, it should be noted that, contrary to the applicant's assertions, the measures adopted under the EAEC Treaty are not necessarily subject to the obligations applicable within the framework of the European Union. As pointed out by the Commission, the European Atomic Energy Community and the European Community, now the European Union, are indeed separate organisations established by separate treaties, with separate legal personalities (see, to that effect, judgment of 7 April 1965, *Müller* v *Councils*, 28/64, EU:C:1965:39, English special edition 1965, p. 247) and each subject to specific rules.

48 Thus, the rules applicable within the framework of the European Atomic Energy Community are provided for by the EAEC Treaty. One such rule is Article 106a(1) EA, which, for the functioning of the European Atomic Energy Community, renders applicable certain provisions of the EU and FEU Treaties, in particular Article 15 TFEU, formerly Article 255 EC, which forms the basis of Regulation No 1049/2001. Based on a provision applicable to the European Atomic Energy Community, the regulation, which establishes general rules for access to documents of the institutions, is intended to apply — as the applicant does not indeed dispute — without it being disputed by the applicant, to documents held by the institutions and bodies operating in that context.

49 As stated by the Commission, that is not the case for Regulation No 1367/2006, which, as stated in its preamble, was adopted on the basis of Article 175 EC, now Article 192 TFEU. Since the latter is not mentioned in Article 106a(1) EA, no measure adopted on the basis thereof, including Regulation No 1367/2006, can be applied within the framework of Euratom.

50 In the third place, it should be noted that the text of Regulation No 1367/2006 refers specifically to the institutions and bodies of the European Community, without contemplating its application to other entities, for example, institutions or bodies under the European Atomic Energy Community. Thus, its title states that the regulation applies the provisions of the Aarhus Convention to 'Community institutions and bodies'. Moreover, the basis for the regulation, mentioned at the beginning of the preamble, refers to the EC Treaty only. Lastly, Article 2(1)(c) provides that the terms 'Community institution or body' mean 'any public institution, body, office or agency established by, or on the basis of, the Treaty', which, in the light of the basis for Regulation No 1367/2006, can only be the EC Treaty, which preceded the FEU Treaty.

51 That analysis cannot be called into question by the arguments put forward by the applicant.

52 First of all, the applicant denies that Regulation No 1367/2006 applies the Aarhus Convention.

53 In that regard, it is sufficient to note that, as mentioned in paragraph 46 above, that argument is contradicted by the very wording of the regulation invoked which, in its title, its recitals and its provisions, refers to that convention, contrary to applicant's claims.

54 Next, the applicant states that Article 2(1)(d) of Regulation No 1367/2006 includes in the definition of environmental information 'radiation or waste, including radioactive waste'. From that reference to radioactive realities in the regulation, it infers that the regulation applies to access to information on nuclear safety, including documents held within the framework of the European Atomic Energy Community.

55 In that respect, it should be noted that there is no legal basis for the application of Regulation No 1367/2006 to documents held within the framework of the European Atomic Energy Community since the provision on which the regulation is based does not apply to the EAEC Treaty. This absence of legal basis cannot be offset by the presence of terms that include references to nuclear energy in the regulation, especially since those references can be found in contexts other than the European Atomic Energy Community.

56 In addition, the applicant submits that the Commission's Rules of Procedure were amended to ensure compliance with the requirements arising from Regulation No 1367/2006, in particular when that institution acts within the framework of the EAEC Treaty. On that point, it refers to Commission Decision 2008/401/EC, Euratom of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the implementation of Regulation No 1367/2006 (OJ 2008 L 140, p. 22).

57 In that regard, it should be noted that, as observed by the applicant, a decision was taken by the Commission to ensure the application of Regulation No 1367/2006 to the measures adopted by it, the word 'Euratom' is mentioned in the number of the decision and the preamble to the decision states that it was adopted 'having regard to the Treaty establishing the European Atomic Energy Community'.

58 Those references were made because the rules amended by Decision 2008/401 are, themselves, based on the EAEC Treaty, in addition to the EC Treaty, the ECSC Treaty and the EU Treaty. Since the Commission's Rules of Procedure were based, inter alia, on the EAEC Treaty, the decision amending them also had to be based on that treaty, as well as the EU and EC Treaties. Having expired on 23 July 2002, that is to say, prior to the adoption of Decision 2008/401, the ECSC Treaty, by contrast, is no longer referred to in the decision as a legal basis.

