



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

23 September 2015*

(Access to documents — Regulation (EC) No 1049/2001 — Documents held by ECHA — Documents deriving from a third party — Time-limit for response to an application for access — Refusal of access — Exception relating to protection of the commercial interests of a third party — Exception relating to protection of the decision-making process — Overriding public interest — Environmental information — Emissions into the environment)

In Case T-245/11,

ClientEarth, established in London (United Kingdom),

The International Chemical Secretariat, established in Gothenburg (Sweden),

represented by P. Kirch, lawyer,

applicants,

v

European Chemicals Agency (ECHA), represented by M. Heikkilä, A. Iber and T. Zbihlej, acting as Agents, and by D. Abrahams, Barrister,

defendant,

supported by

European Commission, represented initially by E. Manhaeve, P. Oliver and C. ten Dam, and subsequently by E. Manhaeve, P. Oliver and F. Clotuche-Duvieusart, and latterly by E. Manhaeve, F. Clotuche-Duvieusart and J. Tomkim, acting as Agents,

and by

European Chemical Industry Council (Cefic), established in Brussels (Belgium), represented by Y. van Gerven and M. Bronckers, lawyers,

interveners,

APPLICATION for the annulment of the ECHA decision of 4 March 2011 refusing access to information supplied in the context of the procedure for registration of certain chemical substances,

* Language of the case: English.

THE GENERAL COURT (Second Chamber),

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

Registrar: L. Grzegorzczuk, Administrator,

having regard to the written procedure and further to the hearing on 30 January 2015,

gives the following

Judgment

Legal context

A – International law

1. The TRIPS Agreement

- 1 The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994 (OJ 1994 L 336, p. 214; ‘the TRIPS Agreement’), which constitutes Annex 1 C to the Agreement establishing the World Trade Organisation (‘WTO’) (OJ 1994, L 336, p. 3), contains a Part II headed ‘Standards concerning the availability, scope and use of intellectual property rights’. In that part II, under Section 7, headed ‘Protection of undisclosed information’, Article 39 reads as follows:

‘1. In the course of ensuring effective protection against unfair competition as provided in Article 10 *bis* of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.

2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:

- (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- (b) has commercial value because it is secret; and
- (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilise new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.’

2. Aarhus Convention

2 The Convention on access to information, public participation in decision-making and access to justice in environmental matters was signed in Aarhus on 25 June 1998 ('the Aarhus Convention').

3 Article 2(3) of the Aarhus Convention provides:

"Environmental information" means any information in written, visual, aural, electronic or any other material form on:

- (a) the state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above ...;
- (c) the state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.'

4 Article 3(1) of the Aarhus Convention provides:

'Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.'

5 Article 4(1) to (4) of the Aarhus Convention read as follows:

'1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:

- (a) without an interest having to be stated;
- (b) in the form requested unless:
 - (i) it is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or
 - (ii) the information is already publicly available in another form.

2. The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

3. A request for environmental information may be refused if:

- (a) the public authority to which the request is addressed does not hold the environmental information requested;
- (b) the request is manifestly unreasonable or formulated in too general a manner; or
- (c) the request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

4. A request for environmental information may be refused if the disclosure would adversely affect:

- (a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;
- (b) international relations, national defence or public security;
- (c) the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;
- (d) the confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;
- (e) intellectual property rights;
- (f) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;
- (g) the interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or
- (h) the environment to which the information relates, such as the breeding sites of rare species.

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.'

B – EU law

1. Regulation (EC) No 1049/2001

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

7 Article 2(3) of that regulation provides that the regulation applies ‘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’.

8 Article 4 of Regulation No 1049/2001, headed ‘Exceptions’, provides:

‘...

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

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

...

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

...

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

...’

9 Article 6(2) and (3) of Regulation No 1049/2001 read as follows:

‘2. If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.

3. In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.’

10 Article 7 of Regulation No 1049/2001, headed ‘Processing of initial applications’, provides:

‘1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution’s reply, make a confirmatory application asking the institution to reconsider its position.

3. ...

4. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application.'

11 Article 8 of Regulation No 1049/2001, headed 'Processing of confirmatory applications', provides:

'1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

3. Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.'

12 Article 10 of Regulation No 1049/2001, headed 'Access following an application', reads as follows:

'1. The applicant shall have access to documents either by consulting them on the spot or by receiving a copy, including, where available, an electronic copy, according to the applicant's preference. The cost of producing and sending copies may be charged to the applicant. This charge shall not exceed the real cost of producing and sending the copies. Consultation on the spot, copies of less than 20 A4 pages and direct access in electronic form or through the register shall be free of charge.

2. If a document has already been released by the institution concerned and is easily accessible to the applicant, the institution may fulfil its obligation of granting access to documents by informing the applicant how to obtain the requested document.

3. Documents shall be supplied in an existing version and format (including electronically or in an alternative format such as Braille, large print or tape) with full regard to the applicant's preference.'

2. Directive 2003/4/EC

13 Article 2 of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26) reads as follows:

'For the purposes of this Directive:

1. "Environmental information" shall mean any information in written, visual, aural, electronic or any other material form on:

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

- (b) factors, such as substances, energy, noise, radiation or waste, ... emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

...

- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).

...'

3. *The REACH Regulation*

- 14 Recital 117 in the preamble to Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1), as amended ('the REACH Regulation'), reads as follows:

'EU citizens should have access to information about chemicals to which they may be exposed, in order to allow them to make informed decisions about their use of chemicals. A transparent means of achieving this is to grant them free and easy access to basic data held in the Agency's database, including brief profiles of hazardous properties, labelling requirements and relevant Community legislation including authorised uses and risk management measures. The Agency and Member States should allow access to information in accordance with Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, Regulation ... No 1049/2001 ... and with the [Aarhus] Convention ...'

- 15 Recital 118 in the preamble to the REACH Regulation states:

'Disclosure of information under this Regulation is subject to the specific requirements of Regulation (EC) No 1049/2001. That Regulation sets binding deadlines for the release of information as well as procedural guarantees, including the right of appeal. The Management Board should adopt the practical arrangements for application of those requirements to the Agency.'

- 16 According to Article 1(1) of the REACH Regulation, its purpose is 'to ensure a high level of protection of human health and the environment, including the promotion of alternative methods for assessment of hazards of substances, as well as the free circulation of substances on the internal market while enhancing competitiveness and innovation'.

17 Article 3 of the REACH Regulation, headed ‘Definitions’, provides:

‘For the purposes of this Regulation:

(1) substance: means a chemical element and its compounds in the natural state or obtained by any manufacturing process, including any additive necessary to preserve its stability and any impurity deriving from the process used, but excluding any solvent which may be separated without affecting the stability of the substance or changing its composition;

...

(12) placing on the market: means supplying or making available, whether in return for payment or free of charge, to a third party. ...;

...

(15) intermediate: means a substance that is manufactured for and consumed in or used for chemical processing in order to be transformed into another substance (hereinafter referred to as synthesis) ...’

18 Article 6(1) of the REACH Regulation, that article being headed ‘General obligation to register substances on their own or in preparations’, provides:

‘Save where this Regulation provides otherwise, any manufacturer or importer of a substance, either on its own or in one or more preparation(s), in quantities of one tonne or more per year shall submit a registration to the Agency.’

19 In accordance with Article 10(a)(xi) of the REACH Regulation, that article headed ‘Information to be submitted for general registration purposes’, a registration is to include a technical dossier containing ‘a request as to which of the information in Article 119(2) the manufacturer or importer considers should not be made available on the Internet in accordance with Article 77(2)(e), including a justification as to why publication could be harmful for his or any other concerned party’s commercial interests’.

20 Under Title X, headed ‘Agency’, Article 77(2) of the REACH Regulation, that article being headed ‘Tasks’, provides:

‘The Secretariat shall undertake the following tasks:

...

(e) establishing and maintaining database(s) with information on all registered substances, ... It shall make the information identified in Article 119(1) and (2) in the database(s) publicly available, free of charge, over the Internet, except where a request made under Article 10(a)(xi) is considered justified. The Agency shall make other information in the databases available on request in accordance with Article 118.

...’

21 Article 118 of the REACH Regulation, headed ‘Access to information’, is worded as follows:

‘1. Regulation (EC) No 1049/2001 shall apply to documents held by the Agency.

2. Disclosure of the following information shall normally be deemed to undermine the protection of the commercial interests of the concerned person:

...

(c) the precise tonnage of the substance or preparation manufactured or placed on the market;

(d) links between a manufacturer or importer and his distributors or downstream users.

Where urgent action is essential to protect human health, safety or the environment, such as emergency situations, the Agency may disclose the information referred to in this paragraph.

3. The Management Board shall adopt the practical arrangements for implementing Regulation (EC) No 1049/2001, including appeals or remedies necessary for reviewing a partial or full rejection of a confidentiality request, by 1 June 2008.

4. Decisions taken by the Agency pursuant to Article 8 of Regulation (EC) No 1049/2001 may form the subject of a complaint to the Ombudsman or of an action before the Court of Justice, under the conditions laid down in Articles 195 and 230 of the Treaty respectively.'

22 Article 119 of the REACH Regulation, headed 'Electronic public access', is worded as follows:

'1. The following information held by the Agency on substances whether on their own, in preparations or in articles, shall be made publicly available, free of charge, over the Internet in accordance with Article 77(2)(e):

...

2. The following information on substances whether on their own, in preparations or in articles, shall be made publicly available, free of charge, over the Internet in accordance with Article 77(2)(e) except where a party submitting the information submits a justification in accordance with Article 10(a)(xi), accepted as valid by the Agency, as to why such publication is potentially harmful for the commercial interests of the registrant or any other party concerned:

...

(b) the total tonnage band (i.e. 1 to 10 tonnes, 10 to 100 tonnes, 100 to 1 000 tonnes or over 1 000 tonnes) within which a particular substance has been registered;

...

(d) information, other than that listed in paragraph 1, contained in the safety data sheet;

...'

23 Annex II to the REACH Regulation concerns the 'the requirements that the supplier shall fulfil for the compilation of a safety data sheet'. Point 1.1 of Section 1 of that annex, headed 'Identification of the substance/preparation and of the company/undertaking', provides:

'This section ... shall prescribe how ... the name of the supplier of the substance or mixture and the contact detail information of the supplier of the substance or mixture, including an emergency contact, shall be provided in the safety data sheet.'

24 Point 1.3. of Section 1 of Annex II, headed ‘Details of the supplier of the Safety Data sheet’, provides:

‘The supplier, whether it is the manufacturer, importer, only representative, downstream user or distributor, shall be identified. The full address and telephone number of the supplier shall be given as well as an e-mail address for a competent person responsible for the safety data sheet.

In addition, if the supplier is not located in the Member State where the substance or mixture is placed on the market and he has nominated a responsible person for that Member State, a full address and telephone number for that responsible person shall be given.

For registrants, the information shall be consistent with the information on the identity of the manufacturer or importer provided in the registration.

Where an only representative has been appointed, details of the non-Community manufacturer or formulator may also be provided.’

25 Annex VI to the REACH Regulation, headed ‘Information requirements referred to in Article 10’, provides, in the part headed ‘Information referred to in Article 10(a)(i) to (v)’, in point 3, headed ‘Information on manufacture and use(s) of the substance(s)’:

‘3.1. Overall manufacture, quantities used for production of an article that is subject to registration, and/or imports in tonnes per registrant per year in:

the calendar year of the registration (estimated quantity)

...

3.3. An indication of the tonnage used for his own use(s).’

4. *Regulation (EC) No 1367/2006*

26 Recital 3 in the preamble to Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provision of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies (OJ 2006 L 264, p. 13), is worded as follows:

‘... Provisions of Community law should be consistent with that Convention.’

27 Recital 8 of Regulation No 1367/2006 is worded as follows:

‘The definition of environmental information in this Regulation encompasses information in any form on the state of the environment. This definition, which has been aligned to the definition adopted for Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, has the same content as the one laid down in the Aarhus Convention. The definition of “document” in Regulation (EC) No 1049/2001 encompasses environmental information as defined in this Regulation.’

28 Recital 12 of Regulation No 1367/2006 states the following:

‘The Aarhus Convention calls for public access to environmental information either following a request or by active dissemination by the authorities covered by the Convention. Regulation (EC) No 1049/2001 applies to the European Parliament, the Council and the Commission, as well as to agencies and similar bodies set up by a Community legal act. It lays down rules for these institutions

that comply to a great extent with the rules laid down in the Aarhus Convention. It is necessary to extend the application of Regulation (EC) No 1049/2001 to all other Community institutions and bodies.'

29 Recital 13 of Regulation No 1367/2006 states the following:

'Where the Aarhus Convention contains provisions that are not, in whole or in part, to be found also in Regulation (EC) No 1049/2001, it is necessary to address those, in particular with regard to the collection and dissemination of environmental information.'

