JUDGMENT OF THE COURT (First Chamber)

1 February 2007 *

In Case C-266/05 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 24 June 2005,

Jose Maria Sison, residing in Utrecht (Netherlands), represented by J. Fermon, avocat,

appellant,

the other party to the proceedings being:

Council of the European Union, represented by M. Bauer and E. Finnegan, acting as Agents,

defendant at first instance,

* Language of the case: English.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, J.N. Cunha Rodrigues, K. Schiemann (Rapporteur), M. Ilešič and E. Levits, Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 22 June 2006,

gives the following

Judgment

1 By his appeal, Mr Sison is asking the Court to set aside the judgment delivered by the Court of First Instance of the European Communities on 26 April 2005 in Joined Cases T-110/03, T-150/03 and T-405/03 *Sison* v *Council* [2005] ECR II-1429 ('the judgment under appeal'), by which the Court of First Instance dismissed his applications for annulment of three decisions of the Council of the European Union of 21 January, 27 February and 2 October 2003 refusing access to certain documents (hereinafter, respectively, 'the first decision refusing access', 'the second decision refusing access' and 'the third decision refusing access' and, together, 'the decisions refusing access').

Legal and factual background

Legal framework

2 The 3rd, 4th, 9th and 11th recitals in the preamble to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) are worded as follows:

'(3) ... This Regulation consolidates the initiatives that the institutions have already taken with a view to improving the transparency of the decision-making process.

(4) 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.

...

(9) On account of their highly sensitive content, certain documents should be given special treatment. ...

...

(11) 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. ...'

3 Article 1(a) of Regulation No 1049/2001 states that its purpose is 'to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission ... documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents'.

4 Article 2 of that regulation provides, under the heading 'Beneficiaries and scope':

'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.

...

5. Sensitive documents as defined in Article 9(1) shall be subject to special treatment in accordance with that Article.

...'

5 Under the heading 'Exceptions', Article 4 of Regulation No 1049/2001 provides:

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

(a) the public interest as regards:

— public security,

— defence and military matters,

— international relations,

— the financial, monetary or economic policy of the Community or a Member State;

...

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,

unless there is an overriding public interest in disclosure.

...

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

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

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

...'

6 Article 6(1) of Regulation No 1049/2001 provides:

'Applications for access to a document shall be made in any written form ... The applicant is not obliged to state reasons for the application.'

7 Article 9 of that regulation provides:

'1. Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as "TRÈS SECRET/TOP SECRET", "SECRET" or "CONFIDENTIEL" in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.

...

3. Sensitive documents shall be recorded in the register or released only with the consent of the originator.

4. An institution which decides to refuse access to a sensitive document shall give the reasons for its decision in a manner which does not harm the interests protected in Article 4.

...'

8 Article 11(2) of Regulation No 1049/2001 provides:

'For each document the register shall contain a reference number ... the subject matter and/or a short description of the content of the document ... References shall be made in a manner which does not undermine protection of the interests in Article 4.'

9 Under the heading 'Direct access in electronic form or through a register', Article 12(1) and (2) of that regulation provides:

'1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.

2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.'

Background to the dispute

10 The background to the dispute is set out as follows by the Court of First Instance in paragraphs 2 to 8 of the judgment under appeal:

'2 On 28 October 2002, the Council of the European Union adopted Decision 2002/848/EC implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/460/EC (OJ 2002 L 295, p. 12). That decision included the applicant in the list of persons whose funds and financial assets are to be frozen pursuant to that regulation ("the list at issue"). That list was updated, inter alia, by Council Decision 2002/974/EC of 12 December 2002 (OJ 2002 L 337, p. 85) and Council Decision 2003/480/EC of 27 June 2003 (OJ 2003 L 160, p. 81), repealing the previous decisions and establishing a new list. The applicant's name was retained on that list on each occasion.

3 Under Regulation No 1049/2001, the applicant requested, by confirmatory application of 11 December 2002, access to the documents which had led the Council to adopt Decision 2002/848 and disclosure of the identity of the States which had provided certain documents in that connection. By confirmatory application of 3 February 2003, the applicant requested access to all the new documents which had led the Council to adopt Decision 2002/974 maintaining him on the list at issue and disclosure of the identity of the States which had provided certain documents in that connection. By confirmatory application of 5 September 2003, the applicant specifically requested access to the report of the proceedings of the Permanent Representatives Committee (Coreper) 11 311/03 EXT 1 CRS/CRP concerning Decision 2003/480, and to all the documents submitted to the Council prior to the adoption of Decision 2003/480, which form the basis of his inclusion and maintenance on the list at issue.

4 The Council's response to each of those applications, given by [the first, second and third] decisions [refusing access] respectively, ... was a refusal of even partial access.

5 As regards the first and second decisions refusing access, the Council stated that the information which had led to the adoption of the decisions establishing the list at issue was to be found in the summary reports of the Coreper proceedings of 23 October 2002 (13 441/02 EXT 1 CRS/CRP 43) and 4 December 2002 (15 191/02 EXT 1 CRS/CRP 51) respectively, which were classified as "CONFIDENTIEL UE".

6 The Council refused to grant access to those reports, invoking the first and third indents of Article 4(1)(a) of Regulation No 1049/2001. It stated, first, that "disclosure of [those reports] and of the information in possession of the authorities of the Member States combating terrorism, could give the persons, groups or entities which are the subject of this information the opportunity to prejudice the efforts of these authorities and would thus seriously undermine the public interest as regards public security". Secondly, in the Council's view, the "disclosure of the information concerned would also undermine the protection of the public interest as regards international relations because third

States' authorities [we]re also involved in the action taken in the fight against terrorism". The Council refused to grant partial access to that information on the ground that it was "all ... covered by the aforesaid exceptions". The Council also refused to disclose the identity of the States which had provided the relevant information, stating that "the originating authority(ies) of this information, after consultation in accordance with Article 9(3) of Regulation No 1049/2001, is (are) opposed to the disclosure of the information requested".

7 As regards the third decision refusing access, the Council first stated that the applicant's request concerned the same document as that in respect of which disclosure had been refused to him by the first decision refusing access. The Council confirmed its first decision refusing access and added that access to report 13 441/02 also had to be refused on the basis of the exception relating to court proceedings (second indent of Article 4(2) of Regulation No 1049/2001). The Council then acknowledged that it had by mistake identified report 11 311/03, relating to Decision 2003/480, as relevant. It explained in that regard that it had received no further information or documents justifying the revocation of Decision 2002/848 in so far as it concerns the applicant.

