JUDGMENT OF THE GENERAL COURT (Second Chamber)

7 June 2011 *

In Case T-471/08,

Ciarán Toland, residing in Dublin (Ireland), represented by A. Burke, Solicitor, E. Regan, SC, and J. Newman, Barrister,

applicant,

supported by

Kingdom of Denmark, represented by B. Weis Fogh and C. Vang, acting as Agents,

Republic of Finland, represented by J. Heliskoski, A. Guimaraes-Purokoski and H. Leppo, acting as Agents,

Kingdom of Sweden, represented by A. Falk, S. Johannesson and K. Petkovska, acting as Agents,

interveners,

* Language of the case: English.

v

European Parliament, represented by H. Krück, N. Lorenz and D. Moore, acting as Agents,

defendant,

APPLICATION for partial annulment of the decision of the European Parliament of 11 August 2008, Reference No A (2008) 10636, in so far as it refuses access to Report No 06/02 of the Internal Audit Service entitled 'Audit of the Parliamentary Assistance Allowance',

THE GENERAL COURT (Second Chamber),

composed of N.J. Forwood, President, F. Dehousse (Rapporteur) and J. Schwarcz, Judges,

Registrar: K. Andovà, Administrator,

having regard to the written procedure and further to the hearing on 7 December 2010,

gives the following

Judgment

Legal context

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 (OJ 2001 L 145, p. 43) defines the principles, conditions and limits governing the right of access to the documents of those institutions laid down by Article 255 EC.

2 According to Article 4(2) and (3) of Regulation No 1049/2001:

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

…

— the purpose of inspections, investigations and audits,

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.

...'

Background to the dispute

3 By letter of 11 June 2008, the applicant, Mr Ciarán Toland, applied to the Parliament for access to the 2006 Annual Report of its Internal Audit Service, including the 16 audit reports referred to in paragraph 24 of the European Parliament Resolution of 22 April 2008 with observations forming an integral part of the decision on discharge in respect of the implementation of the European Union general budget for the financial year 2006, section I — European Parliament (OJ 2009 L 88, p. 3).

4 By letter of 23 June 2008, the Secretary-General of the Parliament granted the applicant access to the 2006 Annual Report of the Parliament's Internal Audit Service, Reference No 07/01, of 16 July 2007 ('Report No 07/01'), with the exception of one paragraph which dealt with an audit still pending. No mention was made, in that letter of 23 June 2008, of the other 16 reports requested by the applicant.

5 By letter of 19 July 2008, the applicant submitted a confirmatory application, repeating his request for access to the 16 internal audit reports on the grounds set out in his letter of 11 June 2008 and on the basis that the letter of the Secretary General of the Parliament of 23 June 2008 provided no objective justification, set out in a reasoned opinion, as to why access to those reports had been refused. The applicant also requested access to the redacted paragraph in Report No 07/01.

6 By letter of 11 August 2008 ('the contested decision'), the Parliament, first, refused to grant access to the redacted paragraph in Report No 07/01, second, granted full access to 13 of the 16 internal audit reports and partial access to two further internal audit reports and, third, refused access to the fourteenth of those reports, namely Internal Audit Report No 06/02 of 9 January 2008 entitled 'Audit of the Parliamentary Assistance Allowance' ('Report No 06/02').

7 In the contested decision, the Parliament described Report No 06/02 as containing, in the first part, an analysis of the risks inherent in the financial operations concerning the payment of parliamentary assistance allowance and a detailed analysis of the rules in force and their functioning, in the second part a summary of the action plans set up by the Internal Auditor with a view to improving the functioning of the system and, in the third part, a detailed explanation of those action plans.