59 However, those references cannot have the effect of extending the application of Regulation No 1367/2006 to documents held within the framework of the EAEC Treaty. In addition, contrary to the applicant's claims and as is apparent from paragraph 47 above, the European Union and the European Atomic Energy Community each have a separate legal personality and the word 'Euratom' appearing in Decision 2008/401 cannot have the effect that the provisions of Regulation No 1367/2006, applicable to the Commission only when acting within the scope of the FEU Treaty, also apply to that institution when acting within the scope of the EAEC Treaty.

60 Lastly, the applicant is of the opinion that Regulation No 1367/2006 must be applied within the framework of the European Atomic Energy Community as a result of Decision No 2335/2008/(VIK)CK of the Ombudsman, who ruled to that effect.

61 In that respect, it should be noted that, in that decision, the Ombudsman notes that the Member States and the European Community, succeeded by the European Union, are parties to the Aarhus Convention, with the result that the competent national authorities and the EU institutions must apply the rules laid down by it when they are asked to disclose environmental information (paragraph 61 of the abovementioned decision). According to the Ombudsman, the obligations of the European Union stemming from the Aarhus Convention form part and parcel of EU law pertaining to access to documents (paragraph 62 of the decision).

62 Contrary to the applicant's assertions, those observations do not show that, in the Ombudsman's view, Regulation No 1367/2006 applies to documents held within the framework of the European Atomic Energy Community. They merely confirm that, as regards access to information, the Aarhus Convention, in so far as it was implemented by Regulation No 1367/2006, applies to measures adopted by the EU institutions when acting within the framework of the convention.

63 According to the applicant, the Ombudsman nevertheless states in the decision referred to in paragraph 60 above that, by virtue of Articles 15 TFEU and 106a(1) EA, those obligations do apply to documents held within the framework of the EAEC Treaty.

64 In that respect, it should be noted that, contrary to the applicant's assertions, Regulation No 1367/2006 was not adopted on the basis of Article 255 EC, now Article 15 TFEU, but was based on Article 175 EC, now Article 192 TFEU, which does not apply within the framework of the European Atomic Energy Community. Since it is not applicable within that framework, that last provision cannot form the basis of the application of that regulation to documents held within the framework of that Community (see paragraphs 48 and 49 above).

65 According to the applicant, the Ombudsman also states in its decision that the EU institutions must interpret EU law in the light of general principles and fundamental rights, which include access to documents.

66 In that respect, it should be noted that, as observed by the applicant, the right of access to documents has been upgraded to a fundamental right under Article 42 of the Charter of Fundamental Rights and that, under Article 6(3) EU, the fundamental rights as they result from the constitutional traditions common to the Member States, have the value of general principles of law in the EU legal order.

67 With regard to the European Union, Article 52(2) of the Charter of Fundamental Rights provides that the rights recognised by the charter for which provision is made in the Treaties are to be exercised under the conditions and within the limits defined by those treaties.

68 In the present case, Article 15 TFEU, the successor to Article 255 EC, provides that limits to the right of access are to be determined by means of regulations of the European Parliament and of the Council.

69 Similarly, it is clear from Articles 191 and 192 TFEU, the latter being the successor to Article 175 EC, that actions to implement EU policy on the environment are decided, in principle, by the Parliament and the Council.

70 As to the limits to the right of access, reference must therefore be made to the measures adopted under those provisions, namely Regulations Nos 1049/2001 and 1367/2006.

71 However, if Regulation No 1049/2001 applies to documents held within the framework of the European Community, now the European Union, and through Article 106a(1) EA within the framework of the European Atomic Energy Community, the same is not true, as explained above, of Regulation No 1367/2006, which applies within the framework of the European Community only, now the European Union, as regards information on the environment.

72 Furthermore, under those measures, broad access is to be granted to information in the possession of the institutions, while balancing that access with other interests protected therein, to the extent and in the manner described therein and without altering the scope given to each of those measures. This would be the case if the obligations set out in Regulation No 1367/2006 were applied outside the institutions and bodies of the European Union.

73 The first plea in law must therefore be rejected.

The second plea in law, alleging infringement of the third indent of Article 4(1)(a) of Regulation No 1049/2001, concerning the protection of the public interest as regards international relations

74 The applicant submits that, contrary to the Commission's assertions in the contested decision, the exception concerning the protection of the public interest as regards international relations in the third indent of Article 4(1)(a) of Regulation No 1049/2001 cannot justify the refusal to disclose the Loan Facility Agreement in its entirety (point 1 of the request for access), since access to that document would not harm nuclear safety and the Commission has failed to explain how that access would specifically and actually undermine the protection of that interest.