8 The applicant brought an action for annulment of Decision 2002/974, which was lodged at the Court Registry under number T-47/03.'

Procedure before the Court of First Instance and the judgment under appeal

11 The present appellant brought before the Court of First Instance three successive actions seeking annulment, respectively, of the first decision refusing access (Case T-110/03), of the second decision refusing access (Case T-150/03) and of the third decision refusing access (Case T-405/03). The three cases were joined.

12 By the judgment under appeal, the Court of First Instance dismissed each of those actions.

13 As is apparent from paragraphs 26, 34 and 35 of the judgment under appeal, the action in Case T-405/03 was declared, first, inadmissible in so far as it related to the purely confirmatory refusal of access to report 13 441/02 and, second, unfounded in so far as it concerned a refusal of access to other documents, the Court of First Instance having held, in that respect, that the non-existence of such documents had been established by the Council to the requisite legal standard.

14 The action in Case T-150/03 was dismissed as unfounded, the Court of First Instance having concluded, in paragraph 38 of the judgment under appeal, that the documents sought by the present appellant did not exist.

15 As regards Case T-110/03, the Court of First Instance held, as a preliminary point, in paragraphs 46 and 47 of the judgment under appeal:

'46 With regard to the scope of the Court's review of the legality of a decision refusing access, it should be noted that, in [Case T-14/98] *Hautala* v *Council* [[1999] ECR II-2489], paragraph 71, and [Case T-211/00] *Kuijer* v *Council* [[2002] ECR II-485], paragraph 53, the Court recognised that the Council enjoys a wide discretion in the context of a decision refusing access founded, as in this case, in part, on the protection of the public interest concerning international relations. In *Kuijer* v *Council*, such a discretion was conferred on an institution when it justifies its refusal of access by reference to the protection of the public interest in general. Thus, in areas covered by the mandatory exceptions to public access to documents, provided for in Article 4(1)(a) of Regulation No 1049/2001, the institutions enjoy a wide discretion.

47 Consequently, the Court's review of the legality of decisions of the institutions refusing access to documents on the basis of the exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation No 1049/2001 must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers (see, by analogy, *Hautala* v *Council*, paragraphs 71 and 72, confirmed on appeal, and *Kuijer* v *Council*, paragraph 53).'

16 Ruling upon the present appellant's plea in law, to the effect that the refusal of access to the documents sought involves infringement of the right to a fair trial, and more specifically of the guarantees provided for in Article 6(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), as well as infringement of the principle of proportionality, the Court of First Instance held as follows in paragraphs 50 to 55 of the judgment under appeal:

'50 It should be recalled, first, that, under Article 2(1) of Regulation No 1049/2001, the beneficiaries of the right of access to documents of the institutions are "[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State". That provision makes it clear that the purpose of the regulation is to guarantee access for everyone to public documents and not only access for the requesting party to documents concerning him.

51 Second, the exceptions to access to documents, provided for by Article 4(1)(a) of Regulation No 1049/2001, are framed in mandatory terms. It follows that the institutions are obliged to refuse access to documents falling under any one of those exceptions once the relevant circumstances are shown to exist (see, by analogy, Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313, paragraph 58, and Case T-20/99 *Denkavit Nederland* v *Commission* [2000] ECR II-3011, paragraph 39).

52 Consequently, the particular interest which may be asserted by a requesting party in obtaining access to a document concerning him personally cannot be taken into account when applying the mandatory exceptions provided for by Article 4(1)(a) of Regulation No 1049/2001.

53 The applicant claims, in essence, that the Council was obliged to grant him access to the documents requested in so far as those documents are necessary in order for him to secure his right to a fair trial in Case T-47/03.

54 Since the Council relied on the mandatory exceptions provided for by Article 4(1)(a) of Regulation No 1049/2001 in the first decision refusing access, it cannot be accused of not having taken into account any particular need of the applicant to have the requested documents made available to him.

55 Consequently, even if those documents prove necessary for the applicant's defence in Case T-47/03, which is a question to be considered in that case, that circumstance is not relevant for the purpose of assessing the validity of the first decision refusing access.'

17 In order to reject the present appellant's second plea in law, alleging that the first decision refusing access failed to fulfil the institutions' duty under Article 253 EC to state reasons, the Court of First Instance relied on the following grounds:

'60 In the case of a request for access to documents, where the institution in question refuses such access, it must demonstrate in each individual case, on the

basis of the information at its disposal, that the documents to which access is sought do indeed fall within the exceptions listed in Regulation No 1049/2001 (see, by analogy, Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal* v *Commission* [2000] ECR I-1, paragraph 24). However it may be impossible to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and, thereby, depriving the exception of its very purpose (see, by analogy, *WWF UK* v *Commission*, ... paragraph 65).

61 Under that case-law, it is therefore for the institution which has refused access to a document to provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine.

62 In this case, with regard to report 13 441/02, the Council clearly specified the exceptions on which it was basing its refusal by relying on both the first and third indents of Article 4(1)(a) of Regulation No 1049/2001. It set out in what respects those exceptions were relevant in relation to the documents concerned by referring to the fight against terrorism and to the involvement of third States. Moreover, it provided a brief explanation relating to the need for protection relied on. Thus, as regards public security, it explained that disclosure of the documents would give the persons who were the subject of that information the opportunity to undermine the action taken by the public authorities. As regards international relations, it briefly referred to the involvement of third States in the fight against terrorism. The brevity of that statement of reasons is acceptable in light of the fact that mentioning additional information, in particular making reference to the content of the documents concerned, would negate the purpose of the exceptions relied on.

63 With regard to the refusal of partial access to those documents, the Council expressly stated, firstly, that it had considered that possibility and, secondly, the

reason for the rejection of that possibility, namely that the documents in question were covered in their entirety by the exceptions relied on. For the same reasons as before, the Council could not identify precisely the information contained in those documents without negating the purpose of the exceptions relied on. The fact that that statement of reasons appears formulaic does not, in itself, constitute a failure to state reasons since it does not prevent either the understanding or the ascertainment of the reasoning followed.

