

To the President and Members of the
GENERAL COURT OF THE EUROPEAN UNION

**APPLICATION
FOR ANNULMENT**

pursuant to Article 263 of the
Treaty on the Functioning of the European Union

lodged on behalf of the applicant

Name of Applicant: CEE Bankwatch Network (hereafter: Bankwatch), an
association under Czech law

Address of Applicant: Na Rozcesti 1434/6, Liben, 190 00 Prague, Czech
Republic

**Representative of
Applicant:** Mr. dr. Csaba N. Kiss
attorney at law
H-1172 Hungary, Budapest, Teréz u. 7.

Defendant: Commission of the European Union (hereafter:
Commission)
Rue de la Loi 200, B-1049 Brussels, Belgium,

Method of service: The Applicant hereby declares pursuant to Article 57(4) of
the Rules of Procedure that it chooses as a method of
service acceptance by means of e-curia, R214275, through
its designated agent Mr. dr. Csaba Kiss

General Court of the European Union

Rue du Fort Niedergrünewald

Luxembourg

L-2925

The Honorable Court,

CEE Bankwatch Network (hereafter also: Applicant)

- according to **Article 263** of the Treaty on the Functioning of the European Union (hereafter TFEU)
- according to **Article 15** of the TFEU (ex Article 255 TEC)
- 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
- pursuant to **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
- according to the **Rules of Procedure of the General Court** (L 105, 23 April 2015)

hereby submits the following

APPLICATION FOR ANNULLMENT

against the European Commission (hereafter also: Defendant) as follows.

I. APPLICANT AND REPRESENTATION

1. The Applicant (CEE Bankwatch Network) is an international non-governmental organisation (NGO) with member organisations from countries across Central and Eastern Europe (CEE), engaged in monitoring the activities of international financial institutions (IFIs) which operate in the region and in promoting environmentally, socially and economically sustainable alternatives to their policies and projects.
2. In accordance with Article 78(3) of the Rules of Procedure of the General Court the required proof of existence in law for the Applicant as a legal person under Czech law is included (Annex A3) as well as a copy of the statutes of the Applicant (Annex A4).
3. In accordance with Article 51(1) of the Rules of Procedure of the General Court the attorney representing the Applicant is Mr. dr. Csaba Kiss, licensed attorney at law (Annex A2), having his office in Budapest, Hungary. The authorization for the representation of the Applicant in this proceeding is attached (Annex A5).
4. For the purpose of this proceeding, in accordance with Article 57 of the Rules of Procedure of the General Court, the Applicant agrees to accept service through its designated agent Mr. dr. Csaba Kiss by means of e-curia service to R214275.

II. TYPE OF ACTION

5. The Applicant requests pursuant to Article 264 TFEU the General Court to declare the following act null and void:

Decision of the Secretary General on behalf of the European Commission dated 15 April 2016, reference number Ref. GestDem No. 2015/5866. By this decision a confirmatory application of the Applicant for access to documents held by the Defendant was refused.

III. RELEVANT FACTS AND LEGAL BACKGROUND

6. Public access to information held by the European Parliament, Council and Commission is granted by Regulation (EC) No. 1049/2001¹ which contains general provisions on access to information and Regulation (EC) No. 1367/2006² which contains specific provisions concerning access to environmental information.
7. Article 4(2), third indent, of Regulation (EC) No. 1049/2001 states that *“the institutions shall refuse access to a document where disclosure would undermine the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.”*
8. Regulation (EC) No. 1367/2006 provides in its Article 6(1) preferential treatment to the requests for access to environmental information relating to emissions into the environment. In its first sentence, it states that as regards Article 4(2), first and third indents, of Regulation (EC) No. 1049/2001, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment.
9. According to the second sentence of Article 6(1) of Regulation (EC) No. 1367/2006, the grounds for refusal pursuant to Article 4 of Regulation (EC) No. 1049/2001, concerning other requests for access to environmental information, *“shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.”* These provisions of Regulation (EC) No. 1367/2006 transpose, into the EU law, the requirements of Article 4(4) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), to which EU is a Party³, according to which the grounds for refusal of the environmental information *“shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.”*
10. Under the right of access to documents provided by Article 15(3) of the TFEU, as developed in Regulation (EC) No. 1049/2001, Regulation (EC) No. 1367/2006 and the Aarhus Convention, the Applicant requested access to the following documents related to the EURATOM loan granted by the EC Decision C(2013) 3496 final from 24 June 2013 to Ukraine's state energy utility Energoatom for the Complex (Consolidated) Safety Upgrade Program of nuclear power plants in Ukraine (CCSUP):