30 Recital 15 of Regulation No 1367/2006 is worded as follows:

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

31 Article 1(1) of Regulation No 1367/2006 provides:

'The objective of this Regulation is to contribute to the implementation of the obligations arising under the [Aarhus Convention] by laying down rules to apply the provisions of the Convention to Community institutions and bodies, in particular by:

- (a) guaranteeing the right of public access to environmental information received or produced by Community institutions or bodies and held by them, and by setting out the basic terms and conditions of, and practical arrangements for, the exercise of that right;

...'

32 Article 2 (1) of Regulation No 1367/2006 states the following:

'For the purposes of this Regulation:

...

- (d) "environmental information" means any information in written, visual, aural, electronic or any other material form on:

- (i) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (ii) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in point (i);
- (iii) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements;

...

- (vi) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures in as much as they are or may be affected by the state of the elements of the environment referred to in point (i) or, through those elements, by any of the matters referred to in points (ii) and (iii);

...'

- 33 The first paragraph of Article 3 of Regulation No 1367/2006, which forms part of Title II of that regulation, headed 'Access to environmental information', provides:

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

- 34 Article 6(1) of Regulation No 1367/2006 is worded as follows:

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

Background to the dispute and the contested decision

- 35 By e-mail of 1 December 2010, on the basis of Regulations No 1049/2001 and No 1367/2006 and Article 118 of the REACH Regulation, the International Chemical Secretariat ('ChemSec') made an initial request seeking from the European Chemicals Agency (ECHA) access to three specific categories of information on 356 chemical substances, namely:

- '1. manufacturer/importer name(s) including contact details;
2. the precise tonnage of the substances manufactured or placed on the market;
3. the total tonnage band (i.e. 1 to 10 tonnes, 10 to 100 tonnes, 100 to 1 000 tonnes or over 1 000 tonnes), within which the 356 substances have been registered, in case access to the information under number 2 cannot be accessed.'

- 36 In that request, ChemSec stated that it had not found sufficient information on the 356 substances concerned. ChemSec continued:

'Under Article 77(2)(e) [of the REACH Regulation], the ECHA has the obligation to make information not included in its databases available on request in accordance with Article 118. Therefore all the information that ECHA has not disseminated, has not yet disseminated or does not intend to disseminate has to be made available upon request pursuant to Regulation [No] 1049/2001 and [No] 1367/2006.'

37 By letter of 22 December 2010, ECHA replied to ChemSec as follows :

‘Regarding your point 1, disclosure of information on manufacturer/importer would, pursuant to Article 118(2)(d) of the REACH Regulation, and Article 4(3) [*sic*, in fact Article 4(2)], [of] Regulation No 1049/2001, reveal information on links between manufacturer/importer and downstream users, and thus undermine the protection of commercial interest. In addition, the fact that a manufacturer or importer registered is valuable market information. This information may result in making the market more transparent and allow operators to adapt their behaviour according to the status of their competitors. There is therefore a general interest to not disclose individual operators’ information. An overriding public interest in disclosure of this information cannot be established, and no urgent action which could potentially lead to the disclosure of this information pursuant to Article 118(2) last paragraph of the REACH Regulation is invoked. Hence, this information cannot be disclosed as an exemption to Regulation No 1049/2001 applies.

Regarding your point 2, please note that according to Article 118(2)(c) of the REACH Regulation, information on the precise tonnage of a registered substance is deemed to normally undermine the protection of commercial interest. As for the previous point, Article 4(3) [*sic*, in fact Article 4(2)] of Regulation No 1049/2001 applies as the disclosure of this information would indeed undermine the protection of commercial interest and there is no reason visible that would lead to a different conclusion or to deviate from the legislative assumption. Moreover, no overriding public interest can be established that would require to come to a different conclusion. In addition, as for the previous point, no urgent action according to Article 118(2) last paragraph of the REACH Regulation is demanded. Hence, this information cannot be disclosed as an exemption to Regulation (EC) No 1049/2001 applies.

Regarding your point 3, please note that ECHA has published a list of registered phase-in substances on its website ... This list allows you to verify which substances of interest have been registered, and which ones have not. In the case of the substances you presented on your list, it can easily be verified that the majority of those substances have not been registered (yet). Consequently, ECHA does not hold the information you have requested for the moment and your respective request cannot be processed in that respect.

...

ECHA is making every effort to also include the information on the tonnage band on its website as soon as possible. However, the technical implementation for publishing this information is still under development, and we ask for your understanding that it will still take some time until this information ...will be added on gradually once the dossiers have been processed ...’

38 By letter of 21 January 2011, ChemSec submitted a confirmatory application to ECHA for reconsideration of its ‘denial of 1 December 2010 application requesting access to environmental documents’. That confirmatory application was co-signed by ClientEarth, which was not a party to the initial request, due to a shared interest. Footnote No 1 to that letter is worded as follows:

‘ClientEarth was not a party to the original application, but joins ChemSec’s confirmatory application as a result of a shared interest in gaining access to the requested documents. In the event ECHA requires ClientEarth to submit a separate application requesting identical documents, we respectfully request that this be considered, for purposes of ChemSec, a confirmatory application under Article 8 of Regulation No 1049/2001 that requests reconsideration of ECHA’s denial of its 1 December 2010 application in the form and manner outlined therein.’

- 39 In paragraphs 4 to 6 of their confirmatory application, ClientEarth and ChemSec (together: ‘the applicants’) maintained that the documents whose disclosure they requested represented environmental information, and consequently the Aarhus Convention and Regulation No 1367/2006 were applicable.
- 40 Next, they stated, in paragraphs 7 to 13 of their confirmatory application, that the names of the registrants of substances were not covered by an exception to the right of access to the documents. The applicants stated, in particular, that Article 119(2) of the REACH Regulation provided for the dissemination of all information in the safety data sheets, unless a request for confidentiality under Article 10(a)(xi) of the REACH Regulation was made, and that ECHA was, consequently, obliged to publish the names of registrants on its website. Accordingly, ECHA’s argument that there was a general interest in non-disclosure of individual operators’ information was inaccurate. Moreover, the applicants asserted that, in so far as Article 4(2) of Regulation No 1049/2001 provided that the institutions were to refuse access to a document if its disclosure would undermine the protection of commercial interests, ECHA was bound to undertake a case-by-case analysis, which should be carried out only where the registrants had requested that their name should not be published on the ECHA website. It would be illogical to find the existence of a general interest in non-disclosure if the name were ultimately disseminated over the Internet. In paragraphs 15 and 19 of the confirmatory application, the applicants added that ECHA was bound to contact, when appropriate, the companies which had requested confidentiality with respect to their names in order to assess, in accordance with Article 4(4) of Regulation No 1049/2001, whether there was an overriding public interest in disclosure, and that, given that the information requested was environmental information, in accordance with Article 6(1) of Regulation No 1367/2006, any exception to the right of access to that information had to be interpreted in a restrictive way.
- 41 As regards point 2 of the request for information, the applicants stated, in paragraphs 21 to 24 of the confirmatory application, that, while Article 118(2) of the REACH Regulation constituted a presumption in favour of non-disclosure of the precise tonnage, ECHA should none the less examine whether, in the concrete case, the disclosure of information would not only affect but undermine the commercial interests in question and whether there was an overriding public interest in disclosure. ECHA had not explained how the disclosure would undermine the protection of commercial interests and it had also failed to demonstrate that there was no overriding public interest in disclosure.
- 42 As regards point 3 of the request for information, the applicants stated, in paragraphs 25 to 28 of the confirmatory application, that ECHA had a duty to grant access to the documents requested within the periods laid down by Article 7 of Regulation No 1049/2001, namely, in the absence of any extension, within 15 working days, and that it was unacceptable to cause them to wait until the total tonnage bands became available on the ECHA website.
- 43 Further, the applicants commented, in paragraphs 29 to 33 of the confirmatory application, that there was an overriding public interest in disclosure of the information requested. They stated that that information related to 311 substances that are carcinogenic, mutagenic and toxic to reproduction (CMRs), 17 substances that are persistent, bioaccumulative and toxic or very persistent and very bioaccumulative (PBTs and vPvBs), and 28 substances of equivalent concern, and that that information ought to be accessible to interested citizens and organisations. In addition, information on the precise tonnage in which the substance is placed on the market constitutes information relating to emissions into the environment. Consequently, in accordance with Article 6 of Regulation No 1367/2006, the disclosure of that information was deemed to serve an overriding public interest.
- 44 Last, the applicants asked ECHA to reconsider the initial application and to grant full access to the information requested, with the exception of cases where the exceptions provided for by Article 4 of Regulation No 1049/2001 applied, following a case-by-case assessment of specific substances.

45 By letter of 8 February 2011, the subject heading being ‘Notification of prolongation of time limit concerning your confirmatory request on access to documents’, sent solely to ChemSec, ECHA stated, *inter alia*, the following :

‘Pursuant to Article 8(2) [of Regulation No 1049/2001], ECHA may extend the time limit to reply by 15 working days in exceptional cases. As your application relates to a very large number of documents submitted in the context of registration under the REACH Regulation for the individual substances listed in your request and involves a considerable workload for the Agency, your application requires additional time for processing. Therefore, I decided to extend the original deadline by 15 working days.’

46 By letter of 4 March 2011 (‘the contested decision’), the subject heading being ‘Confirmatory application for reviewing a decision regarding public access to documents’, ECHA confirmed its earlier refusals. That letter was sent to ChemSec and bore the footnote ‘Cc: Vito Buonsante, Client Earth’.

47 First, ECHA commented that the request concerned information submitted by manufacturers, importers or their Only Representatives, in the context of the registration process under the REACH Regulation and that the information was held in its databases. ECHA further commented that technical dossiers were submitted by each manufacturer, importer or Only Representative for each chemical substance, resulting in multiple dossiers per substance, and that ECHA understood the request as being for access to all those technical dossiers for the 356 substances in question (provided that those substances had been registered with ECHA).

48 As regards point 1 of the request, ECHA concluded that it had to confirm the initial decision refusing access to the documents requested. ECHA stated in particular, in Section 1(a) of the contested decision that ‘the disclosure of information on the manufacturer/importer of registered substances severely risk[ed] to reveal information on the links between manufacturers or importers and downstream users, and [might] thus undermine the protection of commercial interests pursuant to Article 118(2)(d) of the REACH Regulation’. In that regard, ECHA referred to ‘further motivations for this assumption in [its] initial decision of 22 December 2010’.

49 None the less, ECHA acknowledged the applicants’ observation that ‘there may be no general interest in considering this information under any circumstances [as] confidential and, therefore, a case-by-case decision after consultation with the owners of all technical dossiers [might] be appropriate’. ECHA took the view that, ‘[w]ithout prejudice to the answer to [that] question, the access to the information requested [could] however not be granted, because [ECHA was], together with the Commission and the Member States, currently reviewing the process related to the public dissemination of information on substances in accordance with Article 119(2) of the REACH Regulation’.

50 ECHA added that the review concerned in particular the dissemination of information on the identity of the manufacturer, importer or distributor, in so far as that information was available in ECHA’s databases. ECHA further stated that, if it decided to publish, in the future, the identity of those persons for certain categories of substances, it would have to adapt its procedures and IT system and, in particular, for existing registrations, provide the opportunity for interested persons to file a confidentiality request regarding their identity.

51 ECHA added that ‘[g]ranting access to the requested information at this moment in time under Regulation (EC) No 1049/2001 would ... not only result in [an] extraordinary high workload for the Agency ... but also circumvent the dedicated procedures [laid down] by the REACH Regulation’ and that, ‘in particular, this would risk depriving registrants of the regular remedy against a negative decision on a confidentiality request as [laid down] in the Regulation’. ECHA concluded that there was no other possibility except to apply Article 4(3) of Regulation No 1049/2001 and to refuse access in that the request related to a matter where no decision had been taken and the disclosure of the information would seriously undermine ECHA’s decision-making process and in that, with regard to

the imminent decision on the future approach by the Agency, no overriding public interest justified the disclosure. Further, ECHA emphasised that it had a duty to ensure equal treatment of all registrants and to provide them with the same possibilities to safeguard their legitimate interests.

