JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

17 March 2005 *

In Case T-187/03,

Isabella Scippacercola, residing in Brussels (Belgium), initially represented by K. Adamantopoulos and D. Papakrivopoulos, lawyers, and subsequently by K. Adamantopoulos and B. Keane, Solicitor, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by L. Flynn and P. Aalto, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the Commission's decision of 19 March 2003 rejecting the application made by the applicant for access to a document relating to the project for the new Athens International Airport at Spata (Greece),

* Language of the case: English.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of J. Azizi, President, M. Jaeger and O. Czúcz, Judges,

Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 9 September 2004,

gives the following

Judgment

The legal background

1 Article 255 EC provides:

'1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

...'.

2 Declaration No 35 annexed to the Final Act of the Treaty of Amsterdam ('Declaration No 35') states:

'The Conference agrees that the principles and conditions referred to in Article [255](1) of the Treaty establishing the European Community will allow a Member State to request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement.'

3 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) defines the principles, conditions and limits governing the right of access to documents of those institutions provided for in Article 255 EC (Article 1(a) of Regulation No 1049/2001). That regulation entered into force on 3 December 2001.

4 Article 2 of Regulation No 1049/2001 provides:

'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.

...

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.

...'.

5 Article 3 of Regulation No 1049/2001, relating to definitions, provides

'For the purpose of this Regulation:

(a) "document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;

(b) "third party" shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.'

6 Article 4 of Regulation No 1049/2001, which defines the exceptions to the abovementioned right of access, is worded as follows:

'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;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

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.

...'.

7 Article 5 of Regulation No 1049/2001, entitled 'Documents in the Member States', lays down:

'Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation.

The Member State may instead refer the request to the institution.'

8 Article 9 of Regulation No 1049/2001, relating to the treatment of sensitive documents, 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.

2. Applications for access to sensitive documents under the procedures laid down in Articles 7 and 8 shall be handled only by those persons who have a right to acquaint themselves with those documents. These persons shall also, without prejudice to Article 11(2), assess which references to sensitive documents could be made in the public register.

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

...'.

9 Article 5 (headed 'Consultations') of the detailed rules for the application of Regulation No 1049/2001, the text of which is to be found in the Annex to Commission Decision 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure (OJ 2001 L 345, p. 94), provides:

'1. Where the Commission receives an application for access to a document which it holds but which originates from a third party, the Directorate-General or department holding the document shall check whether one of the exceptions provided for by Article 4 of Regulation (EC) No 1049/2001 applies. If the document requested is classified under the Commission's security rules, Article 6 of these Rules shall apply.

2. If, after that examination, the Directorate-General or department holding the document considers that access to it must be refused under one of the exceptions provided for by Article 4 of Regulation ... No 1049/2001, the negative answer shall be sent to the applicant without consultation of the third-party author.

3. The Directorate-General or department holding the document shall grant the application without consulting the third-party author where:

(a) the document requested has already been disclosed either by its author or under the Regulation or similar provisions;

(b) the disclosure, or partial disclosure, of its contents would not obviously affect one of the interests referred to in Article 4 of Regulation ... No 1049/2001.

4. In all the other cases, the third-party author shall be consulted. In particular, if the application for access concerns a document originating from a Member State, the Directorate-General or department holding the document shall consult the originating authority where:

(a) the document was forwarded to the Commission before the date from which Regulation ... No 1049/2001 applies;

(b) the Member State has asked the Commission not to disclose the document without its prior agreement, in accordance with Article 4(5) of Regulation ... No 1049/2001.

5. The third-party author consulted shall have a deadline for reply which shall be no shorter than five working days but must enable the Commission to abide by its own deadlines for reply. In the absence of an answer within the prescribed period, or if the third party is untraceable or not identifiable, the Commission shall decide in accordance with the rules on exceptions in Article 4 of Regulation ... No 1049/2001, taking into account the legitimate interests of the third party on the basis of the information at its disposal.

6. If the Commission intends to give access to a document against the explicit opinion of the author, it shall inform the author of its intention to disclose the document after a ten-working day period and shall draw his attention to the remedies available to him to oppose disclosure.