¹ 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

² 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

³ 2005/370/EC: Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters

- loan agreement between Ukraine and EURATOM signed on 7 August 2013, especially in parts concerning environmental and social conditionality;
- specific evidence the EC has been relying on while assessing implementation of conditions precedent to disbursement of the first installment (those listed in Annex to the Commission Decision of 24.06.2013 on granting a EURATOM loan in support of Ukraine safety upgrade program of nuclear power units);
- formal communication between EC and Ukraine regarding Ukraine's undertakings to comply with environmental international agreements (including Espoo and Aarhus Conventions), especially in view of the Espoo MOP decision from June 2014 where Ukraine has been acknowledged to be in non-compliance with its obligations under article 2, paragraph 2, with regards to general legal and administrative framework applicable in the decision-making for the extension of the lifetime for nuclear reactors (paragraph 69 of Decision VI.2);
- the recommendation on the financial and economic aspects of the Project issued by the European Investment Bank as part of its loan appraisal process;
- any communication received from the Ukrainian government or other parties about the planned lifetime extension of Unit 2 at South Ukraine nuclear power plant and Unit 1 at Zaporizhia nuclear power plant.

The request was sent on 7 November 2015 via email.

11. The request of the Applicant was partially refused by the decision of the Defendant (the European Commission, Directorate General for Economic and Financial Affairs) dated 21 December 2015, reference number Ref. GestDem No. 2015/5866 ARES 5980137.
12. The Defendant's position was that while part of the requested documents could be disclosed, the accessibility of certain documents would undermine the institution's decision-making and the protection of commercial interest.
13. The Applicant submitted a confirmatory application pursuant to Article 7(2) of Regulation (EC) No. 1049/2001 on 19 January 2016 asking the Defendant to reconsider its position and grant full access to the abovementioned documents. The Applicant explained why it believes there are reasons for the overriding public interest on the disclosure of the information in more detail in its confirmatory application.
14. The Applicant obtained a copy of the Defendant's decision (the European Commission, the Secretary General) C(2016)2319 final dated 15 April 2016, reference number Ref. GestDem No. 2015/5866, sent with a cover letter dated 18 April 2016 (SG-Grefe (2016) D/4829) to the applicant by mail.
15. In the latter decision, the Defendant states that the position of the Commission that access to the requested information must be denied, on the basis of the need to ensure confidentiality must be upheld. This time, further reasoning was provided concerning the question of prevailing public interest.

IV. LEGAL GROUNDS

16. The Applicant is convinced that the contested Decision is flawed with respect to refusing access to a number of documents requested.

IV.1 Applicability of Regulation (EC) No. 1367/2006 to Euratom documents

17. Under point 2.1 on page 3, the Defendant claims that “*whilst Regulation 1049/2001 applies to documents falling under the EURATOM Treaty, the Commission considers that Regulation 1367/2006 cannot*”. The reasoning is based on the Defendant’s opinion that the Treaty (on the basis of which any public institution, body, office or agency established is regarded as Community institutions and bodies) “*was understood at the time as a reference to the EC Treaty, and should now be understood as a reference to the TFEU*”. According to the reasoning of the Defendant, in such a situation the meaning of the word “Treaty” is dependent upon the time when a certain piece of EU legislation uses this term.

18. The Applicant is of the opinion that the Treaty, as being the most fundamental primary source of law in the European Union, should be understood as such always according to the actual time when its application is in question. It means that while in certain times the EC Treaty was in force, currently the applicable founding documents of the EU are the TEU and the TFEU.

19. This also means that whenever a piece of secondary EU legislation refers to “The Treaty”, always the actual, current Treaty must be understood thereby. Contrary to the Defendant’s claim, reference to the Treaty does not require a historic construction of the notion whereby one has to search for the meaning of the Treaty at the time of the performance of a certain action or adoption of a certain piece of legislation. In such cases, always the actual and prevailing Treaty must be understood to govern relations. The Applicant is convinced that the word “Treaty” should not be understood in different contexts regarding each piece of EU legislation, but that it should have a uniform meaning, i.e. if we are taking into account a question now, then now Euratom is part of the TFEU therefore it has to be bound by those Regulations that are part of EU law.

