JUDGMENT OF THE GENERAL COURT (Second Chamber)

24 May 2011 *

In Case T-250/08,

Edward William Batchelor, residing in Brussels (Belgium), represented initially by F. Young, Solicitor, A. Barav, Barrister, and D. Reymond, lawyer, and subsequently by A. Barav, D. Reymond and F. Carlin, Barrister,

applicant,

supported by

Kingdom of Denmark, represented by B. Weis Fogh and S. Juul Jørgensen, acting as Agents,

intervener,

* Language of the case: English.

European Commission, represented initially by C. Docksey, C. O'Reilly and P. Costa de Oliveira, acting as Agents, and subsequently by C. O'Reilly and P. Costa de Oliveira,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented initially by S. Behzadi-Spencer, L. Seeboruth and I. Rao, acting as Agents, and subsequently by I. Rao, and G. Facenna and T. de la Mare, Barristers,

intervener,

APPLICATION for annulment of the decision of the Secretary General of the Commission of 16 May 2008, refusing access to certain documents exchanged in the course of the assessment of the compatibility with Community law of measures adopted by the United Kingdom of Great Britain and Northern Ireland on the basis of Article 3a of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), and for annulment of the implied decision refusing that access, deemed to have been taken on 9 April 2008,

THE GENERAL COURT (Second Chamber),

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

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 24 November 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, laid down in Article 255 EC, to the documents of those institutions.

2 Under Article 4(2) to (6) of Regulation No 1049/2001:

'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.

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.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, 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.'

3 Under Article 8 of Regulation No 1049/2001:

'1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. …

3. Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.'

4 Article 3a of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as inserted by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Directive [89/552] (OJ 1997 L 202, p. 60), provides:

'1. Each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due and effective time. In so doing the Member State concerned shall also determine whether these events should be available via whole or partial live coverage, or where necessary

or appropriate for objective reasons in the public interest, whole or partial deferred coverage.

2. Member States shall immediately notify to the Commission any measures taken or to be taken pursuant to paragraph 1. Within a period of three months from the notification, the Commission shall verify that such measures are compatible with Community law and communicate them to the other Member States. It shall seek the opinion of the Committee established pursuant to Article 23a. It shall forthwith publish the measures taken in the *Official Journal of the European Communities* and at least once a year the consolidated list of the measures taken by Member States.

3. Member States shall ensure, by appropriate means, within the framework of their legislation that broadcasters under their jurisdiction do not exercise the exclusive rights purchased by those broadcasters following the date of publication of this Directive in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following events which are designated by that other Member State in accordance with the preceding paragraphs via whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage on free television as determined by that other Member State in accordance with paragraph 1.'

Background to the dispute

5 By letter of 20 December 2005, Infront WM AG, a company governed by Swiss law which is engaged in the acquisition, management and marketing of television broadcasting rights for sporting events, lodged a complaint with the Commission

of the European Communities concerning measures adopted by the United Kingdom of Great Britain and Northern Ireland under Article 3a of Directive 89/552 ('the complaint').

6 By letter of 18 December 2006, the applicant — Mr Edward William Batchelor — contacted the Commission, in his capacity as legal counsel for Infront WM, and submitted observations concerning a letter which the Commission had sent to Infront WM on 27 September 2006 in the course of the examination of the complaint. In addition, the Commission was requested, in the letter of 18 December 2006, to communicate all documents relating to the correspondence between the United Kingdom authorities and the Commission since the submission of the complaint, together with all the statistics and data contained in the documents communicated by the United Kingdom in that connection.

7 By letter of 16 January 2007, the Director of the Audiovisual, Media and Internet Directorate of Directorate General Information Society and Media ('DG INFSO') replied that he understood the request for access to documents made in the letter of 18 December 2006 as referring to a letter from the Commission of 2 August 2006 and two letters from the United Kingdom authorities dated 5 September and 15 November 2006 respectively. However, according to the Director, those documents were covered by the exception provided for in the third indent of Article 4(2) of Regulation No 1049/2001, relating to the protection of the purpose of inspections and investigations, since the examination of the complaint by the Commission could give rise to an action for failure to fulfil obligations.

8 On 16 October 2007, the Commission adopted Decision 2007/730/EC on the compatibility with Community law of measures taken by the United Kingdom pursuant to Article 3a(1) of Directive [89/552] (OJ 2007 L 295, p. 12). By Article 1 of Decision 2007/730, the Commission declared the measures taken by the United Kingdom pursuant to Article 3a(1) of Directive 89/552 to be compatible with Community law.

9 By letter of 7 February 2008, the Director-General of DG INFSO informed Mr Batchelor of the adoption of Decision 2007/730 and the position of his Directorate, according to which, following that decision and account being taken of the reasons set out in the Commission's letter of 27 September 2006, the complaint did not demonstrate an infringement of Community law by the United Kingdom.

10 By letter of 21 December 2007, Mr Batchelor asked the Commission to reconsider the position set out in the letter of 16 January 2007 (see paragraph 7 above), taking account of the closure of the investigation concerning the compatibility with Community law of the measures adopted by the United Kingdom. Furthermore, Mr Batchelor also asked the Commission, in particular, to identify and disclose any documents submitted by the United Kingdom after 16 January 2007 and to disclose any non-confidential information contained in correspondence concerning the content of the list of events adopted by the United Kingdom on the basis of Article 3a of Directive 89/552.