75 The Commission disputes that plea.

76 In that regard, it should be noted that under the third indent of Article 4(1)(a) of Regulation No 1049/2001, the institutions are to refuse access to a document where its disclosure would undermine the protection of the public interest as regards international relations.

77 According to the case-law, the particularly sensitive and essential nature of the interests protected by that provision, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation (judgments of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 35, and of 7 October 2015, *Jurašinović* v *Council*, T-658/14, not published, EU:T:2015:766, paragraph 26).

78 Moreover, the Court of Justice and the General Court have held that the criteria set out in Article 4(1)(a) of Regulation No 1049/2001 were very general, since access must be refused, as is clear from the wording of that provision, if disclosure of the document concerned would 'undermine' the protection of the 'public interest' as regards, inter alia, international relations' (judgments of 1 February 2007 in *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 36, and of 7 October 2015, *Jurašinović* v *Council*, T-658/14, not published, EU:T:2015:766, paragraph 27).

79 In those circumstances, review by the Court of the legality of decisions under that provision must be limited, according to that case-law, to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers (judgments of 1 February 2007 in *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 34, and of 7 October 2015, *Jurašinović* v *Council*, T-658/14, not published, EU:T:2015:766, paragraph 28).

80 With regard specifically to the statement of reasons, it 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 that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. 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 meets the requirements of Article 253 EC, now Article 296 TFEU, must be assessed with regard not only to its wording but also to its context and all the legal rules governing the matter in question (judgments of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 80, and of 10 September 2008, *Williams* v *Commission*, T-42/05, EU:T:2008:325, paragraph 94).

81 Lastly, it is clear from the wording of Article 4(1)(a) of Regulation No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, and there is no need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests (judgment of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 46).

82 The question whether, as the applicant claims, the Commission infringed the third indent of Article 4(1)(a) of Regulation No 1049/2001 must be examined in the light of the foregoing considerations.

83 In the contested decision the Commission set out, in essence, three arguments to explain its refusal to grant access to certain documents or parts of documents under the exception concerning international relations:

– first, disclosure of the Loan Facility Agreement in its entirety would compromise the efforts achieved to establish quality relations with Ukraine with a view to upgrading the safety of its nuclear power plants, and it is in the interest of the European Union to maintain the quality of its international relations not only with that State but with other neighbouring countries also;

– secondly, Ukraine is a strategic partner of the European Union in ensuring the safety of its energy supply;

– finally, the disclosure of commercially sensitive information relating to Energoatom would have a negative diplomatic impact.

84 Of those arguments, the first and third ones are criticised by the applicant, while the second one does not raise any comments on its part.

85 As regards the first and third arguments, the applicant maintains, in the first place, that the Commission did not indicate whether the nuclear safety objective was linked to public security, defence or international relations, all three of which are covered by Article 4(1)(a) of Regulation No 1049/2001.

86 In that respect, it should be noted that, contrary to the applicant's claims, paragraph 2.2 of the contested decision clearly and explicitly refers to the protection of the public interest as regards international relations laid down in the third indent of Article 4(1)(a) of Regulation No 1049/2001. In addition, it is apparent from the explanations in the contested decision that, in the Commission's view, if the quality relations established with Ukraine were to deteriorate, the efforts achieved to ensure the safety of power plants around the European Union would be jeopardised. Based on those factors, the Court finds that the exception applied was identified by the Commission as being the one in the third indent of Article 4(1)(a) of Regulation No 1049/2001.

87 In the second place, the applicant argues that, contrary the Commission's assertions, access to the requested documents would not undermine nuclear safety itself, as the documents contain financial and economic information exclusively, and that information does not affect nuclear safety issues.

88 In that regard, it must be held that that argument is ineffective since the Commission did not justify its decision by stating that the request concerned information relating to nuclear safety but rather by noting, as is apparent from paragraph 83 above, that disclosure of the agreement would undermine the quality relations that it established with Ukraine and which it was important to maintain.

89 In the third place, the applicant argues that the way in which the authorities of a third country perceive the decisions of an institution does not form part of the exceptions to the obligation to grant access to the documents of the institutions.

