JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

25 April 2007 *

In Case T-264/04,

WWF European Policy Programme, established in Brussels (Belgium), represented by R. Haynes, Barrister,

applicant,

v

Council of the European Union, represented by B. Driessen and M. Bauer, acting as Agents,

defendant,

supported by

Commission of the European Communities, represented by E. Montaguti and P. Aalto, acting as Agents,

intervener,

* Language of the case: English.

APPLICATION for the annulment of the Council's decision of 30 April 2004 refusing to give the applicant access to certain documents relating to the meeting of the committee of the Council known as 'the Article 133 Committee' of 19 December 2003,

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

composed of H. Legal, President, I. Wiszniewska-Białecka and E. Moavero Milanesi, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 8 November 2006,

gives the following

Judgment

Legal context

1 Article 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 (OJ 2001 L 145, p. 43), which defines the principles,

conditions and limits governing the right of access to documents of those institutions and was adopted pursuant to 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, 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.'

2 Article 4 of Regulation No 1049/2001 provides:

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

(a) the public interest as regards:

— ...

— ...

— 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,

— ...

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.

...

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 7 of Regulation No 1049/2001:

'1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days

from registration of the 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 and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.'

4 Article 19 of Council Decision 2002/682/EC, Euratom of 22 July 2002 adopting the Council's Rules of Procedure (OJ 2002 L 230, p. 7) ('the Rules of Procedure') provides:

'1. The [Committee of Permanent Representatives (Coreper)] shall be responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the Council. It shall in any case ensure consistency of the Union's policies and actions and see to it that the following principles and rules are observed:

...

(d) rules on procedure, transparency and the quality of drafting.

...

3. Committees or working parties may be set up by, or with the approval of, Coreper with a view to carrying out certain preparatory work or studies defined in advance.

The General Secretariat shall update and publish the list of preparatory bodies. Only the committees and working parties on this list may meet as Council preparatory bodies.'

5 Article 21 of the Rules of Procedure states:

'Notwithstanding the other provisions of these Rules of Procedure, the Presidency shall organise the meetings of the various committees and working parties so that their reports are available before the Coreper meetings at which they are to be examined.

...'

Facts

6 By letter of 23 February 2004, WWF European Policy Programme, a non-profit-making organisation established under Belgian law, applied to the Council on the basis of Article 6 of Regulation No 1049/2001 in order to obtain access to documents relating to the first item on the agenda of the meeting of Deputy Members of the committee known as 'the Article 133 Committee' ('the Committee') of 19 December 2003. That item was entitled 'WTO — Sustainability and Trade

after Cancun'. The information sought was, first, the preparatory papers and other information provided to Deputy Members of the Committee by the Commission relating to that agenda item which, according to the applicant, included a report on the state of the negotiations in question, the positions adopted by other countries, any assessment of the outcome of the current European Union approach and outline thoughts towards a new strategy and, secondly, the minutes, resolutions or recommendations arising from that agenda item as a result of the meeting.

7 Upon receipt of the application, the Council consulted the Commission's staff in accordance with Article 4(4) of Regulation No 1049/2001 and, by letter dated 17 March 2004, replied to the applicant's request.

8 As regards the first part of that application, the Council stated, first, that it had identified a note covering a wide range of issues concerning the follow-up to the Cancun conference which raised questions on how issues in the field of trade should be treated during the multilateral negotiations in the World Trade Organisation (WTO). That note, bearing the number MD 578/03 and entitled 'Sustainability and Trade after Cancun' ('the note'), had been drawn up for the attention of the Committee by the Commission's staff on 10 December 2003. Secondly, the Council stated that, given the nature and content of the note, access to it had to be refused pursuant to the third and fourth indents of Article 4(1)(a) of Regulation No 1049/2001 on the ground that its release would undermine the European Union's commercial interests and would also be prejudicial to its economic relations with the third countries referred to in the note. Lastly, the Council refused to grant partial access to the note on the ground that the above exceptions apply to the whole document. The Council did, however, provide the applicant with a communication from the Commission to the Council and the European Parliament entitled 'The World Summit on Sustainable Development one year on: implementing our commitments' (COM(2003) 829 final) and its annex, the Commission Staff Working Paper (SEC(2003) 1471), which were already publicly available.

