JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

13 January 2011 *

In Case T-362/08,

IFAW Internationaler Tierschutz-Fonds gGmbH, established in Hamburg (Germany), represented by S. Crosby, Solicitor, and S. Santoro, lawyer,

applicant,

supported by

Kingdom of Denmark, represented by J. Bering Liisberg and B. Weis Fogh, acting as Agents,

by

Republic of Finland, represented initially by J. Heliskoski, M. Pere and H. Leppo, and later by J. Heliskoski, acting as Agents,

* Language of the case: English.

and by

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

interveners,

v

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

defendant,

APPLICATION for the annulment of the Commission's decision of 19 June 2008 refusing to grant the applicant access to a document sent to the Commission by the German authorities in connection with a procedure for the declassification of a site protected under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7),

THE GENERAL COURT (Eighth Chamber),

composed of M.E. Martins Ribeiro, President, N. Wahl and A. Dittrich (Rapporteur), Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 16 April 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 of the right of access to documents of those institutions provided for by Article 255 EC. The regulation has been applicable since 3 December 2001.

2 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.

…'

3 Article 3 of Regulation No 1049/2001 states:

'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.'

4 Article 4 of the Regulation, which sets out the exceptions to the aforementioned right of access, states the following:

'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;

…

3. …

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.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.'

5 Article 9 of the regulation, which governs 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.

…'

6 Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) is worded as follows:

'If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

Background to the dispute

7 The applicant, IFAW Internationaler Tierschutz-Fonds gGmbH, is a non-governmental organisation active in the field of the preservation of animal welfare and nature conservation.

8 Having received a request from the Federal Republic of Germany on the basis of the second subparagraph of Article 6(4) of Directive 92/43, the Commission of the European Communities delivered on 19 April 2000 an opinion in favour of the carrying out of an industrial project on the Mühlenberger Loch site, a protected zone under the directive. The project consisted in the expansion of the factory belonging to Company D for the purposes of the final assembly of the Airbus A3XX.

9 By letter of 20 December 2001 to the Commission, the applicant requested access to various documents received by the Commission in connection with the examination of the abovementioned industrial project, namely the correspondence originating from the Federal Republic of Germany, the City of Hamburg and the German Chancellor.

10 Taking the view that Article 4(5) of the regulation prohibited it from disclosing the documents in question, on 26 March 2002 the Commission adopted a decision refusing the applicant access to certain documents which it had received in connection with the procedure upon completion of which the Commission had delivered its opinion of 19 April 2000.

11 By application lodged at the Registry of the Court on 4 June 2002, the applicant brought an action for the annulment of the Commission's decision of 26 March 2002.

12 By its judgment of 30 November 2004 in Case T-168/02 *IFAW Internationaler Tierschutz-Fonds* v *Commission* [2004] ECR II-4135, the Court dismissed the action as unfounded.

13 On 10 February 2005 the Kingdom of Sweden, an intervener in Case T-168/02, lodged an appeal before the Court of Justice against the judgment of the Court of First Instance (now the General Court) in that case.

14 In its judgment of 18 December 2007 in Case C-64/05 *Sweden* v *Commission* [2007] ECR I-11389, the Court of Justice set aside the judgment in *IFAW Internationaler Tierschutz-Fonds* v *Commission*, cited in paragraph 12 above, and annulled the Commission's decision of 26 March 2002.

15 As a result of the judgment in *Sweden* v *Commission*, cited in paragraph 14 above, the applicant, by letter of 13 February 2008 to the Commission, repeated its request for access to the documents received by the Commission in relation to the examination of the Mühlenberger Loch project and originating from the German authorities.

16 By letter of 20 February 2008, the Commission acknowledged receipt of the applicant's letter of 13 February 2008.

17 On 26 March 2008 the applicant asked the Commission to reply to its request of 13 February 2008.

18 By letter of 7 April 2008 the Commission informed the applicant that consultation was in progress with the German authorities concerning disclosure of the documents requested.

19 On 9 April 2008, the applicant once again asked the Commission to reply to its request before 22 April 2008.

20 As no reply was received from the Commission by that date, the applicant made a confirmatory application by letter of 29 April 2008.

21 On 19 May 2008 the Commission wrote to the applicant, acknowledging receipt of the confirmatory request and stating that a reply would be given to the applicant within the period specified by Regulation No 1049/2001.

22 On 19 June 2008 the Commission adopted a decision on the applicant's confirmatory request ('the contested decision'), which was communicated to the applicant on the same day. By that decision, the Commission disclosed all the documents requested by the applicant, namely, eight documents received from the City of Hamburg and the Federal Republic of Germany, with the exception of a letter of 15 March 2000 from the German Chancellor to the President of the Commission ('the German Chancellor's letter'), as the German authorities objected to disclosure of that document.

23 According to the contested decision, first, the German authorities stated that disclosure of the German Chancellor's letter would undermine the protection of the public interest as regards the international relations and the economic policy of the Federal Republic of Germany within the meaning of the third and fourth indents of Article 4(1)(a) of Regulation No 1049/2001.

24 That letter concerns a confidential statement drawn up exclusively for internal use. The document concerns a confidential matter relating to the economic policy of the Federal Republic of Germany and other Member States. Disclosure of that document would not only undermine confidentiality, to the detriment of international relations

between the Federal Republic of Germany, the institutions of the European Union and other Member States but would also compromise the economic policy of the Federal Republic of Germany and of other Member States. Consequently, access to the German Chancellor's letter had to be refused pursuant to the third and fourth indents of Article 4(1)(a) of Regulation No 1049/2001.

25 Secondly, the German authorities stated that disclosure of the German Chancellor's letter would seriously undermine the protection of the Commission's decision-making process within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001.

26 That letter concerns a confidential statement, addressed to the Commission and drawn up exclusively for internal use in connection with the discussions relating to the Commission's opinion of 19 April 2000. That document concerns the economic policy of the Federal Republic of Germany and of other Member States. Disclosure of the document would undermine confidentiality and would therefore damage relations between the Federal Republic of Germany, the institutions of the European Union and other Member States. That would seriously undermine the Commission's decision-making process. Consequently, the exception provided for in the second subparagraph of Article 4(3) of Regulation No 1049/2001 applied to the German Chancellor's letter.