20. In such a situation, when refusing the request for information and the confirmatory application of the Applicant, the Defendant was under the obligation to apply not only Regulation (EC) No. 1049/2001 but also Regulation (EC) No. 1367/2006.

21. In this context, the question whether Euratom is party to the Aarhus Convention has no significance whatsoever in this dispute. First, the Applicant relies on a piece of EU legislation and not on the Aarhus Convention directly. Because the Aarhus Convention is not directly applicable, its proper implementation requires implementing acts. And while Euratom may not be party to the Aarhus Convention, its obligation to respect the Regulation (EC) No. 1367/2006 simply stems from being part of the EU and being a Community institution or body in the meaning of

the Regulation (EC) No. 1049/2001 and the TFEU as was demonstrated in the foregoing.

22. Finally, the reference by the Defendant is even less relevant in light of the judgment of the EU Court in *Stichting Natuur en Milieu* case⁴, where the Court found: *“In that regard, it cannot be considered that, by adopting Regulation No 1367/2006, which concerns only EU institutions and moreover concerns only one of the remedies available to individuals for ensuring compliance with EU environmental law, the European Union was intended to implement the obligations, within the meaning of the case-law cited in paragraph 48 of this judgment, which derive from Article 9(3) of the Aarhus Convention”*. In this context, taking the interpretation of the Court into account, the Regulation (EC) No. 1367/2006 is not intended to implement the Aarhus Convention therefore its applicability to Euratom does not depend on whether or not Euratom is party to the Convention.

23. Based on all these, the Defendant made an incomplete assessment of the confirmatory application and made a flawed decision in disregarding all claims of the Applicant which were based on and reasoned by reference to the Regulation (EC) No. 1367/2006.

IV.2 Protection of international relations

24. The Defendant refers to Art. 4(1)(a) of the Regulation (EC) No. 1049/2001 as a legitimate exception from disclosure when refusing the confirmatory application of the Applicant. In this context, the Defendant claims that *“it is clearly in the EU’s interest to maintain this quality of international relations (in general, as well as specifically in the nuclear safety field) and to promote the highest level of EU nuclear safety standards in its neighboring countries”*. The Applicant would like to emphasize that the interest of transparency and the interest to promote a high level of nuclear safety are not mutually exclusive; therefore the Defendant’s presentation of these two interests as such is clearly erroneous. These distinct interests may either enter into conflict with each other or may coexist without problems. However, it is ultimately the duty of the Court to examine how such interests can be harmonized on a case-by-case basis.

25. Therefore, this type of “package argument” (i.e. transparency of nuclear power plant related information is inferior to the interest of nuclear safety) is highly flawed and represents a severely-outdated viewpoint.

26. Furthermore, the Applicant stresses that access to the required documents does not endanger the interest of nuclear safety because the request for information did not affect nuclear safety issues. The information requested by the Applicant concerned the LFA agreements regarding financing, which are of a monetary and economic nature. Thus, the reference of the Defendant to nuclear safety is clearly an exaggeration.

⁴ Joined Cases C-404/12 P and C-405/12 P

27. In addition, the Defendant refers to the interest of nuclear safety as a reason for non-disclosure without having any precise reference to the Regulation (EC) No. 1049/2001. The Defendant does not clarify if nuclear safety is a part of

- public security (first indent of Art. 4(1)(a); or
- defense (second indent of Art. 4(1)(a); or
- international relations (third indent of Art. 4(1)(a).

In such a case, the Defendant is not using a legally defined exception clause from disclosure, thereby putting the Applicant into a situation where counter arguments are extremely complicated.

28. The Applicant is convinced that the Defendant seriously breached its obligation stemming from Regulation (EC) No. 1049/2001 and applicable case law of the EU Court to give specific reasons for non-disclosure. The Defendant under point 2.2 on page 5, writes: *“Disclosure of the LFA would compromise the efforts and progress achieved this far to harmonise the nuclear safety requirements and deteriorate the international relations with Ukraine on future nuclear safety cooperation”*. However, there is no further explanation, detailed reasoning or any other argument as to why access to the requested documents would have such disastrous consequences.