9 As for the second part of the applicant's request, the Council stated that it did not draft minutes of meetings of the Deputy Members of the Committee.

10 By letter of 5 April 2004, the applicant made a confirmatory application on the basis of Article 7(2) of Regulation No 1049/2001 seeking a review of the Council's position with respect to the disclosure of the documents requested, in particular the parts of the note relating to sustainable development and trade. In addition, it sought clarification as to the institution holding minutes of the Committee meetings.

11 By decision of 30 April 2004 ('the contested decision'), the Council confirmed its refusal to disclose the note in the following terms:

'Releasing the document in question would seriously harm the EU's international economic relations with third countries referred [to] therein and also thwart the EU's commercial interests. This Commission note focuses on EU efforts to meet with developing countries' needs and objectives in order to enhance mutual support between environment and development, increasing market access, optimising trade technologies and encouraging investments. It reassesses important trade and environment issues and thoroughly examines the needs of developing countries, in order to contribute to good governance in this context. To this extent, it contains sensitive analytical elements and observations concerning EU orientation to strengthen international governance and develop EU policy direction and concrete

initiatives in the key aspects of the WTO relationship, which, if disclosed, would cause prejudice to the relations between the European Union and the third countries concerned, and seriously undermine the Community's and its Member States' ongoing negotiations and, in ultimate analysis, their whole economic policy.

In the light of the above, the Council holds the view that access to this document must be refused on the basis of Article 4(1)[a], third and fourth indent of ... Regulation [No 1049/2001]. Neither is it possible to grant partial access to it on the grounds of Article 4(6) [of Regulation No 1049/2001], since the above exceptions apply to its whole text.'

12 In the contested decision, the Council also confirmed that there were no minutes of meetings of the Deputy Members of the Committee. It observed that it was common practice, in the absence of minutes, for progress made on a specific issue to be directly reflected, where appropriate, in notes, reports or similar documents drawn up subsequent to the meetings concerned, if at all. However, the Council stated that, in the present case, it held no such documents relating to the outcome of the meeting of 19 December 2003 as regards the first item on the agenda.

13 In a letter to the Council dated 1 June 2004, the Commission clarified its position in relation to the applicant's request. The Commission stated that, in its view, the note should not be disclosed pursuant to the exception laid down in the third indent of Article 4(1)(a) of Regulation No 1049/2001 relating to the protection of the public interest as regards international relations. The Commission also put forward, as an additional ground for refusal, the exception laid down in Article 4(3) of Regulation No 1049/2001 with respect to the protection of the institutions' decision-making process.

Procedure and forms of order sought

14 By application lodged at the Registry of the Court of First Instance on 30 June 2004, the applicant brought the present action.

15 By document lodged at the Registry of the Court of First Instance on 23 November 2004, Friends of the Earth Ltd, a private company limited by guarantee with no share capital established in London (United Kingdom), applied for leave to intervene in support of the forms of order sought by the applicant.

16 By document lodged at the Registry of the Court of First Instance on 10 December 2004, the Commission applied for leave to intervene in support of the forms of order sought by the Council.

17 By order of 14 February 2005, the President of the Fourth Chamber of the Court of First Instance granted the Commission leave to intervene.

18 By order of the President of the Fourth Chamber of the Court of First Instance of 18 March 2005, the application for leave to intervene submitted by Friends of the Earth Ltd was rejected.

19 The parties presented oral argument and replied to the questions put to them by the Court at the hearing on 8 November 2006.

20 The applicant claims that the Court should annul the contested decision.

21 The Council contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

22 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs, including the costs incurred by the Commission.

