Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 5 December 2019[1]

Case C-560/18 P

Izba Gospodarcza Producentów i Operatorów Urządzeń Rozrywkowych
v

European Commission

(Appeal — Access to documents of the EU institutions — Regulation (EC) No 1049/2001 — Documents relating to an ongoing infringement procedure — Detailed opinions delivered in the course of a notification procedure under Directive 98/34/EC — Refusal to grant access — Exception provided for under the third indent of Article 4(2) — Disclosure of the requested documents in the course of proceedings before the General Court — Order that there is no need to adjudicate — Continuing interest in bringing proceedings)

I. Introduction

1. Does an association which represents the interests of operators in a specific commercial sector cease to have an interest in bringing proceedings after the disclosure, in the course of proceedings before the General Court of the European Union, of the documents to which the European Commission had refused access?

2. What matters must the General Court establish in order to be able lawfully to find that an applicant no longer has an interest in bringing proceedings and thus order that there is no need to adjudicate?

3. Must the assessment of the likelihood that the alleged unlawfulness – consisting in the refusal to grant access to certain documents – will recur in the future be made in the abstract, by reference to any hypothetical refusal to grant access on the basis of the same provision of legislation, or in consideration of the particular case at hand, taking into account the subjective and objective characteristics of the specific situation at issue?

4. Those are, in essence, the legal issues forming the backdrop to the present case, in which an association which represents the interests of manufacturers, distributors and operators of amusement machines in Poland has brought an appeal before the Court of Justice seeking the setting aside of the order of the General Court stating that there is no need to adjudicate because that association no longer has an interest in bringing proceedings.

5. In support of its appeal, the appellant has put forward five grounds of appeal. However, in this Opinion I shall confine myself, as the Court has requested, to considering the legal issues raised by the first ground of appeal.

1 Original language: Italian.

6. After defining the scope of the present proceedings, I shall analyse the case-law of the Court of Justice on the interest in bringing proceedings and apply the principles expressed by the Court to the present case.

7. In particular, I shall endeavour to clarify that the possibility of there continuing to be an interest in bringing proceedings in a case concerning access to documents after the disclosure of those documents is merely an exception confined to specific situations which the Court has recently highlighted in its judgment in Case C-57/16 P (*ClientEarth*).[2]

8. I shall conclude by explaining that the present case does not involve one of those specific situations, that the General Court therefore did not err in law in ordering that there was no need to adjudicate, and that the first ground of appeal should therefore be rejected.

II. Legal context

A. Regulation (EC) No 1049/2001

9. Recital 4 of Regulation (EC) No 1049/2001[3] states that:

'The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.'

10. In addition, recital 11 of that regulation states that:

'In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks.

…'

11. Article 2 of Regulation No 1049/2001, entitled 'Beneficiaries and scope', states that:

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

12. Article 4(2) and (3) of Regulation No 1049/2001, entitled '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,

– court proceedings and legal advice,

– the purpose of inspections, investigations and audits,

2 Judgment of 4 September 2018, *ClientEarth* v *Commission*, EU:C:2018:660.

3 Regulation 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).

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. …'

III. The facts, the procedure before the General Court and the order under appeal

A. The background to the action before the General Court

13. On 20 November 2013, in the context of infringement procedure 2013/4218, the European Commission sent the Republic of Poland a letter of formal notice under Article 258 TFEU in which the former asked the latter to bring its national legislative framework governing gambling services into conformity with the fundamental freedoms laid down in EU law.

14. In its reply, received on 3 March 2014, the Republic of Poland informed the Commission of its intention to notify draft legislation amending the Polish Law on Games of Chance, pursuant to Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations. [4]

15. On 5 November 2014, pursuant to Article 8 of Directive 98/34, the Republic of Poland notified the proposed draft law to the Commission. [5]

16. In the context of that procedure, on 3 and 6 February 2015 respectively, the Commission and the Republic of Malta delivered two detailed opinions on the notified draft law, in accordance with Article 9(2) of Directive 98/34.

17. On 17 February 2015, Izba Gospodarcza Producentów i Operatorów Urządzeń Rozrywkowych ('IGPOUR'), an organisation representing the interests of manufacturers, distributors and operators of amusement machines in Poland, requested access to the two opinions delivered by the Commission and the Republic of Malta, pursuant to Article 2(1) of Regulation No 1049/2001.

18. On 10 March 2015, after considering that request, the Commission refused to grant IGPOUR access to the requested documents.

19. On 16 April 2015, IGPOUR therefore sent the Commission a confirmatory application for access to the documents, pursuant to Article 7(2) of Regulation No 1049/2001.