27 In the contested decision the Commission adds that, under Article 4(3) of Regulation No 1049/2001, the exception to the right of access is not applicable if there is an overriding public interest justifying the disclosure of the document in question. Notwithstanding the fact that the document concerned also fell within the scope of the two exceptions mentioned in Article 4(1) of Regulation No 1049/2001, which are not subject to a test of public interest, the Commission considered whether, in the present case, such an overriding public interest existed.

28 According to the Commission, for an overriding public interest justifying disclosure to exist, that interest must, first, be public and secondly, be overriding, that is to say, it must prevail over the interests protected by Article 4(3) of Regulation No 1049/2001. In the present case, the Commission had no evidence to suggest the existence of a possible overriding public interest within the meaning of the above regulation prevailing over the requirement to protect the Commission's decision-making process.

29 With regard to the question of partial access to the document at issue, the Commission stated in the contested decision that, by virtue of the judgment in *Sweden* v *Commission*, cited in paragraph 14 above, it was compelled to accept the outcome of the consultation process and to refuse access to the German Chancellor's letter on the basis of the exceptions claimed by the German authorities and the reasons they gave. As the German authorities oppose disclosure of the whole of the German Chancellor's letter, partial access to that document could not be granted on the basis of Article 4(6) of Regulation No 1049/2001.

Procedure and forms of order sought

30 By application lodged at the Court Registry on 28 August 2008, the applicant brought the present action.

31 By letter registered at the Court Registry on 9 January 2009, the Republic of Finland sought leave to intervene in the present proceedings in support of the form of order sought by the applicant. After hearing the principal parties, leave to intervene was granted by order of 5 March 2009 of the President of the Eighth Chamber of the Court.

32 The Republic of Finland lodged its statement in intervention on 17 April 2009. By documents lodged at the Court Registry on 26 June 2009, the principal parties submitted their observations on that document.

33 By letters registered at the Court Registry on 18 and 29 June 2009 respectively, the Kingdom of Sweden and the Kingdom of Denmark sought leave to intervene in the present proceedings in support of the form of order sought by the applicant. After hearing the principal parties, that leave was granted by order of 12 August 2009 of the President of the Eighth Chamber of the Court.

34 Upon hearing the report of the Judge Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure.

35 The principal parties, the Kingdom of Denmark and the Kingdom of Sweden presented oral argument and their replies to oral questions put by the Court at the hearing on 16 April 2010. Since the Republic of Finland could not be represented at the hearing, it was decided, before closure of the oral procedure, to put a question in writing to the Republic of Finland regarding the admissibility of its argument concerning partial access to the German Chancellor's letter and the application *ratione temporis* of the exceptions to the right of access at issue under Article 4 (6) and (7) of Regulation No 1049/2001. The Republic of Finland replied within the prescribed period and the principal parties, the Kingdom of Denmark and the Kingdom of Sweden submitted their observations.

36 The applicant's observations are not limited to the contents of the Republic of Finland's reply. As the parties were not authorised to add documents to the file going beyond that reply after the hearing, the President of the Eighth Chamber decided, on 15 June 2010, to place those observations in the case-file only to the extent that they concerned the contents of the Republic of Finland's reply.

37 The oral procedure was closed on 15 June 2010.

38 The applicant claims that the Court should:

— order the Commission to produce the German Chancellor's letter to the Court;

— annul the contested decision;

— order the Commission to pay the costs.

39 The Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden claim that the Court should annul the contested decision.

40 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

41 The applicant raises two pleas in support of its claims. The first alleges an infringement of the third and fourth indents of Article 4(1)(a) of Regulation No 1049/2001. According to that article, access to a document is to be refused if its disclosure would undermine the protection of the public interest as regards, in particular, the international relations and the economic policy of a Member State. The second plea alleges an infringement of the second subparagraph of Article 4(3) of Regulation No 1049/2001, which states that access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned is to 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.

42 The interveners support the applicant's argument in that respect. The Republic of Finland also alleges an infringement of Article 4(6) of Regulation No 1049/2001 concerning the possibility of partial access to a document. In addition, according to the Republic of Finland, the requirements of Article 4(7) of the regulation concerning the application *ratione temporis* of the exception to the right of access provided for in the second subparagraph of Article 4(3) have not been fulfilled. In its observations on the statement in intervention of the Republic of Finland, the applicant 'welcomes' that Member State's argument regarding Article 4(7) of Regulation No 1049/2001 and extends it to all the exceptions at issue in the present case.

43 In presenting their respective interpretations of Article 4(5) of Regulation No 1049/2001, for the purpose of determining the consequences of the application of that provision to the present case, in the light of the judgment in *Sweden* v *Commission*, cited in paragraph 14 above, which, according to them, is at the centre of the present dispute, the parties put forward arguments which apply to all the pleas. Before dealing specifically with the various pleas, that question must therefore be considered.

The interpretation of Article 4(5) of Regulation No 1049/2001

Arguments of the parties

44 The applicant claims that it is important to know all the reasons why the Commission approved, in its opinion of 19 April 2000, the declassification of a nature reserve protected by the Natura 2000 scheme, as established by Directive 92/43. It points out that the Federal Republic of Germany repeatedly challenged the Commission's reluctance to declassify the nature reserve and to allow the expansion of Company D's plant, on the Elbe in Hamburg, for the final assembly of the Airbus A3XX. The Commission approved the declassification only a short time after receiving the German Chancellor's letter.

45 According to the applicant, it is clear from the judgment in *Sweden* v *Commission*, cited in paragraph 14 above (paragraph 94), that it is within the jurisdiction of the European Union (EU) judicature to review whether the refusal of access by the institution addressed was validly based on the exceptions set out in Article 4(1) to (3) of Regulation No 1049/2001, regardless of whether the refusal results from an assessment of those exceptions by the institution itself or by the relevant Member State.

46 The Commission's contention that its role is limited to conducting a cursory examination of the Member State's reasons would lead to the authorship rule being effectively re-introduced. The Commission must assess in each individual case whether a document to which access has been requested comes within the scope of the exceptions at issue.

