Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

3 May 2018 *

(Access to documents — Regulation (EC) No 1049/2001 — Documents held by the Commission — Documents originating from a Member State — Documents exchanged pursuant to the control system for ensuring compliance with the rules of the common fisheries policy — Article 113 of Regulation (EC) No 1224/2009 — Public access following a request made by a non-governmental organisation — Action for annulment — Admissibility — Obligation to state reasons — Sincere cooperation — Choice of legal basis)

In Case T-653/16,

Republic of Malta, represented by A. Buhagiar, acting as Agent,

applicant,

v

European Commission, represented by J. Baquero Cruz and F. Clotuche-Duvieusart, acting as Agents,

defendant,

ACTION under Article 263 TFEU for annulment of the decision of the Secretary-General of the Commission of 13 July 2016 on a confirmatory application by Greenpeace for access to documents relating to an allegedly irregular shipment of live bluefin tuna from Tunisia to a fish farm located in Malta, in so far as it grants Greenpeace access to documents originating from the Maltese authorities,

THE GENERAL COURT (Ninth Chamber),

composed of S. Gervasoni, President, K. Kowalik-Bańczyk (Rapporteur) and C. Mac Eochaidh, Judges,

Registrar: E. Coulon,

gives the following

Judgment

I. Background to the dispute

1 In March 2010, the environmental organisation, Greenpeace, sent the European Commission information concerning an allegedly irregular shipment of live bluefin tuna from Tunisia to a fish farm located in Malta.

* Language of the case: English.

2 On the basis of that information, by Commission Decision C(2010) 7791 final of 12 November 2010, the Commission informed the Republic of Malta of identified irregularities in the field of controls of bluefin tuna activities and requested it to open an administrative inquiry based on Article 102(2) of Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006 (OJ 2009 L 343, p. 1).

3 Following the administrative inquiry carried out by the Republic of Malta ('the administrative inquiry'), the Commission established with that Member State, by Commission Decision C(2011) 6257 final of 12 September 2011 pursuant to Article 102(4) of Regulation No 1224/2009, an action plan to overcome shortcomings in the Maltese fisheries control system ('action plan'). According to the Commission, the Republic of Malta had successfully implemented that action plan as of February 2013.

4 Meanwhile, by letter of 14 April 2010, Greenpeace requested that, pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), the Commission grant it access to the documents relating to the shipment of bluefin tuna referred to in paragraph 1 above, including the documents exchanged between the Republic of Malta and the Commission in that regard ('the application of 14 April 2010'). The Commission ultimately refused to grant that access in a confirmatory decision of 3 March 2011. Greenpeace then lodged a complaint with the European Ombudsman on 23 May 2012.

5 By letter of 19 April 2012, Greenpeace requested that the Commission grant it access to various documents postdating the application of 14 April 2010 and, in particular, to the correspondence between the Republic of Malta and the Commission drawn up or received by the Commission after 3 March 2011 ('the application of 19 April 2012'). The Commission ultimately refused to grant Greenpeace access to those documents in a confirmatory decision of 25 September 2012. Greenpeace then lodged a further complaint with the European Ombudsman on 26 April 2013.

6 By recommendation of 29 June 2015, the Ombudsman concluded that the Commission had not sufficiently justified its refusal to grant access to the documents covered by the applications of 14 April 2010 and 19 April 2012 and recommended that the Commission should grant access to the documents in question or provide valid reasons for not doing so.

7 By letter of 29 July 2015 ('the initial application'), Greenpeace restated its applications of 14 April 2010 and 19 April 2012 in the light of the Ombudsman's recommendations for access to be granted to all the documents covered by those two applications as well as those covered by the two complaints investigated by the Ombudsman, namely:

— any and all written documents relating to the transfer of ... bluefin tuna from Tunisia to Malta and subsequent caging and/or slaughtering of tuna in Malta on 20, 21 and 22 March [2010], including, for instance, copies of the catch and transfer declarations, observer reports, etc.;

– any and all video material documenting the transport, caging and, if applicable, slaughtering of that tuna ...;

– any and all written communication on the above matter between the ... Commission and the ... [Maltese Government] ...;

– Commission Decision C(2010) 7791 [final] of 12 November 2010 ..., including any annexes thereto;

– the report drawn up by the Maltese authorities in response, as required by Article 102(3) of ... Regulation [No 1224/2009];

– any documents concerning the Commission's evaluation of the report mentioned in the previous [indent];

– the action plan ...; and

– any correspondence between [the Republic of] Malta and the Commission regarding identified irregularities in the field of controls of bluefin tuna activities in Malta drawn up or received after 3 March 2011.'

8 By email of 28 September 2015, the Commission informed the Republic of Malta of the initial application and consulted it in order for it to let the Commission know, within five working days, whether it opposed the disclosure of the documents originating from the Republic of Malta identified by the Commission at that stage.

9 On 30 September 2015, the Republic of Malta sought an extension of the deadline for replying.

10 On 5 November 2015, the Commission extended the Republic of Malta's time limit for replying by 15 working days. At the same time, the Commission informed the Republic of Malta that it had decided, first, to grant Greenpeace access to the documents originating from the Commission and, second, to continue the ongoing consultation with the Republic of Malta in respect of the documents originating from the Maltese authorities.

11 By letter of 30 November 2015, the Republic of Malta sent its observations to the Commission, setting out the reasons why it considered that the documents both from the Republic of Malta and the Commission could not be disclosed.

12 On 23 December 2015, the Director-General of the Directorate-General (DG) for Maritime Affairs and Fisheries at the Commission refused to grant Greenpeace access to the documents originating from the Republic of Malta identified at that time on the ground that the Republic of Malta was opposed to the disclosure of all documents originating from it ('the initial decision').

13 On 20 January 2016, Greenpeace lodged a confirmatory application ('the confirmatory application').

14 By letter of 13 April 2016, the Commission informed the Republic of Malta of the confirmatory application. In that letter, the Commission stated that, following a review of the scope of the initial application, it had identified further documents covered by the initial application originating both from its services and the Maltese authorities. In the same letter, the Commission therefore consulted the Republic of Malta in order for it to let the Commission know, within five working days, whether it still opposed the full or partial disclosure of the documents originating from the Republic of Malta, including the newly identified documents.

15 On 18 April 2016, the Republic of Malta sought an extension of the deadline for replying.

16 On 27 April 2016, the Commission extended the Republic of Malta's time limit for replying by 10 working days.

17 On 3 May 2016, the Republic of Malta informed the Commission that it objected to the disclosure of all the documents originating from the Maltese authorities, including those identified during the examination of the confirmatory application.

18 On 19 May 2016, the Commission requested the Republic of Malta to indicate, within 10 working days, the reasons for and the extent of its objection to disclosure of the documents in question.

19 On 27 May 2016, the Republic of Malta replied that it was upholding in full the position it had expressed in its letter of 3 May 2016, which it considered to be sufficiently precise.

20 On 13 July 2016, the Secretary-General of the Commission adopted a decision on Greenpeace's confirmatory application ('the contested decision'). By letter of the same day, the Commission informed the Republic of Malta of the adoption of the contested decision.

21 By the contested decision, the Commission granted Greenpeace access, in particular, in redacted form eliminating any personal data, to various documents originating both from its services and the Maltese authorities. As regards the documents originating from the Commission, the documents which were decided to be disclosed were either identified during the examination of the initial application, but mistakenly not then sent to Greenpeace (documents listed in Annex F to the contested decision), or were identified only during the examination of the confirmatory application (documents listed in Annex D to the contested decision). As regards the documents originating from the Republic of Malta, the documents which were decided to be disclosed were both identified during the examination of the initial application (documents listed in Annex B to the contested decision under numbers 112 to 230, 'Documents Nos 112 to 230') and during the examination of the confirmatory application (documents listed in Annex B to the contested decision under numbers 1 to 111 and 231 to 240, 'Documents Nos 1 to 111 and 231 to 240').

II. Procedure and forms of order sought

22 The Republic of Malta brought the present action by application lodged at the Court Registry on 19 September 2016.

23 By separate documents lodged at the Court Registry on the same day, the Republic of Malta, first, lodged an application for interim measures seeking suspension of operation of the contested decision and, second, a request for the confidential treatment vis-à-vis the public of certain data contained in the application and the application for interim measures as well as the annexes thereto.