- 52 Further, ECHA commented that, given the number of technical dossiers per substance, it had to take account of proportionality aspects, if it came to the conclusion that the identity of the manufacturer or importer was not part of the information listed in Article 119(2) of the REACH Regulation. ECHA added that the need to carry out a case-by-case analysis, including third party consultation, of each request for access to those technical dossiers could jeopardise its ability to undertake its tasks in certain areas and, consequently, it had to reserve its right to confer with applicants informally with a view to finding a fair solution, in accordance with Article 6(3) of Regulation No 1049/2001.
- 53 As regards point 2 of the request, ECHA referred to Article 118(2)(c) of the REACH Regulation and stated in Section 1(b) of the contested decision that it had ‘decided to uphold the initial decision, as the disclosure of the precise tonnage of the requested substances would undermine the commercial interest of the registrants involved’ and that ‘information on the precise tonnage band would reveal the market share of companies towards their competitors’. In addition, ECHA stated that making that information public could impact on competition law aspects.
- 54 ECHA further stated that it had not discovered any overriding public interest on the basis of which disclosure would have been justified. On that subject, ECHA stated that it had well noted that the request was motivated by a desire to promote the regulatory approach towards chemical substances that may be candidates for identification as substances of very high concern. However, the legislature had provided, by means of the REACH Regulation, instruments to identify and manage the risks from such substances, foremost the authorisation procedure, which provides for extensive public consultations.
- 55 As regards point 3 of the request, ECHA confirmed, in Section 1(c) of the contested decision, that ‘the requested document [was] not held in [its] databases or files’.
- 56 ECHA stated that Regulation No 1049/2001 did not impose an obligation to create documents in order to respond to requests for access to documents. In order to be able to supply such a document to ChemSec, ECHA would have to put together the information from all the registration dossiers and calculate the total tonnage bands of the substances in question (if applications for registration had indeed been submitted for all those substances). ECHA added that the same would hold for access to the cumulative precise tonnage band for each of the substances listed in the request, if the request was to be understood in that way.
- 57 ECHA added however that it had arranged for the collection of information provided on the tonnage band in the individual dossiers for the substances listed in the request. ECHA annexed to its letter a table containing that information, while explaining that ‘[t]he methodology for establishing the total tonnage band [was ...] in development’ and that ‘ECHA [could] therefore not guarantee the [accuracy] of this manually generated information’.
- 58 On 3 May 2011 the Executive Director of ECHA decided, following advice from ECHA’s Management Board on 24 March 2011, to extend the practice of dissemination over the Internet to the names of registrants. That extension of the practice of dissemination gave effect to advice from the legal service of the European Commission on 21 December 2010, that the identity of the registrant was part of the information which the ECHA had a duty to disseminate, under Article 119(2)(d) of the REACH Regulation, as it appeared in the safety data sheet, unless a valid request for confidentiality had been submitted under Article 10(a)(xi) of the REACH Regulation.

- 59 In a press release published on 18 April 2012 on its website, ECHA stated that it had decided on the methodology to be used for the calculation of the 'total tonnage bands' and stated that it would publish that data in June 2012. On 25 July 2012 a corrigendum of that press release was published on the ECHA website to correct an error in the method of calculation.
- 60 In June 2012 ECHA published on its website the aggregated total tonnage bands within which each substance had been registered, with the exception of tonnages with respect to which confidentiality had been requested, in accordance with Article 119(2)(b) of the REACH Regulation.
- 61 In July 2012 ECHA published version 2.0 of the Data Submission Manual, Part 15 of which, titled 'Dissemination', explained, inter alia, the methodology of publication of the names and addresses of registrants. Version 2.0 of Part 16 of that manual, titled 'Confidentiality claims: How to make confidentiality claims and how to write Article 119(2) [of the REACH Regulation] confidentiality claim justifications', was also published, in July 2012, on the ECHA website and reflected, inter alia, 'changes resulting from additional elements for confidentiality claims under [Article] 119(2)(d) [of the REACH Regulation] on '[o]ther information on the safety data sheet'.
- 62 By press release dated 28 November 2012, ECHA stated that, further to changes in its IT system, the dissemination of the names of registrants on the ECHA website had begun. ECHA explained however that names with respect to which it had granted a request for confidentiality were exempted from dissemination.

Procedure and forms of order sought by the parties

- 63 By application lodged at the Court Registry on 6 May 2011, the applicants brought the present action.
- 64 By document lodged at the Court Registry on 3 August 2011, ECHA, under Article 114(1) of the Rules of Procedure of the Court of 2 May 1991, raised an objection of inadmissibility. The applicants lodged their observations on that objection on 28 September 2011. By order of the Court of 13 December 2011, the objection was joined to the substance and costs were reserved.
- 65 By documents lodged at the Court Registry on 9 August 2011, the Commission and the European Chemical Industry Council ('Cefic') sought leave to intervene in support of the forms of order sought by ECHA.
- 66 By document lodged at the Court Registry on 18 August 2011, the Kingdom of Denmark applied for leave to intervene in support of the form of order sought by the applicants.
- 67 The President of the Eighth Chamber of the Court granted leave to intervene to the Commission and to the Kingdom of Denmark by orders of 8 February 2012 and to Cefic by order of 18 October 2012.
- 68 The Commission and Cefic lodged their statements in intervention on 22 March and 20 December 2012, respectively.
- 69 By document lodged at the Court Registry on 21 March 2012, the Kingdom of Denmark sought to withdraw its application for leave to intervene.
- 70 By order of 22 May 2012, the President of the Eighth Chamber of the Court accepted the Kingdom of Denmark's request for withdrawal and ordered it to bear its own costs.
- 71 When the composition of the chambers of the Court was altered, the Judge-Rapporteur was assigned to the Second Chamber, to which this case was, consequently, allocated.

- 72 By way of measures of organisation of procedure, the Court (Second Chamber) sent a written question to the parties, who replied within the period allowed.
- 73 Upon hearing the Report of the Judge-Rapporteur, the Court decided to open the oral procedure.
- 74 The parties presented oral argument and replied to the questions put by the Court at the hearing on 30 January 2015.
- 75 The applicants claim that the Court should:
- reject the objection of inadmissibility;
 - annul the contested decision;
 - order ECHA to pay the costs, including those of any intervener.
- 76 ECHA contends that the Court should:
- declare the action to be inadmissible;
 - in the alternative, dismiss the action as being unfounded;
 - order the applicants to pay the costs.
- 77 The Commission contends that the Court should dismiss the action as being unfounded in so far as it concerns the ground relied on by the applicants that Article 4(3) of Regulation No 1049/2001 does not apply to environmental information.
- 78 Cefic contends that the Court should:
- dismiss the action for annulment brought by the applicants;
 - order the applicants to pay the costs.
- 79 In response to a question from the Court, the applicants stated that, following the wording of their heads of claim in the reply, they were not maintaining their head of claim seeking a declaration that ECHA was in breach of the Aarhus Convention, Regulation No 1367/2006 and Regulation No 1049/2001. Further, the applicants withdrew their third plea in law, in so far as it claimed an infringement of Article 4(2) of the Aarhus Convention, and this was recorded in the minutes of the hearing.

Law

A – Admissibility

1. The objection of inadmissibility

- 80 In its objection of inadmissibility, ECHA claims, in essence, that the action is inadmissible, as regards ClientEarth, on the ground that ClientEarth was not a party to the initial request for access to documents and the contested decision was not addressed to it, and, as regards ChemSec, on the ground that the initiating application was not signed on its behalf by its lawyer, and consequently ChemSec is not represented by a lawyer before the Court.

- 81 First, it is appropriate to examine the second part of the objection of inadmissibility, raised by ECHA against ChemSec.
- 82 ECHA argues that ChemSec is not represented by a lawyer, within the meaning of Article 19 of the Statute of the Court of Justice of the European Union, and is therefore not a party to the application for annulment of the contested decision, because the initiating application was not signed by its lawyer on its behalf. By signing that application solely in the name of ClientEarth and by framing his signature with the words ‘respectfully submitted, ClientEarth by Pierre Kirch, Avocat’ and, adding below his signature the words ‘On behalf of ClientEarth’, the lawyer limited his representation to ClientEarth.
- 83 Further, ECHA argues that the list of exhibits submitted in support of the main action is signed by the lawyer ‘on behalf of Client Earth’, without reference to ChemSec.
- 84 It must be borne in mind, in the first place, that, according to the first subparagraph of Article 43(1) of the Rules of Procedure of 2 May 1991, the original of every pleading must be signed by the party’s agent or lawyer.
- 85 In that regard, it must be observed, at the outset, that the action for annulment was drafted by the lawyer on behalf of both ClientEarth and ChemSec, as is plain from page 1 of the application.
- 86 Further, on pages 2 and 3 of that application, there is information on the two applicants, including their respective addresses and telephone numbers, and the statement that the lawyer represents both applicants.
- 87 Next, it is not disputed by ECHA that the application bears the original handwritten signature of the lawyer.
- 88 Last, it is clear that each of the applicants duly conferred a power of attorney on the lawyer who signed the application.
- 89 It follows from the foregoing that the application complies both with Article 43(1) of the Rules of Procedure of 2 May 1991, in that it bears the handwritten signature of the lawyer of the parties concerned, and with Article 44(1) of those rules, in that it states the names and addresses of the applicants and the designation of the party against whom the action was brought.
- 90 That conclusion cannot be invalidated by the fact that on the last page of the application the signature is framed with the words ‘respectfully submitted, ClientEarth by Pierre Kirch, Avocat’ and that the words ‘On behalf of ClientEarth’ are added below his signature, with no reference by name to ChemSec.
- 91 First, there is no provision in EU law which states that such references are mandatory and that a lawyer must specify on the last page of the application, after appending his signature, the applicants concerned.
- 92 Second, it cannot reasonably be maintained, in the light of the findings stated in paragraphs 84 to 88 above, that the effect of the reference to ClientEarth alone before and after the signature of the lawyer is that the representation of that lawyer before the Court is limited to that applicant alone.
- 93 To the extent that ECHA observes that it is stated in the judgment in *Parliament v Eistrup* (Case T-223/06 P [2007] ECR II-1581), that the presence of the handwritten signature of a lawyer is deemed to be an essential procedural rule which must be applied strictly, breach of which entails the inadmissibility of the action, suffice it to state that the judgment in *Parliament v Eistrup* concerned a situation in which the original of the application precisely lacked the lawyer’s handwritten signature,

since it bore no more than a stamp of that signature. The approach taken by the Court in that case cannot therefore apply in this case where the signature of the lawyer on the original of the application is not lacking.

- 94 Further, given that the application is signed by the parties' lawyer, the Court must reject as ineffective ECHA's argument that the fact that there is a power of attorney in the application does not remedy the absence of the signature of the parties' lawyer.
- 95 It follows that, by means of the reference on the first page of the application to the fact that the action was brought in the name of the two applicants; the information on the applicants on pages 2 and 3 of the application; the handwritten signature of the lawyer on the last page of the application, and the lodging of two powers of attorney drawn up by each of the applicants in the name of the same lawyer, the requirements of Article 43(1) of the Rules of Procedure of 2 May 1991 were satisfied.
- 96 As regards ChemSec, the objection of inadmissibility must therefore be rejected.
- 97 Secondly, as regards the *locus standi* of ClientEarth, it must be observed that the applicants have submitted one and the same action. According to case-law which is now well established, where one and the same action is involved, as soon as one of the applicants has *locus standi*, there is no need to consider whether or not other applicants are entitled to bring proceedings except where considerations of procedural economy exist (see, to that effect, judgments in Case C-313/90 *CIRFS and Others v Commission* [1993] ECR I-1125, paragraph 31; Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others v Commission* [2011] ECR I-4727, paragraphs 36 to 38; and Case T-79/12 *Cisco Systems and Messagenet v Commission* [2013] ECR, paragraph 40).
- 98 In this case, even if a separate examination of the admissibility of ClientEarth's action were to reveal that ClientEarth does not have *locus standi*, the Court would none the less have to examine the action in its entirety. There are therefore no grounds of procedural economy that would justify the Court departing from the abovementioned case-law (see, to that effect, judgment in *Cisco Systems and Messagenet v Commission*, cited in paragraph 97 above, paragraph 40).
- 99 It follows from the foregoing that the objection of inadmissibility must be rejected in its entirety.

2. The claims that proceedings are barred because the purpose of the action is inadmissible

- 100 ECHA claims that this case concerns a request for specific information and not a request for access to documents or to environmental information. The request in question was not a properly constituted application under Regulation No 1049/2001, and consequently it was inadmissible, and therefore need not have received a response from ECHA under that regulation. Accordingly, that response cannot be challengeable by an action for annulment.
- 101 It must be recalled that, according to settled case-law, only measures which produce binding legal effects and are capable of affecting the interests of third parties by bringing about a distinct change in their legal position constitute measures challengeable by an action for annulment (see order in Case T-456/07 *Commission v CdT* [2010] ECR II-183, paragraph 52 and the case-law cited).
- 102 In addition, in order to ascertain whether a measure the annulment of which is sought is open to challenge by an action for annulment, it is necessary to look to its substance, as the form in which it is cast is, in principle, immaterial (see order *Commission v CdT*, cited in paragraph 101 above, paragraph 53 and the case-law cited).