20. On 12 June 2015, the Commission rejected IGPOUR's confirmatory application in so far as it concerned its own detailed opinion. On 17 July 2015, it rejected the confirmatory application in so far as it concerned the detailed opinion delivered by the Republic of Malta. [6]

4 OJ 1998 L 204, p. 37. Amended by Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015.

5 The Commission assigned reference number 2014/537/PL to that draft law.

6 The contested decisions were registered under the reference GESTDEM 2015/1291.

21. In the contested decisions, the Commission stated that its refusal to disclose the documents requested by IGPOUR was based on the third indent of Article 4(2) of Regulation No 1049/2001. Specifically, the Commission stated that disclosure of the documents in question would have undermined the protection of 'the purpose of inspections, investigations and audits' with regard to infringement procedure 2013/4218, since the opinions requested were inextricably linked to that procedure.

B. The procedure before the General Court and the order under appeal

22. In response to the Commission's refusal, on 1 September 2015, IGPOUR lodged at the Registry of the General Court an action for annulment of the contested decisions.

23. The Kingdom of Sweden was granted leave to intervene in those proceedings in support of the form of order sought by IGPOUR and the Republic of Poland was granted leave to intervene in support of the Commission.

24. The parties presented oral argument and answered the questions put by the General Court at the hearing on 28 September 2017.

25. By document lodged on 6 March 2018, the Commission sought a declaration from the General Court that IGPOUR's action had become devoid of purpose since, as the associated infringement procedure 2013/4218 had been brought to a close, the former had decided to grant the latter access to the two documents at issue. In the same document, the Commission also sought an order for costs against IGPOUR.

26. In light of that request, by order of 14 March 2018, the General Court decided to reopen the oral part of the procedure and invited the parties to submit their observations on the Commission's application for a decision that there is no need to adjudicate.

27. In its observations, IGPOUR disputed that it had ceased to have an interest in bringing proceedings, while the Republic of Poland merely stated in its observations that it was not opposed to the Commission's application. The Kingdom of Sweden did not submit observations on the application.

28. By order of 10 July 2018,[7] the General Court decided that there was no longer any need to adjudicate on the action and ordered the parties to bear their own costs.

29. In reaching its decision, the General Court, having considered the atypical nature of the situation at issue in the case, held that it was unlikely that a similar situation would occur in the future. It thus found that IGPOUR had not retained an interest in bringing proceedings once the requested documents had been made available.

30. The General Court also pointed out that, in its opposition to the Commission's application for a decision that there was no need to adjudicate, IGPOUR had merely referred to the general possibility of a future action for damages, without however stating that it actually intended to bring such an action.

7 Order of 10 July 2018, *Izba Gospodarcza Producentów i Operatorów Urządzeń Rozrywkowych* v *Commission*, T-514/15, not published, EU:T:2018:500.

C. The procedure before the Court of Justice and the forms of order sought

31. By an appeal lodged on 3 September 2018, IGPOUR asks the Court of Justice to set aside the order of the General Court that there is no need to adjudicate and to annul the contested decisions refusing to grant it access to the detailed opinions delivered by the Commission and by the Republic of Malta in the context of notification procedure 2014/537/PL. It also seeks an order for costs against the Commission.

32. In the alternative, IGPOUR asks that the case be referred back to the General Court so that it may give a ruling on the merits and the costs.

33. The Kingdom of Sweden asks the Court to set aside the order under appeal and to annul the contested decisions.

34. The Commission contends, for its part, that the appeal should be dismissed and the appellant ordered to pay the costs.

IV. Examination of the appeal

35. IGPOUR relies on five grounds in support of its appeal.

36. By its first ground of appeal, which can be divided into two parts, IGPOUR argues that the General Court erred in law (in paragraphs 30 and 32 of the order under appeal) (i) in holding that it was unlikely that the unlawfulness alleged by IGPOUR would recur in the future and that, therefore, once the requested documents had been disclosed, IGPOUR no longer had an interest in pursuing the action, and (ii) in holding that, in reaching that conclusion, the relevant issue was whether a specific situation such as the one at issue in the present case was likely to occur in the future, rather than the issue of whether the Commission might, in future cases involving access to documents, again apply the exception provided for under the third indent of Article 4(2) of Regulation No 1049/2001 in the same way.

37. By its second ground of appeal, the appellant submits that the General Court erred in law, in paragraph 33 of the order under appeal, in holding that a decision to close the proceedings without judgment would not enable the Commission to escape effective judicial review.