29. In a number of cases, the Court of Justice of the European Union confirmed that examination of the access to document requests must be specific and must give reasons for their refusals in an individual manner. In the *Association de la presse internationale ASBL (API) v Commission* case⁵ the Court said: *“(54) It should also be recalled that, according to settled case-law, the examination required for the purpose of processing a request for access to documents must be specific in nature. First, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception (see, to that effect, Joined Cases T 110/03, T 150/03 and T 405/03 Sison v Council [2005] ECR II 1429, paragraph 75, and Franchet and Byk v Commission, cited at paragraph 53 above, paragraph 105). Such application may, in principle, be justified only if the institution has previously assessed, firstly, whether access to the document would specifically and actually undermine the protected interest and, secondly, in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, whether there was no overriding public interest in disclosure. Further, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. Consequently, the examination which the institution must undertake in order to apply an exception must be carried out in a concrete manner and must be apparent from the reasons given for the decision (Case T 2/03 Verein für Konsumenteninformation v Commission [2005] ECR II 1121, ‘VKI’, paragraph 69, and Franchet and Byk v Commission, cited at paragraph 53 above, paragraph 115). (55) That concrete examination must, moreover, be carried out in respect of each document covered by the request. It is apparent from Regulation No 1049/2001 that all the exceptions mentioned in paragraphs 1 to 3 of Article 4 thereof are specified as being applicable to ‘a document’ (VKI, cited at paragraph 54 above, paragraph 70, and Franchet and Byk v Commission, paragraph 53 above, paragraph 116). Regarding the scope of *ratione temporis* of those exceptions,*

⁵ Case T-36/04

Article 4(7) of that regulation provides that they are to apply only for the period during which protection is justified on the basis of ‘the content of the document’.”

30. In the *Liga para Protecção da Natureza (LPN) v European Commission* case⁶ the Court said: “(112) Moreover, as has been acknowledged in the case law, when an institution is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of access set out in Article 4 of Regulation No 1049/2001 (*Sweden and Turco v Council*, cited in paragraph 102 above, paragraph 35). In that regard, it has been stated, on the one hand, that the examination of a request for access to documents must be specific and individual in nature and relate to the content of each document referred to in that request and, on the other, that that examination must be apparent from the reasons for the institution’s decision, as regards all the exceptions mentioned in Article 4(1) to (3) of that regulation, on which that decision is based (see, to that effect, *Verein für Konsumenteninformation v Commission*, cited in paragraph 102 above, paragraphs 69 to 74; see also, to that effect, *Opinion of Advocate General Kokott in Commission v Technische Glaswerke Ilmenau*, cited in paragraph 44 above, points 73 to 80).”
31. While the Defendant argues that “disclosure of the LFA would in a reasonably foreseeable way, undermine the international relations between the EU and the Ukraine”, we can conclude with certainty that it is not more than a mere repetition of the words of earlier judgments of the Court without any content or meaning. In this case, it must be determined how this **alleged** undermining impact works. The Commission’s argument is poor and incomplete, as it lacks specific reasoning and is founded on hypothetical damage without any basis in reality. As was stated by the Court in the API case, “(112) Indeed, that risk of the protected interest being undermined must be reasonably foreseeable and not purely hypothetical (*Sweden and Turco v Council*, paragraphs 43 and 63).”

IV.3 Protection of commercial interests

32. In this section of the rejection by the Commission, under point 2.3 on page 5, the Defendant claims that “The project being financed is a 300-million-euro loan facility on the Ukrainian ‘Complex Safety Upgrade Program of Power Units of Nuclear Power Plants’”. Thus, the Defendant implies that the project’s budget takes precedence over transparency. However, the case law of the EU Court makes it absolutely clear that disclosure or non-disclosure do not depend on such factors. The size of the project has nothing to do with the lawful application of exceptions of disclosure, just like the reference by the Defendant to “a legal document that sets out the specific rights and obligations of the two contractual parties”. The Defendant’s argument that “the LFA with Energoatom is currently in the process of being implemented” is also irrelevant. While it may be important when looking at the project’s progress and status, it has no relevance to or impact on whether the underlying documents are to be disclosed or withheld by the Defendant.