8 The Parliament added that Report No 06/02, as a study of the risks associated with financial operations executed by the Parliament's services inherent in the payment of parliamentary assistance allowance and as a set of proposals to improve the system, constituted an audit within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

9 In the Parliament's view, Report No 06/02, although concluded on 9 January 2008, was still protected by the exception to the right of access set out in the third indent of Article 4(2) of Regulation (EC) No 1049/2001. The Parliament referred to the judgment in Joined Cases T-391/03 and T-70/04 *Franchet and Byk* v *Commission* [2006] ECR II-2023, paragraph 120 et seq. It stated that the action plans contained in Report No 06/02 set out principles on which a revision of the legal framework for parliamentary assistance could be based. In addition, those plans described further actions that could already be taken by the Parliament's Directorate General (DG) for Finance prior to any modification of the regulatory framework. The Parliament took the view that its administration should be given a reasonable period of time to allow for consideration and immediate implementation of those proposals, as required by Article 86 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) ('the Financial Regulation'). To grant access to Report No 06/02 at that stage, even partially, might, in the Parliament's view, compromise its effective use and thus the purpose of the audit within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

10 The Parliament also claimed that the action plans in Report No 06/02 contained proposals requiring the adoption of a decision by the competent political authorities, including not only the Bureau of the Parliament and the Conference of Presidents of the European Parliament, but also the Commission, the Council and the Member States. The Parliament stated that, at its plenary session on 22 April 2008, it had, first, encouraged the Bureau's working group on the Members' Statute to present its conclusions with a view to rapid and appropriate action on the remarks contained in Report No 06/02, second, called for an immediate start of the negotiations with the Member States and the Belgian Government, third, given a mandate to its Secretary-General to make contact with the Commission and the Council with a view to securing the possibility of a new set of rules for Members' assistants through an amended contract staff regime and, lastly, charged its working group on the Members' Statute, Assistants and Pension Fund to assess, as a matter of urgency, the operation of

existing rules in detail and, given the importance of the matter, to come forward with any proposals for changes to the rules which it considered necessary.

11 The Parliament added that, while its Bureau had, on 9 July 2008, adopted the implementing measures concerning the Statute of Members, the sensitive and complex decision-making process was still ongoing, in which Report No 06/02 constituted an important reference document. The Parliament asserted that the use which its Members made of the allowances available to them was a sensitive matter followed with great interest by the media and that elements of Report No 06/02 could be used to derail the debate on the reform of the system and compromise rapid reform. Consequently, according to the Parliament, disclosure of Report No 06/02 could, at that stage, seriously undermine not only its decision-making process but also beyond, as the reform could not be carried out by that institution alone.

12 In conclusion, the Parliament, taking the view that the applicant's request of 19 July 2008 did not contain any argument which might justify disclosure of Report No 06/02 and that such disclosure, even partial, would undermine both the purpose of the audit within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001 and the Parliament's decision-making process within the terms of Article 4(3) thereof, decided to reject the applicant's request for access to that report.

Procedure and forms of order sought

13 By application lodged at the Registry of the General Court on 23 October 2008, the applicant brought the present action.

14 By documents lodged at the Registry of the General Court on 13, 17 and 30 March 2009 respectively, the Kingdom of Sweden, the Republic of Finland and the Kingdom of Denmark applied for leave to intervene in the present proceedings in support of the form of order sought by the applicant.

15 By order of 25 June 2009, the President of the First Chamber of the General Court granted those applications for leave to intervene.

16 Following a change in the composition of the Chambers of the General Court, the Judge-Rapporteur was assigned to the Second Chamber, to which the present case was consequently allocated.

17 By documents registered at the Court Registry on, respectively, 26 August and 9 and 11 September 2009, the Kingdom of Sweden, the Republic of Finland and the Kingdom of Denmark lodged their statements in intervention.

18 The Parliament and the applicant submitted observations on those statements in intervention on 16 and 18 November 2009 respectively.

19 Upon hearing the report of the Judge-Rapporteur, the General Court (Second Chamber) decided to open the oral procedure.

20 At the hearing on 7 December 2010, the parties presented oral argument and answered the questions put to them by the Court.

21 In his application, the applicant claims that the Court should:

— annul the contested decision insofar as it refuses access to Report No 06/02;

— order the Parliament to grant him access to Report No 06/02;

— order the Parliament to pay the costs.

22 In his reply, the applicant withdrew his request that the Court order the Parliament to grant him access to Report No 06/02.

23 The Parliament, taking account of that amendment to the form of order sought by the applicant, contends that the Court should:

— dismiss the application for annulment of the contested decision as unfounded;

— order the applicant to pay the costs;

— order the interveners to bear their own costs.