...'.

Facts

10 By letter of 29 January 2003, Ms Isabella Scippacercola applied to the Commission for access to, inter alia, a cost-benefit analysis relating to the project for the new Athens International Airport at Spata. That project had been co-financed by the Cohesion Fund.

11 By letter of 21 February 2003, the Directorate-General (DG) for Regional Policy of the Commission refused to grant the applicant access to the cost-benefit analysis, stating as follows:

'... With reference to your request for a copy of the cost-benefit analysis, since this is a document which predates the entry into force of Regulation ... No 1049/2001, the national authorities have been consulted in accordance with the provisions of Article 5 of ... Decision 2001/937 ... . By fax of 10 February 2002, the national authorities informed the DG [for Regional Policy] that access to that document should not be permitted.

The reason for the refusal relates to protection of intellectual property rights. The document is a study drafted by private consultants on behalf of a bank. The latter assisted Greece during the preparation of the project file, under a confidentiality clause.

In those circumstances, the DG [for Regional Policy] considers that, in accordance with Article 4(5) of Regulation ... No 1049/2001, the analysis in question cannot be released ...'.

12 In the same letter, the defendant sent to the applicant part of the application for Cohesion Fund assistance which, under the heading 'Description of the main conclusions', contained a short description of the main topics of the cost-benefit analysis.

13 By letters of 24 February 2003 and 28 March 2003, the applicant repeated her request.

14 By letter of 19 March 2003, notified to the applicant on 31 March 2003, the Secretary-General of the Commission confirmed the refusal to grant access to the document requested ('the contested decision'). That letter reads as follows:

'Thank you for your letter of 24 February 2003, registered on 26 February, by which you request re-examination of your application for access to the complete text of the cost-benefit analysis concerning the construction of the new Athens International Airport.

That analysis was carried out by a bank on behalf of the Greek national authorities (Ministry of National Economic Affairs).

In accordance with Article 5(4)(a) of the detailed rules for the application of Regulation No 1049/2001, adopted by ... Decision 2001/937, the Commission's services have consulted the Greek authorities regarding access to that document which was sent to the Commission before the entry into force of the regulation (3 December 2001). In response, the Greek authorities indicated that they did not agree to the release of that document by the Commission.

On the basis of Article 4(5) of Regulation No 1049/2001, I am therefore unable to give you access to that document and must consequently confirm the refusal of the Regional Policy [DG] to your request.

...'.

Procedure and forms of order sought by the parties

15 By application lodged on 28 May 2003, the applicant brought the present action.

16 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure.

17 The parties presented oral argument and their replies to the Court's questions at the hearing on 9 September 2004.

18 The applicant claims that the Court should:

— annul the contested decision;

— order the defendant to pay the costs of the case.

19 The defendant contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

Law

20 In support of her action, the applicant puts forward four pleas in law. The first plea alleges error in law and manifest error in the assessment of the facts in that the Commission wrongly considered that the document requested originated from a Member State. The second plea alleges error in law in that the Commission failed to assess the reasons given by the Greek State for its unfavourable view regarding

release of the document requested. The third plea alleges failure to state reasons for the contested decision. The fourth plea alleges error in law in that the Commission failed to examine whether partial access to the information in the document requested should be granted.

The first plea in law, alleging that the Commission wrongly considered that the document requested originated from a Member State

Arguments of the parties

21 The applicant claims that the contested decision is vitiated by an error in law and by a manifest error in the assessment of the facts in that the defendant wrongly considered that the document requested originated from a Member State (Greece). She claims that the defendant wrongly interpreted and applied Article 4(5) of Regulation No 1049/2001 and Article 5(4) of Decision 2001/937. The defendant also infringed Article 1(a) of Regulation No 1049/2001 and the principle of the widest possible access to Commission documents laid down in that provision and in the case-law.

22 The applicant submits that the defendant wrongly considered that the document requested originated from the Greek authorities. She considers that the document originated from a third party and that the provisions of Article 4(4) of Regulation No 1049/2001 should have been applied.