⁶ Case T 29/08

33. Under this chapter of the rejection by the Defendant, the argument which was previously analyzed appears again: “access to the LFA agreement would undermine Energoatom’s as well as the Commission’s commercial interests”. The Defendant, however, does not go further. Thus, the Defendant continues to owe the Applicant an explanation regarding how the commercial interests of the Commission or Energoatom would be undermined, had the Defendant ensured access to the required documents. Since there is virtually nothing in the refusal on how this would happen, it is purely hypothetical which is – according to the case law of the Court – impermissible. As the Court said in the Sophie in’t Veld case⁷, “(52) Indeed, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, first explain how disclosure of that document could specifically and actually undermine the interest protected by the exception — among those provided for in Article 4 of Regulation No 1049/2001 — upon which it is relying. In addition, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical (Council v Access Info Europe, EU:C:2013:671, paragraph 31 and the case-law cited). (64) However, where the institution concerned refuses access to a document the disclosure of which would undermine one of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, that institution remains obliged, as noted in paragraph 52 of the present judgment, to explain how disclosure of that document could specifically and actually undermine the interest protected by an exception provided for in that provision, and the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical.”
34. In fact, the same arguments are applicable to the reasoning given by the Defendant in its rejection on page 6 (“Moreover, wider disclosure of the EIB opinion would make public the content of certain contractual provision contained in the LFA, which would undermine Energoatom’s and the Commission’s commercial interests, for the reasons explained above.”).
35. The Applicant in addition would like to contest the characterization of the required information as “commercial”. The Defendant did not address the argument of the Applicant included in the confirmatory application where it argued that Energoatom is a state owned company in Ukraine and therefore there can be no commercial interests involved in the actions of Energoatom.
36. Finally, the Defendant did not examine whether keeping up the secrecy of the required documents with a reference to commercial secrecy is still necessary. As the case law of the General Court demonstrates in the Axa Versicherung AG case⁸ “It has also been held, more generally, that the negative effects liable to follow upon the disclosure of commercially sensitive information become less significant the older the information is (see, to that effect, order of 19 June 1996 in NMH Stahlwerke and Others v Commission, T-134/94, T-136/94 to T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94, EU:T:1996:85, paragraphs 24 and 32)”. The Defendant failed to give any reason if the non-disclosed information is still necessary to keep secret and whether there will be any time in the future when the requested documents can be accessed.

⁷ Case C-350/12 P

⁸ Case T-677/13

37. Altogether, the Applicant is convinced that the reference by the Defendant to the protection of commercial interest is again flawed and does not meet the standards set by the Court in the ClientEarth and International Chemical Secretariat v. ECHA case⁹. The Court found in that case that *“First, it must be noted that the system of exceptions laid down in Article 4 of Regulation No 1049/2001, particularly in Article 4(2), is based on a weighing of the opposing interests in a given situation, that is to say, on the one hand, the interests which would be favoured by the disclosure of the documents in question and, on the other, those which would be jeopardised by such disclosure. The decision taken on a request for access to documents depends on which interest must prevail in the particular case (judgment in LPN and Finland v Commission, cited in paragraph 145 above, paragraph 42). [...] In such a case, the institution concerned must nevertheless specify on which general considerations it bases the presumption that disclosure of the documents would undermine one of the interests.”*
38. As the Defendant failed to meet these requirements, the underlying decision is again to be annulled by the Court.

IV.4 Overriding public interest

39. First, the Applicant is convinced that there is overriding public interest in the disclosure of the requested data. It must be noted that the reasoning given here by the Defendant is incomplete and flawed, as was its aforementioned argument with regards to commercial interests. The Defendant gave no details or explanations regarding the protection of privacy exception. Instead, the Defendant only provided mere declarations.
40. In addition, the Defendant fails to explain how certain public interests were weighed in its decision-making. Therefore, it can be questioned whether there was *any* assessment of diverging public interest in reality.
41. Under point 3 on page 7, the Defendant claims that *“updating nuclear safety of the power plants in an EU neighboring country is an even more important public interest”*. The Defendant fails to explain why this is so and where this evaluation stems from. It is however, clearly contradicting to the findings of the EU Court in the *in’t Veld* case¹⁰, in which the Court stated: *“(53) Moreover, if the institution applies one of the exceptions provided for in Article 4(2) and (3) of Regulation No 1049/2001, it is for that institution to weigh the particular interest to be protected through non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible, having regard to the advantages of increased openness, as described in recital 2 to Regulation No 1049/2001, in that it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (Council v Access Info Europe, EU:C:2013:671, paragraph 32 and the case-law cited).”* The Applicant claims that the Defendant either did not perform this balancing of public

⁹ Case T-245/11

¹⁰ Case C-350/12 P

versus commercial interests, or it failed to communicate its details, as would have been its duty.