24 The Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden essentially support the applicant's claim for annulment of the contested decision.

Law

25 The present action, in addition to setting out three pleas in law formally alleging a manifest error of assessment, breach of the duty to state reasons for a decision and infringement of the principle of proportionality, essentially alleges errors of law consisting in the breach, by the Parliament, of the third indent of Article 4(2) of Regulation No 1049/2001 and of Article 4(3) thereof. It is according to that distinction that it is appropriate, after certain preliminary considerations, to examine the various pleas and arguments put forward by the applicant.

Preliminary considerations

26 Regulation No 1049/2001, as Article 1 and Article 2(1) and (3) thereof state, seeks to grant the public a right of access to documents of the institutions in all the areas of activity of the European Union, subject to certain exceptions which it defines.

27 In accordance with recital 1 in the preamble thereto, the regulation reflects the intention expressed in the second paragraph of Article 1 EU, inserted by the Treaty of Amsterdam, of marking a new stage in the process of creating an ever closer union

among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. As is stated in recital 2 in the preamble to Regulation No 1049/2001, the right of public access to documents of the institutions is connected with the democratic nature of those institutions.

28 According to settled case-law, the exceptions to document access must be interpreted and applied strictly so as not to frustrate application of the general principle that the public should be given the widest possible access to documents held by the institutions (Case C-64/05 P *Sweden* v *Commission* [2007] ECR I-11389, paragraph 66; Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraph 36; and *Franchet and Byk* v *Commission*, cited in paragraph 9 above, paragraph 84). Furthermore, the principle of proportionality requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view (see, to that effect, Case C-353/99 P *Council* v *Hautala* [2001] ECR I-9565, paragraph 28).

29 Furthermore, the examination required for the processing of 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 is not of itself sufficient to justify application of that exception (see, by analogy, Case T-20/99 *Denkavit Nederland* v *Commission* [2000] ECR II-3011, paragraph 45). In principle, such an application can be justified only if the institution has previously determined, first, that 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, that there is no overriding public interest justifying disclosure of the document concerned (see, to that effect, Joined Cases T-355/04 and T-446/04 *Co-Frutta* v *Commission* [2010] ECR II-1, paragraph 123). Second, the risk of the protected interest being undermined must be reasonably foreseeable and not purely hypothetical (see, by analogy, Case T-211/00 *Kuijer* v *Council* [2002] ECR II-485, paragraph 56). That

examination must be apparent from the reasons for the decision (Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-1121, paragraph 69, and *Franchet and Byk* v *Commission*, cited in paragraph 9 above, paragraph 115).

30 A concrete, individual examination of each document is also necessary where, even if it is clear that a request for access refers to documents covered by an exception, only such an examination can enable the institution to assess the possibility of granting the applicant partial access under Article 4(6) of Regulation No 1049/2001 (see, to that effect, Case T-123/99 *JT's Corporation* v *Commission* [2000] ECR II-3269, paragraph 46, and *Franchet and Byk* v *Commission*, cited in paragraph 9 above, paragraph 117).

31 It is in the light of those principles that the present action must be examined.

Breach of the third indent of Article 4(2) of Regulation No 1049/2001

Arguments of the parties

32 The applicant, supported by the interveners, claims that in this case the Parliament was wrong to rely on the exception to the right of access laid down in the third indent of Article 4(2) of Regulation No 1049/2001 designed to protect the purposes of audits.

33 As the audit was finalised on 9 January 2008, there was no further reason, in August 2008, to refuse disclosure, which could in no way have affected its proper completion. As regards the claim that such disclosure would have compromised 'the purpose of the audit' in that it would have deprived the administration of a reasonable period of time in which to consider and implement the measures recommended in Report No 06/02, the applicant asserts that the situation in the present case differed from that at issue in *Franchet and Byk* v *Commission*, cited in paragraph 9 above. In the present case, the contested decision did not specify any period at all beyond which Report No 06/02 might have been disclosed. That decision stated that the reforms envisaged were regulatory and legislative in nature and it made no mention of any other investigation or inspection, the outcome of which might have been affected by disclosure of Report No 06/02. Consequently, the conditions for the application of the exception in the third indent of Article 4(2) of Regulation No 1049/2001, on the ground that the purpose of the audit would be undermined, were not met.