Law

23 The applicant relies on three pleas in law alleging (i) infringement of Article 4(1) of Regulation No 1049/2001 in that the Council, in refusing it access to the note, failed to provide adequate reasons for its refusal and erred in its assessment as to whether the relevant information could be disclosed; (ii) infringement of Article 4(6) of Regulation No 1049/2001 in that the Council, by rejecting the possibility of a partial disclosure of the note, failed properly to apply the principle of proportionality; and (iii) infringement of Article 2 of Regulation No 1049/2001 in that the Council

infringed its right of access to documents by refusing it access to the minutes relating to the first item on the agenda of the meeting of 19 December 2003 or, in the absence of a minute, to information on the terms of the discussions which took place at that meeting and the records of those in attendance at that meeting.

The first plea, alleging infringement of Article 4(1) of Regulation No 1049/2001

Arguments of the parties

24 The applicant submits that the Council, first, failed to state adequate reasons for its refusal to grant access to the note and, secondly, erred in its assessment as to whether the note could be disclosed.

25 With regard to the requirement to state adequate reasons, the applicant states that, to the extent that the note relates to the WTO, and in particular to sustainable development and trade, the Council failed to identify the manner in which disclosure of information of such a general nature could genuinely prejudice the Community's international relations and economic policy.

26 With regard to the allegedly erroneous assessment as to whether the note could be disclosed, the applicant draws attention to the case-law of the Court of First Instance relating to the Council's former rules governing access to documents and states that that case-law remains relevant to decisions taken pursuant to Regulation No 1049/2001 and the internal rules of procedure which replace them. In particular, it is apparent from Case T-194/94 *Carvel and Guardian Newspapers* v *Council* [1995] ECR II-2765 that any response to a request for information must balance, on a case by case basis, the interest of citizens in gaining access to the documents

concerned against any interest of the Council in maintaining the confidentiality of those documents. Likewise, any exception relied on must be interpreted restrictively and a refusal of disclosure must be properly reasoned. Moreover, the Council did not establish the connection between the subject-matter of the note and any adverse consequences of its disclosure.

27 The applicant concludes that the Council erred in failing to apply the correct balance when it considered the application for access to the note and in failing to have adequate regard to the fundamental right of access to documents conferred by Article 2 of Regulation No 1049/2001.

28 The Council contends, in the first place, that it stated the reasons for its decision in the most thorough manner possible without disclosing the content of the note. In an effort to be as transparent as possible as to the negotiations' goals, it sent to the applicant two Commission documents which provided more information on those goals.

29 In that regard, the Commission observes that, in the contested decision, the Council described the contents of the note in an appropriate and sufficiently detailed way, explaining why access to those contents was covered by an exception. In accordance with settled case-law, such a statement of reasons is sufficiently clear to allow the applicant to understand why the Council did not grant it access to the note and to enable the Court of First Instance to review the legality of the contested decision.

30 In the second place, the Council states that the note concerns the way in which the Community should conduct negotiations on trade and the environment within the WTO in the course of the Doha round. More specifically, the note contains sensitive analytical material and observations concerning the Community's policy to

strengthen international governance, including details concerning the EU's response to the needs and objectives of developing countries. It also sets out Community policy direction and concrete initiatives in the key aspects of its relationship with the WTO. The Council stated at the hearing that it was an information note on the status of negotiations setting out, on the one hand, the positions adopted by third countries and, on the other hand, the options open to the Community.

31 Disclosure of the note would prejudice the relations between the Community and the third countries referred to in the note and would seriously undermine the positions adopted by the Community and its Member States in negotiations within the WTO and, therefore, their whole economic policy.

32 The Council draws attention to the sensitive context of those negotiations, the resistance encountered and the difficulty in reaching an agreement, illustrated by the breakdown of negotiations at the WTO Ministerial Conference in Cancun in September 2003. In that context, disclosure of the note, which describes the different options that the Community has and proposes the approach it should adopt in those negotiations, and which assesses the positions of the other parties to the negotiations, would seriously undermine the room for negotiation needed by the Community institutions in order to bring complex negotiations within the WTO to a successful conclusion. In that regard, the applicant itself acknowledged that negotiating tactics should not, by their very nature, be disclosed to the public.

33 The Council infers from the above that access to the note must be refused on the basis of the third and fourth indents of Article 4(1)(a) of Regulation No 1049/2001 in order to protect the public interest as regards international relations and the Community's financial, monetary and economic policy.