42. Under point 3 on page 8 the Defendant claims that *“benefit of a safer nuclear energy production ... is more important than the public interest.”* The Applicant would like to reiterate that the disclosure would not undermine the aforementioned interest. The Defendant continued to ignore its duty to explain, instead relying on allegations. Through this, the Defendant breached the prevailing case law of the Court.
43. Lastly, under point 3 on page 8, the Defendant claims that *“nor have I been able to identify any other public interest capable of overriding the interests protected”*. Firstly, the Applicant must raise the question which factors of public interest the Commission *did* consider. There is no list of possible public interests presented by the Defendant in its response, and the Defendant does not indicate how and why there is no overriding public interest; thus, the Applicant is unable to accept the rejection of an overriding public interest as credible. Again, as was noted in the *in’t Veld* case¹¹, *“(76) In that regard, the General Court, in paragraphs 81 to 95 of the judgment under appeal, noted that the requirements for transparency are greater where the Council is acting in its legislative capacity. Yet, initiating and conducting negotiations in order to conclude an international agreement fall, in principle, within the domain of the executive. However, the General Court also added that application of the principle of the transparency of the decision-making process of the European Union could not be ruled out in international affairs, especially where a decision authorising the opening of negotiations involves an international agreement which may have an impact on an area of the European Union’s legislative activity, such as the proposed agreement which concerns, in essence, the processing and exchange of information in the context of police cooperation, which may also affect the protection of personal data. In that regard, the fact that document 11897/09 concerns an area potentially covered by the exception referred to in the third indent of Article 4(1)(a) of Regulation No 1049/2001, relating to the protection of the public interest in the field of international relations, is irrelevant for the purposes of an assessment of the application of the separate exception, relating to the protection of legal advice, provided for in the second indent of Article 4(2) of that regulation. Moreover, the fact that the procedure for concluding the proposed agreement was still ongoing at the time of the adoption of the decision at issue is not conclusive in ascertaining whether, despite that risk, there exists any overriding public interest justifying disclosure. Indeed, the public interest in the transparency of the decision-making process would become meaningless if, as the Commission proposes, it were to be taken into account only in those cases where the decision-making process has come to an end.”*
44. The Applicant wishes to note that the Loan Facility Agreement whose disclosure was requested by the Applicant contains crucial information with respect to the environmental and social conditionality of the funding that the recipient of European public funding (in this case the Ukrainian nuclear operator Energoatom) has to respect as well as it contains monitoring and reporting requirements. Public access to this document would support the interested public in ensuring the respect of

¹¹ Case C-350/12 P

these conditions of the LFA. Therefore the Applicant is convinced that the LFA contains information of high public interest.