47 The Kingdom of Denmark argues that, according to Regulation No 1049/2001, the institutions of the European Union have an independent decision-making power. They have final responsibility for verifying whether a refusal of access is justified and must make a specific assessment of the application for access to the documents.

48 Although, in certain cases, the institutions of the European Union may, exceptionally, limit themselves to a prima facie assessment, the fact that the procedure laid down in Article 4(5) of Regulation No 1049/2001 applies to the present case is not a circumstance which justifies a prima facie assessment being sufficient.

49 The Republic of Finland points out that, according to the judgment in *Sweden* v *Commission*, cited in paragraph 14 above, when Article 4(5) of Regulation No 1049/2001 applies, the institution concerned must always, in examining the document in question, assess whether the exceptions to access to that document put forward by the Member State concerned are applicable. If, in the Commission's assessment, the reasons adduced by the Member State are inappropriate, the Commission must grant the access to the document requested. Since, in the present case, the Commission failed to fulfil that obligation, the contested decision should be annulled.

50 In support of its interpretation, the Republic of Finland points out that the grounds of exception in Article 4 of Regulation No 1049/2001 must be interpreted and applied strictly.

51 Secondly, the obligation to state reasons under Article 253 EC is also applicable to a decision of refusal adopted pursuant to Article 4(5) of Regulation No 1049/2001. The Member State concerned is merely given a power to take part in the adoption of an EU decision (*Sweden* v *Commission*, cited in paragraph 14 above, paragraphs 76 and 81). The fact that a decision of an EU institution is concerned means that the

institution which has taken the decision is responsible for the correct assessment of the applicability of the exceptions at issue.

52 Thirdly, the abolition of the authorship rule by Regulation No 1049/2001 would be pointless if, as the Commission maintains, that institution has only to consider whether the exception relied upon by a Member State is manifestly inappropriate. The Republic of Finland adds that an EU institution must assess in each individual case whether a document falls within the exceptions set out in Article 4 of the regulation.

53 The Kingdom of Sweden argues that it is clear from the judgment in *Sweden* v *Commission*, cited in paragraph 14 above, that the Member State concerned does not have a general and unconditional right of veto permitting it arbitrarily to oppose the disclosure of a document by an EU institution, and that it must give reasons for its decision by reference to the exceptions to the right of access provided for in Regulation No 1049/2001. However, the type of examination that the institution must carry out when a Member State objects to disclosure was not clarified by that judgment.

54 In that regard, the Kingdom of Sweden states that the Commission must ensure that the reasons put forward by the Member State are legally correct, from a formal and substantive point of view, and that it must carry out an individual examination of each document as well as making an analysis to determine whether there is a real and concrete risk that disclosure of a document could damage a protected interest. The importance of maintaining a uniform interpretation of Regulation No 1049/2001 also speaks in favour of a right of examination on the part of the institution.

55 According to the Kingdom of Sweden, the institution's decision must be preceded by a dialogue marked by cooperation in good faith with Member States. In certain cases, for example, where the monetary or economic policy of a Member State might be

negatively affected, the point of view of that Member State must take precedence. In other cases, where disclosure of a document could seriously undermine the decision-making process of an institution, the institution in question must have a discretion when determining whether the Member State's argument is inadequate.

56 The Commission points out that, as the document to which access was refused originated in a Member State, it applied Article 4(5) of Regulation No 1049/2001, as interpreted by the Court of Justice in *Sweden* v *Commission*, cited in paragraph 14 above. It points out that the German authorities opposed disclosure of the German Chancellor's letter.

57 According to the Commission, the central issue is the extent to which it is obliged to respect a Member State's objection to disclosure of a document when such objection is duly based on reasons put forward in terms of the exceptions contained in Article 4(1) to (3) of Regulation No 1049/2001. In other words, it must be determined to what extent the Commission is obliged to substitute its own assessment for that of the Member State.

58 The Commission submits that two provisions of Regulation No 1049/2001 deal with the situation where a document to which access is requested originates, not from the institution concerned, but from a third party, namely, Article 4(4), which refers to the general regime for access to documents originating from third parties and Article 4(5), which deals with documents originating from a Member State. By adding Article 4(5) of Regulation No 1049/2001, the legislature created a special position for the Member States in accordance with Declaration No 35 relating to Article 255(1) EC annexed to the Final Act of the Treaty of Amsterdam.

59 According to the Commission, the Court of Justice held in *Sweden* v *Commission*, cited in paragraph 14 above (paragraph 44), that the requirement in that provision of prior agreement of the Member State in Article 4(5) of Regulation No 1049/2001 would risk becoming a dead letter if, despite a Member State's objection to disclosure of a document originating from it, the institution were nevertheless free to disclose the document in question, even without any agreement of that Member State. Such a requirement would have no useful effect, and indeed would be meaningless, if the need to obtain such prior agreement to disclosure of the document ultimately depended on the discretion of the institution in possession of the document. According to paragraphs 45 and 46 of that judgment, an agreement is legally different from a mere opinion and the right to be consulted is already possessed by the Member States to a great extent by virtue of Article 4(4) of Regulation No 1049/2001.

60 In paragraph 47 of the judgment in *Sweden* v *Commission*, cited in paragraph 14 above, the Court of Justice pointed out that, in contrast to Article 9(3) of Regulation No 1049/2001, Article 4(5) of that regulation gives the Member State an option, and only the actual exercise of that option in a particular case has the consequence of making the prior agreement of the Member State a necessary condition of the future disclosure of the document in question.

61 From a procedural point of view, according to paragraph 87 of the judgment in *Sweden* v *Commission*, cited in paragraph 14 above, the Member State which objects to disclosure of a document is obliged to state reasons for that objection with reference to the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001. It follows from paragraphs 45 to 47 and 76 of that judgment that the existence of a properly reasoned objection precludes the Commission from disclosing the document concerned.

62 The Commission cannot accept a Member State's objection, and must therefore carry out its own assessment, if no reasons at all are given for the objection or if the reasons invoked are not put forward in terms of the exceptions listed in Regulation No 1049/2001 (*Sweden* v *Commission*, cited in paragraph 14 above, paragraph 88).