11 By letter of 7 February 2008, the Director of the Audiovisual, Media and Internet Directorate of DG INFSO informed Mr Batchelor that the documents to which he had requested access could not be disclosed to him, on the ground that they were covered by the exception, provided for in the second indent of Article 4(2) of Regulation No 1049/2001, relating to the protection of court proceedings and legal advice because Case C-125/06 P *Commission* v *Infront WM*, between the Commission and Infront WM concerning the United Kingdom measures, was still pending before the Court of Justice.

12 By letter of 21 February 2008, Mr Batchelor lodged a confirmatory application, within the meaning of Article 7(2) of Regulation No 1049/2001, with the Secretary General of the Commission. By letter of 14 March 2008, the Commission informed Mr Batchelor, pursuant to Article 8(2) of Regulation No 1049/2001, that the time-limit prescribed in Article 8(1) thereof had been extended by 15 working days.

13 By letter of 16 May 2008 ('the express decision'), the Secretary General of the Commission gave his decision on Mr Batchelor's confirmatory application. The Secretary General explained, first, that three documents were covered by Mr Batchelor's request: (i) a letter from the Director General of DG INFSO to the United Kingdom Permanent Representative of 2 August 2006; (ii) a letter from the United Kingdom authorities to the Commission of 5 September 2006; and (iii) a letter from the United Kingdom Permanent Representative to the Commission of 19 February 2007 containing five annexes.

14 As regards the letters of 5 September 2006 and 19 February 2007, the Commission stated that it had consulted the United Kingdom authorities, which relied on Article 4(5) of Regulation No 1049/2001 for their objection to the disclosure of those letters based on the exception provided for in the second subparagraph of Article 4(3) of that regulation. Specifically, the United Kingdom authorities argued that those documents contain the views which the United Kingdom had expressed — in confidence — on the questions raised in the complaint. The disclosure of such views would seriously undermine the dialogue between the Commission and the Member States with respect to the examination of the substance of a complaint, which would in turn undermine the Commission's decision-making process. Furthermore, the annexes to the letter of 19 February 2007 contain confidential information concerning the commercial interests of broadcasters and other holders of television broadcasting rights for a number of sporting activities. Accordingly, those annexes are covered by the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001.

15 The Commission stated in the express decision that, given the reasoned opposition of the United Kingdom authorities to disclosure of the letters at issue, it was obliged — as is clear from Case C-64/05 P *Sweden* v *Commission* [2007] ECR I-11389 — to refuse the access requested by Mr Batchelor.

16 As regards the letter of 2 August 2006, the Commission stated that its disclosure would seriously undermine the protection of the purpose of investigations, an exception provided for in the third indent of Article 4(2) of Regulation No 1049/2001, since the Commission would risk being confronted with an unwillingness to cooperate on the part of the Member States as regards the assessment of the compatibility of the measures notified under Article 3a of Directive 89/552. According to the Commission, the confidentiality of that document must be maintained until the General Court gives a ruling on the actions brought by the Fédération Internationale de Football Association (FIFA) and the Union des associations européennes de football (UEFA) in Cases T-68/08 and T-55/08, respectively, contesting Decision No 2007/730.

17 The Commission also refused to grant partial access to the letter of 2 August 2006 on the ground that that letter is covered in its entirety by the exception under the third indent of Article 4(2) of Regulation No 1049/2001. Lastly, the Commission found that there was no evidence to indicate the existence of an overriding public interest in the disclosure of the documents to which Mr Batchelor had requested access.

Procedure and forms of order sought

18 By application lodged at the Court Registry on 18 June 2008, Mr Batchelor brought the present action.

19 By document lodged at the Court Registry on 30 September 2008, the United Kingdom applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission. By document lodged at the Court Registry on 2 October 2008, the Kingdom of Denmark applied for leave to intervene in the present proceedings in support of the form of order sought by Mr Batchelor. By order of 2 December 2008, the President of the Seventh Chamber of the General Court

granted those parties leave to intervene. The United Kingdom lodged its statement in intervention, and the other parties lodged their observations on that statement, within the prescribed time-limits.

20 By order of 4 August 2010, on the basis of Articles 65(b) and 66(1) and the third subparagraph of Article 67(3) of the General Court's Rules of Procedure, the President of the Seventh Chamber of the General Court ordered the Commission, to produce copies of all of the documents to which it had refused access.

21 By letter of 6 September 2010, the Commission complied with that measure of inquiry.

22 Since the composition of the Chambers of the Court has been altered, the Judge-Rapporteur has been assigned to the Second Chamber, to which the present case has accordingly been allocated.

23 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure and, in the context of the measures of organisation of the procedure, put a question in writing to the Commission, to which it replied by letter of 29 October 2010.

24 At the hearing on 24 November 2010, the parties presented oral argument and replied to questions put by the Court.

25 Mr Batchelor claims that the Court should:

— annul the implied decision of refusal of 9 April 2008 and the express decision;

— order the Commission and the United Kingdom to pay the costs.

