Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 5 September 2013 [1]

**Joined Cases C-514/11 P and C-605/11 P**

**Liga para a Protecção da Natureza (LPN) (C-514/11 P),**
**Republic of Finland (C-605/11 P)**
**v**

**European Commission**

(Appeal — Regulation (EC) No 1049/2001 — Access to documents of the institutions — Refusal to grant access to documents relating to a current infringement procedure concerning a dam project on the River Sabor (Portugal) — Article 4 — Exception relating to the protection of the purpose of inspections, investigations and audits — Obligation to carry out a specific and individual examination — Overriding public interest — Regulation (EC) No 1367/2006 — Article 6 — Environmental information)

## I – Introduction

1. By their respective appeals, the Liga para a Protecção da Natureza ('LPN') and the Republic of Finland [2] seek to have set aside the judgment of the General Court of the European Union of 9 September 2011 in Case T-29/08 *LPN* v *Commission* [2011] ECR II-6021 ('the judgment under appeal'), by which that Court dismissed the application by LPN for annulment of the Commission decision of 22 November 2007. That decision upheld the refusal, on the basis of Article 4(2), third indent, 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, [3] to grant LPN access to documents contained in the file of a current infringement procedure initiated against the Portuguese Republic concerning a dam construction project on the River Sabor (Portugal), which was liable to infringe Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, [4] and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [5] ('the contested decision').

1 — Original language: French.

2 — The appeals of LPN and the Republic of Finland were lodged at the Registry of the Court of Justice on 25 and 30 November 2011 respectively.

3 — OJ 2001 L 145, p. 43.

4 — OJ 1979 L 103, p. 1.

5 — OJ 1992 L 206, p. 7.

2. The present appeals concern essentially the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001 relating to the protection of the purpose of inspections, investigations and audits, interpreted in the light of 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. [6]

3. The appeals raise two questions of principle:

— the first question which arises is whether, in an infringement procedure that is still in progress, the European Commission is required to examine individually and specifically every document in respect of which a request for access has been made under Regulation No 1049/2001 in order to determine whether each of the documents in question is covered by the exception to the right of access laid down in Article 4(2), third indent, of that regulation, relating to the protection of the purpose of inspections, investigations and audits, or whether, in order to refuse access to all those documents, it may base its decision on a general presumption that disclosure of the documents would undermine the purposes of those particular activities;

— the second question in the present case is whether Regulation No 1367/2006, and in particular the second sentence of Article 6(1) thereof, which provides that the grounds for refusal are to be interpreted in a restrictive way where the information requested relates to emissions into the environment, alters that assessment.

## II – Legal framework

### A – *Regulation No 1049/2001*

4. Regulation No 1049/2001 defines the principles, conditions and limits governing the right of access to documents of the institutions of the European Union provided for in Article 15 TFEU.

5. Article 2 of Regulation No 1049/2001 provides:

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

…

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

…’

6. Article 4 of Regulation No 1049/2001 provides for exceptions to the right of access to documents of the EU institutions, the ones which concern us being found in Article 4(2), which provides:

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

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

6 — OJ 2006 L 264, p. 13.

— court proceedings and legal advice,

— the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.'

7. The exceptions provided for in, inter alia, Article 4(2) of Regulation No 1049/2001 apply only for the period during which protection is justified on the basis of the content of the document.

B – *Regulation No 1367/2006*

8. Recital 15 in the preamble to Regulation No 1367/2006 states that '[w]here Regulation … No 1049/2001 provides for exceptions, these should apply subject to any more specific provisions in this Regulation concerning requests for environmental information. The grounds for refusal as regards access to environmental information should be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions in the environment. …'

9. Article 3 of Regulation No 1367/2006 provides that 'Regulation … No 1049/2001 shall apply to any request by an applicant for access to environmental information held by Community institutions and bodies without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

…'

10. Paragraph 1 of Article 6 of that regulation, entitled 'Application of exceptions concerning requests for access to environmental information', provides:

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

## III – Facts

11. LPN is a non-governmental organisation, established in Portugal as a non-profit association, the objective of which is to protect the environment. By letter of 22 April 2003, LPN submitted to the Commission's Directorate-General for the Environment a complaint in which it claimed that the dam project at issue was damaging the 'Morais' and 'Sabor and Maçãs River' sites of Community importance, in breach of Directive 92/43. Following that complaint, the Commission initiated an infringement procedure against the Portuguese Republic and contacted the Portuguese authorities in order to establish the extent to which the dam project was liable to infringe Directives 79/409 and 92/43.

12. By letters of 27 March 2007 and 16 July 2007, LPN applied to the Directorate-General for the Environment for access to information on the processing of the complaint and asked to consult documents drawn up by the 'Commission working group' and those exchanged between the Commission and the Portuguese authorities.

13. That application was definitively rejected by the Commission in the contested decision.

14. In support of the contested decision, the Commission maintained that all of the documents which were the subject of the correspondence between it and the Portuguese authorities were covered by the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001. The Commission stated that, in a (current) infringement procedure, a climate of mutual trust needed to prevail between the Commission and the Member State concerned in order to enable them to start a process of negotiation and compromise with a view to reaching an amicable settlement of the dispute, avoiding proceedings before the Court of Justice. Moreover, according to the Commission, Article 6(1) of Regulation No 1367/2006, according to which an overriding public interest in disclosure must be deemed to exist where the information requested relates to emissions into the environment, does not apply to investigations relating to possible infringements of EU law, as in this case.

15. By decision of 28 February 2008 the Commission decided to take no further action on LPN's complaint. After the close of the infringement procedure and, inter alia, by a decision of 24 October 2008, the Commission granted LPN access to almost all the requested documents.

## IV – The judgment under appeal

16. In its action before the General Court, LPN, supported by the Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden, alleged that the Commission had, first, infringed several provisions of Regulation No 1367/2006 and, in particular, Article 6 of that regulation and, secondly, misapplied the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001 concerning, inter alia, the protection of the purpose of investigations.

17. This latter plea was subdivided into three parts. LPN alleged, first, that the Commission had unlawfully failed to examine and state reasons, in a specific and individual manner, as to whether and to what extent that exception applied to each of the documents to which access had been requested. Secondly, it argued that the Commission had wrongly failed to assess whether or not at least partial access to those documents should be granted. Thirdly, LPN contended that the Commission had failed to have regard to the public interests, as invoked in the application for access.