34 Lastly, the Council, supported by the Commission, submits that, in the present case, it was not required to balance the need to maintain the confidentiality of the note, on the one hand, against the applicant's interest in obtaining access to the note, on the other hand. Even though a balancing of interests is required under paragraphs (2) to (4) of Article 4 of Regulation No 1049/2001 in accordance with the relevant case-law, that is not the case as far as paragraph (1) of that article is concerned. It cannot be imagined that this was mere oversight on the part of the legislature. Rather, it was an explicit choice, justified by the importance of the interests requiring protection. That argument is supported by the inclusion in Article 4(1)(b) of Regulation No 1049/2001 of the exception for the protection of privacy and the integrity of the individual in accordance with Community legislation regarding the protection of personal data.

35 Moreover, according to the Council, even if all the exceptions laid down in Article 4 of Regulation No 1049/2001 were subject to strict interpretation, that still could not mean that those exceptions are to be interpreted as not having any practical effect. If the conditions in Article 4(1) of Regulation No 1049/2001 are met, the Council is obliged to apply that provision and refuse access to the note.

Findings of the Court

36 With regard to the alleged inadequacy of the statement of reasons in the contested decision, settled case-law provides that the purpose of the obligation on the institution to state the reasons for its decision to refuse access to a document is, first, 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, secondly, 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 (see Case T-187/03 *Scippacercola* v *Commission* [2005] ECR II-1029, paragraph 66 and the case-law cited).

37 In the present case, in the contested decision the Council sets out in detail the reasons for its refusal by providing information which shed light on the subject-matter of the note and the reasons why its disclosure could undermine the protection of the public interest as regards international relations and the Community's financial, monetary and economic policy. As the Council rightly observed, it is not possible to provide all the information as to why the note cannot be disclosed without revealing its contents and without thereby depriving the exception of its very purpose. It follows that the applicant's argument that the Council failed to provide adequate reasons for its refusal cannot be accepted since the reasoning given in the contested decision is sufficiently clear to allow the applicant to understand why the Council did not grant it access to the note, to enable it to challenge that refusal effectively before the Court of First Instance and to enable that court to review the legality of the contested decision.

38 As regards the assessment as to whether the note could be disclosed and the refusal to grant access to it under the third and fourth indents of Article 4(1)(a) of Regulation No 1049/2001, it must be pointed out that the provisions of Regulation No 1049/2001 substantially reproduce the content of the earlier legislation as regards the scope of the exceptions to the right of access to documents.

39 According to the case-law relating to that legislation, the rule is that the public is to have access to the documents of the institutions and refusal of access is the exception to that rule. Consequently, the provisions sanctioning a refusal must be construed and applied strictly so as not to defeat the application of the rule. Moreover, an institution is obliged to consider in respect of each document to which access is sought whether, in the light of the information available to that institution, disclosure of the document is in fact likely to undermine one of the public interests

protected by the exceptions which permit refusal of access. In order for those exceptions to be applicable, the risk of the public interest being undermined must therefore be reasonably foreseeable and not purely hypothetical (see Case T-211/00 *Kuijer* v *Council* [2002] ECR II-485, paragraphs 55 and 56 and the case-law cited).

40 It is also apparent from the case-law that the institutions enjoy a wide discretion when considering whether access to a document may undermine the public interest and, consequently, that the Court's review of the legality of the institutions' decisions refusing access to documents on the basis of the mandatory exceptions relating to the public interest must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers (see, to that effect, Case T-14/98 *Hautala* v *Council* [1999] ECR II-2489, paragraphs 71 and 72, and *Kuijer* v *Council*, cited in paragraph 39 above, paragraph 53).

41 As to whether there was a manifest error of assessment of the facts, as the applicant essentially submits is the case, it must be noted that the Council refused to grant access to the note so as not to risk upsetting the negotiations that were taking place at that time in a sensitive context, which was characterised by resistance on the part of both the developing and the developed countries and the difficulty in reaching an agreement, as illustrated by the breakdown of negotiations at the WTO Ministerial Conference in Cancun in September 2003. Thus, in considering that disclosure of that note could have undermined relations with the third countries which are referred to in the note and the room for negotiation needed by the Community and its Member States to bring those negotiations to a conclusion, the Council did not commit a manifest error of assessment and was right to consider that disclosure of the note would have entailed the risk of undermining the public interest as regards international relations and the Community's financial, monetary and economic policy, which was reasonably foreseeable and not purely hypothetical.