34 As regards the reasoning of the contested decision, the applicant claims that that decision does not explain how access to Report No 06/02 could specifically and actually undermine the interest protected by the third indent of Article 4(2) of Regulation No 1049/2001. Furthermore, that decision does not examine whether there was an overriding public interest justifying disclosure of Report No 06/02, notwithstanding the assertion that the purpose of the audit would be undermined. That decision, by failing to include such an examination, also infringes the principle of proportionality.

35 However, according to the applicant, the public interest in being apprised of an audit report enabling it to be informed as to how a substantial part of public funds allocated to the Parliament is used clearly constitutes an overriding public interest.

36 The Parliament contends that the judgment in *Franchet and Byk* v *Commission*, cited in paragraph 9 above, recognises the legitimacy of a reasonable period of time for the

administration to decide what action to take in the light of the information contained in a report. In the present case, however, at the time when the contested decision was adopted, the Parliament had had barely seven months to decide on those measures, which was certainly reasonable, in view of the significantly longer periods accepted as reasonable in *Franchet and Byk* v *Commission*, cited in paragraph 9 above.

37 The Parliament submits that the reasonableness of the period must be determined at the time of the adoption of the contested decision and that it is not legally required to declare in that decision when in the future such a reasonable period would finally elapse. It would, it submits, be wrong to criticise it for failing to provide that information.

38 As regards the allegation that the contested decision does not identify any other ongoing investigation or inspection, the contested decision must be understood as meaning that its reference to Report No 06/02 as containing action plans that 'describe further actions that can already be taken by DG Finance prior to any modification of the regulatory framework' clearly designates, in the context of that decision, not only legislative reforms but also inspections and investigations. Furthermore, in August 2008, administrative investigations into the use by certain Members of Parliament of the sums paid as Parliamentary assistance expenses were ongoing and the disclosure of Report No 06/02 would have compromised those investigations. That was also public knowledge and the applicant was aware of it.

39 The Parliament challenges the assertion that the contested decision was insufficiently reasoned, whether with regard to the existence of a risk that the protection of the purpose of the audit would be undermined or with regard to the absence of an overriding public interest in disclosure.

40 As regards the argument based on the alleged infringement of the principle of proportionality, the Parliament contends that, apart from the fact that that argument is, in substance, merely a repetition of the applicant's other arguments, the question at issue in this case has nothing to do with the proportionality test, but with the balancing of the public interest in the protection of a document against the public interest in its disclosure.

41 Finally, as regards the argument alleging that transparency might constitute an overriding public interest justifying disclosure of a document otherwise covered by the exception in Article 4(2) or (3) of Regulation No 1049/2001, the Parliament submits that that claim ignores the logic of that regulation.

Findings of the Court

42 The third indent of Article 4(2) of Regulation No 1049/2001 authorises the refusal of access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

43 In the case which gave rise to the judgment in *Franchet and Byk* v *Commission*, cited in paragraph 9 above (paragraph 109), the Court held that the third indent of Article 4(2) of Regulation No 1049/2001 had to be interpreted in such a way that that provision, the aim of which is to protect 'the purpose of inspections, investigations and audits', applies only if disclosure of the documents in question may endanger the completion of those activities.

44 Admittedly, the various acts of investigation or inspection may remain covered by the exception based on the protection of inspections, investigations and audits as long as the investigations or inspections continue, even if the particular investigation or inspection which gave rise to the report to which access is sought has been completed (*Franchet and Byk* v *Commission*, cited in paragraph 9 above, paragraph 110).

45 Nevertheless, to allow that the various documents relating to inspections, investigations or audits are covered by the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001 until the follow-up action to be taken has been decided would make access to those documents dependent on an uncertain, future and possibly distant event, depending on the speed and diligence of the various authorities. Such a solution would be contrary to the objective of guaranteeing public access to documents relating to any irregularities in the management of financial interests, with the aim of giving citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers (*Franchet and Byk* v *Commission*, cited in paragraph 9 above, paragraphs 111 and 112).