63 According to paragraph 89 of the judgment in *Sweden* v *Commission*, cited in paragraph 14 above, the Commission is obliged, in its decision refusing access, to set out the reasons relied on by that Member State to show that one of the exceptions to the right of access in Article 4(1) to (3) of Regulation No 1049/2001 applies.

64 The Commission submits that it fulfilled its obligations under Regulation No 1049/2001, as interpreted by the Court of Justice in *Sweden* v *Commission*, cited in paragraph 14 above. The German authorities were consulted and they objected to disclosure of the German Chancellor's letter, citing reasons which were based on the exceptions set out in the third and fourth indents of Article 4(1)(a) and the second subparagraph of Article 4(3) of the above regulation. The Commission then considered whether the exceptions had been prima facie properly relied upon and, that being so, presented the reasons in its refusal decision.

65 According to the Commission, when a Member State objects, the Commission's review is limited to checking that the objection is prima facie based on the exceptions provided for by Regulation No 1049/2001 and that reliance on those exceptions is not manifestly improper. An exception would be manifestly improper if a Member State were to invoke the exception in order to refuse access to a document where the document clearly did not fall within the scope of the exception as interpreted by the EU courts.

66 Judicial review of the legality of the contested decision should in turn be limited to verifying that the Commission duly checked that reliance on the relevant exceptions was not manifestly improper.

Findings of the Court

67 It should be pointed out that, as is apparent from the fourth recital and Article 4 of Regulation No 1049/2001, the purpose of the regulation is to give the fullest possible effect to the right of public access to documents held by an institution. Pursuant to Article 2(3) of the regulation, that right extends not only to documents drawn up by an institution but also to documents received from third parties, including the Member States, as expressly stated in Article 3(b) of the regulation.

68 Article 4 of Regulation No 1049/2001 lays down exceptions to the right of access to a document. Article 4(5) states that a Member State may request an institution not to disclose a document originating from that Member State without its prior agreement.

69 In the present case, the Federal Republic of Germany availed itself of the possibility offered by Article 4(5) of Regulation No 1049/2001 and asked the Commission not to disclose the German Chancellor's letter. It based its objection on the exceptions concerning the protection of the public interest as regards the international relations and the economic policy of a Member State laid down in the third and fourth indents of Article 4(1)(a) of the regulation and on the exception concerning the protection of the Commission's decision-making process, laid down in the second subparagraph of Article 4(3) of the same regulation. In the contested decision, the Commission based its refusal to grant access to the German Chancellor's letter on the objection raised by the German authorities pursuant to Article 4(5) of Regulation No 1049/2001.

70 The scope of the objection raised by the German authorities under Article 4(5) of Regulation No 1049/2001 must therefore be analysed.

71 In that regard, it must be pointed out that, as is apparent from the judgment in *Sweden* v *Commission*, cited in paragraph 14 above (paragraph 81), that provision is procedural in nature since it is a provision dealing with the process of adoption of an EU decision.

72 Unlike Article 4(4) of Regulation No 1049/2001, which gives third parties only a right of consultation in regard to documents originating from them, Article 4(5) makes the prior agreement of the Member State a necessary condition for disclosure of a document originating from it if the Member State so requests. In such a case, an institution which does not have the agreement of the Member State concerned is not free to disclose the document at issue (*Sweden* v *Commission*, cited in paragraph 14 above, paragraph 44). In the present case, the Commission's decision regarding the request for access to the document at issue thus depends on the decision taken by the Member State in the context of the process of adoption of the contested decision.

73 However, according to the judgment in *Sweden* v *Commission*, cited in paragraph 14 above (paragraph 58), Article 4(5) of Regulation No 1049/2001 does not confer on the Member State a general and unconditional right of veto, permitting it arbitrarily to oppose, and without having to give reasons for its decision, the disclosure of any document held by an institution simply because it originates from that Member State.

74 According to the judgment in *Sweden* v *Commission*, cited in paragraph 14 above (paragraph 76), the exercise of the power conferred by Article 4(5) of Regulation No 1049/2001 on the Member State concerned is delimited by the substantive exceptions set out in Article 4(1) to (3), with the Member State merely being given in this respect a power to take part in the EU decision. The prior agreement of the Member State referred to in Article 4(5) of the regulation resembles not a discretionary right of veto but a form of assent confirming that none of the grounds of exception under Article 4(1) to (3) is present. The decision-making process thus established by Article 4(5) of Regulation No 1049/2001 thus requires the institution and the Member State involved to confine themselves to the substantive exceptions laid down in

Article 4(1) to (3) of the regulation (*Sweden* v *Commission*, cited in paragraph 14 above, paragraph 83).

75 It is also worth noting that the implementation of such rules of EU law is entrusted jointly to the institution and the Member State which has made use of the possibility granted by Article 4(5) of Regulation No 1049/2001. In the context of the decision-making process at issue, in which the institution and the Member State concerned take part, and whose purpose it is to determine whether access to a document must be refused pursuant to the substantive exceptions set out in Article 4(1) to (3) of the said regulation, the institution and the Member State are obliged to respect the duty of loyal cooperation set out in Article 10 EC and referred to in recital 15 of Regulation No 1049/2001 (*Sweden* v *Commission*, cited in paragraph 14 above, paragraph 85).

76 A Member State which, following such dialogue, objects to disclosure of the document in question is obliged to state reasons for that objection with reference to those exceptions (*Sweden* v *Commission*, cited in paragraph 14 above, paragraph 87).

77 It follows that Article 4(5) of Regulation No 1049/2001 entitles a Member State to object to the disclosure of documents originating from it only on the basis of the substantive exceptions laid down in Article 4(1) to (3) and if it gives proper reasons for its position (*Sweden* v *Commission*, cited in paragraph 14 above, paragraphs 87 and 99).