26 The Commission contends that the Court should:

— dismiss the action against the implied negative decision as inadmissible;

— dismiss the action against the express decision as unfounded;

— order Mr Batchelor to pay the costs.

27 The United Kingdom contends that the Court should:

— dismiss the action against the implied negative decision as inadmissible;

— dismiss the action against the express decision as unfounded.

Law

28 Mr Batchelor puts forward two pleas in law: (i) breach of the duty to state reasons for a decision and (ii) infringement of Article 255 EC, read in conjunction with Articles 1, 2 and 4 of Regulation No 1049/2001.

1. *Admissibility of the action contesting the implied decision*

Arguments of the parties

29 The Commission, supported by the United Kingdom, contends that Mr Batchelor has no interest in bringing an action contesting the implied decision which was deemed, in accordance with Article 8(3) of Regulation No 1049/2001, to have been taken on 9 April 2008 ('the implied decision'). Given that the express decision was adopted before the action was brought, annulment of the implied decision would not give Mr Batchelor any more of an advantage than he would have if the express decision were to be annulled.

30 Mr Batchelor submits that the Commission's position would lead to an absurd situation, in which the adoption of an express decision after the expiry of the time-limit prescribed in Article 8(1) of Regulation No 1049/2001 would make it impossible for the Court to review an implied negative decision, which is by definition an act without a statement of reasons.

Findings of the Court

31 It follows from the case-law that, where an express decision of refusal is adopted after the period prescribed in Article 8(3) of Regulation No 1049/2001, the applicant no longer has an interest in bringing proceedings against an implied decision deemed to have been adopted on account of the expiry of that period (see, to that effect, Joined Cases T-355/04 and T-446/04 *Co-Frutta* v *Commission* [2010] ECR II-1, paragraph 45, and order of 17 June 2010 in Case T-359/09 *Jurašinović* v *Council*, not published in the ECR, paragraph 40).). The legal consequences attaching to the expiry of that period, as regards access to the documents concerned, become obsolete as soon as an express decision is adopted.

32 The interest relied on by Mr Batchelor at the hearing, consisting in the possibility of bringing a subsequent action for compensation on the basis that the time-limit concerned was exceeded, does not call into question the assessment in paragraph 31 above. The prior annulment of the implied decision is not a condition for bringing such an action.

33 It follows that the action must be dismissed as inadmissible in so far as it is directed against the implied decision.

2. *The action contesting the express decision*

The first plea: breach of the duty to state reasons

Arguments of the parties

34 As regards the express decision, Mr Batchelor first of all states that he is in no position to ascertain whether, in addition to the documents identified by the Commission, there are others which are relevant to his request. Next, Mr Batchelor submits that the reasoned opposition of a Member State, on the basis of Article 4(5) of Regulation No 1049/2001, to the disclosure of a document does not release the Commission from its obligation to carry out a comprehensive review of the validity of the reasons relied on by that Member State and to set out its own reasoning in that regard in accordance with Article 253 EC and Article 8(1) of Regulation No 1049/2001. That approach is confirmed by several paragraphs in *Sweden* v *Commission*, paragraph 15 above, the Opinion of Advocate General Poiares Maduro in that case ([2007] ECR I-11394), and the Commission's proposal concerning the amendment of Regulation No 1049/2001, which refers to the interpretation of Article 4(5) of that regulation in the version in force.

35 Furthermore, to require the Commission to act in accordance with a reasoned refusal on the part of the Member State consulted would be to disregard the wording of Article 4(5) of Regulation No 1049/2001, which refers to a 'request' by the Member State concerned, and would amount to reintroducing the 'authorship rule' abolished by Regulation No 1049/2001.

36 The incoherence of the argument put forward by the Commission is also clear from the fact that it led the Commission to refuse access even to documents in the public

domain, such as the list of 2006 World Cup football matches, and the list of those matches in the 1994, 1998 and 2002 World Cups which were not broadcast live on free-to-air television, and from the fact that the Commission refused access to a document in respect of which the United Kingdom authorities had accepted disclosure.

37 As it is, apart from a slavish acceptance of the United Kingdom's assessment, the express decision does not contain any reasoning on the basis of which the Commission concluded that the reasons put forward by that Member State were valid or that there was no overriding public interest in disclosure of the documents concerned. The situation mentioned in paragraph 36 above also shows that the Commission did not examine the validity of the reasons put forward by the United Kingdom. Furthermore, the express decision does not contain the reasons for refusal relied on in that regard by the United Kingdom in its statement in intervention.

38 Lastly, the express decision does not contain any assessment by the Commission as to the possibility of granting partial access to the documents requested.

39 Accordingly, Mr Batchelor submits, by relying exclusively on the reasoned refusal of the United Kingdom authorities concerning his request for access to the documents and by failing to consider the possibility of granting partial access to the documents covered by that request, the Commission acted in breach of its duty to state reasons for its decision.

40 As regards the Commission's letter of 2 August 2006, Mr Batchelor claims that the assertion that its disclosure would prevent the United Kingdom from cooperating and from providing the information necessary for the purposes of the Commission's assessment of the compatibility of the national measures with Community law is merely hypothetical and unsupported by any evidence. Accordingly, it constitutes an insufficient statement of reasons.