18. The General Court held that, at the time of the adoption of the contested decision, an infringement procedure was in progress and that the Commission was, in principle, entitled to invoke the exception relating to the protection of the purpose of investigations laid down in Article 4(2), third indent, of Regulation No 1049/2001.[7]

19. In the view of the General Court, it was apparent from the statement of reasons for the contested decision that the Commission had essentially relied on the principle, recognised by the Court of Justice in recent judgments, allowing the institution concerned to dispense with a specific and individual examination of each of the documents in question on the ground that all those documents form part of a single category of documents falling within the scope of an exception laid down in Article 4 of Regulation No 1049/2001.[8] This was the basis on which the Commission refused access to all of the documents contained in the file of the current infringement procedure in the field of environmental law.

7 — See paragraph 101 of the judgment under appeal.

8 — Ibid., paragraphs 118 and 119.

20. Furthermore, the General Court pointed out that the contested decision had been adopted under both Regulation No 1049/2001 and Regulation No 1367/2006 and that it was necessary to consider, first, whether, as argued by LPN and the interveners, the latter regulation was capable of modifying the scope of the Commission's obligation to carry out a specific and individual examination of the documents concerned pursuant to Regulation No 1049/2001. [9]

A – *The effects of Regulation No 1367/2006 on the scope of the Commission's obligation to examine*

21. The General Court held that there were a number of exceptions to the Commission's obligation to examine specifically and individually the documents to which access had been requested. Such would be the case where it was obvious that access had to be refused (if, for example, certain documents were manifestly covered in their entirety by an exception to the right of access) or, on the contrary, granted (because certain documents were manifestly accessible in their entirety), or where the documents concerned had already been the subject of a concrete, individual assessment by the Commission in similar circumstances. [10]

22. According to the General Court, it is 'in principle, open to the institution concerned to base its decisions … on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature, provided that it establishes in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose'. [11]

23. The General Court held that the recitals in the preamble to, and the provisions of, Regulation No 1367/2006 contained nothing to support the conclusion that the general considerations referred to above [12] were not applicable to a request for access to environmental information. [13]

24. The General Court held that, although Article 6(1) of Regulation No 1367/2006 provides for a strict interpretation of the exceptions to the right of access and to the balancing of the divergent interests, 'that finding [had] no bearing on the question whether the institution concerned [was] or [was] not required to carry out a specific and individual examination of the documents or information requested'. [14] According to the General Court, 'the conditions recognised by the case-law, under which that institution may, exceptionally, dispense with such a specific and individual examination, apply *mutatis mutandis* where the documents concerned obviously fall within a single category capable of being covered by one of the exceptions laid down in Article 4 of Regulation No 1049/2001. Indeed, under those principles enshrined in case-law, even though it follows from the first sentence of Article 6(1) of Regulation No 1367/2006 that the presumption of the existence of an overriding public interest in the disclosure of information on emissions into the environment does not apply in the context of a current infringement procedure, all the documents arising from such an infringement procedure are capable of being protected as a category'. [15]

9 — Ibid., paragraphs 103 and 104.
10 — Ibid., paragraphs 113 and 114.
11 — Ibid., paragraph 115.
12 — Ibid., paragraphs 113 to 115.
13 — Ibid., paragraph 116.
14 — Ibid., paragraph 117.
15 — Ibid., paragraph 117.

B – *Compliance by the Commission with its obligation to examine the documents concerned*

25. The General Court held that in this case it was obvious, on the one hand, that all the documents concerned fell, so far as concerns the entirety of their content, within the same category of documents and, on the other, that access to that category of documents had to be refused on the basis of the exception invoked. In its view, it was inconceivable that the Commission could have granted access to only one of those documents or to part of their content without undermining the ongoing negotiations with the Portuguese authorities. The General Court was of the view that the disclosure, even if only partial, of the documents concerned could in fact have undermined the purpose of the Commission's investigations concerning the Portuguese Republic's alleged infringements in connection with the dam project. [16]

26. Moreover, the General Court rejected the argument of LPN and the interveners in which they claimed that, if the Commission were allowed to dispense with a specific and individual examination of the content of each of the documents concerned, it would be unable to take sufficiently into account the public interest served by disclosure within the meaning of the second sentence of Article 6(1) of Regulation No 1367/2006. [17]

27. The General Court added that the position of complainants in the context of infringement procedures, within the meaning of the Commission communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (COM(2002) 141 final), [18] is fundamentally different from their position, for example, in the context of a procedure for the application of the Community competition rules, during which complainants have specific procedural rights, observance of which is subject to genuine judicial review in an action against a decision rejecting their complaint. [19]

28. The General Court held that interested parties have the right to demonstrate that a given document disclosure of which has been requested is not covered by that presumption, or that there is a higher public interest justifying the disclosure of the document concerned by virtue of Article 4(2) of Regulation No 1049/2001. [20] However, according to the General Court, neither LPN nor the interveners had put forward any evidence capable of calling into question the validity of the finding that all the documents concerned were covered by the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001. [21]

C – *Overriding public interest in disclosure*

29. The General Court held that since, at the time of the adoption of the contested decision, the infringement procedure initiated against the Portuguese Republic was in progress, the presumption of the existence of an overriding public interest in disclosure pursuant to the first sentence of Article 6(1) of Regulation No 1367/2006 was not applicable to this case, with the result that there was not even any need to adjudicate on whether or not the documents concerned contained information actually relating to 'emissions' into the environment. [22] The General Court found that, contrary to the observations of LPN and the interveners, the first sentence of Article 6(1) of Regulation

16 — Ibid., paragraph 121.
17 — Ibid., paragraph 122.
18 — OJ 2002 C 244, p. 5.
19 — See paragraph 126 of the judgment under appeal.
20 — Ibid., paragraph 128.
21 — Ibid., paragraph 129.
22 — Ibid., paragraph 134.