78 With regard, in the present case, to the scope of Article 4(5) of Regulation No 1049/2001 as regards the Commission, it must be recalled that the Court of Justice held in paragraph 94 of its judgment in *Sweden* v *Commission*, cited in paragraph 14 above, that, from the point of view of the person requesting access, the Member State's intervention does not affect the EU nature of the decision that is subsequently addressed to him by the institution in reply to the request he has made for access to a document in its possession. That aspect is all the more important if such a decision is based

exclusively on the consideration, by the Member State, of the applicability of those substantive exceptions.

79 The Commission, as author of the decision to refuse access to documents, is responsible for the lawfulness of that decision. Before refusing access to a document originating from a Member State, it must, therefore, consider whether the latter has based its objection on the substantive exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001 and whether it has provided a proper statement of reasons in that regard.

80 It must be pointed out that, in the present case, the examination of the applicability of the substantive exceptions must be clear from the reasons for the decision of the EU institution (see, to that effect, Case T-14/98 *Hautala* v *Council* [1999] ECR II-2489, paragraph 67; Case T-188/98 *Kuijer* v *Council* [2000] ECR II-1959, paragraph 38; and Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-1121, paragraph 69). Although the decision refusing access is based exclusively on consideration, by the Member State concerned, of the applicability of those exceptions, the application thereof is ultimately based on the reasoning of that Member State. It follows that the latter's reasoning must be clear from the reasons for the decision of the EU institution.

81 In so far as the Commission does not object to disclosure of the document in question and sets out in its decision the reasons relied on by the Member State, it is the reasons put forward by that Member State and repeated in the said decision which are to be considered by the EU judicature.

82 Since it is clear from settled case-law that the statement of reasons for a decision adopted by an EU institution must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure (Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 80 and the case-law cited), it must be

pointed out that the reasons put forward by the Member State concerned in the context of its request under Article 4(5) of Regulation No 1049/2001 must be sufficient to meet the requirements of Article 253 EC, as interpreted by the case-law in the area of access to documents pursuant to the same regulation. The reasons put forward by the Member State concerned must allow the person who has asked for the document to understand the origin and grounds of the refusal of his request and the competent court to exercise, if need be, its power of review (*Sweden* v *Commission*, cited in paragraph 14 above, paragraph 89).

83 The Court of Justice has already held that the Commission cannot accept a Member State's objection to disclosure of a document originating from that State if the objection gives no reasons at all or if the reasons are not put forward in terms of the exceptions listed in Article 4(1) to (3) of Regulation No 1049/2001 (*Sweden* v *Commission*, cited in paragraph 14 above, paragraph 88). In the procedure for the adoption of a decision refusing access, the Commission must make sure that those reasons exist and refer to them in the decision it ultimately makes (*Sweden* v *Commission*, cited in paragraph 14 above, paragraph 99).

84 For the appraisal of the present case, it is not necessary to deal with the question whether the Commission was obliged, in addition to the purely formal review as to whether the Member State has given reasons for its refusal to grant access and done so in terms of the exceptions listed in Article 4(1) to (3) of Regulation No 1049/2001, to carry out a *prime facie* review or a full review of the reasons on which the Member State bases its objection.

85 With regard to the disclosure of, or refusal of access to, a document originating from a Member State without the prior agreement of that Member State, there are two levels of review of the legality of such a disclosure or refusal of access which may be

distinguished, namely the review which the Commission is entitled to carry out in regard to the objection raised by the Member State pursuant to Article 4(5) of Regulation No 1049/2000 and the review which the EU judicature is entitled to carry out of the Commission's final decision to permit or refuse access.

86 The present case deals with a Commission decision refusing access which does not contradict the grounds of objection put forward by the Member State but which is based on those grounds, the consequence of which was therefore that the document in question was not communicated. The question to be considered in the present case does not therefore concern the type of review which the Commission is entitled to carry out in regard to an objection raised by a Member State pursuant to Article 4(5) of Regulation No 1049/2001. Since the contested decision corresponds to the request of the Member State concerned, the question whether the Commission was entitled to carry out a prima facie review or a complete review of the grounds for the Member State's request is irrelevant. It would have been necessary to consider that question if the Commission's decision did not correspond to the Member State's request. Where the Commission's decision regarding disclosure of a document originating in a Member State corresponds to the latter's request pursuant to Article 4(5) of Regulation No 1049/2001, the type of review to be identified is that which the EU judicature is entitled to carry out in regard to the Commission's decision to refuse access to the document in question.

87 With regard to judicial review of the legality of a decision refusing access, it is clear from paragraph 94 of the judgment in *Sweden* v *Commission*, cited in paragraph 14 above, that it is within the jurisdiction of the EU judicature to review, on application by a person to whom the institution has refused to grant access, whether that refusal was validly based on the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001, regardless of whether the refusal results from an assessment of those exceptions by the institution itself or by the relevant Member State. It follows that, contrary to the Commission's claim, the review carried out by the EU judicature is not limited to a *prime facie* review. The application of that provision does not therefore

prevent a complete review being carried out of the Commission's refusal decision, which must, in particular, respect the obligation to give reasons and be based on the substantive assessment made by the Member State concerned of the applicability of the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001.

88 The carrying out of a complete review by the EU judicature of the substantive exceptions at issue does not necessarily imply that the Commission is or is not entitled to carry out a complete review in regard to the objection raised by the Member State pursuant to Article 4(5) of Regulation No 1049/2001. Even if the Commission refused access to a document originating in a Member State after finding, on the basis of a prima facie review that, in its view, the grounds of objection submitted by the Member State were not put forward in a way that was not manifestly improper, review by the EU judicature is not, by virtue of the application of Article 4(5) of Regulation No 1049/2001, limited to a prima facie review of the applicability of the exceptions laid down in Article 4(1) to (3) since it is reviewing the applicability of those exceptions on the basis of the substantive assessment carried out by the Member State concerned.

The first plea, alleging an infringement of the third and fourth indents of Article 4(1)(a) of Regulation No 1049/2001

89 This plea is in two parts, which must be considered together. It refers to the exceptions to the right of access concerning the protection of the public interest as regards international relations and the economic policy of a Member State.

Arguments of the parties

90 First of all, with regard to the exception to the right of access concerning the protection of the public interest as regards international relations by virtue of the third indent of Article 4(1)(a) of Regulation No 1049/2001, the applicant submits that that provision does not apply to internal relations within the European Union. International relations consist only of the relations between the EU institutions and third countries or international organisations.