23 The applicant points out that the different language versions of the regulation support the interpretation that the term 'originating' applies to a document which must have been created for or drafted by the Member State.

24 She submits that the document requested should be classed as a 'third-party document' in accordance with Article 4(4) of Regulation No 1049/2001. She asserts that it transpires from the defendant's letter of 21 February 2003 that the author of the document requested is either the private consultants or the bank, who are assumed to have prepared the cost-benefit analysis in the course of compiling the project file.

25 Alternatively, since the submission of the cost-benefit analysis was a requirement for the grant of financial assistance, the applicant submits that the Airport Company could be considered the 'owner' of the document requested. The Airport Company was the implementing entity of the Spata Airport construction project and the sole beneficiary of Cohesion Fund assistance. In any event, it is clear that the document requested does not originate from a Member State.

26 It is the applicant's view that the term 'originating' should be interpreted strictly. That interpretation should be in accordance with Community case-law, according to which any exception to the rules on access to documents must be interpreted and applied strictly (Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal* v *Commission* [2000] ECR I-1, paragraph 27, and Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313, paragraph 56).

27 She points out that Regulation No 1049/2001 refers to the widest possible access to documents (Article 1(a)) and that its stated purpose is to give the fullest possible effect to the right of public access to documents (preamble). It would be contrary to that purpose to interpret the term 'originating' so broadly as to enable a Member State which merely 'forwards' a document to the Commission to benefit from the provisions of Article 4(5) of Regulation No 1049/2001.

28 The applicant disputes the defendant's assertion that the identity of the author is irrelevant. On the contrary, the identity of the author is essential to the process of granting access to documents. If it were not, any third party could bypass the requirements of Regulation No 1049/2001 simply by asking a Member State to forward the document to the Commission.

29 The applicant rejects the defendant's statement that once a document is sent to a Community institution, it should be dealt with under Article 4(5) of Regulation No 1049/2001. The applicant submits that, in most cases, determining authorship of each document will not be problematic. In any event, the convenience of administration should not take priority over the rights of citizens of the European Union to the widest possible access to documents except where it would be unreasonably burdensome (Case C-353/99 P *Council* v *Hautala* [2001] ECR I-9565, paragraphs 29 and 30, and Case T-14/98 *Hautala* v *Council* [1999] ECR II-2489, paragraphs 85 to 88). The authorship of the document in the present case is not in doubt. It is clearly a document drafted by a third party. The Commission should therefore have dealt with it under Article 4(4) of Regulation No 1049/2001 instead of under Article 4(5) of that regulation.

30 The defendant takes issue with those arguments and contends that the document in question originates from the Hellenic Republic for the purposes of Regulation No 1049/2001.

Findings of the Court

31 It is important to point out, first of all, that the right of access to documents of the institutions, provided for in Article 2 of Regulation No 1049/2001, covers, in accordance with paragraph 3 of that article, all documents held by the European

Parliament, the Council and the Commission, whether drawn up or received by them. Accordingly, the institutions may be required, in appropriate cases, to communicate documents originating from third parties, including, in particular, the Member States, in accordance with the definition of 'third party' in Article 3(b) of Regulation No 1049/2001.

32 Secondly, it should be recalled that, before Regulation No 1049/2001 entered into force, public access to Commission documents was governed by Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58). Article 1 of that decision formally adopted the code of conduct approved by the Council and the Commission on 6 December 1993 concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41), which was annexed to the decision. That code of conduct provided, in the third paragraph of the section headed 'Processing of initial applications', that, '[w]here the document held by an institution was written by a natural or legal person, a Member State, another Community institution or body or any other national or international body, the application must be sent direct to the author'. Consequently, under that rule, known as the 'authorship rule', an institution was not entitled to disclose documents originating from a wide category of third parties, including from a Member State, and the applicant for access to documents was obliged, where appropriate, to send his application direct to the third party in question.

33 The authorship rule was not referred to in Regulation No 1049/2001, which states that, in principle, all documents of the institutions must be accessible to the public.