No 1367/2006, as a *lex specialis* in relation to Regulation No 1049/2001, excluded improvement of transparency in environmental matters for the purposes of the balancing of divergent interests as provided for in Article 4(2) of Regulation No 1049/2001 where the documents concerned were contained in the file of a current infringement procedure. [23]

30. Moreover, according to the General Court, the second sentence of Article 6(1) of Regulation No 1367/2006 'concerns only the obligation to interpret restrictively exceptions other than those mentioned in the first sentence of Article 6(1) of Regulation No 1367/2006, that is to say, other than those laid down in Article 4(2), first and third indents, of Regulation No 1049/2001.' [24] The General Court also held that 'the second sentence of Article 6(1) of Regulation No 1367/2006 refers only to a "public interest" in disclosure and not to an "overriding" public interest within the meaning of the last phrase of Article 4(2) of Regulation No 1049/2001'. [25] Consequently, 'the argument of LPN and the interveners that, in this case, the principles of increased transparency, of public access to documents, of closer participation by the citizen in the decision-making process and of greater legitimacy nevertheless constitute a public interest, and even an overriding public interest in disclosure of the documents concerned, [had to] be rejected'. [26]

31. Lastly, the General Court found that LPN and the interveners were neither able to identify any overriding public interest other than that of the supposedly increased transparency in environmental matters, of which the Commission should have taken account for the purposes of applying the last phrase of Article 4(2) of Regulation No 1049/2001 to this case, nor capable of explaining whether and to what extent the information requested related to emissions into the environment within the meaning of Article 6(1) of Regulation No 1367/2006. [27]

## V – Procedure before the Court

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

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

34. The Kingdom of Denmark and the Kingdom of Sweden, interveners at first instance, support the forms of order sought by LPN and the Republic of Finland.

35. Written observations were submitted by LPN, the Republic of Finland, the Kingdom of Denmark, the Federal Republic of Germany, the Kingdom of Sweden and the Commission. Oral observations were submitted by the appellants and the interveners, including the Republic of Estonia, at the hearing held on 29 May 2013.

## VI – The appeals

36. LPN and the Republic of Finland put forward three main grounds in support of their appeals.

23 — Ibid., paragraph 135.
24 — Ibid., paragraph 136.
25 — Idem.
26 — Idem.
27 — See paragraph 138 of the judgment under appeal.

37. Their first ground of appeal alleges infringement of Article 4(2), third indent, of Regulation No 1049/2001. Their second ground of appeal alleges infringement of the second sentence of Article 6(1) of Regulation No 1367/2006. Their third ground of appeal alleges infringement of the last phrase of Article 4(2) of Regulation No 1049/2001.

38. In addition, LPN claims that the decision on costs contained in paragraphs 141 and 143 of the judgment under appeal is vitiated by several errors of law. LPN adds that the judgment under appeal contains two inconsistencies concerning the identification of the contested decision.

## VII – Analysis

39. Before examining the grounds put forward by LPN and the Republic of Finland in support of their appeals, it is necessary to address the argument put forward by LPN in its appeal concerning its status as a non-governmental organisation active in the environmental field. According to LPN, a request for access to documents relating to State aid made by a party defending its own private interests, such as that at issue in the case of *Commission* v *Technische Glaswerke Ilmenau*,[28] cannot be likened to a request such as that at issue in the present case, which, firstly, emanates from an organisation representing public interests, a circumstance which confers on it a particular interest in taking an active part in the infringement procedure and, secondly, concerns documents relating to emissions into the environment, a situation specifically covered by Regulation No 1367/2006.

40. In my view, the General Court acted correctly in finding, in paragraph 137 of the judgment under appeal, 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.

41. It is clear from the judgment in *Sison* v *Council*[29] that the purpose of Regulation No 1049/2001 is to give the general public a right of access to documents of the institutions and not to lay down rules designed to protect the particular interest which a specific individual may have in gaining access to one of them.[30] In that judgment the Court found that Regulation No 1049/2001 did not provide for account to be taken of certain specific interests of which persons could themselves avail in order to obtain access to a particular document.[31] I consider that the same reasoning applies to the provisions of Regulation No 1367/2006, applicable in the present cases, the purpose of which is to give the public[32] a right of access to environmental information held by institutions or bodies of the European Union.

42. Accordingly, the particular status of LPN cannot be taken into account in the context of the application of Article 4(2), third indent, of Regulation No 1049/2001 and of Article 6(1) of Regulation No 1367/2006.

28 — Case C-139/07 P [2010] ECR I-5885.

29 — Case C-266/05 P [2007] ECR I-1233.

30 — See *Sison* v *Council*, paragraph 43. Regulation No 1049/2001 confers a very extensive right of access to the documents of the institutions concerned, there being, in accordance with Article 6(1) of the regulation, no requirement to state reasons for the application in order to enjoy that right. See Case C-362/08 P *Internationaler Hilfsfonds* v *Commission* [2010] ECR I-669, paragraph 56.

31 — See *Sison* v *Council*, paragraph 45.

32 — 'The public' is defined in Article 2(1)(b) of Regulation No 1367/2006 in the widest terms as 'one or more natural or legal persons, and associations, organisations or groups of such persons'.

A – *First ground of appeal: infringement of Article 4(2), third indent, of Regulation No 1049/2001*

1. Arguments

43. LPN considers that the General Court misinterpreted Article 4 of Regulation No 1049/2001. It points out that the file in the present case contains different types of documents and that it is entirely erroneous and disproportionate to state that, in the context of an ongoing infringement procedure, 'all the documents arising from such an infringement procedure are capable of being protected as a category'. [33]

44. The Republic of Finland disputes the fundamental proposition, contained in the judgment under appeal, that, by virtue of the exception relating to the protection of the purpose of inspections, investigations and audits in Article 4(2), third indent, of Regulation No 1049/2001, all the documents relating to an infringement procedure can be protected as forming a category, with the result that an institution may refuse access to all those documents on the basis of a general presumption that disclosure of the content of such documents would in principle undermine the protection of the purpose of investigations.

45. LPN and the Republic of Finland take the view that the judgment in *Commission* v *Technische Glaswerke Ilmenau* concerning State aid cannot be applied in the present case.

46. The Kingdom of Denmark and the Kingdom of Sweden contend that the General Court infringed Article 4(2), third indent, of Regulation No 1049/2001 in applying a general presumption in order to exclude access to all the documents relating to an infringement procedure. They take the view that the Commission is, on the contrary, obliged to establish, in the light of the specific circumstances, whether disclosure of each of the documents would undermine the purpose of investigations. They note that the Court has applied general presumptions in very few cases and then for clearly defined reasons which are not applicable in the present context.

47. The Federal Republic of Germany and the Commission consider that it is appropriate to apply a general presumption that the disclosure of documents relating to infringement procedures would undermine the protection of the purpose of investigations, within the meaning of Article 4(2), third indent, of Regulation No 1049/2001. They contend that, if exchanges between the Commission and the Member State concerned were disclosed, the willingness to cooperate in a climate of mutual trust would be undermined. According to the Commission and the Federal Republic of Germany, the judgment in *Commission* v *Technische Glaswerke Ilmenau* should be applied by analogy in the present cases, since the procedure for reviewing State aid is a variant of the infringement procedure that is adapted to the special problems created by State aid with regard to competition in the common market.