24 The Commission lodged its defence on 12 December 2016.

25 The applicant lodged its reply on 30 March 2017 and the Commission lodged its rejoinder on 19 May 2017.

26 By order of 25 August 2017, *Malta* v *Commission* (T-653/16 R, not published, EU:T:2017:583), the President of the Court granted the application for interim relief and reserved the costs.

27 The Republic of Malta claims that the Court should:

– annul the contested decision in so far as that decision grants access to the documents originating from the Maltese authorities;

– order the Commission to pay the costs.

28 The Commission contends that the Court should:

– dismiss the application;

– order the Republic of Malta to pay the costs.

III. Law

29 In support of its action, the Republic of Malta relies in the application on four pleas in law, respectively alleging, first, failure to abide by the procedural time limits stipulated in Regulation No 1049/2001 and breach of the duty of sincere cooperation, second, failure to take account of the scope of the initial application and its mistaken construction as a fresh application for access to documents, third, unlawful extension of the scope of the application for access to documents during the examination of the confirmatory application and infringement of the principle of sound administration and, fourth, infringement of Article 113 of Regulation No 1224/2009. In addition, the Republic of Malta raised a fifth plea in its reply, alleging breach of the obligation to state reasons.

A. Admissibility

30 The Commission submits that the Republic of Malta's action and, in any event, all the pleas which the Republic of Malta relies on in support of that action are inadmissible.

1. The admissibility of the Republic of Malta's action and the first four pleas raised in support of that action

31 The Commission primarily contends that the Republic of Malta's action is inadmissible in so far as it seeks the annulment of a 'confirmatory decision at large' and not a 'distinct decision' of the Commission granting access to documents originating from the Maltese authorities in disregard of the Maltese authorities' opposition under Article 4(5) of Regulation No 1049/2001. In the alternative, the Commission maintains that the first four pleas raised by the Republic of Malta in support of its action are inadmissible in so far as they 'are not ... based on the substantive exceptions [to public access to documents] set out in Article 4(1) to (3) of Regulation No 1049/2001'.

32 The Republic of Malta contests that plea of inadmissibility.

33 It should be noted that the European Union is a union based on the rule of law in which all acts of the institutions of the European Union are subject to review of their compatibility with, in particular, the Treaties and general principles of law (see judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 60 and the case-law cited). The Treaties have established a complete system of legal remedies and procedures designed to permit the Court of Justice of the European Union to review the legality of measures adopted by the institutions (judgment of 23 April 1986, *Les Verts* v *Parliament*, 294/83, EU:C:1986:166, paragraph 23).

34 That principle is articulated, in particular, in Article 263 TFEU, according to which the Court of Justice of the European Union is to review the legality of acts of the Commission, other than recommendations and opinions, and it is for that purpose to have jurisdiction in actions on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

35 It follows that the Member States may, by means of an action for annulment, challenge any measure adopted by the Commission in the form of a regulation or an individual decision and may, in so doing, plead in support of their claims, inter alia, any infringement of an essential procedural requirement or infringement of any rule of law relating to the application of the Treaties (see, to that effect, judgment of 20 March 1985, *Italy* v *Commission*, 41/83, EU:C:1985:120, paragraph 30).

36 In the first place, it follows that a Member State is entitled to challenge, by means of an action for annulment, a Commission decision adopted under Regulation No 1049/2001 allowing a natural or legal person to have access to documents held by the Commission originating from that Member

State, and does not need to identify a separate Commission decision — alone susceptible to challenge — not to give effect to the objection of that Member to disclosure of the documents concerned.

37 In the second place, a Member State is entitled, in support of an action brought against a Commission decision granting a third party access to documents, to rely on any plea relating to one of the four cases laid down in Article 263 TFEU under which an action for annulment may be brought and, in particular, any plea alleging infringement of a procedural or substantive requirement which it considers relevant, without prejudice to whether or not that plea is in fact relevant. Thus, as regards the admissibility of a plea advanced against such a decision, there is no need to draw a distinction according to whether the rule which is alleged to have been breached is provided for by Regulation No 1049/2001 or by another legal instrument.

38 Those considerations cannot be called into question by the Commission's argument alleging, in essence, that Article 4(5) of Regulation No 1049/2001 has circumscribed and limited the right of the Member States to oppose disclosure of documents which they have sent to an institution.

39 In that regard, it should be noted that Article 4(5) of Regulation No 1049/2001 states that 'a Member State may request an institution not to disclose a document originating from that State without its prior agreement'.

40 It is indeed true that Article 4(5) of Regulation No 1049/2001 has been interpreted as entitling the Member State concerned to object to the disclosure of documents originating from it only on the basis of the substantive exceptions laid down in Article 4(1) to (3) of that regulation and if it gives proper reasons for its position (judgments of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 99, and of 21 June 2012, *IFAW Internationaler Tierschutz-Fonds* v *Commission*, C-135/11 P, EU:C:2012:376, paragraph 59).

41 However, such circumscription of the power to participate in a decision of the European Union conferred on the Member State concerned by Article 4(5) of Regulation No 1049/2001 cannot prevent that Member State from seeking the annulment of a Commission decision granting access to the documents in question and from relying, for such purposes, on illegalities other than those alleging infringement of Article 4 of Regulation No 1049/2001. The interpretation to the contrary advanced by the Commission would mean allowing the EU legislature to restrict the scope of the cause of action afforded to the Member States by Article 263 TFEU and thereby undermine the complete system of legal remedies and procedures established by the Treaties permitting the Court of Justice of the European Union to review the legality of measures adopted by the institutions.

42 It should be added that Article 42 of the Charter of Fundamental Rights of the European Union and Article 15(3) TFEU, both mentioned by the Commission, do establish the right for any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State to have access to the documents of the institutions. However, allowing a Member State to bring an action for annulment against a Commission decision granting access to documents and to raise any plea calling into question the legality of that decision does not have the effect of unduly restricting the right of access to the documents, but only of allowing the EU judicature to review the legality of that decision in the light of all the procedural and substantive rules that may apply, thereby safeguarding the right of the Member State concerned to an effective remedy.

43 It follows that the action brought by the Republic of Malta for the partial annulment of the contested decision and the first four pleas raised in support of that action are admissible.

44 Accordingly, the plea of inadmissibility raised by the Commission against the Republic of Malta's action and against the first four pleas raised in support of that action must be dismissed.

2. The admissibility of the fifth plea, alleging breach of the obligation to state reasons

45 The Commission contends that the fifth plea, alleging an inadequate statement of reasons for the contested decision, was raised for the first time in the reply and is therefore inadmissible under Article 84(1) of the Rules of Procedure of the General Court.

46 Indeed, in that regard, under Article 84(1) of the Rules of Procedure, new pleas in law may not be introduced in the course of proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure.

47 However, it has consistently been held that an absence or inadequate statement of reasons constitutes an infringement of essential procedural requirements for the purposes of Article 263 TFEU and is a plea involving a matter of public policy which may, and even must, be raised by the EU judicature of its own motion (judgment of 20 March 1959, *Nold* v *High Authority*, 18/57, EU:C:1959:6, p. 115; see also, judgment of 2 December 2009, *Commission* v *Ireland and Others*, C-89/08 P, EU:C:2009:742, paragraph 34 and the case-law cited).

48 In those circumstances, the Court has jurisdiction to hear the applicants' plea alleging breach of the obligation to state reasons, without it being necessary to examine whether that plea, raised for the first time in the reply, satisfies the conditions laid down in Article 84(1) of the Rules of Procedure (see, to that effect, judgment of 20 July 2017, *Badica and Kardiam* v *Council*, T-619/15, EU:T:2017:532, paragraph 43).

49 The substance of the fifth plea will therefore be examined in paragraphs 51 to 65 below.

B. Substance

50 The Court considers it appropriate to examine, first, the fifth plea, alleging an inadequate statement of reasons in the contested decision, next and jointly, the first three pleas relating to the procedure for the adoption of that decision and, lastly, the fourth plea, alleging infringement of Article 113 of Regulation No 1224/2009

1. Fifth plea in law, alleging breach of the obligation to state reasons

51 The Republic of Malta submits that the Commission did not sufficiently explain, in the contested decision or in the letter of 13 July 2016 informing the Maltese authorities of the adoption of that decision, the reasons why it had decided to depart from its previous practice relating, first, to the requirement of precision in applications for access to documents, second, the inadmissibility of confirmatory applications overstepping the scope of the initial application and, third, non-disclosure of documents not specifically identified in the application for access, in particular when originating from third parties. The Republic of Malta also criticises the Commission for not having provided any explanations as to why it considered that numerous documents originating from the Maltese authorities fell within the scope of the application for access to documents and should therefore be disclosed, despite the fact that the Republic of Malta made representations to the Commission to that effect on several occasions during the consultation phase.