46 It was therefore appropriate to ascertain whether, at the time of the adoption of the decisions contested in that case, inspections and investigations were still in progress which could have been jeopardised by the disclosure of the requested documents, and whether those activities were carried out within a reasonable period (*Franchet and Byk* v *Commission*, cited in paragraph 9 above, paragraph 113).

47 It is clear from those statements that the exception to the right of access laid down in the third indent of Article 4(2) of Regulation No 1049/2001 may be declared to be applicable to an audit report the disclosure of which could jeopardise inspections or investigations which were being conducted, for a reasonable period, on the basis of its content.

48 In the present case, in the first paragraph on page 3 of the contested decision, the Parliament's refusal to grant access to Report No 06/02 on the basis of the third indent of Article 4(2) of Regulation No 1049/2001 is founded, by reference to the judgment in *Franchet and Byk* v *Commission*, cited in paragraph 9 above, on the submission that 'Parliament's administration should be given a reasonable period of time to allow for consideration and immediate implementation of [the] proposals [contained in Report No 06/02], as requested by Article 86 of the Financial Regulation'.

49 According to the same paragraph of the contested decision, '[to] grant access to this document at this stage, even partially, could compromise this effective use of the Report and thus the "purpose of the audit"'. In the first and second paragraphs on page 4 of the contested decision, the Parliament concludes, this time in affirmative terms, that to grant such access, even partially, at that stage 'would compromise the effective use of [the] contents [of Report No 06/02]' or 'undermine the purpose of the audit'.

50 It is clear from those statements that the Parliament submits, on the basis of the judgment in *Franchet and Byk* v *Commission*, cited in paragraph 9 above, that disclosure of Report No 06/02 at the date of the contested decision would have been too early to allow it successfully to complete, even before any reforms of the regulatory and/or legislative framework for the parliamentary assistance allowance, the immediate actions recommended in that report.

51 However, the contested decision makes no mention of any specific inspection or investigation or of any other administrative checks which were ongoing at the time of that decision and which might have constituted the implementation of the immediate actions recommended in Report No 06/02.

52 The contested decision, in the part concerned with the rejection of the request for access to Report No 06/02, thus merely makes reference in an abstract manner to the need to allow the administration a reasonable period of time for the immediate implementation of the proposals contained in that report and merely mentions various initiatives undertaken for the purpose of a regulatory and/or legislative reform of the rules governing parliamentary assistance.

53 In that connection, the reference to those various initiatives undertaken with a view to reform of parliamentary assistance relate, not so much to the exception laid down in the third indent of Article 4(2) of Regulation No 1049/2001 concerning the protection of the purpose of inspections, investigations and audits, as to the exception laid down in Article 4(3) thereof relating to the protection of the institution's decision-making process. It is, moreover, in that sense that, at the top of page 4 of the contested decision, the Parliament states that 'disclosure of … Report [No 06/02] would, at present, seriously undermine the decision-making process of the European Parliament'.

54 The only reference, in the contested decision, to a specific investigation appears in the part of that decision rejecting the request for access to certain redacted passages of audit reports other than Report No 06/02, on the ground that access to those passages would lead to disclosure of an individual case of suspected fraud under investigation by the European Anti-Fraud Office (OLAF). In reply to a question from the Court at the hearing, the Parliament indicated, however, that Report No 06/02 did not, for its part, contain any nominative information allowing individual cases to be identified.

55 At the hearing, the Parliament maintained that inspection and investigation procedures and other administrative checks on the basis of Report No 06/02 were ongoing at the date of the contested decision. However, as stated in paragraph 51 above, that decision does not mention any procedure of that kind. Consequently, that decision, which does not mention those alleged procedures, provides even less justification as to why the period for their completion had, in August 2008, to be regarded

as reasonable or how, in particular, their successful completion would have suffered through disclosure of Report No 06/02.