41 The Commission and the United Kingdom dispute the merits of those arguments.

Findings of the Court

42 It is settled law that the statement of reasons required under Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review. The requirement to state reasons must be evaluated according to 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 the wording of the measure, but also to its context and to all the legal rules governing the matter in question (Case C-265/97 P *VBA* v *Florimex and Others* [2000] ECR I-2061, paragraph 93).

43 First of all, as regards Mr Batchelor's assertion that he is not in a position to ascertain whether other documents relevant to his application exist which are not identified in the express decision, it must be stated that the Commission clearly identified in that decision the documents covered by Mr Batchelor's request. In that respect, therefore, the express decision is reasoned to the requisite legal standard.

44 Next, it must be found that, as regards the documents originating from the United Kingdom authorities, the extent of the Commission's duty to state reasons depends on the definition of the legal consequences attaching to a Member State's objection, on the basis of Article 4(5) of Regulation No 1049/2001, to the disclosure of a document.

45 In that connection, it should be observed that to interpret Article 4(5) of Regulation No 1049/2001 as conferring on the Member State a general and unconditional right of veto, so that it can oppose, in an entirely discretionary manner and without having to give reasons for its decision, the disclosure of any document held by a Community institution, simply because it originates from that Member State, is not compatible with the objective of improving transparency in the decision-making process in the European Union. If such an interpretation were to be applied, an especially important class of documents which could form the basis of the Community decision-making process and cast light on it would be removed from the scope of Regulation No 1049/2001. As a consequence, the right of public access would be frustrated, to that extent, without any objective reason (see, to that effect, *Sweden* v *Commission*, paragraph 15 above, paragraphs 58 to 60, 62 and 64).

46 Thus, the Member State concerned is obliged to state reasons for any objection it may have, by reference to the exceptions listed in Article 4(1) to (3) of Regulation No 1049/2001. Where a Member State fulfils that obligation, the institution concerned must refuse the request for access, but must discharge its own obligation to state reasons, by explaining in its decision the reasons relied on by that Member State to show that one of the exceptions provided for under Article 4(1) to (3) of Regulation No 1049/2001 applies (see, to that effect, *Sweden* v *Commission*, paragraph 15 above, paragraphs 87, 89 and 90).

47 It follows from those considerations — which are intended to safeguard the objective of Regulation No 1049/2001 while attempting to attribute to Article 4(5) thereof a legislative content which is separate and distinct from that of Article 4(4) — that, after

stating that the objection entered by a Member State sets out the reasons for which, in the view of that State, the documents concerned are covered by an exception to the right of access, the Commission need not set out its own assessment of the merits of that reasoning.

48 In the present case, as regards the documents originating from the United Kingdom, the Commission set out, in Section 2 of the express decision, the reasons relied on by that Member State and stated that those reasons are formulated by reference to the exceptions listed in the first indent of Article 4(2) and the second subparagraph of Article 4(3) of Regulation No 1049/2001. The Commission has therefore fulfilled its obligation under Article 253 EC and Article 8(1) of Regulation No 1049/2001 to state reasons.

49 Lastly, as regards the Commission's letter of 2 August 2006, it should be noted that the duty to provide a statement of reasons is an essential procedural requirement, as distinct from the question whether the reasons given are sound, which goes to the substantive legality of the contested measure (see Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049, paragraph 94).

50 It must be found that the arguments relied on by Mr Batchelor in that regard in order to demonstrate the lack of reasoning in the express decision, or the insufficiency of the reasons stated, in fact concern the merits of those reasons, which will be examined in the context of the second plea. Moreover, it should be observed that Section 3.1 of the express decision states the reasons why the Commission took the view that disclosure of the letter at issue would undermine the purpose of the investigation and accordingly fell to be refused, pursuant to the third indent of Article 4(2) of Regulation No 1049/2001.

51 The first plea must therefore be rejected.

The second plea: infringement of Article 255 EC, read in conjunction with Articles 1, 2 and 4 of Regulation No 1049/2001

The documents from the United Kingdom

— Arguments of the parties

52 Mr Batchelor claims that, according to the case-law, all exceptions to the right of access to documents must be interpreted restrictively, as the principle of access must be protected.

53 As regards the exception based on the second subparagraph of Article 4(3) of Regulation No 1049/2001 (see paragraph 14 above), Mr Batchelor observes that, in the present case, a Member State has relied on a provision intended to protect the Commission's decision-making process in future cases. By the time both the implied and express decisions were adopted, the Commission had already adopted Decision 2007/730 and closed the complaint file (see paragraphs 8 and 9 above). By its very essence, which is exclusively linked to the decision-making procedure of the institutions, that exception may be relied on only by the institutions. In that connection, the fact that the United Kingdom authorities had not sent the documents identified in the express decision in order for them to be made public is irrelevant, as is the argument that those documents had also been examined in the context of the complaint.

54 Furthermore, the consideration that disclosure of the documents at issue would affect the willingness of the Member States to cooperate with the Commission relates

to a situation which is not reasonably foreseeable, but purely hypothetical. Moreover, the Member States are required to cooperate with the Commission pursuant to Article 10 EC and cannot disregard that obligation on the ground that the Commission has allowed access to a document in accordance with Regulation No 1049/2001. In that connection, Mr Batchelor recalls the position adopted by the Commission itself as regards the assessment of measures falling within the scope of Article 3a of Directive 89/552, according to which the Commission will carry out the assessment in question only if sufficient information is provided by the Member State as to the importance of each event for society and the procedures followed for the choice of the events concerned. A failure on the part of the Member State to cooperate in the context of the procedure established by Article 3a(2) of Directive 89/552 is therefore inconceivable.