- 103 A written expression of opinion or a simple statement of intention cannot constitute a decision that is challengeable by an action for annulment, since it cannot produce legal effects or is not intended to produce such effects (see order *Commission v CdT*, cited in paragraph 101 above, paragraph 55 and the case-law cited).
- 104 It has been held, moreover, as regards actions for annulment brought by individuals, that a letter sent in response to a request made by the addressee does not necessarily constitute a decision enabling that addressee to bring an action for annulment (see order in *Commission v CdT*, cited in paragraph 101 above, paragraph 56 and the case-law cited).
- 105 As regards however the right of access to documents of the institutions, it must be observed that, pursuant to Article 8(1) and (3) of Regulation No 1049/2001, which is the specific expression of the principle of judicial protection, any refusal of access to the documents requested from the administration may be subject to challenge by way of court proceedings. That is so whatever the reason relied on to refuse access (judgment in Case C-127/13 P *Strack v Commission* [2014] ECR, paragraph 39).
- 106 Accordingly, it is irrelevant to the right of challenge of the parties concerned that it is argued that access to a document must be refused for one of the reasons laid down in Article 4 of Regulation No 1049/2001 or that it is argued that the document requested does not exist. Any other outcome would make impossible review by the Courts of the European Union of the merits of decisions refusing access to documents held by the institutions, since it would suffice for the institution concerned to state that a document does not exist to avoid judicial review altogether. Therefore, it is clear that the fact that a document to which access has been requested does not exist or the fact that it is not in the possession of the institution concerned does not make Regulation No 1049/2001 inapplicable (*Strack v Commission*, cited in paragraph 105 above, paragraphs 40 and 41).
- 107 It must be stated that the rejection of a confirmatory application is, as a general rule, capable of being challenged by an action for annulment. Section 1 of the contested decision is in any event headed 'Decision with regard to your confirmatory application' and, as laid down in Article 8(1) of Regulation No 1049/2001, ECHA informed ChemSec in Section 3 of the contested decision of the possibility of bringing legal proceedings under Article 263 TFEU.
- 108 ECHA's argument that an inadmissible request cannot be subject to the application of Regulation No 1049/2001 and, therefore, to the jurisdiction of the General Court cannot be accepted.
- 109 Admittedly, as stated in the case-law cited in paragraph 104 above, any response to a general request for information does not necessarily constitute a decision against which an action for annulment can be brought.
- 110 However, the applicants requested clearly defined information, relating to a list of specific substances which were, according to them, supposed to be in the possession of ECHA. In its reply, ECHA did not confine itself to sending mere general information, but adopted a decision rejecting the request for information. Irrespective of whether or not ECHA had a duty to give access to that information, under in particular Regulation No 1049/2001, the fact remains that that was a negative decision intended to produce legal effects and therefore open to challenge by legal proceedings.
- 111 It follows that ECHA cannot claim that its reply to the applicants' confirmatory application for information is not an act against which an action for annulment can be brought, and consequently the plea that proceedings are barred must be rejected.

B – *Whether the subject-matter of the dispute concerning the request for information continues to exist in so far as it relates to the names and contact details of registrants disclosed after the action was brought*

- 112 By point 1 of the request for information, ChemSec sought access to information on the names and contact details of the manufacturer(s) or importer(s) with respect to 356 chemical substances (see paragraph 35 above).
- 113 Given that, after the action was brought, ECHA introduced a new practice for the dissemination over the Internet of certain information covered by Article 119 of the REACH Regulation and that ECHA published on its website, in November 2012, some of the information requested, the Court must examine to what extent the applicants retain an interest in bringing proceedings against the contested decision with respect to point 1 of the request for information.
- 114 It must be recalled that, according to the case-law, an applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible. That interest in bringing proceedings and the purpose of the action must continue until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be likely, if successful, to procure an advantage for the party bringing it (judgments in Case C-362/05 P *Wunenburger v Commission* [2007] ECR I-4333, paragraph 42, and Case T-233/09 *Access Info Europe v Council* [2011] ECR II-1073, paragraph 33).
- 115 If the applicant's interest in bringing proceedings ceases to exist in the course of proceedings, a decision of the Court on the merits cannot procure him any advantage (*Wunenburger v Commission*, cited in paragraph 114 above, paragraph 43, and *Access Info Europe v Council*, cited in paragraph 114 above, paragraph 33).
- 116 In this case, ECHA's reply to the written question from the Court indicates that it published the names of companies with respect to all substances registered up to the end of November 2012, with the exception of those where the companies had made a request for confidentiality. ECHA added that publication extended to the name and address of the company, but excluded any personal data (such as telephone numbers or e-mail addresses which could be associated with staff members of the company). As regards the substances in question, the ECHA stated that 95 registrants had requested that their identity not be disclosed, with the result that, for 55 of those substances, the 'EC numbers' of which are listed in Annex Q.2 to that reply by ECHA, all the company names and addresses are not available on the ECHA website. On the other hand, with respect to 6 611 companies which had registered the substances in question, the information was published in full (with the exception of personal data). It must be added that the source of the data with respect to the information which has been published is an extract from ECHA's database as at 23 April 2014. At the hearing, ECHA explained that the number of registrants whose identity was or was not published was constantly changing, as new applications for registration were made. The available data is therefore not up to date and represents only the publication status as at 23 April 2014.
- 117 As regards the information at issue which is now accessible to the public, ECHA asserts in its reply to the written question from the Court that the action has become devoid of purpose, while the Commission maintains that the applicants have no interest in continuing these proceedings in that regard.
- 118 The applicants state, in paragraph 1 of their reply to the written question from the Court, that all the names have not been disclosed by ECHA and, therefore, their request has been only partly granted, and consequently the question of annulment of the refusal decision with respect to point 1 of the request for information remains open and must be resolved by the Court. At the hearing, the

applicants added that they were requesting the Court also to give a ruling on point 1 of the request for information to the extent that it concerns information which has, in the interim, been made available on the ECHA website.

- 119 In that regard, it is clear that, as regards the requested information which has been disclosed on the ECHA website, the action is now devoid of purpose and the applicants have lost their interest in bringing proceedings, with the result that there is no longer any need to adjudicate (see, to that effect, Case T-84/03 *Turco v Council* [2004] ECR II-4061, paragraphs 28 to 30; Case T-29/08 *LPN v Commission* [2011] ECR II-6021, paragraph 57; orders of 6 September 2012 in Case T-180/10 *Nickel Institute v Commission*, not published in the ECR, paragraph 20; 14 January 2014 in Case T-303/13 *Miettinen v Council*, not published in the ECR, paragraphs 17 to 19; and 7 May 2014 in Case T-511/10 *Evropaïki Dynamiki v Commission*, not published in the ECR, paragraph 20).
- 120 From that perspective, so far as that information is concerned, the applicants' request can therefore be deemed to be satisfied. Annulment of the contested decision, in so far as it refuses access to that information, would therefore procure them no advantage.
- 121 It follows that there is no longer any need to adjudicate on the application with respect to the names and contact details which have been disclosed on the ECHA website. However, as was stated in paragraph 116 above, it is impossible to determine exactly to what extent that information is currently accessible on the Internet. Since ECHA has solely provided information on the publication status as at 23 April 2014, the decision that there is no need to adjudicate must be limited to data published on that date.
- 122 Thereafter, the Court must examine the action solely in so far as it is directed against the rejection of point 1 of the request for information in that it concerns data not published as at 23 April 2014, and against the rejection of points 2 and 3 of the request for information.

C – Substance

- 123 In support of their action for annulment, the applicants put forward five pleas in law. The first plea in law concerns the decision to extend the time-limit for replying to the confirmatory application, and is a claim of an infringement of Article 8(2) of Regulation No 1049/2001. The second plea in law is a claim of an infringement of Article 4(4) and (6) of Regulation No 1049/2001. The third plea in law is a claim of infringement of Article 4(1), (3) and (4) of the Aarhus Convention and Article 6(1) of Regulation No 1367/2006. The fourth plea in law is a claim of an infringement of the first indent of Article 4(2) and the first subparagraph of Article 4(3) of Regulation No 1049/2001. The fifth plea in law is a claim of an infringement of the last subparagraph of Article 4(2) and the first subparagraph of Article 4(3) of Regulation No 1049/2001.
- 124 As regards how those pleas in law should be examined, it must be observed that the first plea in law refers without distinction to all the points of the request for information and may therefore be examined with regard to all those points, whereas the other four pleas in law must be examined separately with respect to each of the three points of the request for information.
- 125 As regards point 1 of that request, in so far as it concerns data not yet published as at 23 April 2014, the Court must analyse together the fourth and fifth pleas in law, the fourth concerning an infringement of the first indent of Article 4(2) and the first subparagraph of Article 4(3) of Regulation No 1049/2001, and the fifth concerning an infringement of the last subparagraph of Article 4(2) and the first subparagraph of Article 4(3) of Regulation No 1049/2001.

126 As regards point 2 of the request for information, the Court must examine together the fourth and fifth pleas in law, in so far as they concern, respectively, an infringement of the first indent of Article 4(2) of Regulation No 1049/2001 (the fourth plea) and an infringement of the last subparagraph of Article 4(2) of Regulation No 1049/2001 (the fifth plea), as well as the third plea in law, in so far as it concerns an infringement of Article 4(4) of the Aarhus Convention and Article 6(1) of Regulation No 1367/2006, given that those pleas in law overlap. Further, it is necessary to examine, with regard to point 2 of the request for information, the second plea in law, concerning an infringement of Article 4(4) and (6) of Regulation No 1049/2001.

127 Last, as regards point 3 of the request for information, it is necessary to examine (i) the second plea in law, in so far as it concerns an infringement of Article 4(4) of Regulation No 1049/2001 and (ii) the third plea in law, concerning an infringement of Article 4(1), (3) and (4) of the Aarhus Convention and Article 6(1) of Regulation No 1367/2006.

1. The first plea in law: infringement of Article 8(2) of Regulation No 1049/2001, covering points 1, 2 and 3 of the request for information

128 The applicants claim that the contested decision must be annulled since the decision by ECHA to extend the time-limit for replying to the confirmatory application did not comply with the requirements of Article 8(2) of Regulation No 1049/2001.

129 First, it must be observed that, under Article 8(1) of Regulation No 1049/2001, the institution concerned has a period of 15 working days to reply to the confirmatory application. Article 8(2) thereof provides that '[i]n exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given'. Last, under Article 8(3) of that regulation, '[f]ailure by the institution to reply within the prescribed time-limit shall be considered as a negative reply, and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty'.

130 It is apparent from the case-law that the expiry of the time-limits laid down in Article 8 of Regulation No 1049/2001 does not have the effect of depriving the institution of the power to adopt an express decision (see, to that effect, Joined Cases T-355/04 and T-446/04 *Co-Frutta v Commission* [2010] ECR II-1, paragraph 56, and Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair v Commission* [2010] ECR II-5723, paragraph 50).

131 In the field of access to documents, the legislature specified the consequences of failure to comply with the time-limits laid down in Article 8(1) and (2) of Regulation No 1049/2001, by providing, in Article 8(3) thereof, that such failure on the part of the institution is to give the applicant the right to institute judicial proceedings (judgment in *Co-Frutta v Commission*, cited in paragraph 130 above, paragraph 58).

132 Whether the decision on the confirmatory application is vitiated by an illegality which justifies its annulment is not however affected by the fact that the period allowed for the response to the confirmatory application was exceeded (see, to that effect, order of 27 November 2012 in Case T-17/10 *Steinberg v Commission*, not published in the ECR, paragraph 102).

133 In this case, it must be observed that the ECHA maintained, in its extension letter of 8 February 2011, after referring to the content of the request, that the extension of the time-limit was justified having regard to the fact that the request related to a very large number of documents submitted in the context of registration under the REACH Regulation for the substances listed in the request and that the request involved a considerable workload for ECHA.

134 The applicants appear to believe that the alleged unlawfulness of the extension decision could affect the lawfulness of the contested decision.

135 Yet even if the extension decision constituted an infringement of Article 8(2) of Regulation No 1049/2001, that irregularity could have no effect on the lawfulness of the contested decision.

136 As is apparent from the case-law cited in paragraph 132 above, the mere fact that the period prescribed for a reply to the confirmatory application is exceeded cannot justify the annulment of the contested decision. The same is true where the lawfulness or validity of an extension decision are challenged. Even if the extension decision were to be invalid, that would permit the conclusion, at most, only that the time-limit for a reply to the confirmatory application has not been extended and, consequently, that the contested decision was adopted out of time, which does not however affect its lawfulness.

137 Further, there is no reason to believe that ECHA would have come to a decision other than that given in the contested decision, if it had not adopted the extension decision.