38. By its third ground of appeal, IGPOUR submits that the General Court erred in law, in paragraph 34 of the order under appeal, in holding that closing the proceedings without judgment would not put an unjustifiable burden on IGPOUR in the event of its needing to bring an action for damages against the Commission.

39. The fourth ground of appeal also concerns paragraph 34 of the order under appeal and alleges that the General Court erred in law in holding that no need to adjudicate arose from any claims that might be submitted by IGPOUR or its members seeking compensation for the harm caused by the contested decisions, because IGPOUR had not specified whether the intention to bring an action for damages was purely hypothetical, it had not relied on precise, specific and verifiable evidence, and it had provided no evidence of the damage caused by the contested decisions.

40. By its fifth ground of appeal, IGPOUR submits that the General Court erred in law, in paragraph 34 of the order under appeal, in holding that IGPOUR had no interest in pursuing the action, even though the annulment of the contested decisions was necessary to make good the non-material harm inflicted on it as a professional organisation.

41. As I have mentioned, this Opinion will focus on the first ground of appeal.

A. The first ground of appeal, alleging an error of law in that the General Court held that (i) it was unlikely that the unlawfulness alleged by IGPOUR would recur in the future and (ii) the relevant issue was whether a specific situation similar to the one at issue in the present case was likely to occur in the future

1. Arguments of the parties

42. IGPOUR submits that, in paragraphs 30 and 32 of the order under appeal, the General Court erred in law in holding that it was unlikely that, in a situation similar to that at issue in the present case, the Commission's alleged unlawful refusal to grant access to the requested documents would occur in the future, and that IGPOUR therefore had no interest in pursuing the action.

43. More specifically, IGPOUR submits that the General Court did not consider it unlikely that the Commission would in future adopt an interpretation of the third indent of Article 4(2) of Regulation No 1049/2001 according to which, if the documents to which access is requested pursuant to that regulation include references to letters of formal notice or, even in the absence of such references, are 'inextricably linked' to an ongoing infringement procedure, they are covered by a general presumption of non-disclosure.

44. Indeed, the appellant submits that the General Court instead assessed the likelihood that the interpretation applied in the present case would be used again in a situation similar to that at issue in the present case, that is to say, in a new case in which, in the context of an infringement procedure, a Member State notifies the Commission of a draft law addressing the concerns on which the infringement procedure is based and the Commission then refuses to disclose opinions given on that draft law in order to protect the requisite confidentiality of relations between the Member States and the Commission in infringement proceedings.

45. In this connection, IGPOUR refers in particular to the judgment of the General Court of 22 March 2018, *De Capitani* v *Parliament*,[8] in which the Court confirmed, in a similar situation, that the applicant did have an interest in obtaining a decision, inasmuch as the applicant's allegation of unlawfulness was based on an interpretation of one of the exceptions provided for in Regulation No 1049/2001 that the Parliament was likely to rely on again in the event of a new request for access.

46. According to IGPOUR, the General Court made the error mentioned above in endorsing the Commission's interpretation that the principle of transparency underlying Directive 98/34 (now replaced by Directive 2015/1535) does not preclude it from relying on general presumptions of non-disclosure with regard to detailed opinions delivered in the context of a non-confidential notification procedure.

47. In addition, IGPOUR submits that, given the extreme breadth of a Member State's notification obligations under Directive 2015/1535, it is highly likely that many notified documents will, at least in part, address the Commission's concerns.

48. Moreover, the appellant observes that another order concerning it, the order of 19 July 2018, *Izba Gospodarcza Producentów i Operatorów Urządzeń Rozrywkowych* v *Commission*,[9] may be regarded as relevant to the present case, in that it shows the Commission's persistence in applying its interpretation of the third indent of Article 4(2) of Regulation No 1049/2001 and of the principle of transparency laid down by Directives 98/34 and 2015/1535. That precedent confirms, in the appellant's view, the likelihood of the disputed interpretation recurring in the future.

8 T-540/15, EU:T:2018:167.

9 Order of 19 July 2018, T-750/17, not published, EU:T:2018:506.

49. Lastly, IGPOUR submits that it is highly likely that it will in the future lodge requests for access to documents similar to those at issue in the present case, since it is an organisation of entrepreneurs and its activities concern all aspects of the business operations of its members and not only those aspects which are directly related to the specific sector it represents, namely the gambling sector.

50. The Swedish Government considers that the appeal is well founded. It confines its observations to IGPOUR's first ground of appeal. In this connection it observes that, although IGPOUR now has access to the documents at issue, it is clear from paragraphs 10 and 35 of the appeal that the Commission has not formally withdrawn the contested decisions, and so the action still has a purpose.