90 In that respect, it should be noted that the way in which the authorities of a third country perceive the decisions of the European Union is a component of the relations established with that third country. Indeed, the pursuit and the quality of those relations depend on that perception. It may therefore warrant the application of the exception concerned.

91 In the fourth place, the applicant complains that the Commission failed to explain how disclosure of the requested documents would deteriorate the relations established with Ukraine in the field of nuclear safety. Furthermore, the Commission failed to explain how disclosure of commercially sensitive information relating to Energoatom would have a diplomatic impact.

92 In the light of the case-law cited in paragraphs 77 to 79 above, that line of argument must be rejected. In the contested decision, the Commission expressly stated that Ukraine had accepted to pass 'stress tests' on a voluntary basis, that they had enabled the Commission and Ukraine to gain a better understanding of existing risks, and that it was clearly in the interest of the European Union to maintain such quality relations and promote the highest level of EU nuclear safety standards in neighbouring countries. The Commission also explained that any subsequent disclosure to third parties of the agreement in its entirety would deteriorate the quality relations established, with all the resulting implications for nuclear safety.

93 Similarly, in the context of the exception concerned, the Commission stated that the disclosure of commercially sensitive information relating to Energoatom would have a negative diplomatic impact. Since this is a State-owned enterprise, that statement of reasons did not require further explanations.

94 In the fifth place, the applicant submits that, in its view, the risk invoked by the Commission in rejecting the request is not reasonably foreseeable but purely hypothetical. In the light of the case-law cited in paragraph 35 above, the nature of that risk, according to the applicant, did not justify the adoption of the contested decision.

95 In that regard, it should be noted that disclosure of an agreement concluded by an EU institution with a third country State-owned enterprise and based on quality relations established with the authorities of that country may have the effect of deteriorating those relations and, therefore, of impeding the attainment of the objectives pursued by the agreement and, more generally, the policy of which it forms part, since agreements of the same kind are concluded with other third countries. In the present case, that policy is crucial for the European Union, as it is designed to ensure the safety of nuclear power plants in surrounding countries. In those circumstances, the risk invoked has a reasonable degree of foreseeability and is not hypothetical. The contested decision is therefore not vitiated, on that point, by a manifest error of assessment.

96 The same applies to the negative diplomatic impact that could stem from the disclosure of commercial information relating to Energoatom.

97 It is clear, furthermore, from reading the agreement produced before the Court in the context of the measure of inquiry referred to in paragraph 25 above that the Commission did not make a manifest error of assessment in taking the view that the undisclosed parts of the agreement contained sensitive information relating to Energoatom, such as the provisions seeking to identify potential commercial risks and financial conditions, the disclosure of which would specifically and actually undermine the protection of international relations of the European Union.

98 In addition to the foregoing, it must be stated that, as is apparent from the third indent of Article 4(1)(a) of Regulation No 1049/2001, protection of the public interest described above did not have to be balanced against an overriding public interest.

99 Lastly, it should be observed that, in the light of the case-law referred to in paragraph 80 above, the statement of reasons provided by the Commission is sufficient to enable the appellant to ascertain the reasons for the decision taken and for the Court to exercise its power of review.

100 The second plea must therefore be rejected.

The third plea in law, alleging infringement of the first indent of Article 4(2) of Regulation No 1049/2001, concerning the protection of commercial interests

101 The applicant submits that, contrary to the Commission's decision, the exception concerning commercial interest in the first indent of Article 4(2) of Regulation No 1049/2001 cannot justify, in the present case, the refusal to disclose the agreement (point 1 of the request for access) and the EIB recommendation (point 4 of the request for access) in their entirety, since Energoatom has no commercial interest, the Commission failed to explain how such access would specifically and actually undermine the protected interest, and that risk is hypothetical.

102 The Commission disputes this plea.

103 In that regard, it must be recalled that under the first indent of Article 4(2) of Regulation No 1049/2001, the institutions may refuse access to a document where its disclosure would undermine the protection of 'commercial interests of a natural or legal person, including intellectual property', unless there is an overriding public interest in disclosure.

104 As pointed out in point 34 above, the exceptions to the right of access to documents laid down in Article 4 of Regulation No 1049/2001 must be interpreted and applied strictly so as to give the widest possible public access to documents held by the institutions.