34 It follows, however, from Article 4(5) of Regulation No 1049/2001 that, among third parties, the Member States are subject to special treatment. That provision confers on the Member State the power to request the institution not to disclose documents originating from that State without its prior agreement. It should be recalled that Article 4(5) of Regulation No 1049/2001 transposes Declaration No 35, by which the Conference of the High Contracting Parties to the Treaty agreed that the principles

and conditions set out in Article 255 EC will allow a Member State to request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement. That power conferred on Member States by Article 4(5) of Regulation No 1049/2001 is explained by the fact that it is neither the object nor the effect of that regulation to amend national legislation on access to documents (recital 15 in the preamble to Regulation No 1049/2001 and judgment in Case T-76/02 *Messina* v *Commission* [2003] ECR II-3203, paragraphs 40 and 41).

35 In this case, it is important to note that the document at issue was received by the defendant in connection with an application for financing from the Cohesion Fund. In that regard, it must be pointed out that, under Article 10(3) of Council Regulation (EC) No 1164/94 of 16 May 1994 establishing a Cohesion Fund (OJ 1994 L 130, p. 1), as amended by Council Regulation (EC) No 1264/1999 of 21 June 1999 (OJ 1999 L 161, p. 57) and by Council Regulation (EC) No 1265/1999 of 21 June 1999 (OJ 1999 L 161, p. 62), applications for assistance for projects from that Fund are to be submitted by the beneficiary Member State. In accordance with Article 10(4), applications for assistance must contain, inter alia, a cost-benefit analysis.

36 It follows that, in the context of the Cohesion Fund, firstly, applications for assistance are to be submitted only by the beneficiary Member State and, secondly, a cost-benefit analysis report necessarily forms part of the information which such an application must contain.

37 In this case, the cost-benefit analysis was carried out by a bank on behalf of the Greek national authorities. That document forms part of the information which an application submitted for assistance from the Cohesion Fund must contain.

38 Consequently, without there being any need to determine whether documents simply forwarded (and not drafted) by Member States are covered by Article 4(5) of Regulation No 1049/2001, it is sufficient to note that the document in question, which was created by a bank on behalf of the Greek national authorities, was drawn up on behalf of a Member State.

39 In those circumstances, it must be concluded that the defendant did not err by considering that the document originated from a Member State.

40 Moreover, the applicant's argument that any third party could circumvent its obligations under Regulation No 1049/2001 simply by asking a Member State to forward the document to the defendant is completely irrelevant in this case. It has already been pointed out that the document in question was received by the defendant in connection with an application for assistance from the Cohesion Fund. In the context of the Cohesion Fund, the beneficiary Member State is the sole interlocutor of the Commission. Applications for assistance for projects are submitted only by the beneficiary Member State and, consequently, the document received by the defendant would not have been received by it if the Greek authorities had not submitted their application for financial assistance from the Cohesion Fund.

41 It follows from those considerations that the first plea in law must be rejected.

The second plea in law, alleging that the Commission failed to assess the reasons given by the Member State for its negative opinion

Arguments of the parties

42 The applicant claims that the defendant infringed the letter and spirit of Articles 4 (5) of Regulation No 1049/2001 and 5(4) of Decision 2001/937 in that it failed to

assess the reasons given by the Greek State for its negative opinion concerning the disclosure of the document requested. In that way, the defendant conferred on the Member State a de facto power of veto concerning the disclosure of the document held by it.

43 In the applicant's view, the use of the verbs 'consult', 'request' and 'ask' in Article 4(4) and (5) of Regulation No 1049/2001 and Article 5(4) of Decision 2001/937 shows that the Commission is not bound by the opinion given by the Member State. To interpret the abovementioned articles as conferring on Member States a right of veto over disclosure of a document originating from them would contradict the obvious meaning of the word 'request'.

44 She claims that decisions on release of documents held by the institutions can be taken only by the institutions and refusal to disclose should be justified by the institution on the basis of Article 4(1) to (3) of Regulation No 1049/2001.