51. According to the Swedish Government, IGPOUR deliberately applied for access to the detailed opinions in the context of a notification procedure while the infringement procedure was still ongoing. However, access to those documents was granted only after both the infringement procedure and the notification procedure had been completed. Since the disclosure of the requested documents did not take place until after those procedures had been completed, it did not fully meet the objectives pursued by the request for access.

52. The Swedish Government shares IGPOUR's view that the General Court ought to have considered whether the general presumption applied by the Commission in the contested decisions might again be relied upon by that institution in the future. That conclusion is directly confirmed by the judgment of 4 September 2018, *ClientEarth* v *Commission*, from which it is clear that what must be considered is whether the alleged unlawful act is liable to recur in the future.

53. Like IGPOUR, the Swedish Government considers that a similar situation could occur again in the future.

54. In the first place, there is an imminent risk that the Commission will be able to justify decisions refusing to grant future requests for access to documents submitted in the context of notification procedures under Directive 2015/1535 by reference to the disputed general presumption.

55. In the second place, it is a matter of fact that, after adopting the contested decisions, the Commission applied the disputed general presumption as a reason for rejecting a further request from IGPOUR for access to the Commission's observations and a detailed opinion in the context of a notification procedure under Directive 2015/1535.

56. In the third place, the fact that IGPOUR is at risk of the disputed general presumption being relied on again in the future follows from the fact that it is an organisation which represents the interests of manufacturers, distributors and operators of amusement machines in Poland, whose activities concern all aspects of the business operations of its members and not only those aspects which are directly related to the specific sector it represents or are covered by the national legislation on games of chance. Lastly, this risk concerns not only IGPOUR's requests for access to documents, but also such requests from other actors.

57. The Commission contends that the first ground of appeal is unfounded, for three reasons.

58. In the first place, it argues that IGPOUR does not dispute the legal criteria applied by the General Court in assessing the possibility that IGPOUR might have retained an interest in pursuing the action, but seems to be asking the Court of Justice to replace the General Court's assessment of a factual element, that is to say, the likelihood that the alleged unlawfulness will recur in the future, with its own assessment of that same factual element. According to the Commission, the General Court correctly examined the circumstances of the case and concluded that IGPOUR had no specific, vested interest in preventing the alleged unlawfulness from recurring in the future.

59. In the second place, the Commission maintains that, once it decided to grant access to the documents in question, the appellant's vested interest in the annulment of the contested decisions disappeared, since the continuation of the proceedings would not have resulted in any specific advantage for it. IGPOUR is wrong to claim that its interest in the continuation of the proceedings may be considered to lie in challenging the interpretation of Regulation No 1049/2001 on the basis of which the Commission adopted the contested decisions and which might recur in the future.

60. In the third place, the Commission maintains that the General Court was right to take the specific factual elements of the case as a point of reference for assessing the degree of likelihood that actions such as that brought by IGPOUR might recur and to conclude that it was unlikely that such an atypical situation would recur in the future.

61. Lastly, in the Commission's view, IGPOUR is in a very different position from that of the appellant in the case which gave rise to the judgment in *ClientEarth* v *Commission* (C-57/16 P, EU:C:2018:660). In that case, the Court acknowledged that the party requesting access had an interest in bringing or continuing the proceedings notwithstanding the disclosure of the documents requested, because the appeal sought variation of a judgment in which the application of a general presumption of confidentiality to a certain category of documents had been accepted and because the party requesting access, a non-profit organisation for the protection of the environment, was particularly likely to encounter the alleged unlawfulness again.

2. Assessment

62. The purpose of this appeal is for the Court of Justice to review the order under appeal of 10 July 2018 in order to determine whether or not the General Court erred in law in finding that the present appellant had ceased to have an interest in bringing proceedings (*rectius* an interest in pursuing the action) as a result of the fact that, prior to the conclusion of the proceedings before that court, the Commission had granted access to the documents to which it had previously refused to grant access in the decisions which had given rise to the action for annulment.

63. To that end I shall briefly summarise the principles laid down by the Court in relation to the interest in bringing proceedings and then address the limits within which such an interest may be retained following the disclosure of the documents requested.