2. Assessment

48. As a preliminary point, it should be recalled that LPN requested access to all the documents contained in the administrative file of an infringement procedure initiated under Article 258 TFEU against the Portuguese Republic in the field of environmental law. That request was made while the administrative procedure was in progress. In the contested decision, the Commission refused to make the documents requested available to LPN, relying on the exception to the right of access laid down in Article 4(2), third indent, of Regulation No 1049/2001 based on the protection of the purpose of

33 — See paragraph 117 of the judgment under appeal.

inspections, investigations and audits. In doing so the Commission did not establish, for each document requested, whether disclosure would undermine the purpose of the investigation initiated under Article 258 TFEU against the Portuguese Republic, taking the overall view that disclosure of all the documents at that stage would undermine the infringement procedure.

49. That approach was endorsed in the judgment under appeal.

50. The General Court held that, since at the time of the adoption of the contested decision the infringement procedure was in progress, the Commission could proceed on the basis of the principle that a general presumption that disclosure of the documents in the administrative file would undermine protection of the purpose of the investigation applied to all of the documents concerned. [34]

51. It is not disputed in the present appeals that, as was stated in paragraph 101 of the judgment under appeal, the Commission was, in principle, entitled to invoke the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001, relating to the protection of the purpose of investigations, inasmuch as an infringement procedure was in progress at the time when the request at issue was made. On the other hand, at issue here are the nature and intensity of the investigation carried out by the Commission when that exception was applied to the documents at issue and, in particular, the question whether that institution was required to conduct a specific assessment of the content of each of those documents, or whether it could, by contrast, merely rely on a general presumption that protection of the purpose of the procedure applicable to all the documents requested would be undermined.

52. It is settled case-law that Regulation No 1049/2001 seeks, as indicated in recital 4 in the preamble thereto, and Article 1 thereof, to give the public a right of access to documents of the institutions which is as wide as possible. [35] However, that right is subject to certain limits based on grounds of public or private interest. More specifically, and in reflection of recital 11 in the preamble thereto, 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 article. Thus, if the Commission decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception – among those laid down in Article 4 of Regulation No 1049/2001 – upon which it is relying. Since they derogate from the principle of the widest possible public access to documents, those exceptions must be interpreted and applied strictly. [36]

53. It is clear from that case-law that, in order to safeguard the guiding principle of transparency, the Commission was in principle required not only to examine specifically and individually each of the documents to which access had been requested by LPN in order to determine whether their disclosure would actually undermine the purpose of the investigation initiated under Article 258 TFEU against the Portuguese Republic, but also to explain, with regard to each document at issue, how total or partial access to each of those documents might undermine that purpose.

54. However, as the General Court stated in paragraph 113 et seq. of the judgment under appeal, there are exceptions originating from case-law to the Commission's obligation to examine specifically and individually the documents to which access has been requested.

34 — Ibid., paragraph 127.

35 — Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraph 33, and *Commission* v *Technische Glaswerke Ilmenau*, paragraph 51.

36 — See Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Oth*ers v *API and Commission* [2010] ECR I-8533, paragraphs 70 to 73 and the case-law cited.

55. According to that case-law,[37] an individual and specific examination of each document may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted. In such cases, the institution concerned may base its decision on a general presumption which applies to certain categories of document, where similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature.[38]

56. According to the most recent case-law, where access is refused on the basis of such a general presumption the interested parties may, if they so wish, demonstrate that a given document disclosure of which has been requested is not covered by that presumption, or that there is a higher public interest justifying the disclosure of the document concerned by virtue of Article 4(2) of Regulation No 1049/2001.[39]

57. In that regard, I would point out that the possibility of relying on general presumptions applying to certain categories of documents, instead of examining each document individually and specifically before refusing access to it, is no insignificant matter. The effect is not only that it restricts the fundamental principle of transparency laid down in Article 11 EU, Article 15 TFEU and Regulation No 1049/2001 but also, and of necessity, that it limits in practice access to the documents at issue. Accordingly, I take the view that the use of such presumptions must be founded on reasonable and convincing grounds. So far, the Court has expressly acknowledged the possibility of relying on such general presumptions in three specific circumstances, namely, procedures for reviewing State aid,[40] merger control procedures[41] and proceedings pending before the European Union Courts.[42]

58. First of all, in *Commission* v *Technische Glaswerke Ilmenau*, the Court allowed a general presumption to apply to refusal of access to documents relating to procedures for reviewing State aid. The Court held that, for the purposes of interpreting the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001, account must be taken of the fact that the interested parties,[43] except for the Member State responsible for granting the aid, do not, under Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU],[44] have a right to consult the documents on the Commission's administrative file. The Court took the view that, if those interested parties were able to obtain access, on the basis of Regulation No 1049/2001, to the documents concerned, the system for the review of State aid would be called into question.

59. Subsequently, in *Commission* v *Éditions Odile Jacob* and *Commission* v *Agrofert Holding*, the Court allowed a general presumption to be used also in order to refuse access to documents relating to merger control proceedings by reason of the fact that the legislation governing those procedures lays down strict rules as regards the treatment of information obtained or findings made in those proceedings.

37 — See, to that effect, *Sweden and Turco* v *Council*, paragraph 50; *Commission* v *Technische Glaswerke Ilmenau*, paragraph 54; Case C-404/10 P *Commission* v *Éditions Odile Jacob* [2012] ECR, paragraph 116, Case C-477/10 P *Commission* v *Agrofert Holding* [2012] ECR, paragraph 57; and *Sweden and Others* v *API and Commission*, paragraph 74.

38 — See, to that effect, *Commission* v *Technische Glaswerke Ilmenau*, paragraph 54; *Commission* v *Éditions Odile Jacob*, paragraph 116; *Commission* v *Agrofert Holding*, paragraph 57; and *Sweden and Others* v *API and Commission*, paragraph 74.

39 — See, to that effect, *Commission* v *Technische Glaswerke Ilmenau*, paragraph 62; *Commission* v *Éditions Odile Jacob*, paragraph 126; and *Commission* v *Agrofert Holding*, paragraph 68.

40 — See *Commission* v *Technische Glaswerke Ilmenau*.

41 — See *Commission* v *Éditions Odile Jacob* and *Commission* v *Agrofert Holding*.

42 — See *Sweden and Others* v *API and Commission*.

43 — Namely, inter alia, the recipients of aid and their competitors.

44 — OJ 1999 L 83, p. 1.