55 Mr Batchelor points out that, under Article 3a(1) of Directive 89/552, Member States have an obligation to compile a list of events of major importance to society in a clear and transparent manner, which means that, even after a decision has been taken on the compatibility of the list with Community law, disclosure of the documents relating to that list which have been submitted to the Commission cannot be refused on the ground that the Member State would withhold its future cooperation. Even though the Commission received the documents originating from the United Kingdom authorities in response to a request for information which it had sent to them in connection with the complaint, Decision 2007/730 was based on that information.

56 In that context, Mr Batchelor submits that, according to the Commission itself, the information provided by the United Kingdom in the context of the examination of the complaint was relevant for the purposes of assessing the compatibility of the United Kingdom measures with Community law and that, according to the letter of 7 February 2008 (see paragraph 9 above), the adoption of Decision 2007/730 led to no further action being taken with respect to the complaint. Thus, in the express decision, the Commission identified the documents at issue as falling within the scope of Mr Batchelor's confirmatory request, which concerned the documents relating to the assessment of the measures notified by the United Kingdom pursuant to Article 3a(2) of Directive 89/552. It follows that the assessment of the compatibility of

those measures coincided with the examination of the complaint and that the Commission's arguments — set out for the first time in the defence — alleging a distinction between the two procedures, must be dismissed. Mr Batchelor points out in that regard that, according to the express decision, the letter of 19 February 2007 offered the views of the United Kingdom authorities on the Commission's approach to certain questions relating to Article 3a of Directive 89/552.

57 Furthermore, the argument relating to the possibility of reopening the assessment procedure with respect to the measures notified by the United Kingdom following annulment of Decision 2007/730 by the General Court cannot be accepted, because it would justify the non-disclosure of all documents communicated to the Commission during an investigation.

58 Accordingly, by relying on the exception provided for in the second subparagraph of Article 4(3) of Regulation No 1049/2001 in order to refuse access to the documents from the United Kingdom, the Commission erred in law.

59 Furthermore, Mr Batchelor states that, by failing to consider the possibility of granting partial access to the documents requested, the Commission infringed Article 4(6) of Regulation No 1049/2001. Moreover, the express decision does not indicate whether the Commission had invited the United Kingdom to state reasons for its position on the possibility of partial access or whether such reasons were in fact provided.

60 For its part, the Commission contends, first of all, that in the context of the application of Article 4(5) of Regulation No 1049/2001, its power is limited to checking that the objections made by the Member State are based on Article 4(1) to (3) of Regulation No 1049/2001 and that they do not manifestly fall outside the scope of

the exceptions under those provisions. Concomitantly, the review exercised by the Courts of the European Union of the legality of the Commission's assessment should be limited to verifying that the Commission has in fact carried out that examination.

61 Next, as regards the exception based on the second subparagraph of Article 4(3) of Regulation No 1049/2001 (see paragraph 14 above), the Commission states that the documents provided by the United Kingdom were provided in the context of the examination of the complaint and contain the views of the United Kingdom authorities submitted in the course of preliminary consultations with the Commission. Supported by the United Kingdom, the Commission maintains that, contrary to the assertions made by Mr Batchelor, a Member State participating in the decision-making process leading to the adoption of an act of an institution is entitled to rely on the exception provided for in the second subparagraph of Article 4(3) of Regulation No 1049/2001, which is intended to protect the 'time to reflect' inherent in that process. In the present case, the risk of undermining that process — which involves verification of a similar kind, both under Article 3a of Directive 89/552 and in infringement proceedings — is reasonably foreseeable despite the closure of the investigation concerned, since the lawfulness of Decision 2007/730 is challenged before the General Court in Cases T-55/08 *UEFA* v *Commission* and T-68/08 *FIFA* v *Commission*. Those documents, which the Commission had used both for the purposes of its examination under Article 3a of Directive 89/552 and in connection with the complaint, would be of key importance in the reopening of the procedure for investigating the compatibility with Community law of the measures adopted by the United Kingdom, if Decision 2007/730 were to be annulled on substantive grounds. The United Kingdom authorities would once again have to be able to cooperate in full confidence with the Commission until the case was finally closed, failing which the Commission's decision-making process would be seriously undermined. In those circumstances, the reasoning followed by the United Kingdom is not manifestly inappropriate.

62 The Commission adds that the obligation to cooperate laid down in Article 10 EC does not preclude the Member States from requesting that certain information be

kept confidential. Moreover, the Member States' obligation to cooperate in the context of Article 3a(2) of Directive 89/552 is irrelevant in the present case, since the documents concerned were produced in the course of the examination of a complaint and do not form part of the notification made by the United Kingdom under that provision.

63 The United Kingdom states that, even though some information contained in Annexes (iv) to (vi) to the letter of 19 February 2007 is not confidential, the manner of its presentation reveals certain information which cannot be disclosed without undermining the mutual confidence which must govern communications between the Commission and a Member State in the circumstances of the present case.