105 In order to justify a refusal to grant access to a document whose disclosure has been requested, it is not sufficient, in principle, according to the case-law, for the requested document to be covered by an activity mentioned in Article 4(2) of Regulation No 1049/2001. As a rule, the institution to which the request is addressed must also provide explanations as to how access to that document could specifically and actually undermine the interest protected by the exception or exceptions relied on. Moreover, the risk of that interest being compromised must be reasonably foreseeable and not purely hypothetical (judgment of 28 March 2017, *Deutsche Telekom* v *Commission*, T-210/15, EU:T:2017:224, paragraph 27).

106 That case-law thus shows that the reasons given by the Commission to justify its refusal to provide the requested information must be examined in the light of three requirements.

107 As to the first requirement, namely being covered by an activity mentioned in Article 4(2) of Regulation No 1049/2001, the applicant submits that the contested decision is based on an error of assessment because there can be no commercial interests of Energoatom in the present case as it is a State-owned enterprise.

108 In that regard, it should be noted that there is nothing to preclude a State-owned enterprise such as Energoatom from being deemed to hold commercial interests within the meaning of the first indent of Article 4(2) of Regulation No 1049/2001. Indeed, the mere fact that the capital of an enterprise is owned by public authorities is not, as such, capable of depriving it of any commercial interests that may qualify for protection in the same way as those of a private company. In the present case, as

pointed out by the Commission, Energoatom engages in commercial activities, in the context of which it faces competition in the electricity market and is thus required to protect its interests in that market. Accordingly, there is no denying that the documents to which access is requested can concern commercial interests and, as such, be covered by the activity mentioned in the first indent of Article 4(2) of Regulation No 1049/2001.

109 As to the second requirement stemming from the case-law mentioned in paragraph 105 above, the applicant criticises the Commission for failing to explain how the parties' interests would be specifically and actually jeopardised if the requested documents were transmitted in their entirety.

110 With regard to the Loan Facility Agreement, the Commission explained in the contested decision that, if the agreement were disclosed in its entirety, the commercial interests of Energoatom as well as its own commercial interests in relation to Euratom loan agreements would be undermined. Concerning Energoatom, the Commission pointed out that the agreement stipulated the rights and obligations of both parties and addressed a wide range of potential and identified business risks. Moreover, according to the Commission, it contains sensitive commercial information such as the electricity prices charged by Energoatom and the thresholds of financial covenants. In its explanation, the Commission also mentioned that the agreement was still in the process of being implemented.

111 As to its own interests, the Commission stated that the agreement was based on a template used for other Euratom contracts. In those circumstances, disclosure of the agreement in its entirety would impede not only the implementation of the Loan Facility Agreement concluded with Energoatom but also that of other presently ongoing contracts of that kind. It would also render more difficult the Commission's position in future negotiations for contracts of a similar kind.

112 As regards the EIB recommendation, the Commission found in the contested decision that the selected parts contained commercially sensitive information provided by Energoatom as well as advice on reducing risks inherent to the loan. In addition, according to the Commission, those parts reflect provisions of the Loan Facility Agreement in respect of which the Commission had already established that disclosure thereof would undermine its commercial interests and those of Energoatom.

113 In view of those explanations and given the fact that it drew a distinction between the parts of the documents relating to commercial interests and those unrelated to those interests, which have been provided, the Court finds that the Commission carried out an examination which satisfies the requirements of the case-law cited in paragraph 105 above and that it has provided sufficient explanations in that respect.

114 In the light of those explanations it should be observed, moreover, that, contrary to the applicant's assertions, the Commission did state in the contested decision the reasons why disclosure was not foreseeable in the near future. It thus explained that the agreement concluded with Energoatom was still ongoing and that it was based on a template used for other contracts. Therefore, in its view, disclosure of the requested documents in their entirety would have an impact not only on the implementation of the agreement concluded with Energoatom but also on that of other contracts, whether already concluded or to be concluded.

115 As to the third requirement stemming from the case-law mentioned in paragraph 105 above, the applicant maintains that the threat to the commercial interests relied on by the Commission is purely hypothetical.

116 In that regard, it must be noted that the risk of undermining Energoatom's commercial interests by disclosing related sensitive information, as well as the risk of hindering the proper performance of other contracts already concluded or to be concluded, has a reasonable degree of foreseeability and

cannot be characterised as hypothetical, since, first, the documents concerned consist of a Loan Facility Agreement based on a template used for other contracts and a recommendation from a bank in respect of that loan and, secondly, the enterprise concerned is active in the electricity market.