52 The Commission disputes the arguments of the Republic of Malta.

53 According to settled case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its

power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgment of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 63; see also, judgment of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 88 and the case-law cited).

54 It is also apparent from the case-law that the Commission must, if a decision goes appreciably further than previous decisions and departs from well-established decision-making practice, provide a fuller account of its reasoning (judgments of 26 November 1975, *Groupement des fabricants de papiers peints de Belgique and Others* v *Commission*, 73/74, EU:C:1975:160, paragraph 31, and of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 155).

55 In the present case, it should be observed as a preliminary point that the Republic of Malta does not deny the existence or the adequacy of the statement of reasons for the contested decision in so far as that decision examines whether the documents originating from the Maltese authorities identified by the Commission are covered by the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001 or whether they may therefore be disclosed under that regulation. In addition, the Republic of Malta does not call into question the fact that the Commission also explained in detail in the contested decision the reasons for which, in its view, Article 113 of Regulation No 1224/2009 did not preclude the application of Regulation No 1049/2001. Lastly, the Republic of Malta does not deny that it was able to ascertain the reasons for the contested decision and to challenge its reasoning in the present action.

56 However, in essence, the Republic of Malta complains, in the first place, that the Commission departed, without stating specific reasons, from its earlier decision-making practice as regards the processing of imprecise applications for access, the identification of documents covered by an application for access and the processing of confirmatory applications overstepping the scope of the initial application.

57 The Court nevertheless notes that, in establishing the existence of such a practice, the Republic of Malta merely refers to the judgment of 2 July 2015, *Typke* v *Commission* (T-214/13, EU:T:2015:448, paragraph 13), mentioning a singular case in which the Secretary-General of the Commission rejected a confirmatory application in so far as it concerned an aspect not covered by the corresponding initial application. Reliance solely on that judgment cannot establish the existence of well-established decision-making practice relative as regards the processing of imprecise applications for access, the identification of documents covered by an application for access and the processing of confirmatory applications overstepping the scope of the initial application. Consequently, in the absence of proven well-established previous practice from which the Commission departed, the Republic of Malta cannot criticise that institution for not having explained the reasons for its alleged change of approach (see, to that effect, judgments of 28 April 2010, *Amann & Söhne and Cousin Filterie* v *Commission*, T-446/05, EU:T:2010:165, points 118 and 158, and of 20 September 2012, *Poland* v *Commission*, T-333/09, not published, EU:T:2012:449, paragraph 92).

58 The Republic of Malta also criticises the Commission, in the second place, for not having sufficiently justified, in or before the contested decision, the addition of certain documents to the application for access to documents, despite its requests for explanations to that effect during the consultation phase, in particular in its letters of 30 September 2015, 30 November 2015 and 27 May 2016.

59 In that regard, first, it is true that, in its letter of 30 September 2015, the Republic of Malta asked the Commission why it had reneged on a previously expressed position and added, to the initial application, documents exchanged between them, in particular emails and minutes of meetings. Next, it does appear that, in its letter of 30 November 2015, the Republic of Malta stated that, in its view, many documents considered relevant by the Commission were not covered by the application for access. Lastly, it is common ground that, in its letter of 27 May 2016, the Republic of Malta objected to the Commission's identification of new documents at the stage of the confirmatory application, since that practice, according to the Republic of Malta, amounted to an extension of the scope of the application, which is not permitted under Article 7(2) of Regulation No 1049/2001.

60 Be that as it may, it should, first, be observed that, although the letter of 30 September 2015 expressly requested an explanation from the Commission, that letter does in fact pre-date the initial decision which upheld the opposition of the Republic of Malta and refused to grant Greenpeace access to Documents Nos 112 to 230. In those circumstances, the Republic of Malta cannot allege that the Commission did not address its request for an explanation in the initial decision and, having subsequently failed to repeat that request for an explanation, cannot complain that the Commission did not address it in the contested decision.

61 Second, the letter of 30 November 2015, which also pre-dates the initial decision, did not contain any details capable of identifying the documents to which it was referring and of understanding the reasons why the relevant documents were not covered by the request for access. In addition, that letter did not seek any explanation from the Commission and, therefore, did not call for a reply from the Commission.

62 Third, the Court notes that, in its letter of 27 May 2016, the Republic of Malta did not contest the actual connection to the application for access of each of the documents identified by the Commission at the stage of the examination of the confirmatory application and did not request any further explanations on that point from the Commission. In its letter of 27 May 2016, the Republic of Malta merely contested the very principle of adding, during the examination of the confirmatory application, documents to the application for access which had not been identified during the examination of the initial application.

63 In that regard, the Commission stated in the contested decision that, following a review of the application for access, it had identified other documents falling within its scope (Documents Nos 1 to 111 and 231 to 240). It is true that, in the contested decision, the Commission did not explain why it considered itself entitled to add documents to the application for access during the examination of the confirmatory application, although it did not make a decision on disclosure of those documents during the examination of the initial application. However, it should be noted that, in its letter of 27 April 2016, the Commission had already explained to the Republic of Malta that the Secretariat-General of the Commission was responsible for conducting an independent review of the initial reply given by the Director-General of DG Fisheries and Maritime Affairs and that, in the context of that review, it was for the Secretary-General to verify whether all documents falling under the scope of the request had been identified at the initial stage, especially in cases as the present one, where the applicant specifically contested that the list of documents submitted at the initial stage was complete. In those circumstances, it was not essential for the Commission to set out afresh in the contested decision the reasons why it was entitled to add further documents identified for the first time during the examination of the confirmatory application to the application for access.

64 It follows from the foregoing that the contested decision is not vitiated by the defect in the statement of reasons alleged by the Republic of Malta.

65 The fifth plea in law, examined by the Court in exercising its power to raise a matter of public policy *ex officio*, must therefore be rejected as unfounded.

2. The first three pleas in law, relating to the procedure for the adoption of the contested decision

66 By its first plea, the Republic of Malta submits, in essence, that the Commission did not process the initial application and the confirmatory application within the time limits prescribed in Articles 7 and 8 of Regulation No 1049/2001 and that, when processing those applications, it breached the duty of sincere cooperation owed to the Maltese authorities. In view of the arguments advanced by the Republic of Malta, this plea may be subdivided into three complaints, the first alleging late notification for the purposes of consultation of the Maltese authorities of the initial application and of the confirmatory application, the second setting excessively short deadlines for the replies of the Maltese authorities and the third the lateness of the initial decision and the contested decision, since both decisions were adopted after the expiry of the time limits laid down in Regulation No 1049/2001, and the contested decision was, moreover, adopted after an implied decision rejecting the confirmatory application.

67 By its second plea, the Republic of Malta submits, in essence, that the Commission disregarded the scope of the initial application in treating it as a fresh application for access covering many documents unrelated to the two previous applications or not specifically identified by Greenpeace. In the context of this plea, the Republic of Malta complains, in particular, that the Commission included documents — generally more recent documents — in the scope of the application for access which, first, were not explicitly covered by the applications of 14 April 2010 and of 19 April 2012 and, second, were, by their very nature, unrelated to the irregularities reported by Greenpeace in 2010 or to the administrative investigation.

68 By its third plea, the Republic of Malta maintains, in essence, that the Commission wrongfully extended the scope of the application for access to documents and breached the principle of sound administration by identifying, during the examination of the confirmatory application and on the basis of an insufficiently precise application, further documents which had not been identified at that time as falling within the scope of that application. In the context of this plea, the Republic of Malta complains, in particular, that the Commission, first, did not ask Greenpeace to clarify its application for access to documents on the basis of Article 6(2) of Regulation No 1049/2001, second, did not carry out a thorough examination of the initial application for access to documents, third, examined certain documents only during the examination of the confirmatory application in breach of Articles 7 and 8 of Regulation No 1049/2001, which organise a two-phase procedure for the examination of applications for access to documents, and, fourth, made a manifest error of assessment as to the determination of the subject matter and the scope of the application for access to documents.

69 It is clear from the arguments advanced by the Republic of Malta in support of the first three pleas that it accuses the Commission of having disregarded various procedural rules laid down in Articles 4 and 6 to 8 of Regulation No 1049/2001, some of which also arise from the duty of sincere cooperation.

70 For the purposes of any examination of the substance of the first three pleas, it must first be determined whether, and if so to what extent, those pleas are relevant.