— Findings of the Court

64 It should be made immediately clear that, in view of the explanations provided by the Commission in its defence and its letter of 29 October 2010, according to which it no longer opposed disclosure of the first two annexes to the letter from the United Kingdom's Permanent Representative, with the exception of certain information in respect of which the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001 was invoked (see paragraph 14 above), Mr Batchelor stated at the hearing that he no longer challenged the assessment made in the express decision in relation to that information.

65 Thus, as regards the documents originating from the United Kingdom, Mr Batchelor raises, in essence, a plea alleging infringement of the second subparagraph of Article 4(3) of Regulation No 1049/2001.

66 In that connection, the position defended by the Commission and the United Kingdom as to the extent of review by the Courts in cases where Article 4(5) of Regulation No 1049/2001 applies (see paragraph 60 above) must be rejected from the outset.

67 Where a Member State relies on Article 4(5) of Regulation No 1049/2001 and pleads grounds for refusal listed in Article 4(1) to (3) thereof, it is within the jurisdiction of the Courts of the European Union to verify, where a person to whom the institution has refused to grant access so requests, that that refusal was validly based on those exceptions, despite the fact that the refusal results from the assessment of those exceptions made, not by the institution itself, but by the Member State concerned. In addition, it should be pointed out that, from the point of view of the person concerned, the intervention of the Member State does not detract from the Community nature of the decision that is subsequently addressed to him by the institution in response to the request he has made for access to a document in its possession (see, to that effect, *Sweden* v *Commission*, paragraph 15 above, paragraph 94).

68 Furthermore, in view of the objectives pursued by Regulation No 1049/2001, the exceptions, listed in Article 4 thereof, to the public's right of access to documents of the institutions must be interpreted and applied strictly (see, to that effect, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraph 36).

69 As regards the interpretation of the second subparagraph of Article 4(3) of Regulation No 1049/2001, it should be observed that that provision is intended to protect certain types of documents drawn up in the course of a procedure, the disclosure of which, even after that procedure has terminated, may undermine the decision-making process of the institution concerned.

70 Those documents must contain 'opinions for internal use as part of deliberations and preliminary consultations within the institution concerned'.

71 According to Section 2 of the express decision, the documents originating from the United Kingdom satisfy that definition, since they contain the 'opinions' of the United Kingdom authorities 'for internal use' of the Commission 'as part of preliminary consultations between the Commission and those authorities'.

72 Furthermore, in response to a question put by the Court at the hearing, the Commission explained that, in its view, the second subparagraph of Article 4(3) of Regulation No 1049/2001 also covers documents originating from bodies external to the institution concerned since, even though they are intended to provide information, they express — albeit by implication — the opinion of their author as to the accuracy or relevance of the information concerned.

73 However, the terms in which the second subparagraph of Article 4(3) of Regulation No 1049/2001 is framed cannot be so broadly construed. First, to hold that a document is intended for internal use by an institution simply because that institution is the addressee would render that condition meaningless, because it would be satisfied by any document received by an institution. Secondly, the interpretation underpinning the position set out in the express decision fails to have regard for the fact that deliberations or preliminary consultations must, according to that provision, take place 'within the institution'. As it is, reference is made in the express decision to consultations between the Commission and the United Kingdom authorities, which accordingly did not take place 'within the institution'.

74 Far from being the outcome of mere grammatical construction, those findings are consistent with the principle set out in paragraph 68 above, which the position defended in the express decision and expanded upon by the Commission at the hearing fails to take into account. Furthermore, those findings preserve the effectiveness of the first subparagraph of Article 4(3) of Regulation No 1049/2001 and, consequently, the logic dictating the need for two separate subparagraphs in that provision, the first

concerning the period up to the completion of the decision-making process and the second covering also the period after such completion.

75 First of all, if the second subparagraph of Article 4(3) of Regulation No 1049/2001 were construed as covering every document sent to an institution by an external sender which contains an 'opinion' in the broadest sense of that word and which could give rise to a reply, on the view that those factors combine to make up a 'consultation' for the purposes of that provision, the effect would be that the second subparagraph of Article 4(3) would cover as wide a category of 'documents' as the first subparagraph. Next, given that those categories of documents would be protected in identical conditions — if, that is to say, their disclosure would seriously undermine the decision-making process — the first subparagraph would become redundant, since the second covers the period both before and after the completion of that process.

76 The documents sent to an institution by an external person or body, in order to be the subject of an exchange of views with the institution concerned, do not therefore fall within the scope of the second subparagraph of Article 4(3) of Regulation No 1049/2001. It follows that the United Kingdom could not validly base its arguments on that provision in order to request the Commission to refuse to give access to the letters concerned. It should be added that the fact that, in *Sweden* v *Commission*, paragraph 15 above, the Court acknowledged that a Member State may rely on the exceptions provided for in Article 4(3) of Regulation No 1049/2001 does not in any way call that finding into question: the reference to Article 4(3) made by the Court of Justice in that judgment can be explained by the existence of the first subparagraph of that provision, which also covers documents received by an institution.

77 In any event, it must be held that the condition relating to the risk that the decision-making process of the institution would be seriously undermined is not satisfied in the present case.