60. According to the Court, generalised access, on the basis of Regulation No 1049/2001, to the documents exchanged, in the context of such a procedure, between the Commission and the notifying parties or third parties, would jeopardise the balance which the European Union legislature wished to ensure, in the merger regulation, between the obligation on the undertakings concerned to communicate possibly sensitive commercial information to the Commission in order that the latter may assess the compatibility of the proposed transaction with the common market, on the one hand, and the guarantee of increased protection, by virtue of the requirement of professional and business secrecy, for the information so provided to the Commission, on the other hand.[45] According to the Court, it follows from the foregoing that there is a general presumption that the disclosure of the documents concerned undermines, in principle, the protection of the commercial interests of the undertakings involved in the merger and also the protection of the purpose of investigations relating to the control of that operation.[46]

61. Lastly, in *Sweden and Others* v *API and Commission*, the Court held that it was appropriate to allow a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings, for the purposes of the second indent of Article 4(2) of Regulation No 1049/2001, while those proceedings remain pending.[47]

62. According to the Court, the fact that Regulation No 1049/2001 imposes transparency obligations on certain institutions cannot, in the context of pending court proceedings, lead the procedural position of those institutions to be undermined vis-à-vis the principle of equality of arms. Moreover, the Court held, on the basis of the principle of the sound administration of justice, that the exclusion of judicial activities from the scope of the right of access to documents, without any distinction being drawn between the various procedural stages, was justified in the light of the need to ensure that, throughout the judicial proceedings, the exchange of arguments by the parties and the deliberations of the Court in the case before it should take place in an atmosphere of total serenity. The Court also held, relying by analogy on the judgment in *Commission* v *Technische Glaswerke Ilmenau*, that such a presumption was justified also because neither the Statute of the Court of Justice of the European Union nor the Rules of Procedure of the European Union Courts provided for any third-party right of access to pleadings submitted to the Court in court proceedings.

63. LPN and the Republic of Finland claim that the General Court erred in law in finding that the Court's reasoning in *Commission* v *Technische Glaswerke Ilmenau*, in respect of procedures for reviewing State aid, applies also in respect of infringement procedures. I do not share that view.

64. It is clear not only from *Commission* v *Technische Glaswerke Ilmenau* but also from *Commission* v *Éditions Odile Jacob* and *Commission* v *Agrofert Holding* that the Court allowed general presumptions to be applied for the purpose of refusing access to documents relating to procedures for reviewing State aid or for merger control, relying, inter alia, on the existence of strict rules limiting access to the files in those procedures. In other words, although the Court, like the European Union legislature, has not introduced a hierarchy between the measures at issue,[48] it has circumscribed the application of the general provisions of Regulation No 1049/2001 by such general presumptions, where access to documents in the administrative file would jeopardise the specific purpose of rules designed to ensure the very effectiveness of procedures for reviewing State aid and merger control.

45 — See *Commission* v *Éditions Odile Jacob*, paragraph 121, and *Commission* v *Agrofert Holding*, paragraph 62.

46 — See *Commission* v *Éditions Odile Jacob*, paragraph 123, and *Commission* v *Agrofert Holding*, paragraph 64.

47 — See *Sweden and Others* v *API and Commission*, paragraph 94.

48 — See, to that effect, *Commission* v *Éditions Odile Jacob*, paragraph 110, and *Commission* v *Agrofert Holding*, paragraph 52, in which the Court held that, despite the absence of a provision expressly establishing a hierarchy between Regulation No 1049/2001 and the merger control regulations, 'it is appropriate to ensure that each of those regulations is applied in a manner which is compatible with the other and which enables a coherent application of them'.

65. Although, in order to justify the application of such general presumptions, the existence of those specific rules restricting public access to the administrative file, in the context of certain procedures, has taken on a certain significance in the reasoning of the Court, not only in *Commission* v *Technische Glaswerke Ilmenau* but also in *Commission* v *Éditions Odile Jacob* and *Commission* v *Agrofert Holding*,[49] I consider, contrary to the arguments put forward by LPN and the Republic of Finland, that that fact was not in itself decisive.

66. The application of such 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 undermined.

67. In that regard, I note that in *Sweden and Others* v *API and Commission* the Court based its reasoning mainly on the principle of the equality of arms and the need to ensure the proper conduct of proceedings in order to justify the application of such general presumptions. The absence of any third-party right of access to pleadings submitted to the Court in court proceedings was addressed in that judgment only as a supplementary point in order to justify the exclusion of judicial activities as such from the scope of Regulation No 1049/2001.

68. It follows that the element unifying the Court's reasoning in all of those cases[50] was the fact that access to the documents for certain procedures was totally incompatible with their proper conduct and was likely to undermine them. Moreover, it follows from *Commission* v *Technische Glaswerke Ilmenau*, *Commission* v *Éditions Odile Jacob* and *Commission* v *Agrofert Holding* that the general presumption of refusal of access covered all of the unpublished documents relating to the administrative files for the procedures at issue.

69. I consider that that unifying element also applies to the pre-litigation phase of infringement procedures governed by Article 258 TFEU, even though such procedures are not in all respects equivalent to procedures for reviewing State aid or mergers or to court proceedings, nor are the latter equivalent among themselves.

70. However, it should be noted that there is a particular connection between an infringement procedure and a procedure for reviewing State aid, both of which are intended to ensure that Member States comply with European Union law. When negative decisions are taken in cases of unlawful aid, the second subparagraph of Article 108(2) TFEU exempts the Commission from the pre-litigation phase provided for in Article 258 TFEU and, if the period laid down in the Commission's negative decision[51] for the State to comply with it is exceeded, the Commission may refer the matter directly to the Court of Justice.[52] It follows that, under the second subparagraph of Article 108(2) TFEU, the Commission's negative decision concerning unlawful aid replaces in some measure the pre-litigation phase of the infringement procedure.

49 — In *Commission* v *Éditions Odile Jacob*, paragraph 115, and *Commission* v *Agrofert Holding*, paragraph 56, the Court also based its decision on the purpose of the protection of commercial interests, stating that that purpose and the purpose of investigations were closely connected.

50 — Namely, *Commission* v *Technische Glaswerke Ilmenau*, *Commission* v *Éditions Odile Jacob*, *Commission* v *Agrofert Holding* and *Sweden and Others* v *API and Commission*.

51 — Or, where appropriate, the period subsequently fixed by the Commission. See Joined Cases C-485/03 to C-490/03 *Commission* v *Spain* [2006] ECR I-11887, paragraph 53.

52 — See *Commission* v *Spain*, paragraph 53.