91 In the contested decision, the Commission referred exclusively to relations between the Federal Republic of Germany, the EU institutions and other Member States. Consequently, the applicant argues, the Commission erred in law by applying the provision at issue.

92 Secondly, in relation to the exception to the right of access concerning the protection of the public interest as regards the economic policy of a Member State, laid down in the fourth indent of Article 4(1)(a) of Regulation No 1049/2001, the Commission simply stated, in the contested decision, that the document in question concerned a confidential statement drawn up solely for internal use and that disclosure of it would compromise the confidentiality of the economic policy of the Federal Republic of Germany and of other Member States. The Commission gave no further reason.

93 According to the applicant, the brevity of the reasons for the contested decision may be justifiable if the German Chancellor's letter was confidential. The applicant points out that the question is therefore whether the German Chancellor's letter is confidential or not. It finds it scarcely credible that the letter could contain information of such a sensitive nature but it points out that it has not seen the letter. The Commission bears the burden of proving that the German Chancellor's letter is of a confidential nature.

94 The applicant adds, in its observations on the statement in intervention of the Republic of Finland, that that is all the more true in view of the period of time that has elapsed since the Commission received the information contained in that document. The Commission ought to have undertaken a review, within the meaning of Article 4(7) of Regulation No 1049/2001, of the real reasons why the German Chancellor's letter was not disclosed.

95 Contrary to what the Commission claims, a broad discretion may be attributed only to a party to the proceedings. The exercise of that discretion is thus amenable to review by the EU judicature. In the present case, the decision was taken by a third party to the proceedings, namely, the Member State, the exercise of whose discretion is not amenable to judicial review. That Member State thus does not have a broad discretion but the exercise of its power is delimited by the exceptions set out in Article 4(1) to (3) of Regulation No 1049/2001.

96 The Kingdom of Denmark argues that the Commission is in breach of its duty to state reasons for the contested decision.

97 The Republic of Finland adds that, contrary to the Commission's claim, the applicant does not have to prove that the exception at issue cannot apply to the document in question, since it does not have sufficient knowledge of the content of the document.

98 With regard to the application *ratione temporis* of the exceptions to the right of access pursuant to Article 4(7) of Regulation No 1049/2001, the Republic of Finland, supported by the applicant, the Kingdom of Denmark and the Kingdom of Sweden, points out that that provision is inseparably linked to the provisions of Article 4(1) to (3).

99 The Kingdom of Sweden argues that the right of access provided for in the third indent of Article 4(1)(a) of Regulation No 1049/2001 is not applicable because the relations at issue are not international in nature.

100 The Commission disputes the arguments of the applicant and the interveners.

Findings of the Court

101 In this plea, the applicant submits that the Commission cannot validly base its refusal to grant access to the German Chancellor's letter on the objection raised by the German authorities pursuant to Article 4(5) of Regulation No 1049/2001 by relying on the exceptions concerning the protection of the public interest as regards international relations and the economic policy of a Member State laid down in the third and fourth indents of Article 4(1)(a) of the regulation.

102 The complaint based on the exception to the right of access concerning the protection of the public interest as regards the economic policy of a Member State, laid down in the fourth indent of Article 4(1)(a) of Regulation No 1049/2001, must be considered first, in the light of the considerations concerning the interpretation of Article 4(5) of that regulation (see paragraphs 67 to 88 above).

103 In that regard, it must be noted that, in the present case, in which the Commission's refusal to grant access to a document originating from a Member State pursuant to Article 4(5) of Regulation No 1049/2001, application of the exceptions relating to the public interest provided for in Article 4(1)(a) of that regulation is based on the substantive assessment made by the Member State and not that of the Commission.

104 With regard to the extent of the review of the legality of such a decision by the EU judicature, it must be pointed out that the Court of Justice has already held in connection with the application of the substantive exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation No 1049/2001 by an institution outside the scope of Article 4(5) of the regulation, that that institution must be recognised as enjoying a broad discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest. The Court based that discretion, in particular, on the fact that such a refusal decision is of a complex and delicate nature which calls for the exercise of particular care and that the criteria set out in Article 4(1)(a) of Regulation No 1049/2001 are very general (*Sison* v *Council*, cited in paragraph 82 above, paragraphs 34 to 36).

105 That reasoning is also valid if, in the case of a refusal to grant access to a document originating from a Member State pursuant to Article 4(5) of Regulation No 1049/2001, the application of a substantive exception provided for in Article 4(1)(a) of the regulation is based on the Member State's assessment. It must be added in this connection that assessment of the question whether disclosure of a document undermines the interest protected by those substantive exceptions can be among the political responsibilities of that Member State (see, by analogy, *Hautala* v *Council*, cited in paragraph 80 above, paragraph 71, and Case T-211/00 *Kuijer* v *Council* [2002] ECR II-485, paragraph 53). In such a case, the Member State must enjoy a broad discretion, in the same manner as the institution.

106 It follows that, in the present case, the Federal Republic of Germany must be recognised as enjoying a broad discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by the exceptions provided for in the fourth indent of Article 4(1)(a) of Regulation No 1049/2002 could undermine the public interest.

107 The EU judicature's review of the legality of such a decision must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers (see, to that effect, *Sison* v *Council*, cited in paragraph 82 above, paragraphs 34 and 64).

108 With regard to the exception to the right of access concerning the protection of the public interest as regards the economic policy of a Member State, laid down in the fourth indent of Article 4(1)(a) of Regulation No 1049/2001, the applicant challenges, first, the adequacy of the statement of reasons for the contested decision in regard to that exception by arguing that the Commission merely set out briefly the confidential nature of the statement contained in the German Chancellor's letter, without giving any additional reason and, secondly, it challenges the applicability of the exception to the present case. The Kingdom of Denmark also argues that the Commission has not fulfilled its obligation to state reasons.

109 With regard first to the statement of reasons for the contested decision, it is settled case-law that, pursuant to Article 253 EC, it must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent EU Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (*Sison* v *Council*, cited in paragraph 82 above, paragraph 80 and the case-law cited).