45 The applicant points out that, in the two letters addressed to her, the defendant refers to the negative opinion of the Greek authorities and, very succinctly, to the reasons given by those authorities for their negative opinion. There is no indication that the defendant assessed those reasons. The contested decision contains even less information as to the reasons given by the Greek authorities and as to the Commission's assessment of those reasons. The Secretary-General merely refers to the negative opinion expressed by the Greek authorities.

46 The applicant submits that the defendant ought to have assessed the reasons given by the Greek authorities and should have provided an outline of its assessment in its letters addressed to her. The defendant acted as if it were bound by the opinion of the Greek State.

47 The applicant submits that Article 4(2) of Regulation No 1049/2001 provides that the Commission is to refuse access under certain conditions. Where one of those conditions is fulfilled, the Commission must refuse access. In contrast, Article 4(5) does not state that the Commission must refuse access but rather that the Member State may request such refusal. How that request is then dealt with is left to the discretion of the Commission.

48 The applicant states that she doubts whether, in Member States with their own systems of access to documents, a request from the Commission to refuse access would be regarded as being mandatory. She asserts that the defendant admits that that is not the case when it states that its wishes should be considered 'so far as possible'. That means that its view expressed in such a consultation is not decisive or mandatory in determining whether or not access to its documents is to be granted at a national level.

49 According to the applicant, if a Member State were to consider the defendant's view to be mandatory, that would place a clear limitation on the rights of citizens in that Member State and would grant the defendant, with perhaps no understanding of the national legal system in question, a de facto right of veto. She submits that, in any event, the Member State retains an element of discretion as to the manner in which access may be granted in order to reconcile the requirements of its own national legal system with the legal system of the originator. By analogy, although the Member State may request that access be refused, the defendant retains an element of discretion to determine, together with the Member State, the manner in which its concerns can be met whilst still granting the widest possible access to documents.

50 At the hearing, the applicant maintained that Article 9(3) of Regulation No 1049/2001 states that the consent of the originator is required for the disclosure of sensitive documents. She submits that, if the Community legislature had intended,

in Article 4(5) of the regulation, to grant a right of veto to the Member States, it would have adopted a form of words similar to that provision.

51 The defendant takes issue with those arguments and contends that the plea in law should be rejected.

Findings of the Court

52 The question raised in this plea in law is whether, in providing that a Member State may request an institution not to disclose a document originating from it without its prior agreement, Article 4(5) of Regulation No 1049/2001 confers a right of veto on that State or whether it leaves the institution with an element of discretion.

53 It should be recalled that Regulation No 1049/2001 provides that, in principle, all documents of the institutions should be accessible to the public (recital 11 in the preamble).

54 As regards third-party documents, Article 4(4) of the regulation requires the institution to consult the third party concerned with a view to assessing whether an exception in Article 4(1) or (2) of the regulation is applicable, unless it is clear that the document must or must not be disclosed. It follows that the institutions are not required to consult the third party concerned if it is clearly apparent that the document must be disclosed or that it must not be disclosed. In all other cases, the institutions must consult the third party in question. Consequently, consultation of the third party concerned constitutes, as a general rule, a prerequisite for determining whether the exceptions to access provided for in Article 4(1) and (2) of Regulation No 1049/2001 are applicable in the case of third-party documents.

55 Moreover, the defendant's obligation under Article 4(4) of Regulation No 1049/2001 to consult third parties does not affect its power to decide whether one of the exceptions provided for by Article 4(1) and (2) of the regulation is applicable.

56 On the other hand, it is clear from Article 4(5) of Regulation No 1049/2001 that Member States are the subject of special treatment. That provision confers on a Member State the right to request the institution not to disclose a document originating from that Member State without its prior agreement. It should be recalled, as stated in paragraph 34 above, that that provision transposes Declaration No 35.