(a) The relevance of the first three pleas

71 In order to assess whether, and if so to what extent, the first three pleas are relevant, the Court considers it necessary to set out, at the outset, the contours and purposes of the procedure for the examination of applications for access to documents. In that regard, a distinction must be drawn between the procedural rules laid down in Articles 6 to 8 of Regulation No 1049/2001, on the one hand, and, on the other, the procedural rules laid down in Article 4(4) and (5) of that regulation or arising from the duty of sincere cooperation.

(1) The procedural rules laid down in Articles 6 to 8 of Regulation No 1049/2001

72 The procedural rules laid down in Articles 6 to 8 of Regulation No 1049/2001 may be summarised as follows.

73 In the first place, applications for access to a document are to be made in a sufficiently precise manner to enable the institution to identify the requested document (Article 6(1) of Regulation No 1049/2001). If an application is not sufficiently precise, the institution is to ask the applicant to clarify the application and assist the applicant in doing so, for example, by providing information on the use of the public registers of documents (Article 6(2) of the regulation). In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may also confer with the applicant informally, with a view to finding a fair solution (Article 6(3) of the regulation). In general, the institutions must provide information and assistance to citizens on how access to documents is granted (Article 6(4) of Regulation No 1049/2001).

74 In the second place, both initial and confirmatory applications must be handled promptly, the institution being required to decide on such applications within 15 working days and, in the case of refusal, provide the applicant with a statement of the reasons for the refusal (see Article 7(1) and Article 8(1) of Regulation No 1049/2001, respectively). In exceptional cases, for example in the event of an initial or confirmatory application relating to a very long document or to a very large number of documents, that time limit may be extended by 15 working days (see Article 7(3) and Article 8(2) of the regulation respectively). In the event of failure by the institution to reply to an initial application within the prescribed time limit, the applicant is thus entitled to make a confirmatory application asking the institution to reconsider its position (Article 7(4) of the regulation). In the event of failure by the institution to reply to a confirmatory application within the prescribed time limit, the applicant is thus entitled to rely on the existence of a negative reply and institute court proceedings against the institution (Article 8(3) of Regulation No 1049/2001).

75 Several conclusions can be drawn from the procedural rules laid down in Articles 6 to 8 of Regulation No 1049/2001 and, more generally, from the provisions of that regulation as a whole.

76 First, it follows from Articles 6 to 8 of Regulation No 1049/2001 that those articles govern how applications for access to documents are to be made and organise the processing, by the institution concerned, of such applications. Consequently, those provisions concern only the relationship between the applicant and the institution concerned, and not the relationship between the institution and third parties, such as the Member States, from which certain documents originate.

77 Next, the procedure laid down in Articles 6 to 8 of Regulation No 1049/2001 principally aims to achieve the swift and straightforward processing of applications for access to documents and, as a secondary matter, to avoid, in accordance with the principle of sound administration, the institution from bearing a disproportional workload (see, to that effect, judgment of 2 October 2014, *Strack* v *Commission*, C-127/13 P, EU:C:2014:2250, paragraphs 25, 27 and 28). That procedure has therefore been introduced in the interests of persons requesting access to documents, whilst taking into account the constraints of the institutions. However, that procedure does not per se aim to protect the interests of third parties, and in particular that of the Member States, in opposing the disclosure of certain documents originating from them and also does not take account of the constraints of third parties and of the Member States where they are consulted on the possible disclosure of those documents.

78 That view is supported by the fact that Regulation No 1049/2001 aims, according to Article 1(a) thereof, 'to ensure the widest possible access to documents' and is founded on the principle expressed in recital 11 thereof that 'all documents of the institutions should be accessible to the public'. It is for that reason that the regulation, and in particular its procedural provisions, is designed to facilitate as far as possible the exercise of the right of access to documents (see, to that effect, judgment of

29 June 2010, *Commission* v *Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 49), and not to render the exercise of that right more difficult, for instance by subjecting its exercise to unnecessary constraints of a formal nature.

79 Lastly, the submission of an application for access to documents is not the only means of accessing documents. Under Article 2(4) of Regulation No 1049/2001, documents held by the institutions are to be made accessible to the public either following a written application or directly in electronic form or through a register. That is why, in addition to Articles 6 to 10 on the processing of applications for access to documents and how access is to be granted following an application, Regulation No 1049/2001 contains provisions relating to the administration of registers of documents (Article 11 of that regulation), to direct access in electronic form or through a register (Article 12 of the regulation) and to the publication in the Official Journal of certain documents (Article 13 of the regulation).

80 It follows that an institution is not precluded from making documents public despite the fact that no application to that effect has been submitted to it, nor, for reasons of transparency and completeness, from informing a person who has submitted an application under Regulation No 1049/2001 of documents that that person has not expressly identified and referred to in his application.

81 In those circumstances, infringement of the rules for examining applications for access to documents provided for in Articles 6 to 8 of Regulation No 1049/2001, although capable, in certain circumstances, of affecting the legality of a decision refusing to grant access to certain documents, cannot affect the legality of a decision to grant access to those documents.

82 In particular, first, as regards Article 6 of Regulation No 1049/2001, it is important to note that, although an institution cannot reject an application as insufficiently precise without previously having asked the applicant to clarify his application (see, to that effect, judgments of 26 October 2011, *Dufour* v *ECB*, T-436/09, EU:T:2011:634, paragraph 31, and of 22 May 2012, *Internationaler Hilfsfonds* v *Commission*, T-300/10, EU:T:2012:247, paragraphs 84 to 87), an institution cannot legitimately be criticised for having granted access to documents on the basis of an allegedly imprecise application without asking the applicant to clarify his application.

83 Where an applicant has not been asked to clarify his application, neither can the institution nor a fortiori a third party legitimately rely on the allegedly vague nature of the applicant's request (see, to that effect, judgment of 19 November 2014, *Ntouvas* v *ECDC*, T-223/12, not published, EU:T:2014:975, paragraph 46). Thus, where an institution considers itself able, without incurring a disproportional workload, of identifying all documents potentially related to a request, even expressed in general terms in respect of many documents, that institution is free to take a decision, without having asked the applicant to clarify that application, then, where appropriate, to grant access to all the documents identified, provided that the documents do not fall under the exceptions laid down, inter alia, in Article 4 of Regulation No 1049/2001.

84 Furthermore, being required to carry out a full examination of all the documents covered by an application for disclosure (see, to that effect, judgment of 22 May 2012, *Internationaler Hilfsfonds* v *Commission*, T-300/10, EU:T:2012:247, paragraph 69), an institution may, at any moment, including for the first time during the examination of the confirmatory application to the application for access, identify further documents potentially related to the application.

85 Second, as regards Articles 7 and 8 of Regulation No 1049/2001, the Court notes that the time limits laid down under those articles merely aim to achieve the swift processing of applications for access to documents and to expedite the disclosure of the documents requested where their disclosure is possible.

86 It should also be noted that failure to comply with the time limit laid down in Articles 7 and 8 of Regulation No 1049/2001 does not have the effect of depriving the institution of the power to adopt a decision and does not in itself taint a decision with unlawfulness justifying its annulment (see, to that effect, judgments of 28 June 2012, *Commission* v *Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 89; of 14 July 2016, *Sea Handling* v *Commission*, C-271/15 P, not published, EU:C:2016:557, paragraphs 78, 79 and 84; and of 19 January 2010, *Co-Frutta* v *Commission*, T-355/04 and T-446/04, EU:T:2010:15, paragraphs 59 and 71).

87 It is all the more necessary for there to be no repercussions from failure to comply with the abovementioned time limits in the case of a decision granting access to documents if, in such a case, the applicant has obtained satisfaction despite the Commission's failure to comply with those time limits, which were introduced solely for his benefit.

88 Having regard to the foregoing considerations, a Member State cannot, in respect of the decision of an institution to grant access to documents, legitimately rely on arguments based on infringement of Articles 6 to 8 of Regulation No 1049/2001.

89 In the present case, in the light of the arguments relied on by the Republic of Malta in support of the first three pleas in law, summarised in paragraphs 66 to 68 above, it must be held that, in respect of those three pleas, the Republic of Malta relies on procedural irregularities under Articles 6 to 8 of Regulation No 1049/2001, such as, in particular, disclosure of documents not specifically covered in the initial and confirmatory applications, the identification of documents at the stage of the examination of the confirmatory application or failure to comply with the time limits for processing initial and confirmatory applications.