78 In that regard, it should be borne in mind that the examination required for the purposes of processing a request for access to documents must be specific in nature. On the one hand, the mere fact that a document concerns an interest protected by an exception is not sufficient to justify application of that exception. Such application may, as a rule, be justified only if the institution has previously assessed whether access to the document would specifically and effectively undermine the protected interest. On the other hand, the risk of a protected interest being undermined must, if it is to be relied upon, be reasonably foreseeable and not purely hypothetical (see judgment of 11 March 2009 in Case T-166/05 *Borax Europe* v *Commission*, not published in the ECR, paragraph 88 and the case-law cited).

79 It should also be recalled that the documents in question were provided by the United Kingdom in response to a letter from the Commission of 2 August 2006, which was sent to the United Kingdom authorities following the submission of the complaint. As emerges from the fourth paragraph of Section 2 of the express decision, the United Kingdom takes the view that the disclosure of those letters would seriously undermine its cooperation in good faith with the Commission in the examination of a complaint concerning an alleged infringement of Community law, as it would be prevented from responding frankly to the Commission's requests. That would jeopardise the Commission's decision-making process in the case of alleged infringements of Community law.

80 That argument cannot be accepted. To acknowledge a declaration, by which a Member State manifests its unwillingness to cooperate with the institution if the latter allows access to a document, as evidence that the decision-making process would be seriously undermined for the purposes of the second subparagraph of Article 4(3) of Regulation No 1049/2001 would amount to giving the Member States discretionary power in that matter or would, at least, make the policy of access to documents implemented by that regulation conditional upon the relevant national policies. That would not be compatible either with the system of access to documents established by Regulation No 1049/2001 (see, that that effect, *Sweden* v *Commission*, paragraph 5 above, paragraphs 58 and 65) or with the Member States' obligation under Article 10 EC to cooperate with the Commission in good faith.

81 It follows that the second subparagraph of Article 4(3) and Article 4(5) of Regulation No 1049/2001 must be interpreted as precluding a Member State from relying on its own unwillingness to cooperate with the Commission, in the event that a document were to be disclosed under Regulation No 1049/2001, as a valid basis for the claim that the decision-making process of the institution concerned would be seriously undermined.

82 The express decision must therefore be annulled in so far as it concerns the refusal of access to the letters of 5 September 2006 and 19 February 2007, except to the extent that it concerns the information contained in the first two annexes to the letter of 19 February 2007, in respect of which the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001 has been invoked.

The document from the Commission

— Arguments of the parties

83 Mr Batchelor states that the fact that a document concerns an inspection or investigation is not enough in itself to justify the application of the exception provided for in the third indent of Article 4(2) of Regulation No 1049/2001. The Commission is required, therefore, to show in the reasons for its decision that it is reasonably foreseeable that disclosure of the document concerned would actually undermine the protection of the purpose of the investigation or inspection.

84 Furthermore, the provision establishing the exception relied on by the Commission is not intended to protect the investigation as such, but the purpose of that investigation, so the protected interest is unlikely to be undermined after the investigation concerned has been closed.

85 As it is, in the present case, the Commission has not explained how disclosure of its letter of 2 August 2006 might induce the United Kingdom authorities to withhold information in a procedure with which the Member States are required to cooperate and which, as matters stood, had already been closed. In those circumstances, the possibility that the General Court might annul Decision 2007/730 could only be regarded as a hypothetical, future and probably distant event.

86 Moreover, the Commission refers in the express decision to the information provided by the Member State, even though the letter at issue emanated from the Commission itself. Lastly, the Commission has disregarded the existence of an overriding public interest which justifies disclosure of the relevant document and meets the need for increased transparency and public participation in the decision-making process. It follows that the Commission erred in relying, as regards the letter of 2 August 2006, on the exception provided for in the third subparagraph of Article 4(2) of Regulation No 1049/2001 and that, accordingly, the express decision should be annulled.

87 The Commission states that a distinction must be drawn between, on the one hand, the documents forming part of the United Kingdom's notification under Article 3a(2) of Directive 89/552 and, on the other, documents submitted to the Commission in the context of the investigation opened after the complaint was lodged, which constitutes a procedure distinct from the notification procedure. The Commission also states that the investigation in respect of which the exception in the third indent of Article 4(2) of Regulation No 1049/2001 is invoked is an investigation under Article 3a(2) of Directive 89/552. Furthermore, the Commission carried out an individual assessment of the document by reference to the exception invoked and concluded, by means of a sufficient and proper statement of reasons, that there was a reasonably foreseeable

risk that the purpose of the investigation would be undermined. In that regard, as the express decision states, if Decision 2007/730 were to be annulled on substantive grounds in Cases T-55/08 *UEFA* v *Commission* and T-68/08 *FIFA* v *Commission*, then pending, the assessment procedure would have to be reopened and the information gathered prior to the adoption of the decision would have to be re-examined, including the information in the documents to which access had been refused.

88 The Commission also explains that it did not rely on the exceptions provided for in the second indent of Article 4(2) and the second subparagraph of Article 4(3) of Regulation No 1049/2001 with respect to the letter of 2 August 2006.