138 It follows that the first plea in law is ineffective.

139 Further, first, to the extent that the applicants appear to suggest that the reasons stated for the extension decision (see paragraph 133 above) did not permit them to determine whether that decision was vitiated by error, suffice it to state that that statement of reasons is sufficiently detailed to enable them to understand why ECHA had decided to extend the time-limit and, therefore, to form an opinion on the lawfulness of that decision.

140 Second, as regards whether the reasons stated for the extension decision were well founded, it must be recalled that ECHA had received a request for access to documents concerning three different categories of information relating to 356 different substances. The request therefore concerned a very large number of documents and was indeed likely to entail an exceptional workload, and consequently the conditions for an extension laid down by Article 8(2) of Regulation No 1049/2001 were satisfied in this case.

141 While the applicants accept that the conditions for an extension were ‘existing in theory’, they submit none the less that the extension was not justified, since ECHA did not consult third parties and did not make a case-by-case assessment of the documents requested.

142 In essence, the applicants appear to complain that ECHA did not use the extension of the time-limit in order to examine correctly the confirmatory application. That argument must be rejected, given that the alleged errors committed in the examination of the confirmatory application cannot call into question the correct application of Article 8(2) of Regulation No 1049/2001. Those alleged errors could affect the lawfulness of the contested decision itself, but not the lawfulness of the decision to extend the time-limit.

143 It follows from the foregoing that the first plea in law must be rejected.

2. The fourth and fifth pleas in law: the fourth concerning an infringement of the first indent of Article 4(2) and the first subparagraph of Article 4(3) of Regulation No 1049/2001, and the fifth concerning an infringement of the last subparagraph of Article 4(2) and the first subparagraph of Article 4(3) of Regulation No 1049/2001, in so far as they relate to point 1 of the request for information

144 In so far as point 1 of the request for information concerns names and contact details of registrants not yet published over the Internet as at 23 April 2014, the Court must analyse together the fourth and fifth pleas in law, claiming, taken together, that ECHA erred in its reliance on the grounds for refusal laid down in (i) Article 4(2) of Regulation No 1049/2001 and (ii) Article 4(3) of that regulation.

145 It should be recalled, at the outset, that Article 15(3) TFEU provides that any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, are to have a right of access to the documents of the institutions of the European Union, subject to the principles and conditions defined by means of regulations in accordance with the ordinary legislative procedure. Regulation No 1049/2001 seeks, as indicated in recital 4 of the preamble and Article 1 thereof, to give the public a right of access to documents of the institutions which is as wide as possible. It is also apparent from that regulation, in particular from recital 11 of the preamble and Article 4 thereof, which lays down a system of exceptions to that right, that that right of access is, nevertheless, subject to certain limits based on reasons of public or private interest (see judgment in Joined Cases C-514/11 P and C-605/11 P *LPN and Finland v Commission* [2013] ECR, paragraph 40 and the case-law cited).

146 It must also be recalled that the exceptions to document access must be interpreted and applied strictly so as not to frustrate application of the general principle that the public should be given the widest possible access to documents held by the institutions (judgments in Case C-64/05 P *Sweden v Commission* [2007] ECR I-11389, paragraph 66, and Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2006] ECR II-2023, paragraph 84).

a) The first part: infringement of the first indent of Article 4(2) of Regulation No 1049/2001

147 The applicants claim that ECHA failed to demonstrate that there was a sufficiently specific adverse effect on the interest protected by the first indent of Article 4(2) of Regulation No 1049/2001. More particularly, they dispute the fact that the disclosure of the information requested might be considered to undermine the protection of the commercial interests of the persons concerned, pursuant to Article 118(2)(d) of the REACH Regulation. The applicants observe that, inter alia, the publication of the names of registrants on the ECHA website contradicts ECHA's argument on that point.

148 In accordance with the first indent of Article 4(2) of Regulation No 1049/2001, access to a document is to be refused by the institutions where its disclosure would undermine the protection of the commercial interest of a natural or legal person, unless there is an overriding public interest in disclosure. It must be observed that Article 118(2)(d) of the REACH Regulation states, in that regard, that, normally, the disclosure of information on links between a manufacturer or importer and his distributors or downstream users is to be deemed to undermine the protection of the commercial interests of the concerned person.

149 In the contested decision, ECHA refused access to the information requested on the view that, inter alia, the disclosure of information on the manufacturer or importer of the registered substances created a serious risk that such information would be revealed and was therefore, under Article 118(2)(d) of the REACH Regulation, likely to undermine the protection of commercial interests (see paragraph 48 above).

150 In its written pleadings, ECHA maintains that in the contested decision it correctly applied the first indent of Article 4(2) of Regulation No 1049/2001 and Article 118(2)(d) of the REACH Regulation. ECHA also submits that Article 119 of the REACH Regulation establishes a specific and comprehensive body of rules governing disclosure and confidentiality.

151 Yet the names and contact details constitute information which is covered by Article 119(2)(d) of the REACH Regulation. Further, since November 2012, the ECHA has published, on the basis of that provision, on its website, the names and contact details with respect to all the registered substances, except when a request for confidentiality has been made. ECHA could not therefore justify the refusal of access to the information requested on the basis of the first indent of Article 4(2) of Regulation No 1049/2001, read together with Article 118(2)(d) of the REACH Regulation.

152 If, on the one hand, the rules for dissemination over the Internet, established by Article 119 of the REACH Regulation are exhaustive, the first indent of Article 4(2) of Regulation No 1049/2001, read together with Article 118(2)(d) of the REACH Regulation, cannot be applicable to information covered by Article 119 of that regulation and, consequently, cannot justify the refusal of access to the information on the names and contact details of registrants.

153 If, on the other hand, the rules laid down by Article 119 of the REACH Regulation do not, in principle, entirely exclude the rules governing access to documents laid down by Article 118 of the REACH Regulation and Regulation No 1049/2001, the fact remains that Article 119(2)(d) of the REACH Regulation provides that the information requested in this case must be disclosed over the Internet, unless ECHA upholds a request for confidentiality. Consequently, ECHA cannot, in the absence of such a request, use as a reason for the refusal of any disclosure of the information requested the legal presumption provided for in Article 118(2)(d) of the REACH Regulation, by holding that the disclosure would undermine the protection of the commercial interests of the concerned person. The legal presumption in Article 118 of the REACH Regulation cannot justify information being, normally, withheld, when a more specific provision, namely Article 119(2)(d) of the REACH Regulation, imposes a requirement that that information should, normally, be disclosed.

154 It follows that the conditions for the ground of refusal under the first indent of Article 4(2) of Regulation No 1049/2001, read together with Article 118(2)(d) of the REACH Regulation, are not satisfied in this case, and there is no need to examine whether and to what extent the disclosure of the names of the registrants is genuinely liable to reveal the links between a manufacturer or importer and his distributors or downstream users.

b) The second part: infringement of Article 4(3) of Regulation No 1049/2001

155 The applicants claim that ECHA erred in relying on the exception to the right of access to documents laid down in Article 4(3) of Regulation No 1049/2001 in order to refuse to disclose the names of manufacturers or importers.

156 In that regard, it is appropriate to bear in mind the settled case-law, according to which it must be shown that the access in question was likely specifically and actually to undermine the interest protected by the exception, and that the risk of that interest being undermined was reasonably foreseeable and not purely hypothetical (see judgment of 18 December 2008 in Case T-144/05 *Muñiz v Commission*, not published in the ECR, paragraph 74 and the case-law cited).

157 In addition, in order to be covered by the exception in the first subparagraph of Article 4(3) of Regulation No 1049/2001, the decision-making process must be seriously undermined. That is the case, in particular, where the disclosure of the documents in question has a substantial impact on the decision-making process. How serious it is will depend on all the circumstances of the case, and in particular the negative effects on the decision-making process to which the institution refers in connection with disclosure of the documents concerned (judgment in *Muñiz v Commission*, cited in paragraph 156 above, paragraph 75).

158 In the contested decision, ECHA concluded that the conditions laid down by Article 4(3) of Regulation No 1049/2001 were satisfied in this case. More specifically, ECHA commented that it was engaged in a review of the process involved in the public dissemination of information on substances pursuant to Article 119(2) of the REACH Regulation and that the review related in particular to the dissemination of information on the identity of the manufacturer, importer or distributor. ECHA stated that, if it decided to make public, in the future, the identity of those persons with respect to certain categories of substances, it would have to adapt its procedures and IT system and, inter alia, introduce, with respect to existing registrations, the possibility for the persons concerned of making a request that their identity be confidential. ECHA added that to permit access to the information requested on the basis

of Regulation No 1049/2001 would not only generate an extraordinarily high workload, but also circumvent the dedicated procedures laid down by the REACH Regulation (see paragraphs 49 to 51 above).

- 159 First, it is true that, at the time when the contested decision was adopted, ECHA was contemplating altering its practice with regard to the dissemination of information on the identity of registrants in order to adjust that practice to the requirements of Article 119(2) of the REACH Regulation and that that information was therefore the subject of an ECHA decision-making process.
- 160 Second, as regards whether the disclosure could have seriously undermined that decision-making process, it must be observed that the names of registrants are not information on that process itself, but rather information affected by the decision which is the outcome of that process. Access to the information requested was not liable to prevent ECHA from deciding on measures to be taken in order to meet its obligations to disclose information over the Internet, under Article 119(2) of the REACH Regulation.
- 161 Further, to the extent that ECHA argued in the contested decision that the grant of access to the information requested on the basis of Regulation No 1049/2001 would have caused it an extraordinarily high manual workload, suffice it to state that Article 4(3) of Regulation No 1049/2001 serves solely to protect the decision-making process and not to ensure that the workload of the institutions concerned does not become excessive.
- 162 The same holds good for ECHA's argument that access to the information requested on the basis of Regulation No 1049/2001 would circumvent the procedures laid down by the REACH Regulation. The alleged risk that those procedures would be circumvented does not relate to the decision-making process, but rather the consequences of disclosure of the information requested. Yet it is only the decision-making process which is covered by the ground of refusal provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001.
- 163 It follows from the foregoing that ECHA has failed to demonstrate that the disclosure of the information requested would have seriously undermined the decision-making process at issue. It follows that the second part, claiming an infringement of the first subparagraph of Article 4(3) of Regulation No 1049/2001, and, therefore, the fourth and fifth pleas in law, in so far as they concern point 1 of the request for information, are well founded, to the extent that there remains a need to adjudicate.
- 164 In the light of the foregoing, it must be concluded that the reasons set out in the contested decision are not sufficient to justify the refusal of the information requested by point 1 of the request for information, and consequently the Court must annul the contested decision in that regard in so far as it concerns information not yet disclosed as at 23 April 2014, and there is no need to examine the second and third pleas in law in that respect.

3. *The second, third, fourth and fifth pleas in law: infringement of Article 4(4) and (6) of Regulation No 1049/2001 (the second plea); infringement of Article 4(4) of the Aarhus Convention and Article 6(1) of Regulation No 1367/2006 (the third plea); infringement of the first indent of Article 4(2) of Regulation No 1049/2001 (the fourth plea), and infringement of the last paragraph of Article 4(2) of Regulation No 1049/2001 (the fifth plea), in so far as they concern point 2 of the request for information*

a) The third, fourth and fifth pleas in law: infringement of Article 4(4) of the Aarhus Convention and Article 6(1) of Regulation No 1367/2006 (the third plea); infringement of the first indent of Article 4(2) of Regulation No 1049/2001 (the fourth plea), and infringement of the last subparagraph of Article 4(2) of Regulation No 1049/2001 (the fifth plea)

165 The applicants claim that ECHA was not entitled to reject point 2 of the request for information on the basis of the first indent of Article 4(2) of Regulation No 1049/2001, read together with Article 118(2)(c) of the REACH Regulation, and that ECHA was in breach of the principle that any exception to the right of access to environmental information must be interpreted in a restrictive way, in accordance with Article 4(4) of the Aarhus Convention and Article 6(1) of Regulation No 1367/2006.

166 In that regard, the Court must examine, first, whether ECHA was entitled to take the view that disclosure of the precise tonnage of the substances at issue would have undermined the protection of the commercial interests of concerned persons and, second, whether an overriding public interest justified the disclosure of that information.

Undermining the protection of commercial interests

167 The applicants claim that ECHA failed to comply with the first indent of Article 4(2) of Regulation No 1049/2001, in that ECHA relied on the presumption in Article 118(2)(c) of the REACH Regulation in order to refuse access to the information covered by point 2 of the request for information, since that presumption is not evidence of how the commercial interests of the legal or natural persons who had registered each of the 356 substances concerned were undermined.