56 At the hearing, the Parliament also argued that disclosure of Report No 06/02 would have been contrary to the nature of that document. It is, the Parliament submitted, an internal document, drawn up in the context of the Financial Regulation, and not a document which was intended to be made public, such as the report of the Court of Auditors of the European Union on the implementation of the budget, which is published annually in the *Official Journal of the European Union*. According to the Parliament, disclosure of that type of internal document risks leading internal auditors of the institutions to impose limits on their comments, with the consequence that the internal audits would be less effective in improving the functioning of the institutions concerned.

57 It must be noted, at the outset, that that reasoning does not appear in the contested decision. It is true that, on pages 2 and 3 of that decision, the Parliament cited the first subparagraph of Article 86(1) of the Financial Regulation, which mentions that the internal auditor advises the institution on dealing with risks. However, it did not extrapolate from those quotations, one of which, moreover, appears in a part of the contested decision other than that which examines the request for access to Report No 06/02, any argument comparable to that which it put forward for the first time at the hearing. Moreover, the fact that, in the present case, the Parliament has authorised access, at least in part, to 15 of the 16 internal audit reports mentioned in the request for access indicates that it is not so much the nature of those audit reports as internal documents that determined the decision to grant or refuse access by the Parliament as much as the specific subject and content of those reports.

58 In view of the foregoing, it must be held that, in the contested decision, the Parliament failed to establish to the requisite legal standard that access to Report No 06/02 would have undermined the purpose of the audit. Consequently, without there being any need to examine the question as to whether there is an overriding public interest in disclosure, it must be held that the contested decision, in so far as it refused access

to Report No 06/02 on the basis of the third indent of Article 4(2) of Regulation No 1049/2001, is unfounded.

Breach of Article 4(3) of Regulation No 1049/2001

Arguments of the parties

59 The applicant, supported by the interveners, claims that the Parliament wrongly relied in this case on the exception to the right of access laid down in Article 4(3) of Regulation No 1049/2001, which relates to protection of the institution's decision-making process.

60 The grounds of the contested decision, stating, on the one hand, that the use by Members of Parliament of the parliamentary assistance allowance is a sensitive subject arousing great interest in the media and, on the other hand, that disclosure of Report No 06/02 might derail the decision-making process, are assertions which are more political than legal, based, moreover, on the presumption that transparency and the right of the public to be informed preclude the proper functioning of regulatory and legislative activities. That being the case, the contested decision challenges the fundamental principle of transparency.

61 The applicant observes that, in the contested decision, the Parliament failed to give any consideration whatsoever to the overriding public interest in being informed. However, the view should be taken instead that the legislative and regulatory decision-making process of a democratic institution cannot, in principle, be upset by the

provision of information to the public. The overriding public interest in disclosure is more important than the concern to remove the risk — which is, moreover, hypothetical — that the public debate would be distorted by that disclosure. The contested decision does not contain any adequate reasoning capable of justifying the making of an exception to the principle of transparency in the present case.

62 The applicant submits that the particular importance accorded in Regulation No 1049/2001 to transparency, with regard to documents and information relating to legislative activity, cannot be relied on in order to attempt to justify a failure to comply with the obligation of transparency in other areas of the Parliament's activity, in particular in that of its administrative activities. Transparency applies not merely to matters of legislation but also to administrative, non-legislative and internal institutional executive functions.

63 The Parliament's attempt to confine the principle of transparency, as an overriding public interest, to the legislative process after a legislative proposal has been made represents a limited and erroneous construction of the case and fundamentally misconstrues the basic principles contained in Regulation No 1049/2001. The Parliament wrongly denies that Report No 06/02 sets out principles upon which a revision of the legal framework could be based and artificially disconnects from the legislative process ongoing inter-institutional discussions which generally precede the presentation by the Commission of a formal legislative proposal.

64 Although it may be held that the judgment in *Sweden and Turco* v *Council*, cited in paragraph 28 above, was confined to an overriding interest of transparency in respect of legislation, the applicant takes the view that the overriding public interest in transparency requires a similar right of access in respect of matters concerning, as in the present case, the governance of public finances.