64 With regard to the identity of the States which provided relevant documents, it must be noted that the Council itself drew attention to the existence of documents from third States in its original decisions refusing access. First, the Council specified the exception put forward in that regard, namely Article 9(3) of Regulation No 1049/2001. Second, it provided the two criteria used for the application of that exception. In the first place, it implicitly but necessarily took the view that the documents in question were sensitive documents. That factor appears comprehensible and ascertainable in the light of the relevant context, and in particular in the light of the classification of the documents in question as "CONFIDENTIEL UE". In the second place, the Council explained that it had consulted the authorities concerned and had taken note of their opposition to any disclosure of their identity.

65 Despite the relative brevity of the statement of reasons for the first decision refusing access (two pages), the applicant was fully able to understand the reasons for the refusals given to him and the Court has been able to carry out its review. The Council therefore duly provided statements of reasons for those decisions.'

18 By a third plea in law, alleging infringement of the right of access to documents, the present appellant alleged a breach of the second paragraph of Article 1 EU, Articles 6(1) EU and 255 EC, as well as of Article 4(1)(a) and (6) and Article 9(3) of Regulation No 1049/2001.

19 Ruling on the first part of that third plea in law, according to which, at the time of the adoption of the first decision of refusal, the Council failed both to conduct a concrete examination of whether the disclosure of the information requested was likely to undermine the public interest and to balance its own interests against those of the then applicant, and disregarded the principle that exceptions to the right of access to documents must be strictly interpreted, the Court of First Instance held, inter alia, as follows in paragraphs 71 to 82 of the judgment under appeal:

'71 It must be pointed out, at the outset, that the Council was not obliged, under the exceptions provided for in Article 4(1)(a) of Regulation No 1049/2001, to take into account the applicant's particular interest in obtaining the documents requested (see paragraphs 52 and 54 above).

...

74 With regard, in the first place, to the protection of the public interest as regards public security, ...

...

77 ... it must be accepted that the effectiveness of the fight against terrorism presupposes that information held by the public authorities on persons or entities suspected of terrorism is kept secret so that that information remains relevant and enables effective action to be taken. Consequently, disclosure to the public of the document requested would necessarily have undermined the public interest in relation to public security. In that regard, the distinction put

forward by the applicant between strategic information and information concerning him personally cannot be accepted. Any personal information would necessarily reveal certain strategic aspects of the fight against terrorism, such as the sources of information, the nature of that information or the level of surveillance to which persons suspected of terrorism are subjected.

78 The Council did not, therefore, make a manifest error of assessment in refusing access to report 13 441/02 for reasons of public security.

79 With regard, in the second place, to the protection of the public interest as regards international relations, it is obvious, in the light of Decision 2002/848 and Regulation No 2580/2001, that its purpose, namely the fight against terrorism, falls within the scope of international action arising from United Nations Security Council resolution 1373 (2001) of 28 September 2001. As part of that global response, States are called upon to work together. The elements of that international cooperation are very probably, or even necessarily, to be found in the document requested. In any event, the applicant has not disputed the fact that third States were involved in the adoption of Decision 2002/848. On the contrary, he has requested that the identity of those States be disclosed to him. It follows that the document requested does fall within the scope of the exception relating to international relations.

80 That international cooperation concerning terrorism presupposes a confidence on the part of States in the confidential treatment accorded to information which they have passed on to the Council. In view of the nature of the document requested, the Council was therefore able to consider, rightly, that disclosure of that document could compromise the position of the European Union in international cooperation concerning the fight against terrorism.

81 In that regard, the applicant's argument — to the effect that the mere fact that third States are involved in the activities of the institutions cannot justify application of the exception in question — must be rejected for the reasons set out above. Contrary to what that argument assumes, the cooperation of third States falls within a particularly sensitive context, namely the fight against terrorism, which justifies keeping that cooperation secret. Moreover, read as a whole, the decision makes it clear that the States concerned even refused to allow their identity to be disclosed.

82 It follows that the Council did not make a manifest error of assessment in considering that disclosure of the document requested was likely to undermine the public interest as regards international relations.'

20 Ruling on the third part of the third plea in law, to the effect that a strict interpretation of the 'authorship rule' would require the Council to disclose the identity of the States which submitted documents relating to Decision 2002/848 as well as the exact nature of those documents in order to enable the then applicant to apply to their authors for access to those documents, the Court of First Instance ruled as follows in paragraphs 91 to 99 of the judgment under appeal:

'91 It should be noted at the outset that the applicant's argument is essentially based on old case-law relating to the Code of conduct of 6 December 1993 concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41; "the code of conduct") implemented by Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43) and by Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58).

92 Under the code of conduct, where the author of the document held by an institution was a third person, the application for access was to be sent direct to that person. The Court concluded from this that the institution was required to inform the person concerned of the identity of the author of the document so that he could contact that author directly ([Case C-41/00 P] *Interporc* v *Commission* [[2003] ECR I-2125], paragraph 49).

93 However, under Article 4(4) and (5) of Regulation No 1049/2001, it is for the institution in question itself to consult the third party who is the author unless the correct response, affirmative or negative, to the request for access is inherently obvious. In the case of the Member States, they may request that their agreement be provided.

94 The authorship rule, as referred to in the code of conduct, therefore underwent a fundamental change in Regulation No 1049/2001. As a result, the identity of the author assumes much less importance than under the previous rules.

95 In addition, for sensitive documents, Article 9(3) of Regulation No 1049/2001 provides that such documents "shall be recorded in the register or released only with the consent of the originator". It must therefore be held that sensitive documents are covered by a derogation the purpose of which is clearly to guarantee the secrecy of their content and even of their existence.

96 The Council was therefore not obliged to disclose the documents in question, of which States are the authors, relating to the adoption of Decision 2002/848, including the identity of those authors, in so far as, firstly, those documents are sensitive documents and, secondly, the States responsible for them have refused to agree to their disclosure.

97 It must be observed that the applicant disputes neither the legal basis put forward by the Council, namely Article 9(3) of Regulation No 1049/2001, which implies that the documents concerned are considered to be sensitive, nor the fact that the Council obtained an adverse opinion from the States responsible for the documents concerned.

98 For the sake of completeness, there is no doubt that the documents in question are sensitive documents. ... Moreover, in view of the presumption of legality attaching to any statement of an institution, it should be noted that the applicant has not adduced any evidence that the Council's statement — that it had received an adverse opinion from the States concerned — is erroneous.

99 Consequently, the Council was fully entitled to refuse to disclose the documents in question, including the identity of their authors.'

The appeal

21 On his appeal, in support of which he advances five grounds, the appellant claims that the Court should set aside the judgment under appeal and itself dispose of the proceedings by granting the forms of order sought at first instance for annulment of the decisions refusing access. The appellant also seeks an order that the Council pay the costs.