117 In the application, the applicant also criticised the Commission for justifying the application of the exception concerning commercial interests by relying on the fact that the agreement was worth more than EUR 300 million. However, according to the applicant, the size of the agreement is irrelevant when applying the exception in question.

118 That argument must also be rejected as it is based on a misreading of the contested decision. Indeed, it is apparent from the contested decision that, while the value of the agreement was mentioned in the project description to which the documents relate, that factor was not the basis for the reasons given for applying the exception in the present case. Furthermore, it cannot be denied that the undermining of the commercial interests of a party to a contract increases with the value of that contract.

119 Moreover, it is apparent from reading the requested documents that were sent to the Court in the context of the measure of inquiry referred to in paragraph 25 above that, as stated in the contested decision, the undisclosed parts of the Loan Facility Agreement and of the EIB recommendation identify the rights and obligations of the parties to the agreement and contain sensitive commercial information, such as electricity prices charged by Energoatom and thresholds of financial covenants as well as risk analyses relating to the loan, the disclosure of which would specifically and actually undermine the commercial interests of both Energoatom and the Commission, within the meaning of the first indent of Article 4(2) of Regulation No 1049/2001.

120 The third plea in law must therefore be rejected.

The fourth plea in law, alleging infringement of Article 4 of Regulation No 1049/2001, in that the Commission failed to examine whether there was an overriding public interest in disclosure

121 In the application, the applicant criticises the Commission for failing to examine whether there was an overriding public interest requiring disclosure despite the protection of the interests previously examined.

122 The Commission disputes this plea.

123 In that regard, it must be recalled that under Article 4(2) of Regulation No 1049/2001, the institutions are to refuse access to a document where its disclosure would undermine, inter alia, the protection of commercial interests of a natural or legal person, unless there is an overriding public interest in disclosure.

124 However, it follows from Article 4(1) of Regulation No 1049/2001 that the possible existence of an overriding public interest does not need to be examined when the exception concerning the protection of the public interest as regards international relations is invoked.

125 As was held in paragraph 98 above, the Commission cannot be criticised, in the present case, for not balancing the public interest as regards international relations against an overriding public interest.

126 By contrast, for the application of Article 4(2) of Regulation No 1049/2001, the Commission was required to balance commercial interests, which, in its view, were threatened by the disclosure of the documents at issue, against the overriding public interest invoked by the applicant, which would be favoured by the disclosure of the documents in question. It is settled case-law that the decision taken on a request for access to documents depends on which interest must prevail in the particular case

(see, to that effect, judgments of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 42, and of 13 January 2017, *Deza* v *ECHA*, T-189/14, EU:T:2017:4, paragraph 53).

127 It should be observed that it is however for the person making the request to plead specific circumstances to show that there is an overriding public interest to justify the disclosure of the documents concerned (see, to that effect, judgment of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 94).

128 In its initial request, the applicant did not rely on any overriding public interest to obtain disclosure of the recommendation despite the protection owed to the relevant commercial interests.

129 In its confirmatory application, the applicant argued that there was an overriding public interest in so far as the requested information relates to emissions into the environment and nuclear energy as unsafe technology. The economic and financial aspects were also covered by that general interest in so far as the nuclear safety upgrade program represented a cost incurred by society as a whole.

130 In the contested decision, the Commission replied that the interests invoked by the applicant in its confirmatory application, while indeed of a public nature, were less important than the objective pursued by the loan, which is to upgrade the safety of nuclear power plants in EU neighbouring countries. Most importantly, according to the Commission, that objective would be better preserved by maintaining quality relations with Ukraine and the progress achieved in the context of the Loan Facility Agreement.

131 Except as regards the public interest in knowing the financial cost of the loan, discussed in paragraph 137 below, it must be held that, in the present case, the applicant's arguments set out in its confirmatory application regarding the overriding public interest are brief and imprecise.