90 Consequently, for the reasons set out in paragraphs 72 to 88 above, the pleas based on such irregularities are ineffective as regards the contested decision.

(2) The procedural rules laid down in Article 4(4) and (5) of Regulation No 1049/2001 or arising from the duty of sincere cooperation

91 The procedural rules laid down in Article 4(4) and (5) of Regulation No 1049/2001 or arising from the duty of sincere cooperation may be set out as follows.

92 In the first place, Article 4(4) of Regulation No 1049/2001 lays down that, in the case of a document originating from a third party, the institution is to consult the third party with a view to assessing whether an exception under Article 4(1) or (2) is applicable, unless it is clear whether or not the document is to be disclosed.

93 In that regard, it has been held that a Member State already has, to a great extent, a right to be consulted before disclosure of documents held by an institution originating from the Member State by virtue of Article 4(4) of Regulation No 1049/2001 (judgment of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 46).

94 In the second place, Article 4(5) of Regulation No 1049/2001 provides, as has already been stated in paragraph 39 above, that a Member State may request the institution not to disclose a document originating from it without its prior agreement.

95 In that regard, it should be made clear that, since it confines itself to requiring the prior agreement of the Member State concerned where that State has made a specific request to that effect, Article 4(5) of Regulation No 1049/2001 is procedural in nature (judgments of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraphs 78 and 81, and of 21 June 2012, *IFAW Internationaler Tierschutz-Fonds* v *Commission*, C-135/11 P, EU:C:2012:376, paragraphs 53 and 54).

96 In the third place, an institution considering whether to disclose documents and the Member State from which those documents originate are obliged, in accordance with the duty of sincere cooperation set out in Article 4(3) TEU, to act and cooperate in such a way that Regulation No 1049/2001 is effectively applied (judgment of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 85).

97 In particular, an institution which receives a request for access to a document originating from a Member State and that Member State must, once that request has been notified by the institution to the Member State, commence without delay a genuine dialogue concerning the possible application of the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001, while paying attention in particular to the need to enable the institution to adopt a position within the time limits within which Articles 7 and 8 of the regulation require it to decide on the request for access (judgment of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 86).

98 It therefore follows that Article 4(4) and (5) of Regulation No 1049/2001, interpreted in accordance with the duty of sincere cooperation, determines the rules for the consultation by an institution of third parties from whom documents originate and the ways in which the Member States from whom documents originate may participate in the process for the adoption of the institution's decision on access to those documents.

99 Therefore, in contrast to Articles 6 to 8 of Regulation No 1049/2001, Article 4(4) and (5) of that regulation governs the relationship between the institution and third parties, in particular the Member States, as regards documents originating from the latter, and is intended to protect the interests of such third parties and of the Member States to oppose disclosure of the documents.

100 In those circumstances, the infringement of Article 4(4) and (5) of Regulation No 1049/2001 and of the duty of sincere cooperation owed by the institution to a Member State is liable to affect the legality of a decision granting access to documents originating from that Member State.

101 In the light of the foregoing considerations, a Member State may, in respect of the decision of an institution granting access to documents originating from that Member State, legitimately rely on pleas alleging infringement of Article 4(4) and (5) of Regulation No 1049/2001 and on breach of the duty of sincere cooperation in following the procedure provided for by that article.

102 In the present case, the Republic of Malta also claims, in the context of the first and second limbs of the first plea, that when the Commission consulted it under Article 4(4) of Regulation No 1049/2001 in order ascertain whether it objected to disclosure of the documents at issue, that institution had not cooperated fully with it in so far as, after having delayed in informing it of Greenpeace's initial and confirmatory applications, it set disproportionately short time limits for reply. By that line of argumentation, the Republic of Malta is in fact relying on an irregularity vitiating the procedure provided by Article 4(4) and (5) of Regulation No 1049/2001 and on a breach of the duty of sincere cooperation in respect of that procedure.

103 Consequently, for the reasons set out in paragraphs 91 to 101 above, that line of reasoning is relevant to the contested decision.

104 It is therefore necessary to examine the substance only of the complaints alleging the setting of insufficient time limits for reply and breach of the duty of sincere cooperation

(b) Assessment of the complaints alleging the setting of insufficient time limits for reply and breach of the duty of sincere cooperation

105 In the present case, the Republic of Malta criticises the Commission not only for having informed it of the initial application and of the confirmatory application several months after their receipt, but also, and in particular, for subsequently having set the Republic of Malta only five days in which to analyse whether the documents at issue could be disclosed under the exceptions provided for Article 4(1) to (3) of Regulation No 1049/2001 and, in deciding whether or not to exercise the option available to it, under Article 4(5) of that regulation, of requesting that those documents should not be disclosed.

106 In that regard, it should be noted as a preliminary point that, although Articles 7 and 8 of Regulation No 1049/2001 require the institutions to respond to initial and confirmatory applications for access to documents within certain times, the regulation does not set any period of time within which an institution should inform a Member State that an application for access to documents originating from it has been made, nor within which to communicate the application to the Member State. In particular, Regulation No 1049/2001 does not specify the time limit for a reply which the institution should consequently set for the Member State, so that the latter can inform the institution of any opposition to disclosure of the documents in question.

107 However, having regard to the case-law set out in paragraphs 96 and 97 above, it follows from the duty of sincere cooperation that the Commission is bound to act diligently in its relations with the Member State concerned so that it can itself take a decision within the time limits stipulated in Articles 7 and 8 of Regulation No 1049/2001.

108 In the present case, first, the Commission forwarded the initial application of 29 July 2015 to the Republic of Malta on 28 September 2015, that is to say almost two months after receiving it, and at the same time asked that Member State to inform it within five working days as to whether it objected to disclosure of the documents identified at that stage as originating from the Maltese authorities (Documents Nos 112 to 230).

109 Second, it is common ground that the Commission sent the Republic of Malta the confirmatory application, lodged on 20 January 2016, only on 13 April 2016, that is to say almost three months after having received it, and that, at the same time, it again gave that Member State only five working days within which to inform it of any opposition the Member State might have to disclosure of all the documents originating from the Maltese authorities, thus including those identified for the first time at the stage of the examination of the confirmatory application (Documents Nos 1 to 111 and 231 to 240).

110 However, it should also be made clear, first, that, at the request of the Republic of Malta, the Commission extended that Member State's initial time limit by 15 working days following the communication of the initial application (see paragraph 10 above). In fact, the Republic of Malta opposed disclosure of Documents Nos 112 to 230 on 30 November 2015, whilst it had been forwarded a copy of Greenpeace's initial application on 28 September 2015, that is to say more than two months earlier.

111 Second, at the request of the Republic of Malta, the Commission extended that Member State's initial time limit by 10 working days following the communication of the confirmatory application (see paragraph 16 above). In fact, the Republic of Malta opposed disclosure of all the documents in question on 3 May 2016, whilst it had been forwarded a copy of Greenpeace's confirmatory application on 13 April 2016, that is to say almost three weeks earlier. Furthermore, after having receiving the reply of the Republic of Malta dated 3 May 2016, the Commission invited that Member State on 19 May 2016 to indicate, within 10 working days, the specific reasons why the exceptions laid down in Regulation No 1049/2001 applied and those parts of the documents which were covered

by the exceptions (see paragraph 18 above). On 27 May 2016, the Republic of Malta merely reiterated its opposition in stating that the analysis contained in its letter of 3 May 2016 was sufficient to identify the exceptions to which that letter referred (see paragraph 19 above).

112 Thus, it would appear that the Republic of Malta has, in fact, had several weeks to analyse the documents identified by the Commission at the stage of the examination of the initial application as well as at the stage of the examination of the confirmatory application. In addition, despite the number of documents concerned, the Republic of Malta was able to analyse those documents and, in respect of each of them, rely on some of the exceptions provided for by Article 4 of Regulation No 1049/2001 and Article 113 of Regulation No 1224/2009 before the Commission had taken a decision on the initial and confirmatory applications.

113 Moreover, having regard to the case-law set out in paragraph 97 above, account must be taken of the fact that, pursuant to Article 7(1) and (3) and of Article 8(1) and (2) of Regulation No 1049/2001, the Commission was itself required to reply in time to Greenpeace's initial and confirmatory applications, at the latest within 30 days.

114 In those circumstances, the Republic of Malta cannot claim that the Commission breached the duty of sincere cooperation by delaying informing it of the initial and confirmatory applications and by setting disproportionately short time limits for reply.