64. According to the settled case-law of the Court, the purpose of the action must, like the interest in bringing proceedings, continue until the final decision, failing which there will be no need to adjudicate. Such an interest presupposes that the annulment of the contested measure must of itself be capable of having legal consequences and that the action must be likely, if successful, to procure an advantage for the party bringing it.[10]

65. Accordingly, in order for it to be held that there is an interest in bringing proceedings or in pursuing the action, not only must the applicant be in a particular situation in relation to the act whose lawfulness he intends to challenge, but also the annulment of that act must have positive effects on his legal situation.[11] If the applicant can derive no benefit from the fact that his action may be upheld, bringing proceedings or pursuing the action cannot be justified. Indeed, it is precisely in order to ensure the proper administration of justice, by preventing the Courts of the European Union

10 See, inter alia, judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 43 and the case-law cited.

11 Such a characterisation of the interest in bringing proceedings is confirmed, on the one hand, in the wording of certain official languages of the European Union, such as German, which designates the interest in bringing proceedings by the term 'Rechtsschutzbedurfnis' or 'Rechtschutzinteresse' (literally 'need for' or 'interest in judicial protection') and, on the other hand, in the case-law of the Court, which refers to 'a vested and current interest requiring judicial protection' (see judgment of 26 February 2015, *Planet* v *Commission*, C-564/13 P, EU:C:2015:124, paragraphs 28 and 34). See also, to that effect, the Opinion of Advocate General Mengozzi in *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:409, points 27 and 28 and footnote 19.

from having to deal with purely hypothetical questions, the answer to which is not capable of giving rise to legal consequences or of procuring any advantage for the applicant, that any person bringing legal proceedings must have an interest in bringing proceedings and must maintain that interest throughout the proceedings. [12]

66. An interest in bringing proceedings, which is described in the case-law as an essential and fundamental prerequisite for any legal proceedings, must be vested and current and cannot be assessed on the basis of a future, hypothetical event. [13]

67. The question whether an applicant retains an interest in bringing proceedings must, therefore, be assessed in the light of the specific circumstances of the particular case, taking account, in particular, of the consequences of the alleged unlawfulness and of the nature of the damage claimed to have been sustained. [14]

68. From the case-law to which I have alluded it is possible to discern the following general principles: the interest in bringing proceedings must exist when the action is brought and must continue until the case is closed, failing which the action will be inadmissible or there will be no need to adjudicate; the interest in bringing proceedings must be specific, current and vested, and not merely hypothetical; and the outcome of the case must be capable of conferring a specific advantage on the applicant.

69. I shall now address the second aspect, which is the more specific question of whether or not an interest in bringing proceedings can be retained in a case concerning access to documents where, in the course of the proceedings before the court, the documents in question are made available to the party requesting access.

70. The basic argument of the appellant in the present case is that it had an interest in bringing proceedings even after the Commission made the requested documents available (after the conclusion of the infringement procedure against the Republic of Poland), because of the risk that such a situation, which it alleges to be unlawful, might frequently recur in the future.

71. It is therefore necessary to outline the situation that might recur in the future and might therefore justify a continuing interest in bringing proceedings.

72. In the appellant's submission, that 'situation' is the Commission's interpretation of the third indent of Article 4(2) of Regulation No 1049/2001. In other words, the appellant considers that the mere fact that the Commission might interpret that provision in the same way in the future, and thus take the view that it is entitled to refuse to grant a request for access to documents in the course of an infringement procedure against a Member State, means that there is a continued interest in bringing proceedings and that the action must therefore proceed until final judgment.

73. Such a solution would, however, have paradoxical consequences in that, in any case concerning access to documents, the interest in bringing proceedings would automatically be retained simply because the EU institution in question might, in the future and in different circumstances, again interpret a given legislative provision in the disputed manner.

74. To prevent such paradoxical effects, which would render nugatory the provisions which enable the General Court, in cases concerning access to documents, to order that there is no need to adjudicate, it is certainly preferable that the test should be the likelihood of the recurrence of the specific situation at issue in the case at hand.

12 Opinion of Advocate General Mengozzi in *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:409, point 28 and the case-law cited.

13 Opinion of Advocate General Mengozzi in *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:409, point 29 and the case-law cited.

14 Judgment of 28 May 2013, *Abdulrahim* v *Council and Commission*, C-239/12 P, EU:C:2013:331, paragraph 65.

75. This accords with what I said earlier about the nature of the interest in bringing proceedings, which must be specific and vested, and not merely hypothetical.

76. Naturally, this does not mean that the situation to be considered for the test of likelihood of recurrence may only be the situation at issue in the present appeal; it may be any similar situation arising from similar facts.