42 It follows from the above that the Council has, first, given sufficient reasons for its refusal to grant access to the note and, secondly, not misinterpreted the conditions for applying the exceptions to public access to documents laid down in the third and fourth indents of Article 4(1)(a) of Regulation No 1049/2001.

43 Those conclusions cannot be altered by the applicant's arguments concerning the need to balance its interest in having access to the note against the Council's interest in not disclosing it.

44 The exceptions set out in Article 4(1) of Regulation No 1049/2001 are framed in mandatory terms and it follows that the institutions are obliged to refuse access to documents falling under any one of those mandatory exceptions once the relevant circumstances are shown to exist (see, by analogy, Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313, paragraph 58). Those exceptions are therefore different from the exceptions relating to the interest of the institutions in maintaining the confidentiality of their deliberations laid down in Article 4(3) of Regulation No 1049/2001, in the application of which the institutions enjoy a discretion which allows them to balance, on the one hand, their interest in maintaining the confidentiality of their deliberations against, on the other hand, the interest of the citizen in gaining access to documents (see, by analogy, *Carvel and Guardian Newspapers* v *Council*, cited in paragraph 26 above, paragraphs 64 and 65).

45 Since the exceptions at issue in the dispute fall under Article 4(1) of Regulation No 1049/2001, the Council was not required in the present case to balance the protection of the public interest against the applicant's interest in gaining access to the note.

46 In view of the foregoing, the first plea must be rejected.

The second plea, alleging infringement of Article 4(6) of Regulation No 1049/2001

Arguments of the parties

47 The applicant submits, in essence, that the Council failed properly to apply the principle of proportionality in assessing whether partial disclosure of the note was possible.

48 The Council claims that it considered the possibility of a partial disclosure of the note in accordance with Article 4(6) of Regulation No 1049/2001 and the relevant case-law and also consulted the Commission, which had drawn up the note, on this point. As a result of this, the Council concluded that the exceptions set out in the third and fourth indents of Article 4(1)(a) of Regulation No 1049/2001 applied to the note in its entirety and that, consequently, partial access to the note could not be granted. Moreover, it would have been difficult for it to provide further information without disclosing the content of the note.

49 At the hearing, the Council stated that it was a closely-written document, designed to provide experts in the field with information on specific issues relating to the negotiations that were ongoing and did not contain generalities which could have been taken in isolation and disclosed. Therefore, both the analytical elements and the observations contained in the note were of a sensitive nature.

Findings of the Court

50 It is clear from the wording itself of Article 4(6) of Regulation No 1049/2001 that an institution is required to consider whether it is appropriate to grant partial access to documents requested and to confine any refusal to information covered by the relevant exceptions. The institution must grant partial access if the aim pursued by that institution in refusing access to a document may be achieved where all that is required of the institution is to blank out the passages which might harm the public interest to be protected (see, to that effect, Case C-353/99 P *Council* v *Hautala* [2001] ECR I-9565, paragraph 29).

51 In the present case, it is apparent from the contested decision and was confirmed at the hearing that the Council considered the possibility of a partial disclosure of the note and also consulted the Commission on this question pursuant to Article 4(4) of Regulation No 1049/2001. As a result of this, the Council concluded that such partial disclosure under Article 4(6) of Regulation No 1049/2001 was not possible since the exceptions in Article 4(1) of Regulation No 1049/2001 applied to the note in its entirety. The Commission, the framer of the note, also came to that conclusion in its correspondence with the Council, in particular in its letter of 1 June 2004.

52 The Council justifies its refusal to grant partial access to the note on the ground that it consists entirely of elements of analysis and observations on the positions of a number of the Community's partners in negotiations within the WTO and on negotiating options open to Community negotiators, the disclosure of which would have seriously undermined the conduct of the ongoing negotiations. It also stated that the note had been designed to provide experts, such as the Members of the Committee, with information.