115 The first three pleas in law must therefore be dismissed as in part ineffective and in part unfounded.

3. The fourth plea, alleging infringement of Article 113 of Regulation No 1224/2009

116 By its fourth plea, the Republic of Malta submits, in essence, that, by granting Greenpeace access to Documents Nos 112 to 230, the Commission infringed Article 113(2) and (3) of Regulation No 1224/2009. According to the Republic of Malta, without the express consent of the Maltese authorities, those provisions preclude the disclosure to the public of the documents sent by those authorities to the Commission pursuant to Regulation No 1224/2009. The Republic of Malta submits that those provisions are more specific in nature and derogate, in respect of the monitoring of compliance with the rules of the common fisheries policy, from the general rules on public access to documents laid down in Regulation No 1049/2001 and, in particular, in Article 4 thereof.

117 The Commission disputes the arguments of the Republic of Malta. In particular, it contends that Article 113(2) and (3) of Regulation No 1224/2009 must be read in conjunction and reconciled with Regulation No 1049/2001 and, more specifically, with Article 4(5) of that regulation, which allows a Member State to oppose disclosure of documents originating from it only under the substantive exceptions laid down in Article 4(1) to (3) of the regulation.

118 Taking cognisance of the arguments of the parties, it is necessary to determine whether, and to what extent, Article 113(2) and (3) of Regulation No 1224/2009, possibly read in conjunction with Article 4 of Regulation No 1049/2001, precluded access to Documents Nos 112 to 230 from being granted to Greenpeace without the consent of the Republic of Malta, from which those documents originated.

119 For that purpose, it is necessary, first of all, to set out the relevant provisions of Article 113 of Regulation No 1224/2009 in context and examine how those provisions relate to those of Regulation No 1049/2001.

(a) Article 113 of Regulation No 1224/2009 in context

120 As a preliminary point, it should be noted that in Title XII, entitled 'Data and information', of Regulation No 1224/2009, Chapter II relates to the '[c]onfidentiality of data'. This chapter contains only two articles, namely Articles 112 and 113 concerning the '[p]rotection of personal data' and the '[c]onfidentiality of professional and commercial secrecy', respectively.

121 Articles 112 and 113 of Regulation No 1224/2009 replaced Article 37 of Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy (OJ 1993 L 261, p. 1). In the absence, at the time when Regulation No 2847/93 was adopted, of the general EU legislation on the protection of personal data by the institutions and by the Member States, Article 37 of that regulation covered both the protection of individual data and the confidentiality of the data collected and exchanged pursuant to the regulation on the basis of professional and commercial secrecy, in Article 37(2) and (7) to (10) and in Article 37(1) and (3) to (6), respectively.

122 When Regulation No 1224/2009 was adopted, the EU legislature took account of the adoption of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1) and of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

123 As a result, Article 112 of Regulation No 1224/2009 now deals with the protection of personal data separately, essentially by referring to Regulation No 45/2001 and the national legislation transposing Directive 95/46.

124 The provisions of Article 113 of Regulation No 1224/2009 reproduce, in large part, the other provisions of Article 37 of Regulation No 2847/93 that did not deal with the protection of personal data.

125 First, Article 113 of Regulation No 1224/2009 contains provisions ensuring the confidentiality of data relating to professional and commercial secrets. In particular, it is laid down that the Member States and the Commission are to take all necessary steps to ensure that the data collected and received within the framework of Regulation No 1224/2009 is treated in accordance with the applicable rules on professional and commercial secrecy of data. Thus, data communicated pursuant to that regulation is to be subject to the applicable rules regarding confidentiality where disclosure would harm certain interests such as the privacy and the integrity of the individual — in accordance with EU legislation regarding the protection of personal data — the commercial interests of a natural or legal person, court proceedings and legal advice, or the scope of inspections or investigations. However, the information relating to such data may always be disclosed if necessary to bring about the cessation or prohibition of an infringement of the rules of the common fisheries policy (Article 113(4) of Regulation No 1224/2009).

126 Next, Article 113 of Regulation No 1224/2009 contains provisions specifically relating to data originating from a Member State, which is why the Republic of Malta has invoked them in the present proceedings. In that regard, it is important to set out Article 113(2) and (3) of Regulation No 1224/2009, which is almost identical to Article 37(3) and (5) of Regulation No 2847/93, and provides as follows:

'2. The data exchanged between Member States and the Commission [within the framework of this Regulation] shall not be transmitted to persons other than those in Member States or EU institutions whose functions require them to have such access unless the Member States transmitting the data give their express consent.

3. The data [collected and received within the framework of this Regulation] shall not be used for any purpose other than that provided for in this Regulation unless the authorities providing the data give their express consent for the use of the data for other purposes and on condition that the provisions in force in the Member State of the authority receiving the data do not prohibit such use.'

127 Finally, Article 113 of Regulation No 1224/2009 contains more general provisions. In particular, that article provides that it is not to be construed as an obstacle to the use of data, obtained pursuant to the regulation, in the framework of legal actions or proceedings subsequently undertaken for failure to respect the rules of the common fisheries policy. The competent authorities of the Member State transmitting the data are to be informed of all the instances where that data is utilised for those purposes (Article 113(6) of Regulation No 1224/2009).

128 At this point, several conclusions can be drawn from the provisions of Regulation No 1224/2009 mentioned in paragraphs 120 to 127 above.

129 First, Articles 112 and 113 of Regulation No 1224/2009 are not per se intended to apply to documents, but only to data collected pursuant to that regulation.

130 In that regard, it should be noted that Regulation No 1224/2009 does not define what is meant by 'data', but merely what is meant by the more specific 'vessel monitoring system data' (Article 4(12) of Regulation No 1224/2009).

131 Nonetheless, it is clear from the provisions of Regulation No 1224/2009 taken as a whole, and in particular from Articles 12, 33, 34, 63, 78, 93, 101, 109 and 116 thereof, that the data to which the regulation refers concerns, in particular, data recorded by Member States in various computer databases created by the Member States and made available in the secure part of the official website to a limited number of users authorised by the Member States and by the Commission. Thus, that regulation covers, in particular, vessel monitoring system data, data relating to fishing activities, in particular the fishing logbook, the landing declaration, the transhipment declaration and prior notification, data from take-over declarations, transport documents and sales notes, data from fishing licences and fishing authorisations, the data on the exhaustion of fishing opportunities, data from inspection and surveillance reports, data on engine power, vessel detection system data, data on sightings, data relating to international fisheries agreements, data on entries into and exits from fishing areas, maritime areas, areas of regulation of certain regional organisations as well as third country waters, automatic identification system data and data in the national registers of infringements.

132 Second, Articles 112 and 113 of Regulation No 1224/2009 provide for three types of protection of data collected under that regulation, applicable, first, to personal data (Article 112 and Article 113(4)(a) of the regulation), second, to confidential data relating to professional and commercial secrecy (Article 113(1) and (4)(b) of the regulation) and, third, to the data provided by a Member State (Article 113(2) and (3) of the regulation). It is this third and last type of protection which is at issue in the present case.

133 Third, it is clear from the actual wording of Article 113(2) and (3) of Regulation No 1224/2009 that data collected and transmitted by a Member State to the Commission pursuant to that regulation cannot, in principle, be transmitted to persons other than those whose responsibilities require them to have such access, or be used for any purposes other than those provided for in the regulation, unless the Member State who transmitted the data gives its express consent.

134 Only Article 113(4) and (6) of Regulation No 1224/2009 could potentially be interpreted as allowing, by way of exception and in specific cases, disclosure of data originating from a Member State without the latter's consent. First, the provisions set out in paragraphs 125 and 127 above appear to allow, in all circumstances, the disclosure or use of certain data for the purposes of the cessation or prohibition of an infringement to the rules of the common fisheries policy. Second, Article 113(6) of Regulation No 1224/2009 provides that the Member State which provides the data is merely to be informed of the use of the data for the purposes of judicial or administrative proceedings.

135 The relationship between Article 113(2) and (3) of Regulation No 1224/2009 and Regulation No 1049/2001 can now be examined.