77. On reading the precedents of the Court on this subject I find support for this approach. In one judgment, which the appellant in fact cites in support of its own arguments, the Court points out that, in order for there to be a continued interest in bringing proceedings, it is necessary that the alleged unlawfulness should be liable to recur in the future, 'independently of the [particular] circumstances of the case [at hand]'. [15]

78. The meaning that must be ascribed to those words, if one reads the Court's reasoning in full, is that an applicant may retain an interest in bringing proceedings if that applicant demonstrates that the alleged unlawfulness might occur again in the future even in a procedure which is similar, rather than identical, to that under examination. [16]

79. In the present case, the situation that must be considered for the purposes of assessing the degree of likelihood of its occurring again in the future is the situation where a request for access to documents is made by an association which represents business interests in the context of an infringement procedure in the course of which, in order to avoid the consequences of the alleged infringement, the Member State notifies the Commission of a draft law amending the provisions deemed to be unlawful. In this particular case, the requested documents are two opinions given in the context of the infringement procedure, one from the Commission itself and the other from another Member State.

80. This is undoubtedly an atypical situation and the likelihood of its occurring again certainly cannot be regarded as high.

81. The appellant has made no specific submission in this regard. As I have mentioned, it confines itself to asserting that the error of law which the General Court made lies in the fact which it took as a point of reference for assessing the likelihood of recurrence.

82. By contrast, the Commission, which takes the view that this is a point of fact rather than a point of law, the assessment of which by the General Court is not open to review or amenable to appeal, has, in its pleadings and again at the hearing, repeatedly argued that this is an atypical situation. It has confirmed that it has rarely arisen in practice and that it is therefore unlikely that it will occur again in the near future.

83. In order to determine whether the General Court did in fact err in law in finding it unlikely that the situation at issue in the present case would occur again, it is helpful to make a comparison with a recent precedent of the Court of Justice, which has been cited by all the parties to these proceedings in support of their respective positions, in particular by the Swedish Government in its written observations and by the appellant at the hearing.

15 Judgment of 7 June 2007, *Wunenburger* v *Commission*, C-362/05 P, EU:C:2007:322, paragraph 52.

16 In that judgment, which concerned a selection procedure for promotion, the Court of Justice noted that 'the Court of First Instance [had] held that the appellant retained an interest in obtaining a judgment regarding the lawfulness of the selection procedure at issue so that the alleged unlawfulness might not recur in the future in a similar procedure to that in the present case. In that regard the Court of First Instance [had] based its decision on the plea in law, relied on by the appellant alleging that the selection procedure was unlawful owing to the pre-selection of candidates on the basis of the director-general's memorandum. The Court of First Instance [had] held that it could not be ruled out that the director-general might play a similar role in a subsequent and similar selection procedure'.

84. In Case C-57/16 P, the Court, sitting as the Grand Chamber, ruled on an appeal against a judgment of the General Court concerning access to Commission documents. What is of particular relevance to the present case is the fact that the Court was invited by the Commission to declare that there was no longer any need to adjudicate on the appeal, since, after the hearing and prior to judgment being delivered, the Commission had sent the appellant the documents requested.

85. On that occasion, also referring to previous case-law, the Court stated that an applicant may, *in certain cases*, retain an interest in seeking annulment of the contested act even after the documents requested have been made available.[17] However, that was only under certain circumstances, which the Court found to be present in the case before it but which, as I shall explain, are absent from the present case. It concluded that, '*in such circumstances*', it must be held that the appellant had retained an interest in bringing proceedings and that 'recognition of such an interest is in the interests of the sound administration of justice, having regard to the risk of recurrence of the alleged unlawfulness and *in view of the particular circumstances [of the case]*'.[18]

86. Contrary to what the appellant appears to maintain, the Court did not, in its judgment in Case C-57/16 P, assert any general principle relating to a continuing interest in bringing proceedings in cases concerning access to documents of the EU institutions.

87. On the contrary, dispelling any doubt that might arise on reading certain judgments of the General Court,[19] the Court of Justice explained that, in cases concerning access to documents, it would be exceptional for there to be a continuing interest in bringing proceedings once the documents have been made available by the EU institution in question, and that the rule is that, once the documents are made available, the action loses its purpose and the interest in bringing proceedings disappears.

88. Whether or not such an exceptional situation, where there is a continuing interest in bringing proceedings, arises will depend on a number of variables, including the characteristics of the party requesting access and the nature of the interests at stake, the specific legislative framework that applies, the type of document or documents to which access is requested, the nature of the procedure to which the document or documents requested relate, and the exception to the right of access relied on by the Commission when refusing to grant access.

89. Each of these variables, which, in light of what I have already said, are to my mind the 'particular circumstances' that enable an interest in bringing proceedings to continue, differs as between Case C-57/16 P and the present case. This indicates that a different solution is called for in the case at hand.