45. The examination of the overriding public interest was missed by the Defendant, breaching the Court's holding in the *Liga para Protecção da Natureza (LPN) v European Commission* case¹²: *"(102) When it refuses access to the documents concerned on the basis of that exception, the Commission must nevertheless, firstly, satisfy its obligation to examine whether those documents were in fact covered, in their entirety, by that exception and, secondly, correctly balance the possible overriding public interests in their disclosure and the interest in the protection of their confidentiality (see, to that effect, Joined Cases C 39/05 P and C 52/05 P Sweden and Turco v Council [2008] ECR I 4723, paragraph 33 and seq., and Case T 2/03 Verein für Konsumenteninformation v Commission [2005] ECR II 1121, paragraph 69 and seq.)."*
46. Finally, the Applicant is convinced that there is an overriding public interest in disclosure. Information requested concerned implementation of the "Nuclear safety upgrade program" by Ukraine and actions of EC, which were supposed to ascertain that nuclear safety conditions attached to financing of this program are met. There is an overriding public interest in (nuclear) safety and security, especially since in this case there are numerous clear signs that nuclear safety in Ukraine is jeopardised:
47. The "Nuclear safety upgrade program" in actuality enables the recipient state owned nuclear operator Energoatom to extend the lifetime of nuclear reactors beyond projected. In the years 2013 and 2015, two of the reactors (South Ukraine, Units 1 and 2) had their lifetime extended without the full implementation of all required top priority safety measures.
48. Financial issues of the nuclear operator raise serious concerns regarding ability to finance the required safety upgrades fully and in a timely manner.
49. Ukraine's state nuclear regulatory inspectorate, responsible for both safety inspections and licensing decisions has been deprived of its independent authority and restricted in its powers during the year 2015, when decisions on extended operation beyond the projected lifetime of Unit 2 at South Ukraine were taken.
50. The Ukrainian public has limited access to decision-making and ability to effectively participate and have its concerns being taken in a due account within the decision-making process, since the country has not met its obligations under the Energy Community Treaty to transpose the EIA Directive and there is no sufficient EIA legislation.
51. Ukraine is ignoring requests (some in a repeated fashion) for information and clarification by several neighboring country governments with respect to the nuclear safety program and nuclear lifetime extensions and requests of these governments that a procedure according to international law (the Espoo Convention) be initiated and their citizens be involved.

¹² Case T 29/08

52. The EC involved in financing the “Nuclear safety upgrade program” in Ukraine does not seem to be active in assuring that safety is adhered to despite our repeatedly raised concerns that Ukraine is violating international law (Espoo Convention and Aarhus Convention) and conditions of the financing agreements.
53. The information requested is related to highly dangerous actions that can have a huge impact on the safety of a large number of people. Transparency – or access to information relevant for decision-making – is a fundamental condition for effective public participation. Public participation, even scrutiny of decision-making by concerned members of public, is of vital importance when the stakes are this high and when those that were put in charge of protecting our safety are not fully transparent.
54. Problems linked to ageing of the nuclear fleet are broadly understood as the physical degradation of structures, system and components as well as the obsolescence of concepts and technologies, design, and losses in the transmission of human know-how.
55. Ageing directly impacts the possibilities of lifetime extension of nuclear facilities, one of the two key challenges (with nuclear waste) identified by the European Commission in its Strategic Energy Technology Plan.
56. Nuclear safety is one of the issues that, at least in terms of nuclear public relations, is given priority. Reality shows, however, that economic or political arguments can play an overriding role. The potential cost of upgrades, the likely cost recovery time, and the operator’s ownership status and political influence can all act to reduce the priority accorded to nuclear safety during lifetime extension decisions.
57. The independence of nuclear regulators is an important factor in counterbalancing such pressures.
58. Public access to information (transparency) as guaranteed under the Aarhus Convention can also help to guarantee that the highest standards of nuclear safety are considered, as can public participation and provisions to ensure that account is taken of critical public opinion. Public opinion keeps all decision-makers on their toes: regulators, politicians, suppliers and operators.
59. The nuclear industry is under an enhanced public scrutiny and in this situation, unreasonable secrecy makes more harm to the nuclear sector itself than a realistic disclosure policy would, if any. In fact, the Defendant should realize that more transparency in the nuclear sector would be the own interest of the sector therefore more public trust could ensure an atmosphere of security, instead of an atmosphere of suspicion. This is even more so in the case when Ukraine is involved in such matters, given that the name of Ukrainian nuclear power plants became associated with the Chernobyl disaster. To overcome this would also be the interest of the nuclear sector and of the EU, contrary to what the Commission is doing in the present case. While the Commission had noticed this interest in certain instances (e.g. when funding and managing the so-called ANCLI project on access to

information and public participation in nuclear decision-making), it seems that if fails to do so when specific decisions and plants are in question. In such a case, however, overriding public interest is indeed on the side of more transparency.

V. ORDER SOUGHT

For the reasons outlined above the Applicant respectfully request the General Court to:

- I. declare the contested Commission Decision of 15 April 2015, reference number Ref. GestDem No. 2015/5866 null and void,
- II. order the Commission to pay the costs of the proceeding.

Done in Budapest, Hungary on 16 June 2016, on behalf of the Applicant,
by Mr. dr. Csaba Kiss, licensed attorney at law.

Mr. dr. Csaba Kiss
on behalf of the Applicant