(b) The relationship between Article 113 of Regulation No 1224/2009 and Regulation No 1049/2001

136 In the first place, it must be noted that Regulations Nos 1049/2001 and 1224/2009 pursue different objectives. The first is designed to ensure the greatest possible transparency in the decision-making process of the public authorities and the information on which they base their decisions. It is thus designed to facilitate as far as possible the exercise of the right of access to documents, and to promote good administrative practices (see, by analogy, judgment of 29 June 2010, *Commission* v *Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 49). The second is, according to Article 1 thereof, designed to ensure a system for control, inspection and enforcement ensuring compliance with the rules of the common fisheries policy

137 No provision of Regulations Nos 1049/2001 and 1224/2009 expressly gives one regulation priority over the other. Accordingly, it is appropriate to ensure that each of those regulations is applied in a manner compatible with the other and which enables a coherent application of them (see, by analogy, judgments of 29 June 2010, *Commission* v *Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 56, and of 28 June 2012, *Commission* v *Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 110).

138 In the second place, in the light of what has been stated in paragraph 129 above, Article 113(2) and (3) of Regulation No 1224/2009 is not itself intended to govern the conditions for public access to documents transmitted to the Commission by a Member State pursuant to that regulation. Those provisions are merely intended to specify the conditions under which data collected and transmitted by a Member State within the framework of that regulation can be transferred and used.

139 It follows that Article 113(2) and (3) of Regulation No 1224/2009 is not, as such, *lex specialis* derogating from the general rules on public access to documents laid down in Regulation No 1049/2001, but in fact lays down specific rules ensuring enhanced protection of certain data, whether or not personal and regardless of its level of confidentiality, solely on the basis that it was provided by a Member State. This explains why Regulation No 1224/2009, which does not contain any provision on public access to documents, does not refer to Regulation No 1049/2001 whereas, in so far as it contains provisions on data protection and in particular in relation to personal data, it refers, in particular in Article 112, to Regulation No 45/2001.

140 Nevertheless, the fact remains that, as has been stated in paragraph 137 above, both Regulation No 1049/2001 and Regulation No 1224/2009 should be applied consistently.

141 Thus, the rules on access to documents, particularly those set out in Article 4 of Regulation No 1049/2001, cannot, where, as in the present case, the documents covered by the application fall within a particular area of EU law — in this case, the system for control in order to ensure compliance with the rules of the common fisheries policy — be applied and interpreted without taking account of the specific rules governing the transmission and use of the data contained in those documents, which are laid down, in the present case, in Article 113(2) and (3) of Regulation No 1224/2009 (see, by analogy, judgments of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraph 83, and of 26 April 2016, *Strack* v *Commission*, T-221/08, EU:T:2016:242, not published, paragraph 154).

142 Therefore, where a request based on Regulation No 1049/2001 seeks to obtain access to documents containing data within the meaning of Regulation No 1224/2009, Article 113(2) and (3) of Regulation No 1224/2009 become applicable in its entirety (see, by analogy, judgments of 29 June 2010, *Commission* v *Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 63, and of 2 October 2014, *Strack* v *Commission*, C-127/13 P, EU:C:2014:2250, paragraph 70).

143 In the third place, in the light of what has been stated in paragraphs 133 and 134 above, it must be held, subject only to any exception provided for by Article 113(4) and (6) of Regulation No 1224/2009, that Article 113(2) and (3) of that regulation, applicable to the data contained in a document transmitted by a Member State to the Commission in the framework of that regulation, subjects any transmission or use of data not provided for by that regulation to the express consent of that Member State.

144 In that regard, first, the wording of Article 113(2) and (3) of Regulation No 1224/2009, referred to in paragraph 126 above, differs considerably from that of Article 4(5) of Regulation No 1049/2001, set out in paragraphs 39 and 94 above. In principle, Article 113(2) and (3) of Regulation No 1224/2009 precludes certain forms of transmission or use of data communicated by a Member State, unless the Member State has given its express consent. Conversely, whilst clear from Article 2(1) of Regulation No 1049/2001 that the documents of the institutions, including those originating from the Member States, can in principle be made public, Article 4(5) of that regulation confines itself to providing that a Member State may request that a document originating from that Member State not be disclosed without its prior agreement.

145 By contrast, Article 113(2) and (3) of Regulation No 1224/2009 is worded in similar terms to those of Article 9(3) of Regulation No 1049/2001, according to which '[s]ensitive documents shall be … released only with the consent of the originator'. Under Article 9(3) of Regulation No 1049/2001, the originating authority of a sensitive document is empowered to oppose disclosure of that document's content (judgment of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 101).

146 Consequently, Article 113(2) and (3) of Regulation No 1224/2009 does not merely lay down that, where a Member State makes a specific request to that effect, a document originating from that Member State cannot subsequently be disclosed without its prior agreement, as does Article 4(5) of Regulation No 1049/2001, but — similarly to Article 9(3) of Regulation No 1049/2001 — it sets prior and express consent of that Member State as an unqualified condition for certain forms of transmission and use of data communicated by that Member State (see, to that effect, judgment of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraphs 47 and 78).

147 Second, it appears that, as far as concerns data communicated by a Member State pursuant to Regulation No 1224/2009, the EU legislature intended to maintain, in a certain form, the authorship rule, which was nevertheless, in principle, abolished in respect of public access to documents under Regulation No 1049/2001. That rule, in the form it took before the entry into force of Regulation No 1049/2001, implied that, where the author of the document held by an institution was a third

party, the request for access to the document had to be made directly to the author of the document (see, to that effect, judgment of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraph 56).

148 In that regard, it has already been pointed out in paragraph 126 above that Article 113(2) and (3) of Regulation No 1224/2009 is, in essence, identical to Article 37(3) and (5) of Regulation No 2847/93 as it stood before the entry into force of Regulation No 1049/2001. At the time of the adoption of Regulation No 1224/2009 and within the context of the working group 'Internal and external fisheries policy' of the Council of the European Union, the Swedish delegation opposed maintaining the authorship rule, which it considered to be incompatible with Regulation No 1049/2001, which had entered into force. That delegation therefore proposed that the provisions of what is now Article 113(2) and (3) of Regulation No 1224/2009 be worded differently, so that the authorities who provided the data would only need to be consulted. Nevertheless, the Council finally agreed on the proposal of the Commission consisting in reproducing, without making any significant amendments, Article 37(3) and (5) of Regulation No 2847/93 in Regulation No 1224/2009.

149 It therefore appears that, in adopting Article 113(2) and (3) of Regulation No 1224/2009, the EU legislature intended to maintain the power of a Member State which has transmitted data under that regulation to monitor and control all forms of its transmission or use not provided for by the regulation.

150 Third, the prohibition on the transmission or use of data transmitted by a Member State laid down in Article 113(2) and (3) of Regulation No 1224/2009 applies in all cases where that Member State has not expressly consented to that transmission or use.

151 Accordingly, contrary to what was held as far as concerns the restriction laid down on public access to documents in Article 4(5) of Regulation No 1049/2001 (see, to that effect, judgment of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraphs 47 and 99), the application of the restriction laid down in Article 113(2) and (3) of Regulation No 1224/2009 is not subject to express and prior opposition of the Member State concerned, to reliance by that Member State on one of the substantive exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001 or in Article 113(4) of Regulation No 1224/2009, or to a statement of reasons for any opposition formulated by the Member State.

152 Fourth, since it is a direct consequence of the absence of express consent from the Member State that provided the data, the prohibition on the transmission or use of such data laid down in Article 113(2) and (3) of Regulation No 1224/2009 is not based on a substantive exception, such as protection for the purposes of inspections, investigations and audits referred to in the third indent of Article 4(2) of Regulation No 1049/2001 and in Article 113(4)(d) of Regulation No 1224/2009. It follows that that prohibition cannot, as the Commission claims, come to an end after an administrative investigation initiated under Article 102(2) of Regulation No 1224/2009 is closed, but ceases only when the Member State which provided the data in question expressly agrees to its transmission or use.

153 In the fourth and last place, disclosure to the public, and in particular to a non-governmental organisation, of a document containing data communicated by a Member State under Regulation No 1224/2009 clearly constitutes a form of transmission and of use of that data which has not been provided for by that regulation. The Republic of Malta also argues that, in adopting Regulation No 1224/2009, and more specifically, Article 113(3) thereof, which prohibits the use of such forms of data for any 'purpose other than that provided for in [that] regulation', the Commission had explained, in the 'Internal and external fisheries policy' working group, in response to a question by the Finnish delegation, that the term 'other purposes' referred to in that provision could refer, in particular, to the publication of data by a non-governmental organisation.

154 In the light of the foregoing considerations, Article 113(2) and (3) of Regulation No 1224/2009 prohibits, in principle, disclosure to the public, and in particular to a non-governmental organisation, under Regulation No 1049/2001, of documents not redacted containing data communicated by a Member State to the Commission under Regulation No 1224/2009 where that Member State has not expressly given its consent and, a fortiori, where, as is the case here, that Member State expressly opposed disclosure.