90. The party requesting access in Case C-57/16 P was a non-profit organisation for the protection of the environment; the present appellant is an association that represents the interests of manufacturers, distributors and operators of amusement machines and games of chance.

91. In environmental matters, as we know, there are specific rules relating to the transparency of documents which require, inter alia, that the grounds for refusing to grant access to environmental information should be interpreted restrictively.[20]

17 Judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 48. My italics.

18 Judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 56. My italics.

19 T-540/15, EU:T:2018:167.

20 Recital 15 of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13).

92. In so far as concerns the type of document or documents to which access is requested, Case C-57/16 P concerned impact assessment reports and the accompanying opinions of an Impact Assessment Board, which contained information constituting important elements of the EU legislative process forming part of the basis for the legislative action of the European Union. Accordingly, the ground for refusing to grant access must be interpreted restrictively, taking into account the public interest served by disclosure of the requested information, thereby aiming for greater transparency in respect of that information. [21]

93. The documents to which access was requested in the present case are opinions given by the Commission and by a Member State on a proposed legislative amendment submitted by the Republic of Poland in order to avoid the consequences of an infringement procedure.

94. It is important to remember that Case C-57/16 P clearly arose in the context of a legislative procedure. [22] While the present case also concerns a legislative procedure, it is one that falls within the scope of an infringement procedure initiated against a Member State, in the context of which, according to settled case-law, the confidentiality of the dialogue between the Commission and the Member States must be protected.

95. There can be no question that there is a close connection between the documents at issue and the infringement procedure. The Commission has consistently asserted this in its pleadings and at the hearing, the point was confirmed by the Republic of Poland at the hearing, and it has not been refuted by any specific argument put forward by the appellant, which has merely disputed it without presenting any substantive objection, even though it was able to read the contents before the proceedings began before the Court of Justice.

96. Indeed, it must be remembered that the Court has on several occasions emphasised that the documents in a file relating to the pre-litigation stage of an infringement procedure constitute, as regards protection of the purpose of investigations, a single category of documents, and no distinction should be made on the basis of the type of document forming part of the file or of the author of the documents in question. [23]

97. Furthermore, the basis on which the Commission refused to grant access differs in the two cases. In Case C-57/16 P, which concerned a legislative procedure, the Commission had relied on the first subparagraph of Article 4(3) of Regulation No 1049/2001, justifying its refusal to grant access by its need for a period of reflection during which no external pressures should influence the policy initiatives to be proposed.

98. In the present case, by contrast, the Commission based its refusal to grant access to the requested documents on the third indent of Article 4(2) of Regulation No 1049/2001, justifying its refusal by reference to the fact that the opinions in question contained assessments directly connected with the infringement procedure, knowledge of which could have undermined the dialogue between the Member States and the Commission in a pre-litigation procedure.

21 Judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraphs 91 and 100.

22 Recital 6 of Regulation No 1049/2001 indicates that wider access should be granted to documents in cases where the EU institutions are acting in their legislative capacity. The possibility for citizens to scrutinise and be made aware of all the information forming the basis for EU legislative action is a precondition for the effective exercise of their democratic rights as recognised, in particular, in Article 10(3) TEU. The exercise of those rights presupposes not only that those citizens have access to the information at issue so that they may understand the choices made by the EU institutions within the framework of the legislative process, but also that they may have access to that information in good time, at a point that enables them effectively to make their views known regarding those choices (judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 84).

23 Judgment of 14 November 2013, *LPN* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 64, and judgment of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraph 74.

99. On the subject of the Commission's reason for refusing to grant access, and thus the interpretation of the third indent of Article 4(2) of Regulation No 1049/2001, which is not a direct subject of this Opinion, for the reasons I have mentioned, I shall confine myself to a few brief observations.

100. While the rule for access to documents of the EU institutions is that there should be the greatest possible transparency and the possibilities for refusing to grant access on specific grounds are therefore exceptions, which, inasmuch as they depart from the general principle, should be applied strictly,[24] there are, in the case-law of the Court, different approaches to the application of those principles.

101. The judgment in Case C-57/16 P has the merit of clarifying the latitude that may be applied to these exceptions, by reference to the type of document, the characteristics of the party requesting access and the nature of the procedure in question. Indeed, while, in the context of a legislative procedure, the latitude that may be applied to the right of access is greater (and greater still in the field of environmental protection), in the case of pre-litigation infringement procedures, that is to say, inspections in the broad sense, that latitude tends to be reduced and the balance between the interest in transparency and the interest in confidentiality tends to shift toward the latter, allowing the EU institutions to rely on general presumptions.