168 First, it must be noted that the system of exceptions laid down in Article 4 of Regulation No 1049/2001, particularly in Article 4(2), is based on a weighing of the opposing interests in a given situation, that is to say, on the one hand, the interests which would be favoured by the disclosure of the documents in question and, on the other, those which would be jeopardised by such disclosure. The decision taken on a request for access to documents depends on which interest must prevail in the particular case (judgment in *LPN and Finland v Commission*, cited in paragraph 145 above, paragraph 42).

169 Second, it must be observed that, in accordance with settled case-law, although, in order to justify refusing access to a document, it is not sufficient, in principle, for the document to fall within an activity or an interest referred to in Article 4 of Regulation No 1049/2001, as the institution concerned must also explain how access to that document could specifically and actually undermine the interest protected by an exception laid down in that article, it is nevertheless open to that institution to base its decisions in that regard on general presumptions which apply to certain categories of document, as similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature (judgments in Case C-477/10 P *Commission v Agrofert Holding* [2012] ECR, paragraph 57; of 28 June 2012 in Case C-404/10 P *Commission v Éditions Odile Jacob*, not published in the ECR, paragraph 116; in Case C-280/11 P *Council v Access Info Europe* [2013] ECR, paragraph 72; and Case C-365/12 P *Commission v EnBW Energie Baden-Württemberg* [2014] ECR, paragraphs 64 and 65).

- 170 In such a case, the institution concerned must nevertheless specify on which general considerations it bases the presumption that disclosure of the documents would undermine one of the interests protected by the exceptions under Article 4 of Regulation No 1049/2001, and there is no need to carry out a concrete assessment of the content of each of those documents (judgment in *Council v Access Info Europe*, cited in paragraph 169 above, paragraph 73).
- 171 More specifically, the requirement to ascertain whether the general presumption in question actually applies cannot be interpreted as meaning that the institution must examine individually each document requested in the case. Such a requirement would deprive that general presumption of its proper effect, which is to permit the institution to reply to a global request for access in a manner equally global (judgment in *LPN and Finland v Commission*, cited in paragraph 145 above, paragraph 68).
- 172 It must however be pointed out that a general presumption does not exclude the possibility of demonstrating that a given document disclosure of which has been requested is not covered by that presumption or that there is an overriding public interest justifying the disclosure of that document, under Article 4(2) of Regulation No 1049/2001 (see judgment in *Commission v EnBW*, cited in paragraph 169 above, paragraph 100 and the case-law cited).
- 173 Third, under Article 118(2)(c) of the REACH Regulation, disclosure of ‘the precise tonnage of the substance or preparation manufactured or placed on the market’ is, normally, to be deemed to undermine the protection of the commercial interests of the concerned person.
- 174 In this case, as regards point 2 of the request for information, ECHA stated, in Section 1(b) of the contested decision, that Article 118(2)(c) of the REACH Regulation included a general presumption that information on the precise tonnage normally undermined the protection of the commercial interests of the concerned person. ECHA considered that there was no evidence to rebut that legal presumption and that disclosure would harm the commercial interests of the registrants. That information would reveal the market share of the companies compared with their competitors. Moreover, ECHA argued that making that information public could have an impact on competition law aspects (see paragraph 53 above).
- 175 It is clear that what the applicants want from the ECHA, by means of point 2 of the request for information on the precise tonnage of the substances manufactured or placed on the market, is information the disclosure of which is, precisely in accordance with the presumption established by Article 118(2)(c) of the REACH Regulation, normally to be deemed to undermine the protection of the commercial interests of the concerned person, and consequently that presumption is applicable in this case.
- 176 To the extent that the applicants do no more than assert that ECHA, by relying on Article 118(2)(c) of the REACH Regulation, has not proved how disclosure of the precise tonnage would have undermined the commercial interests of the persons who registered each of the 356 substances concerned, such comments cannot rebut the presumption laid down by that article. Where the legal presumption in Article 118(2)(c) of the REACH Regulation is applicable, the authority concerned are free to take the view that disclosure would undermine the protection of the commercial interests of the persons concerned without having to make an individual assessment of the content of each of the documents disclosure of which is requested. By reason of that legal presumption, and in the absence of specific factors which could call it into question, ECHA was not obliged to demonstrate how disclosure of the precise tonnage would have undermined the commercial interests of the concerned persons.
- 177 That conclusion is not invalidated by fact that the examination required for the processing of a request for access to documents must, as a general rule, be specific and individual. As is clear from the case-law cited in paragraph 169 above, that rule is subject to exceptions, inter alia where there is a general presumption that the disclosure of the document at issue would undermine one of the

interests protected by the exceptions provided for in Article 4 of Regulation No 1049/2001. That is even more the case where, as here, such a presumption is expressly provided for by a provision of legislation, namely Article 118(2)(c) of the REACH Regulation.

178 In the light of the foregoing, it must be concluded that, under Article 118(2)(c) of the REACH Regulation read together with the first indent of Article 4(2) of Regulation No 1049/2001, ECHA was entitled to take the view that the disclosure of the precise tonnage of the substances registered would have undermined the commercial interests of the persons concerned. It remains to be ascertained whether the existence of an overriding public interest none the less justified that disclosure.

Whether an overriding public interest justified disclosure

179 The applicants claim that ECHA cannot refuse access to information in order to protect an interest covered by one of the exceptions provided for in Article 4(2) of Regulation No 1049/2001 unless, first, it checks that there is no overriding public interest justifying the disclosure of that document and, second that, that it weighs the various competing interests, as ECHA failed to do in the contested decision.

180 More specifically, the applicants claim that the request for information concerns environmental information and emissions into the environment and that, accordingly, there is an overriding public interest in the disclosure of the data requested, in accordance with Article 6(1) of Regulation No 1367/2006. Further, the applicants complain that ECHA infringed Article 4(4) of the Aarhus Convention and Article 6(1) of Regulation No 1367/2006 which impose, according to the applicants, the requirement that any exception to the right of access to environmental information must be interpreted in a restrictive way.

181 In this case, ECHA stated, in the contested decision, that it had detected no overriding public interest capable of justifying disclosure of the information requested. ECHA stated that it had well noted that the request was motivated by ‘promoting the regulatory approach towards chemical substances that are possibly candidates for identification as substances of very high concern’. It added that ‘[h]owever, the [legislature had] provided with the REACH Regulation instruments to identify and manage the risks from such substances, foremost the authorisation procedure, which [provided for] extensive public consultations’ (see paragraph 54 above).

182 In order to examine the applicants’ arguments, first, the Court must ascertain whether, on the assumption that the information at issue constitutes environmental information, that was sufficient ground for a finding that there was an overriding public interest in its disclosure. Second, the Court must analyse whether the information requested relates to emissions into the environment, with the result that, in accordance with Article 6(1) of Regulation No 1367/2006, its disclosure would be deemed to serve an overriding public interest. Third and last, the Court must examine whether the applicants’ claim that, in this case, ECHA failed to undertake a weighing of the various competing interests, is well founded.

– Whether there is an overriding public interest in cases of requests for environmental information

183 First, it is necessary to ascertain whether it follows from the second sentence of Article 6(1) of Regulation No 1367/2006 that there is always an overriding public interest in the disclosure of environmental information.

184 In that regard, it must be recalled that, in accordance with the last subparagraph of Article 4(4) of the Aarhus Convention, the grounds which permit refusal of a request for information on the environment ‘shall be interpreted in a restrictive way taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment’.

- 185 That principle is confirmed by the second sentence of recital 15 in the preamble to Regulation No 1367/2006, to the effect that '[t]he 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 into the environment'.
- 186 The second sentence of Article 6(1) of Regulation No 1367/2006 provides that, '[a]s regards the other exceptions set out in Article 4 of [Regulation No 1049/2001], the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment'. Yet it is clear from the wording and the scheme of Article 6(1) that the 'other exceptions' within the meaning of the second sentence of Article 6(1) do not include the protection of commercial interests, put forward as a ground by ECHA for the rejection of point 2 of the request for information (see paragraphs 37 and 53 above).
- 187 The first sentence of Article 6(1) of Regulation No 1367/2006 lays down a rule as regards the exceptions found in the first and third indents of Article 4(2) of Regulation No 1049/2001. The second sentence of Article 6(1) mentions not merely 'other exceptions', but the 'other exceptions set out in Article 4 of Regulation [No 1049/2001]'. Consequently the exceptions covered by that provision are those set out in Article 4(1), the second indent of Article 4(2), and Article 4(3) and (5) (judgment in *LPN and Finland v Commission*, cited in paragraph 145 above, paragraph 83). Given that the protection of commercial interests is covered by the first indent of Article 4(2) of Regulation No 1049/2001, which is referred to in the first sentence of Article 6(1) of Regulation No 1367/2006, it is not included within the concept of 'other exceptions' in the second sentence of Article 6(1).
- 188 In this case, it is clear, first, that, in the context of the application of the exception set out in the first indent of Article 4(2) of Regulation No 1049/2001, concerning, inter alia, the protection of commercial interests, the applicants cannot validly rely on the second sentence of Article 6(1) of Regulation No 1367/2006. On the one hand, the second sentence of Article 6(1) refers only to the requirement that 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 set out in the first and third indents of Article 4(2) of Regulation No 1049/2001 (see the case-law cited in paragraph 187 above), should be interpreted in a restrictive way.
- 189 On the other hand, 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 sentence of Article 4(2) of Regulation No 1049/2001 (judgment in *LPN v Commission*, cited in paragraph 119 above, paragraph 136). It cannot therefore be inferred from the second sentence of Article 6(1) of Regulation No 1367/2006 that there is always an overriding public interest in the disclosure of environmental information.
- 190 Secondly, the applicants state that the 356 substances with respect to which a request for access to information was submitted are highly toxic chemicals. They consider that it is legitimate for the public to know that hundreds of thousands of tonnes of substances that can adversely affect human health and the environment are on the EU market, handled by workers and used in consumer products. To recognise the right of citizens to have a thorough knowledge of the amount of hazardous substances on the market would make it possible to exercise greater pressure in favour of those substances being replaced by safer alternatives.
- 191 It must be observed that the fact that citizens have the opportunity to obtain appropriate environmental information and have genuine opportunities to participate in the decision-making process in relation to the environment plays an essential role in a democratic society. As stated in the preamble to the Aarhus Convention, improved access to information and public participation in

decision-making enhances the quality and the implementation of decisions, contributes to public awareness of environmental issues, gives the public the opportunity to express its concerns and enables public authorities to take due account of such concerns.

192 The public's right to receive that information constitutes the expression of the principle of transparency, to which the provisions of Regulation No 1049/2001, as a body, give effect, as is apparent from recital 2 in the preamble to that regulation, according to which openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to them, and contributes to strengthening the principle of democracy (judgment in Case T-36/04 *API v Commission* [2007] ECR II-3201, paragraph 96).

193 While it is true that an overriding public interest capable of justifying the disclosure of a document must not necessarily be distinct from the principles which underlie Regulation No 1049/2001 (judgment in *LPN and Finland v Commission*, cited in paragraph 145 above, paragraph 92), it is none the less apparent from the case-law that general considerations alone cannot provide an appropriate basis for establishing that the principle of transparency is of particularly pressing concern and capable of prevailing over the reasons justifying the refusal to disclose the documents in question, and that it is the task of the party requesting information to make specific reference to circumstances showing that there is an overriding public interest to justify the disclosure of the documents concerned (see, to that effect, judgment in *LPN and Finland v Commission*, cited in paragraph 145 above, paragraphs 93 and 94 and the case-law cited).

194 In this case, it is clear from the applicants' arguments as summarised in paragraph 190 above that they do no more, in essence, than claim that the fact that the information requested constitutes environmental information concerning hazardous substances justifies increased transparency and public access to that information in order to ensure better participation by citizens in the decision-making process and thereby to contribute to the reduction of risks with respect to health and the environment. In so doing, the applicants merely rely, in a general way, on the principles that underlie Regulation No 1367/2006 read together with Regulation No 1049/2001, and fail to present any argument capable of demonstrating that, as regards the precise tonnage of the substances, the application of those principles represents, having regard to the particular circumstances of this case, a matter of particularly pressing concern. As stated in the case-law cited in paragraph 193 above, general considerations cannot provide an appropriate basis for establishing that the principle of transparency represents in a specific case a matter of particularly pressing concern which prevails over the reasons justifying the refusal to disclose the documents requested.

195 Further, nor do the applicants explain why it is essential to make public the precise tonnage of the substances at issue and why making public the total tonnage band within which a substance has been registered, as provided for by Article 119(2)(b) of the REACH Regulation, is not sufficient to satisfy the public interest in disclosure.

196 It follows from the foregoing that an overriding public interest in the disclosure of the information requested within point 2 of the request for information cannot be inferred from the mere fact, even if it is proved, that the information at issue constitutes environmental information.