22 The Council claims that the Court should dismiss the appeal and order the appellant to pay the costs.

The appeal in so far as it relates to Cases T-150/03 and T-405/03

23 It should be recalled at the outset that, according to settled case-law, it follows from Article 225 EC, the first paragraph of Article 58 of the Statute of the Court of Justice and Article 112(1)(c) of the Court's Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (Case C-131/03 P *Reynolds Tobacco and Others* v *Commission* [2006] ECR I-7795, paragraph 49 and the case-law there cited).

24 In this case, although the appellant seeks, in his notice of appeal, to have the judgment under appeal set aside in so far as it disposes of Cases T-110/03, T-150/03 and T-405/03, the five grounds of appeal are directed exclusively against the reasons on which the Court of First Instance relied for the purpose of dismissing the application in Case T-110/03. Those grounds of appeal, in contrast, contain no criticism of the grounds on which the Court of First Instance relied in deciding to dismiss the applications in Cases T-150/03 and T-405/03.

25 In those circumstances, the appeal must be dismissed as inadmissible to the extent to which it seeks to have the judgment under appeal set aside in so far as it dismissed the applications in Cases T-150/03 and T-405/03.

The appeal in so far as it relates to Case T-110/03

The first ground of appeal, alleging breach of Articles 220 EC, 225 EC and 230 EC, as well as of the rights of the defence, the right to a fair hearing and the right to effective judicial protection

— The appellant's arguments

26 By the first part of the first ground of appeal, the appellant submits that, by ruling, in paragraphs 46 and 47 of the judgment under appeal, that the Council enjoys an unlimited discretion to refuse access to documents on the basis of the exceptions relating to the protection of the public interest provided for in Article 4(1)(a) of Regulation No 1049/2001 and that the Court's review of such discretion is limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers, the Court of First Instance unduly limited the scope of the full legal review incumbent upon it under Article 230 EC. Article 67(3) of the Rules of Procedure of the Court of First Instance also allows that Court to base its review on the content of documents to which access has been refused, which also confirms that the Court of First Instance is bound to carry out a full review of the legality of the institutions' decisions in respect of public access to their documents.

27 In the alternative, the appellant submits that such a full review of legality is justified at least in the light of the particular facts of this case, which differs in three respects from the case which gave rise to the judgment in *Hautala* v *Council*, to which paragraphs 46 and 47 of the judgment under appeal refer. First, the documents requested and the first decision refusing access fall entirely within the scope of the EC Treaty and not within that of the common foreign and security policy set out in Title V of the EU Treaty. Secondly, those documents are not for internal use, but are

intended to inform the legislative process, and should therefore be given wider access. Thirdly, the appellant has a legitimate interest in obtaining access to those documents, which concern him personally and have led to his inclusion on the list at issue.

28 By holding, in regard to that third point, in paragraph 52 of the judgment under appeal, that the particular interest which may be asserted by a requesting party in obtaining access to a document concerning him personally cannot be taken into account when applying the mandatory exceptions provided for by Article 4(1)(a) of Regulation No 1049/2001, the Court of First Instance made two errors of law.

29 First, it failed to carry out its review from the point of view of the general principle stated in Article 6(3)(a) of the ECHR, under which 'everyone, charged with a criminal offence has the ... [right] to be informed, promptly ... and in detail, of the nature and cause of the accusation against him', notwithstanding the fact that the appellant comes within the terms of such provision because of his inclusion on the list at issue. Second, by thus ignoring the appellant's particular interest, the Court of First Instance disregarded the rule that the decision relating to an application for access to the institutions' documents should be taken after an examination of the particular facts of each case.

30 By the second part of the first ground of appeal, the appellant maintains that, by failing to examine the legality of the first decision refusing access in the light of the principle set out in Article 6(3)(a) of the ECHR and to address his arguments on that point, the Court of First Instance infringed the rights of the defence and the general principle guaranteeing the right to a fair trial.

31 By the third part of the first ground of appeal, the appellant submits that, by limiting the scope of the review of legality and by failing to uphold the argument alleging failure to comply with the principle set out in Article 6(3)(a) of the ECHR, the Court of First Instance also infringed the right to an effective legal remedy which the appellant has under Article 13 of the ECHR.

— Findings of the Court

32 So far as the first part of the first ground of appeal is concerned, it is clear from the Court's case-law that the scope of the review of legality incumbent on the Community Courts under Article 230 EC can vary according to the matters under consideration.

33 With regard to judicial review of compliance with the principle of proportionality, the Court has thus held that the Community legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. It concluded from this that the legality of a measure adopted in those fields can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see, in particular, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 80 and the case-law there cited).

34 Contrary to the appellant's submission, the Court of First Instance, in line with that case-law, correctly held, in paragraph 46 of the judgment under appeal, as regards the scope of the judicial review of the legality of a decision of the Council refusing public access to a document on the basis of one of the exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation No 1049/2001, that the Council must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest. The Court of First Instance also correctly held, in paragraph 47 of the judgment under appeal, that the Community Court's review of the legality of such a decision must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers.

35 In the first place, it must be accepted that the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation.

36 Secondly, the criteria set out in Article 4(1)(a) of Regulation No 1049/2001 are very general, since access must be refused, as is clear from the wording of that provision, if disclosure of the document concerned would 'undermine' the protection of the 'public interest' as regards, inter alia, 'public security' or 'international relations'.

37 In that regard, it is clear from an examination of the preparatory documents which preceded the adoption of that regulation that various proposals intended to define more precisely the scope of the public-interest exceptions to which Article 4(1)(a) of that regulation refers, which would undoubtedly have enabled the opportunities for judicial review in regard to the institution's assessment to be correspondingly increased, were not accepted.

38 That is the case, in particular, with regard to the clarification contained in the Proposal of 27 June 2000 for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ 2000 C 177 E, p. 70), a clarification which was intended to restrict the scope of application of those exceptions to cases which could 'significantly undermine' the protection of those interests. That is also the case with regard to the 30th amendment to the abovementioned proposal, contained in the legislative proposal in the Report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs of the European Parliament (A5-0318/2000), where it was

suggested that Article 4 be amended in such a way that access would be refused where disclosure of a document could 'significantly' undermine public security or a 'vital interest' relating to the Union's international relations.