102. The system of exceptions laid down in Article 4 of Regulation No 1049/2001, particularly in paragraph 2 thereof, is based on a balancing of the opposing interests in a given situation, that is to say, first, the interests which would be favoured by the disclosure of the documents in question and, secondly, 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.[25]

103. Under the exception relied upon by the Commission in this case, namely that set out in the third indent of Article 4(2) of Regulation No 1049/2001, the institutions of the European Union must refuse access to a document where its disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure of the document concerned.[26]

104. Indeed, the Court has recognised five categories of documents which enjoy general presumptions of confidentiality, which include documents relating to an infringement procedure during its pre-litigation stage, including the documents exchanged between the Commission and the Member State concerned during an EU Pilot procedure.[27]

105. The objective of such presumptions is thus the possibility, for the EU institution concerned, to consider that the disclosure of certain categories of documents undermines, in principle, the interest protected by the exception which it is invoking, by relying on such general considerations, without being required to examine specifically and individually each of the documents requested.[28]

106. The purpose of the pre-litigation stage of the infringement procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under European Union law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission.[29]

24 Judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 78.

25 Judgment of 14 November 2013, *LPN* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 42.

26 Judgment of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraph 58.

27 Judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 81 and the case-law cited.

28 Judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 52 and the case-law cited.

29 Judgment of 14 November 2013, *LPN* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 62 and the case-law cited.

107. The disclosure of the documents concerning an infringement procedure during its pre-litigation stage would, in addition, be likely to change the nature and progress of that procedure, given that, in those circumstances, it could prove even more difficult to begin a process of negotiation and to reach an agreement between the Commission and the Member State concerned putting an end to the infringement alleged, in order to enable European Union law to be respected and to avoid legal proceedings. [30]

108. It can therefore be presumed that the disclosure of the documents concerning an infringement procedure during its pre-litigation stage risks altering the nature of that procedure and changing the way it proceeds and, accordingly, that disclosure would in principle undermine the protection of the purpose of investigations, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001. [31]

109. The Court has also clarified that that 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 the document concerned by virtue of Article 4(2) of Regulation No 1049/2001. [32] The burden of proving that, however, rests with the party requesting access [33] and, in the present case, that burden does not appear to have been discharged.

110. In the present case, it would not appear inappropriate to rely on a general presumption, given that the case arose in the context of an infringement procedure, albeit one that is characterised by certain particular features.

111. In light of the foregoing, it may be concluded that the appellant in this case has failed to demonstrate that it had a continuing interest in bringing proceedings once the requested documents, access to which was initially refused by the Commission, were made available to it in the course of the proceedings before the General Court.

112. In so far as concerns the first ground of appeal, the General Court in no way erred in law in finding it unlikely that the unlawfulness alleged by IGPOUR might recur in the future and that, in reaching that conclusion, the relevant issue was whether a situation similar to the one at issue in the present case was likely to occur in the future.

113. Because of the nature of the infringement procedure in the context of which the request for access to documents was made, the nature of the requested documents and the characteristics of the party requesting access, and the subject matter of the procedure, the approach taken, exceptionally, by the Court in the judgment in Case C-57/16 P cannot apply.

114. Thus, the general approach, confirmed in the judgment in Case C-57/16 P, applies, in accordance with which, in the absence of particular circumstances, the General Court may conclude the proceedings with an order that there is no need to adjudicate where, in a case concerning access to documents, the documents in question are made available in the course of the action and the party that requested access fails to demonstrate any specific interest such as to justify the continuation of the proceedings.

30 Judgment of 14 November 2013, *LPN* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 63.

31 Judgment of 14 November 2013, *LPN* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 65.

32 Judgment of 14 November 2013, *LPN* v *Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 66 and the case-law cited.

33 Judgment of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraph 90.

115. Indeed, I find in the present case no specific reasons to suggest that the appellant is 'particularly vulnerable to such implementations of that presumption', by contrast with the appellant in Case C-57/16 P, which, as a non-profit organisation whose aim is the protection of the environment, includes among its tasks the promotion of increased transparency and lawfulness in relation to the EU legislative process in environmental matters, which — again in the Court's own words — makes it likely that it will again request access to documents similar to the documents at issue in the future.[34] The same cannot be said of the appellant in the present case, which has not demonstrated any specific interest in the annulment of the contested decisions, in that, as is apparent from the foregoing considerations and by contrast with Case C-57/16 P, the continuation of the proceedings could procure no specific additional advantage for it.

V. Conclusion

116. On the basis of all of the foregoing, I suggest that the Court reject the first ground of appeal as unfounded.

34 Judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 54.