89 Lastly, the Commission rejects both Mr Batchelor's assertion that it had failed to consider the possibility of granting partial access, on the ground that it made an assessment of the application of the exception to the individual document concerned, and the argument that it had disregarded the overriding public interest in disclosure of the letter of 2 August 2006.

— Findings of the Court

90 As regards the content of the letter of 2 August 2006, Mr Batchelor points out an error concerning the assertion made in the express decision that the letter in question contains information provided by the United Kingdom, whereas it is the first letter sent by the Commission after the complaint was lodged. As is clear from Section 3.1 of the express decision, the Commission justified the non-disclosure of that document by reference to the risk that Member States would no longer wish to cooperate in procedures under Article 3a of Directive 89/552 if they thought that the information they pass on might subsequently be communicated to third parties. It is clear from the letter of 2 August 2006, which was produced by the Commission in the

context of the measures of inquiry (see paragraphs 20 and 21 above), that it does not contain any information originating from the United Kingdom authorities. The letter in question is a summary of the complaint and its purpose is to seek the opinion of the United Kingdom authorities about Infront WM's allegations. The only reference to information provided by the United Kingdom authorities concerns the audience figures, which were nevertheless criticised in the complaint and therefore already in Mr Batchelor's possession as legal counsel for Infront WM (see paragraphs 5 and 6 above). It follows that the reason relied on by the Commission in the express decision in order to justify non-disclosure of the document in question is not compatible with the content of that letter.

91 In any event, even leaving that fact aside, it should be observed that the facts relied on by the Commission in the express decision are not sufficient to satisfy the conditions laid down in the third indent of Article 4(2) of Regulation No 1049/2001.

92 In that connection, it should be observed that, as the Commission states (see paragraph 87 above), the investigation in respect of which the relevant exception is invoked is the procedure for the assessment of the compatibility with Community law of the measures adopted by the United Kingdom in the context of Article 3a of Directive 89/552.

93 However, the purpose of the Commission's involvement in that procedure is to verify whether the mechanism provided for under Article 3a(3) of that directive — involving obligations for the other Member States and constituting an impediment to the freedom to provide services — may, in the present case, be triggered. Furthermore, if, after the complaint was lodged, the Commission requested clarification and further

information from the United Kingdom authorities, it was clearly because they were necessary for the purposes of its assessment.

94 In those circumstances, it must be found that, if a Member State does not wish to forward to the Commission the documents necessary for the purposes of that assessment, on the ground that it objects to their possible disclosure by the Commission to third parties pursuant to Regulation No 1049/2001, the only consequence will be that the Commission will not carry out, in the context of Article 3a of Directive 89/552, the assessment of the compatibility with Community law of the measures adopted by the Member State and primary law will apply in full. It should be added in that regard that, under Article 3a of Directive 89/552, the role of the Commission is not to implement a European Union policy on public access to events of major importance for society, but simply to provide a mechanism to prevent the circumvention of any relevant national measures where they are in conformity with Community law. Furthermore, as the use of the word 'may' in Article 3a(1) of Directive 89/552 makes clear, Member States are free to decide whether they wish to implement a policy on events of major importance for their society.

95 Accordingly, the purpose of the Commission's investigation is not to grant access, through free television, to events of major importance for society, but to ensure that Community law is complied with where a Member State wishes to avail itself of the mutual recognition mechanism in relation to measures which it adopts as part of a policy in that field. However, the objective of compliance with Community law is not jeopardised if a Member State does not wish to cooperate in the assessment as to whether the measures which it adopts or intends to adopt are compatible with Community law: in such circumstances, those measures will not be examined by the Commission, but nor will they benefit from mutual recognition, and the freedom to provide services guaranteed by primary law will apply in full.

96 It follows that, by relying on the third indent of Article 4(2) of Regulation No 1049/2001 in order to refuse disclosure to Mr Batchelor of the letter of 2 August 2006, the Commission erred in law.

97 Accordingly, the express decision must be annulled, except in so far as it concerns the information contained in the first two annexes to the letter of 19 February 2007, in respect of which the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001 has been invoked.

Costs

98 Under Article 87(2) of the Rules of Procedure, 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 Commission has been essentially unsuccessful, it must be ordered to pay the costs, since the applicant applied for costs, with the exception of the costs it incurred as a result of the intervention of the United Kingdom. In that connection, the United Kingdom must be ordered to pay the costs incurred by the applicant on account of its intervention in accordance with the applicant's pleadings.

99 The United Kingdom and the Kingdom of Denmark should bear their own costs, pursuant to Article 87(4) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Dismisses as inadmissible the action against the implied decision of refusal deemed to have been adopted on 9 April 2008;**

2. **Annuls the decision of the Secretary General of the European Commission of 16 May 2008, except in so far as it concerns the information contained in the first two annexes to the letter of 19 February 2007, in respect of which the exception provided for in the first indent of Article 4(2) of 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 has been invoked;**

3. **Orders the Commission to bear its own costs and to pay those incurred by Mr Edward William Batchelor;**

4. **Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs and to pay the costs incurred by Mr Batchelor as a result of its intervention;**

5. **Orders the Kingdom of Denmark to bear its own costs.**

Forwood Dehousse Schwarcz

Delivered in open court in Luxembourg on 24 May 2011.

[Signatures]