39 Thirdly, and as the Council correctly submits, Article 67(3) of the Rules of Procedure of the Court of First Instance does not cast doubt on the correctness of the principles stated in paragraphs 46 and 47 of the judgment under appeal. That provision, which features in Title II, Chapter 3, Section 2, of those Rules, dealing with measures of inquiry, merely provides in its third subparagraph that '[w]here a document to which access has been denied by a Community institution has been produced before the Court of First Instance in proceedings relating to the legality of that denial, that document shall not be communicated to the other parties'. Such a provision is intended, above all, to safeguard the effects of the decision, which has been adopted by an institution, not to disclose a document so long as the Court of First Instance has not decided on the substance of the case, since such non-disclosure is precisely the issue in the dispute submitted to that Court. On the other hand, that procedural provision, even though it shows that the Court may, where appropriate, be required to take cognisance of a document to which the public has been denied access, cannot have any relevance whatever for the purpose of defining the limits of the scope of the judicial review incumbent on the Community Courts under the EC Treaty.

40 As regards, fourth, the appellant's alternative argument based on the alleged particular facts of this case as set out in paragraph 27 of this judgment, these cannot have any influence on the scope of the judicial review which the Court of First Instance was required to undertake in this case.

41 So far as concerns, first, the appellant's assertion that the documents requested contributed in his case to the adoption of an act of a legislative nature, suffice it to observe that, even were it true, such an allegation cannot affect the question whether the disclosure of those documents could undermine the interests protected by Article 4(1)(a) of Regulation No 1049/2001 or, therefore, the question whether the access sought to such documents should be refused. It is appropriate, in particular,

to point out in that regard that, whilst providing that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States should be made directly accessible, Article 12(2) of that regulation adds, however, that this is so only subject to Articles 4 and 9 thereof.

42 With regard, secondly, to the argument that the appellant seeks to draw from the claim that the documents requested and the first decision refusing access fall entirely within the scope of the EC Treaty and not within that of the common foreign and security policy, suffice it to point out that that claim has not been substantiated in this case. As the Council has pointed out, Decision 2002/848, which included the appellant on the list at issue, is closely linked to Council Common Position 2002/847/CFSP of 28 October 2002 updating Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Council Common Position 2002/462/CFSP (OJ 2002 L 295, p. 1).

43 As regards, thirdly, the appellant's specific interest in gaining knowledge of the documents, disclosure of which was requested, it is to be noted, as the Court of First Instance correctly observed in paragraph 50 of the judgment under appeal, that the purpose of Regulation No 1049/2001 is to give the general public a right of access to documents of the institutions and not to lay down rules designed to protect the particular interest which a specific individual may have in gaining access to one of them.

44 That is clear from, in particular, Articles 2(1), 6(1) and 12(1) of that regulation, as well as from its title and from the 4th and 11th recitals in its preamble. The first of those provisions guarantees, without distinction, the right of access to any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, the second specifying in that regard that an applicant is not obliged to state reasons for the application. Article 12(1) provides that the institutions are as

far as possible to make documents 'directly' accessible to the public in electronic form or through a register. The title of Regulation No 1049/2001 and the 4th and 11th recitals in its preamble also emphasise that the purpose of the regulation is to make the institutions' documents accessible to the 'public'.

45 An analysis of the preparatory documents which led to the adoption of Regulation No 1049/2001 also reveals that consideration was paid to the possibility of extending the subject-matter of that regulation by providing for account to be taken of certain specific interests of which persons could avail themselves in order to obtain access to a particular document. Thus, inter alia, the 31st amendment contained in the legislative proposal in the Report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs of the European Parliament suggested the introduction of a new Article 4(2) in the Commission's Proposal mentioned in paragraph 38 of this judgment, according to which, '[w]hen considering the public interest in the disclosure of the document, the institution shall also take account of the interest raised by a petitioner, complainant or other beneficiary having a right, interest or obligation in a matter'. Similarly, the seventh amendment proposed in the Opinion given by the Committee on Petitions of the European Parliament in the same report sought the insertion of a paragraph in Article 1 of the Commission's Proposal to specify that '[a] petitioner, a complainant, and any other person, natural or legal, whose right, interest or obligation in a matter is concerned (a party) shall also have the right of access to a document which is not accessible to the public, but may influence the consideration of his/her case, as described in this Regulation and in implementing provisions adopted by the institutions'. In that regard, however, it must be stated that none of the suggestions thus formulated was incorporated in the provisions of Regulation No 1049/2001.

46 Moreover, it is clear from the wording of Article 4(1)(a) of Regulation No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests.

47 It follows from the foregoing that the Court of First Instance was correct to hold, in paragraph 52 of the judgment under appeal, that the particular interest of an applicant in obtaining access to documents cannot be taken into account by the institution called upon to rule on the question whether the disclosure to the public of those documents would undermine the interests protected by Article 4(1)(a) of Regulation No 1049/2001 and to refuse, if that is the case, the access requested.

48 Even assuming that the appellant has, as he maintains, a right to be informed in detail of the nature and cause of the accusation made against him, which led to his inclusion on the list at issue, and even if such right entailed access to documents held by the Council, it is thus sufficient to point out that such a right could not be exercised, as the Court of First Instance correctly held in paragraphs 52 to 55 of the judgment under appeal, by having recourse to the mechanisms for public access to documents implemented by Regulation No 1049/2001.

49 In light of all of the foregoing, the first part of the first ground of appeal must be held to be unfounded.

50 The same applies to the second part of the first ground of appeal, which alleges an infringement of the rights of the defence on the ground that the Court of First Instance did not address the appellant's argument that his right to be informed in detail of the nature and cause of the accusation against him had been infringed. In that regard, suffice it to note that, as will already be clear from what has been said in paragraph 48 of this judgment, that argument was indeed examined and rejected by the Court of First Instance in paragraphs 52 to 55 of the judgment under appeal.

51 By the third part of the first ground of appeal, the appellant alleges infringement of his right to an effective legal remedy against the interference with his right to be informed in detail of the nature and cause of the accusation made against him by reason of his inclusion on the list at issue.

52 In that regard, however, it is appropriate to point out that, as is clear from paragraph 48 of this judgment, such a right to be informed, assuming it to be established, cannot be exercised by having recourse to the mechanisms for access to documents provided for under Regulation No 1049/2001. It follows that no breach of such a right can result from a decision refusing access adopted under that regulation or, therefore, give rise to judicial censure, in favour of an application for annulment against such a decision. Accordingly, the third part of the first ground of appeal must be held to be unfounded.