71. It should also be noted that, as in procedures relating to State aid or proposed mergers, the Commission plays a pivotal role throughout the infringement procedure. In its role as custodian of the Treaty on the Functioning of the European Union, the Commission has broad discretion in deciding independently whether it is appropriate to initiate the pre-litigation procedure by sending a letter of formal notice and following this up by dispatching a reasoned opinion. [53] The purpose of the pre-litigation procedure is, by giving the Member State the opportunity to exercise its right of defence, to achieve compliance with European Union law whilst avoiding judicial action if possible.

72. I support, furthermore, the finding made by the General Court in paragraph 126 of the judgment under appeal that the pre-litigation phase of the infringement procedure is of a bilateral nature, between the Commission and the Member State concerned, and that is so despite the fact that, as in the present case, it may have been initiated by a complaint, since in any event a complainant has no rights at a later stage of the infringement procedure. [54] As the Commission states in the contested decision, 'in an infringement procedure, a climate of mutual trust needs to prevail between the Commission and the Member State concerned in order to enable them to start a process of negotiation and compromise with a view to an amicable settlement of the dispute without the need to bring proceedings before the Court of Justice'.

73. Moreover, although the procedure prior to the bringing of an action for infringement is not equivalent in all respects to court proceedings, it may lead to such proceedings since the Commission may, at the end of that procedure, apply to the Court for a declaration that the breach of obligations alleged against the Member State concerned has occurred. [55]

74. The sole purpose of preserving the integrity of the conduct of the procedure, which has led the Court to acknowledge a general presumption in matters of reviewing State aid [56] or mergers [57] or in judicial proceedings [58] therefore appears to me to be applicable to the pre-litigation phase of the infringement procedure.

75. I therefore take the view that public access, even if only partial, to the documents relating to that procedure while it is in progress jeopardises the achievement of its objectives and consequently justifies the application of a general presumption, such as that recognised by the Court in the other procedures.

76. LPN and the Republic of Finland correctly maintained that the content of a file in an infringement procedure concerning the environment was necessarily varied and might, in addition to correspondence between the Commission and the Member State concerned, include for example only technical and scientific studies. In the present cases, the General Court established that the file in question contained only correspondence between the Commission and the Member State. [59] However, even if that had not been the case, although it is true that the documents held by the Commission, in the context of an infringement procedure, may doubtless vary in nature and that every infringement procedure initiated against a Member State has its own special features, this does not by any means

53 — If the Commission forms the view that a Member State has failed to fulfil its obligations, it is for the Commission to determine whether it is expedient to take action against that State and what provisions the State has infringed, and to choose the time at which it will initiate infringement proceedings against it; the considerations which determine that choice cannot affect the admissibility of its action. See, in regard to this point, Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 27, and Case C-33/04 *Commission* v *Luxembourg* [2005] ECR I-10629, paragraph 66.

54 — See, to that effect, Communication COM(2002) 141 final, mentioned above.

55 — See, to that effect, Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraph 12, and Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 46. The infringement procedure is characterised by the principle of expediency. See Case C-531/06 *Commission* v *Italy* [2009] ECR I-4103, paragraphs 23 and 24. Responsibility for assessing the expediency of bringing infringement proceedings lies exclusively with the Commission.

56 — See point 58 above.

57 — See points 59 and 60 above.

58 — See points 61 and 62 above.

59 — See paragraph 121 of the judgment under appeal.

remove the need to safeguard the proper conduct of that procedure by limiting intervention by third parties. It follows that the General Court did not err in law in stating in paragraph 121 of the judgment under appeal that the documents contained in the file of a current infringement procedure constituted a single category for the purposes of applying the general presumption of refusing access on the basis of the exception relied on by the Commission.

77. It must also be borne in mind that, under Article 4(7) of Regulation No 1049/2001, an exception can apply only for the period during which protection is justified on the basis of the content of the document.[60] When the procedure is closed, access to the file should be granted if none of the other exceptions laid down in Article 4 of Regulation No 1049/2001 is applicable.

78. In the present cases, it is clear from paragraphs 28 to 35 of the judgment under appeal that, following the decision of 28 February 2008 to take no further action on the complaint concerning the dam project, LPN had access to almost all of the documents which it had requested.[61]

79. I therefore propose that the Court reject the first ground of the appeals as being unfounded.

B – *Second ground of appeal: infringement of the second sentence of Article 6(1) of Regulation No 1367/2006*

1. Arguments

80. LPN contends that, contrary to what the General Court states in paragraphs 113 to 117 of the judgment under appeal, a careful reading of Article 6(1) of Regulation No 1367/2001, in conjunction with Article 4(2) of Regulation No 1049/2001, does not exempt the Commission from the obligation 'to examine specifically and individually the documents to which access has been requested'.[62] It maintains that, although investigations represent exceptions to the first part of Article 6(1) of Regulation No 1367/2006, they are unavoidably and logically covered by the second part of that article. According to LPN, since it cannot be presumed that there is an overriding public interest in refusing access to documents covered by investigations, the potential grounds for such refusal must be interpreted narrowly through an analysis of whether or not the public interest in disclosure of information on the environment takes precedence in the case concerned over any other interests that should be protected by non-disclosure, and by establishing, in the light of the specific circumstances, whether or not the information contained in the requested documents relates to emissions into the environment.

81. The Republic of Finland, supported by the Kingdom of Denmark and the Kingdom of Sweden, contends that in paragraph 136 of the judgment under appeal the General Court misinterpreted the second sentence of Article 6(1) of Regulation No 1367/2006 in finding that that provision 'concerns only the obligation to interpret restrictively exceptions other than those mentioned in the first sentence of Article 6(1) of Regulation No 1367/2006, that is to say, other than those laid down in Article 4(2), first and third indents, of Regulation No 1049/2001'.

82. The Commission maintains that, by excluding from the statutory presumption provided for in the first sentence of Article 6(1) of Regulation No 1367/2006 investigations relating to possible infringements of European Union law, the European Union legislature was clearly concerned to take into account their particular characteristics. Therefore, the possible existence of an overriding public interest justifying disclosure should be examined within the parameters of Regulation No 1049/2001,

60 — See *Sweden and Turco* v *Council*, paragraph 70.

61 — See point 15 above.

62 — See paragraph 113 of the judgment under appeal.

and it cannot be inferred from Regulation No 1367/2006 that infringement procedures relating to the environment should be dealt with differently from the same procedures in other fields as regards the general presumption that disclosure of documents contained in those files would undermine the purpose of the investigation.