53 It is therefore apparent from the contested decision that, in view of the fact that the first item on the agenda of the meeting of the Committee was concerned with an analysis of the status of negotiations within the WTO and the fact that the note had been previously distributed to the Members of the Committee for that purpose, the whole content of the note had to be regarded as sensitive and, accordingly, was covered in its entirety by the pubic interest as regards the Community's international relations and economic policy, which is protected by the exception laid down in the third and fourth indents of Article 4(1)(a) of Regulation No 1049/2001.

54 It follows that, in refusing the applicant partial access to the note, the Council did not apply Article 4(6) of Regulation No 1049/2001 incorrectly.

55 In view of the above, the second plea in law must be rejected.

The third plea, alleging infringement of Article 2 of Regulation No 1049/2001

56 This plea consists of three parts. The first part alleges that the Council refused to grant access to the minutes relating to the first item on the agenda of the meeting of 19 December 2003 on the basis that there were no such minutes. The second part alleges that the Council refused, in the absence of any minutes, to provide the applicant with information on the content of the discussions on the first item on the agenda of the meeting of 19 December 2003 in a form capable of being disseminated. The third part alleges that the Council refused to grant access to the records of those in attendance at that meeting.

The first part, alleging that the Council refused to grant access to the minutes relating to the first item on the agenda of the meeting of 19 December 2003 on the basis that there were no such minutes

— Arguments of the parties

57 The applicant maintains that Regulation No 1049/2001 is applicable to the documents drawn up and held by the Committee. Under Article 21 of the Rules of Procedure, there should be minutes of the meetings of that Committee, either in its configuration of Deputy Members or of full Members, given its status as a Council preparatory committee.

58 It is contrary to the principle of transparency, which is referred to in the preamble to Regulation No 1049/2001 and in Article 19 of the Rules of Procedure, and to the principle of good administration for there not to be any minutes of a meeting of the Committee. The right of access to documents, as guaranteed by Article 2 of Regulation No 1049/2001, would be rendered entirely devoid of meaning if the institutions were not to record information in a form that enables it to be disseminated to the public. The institutions have a duty to record information, especially where that information consists of the deliberations of one of the committees which exist to inform the decision-making of both the Council and the Commission.

59 The Council replies that no minute of that meeting was produced and that there is no rule that such a document must be prepared. In view of the number of meetings organised in the Council, such an obligation would have clearly unacceptable consequences and would be impossible to comply with.

60 The Council draws attention to the case-law according to which, where the institution concerned asserts that a particular document to which access has been sought does not exist, there is a presumption that it does not and that that simple presumption may be rebutted in any way by relevant and consistent evidence. In the present case, the doubts expressed by the applicant as to the non-existence of minutes of the meeting of 19 December 2003 are based on a misinterpretation of the Rules of Procedure.

— Findings of the Court

61 It would be contrary to the requirement of transparency which underlies Regulation No 1049/2201 for institutions to rely on the fact that documents do not exist in order to avoid the application of that regulation. In order that the right of access to documents may be exercised effectively, the institutions concerned must, in so far as possible and in a non-arbitrary and predictable manner, draw up and retain documentation relating to their activities.

62 It is apparent from the heading of the first item on the agenda of the meeting of 19 December 2003, as was confirmed at the hearing, that the purpose of that item was to provide the Members of the Committee with information on the status of the negotiations within the WTO. The purely informative nature of that item at the meeting and the fact that it did not call for any specific implementing measure explain why it was not considered necessary to minute it and why the item was not recorded in a summary report or other subsequent document of the Committee.

63 That being so, it is also not possible to conclude that the Council acted in an arbitrary or unpredictable manner by failing to produce minutes on that item at the meeting. It cannot therefore be concluded that the Council, in claiming that such

minutes do not exist, infringed the applicant's right of access to documents conferred by Regulation No 1049/2001.