53 It follows from all the foregoing that the first ground of appeal relied upon by the appellant in support of his appeal is unfounded in all of its three parts and must for that reason be rejected in its entirety.

The second ground of appeal, alleging infringement of the right of access to documents by reason of the misconstruction of the first and third indents of Article 4(1)(a) of Regulation No 1049/2001 and the misapplication of Article 4(6)

— The appellant's arguments

54 By the first part of the second ground of appeal, the appellant submits that the Court of First Instance misapplied the exception based on the protection of the public interest as regards public security, provided for in the first indent of Article 4(1)(a) of Regulation No 1049/2001, and therefore infringed his right of access to the documents.

55 The analysis by the Court of First Instance in paragraphs 77 to 81 of the judgment under appeal, according to which all information held by the public authorities on persons suspected of terrorism must by definition remain secret, disregards the requirement that exceptions to a rule must be strictly construed and renders the principle of transparency wholly inoperative.

56 By the second part of the second ground of appeal, the appellant argues that the Court of First Instance also misapplied the exception based on the protection of the public interest as regards international relations, provided for in the third indent of Article 4(1)(a) of Regulation No 1049/2001.

57 First, the Court of First Instance's interpretation in that connection in paragraph 79 of the judgment under appeal also disregards the requirement that any exception must be strictly construed.

58 Second, by starting from the false premiss that the documents in question originated in non-member countries, whereas they in fact emanated from Member States, the Court of First Instance, in paragraphs 80 and 81 of the judgment under appeal, misconstrued the meaning of 'international relations' by applying it in respect of information transmitted to the Council by Member States, whereas that concept covers only the relations between the Union and non-member countries.

59 Third, the Court of First Instance's finding that the non-disclosure of the documents requested is justified on the ground that cooperation between the Union and non-member countries must remain secret is mistaken inasmuch as the existence of such cooperation with the Republic of the Philippines was public knowledge.

60 By the third part of the second ground of appeal, the appellant submits that the Court of First Instance erred in law in holding that the Council was entitled to refuse to disclose the identity of the non-member countries which had submitted documents to that institution, whereas his application and the first decision refusing access obviously related to the identity of Member States. In so doing, the Court of First Instance misconstrued Article 4(6) of Regulation No 1049/2001 by failing to examine and to censure the refusal to allow the appellant partial access.

— Findings of the Court

61 As is clear from Article 1 of Regulation No 1049/2001, read, in particular, in the light of the fourth recital in the preamble, the purpose of the regulation is to give the fullest possible effect to the right of public access to documents held by the institutions.

62 However, it also follows from that regulation, particularly from the 11th recital in its preamble and from Article 4, which provides for a scheme of exceptions in that regard, that the right of access to documents is nonetheless subject to certain limitations based on grounds of public or private interest.

63 As they derogate from the principle of the widest possible public access to documents, such exceptions must, as the appellant has correctly observed, be interpreted and applied strictly (see, to that effect, *Netherlands and van der Wal* v *Commission*, paragraph 27).

64 In that regard, however, it must be pointed out that, as is already clear from paragraph 34 of this judgment, such a principle of strict construction does not, in respect of the public-interest exceptions provided for in Article 4(1)(a) of Regulation

No 1049/2001, preclude the Council from enjoying a wide discretion for the purpose of determining whether disclosure of a document to the public would undermine the interests protected by that provision. For the reasons stated by the Court in its examination of the first ground of appeal, the review by the Court of First Instance of the legality of a Council decision refusing access to a document on the basis of one of those exceptions is limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of assessment or a misuse of powers.

65 With the benefit of those preliminary considerations, it must be held, as regards the first part of the second ground of appeal, that, contrary to the appellant's submission and as the Council correctly contends, the Court of First Instance did not err in law in paragraphs 77 and 78 of the judgment under appeal.

66 Indeed, the Court of First Instance having found, in paragraph 77 of the judgment under appeal, that it could readily be accepted that documents held by the public authorities concerning persons or entities suspected of terrorism and coming within the category of sensitive documents as defined by Article 9 of Regulation No 1049/2001 must not be disclosed to the public in order not to prejudice the effectiveness of the operational fight against terrorism and thereby undermine the protection of public security, it could correctly conclude therefrom, in paragraph 78 of the judgment, that the Council did not make a manifest error of assessment in refusing access to the documents requested on the ground that their disclosure would undermine the public interest as regards public security.

67 With regard to the second part of the second ground of appeal, alleging misapplication of the exception relating to international relations provided for in the third indent of Article 4(1)(a) of Regulation No 1049/2001, it must, by contrast, be accepted at the outset, without the need to examine the other arguments relied on by the appellant in connection with that part of that ground of appeal, that, by basing its reasoning on the circumstance that documents had been submitted to the

Council by non-member countries, whereas it is clear from the case-file, as indeed the Council accepts, that such documents emanated from Member States, the judgment of the Court of First Instance is vitiated by a distortion of the facts.

68 It is also clear that such distortion in this instance vitiated, to a very great extent, the reasoning developed in paragraphs 79 to 81 of the judgment under appeal, following which the Court of First Instance concluded, in paragraph 82, that the Council had not made a manifest error of assessment in taking the view that disclosure of the document in respect of which disclosure was sought was likely to undermine the public interest as regards international relations.

69 It is settled case-law that such a distortion of the facts can be relied on as a ground of appeal and may lead to annulment of the judgment vitiated by it.

70 In the present case, however, it must be noted that, as is clear from paragraphs 65 and 66 of this judgment, the Court of First Instance correctly held that the first decision refusing access was validly based on the public-interest exception as regards public security under the first indent of Article 4(1)(a) of Regulation No 1049/2001.

71 It must therefore be held that, even if the Court of First Instance had not distorted the facts in the manner described in paragraph 67 of this judgment, and supposing that it would, in that case, have concluded that the Council had been wrong to base its decision on the public-interest exception as regards international relations, that conclusion could not have led to the annulment by the Court of First Instance of the first decision refusing access, as that decision in fact remains valid in the light of the public-interest exception relating to public security.

72 In view of the foregoing, the distortion of the facts which vitiates the judgment under appeal does not affect the operative part of that judgment, with the result that it need not be annulled on that ground (see, to that effect, Joined Cases C-442/03 P and C-471/03 P *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission* [2006] ECR I-4845, paragraphs 133 and 134).