57 Article 4(5) of Regulation No 1049/2001 thus places Member States in a different position from that of other third parties by laying down, in that regard, a *lex specialis*. It follows from that provision that the Member State has the right, either at the time of submitting a document or subsequently, to request an institution not to disclose a document originating from that Member State without its prior agreement. Where the Member State has made such a request, the institution must seek the prior agreement of the Member State before disclosing the document. That obligation on the institution to seek the prior agreement of the Member State, as clearly imposed by that provision, would be rendered meaningless if the institution could decide to disclose that document despite an express request to the contrary from the Member State concerned. If the institution were entitled to disclose the document notwithstanding the request of the Member State not to give access to that document, the position of the Member State would be no different from that of ordinary third parties. Therefore, contrary to what the applicant submits, such a request from the Member State obliges the institution not to disclose the document in question. If, as in this case, the Member State did not make such a request when submitting the document to the institution, the latter is nevertheless entitled to seek the agreement of the Member State before disclosing the document to third parties. In such a case, the institution is also bound to comply with any request for non-disclosure made by the Member State.

58 In that regard, it must be pointed out that the Member State is not obliged to state reasons for its request under Article 4(5) of Regulation No 1049/2001 and that it is not for the institution to examine, when such a request has been made to it, whether non-disclosure of the document in question is justified, inter alia, in the public interest.

59 In order to ensure that Article 4(5) of Regulation No 1049/2001 is applied in conformity with Declaration No 35 and to facilitate access to the document in question by allowing the Member State from which it originates to give its consent, where appropriate, to its disclosure, it is for the institution to consult that Member State. If that Member State, after being consulted, does not make a request pursuant to Article 4(5) of Regulation No 1049/2001, it is still incumbent on the institution to assess, pursuant to Article 4(4) of that regulation, whether the document must be disclosed or not.

60 Where a Member State has made a request under Article 4(5) of Regulation No 1049/2001, the relevant national provisions of that Member State defining the right of access to documents and the legal framework of any appeal are applicable. Consequently, it is for the national administrative and judicial authorities to assess, on the basis of their national legislation, whether access to the documents originating from the Member State must be granted and to determine whether, and to what extent, there is a right of appeal for the parties concerned.

61 Finally, as regards the argument put forward by the applicant at the hearing, that, if the Community legislature had intended, in Article 4(5) of Regulation No 1049/2001, to grant a right of veto to Member States, it would have adopted a form of words similar to that of Article 9(3) of that regulation, it must be stated that the latter provision lays down specific rules in order to ensure effective protection for secret or confidential documents originating from, inter alia, institutions, Member States, third countries or international organisations in the areas covered by Article 4(1)(a) of Regulation No 1049/2001, notably public security, defence and

military matters. That article specifies, inter alia, the persons who are entitled to handle those documents and provides that sensitive documents are to be recorded in the register or released only with the consent of the originator. In view of the specific character of those rules, it must be held that that article is not connected with Article 4(5) of Regulation No 1049/2001 and therefore cannot properly be relied on for the purpose of interpreting the latter. A classification as 'TRÈS SECRET/TOP SECRET', 'SECRET' or 'CONFIDENTIEL' by a Member State amounts to a statement that the document cannot, in principle, be disclosed. In the case of other documents originating from a Member State, such impossibility can be acknowledged only at the express request of that Member State.

62 In the light of the foregoing considerations, it must be concluded that, under Article 4(5) of Regulation No 1049/2001, where a Member State requests an institution not to disclose a document originating from that Member State without its prior agreement, the institution is bound by that request. Accordingly, the second plea in law put forward by the applicant, alleging that the defendant failed to assess the reasons given by the Greek State for its negative opinion concerning the communication of the document requested, is unfounded.

The third plea in law, alleging failure to state reasons

Arguments of the parties

63 The applicant claims that the defendant erred in law in that it infringed the obligation to state reasons for the contested decision, contrary to the requirement laid down by Article 253 EC. She considers that the lack of a proper assessment by the defendant of the reasons given by the Greek State constitutes a failure to state reasons.

64 The applicant claims that, in the case at issue, the defendant simply informed her of the reasons given by the Greek State for its negative opinion. Nowhere in the two letters sent by the defendant to the applicant, and especially in the contested decision, does the defendant provide a statement of reasons for its refusal to grant access to the document requested. The defendant thereby failed to enable the applicant to identify the reasons underlying its refusal to disclose the document requested and does not permit the Community judicature to exercise its power of review.