65 The Parliament contends, as regards the applicant's reference to the judgment in *Sweden and Turco* v *Council*, cited in paragraph 28 above, that Report No 06/02 was an internal audit report established under the Financial Regulation and was not an external audit report or a legal opinion. At the date of the contested decision, there was no ongoing legislative process and therefore it is not possible, in the present case, to claim the benefit of wider transparency which is guaranteed by Article 12(2) of Regulation No 1049/2001. The principles laid down in the judgment in *Sweden and Turco* v *Council*, cited in paragraph 28 above, given in the context of a request for access to a legal opinion in the legislative context, cannot be transposed as such to the present case, which concerns an internal audit report established outside a legislative procedure.

66 The Parliament contends that, although the contested decision classifies Report No 06/02 as 'an important reference document', that refers to the 'sensitive and complex decision-making process' which was then ongoing, and not to a legislative procedure which did not then exist. Therefore, the applicant has not identified any overriding public interest in disclosure. The only interest claimed by the applicant, which relates to legislative documents, cannot be applied to an internal audit report.

67 The applicant therefore errs in assuming that Report No 06/02 is a form of 'legislative proposal' which falls to be examined in line with the reasoning in *Sweden and Turco* v *Council*, cited in paragraph 28 above. All of the assertions concerning the need for citizens to take part in a full debate on the contents of that report, on the basis of that judgment, are therefore unfounded.

68 The contested decision did not invoke a bare and unreasoned need for confidentiality, but, on the contrary, described the numerous initiatives taken at the time and the sensitive and complex decision-making procedure still ongoing at the time when that decision was adopted. Furthermore, all the other previous attempts at reform in the area concerned had failed and the situation in 2008 was still more uncertain, both as

to the principle of reform and to its specific details. In that context, there were legitimate concerns that the reform process would founder once again if Report No 06/02 were disclosed. That disclosure would have allowed the use of certain elements in that report in order to derail the debate and compromise rapid reform. The Parliament also adopted transitional and emergency measures designed to prepare for the risk of failure of the reform process that it had adopted in July 2008. The applicant is therefore wrong to claim that the Parliament's reliance on the ongoing decision-making process, for the purpose of rejecting the request for access on the basis of Article 4(3) of Regulation No 1049/2001, was flawed.

Findings of the Court

69 Article 4(3) of Regulation No 1049/2001 provides, in its first subparagraph, that '[a]ccess 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'.

70 According to settled case-law, the application of that exception requires it to be established that access to the document in question drawn up by the institution for its internal use in question was likely, specifically and actually, to undermine the interest protected by the exception, and that the risk of that interest being undermined was reasonably foreseeable and not purely hypothetical (in addition to the case-law cited in paragraphs 29 and 30 above, see also, to that effect, the judgment of 18 December 2008 in Case T-144/05 *Muñiz* v *Commission*, not published in the ECR, paragraph 74).

71 In addition, in order to be covered by the exception in the first subparagraph of Article 4(3) of Regulation No 1049/2001, the decision-making process must be seriously undermined. That is the case, in particular, where the disclosure of the documents in question has a substantial impact on the decision-making process. The assessment of that serious nature depends on all of the circumstances of the case including, inter alia, the negative effects on the decision-making process relied on by the institution (*Muñiz* v *Commission*, cited in paragraph 70 above, paragraph 75).

72 It must be observed, first of all, that Report No 06/02, which is an audit report compiled by the Parliament's internal audit service pursuant to Article 86 of the Financial Regulation, is a document drawn up by the institution for its internal use.

73 Next, it is clear that that document, which, according to the wording of the contested decision, 'set out principles on which a revision of the legal framework for Parliamentary assistance could be based' and 'contain[ed] proposals requiring a decision by the competent political authorities', related to an issue on which the institution had not yet taken any decision.

74 In that connection, it is not seriously disputed that the decisions relating to the Statute of the Members of Parliament adopted by the latter prior to the contested decision did not exhaust the wider issue of the reform of the rules on Parliamentary assistance. The Parliament's decision-making process, whether it is conducted by it alone or in conjunction with the Council, the Commission and the Member States, had not therefore ended with those decisions.