73 By the third part of the second ground of appeal, the appellant also alleges distortion of the facts by the Court of First Instance in confusing non-member countries and Member States. He submits that, because of that confusion, the Court of First Instance failed to censure the refusal of partial access by the first decision refusing access in regard to the identity of the States which had sent documents to the Council.

74 In that regard, it is, however, sufficient to note that, contrary to the appellant's submission, that confusion had no effect on the reasoning which led the Court of First Instance to hold, in paragraph 99 of the judgment under appeal, that the Council was entitled to refuse to disclose the identity of the States which had drafted the documents in question.

75 As is clear from paragraphs 95 to 97 of the judgment under appeal, the Court of First Instance based its reasoning in that respect on the fact that, under Article 9(3) of Regulation No 1049/2001, the provision upon which the Council relied in the first decision refusing access, sensitive documents may be disclosed only with the consent of the originator, which was lacking in this case. As the Advocate General noted in points 58 and 59 of his Opinion, Article 9(3) applies equally to documents originating in Member States and in non-member countries.

76 It follows from all of the foregoing that the second ground of appeal relied upon by the appellant in support of his appeal is unfounded in all of its parts and must therefore be rejected in its entirety.

The third ground of appeal, alleging infringement of the duty to state reasons

— The appellant's arguments

77 The appellant first of all argues that, so far as concerns both of the exceptions relied upon by the Council to justify the refusal of access to the documents in question, the Court of First Instance was wrong to satisfy itself, as is evident from paragraphs 62 and 65 of the judgment under appeal, with the unduly brief and formulaic reasoning contained in that regard in the first decision refusing access, while at the same time supplementing it with its own reasoning in paragraphs 77, 80 and 81 of that judgment.

78 As regards, next, the refusal of partial access, the Court of First Instance also accepted as sufficient, contrary to Article 253 EC, a statement of reasons in a standard formula, as is clear from paragraph 63 of the judgment under appeal.

79 Finally, with regard to the refusal to disclose the identity of the States which communicated the information in question, the Court of First Instance's confusion between Member States and non-member countries meant that it completely failed to review the reasoning that disclosure of the identity of the States concerned would threaten the public interest as regards public security or international relations, such failure of review constituting a breach of both Article 253 EC and Article 230 EC.

— Findings of the Court

80 As is clear from settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and

unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, in particular, *Interporc* v *Commission*, paragraph 55 and the case-law there cited).

81 In the present case, the Court of First Instance correctly applied those principles and did not err in law in deciding that, brief though it may be, as regards both the total refusal of access and the refusal of partial access to the documents in respect of which disclosure was sought, the reasoning of the first decision refusing access was still adequate in the light of the context of the case and sufficient to enable the appellant to ascertain the reasons for the refusal and the Court of First Instance to carry out the review of legality incumbent upon it.

82 As the Court of First Instance correctly held in paragraphs 62 and 63 of the judgment under appeal, and as the Council contends before this Court, such brevity is justified, in particular, by the need not to undermine the sensitive interests protected by the exceptions to the right of access established by the first and third indents of Article 4(1)(a) of Regulation No 1049/2001 through disclosure of the very information which those exceptions are designed to protect.

83 The need for the institutions to abstain from referring to matters which would thus indirectly undermine the interests which those exceptions are specifically designed to protect is emphasised in particular by Articles 9(4) and 11(2) of Regulation No 1049/2001. The first of those provisions states that an institution which decides to refuse access to a sensitive document must give the reasons for its decision in a

manner which does not harm the interests protected in Article 4 of Regulation No 1049/2001. Article 11(2), for its part, provides in particular that, if a document is the subject of a reference in the register of an institution, such reference must be made in a manner which does not undermine the protection of the interests in Article 4.

84 The fact that, in the course of examining the substance of the dispute, the Court of First Instance took account of matters which do not appear explicitly in the statement of reasons for the first decision refusing access, including those set out in paragraphs 77, 80 and 81 of the judgment under appeal, cannot invalidate the foregoing analysis.

85 As regards the statement of reasons relied upon by the Council in the first decision refusing access in so far as it refuses to disclose the identity of the States which sent documents to the Council , it is appropriate to observe that the Court of First Instance's confusion between Member States and non-member countries did not affect the reasoning followed by that Court, in paragraphs 64 and 65 of the judgment under appeal, for the purpose of determining whether that statement of reasons meets the requirements of Article 253 EC and of deciding that there was no breach of that provision.

86 The Court of First Instance referred in that regard, in paragraph 64, to the fact that the statement of reasons for the first decision refusing access suggests, first, that the documents concerned are sensitive documents within the meaning of Article 9 of Regulation No 1049/2001 and, second, that the originators of those documents opposed, under Article 9(3), disclosure of the information requested. It is common ground, in that regard, that the identity of the authorities concerned and, in particular, the question whether they are authorities of Member States or non-member countries are irrelevant.

87 It follows from the foregoing that the third ground of appeal relied upon by the appellant is unfounded and must for that reason be rejected.

The fourth ground of appeal, alleging infringement of the presumption of innocence and of the right to an effective legal remedy

— The appellant's arguments

88 The appellant submits that the Court of First Instance arbitrarily limited the scope of his action and, by so doing, failed to apply the presumption of innocence.

89 Contrary to what the Court of First Instance suggests in paragraphs 50 to 56 of the judgment under appeal, the statement made by counsel for the appellant at the hearing, to the effect that the appellant was requesting access only to the documents concerning him, cannot in any way support the conclusion that his application for access sought to obtain disclosure of those documents only for the purposes of enabling him to assert his rights of defence in connection with pending Case T-47/03.

90 The appellant maintains that that application was intended to obtain, both for the public and for himself, access to the documents which justified his inclusion on the list at issue. Such access alone would provide an effective remedy for the infringement of the presumption of innocence of which he was the victim because of such inclusion on, and publication of, that list, by enabling a public reply and debate to be conducted both in general terms and as regards the evidence allegedly used against him.

91 By contrast, any access by the appellant to those documents in connection with Case T-47/03, to which the Court of First Instance refers in paragraph 55 of the judgment under appeal, would not afford him the effective legal remedy required by Article 13 of the ECHR for any person whose rights and liberties guaranteed by that convention have been infringed.

— Findings of the Court

92 The appellant's fourth ground of appeal consists essentially in alleging an infringement of the presumption of innocence by virtue of his inclusion on the list at issue, which was subsequently made public, and in asserting that such infringement can justify access to the documents sought, since disclosure of those documents and the potential public debate concerning them would be the only effective means of securing a remedy for that infringement.