64 Accordingly, the first part of the third plea must be rejected.

The second part, alleging that the Council refused, in the absence of any minutes, to provide the applicant with information on the content of the discussions on the first item on the agenda of the meeting on 19 December 2003

— Arguments of the parties

65 The applicant states that even if, according to the Council, there were no minutes of the meeting of 19 December 2003, in the sense intended by the Commission in its letter of 1 June 2004, the Council should have granted it access to information on the content of the discussions held at that meeting.

66 First, the applicant submits that information on the content of the discussions at the meeting should have been recorded in a form capable of being disseminated in order to give substance to the right of access to documents, which should be interpreted as a right to information in the light of the principle of transparency and the judgment in *Council* v *Hautala*, cited in paragraph 50 above, in which the Court expressly rejected the Council's argument that that right concerned only access to documents and not access to the information contained in them.

67 The right of access to documents, construed as a right of access to information, is particularly relevant in the field of protection of the environment under the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which was signed by the Community. The proposal for a regulation on its application to the Community institutions, which, as was stated at the hearing, subsequently became Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13), refers to Regulation No 1049/2001 with regard to access to information on the environment, which is defined as 'any information in written, visual, aural, electronic or any other material form'. It is therefore clear that Regulation No 1049/2001 applies to information generally and not simply to documents.

68 Secondly, the applicant submits that, in order to give full effect to the right of access to information guaranteed by Community law, the information to which a person has right of access must be provided in a suitable form and, even if the document in which the information is recorded cannot be provided, it must be drawn up, extracted, summarised or paraphrased from that original document.

69 The Council submits, first, that there is no obligation to record information, such as the content of the discussions at meetings of the Committee, in order that they can be made available. The applicant's interpretation of the right of access to documents as a right to information is based on a misreading of Regulation No 1049/2001 and of the case-law.

70 Thus, it is clear from the provisions of Regulation No 1049/2001, in particular its title, Article 2(3), Article 3, Article 10(3) and Articles 11 and 14, that that regulation

applies to documents that are in existence, that is, documents drawn up or received by an institution and in its possession.

71 Similarly, the judgment in *Council* v *Hautala* answers only the question whether it is necessary to grant partial access to an already existing document. There is no support in case-law for the contention that the institutions are obliged to prepare a minute of all meetings held by them.

72 That conclusion cannot be affected by the applicant's argument that the principle of access to information in environmental matters is applicable on the basis of the Aarhus Convention since, at the time when the contested decision was adopted, neither the Aarhus Convention nor the regulation implementing it was in force. Moreover, the concept of environmental information established in that convention does not include committee discussions, on account of their oral nature, and neither of those legal instruments places an obligation on the Committee to draw up minutes of its meetings.

73 Furthermore, it follows from the decisions of the European Ombudsman that an institution is not obliged to produce documents pursuant to Regulation No 1049/2001 where no document exists to which access may be granted.

74 In the second place, the Council contends that, contrary to the applicant's assertions, minutes are not documents that summarise other documents, but rather documents summarising an oral discussion. The applicant is therefore wrong to claim that the means needed to draw up minutes are readily at the Council's disposal.

— Findings of the Court

75 First, it is to be noted that the scope of Regulation No 1049/2001, pursuant to Article 2(3) thereof, extends only to 'documents held by an institution, that is to say, documents drawn up or received by it and in its possession'.

76 Secondly, case-law provides that the concept of a document must be distinguished from that of information. The public's right of access to the documents of the institutions covers only documents and not information in the wider meaning of the word and does not imply a duty on the part of the institutions to reply to any request for information from an individual (see, by analogy, the order in Case T-106/99 *Meyer* v *Commission* [1999] ECR II-3273, paragraphs 35 and 36). It is true that it is apparent from the judgment in *Council* v *Hautala*, cited in paragraph 50 above, that Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43), which preceded Regulation No 1049/2001, covered not only documents held by the institutions as such but also information contained within those documents (paragraph 23 of the judgment). However, access to information — within the meaning of that judgment — may be granted only if that information is contained within documents, which presupposes that such documents exist.

77 In the present case, since there are no minutes or other documents relating to the first item on the agenda of the meeting of the Committee of 19 December 2003, the Council was not obliged to provide the applicant with information on the content of that item at the meeting.