110 In the case of a decision refusing access to a document on the basis of an exception provided for in Article 4 of Regulation No 1049/2001, the statement of reasons must explain how access to that document could specifically and effectively undermine the interest protected by that exception (Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraph 49, and the judgment of 11 March 2009 in Case T-121/05 *Borax Europe* v *Commission*, not published in the ECR, paragraph 37).

111 However, it may be impossible to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and, thereby, depriving the exception of its very purpose (Joined Cases T-110/03, T-150/03 and T-405/03 *Sison* v *Council* [2005] ECR II-1429, paragraph 60 and the case-law cited). Contrary to what the applicant claims, application of that case-law does not require that the document be sensitive within the meaning of Article 9 of Regulation No 1049/2001 (see, to that effect, Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313, paragraph 65; Case T-264/04 *WWF European Policy Programme* v *Council* [2007] ECR II-911, paragraph 37; and the judgment of 30 January 2008 in Case T-380/04 *Terezakis* v *Commission*, not published in the ECR, paragraph 71).

112 As the Court of Justice has held, the need to abstain from referring to matters which would thus indirectly undermine the interests which those exceptions are specifically designed to protect is emphasised in particular by Article 11(2) of Regulation No 1049/2001 (*Sison* v *Council*, cited in paragraph 82 above, paragraph 83). That provision states that if a document, whether or not it is sensitive within the meaning of Article 9 of that regulation, is the subject of a reference in the register of an institution, such reference must be made in a manner which does not undermine the protection of the interests set out in Article 4 of that regulation.

113 In the present case, the Commission relied, in adopting its decision to refuse access to the German Chancellor's letter in regard to the exception provided for in the fourth indent of Article 4(1)(a) of Regulation No 1049/2001, on the fact that disclosure of

that letter could undermine protection of the public interest as regards the economic policy of the Federal Republic of Germany. According to the reasons given by the German authorities, as set out in the contested decision, the German Chancellor's letter concerns a confidential statement drawn up exclusively for internal use. The letter concerns a confidential matter regarding the economic policy of the Federal Republic of Germany and other Member States. Disclosure of the letter would undermine confidentiality and would compromise the economic policy of the Federal Republic of Germany and of other Member States (see paragraph 24 above).

114 That statement of the reasons for the contested decision, brief though it may be, is still adequate in the light of the context of the case and sufficient to enable the appellant to ascertain the reasons for the refusal and the EU judicature to carry out the review of legality incumbent upon it.

115 It must be pointed out that the applicant was well aware of the context of the case.

116 First, the latter was aware of the Commission's opinion of 19 April 2000 concerning the carrying out of an industrial project on the Mühlenberger Loch site, an area protected under Directive 92/43. The project consisted of an enlargement of the factory belonging to Company D for the purposes of the final assembly of the Airbus A3XX. In the opinion of 19 April 2000, the Commission assessed, in particular, the imperative reasons of overriding public interest pursuant to Article 6(4) of Directive 92/43 which were invoked by the German authorities in order to carry out the said project, namely economic and social grounds, such as the very great economic importance of the project for the City of Hamburg, Northern Germany and the European aeronautics industry, in spite of a negative assessment of the implications of the project for the site and in the absence of other solutions. For those imperative reasons of

overriding public interest, the Commission considered, in its opinion, that the negative effects of the project were justified.

117 Secondly, the Commission communicated to the applicant, as an annex to the contested decision, all the documents originating from the German authorities which the applicant had requested, except for the German Chancellor's letter.

118 In that context, by indicating that the German Chancellor's letter concerned a confidential statement disclosure of which would compromise the economic policy of the Federal Republic of Germany and of other Member States, the statement of the reasons for the contested decision clearly shows why, in the Commission's view, access to that document could specifically and effectively undermine the interest protected by the exception in question. Mentioning additional information, in particular making reference to the precise statement contained in the document concerned, could have negated the purpose of the exception relied on (Joined Cases T-110/03, T-150/03 and T-405/03 *Sison* v *Council*, cited in paragraph 111 above, paragraph 62).

119 It follows that the Commission did not breach its obligation to state reasons.

120 With regard, secondly, to the applicability of the exception at issue in the present case, it must be considered whether the assessment that disclosure of the German Chancellor's letter could undermine the protection of the public interest as regards the economic policy of the Federal Republic of Germany is based on a manifest error on the part of the German authorities.

121 As they derogate from the principle of the widest possible public access to documents, such exceptions must be interpreted and applied strictly (Case C-266/05 P in *Sison* v *Council*, cited in paragraph 82 above, paragraph 63 and the case-law cited).

122 Before objecting to disclosure of the documents requested by the applicant, the German authorities were required to consider whether, in the light of the information available to it, disclosure of the document was 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 (*Kuijer* v *Council*, cited in paragraph 105 above, paragraphs 55 and 56, and *WWF European Policy Programme* v *Council*, cited in paragraph 111 above, paragraph 39). It is settled case-law that the examination required for the purpose of processing a request for access to documents must be specific in nature (*Verein für Konsumenteninformation* v *Commission*, cited in paragraph 80 above, paragraph 69 and the case-law cited). That concrete examination must, moreover, be carried out in respect of each document referred to in the request for access. It is apparent from Regulation No 1049/2001 that all the exceptions mentioned in Article 4(1) to (3) are specified as being applicable 'to a document' (*Verein für Konsumenteninformation* v *Commission*, cited in paragraph 80 above, paragraph 70, and Joined Cases T-391/03 and T-70/04 *Franchet and Byk* v *Commission* [2006] ECR II-2023, paragraph 116).

123 In the present case, first, it is apparent from the contested decision that consideration of the applicant's request for access to the documents was carried out in respect of each document mentioned in the request. Since the German authorities did not object to the disclosure of eight documents originating from the City of Hamburg and the Federal Republic of Germany, mentioned individually in the contested decision, but merely objected to the disclosure of the German Chancellor's letter, giving specific reasons in that regard, the Commission granted access to those eight documents and refused to disclose only the German Chancellor's letter (see paragraph 22 above).