93 It must be stated in that regard that, although presented as ostensibly intended to take issue with an error of assessment by the Court of First Instance in regard to the scope of the action, such a ground of appeal in fact amounts fundamentally to a challenge to the lawfulness of the first decision refusing access on the ground that it did not make public the documents in question and that, as a result, it deprived the appellant of the effective remedy to which he was entitled by reason of the fact that the presumption of innocence on which he must be able to rely had been infringed.

94 However, since it was not pleaded in support of the action for annulment of that decision brought before the Court of First Instance, such a ground of appeal constitutes a new plea in law which extends the subject-matter of the proceedings and cannot therefore be pleaded for the first time at the appeal stage.

95 To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal the jurisdiction of the Court of Justice is confined to review of the findings of law on

the pleas argued before the Court of First Instance (see, inter alia, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59; Case C-266/97 P *VBA* v *VGB and Others* [2000] ECR I-2135, paragraph 79; Joined Cases C-456/01 P and C-457/01 P *Henkel* v *OHIM* [2004] ECR I-5089, paragraph 50; and Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 114).

96 It follows that the appellant's fourth ground of appeal must be rejected as being inadmissible.

The fifth ground of appeal, alleging infringement of the right of access to documents on the ground of misconstruction of Articles 4(5) and 9(3) of Regulation No 1049/2001

— The appellant's arguments

97 By the first part of the fifth ground of appeal, the appellant submits that the Court of First Instance erred in law in holding, in paragraphs 64 and 96 of the judgment under appeal, that Articles 4(5) and 9(3) of Regulation No 1049/2001 allow a refusal to disclose, not only the content of documents emanating from Member States unless they consent, but also the identity of those Member States, although the latter information cannot be described as 'a document' within the meaning of those provisions. In so doing, the Court of First Instance improperly extended the scope of the exceptions set out in those provisions.

98 Furthermore, by thus preventing the identification of the Member State which holds the documents in question, the Court of First Instance's construction of those

provisions deprives of practical effect the right of the party concerned to address the national authorities in order to try to obtain access to those documents under national law or, at least, affects that right adversely and disproportionately by requiring those concerned to launch proceedings in all the Member States which might hold those documents.

99 By the second part of the fifth ground of appeal, the appellant maintains that the Court of First Instance did not address his argument that the Council failed to state the grounds upon which disclosure of the identity of the Member States concerned could damage the public interest relating to public security or international relations.

— Findings of the Court

100 As regards the first part of the fifth ground of appeal, it must be pointed out immediately that, as is clear from paragraphs 97 and 98 of the judgment under appeal, it was not disputed before the Court of First Instance, which took it as established, a finding not challenged in the appeal, first, that the documents covered by the first decision refusing access are sensitive documents within the terms of Article 9 of Regulation No 1049/2001 and, second, that the refusal to disclose the identity of the States in which those documents originated was based on Article 9(3), regard being had to the fact that the States concerned were opposed to the disclosure of such information.

101 In view of the special nature of sensitive documents, Article 9(3) of Regulation No 1049/2001 requires the consent of the originating authority before such documents are recorded in the register or released. As the Court of First Instance correctly held in paragraph 95 of the judgment under appeal, it is clear from those

provisions that the originating authority of a sensitive document is empowered to oppose disclosure not only of that document's content but even of its existence.

102 That originating authority is thus entitled to require secrecy as regards even the existence of a sensitive document and, in that regard, as the Council contends before the Court, the Court of First Instance acted correctly in law when it concluded, in paragraph 96 of the judgment under appeal, that such authority also has the power to prevent disclosure of its own identity in the event that the existence of that document should become known.

103 That conclusion, which is thus inevitable in the light of the wording of Article 9(3) of Regulation No 1049/2001, is explicable in the light of the special nature of the documents covered by Article 9(1), the highly sensitive content of which justifies, as stated in the ninth recital in the preamble to that regulation, the requirement that they be given special treatment. That conclusion cannot therefore be held to be disproportionate on the ground that it may give rise, for an applicant refused access to a sensitive document, to additional difficulty, or indeed practical impossibility, in identifying the State of origin of that document.

104 As the legal analysis and findings of fact thus made by the Court of First Instance in paragraphs 95 to 97 of the judgment under appeal are also sufficient in themselves to support the conclusion which that Court reached in paragraph 99 of that judgment, namely that the Council was entitled to refuse to disclose the identity of the States concerned, it is unnecessary to examine the complaint alleging misconstruction of Article 4(5) of Regulation No 1049/2001, since such an examination cannot, in any event, cast doubt on that conclusion or, therefore, on the operative part of the judgment under appeal.

105 As to the second part of the fifth ground of appeal, it must be held that, contrary to the appellant's submission, his argument that the Council wrongly failed to state the grounds upon which disclosure of the identity of the States concerned could have

harmed the public interest as regards public security and international relations was indeed considered by the Court of First Instance.

106 In that regard, it must be observed that, in paragraphs 64 and 65 of the judgment under appeal, the Court of First Instance held that, by citing Article 9(3) of Regulation No 1049/2001 in the first decision refusing access, which necessarily intimated that the documents in question were sensitive documents, and by referring to the opposition of the States concerned to having their identity disclosed, the Council had placed the appellant in a position to understand the grounds of that decision and enabled the Court of First Instance to carry out its review thereof.

107 In paragraph 64, the Court of First Instance expressly noted that the two criteria for the application of Article 9(3) of Regulation No 1049/2001 were, first, the fact that the document in question is a sensitive document and, second, the fact that the originating authority opposed disclosure of the information requested. By so doing, the Court of First Instance indicated, in an implicit but nonetheless certain manner, its view that such opposition was sufficient to justify the refusal by the Council of access to that information, without the Council having to carry out an assessment of the grounds for that opposition or, therefore, to state whether, and in what way, disclosure of that identity would undermine the interests protected by Article 4(1)(a) of that regulation.

108 As, therefore, neither of the two parts of the appellant's fifth ground of appeal is well founded, it must be rejected in its entirety.

109 It follows from all of the foregoing that one of the grounds of appeal must be declared inadmissible and the others unfounded and, accordingly, the appeal must be dismissed.

Costs

110 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has applied for costs and the appellant has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the appeal;

2. Orders Mr Sison to pay the costs.

[Signatures]