– The concept of information relating to emissions into the environment within the meaning of Article 6(1) of Regulation No 1367/2006

197 The applicants claim that the information on the precise tonnage in which a substance is placed on the market constitutes information relating to emissions into the environment. Consequently, in accordance with Article 6 of Regulation No 1367/2006, the disclosure of that information is to be deemed to serve an overriding public interest.

- 198 The applicants also refer to Article 4(4)(d) of the Aarhus Convention, which provides, first, that a request for environmental information may be refused where the disclosure of that information would adversely affect '[t]he confidentiality of commercial and industrial information where such confidentiality is protected by law in order to protect a legitimate economic interest' and, second, that, '[w]ithin this framework, information on emissions which is relevant for the protection of the environment shall be disclosed'.
- 199 First, as regards the disclosure of information relating to emissions into the environment, it must be recalled that Article 6 of Regulation No 1367/2006 adds to Regulation No 1049/2001 specific rules concerning requests for access to environmental information (judgment in *LPN and Finland v Commission*, cited in paragraph 145 above, paragraph 79).
- 200 In particular, the first sentence of Article 6(1) of Regulation No 1367/2006 lays down a legal presumption that an overriding public interest in disclosure exists where the information requested relates to emissions into the environment, except where that information concerns an investigation, in particular one concerning possible infringements of EU law (see, to that effect, judgment in *LPN v Commission*, cited in paragraph 119 above, paragraph 108).
- 201 Accordingly, the first sentence of Article 6(1) of Regulation No 1367/2006 requires that if the institution concerned receives an application for access to a document, it must disclose it where the information requested relates to emissions into the environment, even if such disclosure is liable to undermine the protection of the commercial interests of a particular natural or legal person, within the meaning of the first indent of Article 4(2) of Regulation No 1049/2001.
- 202 In that regard, it must be borne in mind that, where the institutions intend to refuse a request for access to documents on the basis of an exception, that exception must be interpreted and applied strictly (see judgment in *C-506/08 P Sweden v MyTravel and Commission* [2011] ECR I-6237, paragraph 75 and the case-law cited), so as not to frustrate application of the general principle of giving the public the widest possible access to documents held by the institutions (judgment in *Joined Cases T-109/05 and T-444/05 NLG v Commission* [2011] ECR II-2479, paragraph 123).
- 203 By providing that, where the information requested relates to emissions into the environment, an overriding public interest in disclosure exists which is superior to an interest protected by an exception, the first sentence of Article 6(1) of Regulation No 1367/2006 allows a specific implementation of that general principle.
- 204 Secondly, as regards the definition of emissions into the environment, it must be observed that the concept of 'emissions into the environment' is not defined either by the Aarhus Convention or by Regulation No 1367/2006.
- 205 However, while Regulation No 1367/2006 does not contain an express definition of the concept of 'emissions into the environment', Article 2(1)(d)(ii) of that regulation refers, as part of the definition of the concept of 'environmental information', to 'emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in point (i)'. The said 'point (i)' refers to 'the state of the elements of the environment', but not to 'the state of human health and safety', which is actually the subject of 'point (vi)' of that provision.
- 206 Even though the aim of Article 2(1)(d) of Regulation No 1367/2006 is, in principle, to define the concept of 'environmental information', it is legitimate to conclude, having regard to the wording of 'point (ii)' of that provision, that emissions can be only releases into the environment which affect or are likely to affect the elements of the environment.

- 207 Further, it must be noted that the Aarhus Convention Implementation Guide, in the version published in 2000, refers to the concept of emission as described in Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26). Article 2(5) of the directive defines an emission as being the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into the air, water or land, an installation being, under Article 2(3) of that directive, a stationary technical unit where one or more activities listed in Annex I to the directive are carried out.
- 208 In this case, there is no need to determine whether the definition of emissions into the environment stated in the Implementation Guide, which presupposes a release from an installation, is or is not useful for the interpretation of Regulation No 1367/2006, since it is clear that, in any event, the manufacture of a substance or placing it on the market cannot per se be regarded as the release of that substance into the environment, and consequently nor can information on the tonnage manufactured or placed on the market constitute information relating to emissions into the environment.
- 209 First, it must be observed that that conclusion is not invalidated by the applicants' argument that a substance which is placed on the market necessarily interacts with the environment and with human beings, with the result that the placing on the market itself constitutes an emission into the environment.
- 210 In the first place, it must be borne in mind that, as follows from the considerations set out in paragraphs 205 and 206 above, interaction with human health or safety is not sufficient ground for the identification of an emission into the environment and that such an emission presupposes a release into the environment which affects or is likely to affect the elements of the environment.
- 211 In so far as the applicants argue that, once a substance is placed on the market, it ceases to be under the control of the operator and may be released into the environment and affect the elements of the environment, it must be observed that the release into the environment presupposed by the concept of an emission must be real or actual and not merely potential. The abstract risk of an emission from a substance exists from the moment of its production. Admittedly, it cannot be ruled out that the placing of the substance on the market may increase that risk. The fact remains however that neither the production of a substance nor its placing on the market alone involve the emission of that substance into the environment. The mere risk that a substance may be emitted into the environment does not justify the tonnage of the substance manufactured or placed on the market being classified as information relating to emissions into the environment.
- 212 Next, it must be noted that there are substances, in particular intermediates within the meaning of Article 3(15) of the REACH Regulation (see paragraph 17 above), which, if used for their intended purposes, are not emitted into the environment.
- 213 While all substances, other than intermediates, are liable to be released into the environment at some time in their life cycle, that does not however mean that, with respect to those substances, the tonnage manufactured or placed on the market can be considered to be information relating to releases into the environment which affect or are likely to affect the elements of the environment (see paragraph 206 above).
- 214 It follows from the foregoing that the information requested in point 2 of the request for information cannot be regarded as information relating to emissions into the environment. Accordingly, the existence of an overriding public interest cannot be deduced, in this case, from the application of the first sentence of Article 6(1) of Regulation No 1367/2006.

– Weighing the various competing interests

- 215 The applicants claim that ECHA failed to fulfil its obligation to weigh the public interest in the disclosure of environmental information and the commercial interests of the companies concerned served by the refusal to disclose, relying on the legal presumption provided for by Article 118(2)(c) of the REACH Regulation, that disclosure of the precise tonnage undermines the protection of commercial interests.
- 216 That argument cannot be accepted.
- 217 As stated in paragraph 178 above, ECHA was entitled to assume, on the basis of that legal presumption, that the effect of disclosure of the information requested would have been to undermine the protection of the commercial interests of the companies concerned without undertaking a specific examination of each item of information. ECHA then examined, in accordance with the last clause of Article 4(2) of Regulation No 1049/2001, whether, in the particular circumstances, an overriding public interest justified disclosure. ECHA finally concluded, and was correct to do so, on the basis of a statement of reasons which was sufficiently detailed to permit its reasoning to be understood, that no such overriding public interest existed.
- 218 That being the case, the Court must reject the applicants' complaint that ECHA failed to take account of a public interest or an overriding public interest in the disclosure of the environmental information at issue and failed properly to weigh the different interests for the purposes of the last clause of Article 4(2) of Regulation No 1049/2001.
- 219 Nor have the applicants demonstrated that ECHA failed to have regard to the principle that exceptions to the right of access to environmental information must be interpreted in a restrictive way. The refusal of a request for information, based on the legal presumption provided for by Article 118(2)(c) of the REACH Regulation and on there being no overriding public interest justifying the disclosure of the information requested, does not allow a conclusion that the exception to the right of access was not applied strictly.
- 220 It follows that the fourth and fifth pleas in law and also the third plea in law, in so far as the latter is based on an infringement of Article 4(4) of the Aarhus Convention and Article 6(1) of Regulation No 1367/2006, must be rejected as being unfounded with respect to point 2 of the request for information.

b) The second plea in law: infringement of Article 4(4) and (6) of Regulation No 1049/2001

The first part: infringement of Article 4(4) of Regulation No 1049/2001

- 221 The applicants claim that ECHA failed to fulfil its obligations to consult third parties, contrary to Article 4(4) of Regulation No 1049/2001.
- 222 It must be recalled that, in the case of third-party documents, Article 4(4) of Regulation No 1049/2001 requires the institution to consult the third party concerned with a view to assessing whether an exception under Article 4(1) or (2) of that regulation is applicable, unless it is clear that the document should or should not be disclosed. It follows that the institutions are under no obligation to consult the third party concerned if it is clearly apparent that the document should or should not be disclosed. In all other cases, the institutions must consult the relevant third party. Accordingly, consultation of the third party is, as a general rule, a precondition for determining whether the exceptions to the right of access provided for in Article 4(1) and (2) of Regulation No 1049/2001 are applicable in the case of third-party documents (judgments in Case T-168/02 *IFAW Internationaler Tierschutz-Fonds v*

Commission [2004] ECR II-4135, paragraph 55; of 30 January 2008 in Case T-380/04 *Terezakis v Commission*, not published in the ECR, paragraph 54; and Case T-63/10 *Jurašinović v Council* [2012] ECR, paragraph 83).

- 223 It must also be borne in mind that consultation of a third party other than a Member State, provided for by Article 4(4) of Regulation No 1049/2001, does not bind the institution, but must enable it to assess whether an exception provided for by paragraph 1 or 2 of that article is applicable (judgment in *Jurašinović v Council*, cited in paragraph 222 above, paragraph 87).
- 224 As regards point 2 of the request for information, ECHA, by refusing disclosure of the precise tonnages on the ground that that would have undermined the protection of the commercial interests of the concerned persons, applied an exception provided for in Article 4(2) of Regulation No 1049/2001. While it is undisputed that ECHA did not consult the companies concerned before making a decision on the request, it follows from the case-law cited in paragraph 222 above that a failure to consult third parties is compatible with Regulation No 1049/2001 if one of the exceptions provided for by that regulation is clearly applicable to the documents at issue.
- 225 In this case, it has already been established in paragraph 178 above that ECHA was correct to take the view, on the basis of, in particular, the legal presumption provided for by Article 118(2)(c) of the REACH Regulation, that the disclosure of the precise tonnage of the substances in question would have undermined the protection of the commercial interests of the concerned companies and that, in the absence of an overriding public interest justifying disclosure, access to the information requested should be refused. Consequently, the Court must hold that the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001 is clearly applicable to the information at issue, and accordingly consultation of third parties was not necessary.
- 226 The applicants cannot call into question that conclusion by referring to the judgment of the Court of Justice in Case C-266/09 *Stichting Natuur en Milieu and Others* [2010] ECR I-13119. In that judgment the Court ruled on, inter alia, the interpretation of Article 4 of Directive 2003/4, which provision concerns derogations from the right of access. It is true that, in accordance with point 3 of the operative part of that judgment, Article 4 of Directive 2003/4 must be interpreted as meaning that the balancing exercise it prescribes between the public interest served by the disclosure of environmental information and the specific interest served by a refusal to disclose must be carried out in each individual case submitted to the competent authorities, even if the national legislature were by a general provision to determine criteria to facilitate that comparative assessment of the competing interests. The Court did not however hold that the institutions of the European Union could not take into consideration a legal presumption, such as that provided for by the EU legislature in Article 118(2)(c) of the REACH Regulation, and that they should undertake a consultation of third parties even in circumstances where it is clear that a document should or should not be disclosed, notwithstanding the wording of Article 4(4) of Regulation No 1049/2001.
- 227 It follows from the foregoing that the first part of the second plea in law must be rejected.

The second part: infringement of Article 4(6) of Regulation No 1049/2001 and breach of the principle of proportionality

- 228 First, the applicants claim that ECHA failed to fulfil its obligation to examine the possibility of granting partial access to the information on the precise tonnage placed on the market by each registrant, contrary to Article 4(6) of Regulation No 1049/2001.
- 229 It is clear from the terms of Article 4(6) of Regulation No 1049/2001 that, if only parts of the requested document are covered by one or more of the exceptions to the right of access, the remaining parts of the document are to be disclosed. Further, the principle of proportionality requires that derogations

remain within the limits of what is appropriate and necessary to attain the objective pursued (judgments in Case C-353/99 P *Council v Hautala* [2001] ECR I-9565, paragraph 28, and Case T-301/10 *In 't Veld v Commission* [2013] ECR, paragraph 200).