155 That interpretation cannot be called in question by the Commission's argument alleging that the EU legislature could not validly adopt a rule that would impede the application of Regulation No 1049/2001 without vitiating the legal basis of Article 113(2) and (3) of Regulation No 1224/2009 and disproportionately undermining the right of access to documents under Article 42 of the Charter of Fundamental Rights and Article 15(3) TFEU.

156 First, according to settled case-law, the choice of the legal basis of an EU act must rest on objective factors amenable to judicial review, which include the aim and content of that measure. If the examination of an EU measure reveals that it pursues a twofold purpose or that it comprises two components and if one of these is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component (see judgments of 30 January 2001, *Spain* v *Council*, C-36/98, EU:C:2001:64, paragraphs 58 and 59 and the case-law cited, and of 14 June 2016, *Parliament* v *Council*, C-263/14, EU:C:2016:435, paragraphs 43 and 44 and the case-law cited).

157 First, it is common ground, as has been stated in paragraph 136 above, that Regulation No 1224/2009 is principally designed to ensure a system for control, inspection and enforcement for ensuring compliance with the rules of the common fisheries policy. Second, the material scope of Regulation No 1224/2009 predominantly relates to the common fisheries policy, even if only involving the collection and exchange of various data relating to that policy. It is only as a secondary matter that Regulation No 1224/2009 includes, in particular in Articles 112 and 113 thereof, provisions relating to data protection and, in particular, provisions regulating and restricting the transmission and use of data communicated by the Member States.

158 In those circumstances, the Council was required adopt Regulation No 1224/2009 on the sole basis of Article 43 TFEU, relating to the common agricultural policy, which includes the common fisheries policy. In particular, the Council could not have adopted Article 113(2) and (3) of that regulation on the basis of Article 16 TFEU on the protection of personal data or on the basis of Article 15(3) TFEU concerning access to documents. Consequently, the Council was entitled to adopt, in the context of Regulation No 1224/2009, specific rules governing the access to data communicated by a Member State pursuant to that regulation, even if such specific rules would, in practice, result in restricting public access to documents containing such data.

159 Second, it is indeed the case, as has been pointed out in paragraph 42 above, that Article 42 of the Charter of Fundamental Rights, on the one hand, and Article 15(3) TFEU, on the other, provide that any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to the documents of the institutions, bodies and agencies of the Union, irrespective of the medium in which they are stored.

160 However, it must be borne in mind that Article 15(3) TFEU provides that the conditions and limits to the right of access to documents are to be determined by the EU legislature, by means of regulations. It follows that the right of access to documents of the institutions, as enshrined and guaranteed by the Treaties, is not a general and absolute right, but may be subject to limitations and restrictions.

161 In particular, it should be noted that the restriction on access to data under Article 113(2) and (3) of Regulation No 1224/2009 applies only to data originating from the Member States and, as has been stated in paragraph 147 above, the EU legislature intended to maintain, in some form, the authorship

rule, which allows an application for access to a document to be lodged directly with the author of the document. Thus, there is nothing to prevent a person seeking access to a document containing data communicated by a Member State pursuant to Regulation No 1224/2009 from requesting that document directly from the Member State. In that case, the application for access to documents will be considered in accordance with the national law of the Member State concerned.

162 It follows that, although the prior and express consent of the relevant Member State is an absolute condition for the disclosure of data communicated by a Member State pursuant to Regulation No 1224/2009, Article 113(2) and (3) of the regulation does not render access to documents containing such data impossible or excessively difficult. Accordingly, those provisions do not disproportionately undermine the right of access to documents laid down, first, in Article 42 of the Charter of Fundamental Rights, and, second, in Article 15(3) TFEU.

163 It is in the light of those considerations that the Court must examine whether, in the present case, Article 113(2) and (3) of Regulation No 1224/2009 precluded disclosure to Greenpeace of Documents Nos 112 to 230.

(c) Assessment of the substance of the fourth plea alleging infringement of Article 113 of Regulation No 1224/2009

164 As a preliminary point, it should be stated that the Republic of Malta explained that Documents Nos 112 to 230 were exchanged between it and the Commission pursuant to Regulation No 1224/2009 and that they contain data within the meaning of that regulation. Thus, it stated, for example, that some of those documents contain data relating to the position of fishing vessels or the activities of Libyan fishing vessels. Other documents are detailed reports, inspection reports, transfer at sea and caging declarations drawn up by Maltese and international observers. Finally, certain documents were drawn up for the purposes of the administrative inquiry initiated by the Republic of Malta and of the subsequent follow-up to that inquiry by the Commission.

165 The Commission does not contest this description of the documents in question. In particular, it does not call into question the fact that they were exchanged pursuant to Regulation No 1224/2009 and that they contain data within the meaning of that regulation.

166 The Court confirms that Documents Nos 112 to 230, produced by the Republic of Malta, correspond to the description given by the Republic of Malta and that they contain data — in particular numerical data or data of a technical nature — of the same type as that referred to by Regulation No 1224/2009 and referred to in paragraph 131 above.

167 In those circumstances, Article 113(2) and (3) of Regulation No 1224/2009 was applicable to the data contained in Documents Nos 112 to 230.

168 It follows that, unless it were able to rely on Article 113(4) and (6) of Regulation No 1224/2009, the Commission could not disclose to the public and, in particular, transmit to a non-governmental organisation the data contained in Documents Nos 112 to 230 without the express consent of the Republic of Malta.

169 In the present case, first, it is common ground that the Republic of Malta has never expressly agreed to the transmission to Greenpeace of the data contained in Documents Nos 112 to 230 and that, on the contrary, it has even expressly opposed such transmission, in particular in its letters of 30 November 2015, and 3 and 27 May 2016. Second, the Commission has never established or even claimed that the communication to Greenpeace of the data contained in those documents would have been necessary for the purposes of the cessation or prohibition of an infringement to the rules of the common fisheries policy.

170 Furthermore, in view of what has been stated in paragraph 152 above, the Commission is not entitled to claim that the express consent of the Republic of Malta to the transmission or use of the data notified by the Maltese authorities was no longer necessary on the ground that the administrative inquiry had been concluded in 2011 and that the Republic of Malta had, from February 2013, successfully implemented the action plan stemming from that inquiry.

171 Therefore, without the consent of the Maltese authorities, the Commission could not lawfully grant access to the documents at issue, unless it redacted all the data falling within the scope of Regulation No 1224/2009 that they contain.

172 It must, however, be noted that the Commission decided to disclose to Greenpeace Documents Nos 112 to 230, redacting only the personal data they contain, regardless of the fact that they also contain data within the more general meaning of Regulation No 1224/2009. In that regard, the Court notes that, at no time did the Commission consider whether that data could in fact be separated from the documents containing them or whether, as a consequence, it was possible, in the present case, to grant access to the documents in question in a redacted form, excluding such data.

173 In those circumstances, the Republic of Malta is entitled to claim that, by granting Greenpeace access to Documents Nos 112 to 230 and, thereby to the data they contain, the Commission infringed Article 113(2) and (3) of Regulation No 1224/2009.

174 Accordingly, the fourth plea, which is raised only in relation to Documents Nos 112 to 230, must be upheld.

175 It follows from all the foregoing, first, that the contested decision must be annulled in so far as it grants Greenpeace access to Documents Nos 112 to 230 and, second, that the remainder of the application must be dismissed.

IV. Costs

176 Under Article 134(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to bear their own costs.

177 In the present case, the Commission has been unsuccessful as regards the disclosure of Documents Nos 112 to 230 and the Republic of Malta has been unsuccessful as regards the disclosure of Documents Nos 1 to 111 and 231 to 240. Each party must therefore be ordered to bear its own costs, including those relating to the interim measures.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

1. **Annuls Decision of the Secretary-General of the European Commission of 13 July 2016 on a confirmatory application by Greenpeace for access to documents relating to an allegedly irregular shipment of live bluefin tuna from Tunisia to Malta in so far as it grants Greenpeace access to the documents listed in Annex B to that decision under Nos 112 to 230;**

2. **Dismisses the action as to the remainder;**

3. **Orders each party to bear its own costs, including those relating to the interim measures.**

Gervasoni Kowalik-Bańczyk Mac Eochaidh

Delivered in open court in Luxembourg on 3 May 2018.

E. Coulon
Registrar

S. Gervasoni
President

Table of contents