78 It follows that the Council has not infringed the applicant's right of access to documents conferred by Regulation No 1049/2001 by refusing to provide it with

information on the contents of the discussions relating to the first item on the agenda of the meeting of 19 December 2003, since that information did not exist in the form of a document that could be disseminated.

79 That finding cannot be altered by the applicant's arguments relating to the Aarhus Convention or the proposal for a regulation on its application in view of the fact that, as the Council rightly pointed out, at the time when the contested decision was adopted, neither the Aarhus Convention nor the regulation implementing it was in force.

80 Accordingly, the second part of the third plea must be rejected.

The third part, alleging that the Council refused to grant access to the records of those in attendance at the Committee meeting of 19 December 2003

— Arguments of the parties

81 The applicant states, first, that the records of Members of the Committee and of the Commission of discussions within the Committee are not excluded from the scope of Regulation No 1049/2001 and must therefore be accessible to the public, unless the exception laid down in Article 4(3) of Regulation No 1049/2001 relating to internal deliberations applies.

82 The applicant submits, secondly, that its request for information was sufficiently widely couched to encompass records of the Committee's discussions and that the Commission's narrow interpretation of the concept of 'minutes' is totally

unjustified. Consequently, the records of the Members of the Committee and of the Commission should be disclosed since the exception laid down by Article 4(3) of Regulation No 1049/2001, which is an exception to a general obligation, must be narrowly construed. Moreover, the Court of First Instance has previously rejected the argument that the disclosure of a committee's internal deliberations would necessarily undermine the smooth running and effectiveness of such deliberations.

83 The Council states that it is unaware whether the national delegations or the Commission prepared internal records or in what form. Since those records are exclusively for internal use by the Member State concerned or the Commission, they were not communicated to the Council. Consequently, as those records were not held by the Council, they fall outside the scope of Article 2(3) of Regulation No 1049/2001.

84 The Council also contends that, in its reply, the applicant has considerably changed its plea with regard to the claim relating to its request for access to the minutes of the meeting of 19 December 2003 by claiming that the Council infringed Regulation No 1049/2001 because it did not grant it access to the internal records of the Commission and of the Member States' delegations. In that regard, the Council states that, according to case-law, the decision on the confirmatory application sets the boundaries of the scope of the judicial proceedings. It is apparent from the confirmatory application that the applicant did not ask the Council to grant it access to those internal records of the Commission and of the Member States' delegations. Since it did not refuse access to those documents in the contested decision, the Council is not obliged to express a view on the applicant's arguments on that point.

— Findings of the Court

85 It is clear that, in the two letters which prompted the contested decision, the applicant did not ask the Council for access to the records of those in attendance at

the meeting of 19 December 2003. Accordingly, the contested decision is not concerned with access to the records of those in attendance at the meeting of 19 December 2003. Given that, first, where an application is brought before it for annulment of a Council decision refusing access to documents, the Community judicature must, in accordance with Article 230 EC, review the legality of that decision alone and, secondly, that the contested decision is not a response to a request for access to the internal records of the Commission and the Member States' delegations, the applicant's arguments concerning access to those records cannot, as a consequence, be accepted.

86 In any event, even if it were necessary to consider that the applicant's request was to be interpreted as including a request for access to the internal records of the Commission and of the Member States' delegations, the Council could not communicate those records pursuant to Article 2(3) of Regulation No 1049/2001, since they were neither held nor received by the Council.

87 Consequently, the third part of the third plea must be rejected, as must this plea in its entirety.

88 It follows from all of the above that the action must be dismissed.

Costs

89 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, it must be ordered to pay the Council's costs, as applied for by the defendant, in addition to bearing its own.

90 In accordance with the first subparagraph of Article 87(4) of the Rules of Procedure, the institutions which have intervened in the proceedings are to bear their own costs. The Commission must therefore bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to bear its own costs and to pay those incurred by the Council;

3. Orders the Commission to bear its own costs.

Legal Wiszniewska-Białecka Moavero Milanesi

Delivered in open court in Luxembourg on 25 April 2007.

E. Coulon H. Legal

Registrar President