- 230 The Court has previously held that Article 4(6) of Regulation No 1049/2001 requires a specific and individual examination of the content of each document. Only such an examination of each document can enable the institution to assess the possibility of granting the party requesting information partial access. An assessment of documents by reference to categories rather than on the basis of the actual information contained in those documents is insufficient, since the examination which must be undertaken by an institution must enable it to assess specifically whether an exception invoked actually applies to all the information contained in those documents (see, to that effect, judgment in *Franchet and Byk v Commission*, cited in paragraph 146 above, paragraph 117 and the case-law cited).
- 231 As is apparent from the case-law cited in paragraph 169 above, the principle that the assessment required for the processing of a request for access to documents must be specific and individual is however subject to exceptions, in particular where there is a general presumption that the disclosure of the document concerned would undermine one of the interests protected by the exceptions provide for in Article 4 of Regulation No 1049/2001. Further, it has already been stated in paragraph 177 above that this is even more the case where such a presumption is expressly provided for by a provision of legislation, in this case Article 118(2)(c) of the REACH Regulation.
- 232 In so far as the applicants claim that the ECHA failed to consider, after a case-by-case assessment, the possibility of disclosing information on the tonnage of specific substances, it must be observed that the legal presumption provided for in Article 118(2)(c) of the REACH Regulation, that disclosure of the precise tonnage undermines the protection of the commercial interests of the concerned persons, covers all the substances at issue and that the applicants have not put forward, either with respect to all those substances or with respect to specific substances, any factors which might call into question that legal presumption. Nor have the applicants demonstrated that there is an overriding public interest which justifies, at least for some of the substances, the disclosure of the information requested. Consequently, ECHA could take the view, without being obliged to undertake a case-by-case assessment, that the information on the precise tonnage of all the substances at issue was covered by the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001.
- 233 Secondly, the applicants assert, in their reply, that ECHA infringed the principle of proportionality in that it failed to take account of the possibility of disclosing information on the tonnage of specific substances, in accordance with Article 4(6) of Regulation No 1049/2001.
- 234 ECHA contends that the applicants are thereby raising a new plea in law which is inadmissible or, at least, unfounded.
- 235 In the first place, as regards the issue of admissibility raised by ECHA, it must be recalled that Article 44(1)(c) and Article 48(2) of the Rules of Procedure of 2 May 1991 provide that the original application must state the subject-matter of the proceedings and contain a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. However, a plea which may be regarded as amplifying a plea made previously, whether directly or by implication, in the original application, and which is closely connected therewith, must be declared to be admissible. The same applies to a complaint made in support of a plea in law (judgment in *In 't Veld v Commission*, cited in paragraph 229 above, paragraph 97).
- 236 As is apparent from the case-law cited in paragraph 229 above, the authority concerned must have due regard to the principle of proportionality when applying derogations to the right of access to documents. In particular, the aim of Article 4(6) of Regulation No 1049/2001 is to contribute to compliance with that principle by permitting partial disclosure if only part of the document requested

is affected by an exception to the right of access, in order not to exceed the limits of what is appropriate and necessary in order to attain the objective pursued. In that context, the reference made by the applicants to the principle of proportionality is not a new plea in law, but a complaint which amplifies the plea in law based on an infringement of Article 4(6) of Regulation No 1049/2001. In essence, the applicants claim that, by infringing that provision, ECHA was at the same time in breach of the principle of proportionality.

- 237 It follows that the complaint of a breach of the principle of proportionality is admissible.
- 238 As regards the substance, the Court must however hold that this complaint is unfounded, since ECHA did not disregard the requirements of the principle of proportionality in so far as it did not grant, after a case-by-case assessment, access to some of the information requested.
- 239 It has already been stated in paragraph 232 above that, in the light of the legal presumption provided for in Article 118(2)(c) of the REACH Regulation, such a case-by-case assessment was unnecessary. That provision does not exceed the limits of what is appropriate and necessary in order to attain the objective pursued, namely the protection of commercial interests.
- 240 In that regard, it must be stated that that legal presumption does not necessarily preclude access to the information requested, that there is on the contrary the possibility of putting forward, when appropriate, factors which may rebut that presumption or indeed demonstrate the existence of an overriding public interest which justifies full or partial disclosure of the information requested (see, by analogy, the case-law cited in paragraph 172 above). Moreover, ECHA is, in any event, obliged to make public, in accordance with Article 119(2)(b) of the REACH Regulation, the total tonnage band within which a substance has been registered. Accordingly, the REACH Regulation allows, to a certain extent, access to information on the tonnage of a substance, even though its precise tonnage is not disclosed.
- 241 It follows from the foregoing that the second part of the second plea in law and, therefore, that plea in its entirety, must be rejected, in so far as it concerns point 2 of the request for information.
- 242 It follows that the action is unfounded in so far as it concerns the refusal of point 2 of the request for information.

4. The second and third pleas in law: infringement of Article 4(4) of Regulation No 1049/2001 (the second plea), and infringement of Article 4(1), (3) and (4) of the Aarhus Convention and Article 6(1) of Regulation No 1367/2006 (the third plea), in so far as they concern point 3 of the request for information

a) The second plea in law: infringement of Article 4(4) of Regulation No 1049/2001

- 243 The applicants claim that ECHA failed to meet its obligations under Article 4(4) of Regulation No 1049/2001.
- 244 More specifically, the applicants claim that it was ECHA's duty to consult the registrants who had made requests for confidentiality with respect to the non-disclosure of the total tonnage band. They add that, as regards other registrants, that consultation was unnecessary, since it was obvious that there was no ground for refusing to grant access to the information requested.
- 245 ECHA contends that consultation of third parties was not necessary, since it was not obliged to consult third parties concerning information which it did not hold. In addition, even if it did, that information was exclusively subject to the dedicated Internet dissemination provisions in Article 119 of the REACH Regulation.

- 246 First, it must be borne in mind that, in accordance with Article 119(2)(b) of the REACH Regulation, information on the total tonnage band is to be made public over the Internet, except where there has been a request for confidentiality which has been accepted as valid by ECHA.
- 247 Second, it must be observed that Regulation No 1049/2001 is to apply, in accordance with Article 2(3) thereof, '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', and that, according to Article 118(1) of the REACH Regulation, 'Regulation ... No 1049/2001 shall apply to documents held by [ECHA]'. It follows that the right of access to documents of the institutions within the meaning of Article 2(3) of Regulation No 1049/2001 concerns only documents which exist and are in the possession of the institution concerned (judgment in *Strack v Commission*, cited in paragraph 105 above, paragraph 38).
- 248 In this case, ChemSec requested, by point 3 of the request for information, access to information on the total tonnage band within which the 356 substances in question were registered, in the event that the information covered by point 2 of the request for information, namely the precise tonnage of those substances, could not be accessed (see paragraph 35 above).
- 249 In Section 1(c) of the contested decision, ECHA stated that 'the requested document [was] not held in [its] databases or files' and that Regulation No 1049/2001 did not impose the obligation to create documents for the purpose of responding to requests for access to documents. In order to send to the applicants such a document, on the assumption that applications for registration had indeed been submitted for all the substances concerned, ECHA said that it would have to put together the information from all the registration dossiers and calculate the total tonnage bands of the substances concerned. ECHA stated that the same would hold for access to the cumulative precise tonnage band for each of the substances listed in the request, if the request was to be understood in that way. ECHA added however that it was arranging the collection of information provided on the tonnage band in the individual dossiers for the substances listed in the request. ECHA annexed to its letter a table containing that information, while explaining that '[t]he methodology for establishing the total tonnage band [was] ... in development' and that it '[could] not therefore guarantee the [accuracy] of that manually generated information'.
- 250 The applicants state that they did not receive the information requested in so far as their request related to tonnage bands by registrant, and not aggregated data. They add that Article 119(2)(b) of the REACH Regulation requires ECHA to make public the total tonnage band for each individual registrant. Further, while the applicants do not maintain that ECHA was in possession of the total tonnage bands, they consider that ECHA had to have that information available, since ECHA was under an obligation to disseminate it, in accordance with Article 119(2)(b) of the REACH Regulation.
- 251 It must be observed that, on the date of the contested decision, ECHA had not yet determined the methodology for establishing the total tonnage bands and therefore could not take action on the applicants' request for access to that data.
- 252 It must also be observed that the REACH Regulation does not link the obligation under Article 119(2)(b) of that regulation to the right to access to documents provided for in Article 118(1) of that regulation, read together with Article 2(1) of Regulation No 1049/2001. Compliance with the obligation of dissemination over the Internet cannot therefore be enforced by means of a request for access to documents (see, to that effect and by analogy, the judgment in *Strack v Commission*, cited in paragraph 105 above, paragraph 44). From that perspective, a request for access to documents cannot compel ECHA to create certain data which does not exist, even if the dissemination of that data is laid down by Article 119 of the REACH Regulation.

253 Consequently, ECHA was entitled to reject point 3 of the request for information on the ground that it did not hold the information requested. Since ECHA was under no obligation to consult third parties concerning information which was not in its possession, the complaint cannot be made that ECHA infringed Article 4(4) of Regulation No 1049/2001.

254 It follows that the second plea in law must be rejected, in so far as it concerns point 3 of the request for information.

b) The third plea in law: infringement of Article 4(1), (3) and (4) of the Aarhus Convention and Article 6(1) of Regulation No 1367/2006

255 The applicants complain that ECHA infringed Article 4(1), (3) and (4) of the Aarhus Convention and Article 6(1) of Regulation No 1367/2006, by refusing them access to information on the chemical substances which were the subject of their request for information.

256 In so far as the third plea in law also concerns point 3 of the request for information, it must be recalled that, under Article 44(1)(c) of the Rules of Procedure of 2 May 1991, an application initiating proceedings must contain a summary of the pleas in law on which the application is based. That summary must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. An applicant must, accordingly, specify the nature of the pleas in law on which the action is based, with the result that a mere abstract statement of the pleas in law does not satisfy the requirements of the Rules of Procedure (judgment of 12 September 2013 in Case T-331/11 *Besselink v Council*, not published in the ECR, paragraph 38).

257 It is however clear that the applicants do no more than claim that the request for information relates to environmental information and that the derogations from the right of access to such information are governed by the Aarhus Convention and by Regulation No 1367/2006. The applicants fail however to explain how the Aarhus Convention or Regulation No 1367/2006 could have barred ECHA from rejecting point 3 of the request for information on the ground that the information requested was not in its possession. The submission of the plea concerned therefore is such that it is impossible to determine what infringement is alleged, in order to enable the Court to exercise its power of review.

258 Accordingly, the third plea in law must be rejected as being inadmissible in so far as it concerns point 3 of the request for information, in accordance with Article 44(1)(c) of the Rules of Procedure of 2 May 1991.

259 Further, it may be noted that Article 4(3)(a) of the Aarhus Convention expressly provides that a request for environmental information may be refused if the public authority to which the request is addressed does not hold the information requested. The first paragraph of Article 3 of Regulation No 1367/2006 states that 'Regulation ... No 1049/2001 shall apply to any request by an applicant for access to environmental information held by Community institutions and bodies ...', which also permits the conclusion that this reference concerns only documents which exist and are in the possession of the institution concerned. Consequently, even if it is assumed that the total tonnage bands constitute environmental information, that factor cannot call into question the lawfulness of the rejection of point 3 of the request for information.

260 It follows that the action must be dismissed in so far as it concerns point 3 of the request for information.

261 It follows from all the foregoing that, as regards point 1 of the request for information, there is no longer any need to adjudicate on the action, in so far as the names and contact details disclosure of which the applicants had requested were accessible on the ECHA website as from 23 April 2014 (see

paragraph 121 above). As regards other information which was the subject-matter of point 1 of the request for information, the action must be upheld (see paragraph 164 above) and to that extent the contested decision must be annulled.

262 On the other hand, as regards the rejection of points 2 and 3 of the request for information, the action must be dismissed.

Costs

263 Under Article 134(3) of the Rules of Procedure of the General Court, the parties are to bear their own costs where each party succeeds on some and fails on other heads. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing his own costs, pay a proportion of the costs of the other party. Furthermore, under Article 137 of those rules, where a case does not proceed to judgment the costs are in the discretion of the Court.

264 In this case, since the action has been partly upheld, the applicants, ECHA and Cefic must be ordered to bear their own costs.

265 In addition, under Article 138(1) of the Rules of Procedure, the institutions which intervened in the proceedings are to bear their own costs. Consequently, the Commission shall also bear its own costs.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

- 1. Declares that there is no need to adjudicate on the action for annulment of the decision of the European Chemicals Agency (ECHA) of 4 March 2011, in so far as it refused to disclose information requested by point 1 of the request for information, to the extent that point 1 concerns the names and contact details of 6 611 companies which were accessible over the Internet on 23 April 2014;**
- 2. Annuls the ECHA decision of 4 March 2011 in so far as it refused to disclose information requested by point 1 of the request for information, to the extent that point 1 concerns information not yet disclosed on 23 April 2014;**
- 3. Dismisses the action as to the remainder;**
- 4. Orders each party, including the European Commission and the European Chemical Industry Council (Cefic), to bear its own costs.**

Martins Ribeiro

Gervasoni

Madise

Delivered in open court in Luxembourg on 23 September 2015.

[Signatures]

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