132 In the application, admittedly, the applicant stated that the requested documents contained the conditions for granting a loan in the field of nuclear safety and that disclosure of such information would allow the public to monitor actual compliance with those conditions. According to the applicant, that monitoring is crucial given the numerous signs of non-compliance with nuclear safety rules in Ukraine. In that regard the applicant explains that the program being financed would extend the lifetime for two reactors beyond the initial deadline without the implementation of safety measures, that the operator's financial issues raised concerns regarding its ability to finance safety measures, that the authority responsible for the safety of nuclear power plants was deprived of its independence when the decision regarding one of the two reactors concerned was adopted, that the public has limited access to the decision-making process, that Ukraine is ignoring requests for information from neighbouring countries and that the European Union does not seem to be taking the necessary steps to ensure safety compliance. Given the danger involved, the applicant argues that it is essential for the measures taken to be under enhanced public scrutiny, which would become possible by disclosing the requested documents.

133 However, it should be noted that, having been raised only at the stage of the application, those arguments cannot be taken into account when assessing the lawfulness of the contested decision. According to the case-law, the lawfulness of a measure taken by an institution is to be assessed in the light of the information available to it when it was adopted. In proceedings before the EU judicature, no one, therefore, can rely on matters of fact which were not put forward in the course of the administrative procedure (see, to that effect, judgment of 1 July 2010, *AstraZeneca* v *Commission*, T-321/05, EU:T:2010:266, paragraph 687 and the case-law cited).

134 Accordingly, the requirements set out in paragraph 127 above are not satisfied.

135 For the sake of completeness, it should be noted that the parts of the agreement and of the EIB recommendation concerning the social and environmental aspects of the agreement have already been disclosed to the applicant and that disclosure of the selected parts relating to economic and financial aspects would not enable the public to monitor actual compliance with the safety conditions imposed on Energoatom.

136 Furthermore, it must be stated that the Commission, without committing an error of assessment, was entitled to find that nuclear safety is better guaranteed by maintaining quality relations with Ukraine in that field than by granting public access to the requested documents.

137 As regards the public interest in knowing the financial cost of the loan, the Commission, equally without committing any error, was entitled to hold that that interest was less important than ensuring nuclear safety in EU neighbouring countries.

138 It must, therefore, be held that the fourth plea in law is unfounded.

The fifth plea in law, alleging infringement of Article 42 of the Charter of Fundamental Rights

139 In the reply, the applicant puts forward a plea alleging infringement of Article 42 of the Charter of Fundamental Rights, according to which in its letter of 21 December 2015 referred to in paragraph 6 above and in the contested decision as well as in the defence the Commission did not sufficiently take account of the arguments put forward by the applicant during the administrative procedure.

140 As noted by the Commission, to the extent that it relates to the letter of 21 December 2015 and the contested decision, the plea regarding the lawfulness of the administrative procedure was not raised in the application. In so far as that plea does not constitute an amplification of a plea previously made in the original application and in so far as it is not based on matters of law or fact which have come to light in the course of the procedure, the plea is a new plea which must be rejected as inadmissible pursuant to Article 84 of the Rules of Procedure (see, to that effect, judgment of 20 November 2017, *Voigt* v *Parliament*, T-618/15, EU:T:2017:821, paragraph 87).

141 As regards the defence, it follows neither from the Statute of the Court nor its Rules of Procedure that the defendant is required to respond to each of the arguments put forward by the applicant in the application. In addition, the content of a defence cannot have any impact on the lawfulness of the contested decision. Indeed, it must be examined as at the time when the decision is adopted.

142 Lastly, it is apparent from Article 52(2) of the Charter of Fundamental Rights that the rights recognised by the Charter for which provision is made in the Treaties are to be exercised under the conditions and within the limits defined by those treaties. Accordingly, Article 42 of the Charter of Fundamental Rights cannot have a wider meaning than Article 15 TFEU and Regulation No 1049/2001, which implement it. Since the lawfulness of the contested decision in the light of that regulation has already been examined in the context of the preceding pleas, there is no need to review it in the light of Article 42 of the Charter of Fundamental Rights.

143 The fifth plea must therefore be dismissed.

144 It follows from all the foregoing that the application must be dismissed in its entirety.

Costs

145 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

146 Since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Commission.

147 Moreover, pursuant to Article 138(1) of the Rules of Procedure, the United Kingdom is to bear its own costs.

On those grounds,

THE GENERAL COURT (First Chamber),

hereby:

1. Dismisses the action;

2. Orders CEE Bankwatch Network to bear its own costs and pay those incurred by the European Commission;

3. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

Pelikánová Nihoul Svenningsen

Delivered in open court in Luxembourg on 27 February 2018.

E. Coulon
Registrar

I. Pelikánová
President