83. The Federal Republic of Germany contends that the second sentence of Article 6(1) of Regulation No 1367/2006 does not alter the criterion of assessment with regard to the refusal of access to documents in a current infringement procedure relating to the environment, which continues to be governed by Regulation No 1049/2001. That provision, it submits, simply reiterates the requirement, developed by the European Union Courts, that the grounds for derogation should be narrowly interpreted and environmental interests should be taken into consideration in that assessment.

2. Assessment

84. The present ground of appeal relates to the interpretation of Article 6(1) of Regulation No 1367/2006 and concerns, in particular, the question whether the rules on access to information in the field of the environment have any bearing on the question whether or not the Commission should carry out a specific and individual examination of the documents contained in the administrative file of an infringement procedure concerning the environment.

85. My view is that the General Court acted correctly in holding, in paragraph 105 of the judgment under appeal, that '[Regulation No 1367/2006] constitutes a *lex specialis* in relation to Regulation No 1049/2001 by replacing, amending or clarifying certain of the provisions of the latter regulation where the request for access relates to "environmental information" or information "which relates to emissions into the environment"'. [63]

86. It follows clearly from Article 3 of Regulation No 1367/2006 that Regulation No 1049/2001 applies to any request by an applicant for access to environmental information held by the European Union institutions. It follows that the scope of Regulation No 1367/2006 with regard to access to such information is very limited, since the amendments to Regulation No 1049/2001 are very specific.

87. Recital 15 in the preamble to, and Article 6(1) of, Regulation No 1367/2006 explain the interaction between the exceptions laid down in Article 4 of Regulation No 1049/2001 and the provisions of Regulation No 1367/2006.

88. It is clear, first of all, from recital 15 in the preamble to Regulation No 1367/2006 that, in principle, the exceptions laid down in Article 4 of Regulation No 1049/2001 must apply in full, subject to any more specific provisions of Regulation No 1367/2006.

89. The first sentence of Article 6(1) of Regulation No 1367/2006 strengthens application of the principle of transparency '[a]s regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001 … where the information requested relates to emissions into the environment' by providing that an overriding public interest is deemed to be served by their disclosure.

90. However, certain of the exceptions laid down in Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, namely 'investigations, in particular those concerning possible infringements of Community law', are expressly excluded by Article 6(1) of Regulation No 1367/2006 from the application of the principle of increased transparency. The presumption of the existence of an overriding public interest in disclosure does not apply to information contained in an administrative file relating to an infringement procedure, even where the information requested relates to emissions into the environment.

63 — See also paragraph 135 of the judgment under appeal.

91. The question remains whether, on the other hand, those procedures are covered by the second sentence of Article 6(1) of Regulation No 1367/2006. According to that second sentence, in the case of the 'other exceptions' set out in Article 4 of Regulation No 1049/2001, the grounds for refusal 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.

92. LPN and the Republic of Finland consider that the 'other exceptions' necessarily include, by default, infringement procedures, because the first sentence of Article 6(1) of Regulation No 1367/2006 does not apply to them. That would require the Commission, in principle, to examine individually and specifically all the documents contained in the administrative file of an infringement procedure concerning the environment and would preclude application of a general presumption.

93. I do not share that interpretation of the provision at issue.

94. I take the view, primarily, that it is clear not only from the wording of the second sentence of Article 6(1) of Regulation No 1367/2006 but also from the general scheme and purpose of that provision [64] that it applies solely to the exceptions that are not mentioned in the first sentence of that provision. The first sentence of Article 6(1) of Regulation No 1367/2006 mentions infringement procedures expressly, [65] even though it is in order to treat them as derogations in respect of the provisions of Article 4(2), first and third indents, of Regulation No 1049/2001.

95. The provisions of the first and second sentences of Article 6(1) of Regulation No 1367/2006 indicate clearly the express intention of the European Union legislature to remove infringement procedures from the scope of Article 6(1) of Regulation No 1367/2006 as a whole.

96. It follows that the provisions of Regulation No 1049/2001 alone apply to access to documents contained in the administrative file of an infringement procedure concerning the environment and that the second sentence of Article 6(1) of Regulation No 1367/2006 has no bearing on the question whether or not the Commission should conduct a specific and individual examination of those documents. Moreover, since Article 6(1) of Regulation No 1367/2006 does not apply to infringement procedures, the Commission is not obliged to examine whether the information requested relates to emissions into the environment within the meaning of Article 6(1) of Regulation No 1367/2006.

97. I consider, in the alternative, that, even if the Court were to hold that the second sentence of Article 6(1) of Regulation No 1367/2006 does apply to infringement procedures, that would not alter the outcome of the present ground of appeal. That provision, like the settled case-law of the Court relating to Article 4 of Regulation No 1049/2001, [66] recalls the obligation to interpret the grounds for refusal of access in a restrictive way, taking into account the public interest served by disclosure, and adds nothing in that regard to the interpretation or application of Article 4 of Regulation No 1049/2001 that is of relevance to the present case or to the question whether a general presumption is applicable.

98. It is clear from paragraphs 73 and 74 of the judgment in *Sweden and Others* v *API and Commission* that the strict interpretation and application of the exceptions laid down in Article 4 of Regulation No 1049/2001 do not preclude application of general presumptions to certain categories of documents.

64 — See, also, Article 3 of Regulation No 1367/2006 and recital 15 in the preamble to that regulation.

65 — See paragraph 136 of the judgment under appeal.

66 — *Sweden and Turco* v *Council*, paragraph 36.

99. Moreover, I take the view that the obligation to take into account 'whether the information requested relates to emissions into the environment' is clearly linked to, and increases, the obligation to interpret the grounds for refusal of access restrictively. However, once again I consider that that obligation does not preclude application of general presumptions to certain categories of documents.

100. I accordingly take the view that the General Court did not err in law in finding, in paragraph 136 of the judgment under appeal, that 'in the context of the application of the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001, LPN and the interveners cannot properly rely on the second sentence of Article 6(1) of Regulation No 1367/2006', and that the Court should reject the second ground of the appeals as unfounded.

## C – *Third ground of appeal: infringement of the last phrase of Article 4(2) of Regulation No 1049/2001*

### 1. Arguments

101. LPN, the Republic of Finland, the Kingdom of Denmark and the Kingdom of Sweden contend that the analysis of the General Court in paragraphs 132 to 138 of the judgment under appeal concerning the existence of an overriding public interest in disclosure is incorrect.