65 The defendant contends that the reasoning for the contested decision was complete since the decision stated the reason for the refusal of access to the document, namely that the national authorities had requested that it not be disclosed.

Findings of the Court

66 It should be recalled that it is settled case-law that the purpose of the obligation to state the reasons for an individual decision is to provide the person concerned with sufficient information to make it possible to determine whether the decision is well founded or whether it is vitiated by an error which may permit its validity to be contested, and to enable the Community judicature to review the lawfulness of the decision. The extent of that obligation depends on the nature of the measure at issue and the context in which it was adopted (Joined Cases T-551/93 and T-231/94 to T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, paragraph 140; Joined Cases T-46/98 and T-151/98 *CEMR* v *Commission* [2000] ECR II-167, paragraph 46, and Case T-80/00 *Associação Comercial de Aveiro* v *Commission* [2002] ECR II-2465, paragraph 35).

67 The contested decision clearly shows that the defendant had consulted the Greek authorities which had requested it not to disclose the document and that, as a result, it found itself unable, pursuant to Article 4(5) of Regulation No 1049/2001, to disclose that document.

68 It follows that the statement of reasons for the contested decision was complete, since the decision stated the reason for the refusal of access to the document, namely that the national authorities had requested that it not be disclosed.

69 In that regard, it should be recalled that, as has been held previously, the institution is bound by the request made by a Member State under Article 4(5) of Regulation No 1049/2001. In those circumstances, there was no need for the defendant to assess the reasons given by the Greek State.

70 Finally, even though, in the interests of transparency, the defendant informed the applicant of the reasons put forward by the Member State, it must be stated that the defendant was not under any duty to explain to the applicant the reasons which led the Member State in question to make the request pursuant to Article 4(5) of Regulation No 1049/2001, since that provision does not oblige Member States to give reasons for such a request.

71 It follows from those considerations that the third ground of appeal is unfounded.

The fourth plea in law, alleging that the Commission failed to examine whether partial access to the information contained in the document requested should be granted

Arguments of the parties

72 The applicant submits that the defendant committed a manifest error in law consisting of a breach of Article 4(6) of Regulation No 1049/2001 by failing to examine whether partial access to the information contained in the document requested and not covered by the exceptions should be granted.

73 She points out that the defendant provided her with the part of the application for Cohesion Fund assistance that contained a description of the main topics of the cost-benefit analysis rather than the full text of the study as she had requested. That disclosure does not satisfy the requirements of Article 4(6) of Regulation No 1049/2001, since that description does not constitute part of the requested document for the purposes of that provision.

74 The applicant submits that, despite a request from a Member State for access to be refused, the defendant is required to grant the widest possible access to documents and should therefore have assessed whether partial access could be granted. As the defendant did not even attempt to assess whether partial access could be granted, it committed an error in law (*Council* v *Hautala*, cited in paragraph 29 above, paragraphs 29 and 30, and *Hautala* v *Council*, cited in paragraph 29 above, paragraphs 85 to 88).

75 The defendant takes issue with those arguments and contends that the plea in law should be rejected.

Findings of the Court

76 Under Article 4(6) of Regulation No 1049/2001, if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

77 It is true that, in the contested decision, there is no mention of whether the defendant considered the possibility of granting partial access to the document. However, it must be pointed out that, as the applicant was informed, the Member State totally opposed disclosure of the whole document. Since the defendant was bound by that request, partial access to that document was not possible. In those circumstances, it must be concluded that the reasons for the refusal of partial access to the document are implicitly but necessarily contained in the Member State's request.

78 It follows that the plea in law must be rejected.

79 In the light of all the foregoing, the application must be dismissed in its entirety.

Costs

80 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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 applicant has been unsuccessful, she must be ordered to pay the costs, in accordance with the form of order sought by the defendant.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Azizi Jaeger Czúcz

Delivered in open court in Luxembourg on 17 March 2005.

H. Jung
Registrar

M. Jaeger
President