75 It is for that reason appropriate to examine whether, in the contested decision, the Parliament duly established that disclosure of Report No 06/02 would seriously undermine its decision-making process and, if so, whether there was any overriding public interest justifying disclosure.

76 In the contested decision, the Parliament stated that the 'sensitive and complex decision-making process' was still ongoing 'in which [Report No 06/02] constitutes an important reference document' and that '[t]he use Members make of the allowances available to them is a sensitive matter followed with great interest by the media'. The Parliament continued by stating that '[e]lements of the report could be used to derail the debate on the reform of the system and compromise rapid reform'. Therefore, 'disclosure of [Report No 06/02] would, at present, seriously undermine the decision-making process of the European Parliament but also beyond, as the reform cannot be carried out by the Institution alone'. In the remainder of the contested decision, the Parliament repeated the same assertion regarding the undermining of its decision-making process.

77 It is clear from that reasoning in the contested decision that the refusal to grant access is, in substance, based on the concern that elements of Report No 06/02 'could' be used to derail the debate on reform.

78 However, the contested decision does not contain any tangible element which would allow the conclusion to be drawn that that risk that the decision-making process would be undermined was, on the date on which that decision was adopted, reasonably foreseeable and not purely hypothetical.

79 In particular, the contested decision makes no mention of the existence, on the date on which it was adopted, of any acts undermining, or attempting to undermine, the ongoing decision-making process, or of objective reasons on the basis of which it could be reasonably foreseen that the decision-making process would be undermined if Report No 06/02 were disclosed.

80 In that connection, the fact that the use by the Members of Parliament of the financial resources made available to them is a sensitive matter followed with great interest by the media, which the applicant does not deny — quite the contrary — cannot constitute in itself an objective reason sufficient to justify the concern that the decision-making process would be seriously undermined, without calling into question the very principle of transparency intended by the EC Treaty.

81 Likewise, the alleged complexity of the decision-making process did not constitute in itself a specific reason to fear that disclosure of Report No 06/02 would seriously undermine that process.

82 As to the fact put forward by the Parliament that several attempts at reform of parliamentary assistance have failed in the past, it must be held that that does not appear in the contested decision. It was put forward only at a late stage, before the Court, and also without any indication that those failures had been caused by undermining of the decision-making process as a result of the disclosure of sensitive information.

83 In any event, and on the assumption that the Parliament has established that disclosure of Report No 06/02 would seriously undermine its decision-making process, it must be stated that the contested decision does not contain any reasoning with regard to the question whether an overriding public interest did not, despite everything, call for disclosure of that report.

84 The statement, set out in the contested decision, that the 'confirmatory application [contains] no arguments which might justify disclosure', cannot be regarded as constituting reasoning of that kind. In that connection, it must be recalled that, according to Article 6(1) of Regulation No 1049/2001, the person requesting access to documents is not obliged to state reasons for his application.

85 Regard being had to the foregoing, from which it is clear that the Parliament has not, in the contested decision, established that access to Report No 06/02 would seriously undermine its decision-making process and has not, in any event, given reasons for its refusal to grant access, having regard to the requirement that there must be no overriding public interest, it must be concluded that the contested decision is unfounded in so far as it refuses access to Report No 06/02 on the basis of Article 4(3) of Regulation No 1049/2001.

86 In those circumstances, the present action must be upheld and the contested decision annulled in so far as it refuses to grant the applicant access to Report No 06/02.

Costs

87 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 87(4) of those Rules, the Member States which have intervened in the proceedings are to bear their own costs.

88 Since the Parliament has been unsuccessful, and the applicant has applied for costs, the Parliament must be ordered to pay the costs. The Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden are ordered to bear their own costs.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Annuls the decision of the European Parliament of 11 August 2008, Reference No A (2008) 10636, in so far as it refuses access to Report No 06/02 of the Internal Audit Service of the Parliament of 9 January 2008 entitled 'Audit of the Parliamentary Assistance Allowance';**

2. **Orders the Parliament to bear its own costs and to pay the costs incurred by Mr Ciarán Toland;**

3. **Orders the Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden to bear their own costs.**

Forwood Dehousse Schwarcz

Delivered in open court in Luxembourg on 7 June 2011.

[Signatures]