102. They claim, in essence, that the General Court erred in finding that the contested decision was in accordance with the last phrase of Article 4(2) of Regulation No 1049/2001,[67] even though the Commission had not established whether there was any overriding public interest, as it ought to have done (even of its own motion, according to the Kingdom of Sweden) under the last phrase of Article 4(2) of Regulation No 1049/2001, since Article 6(1) of Regulation No 1367/2006 does not provide it with any exemption in that regard.

103. The Commission rejects those arguments.

### 2. Assessment

104. In paragraphs 134 to 136 of the judgment under appeal, the General Court held that Article 6(1) of Regulation No 1367/2006 did not extend the application of the principle of transparency with regard to infringement procedures and that disclosure of information on emissions into the environment relating to those procedures was not deemed to constitute an overriding public interest within the meaning of the last phrase of Article 4(2) of Regulation No 1049/2001.

105. I consider, in the light of my reply to the second ground of appeal above, that that assessment is correct.

67 — See paragraphs 135 and 136 of the judgment under appeal.

106. In paragraph 138 of the judgment under appeal, the General Court held that LPN and the interveners were neither able to identify any overriding public interest other than that of the supposedly increased transparency in environmental matters, of which the Commission should have taken account for the purposes of applying the last phrase of Article 4(2) of Regulation No 1049/2001 to this case, nor capable of explaining whether and to what extent the information requested related to emissions into the environment within the meaning of Article 6(1) of Regulation No 1367/2006. I consider that that finding of fact cannot be challenged at the appeal stage. [68]

107. It is clear from the foregoing that LPN merely contended at first instance that increased transparency in environmental matters constituted in itself an overriding public interest. I take the view, as the Court held in paragraphs 157 and 158 of the judgment in *Sweden and Others* v *API and Commission*, that such imprecise considerations cannot provide an appropriate basis for establishing that, in the present case, the principle of transparency was in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question. Moreover, it follows clearly from paragraph 62 of the judgment in *Commission* v *Technische Glaswerke Ilmenau* that it is not for the Commission to examine of its own motion whether an overriding public interest may justify disclosure of the documents concerned under the last phrase of Article 4(2) of Regulation No 1049/2001 and Article 6(1) of Regulation No 1367/2006. On the contrary, the Court has held that interested parties may demonstrate that there is a higher public interest justifying disclosure of the documents concerned. [69]

108. In view of all of the foregoing, I consider that the third ground of appeal should also be rejected.

## VIII – Additional claim by LPN

109. LPN contends that the judgment under appeal contains two inconsistencies concerning the identification of the contested decision.

110. First, it states that the case brought before the General Court was for annulment of the contested decision and not of the decision of 24 October 2008, as stated in point 1 of the operative part of the judgment under appeal. LPN therefore asks the Court to make clear in point 1 of the operative part of the judgment under appeal that the action was brought against the contested decision.

111. Secondly, LPN considers that paragraph 46 of the judgment under appeal is incorrectly worded and should read as follows:

'LPN withdrew its application for review of the legality of the [contested] decision in so far as it concerns the third plea in law contained in the application, alleging failure to comply with the time-limit laid down in Article 8(1) of Regulation No 1049/2001 …'

112. The Commission takes issue with LPN's arguments.

68 — According to the Court's settled case-law, it is clear from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice that the General Court has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts by the General Court and the legal conclusions which it has drawn from them (Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 96, and Case C-47/10 P *Austria* v *Scheucher-Fleisch and Others* [2011] ECR I-10707, paragraph 57). I note that in the present cases no substantive inaccuracy has been alleged by either LPN or the Republic of Finland concerning the fact established by the General Court in paragraph 138 of the judgment under appeal.

69 — See point 56 above.

113. I consider that LPN has failed to explain in what way the alleged inconsistencies affected its legal position. Moreover, I, like the Commission, take the view that the present claim is inadmissible since it does not concern a point of law within the meaning of Article 58 of the Statute of the Court. Lastly, even if there is any inconsistency, it is for the General Court alone to rectify it under Article 84 of its Rules of Procedure.

114. It follows that the present claim must be rejected.

## IX – LPN's challenge to the assessment of the costs by the General Court

115. LPN contends that the assessment of the costs by the General Court, in paragraphs 141 and 143 of the judgment under appeal, contains several errors of law.

116. The Commission disputes LPN's arguments.

117. In this connection, suffice it to point out that, according to settled case-law, where all the other pleas put forward in an appeal have been rejected, any plea challenging the decision of the General Court on costs must be rejected as inadmissible by virtue of the second paragraph of Article 58 of the Statute of the Court, which provides that no appeal may lie regarding only the amount of the costs or the party ordered to pay them.[70]

118. Inasmuch as I take the view that all of the other grounds of appeal put forward by LPN must be rejected, the last plea, challenging the decision of the General Court on the allocation of costs, must accordingly be declared inadmissible.

119. In the light of all of the foregoing, I consider therefore that both the appeal brought by LPN in Case C-514/11 P and the appeal brought by the Republic of Finland in Case C-605/11 P should be dismissed in their entirety.

## X – Costs

120. Under Article 184(2) of its Rules of Procedure, where the appeal is unfounded, the Court of Justice is to make a decision as to the costs. Under Article 138(1) of those Rules, applicable to the procedure on appeal pursuant to Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Pursuant to Article 140(1) of those Rules, which also applies to appeals by virtue of Article 184(1) thereof, Member States which have intervened in the proceedings are to bear their own costs. Under Article 184(4) of the same Rules, the Court may decide that an intervener at first instance who takes part in the appeal proceedings is to bear his own costs.

121. I consider that LPN and the Republic of Finland should be ordered to pay the costs of Cases C-514/11 P and C-605/11 P respectively, in accordance with the form of order sought by the Commission. The Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia and the Kingdom of Sweden must bear their own respective costs.

70 — See Joined Cases C-302/99 P and C-308/99 P *Commission and France* v *TF1* [2001] ECR I-5603, paragraph 31, and Joined Cases C-57/00 P and C-61/00 P *Freistaat Sachsen and Others* v *Commission* [2003] ECR I-9975, paragraph 124.

## XI – Conclusion

122. In the light of the foregoing, I propose that the Court should:

(1) dismiss the appeals;

(2) order Liga para a Protecção da Natureza (LPN) to bear its own costs and to pay those incurred by the European Commission relating to the appeal in Case C-514/11 P;

(3) order the Republic of Finland to bear its own costs and to pay those incurred by the European Commission relating to the appeal in Case C-605/11 P; and

(4) order the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia and the Kingdom of Sweden to bear their own respective costs relating to the appeals in Joined Cases C-514/11 P and C-605/11 P.