124 Secondly, the German authorities did not commit any manifest error of assessment in concluding, in the context of a specific examination of the document at issue, that there was a risk of undermining the economic policy of the Federal Republic of Germany if the German Chancellor's letter was disclosed. Given the economic importance of the project at issue, the assessment that such a risk was reasonably foreseeable and not purely hypothetical is not manifestly erroneous.

125 First, it is clear from the reasons put forward by the German authorities, as set out in the contested decision, that, to reach their conclusion, they carried out a specific examination of the German Chancellor's letter. In their objection, the German authorities based their reasoning on the specific statement made by the German Chancellor in the document and not merely on abstract facts, such as, inter alia, the fact that the letter came from the German Chancellor of that time.

126 Secondly, as the Commission has stated, without being contradicted on that point by the applicant, it is clear from the examination of the opinion of 19 April 2000 that considerations of economic policy were at the heart of the issues related to the declassification of the site in question. The Commission's opinion of 19 April 2000 dealt essentially with the question whether there were, in relation to Article 6(4) of Directive 92/43, other imperative reasons of overriding public interest, such as the very great economic importance of the enlargement of the factory belonging to Company D for the purposes of the final assembly of the Airbus A3XX for the city of Hamburg, Northern Germany and the European aeronautics industry, justifying the realisation of the project in spite of a negative assessment of the project's implications for the site and in the absence of other solutions. The existence of those considerations of economic policy has not been challenged by the applicant.

127 In the light of the foregoing, it must be concluded that the assessment that disclosure of the German Chancellor's letter could undermine the protection of the public interest as regards the economic policy of the Federal Republic of Germany is not based on a manifest error on the part of the German authorities.

128 That conclusion cannot be called into question by the argument put forward by the applicant that, in view of the period of time that has elapsed since the German Chancellor's letter was sent, refusal to grant access is no longer justified on the basis of the contents of the letter, under Article 4(7) of Regulation No 1049/2001, and that the Commission should have reconsidered the reasons why the letter had not been disclosed.

129 In that regard, it must be noted that, according to Article 4(7) of Regulation No 1049/2001, the exceptions at issue are to apply only for the period during which protection is justified on the basis of the content of the document. They may apply for a maximum period of 30 years.

130 In the present case, it is only in its observations on the statement in intervention of the Republic of Finland that the applicant mentions the application *ratione temporis* of the exceptions to the right of access under Article 4(7) of Regulation No 1049/2001. The application does not contain the argument regarding Article 4(7) of Regulation No 1049/2001. The Republic of Finland alleges, in its statement in intervention, that there is an infringement of Article 4(7) of Regulation No 1049/2001 only in the context of the exception to the right of access provided for in the second subparagraph of Article 4(3) of the regulation concerning the Commission's decision-making process. In its observations on the statement in intervention, the applicant agrees with the idea put forward by the Republic of Finland and extends it to the exceptions referred to in the present plea.

131 It must be pointed out that, since the conditions for admissibility of an action and of the complaints set out therein are a matter of public policy, the Court may consider them of its own motion in accordance with Article 113 of its Rules of Procedure (see, to that effect, the order in Case C-517/08 P *Makhteshim-Agan Holdings and Others*

v *Commission*, paragraph 54, and the judgment in Case T-437/05 *Brink's Security Luxembourg* v *Commission* [2009] ECR II-3233, paragraph 54 and the case-law cited).

132 It is clear from the provisions of Articles 44(1)(c) and 48(2) of the Rules of Procedure, taken together, that the application initiating proceedings must indicate the subject-matter of the dispute and set out in summary form the pleas raised and that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

133 However, the fact that the applicant became aware of a legal matter during the course of the procedure before the General Court does not mean that that element constitutes a matter of law which came to light in the course of the procedure. A further requirement is that the applicant was not in a position to be aware of that matter previously (Case T-340/04 *France Télécom* v *Commission* [2007] ECR II-573, paragraph 164 and the case-law cited). It must be pointed out in that regard that it is not clear from the file that the applicant was not in a position to be aware of a possible infringement of the application *ratione temporis* of the exceptions to the right of access at issue.

134 In the light of the foregoing, it must be concluded that the argument concerning Article 4(7) of Regulation No 1049/2001 is inadmissible since it constitutes a new plea which was not put forward in the application. Moreover, it must be pointed out that that argument does not constitute an amplification of the pleas made by the applicant in the application.

135 Contrary to the claims of the applicant and the interveners, Article 4(7) of Regulation No 1049/2001 is not inseparably linked to the provisions of Article 4(1) to (3). It is true that Article 4(7) of Regulation No 1049/2001 must be applied in conjunction with the exceptions to the right of access provided for in Article 4(1) to (3). However, it cannot

be concluded therefrom that the fact of arguing that there has been an infringement of part of those provisions is the same as alleging an infringement of all of them. The complaint alleging an infringement of Article 4(7) of Regulation No 1049/2001 is not closely linked to the applicant's pleas alleging an infringement of Article 4(1) to (3). Although a specific examination of the exceptions provided for in Article 4(1) to (3) of Regulation No 1049/2001 is an essential condition for deciding on the application *ratione temporis* of the exceptions at issue, Article 4(7) of Regulation No 1049/2001 does not concern the conditions for the application of the exceptions provided for in Article 4(1) to (3), but the limitation in time of their applicability.

136 In any event, it must be pointed out that it is not clear from the file that protection of the public interest at issue was no longer justified at the time that the contested decision was adopted, having regard to the contents of the German Chancellor's letter. In that regard, it must be found that, in support of their argument concerning an alleged infringement of Article 4(7) of Regulation No 1049/2001, neither the applicant nor the interveners invoke circumstances other than the mere lapse of time, such as, for example, factors capable of calling into question the importance of the economic policy considerations put forward.

137 The letter at issue contains a statement by the German Chancellor concerning the carrying out of an enlargement of the factory belonging to Company D for the purposes of the final assembly of the Airbus A3XX on the Mühlenberger Loch site, an area protected under Directive 92/43. As has been held, economic considerations in regard to the city of Hamburg, Northern Germany and the European aeronautics industry were at the heart of the issues related to the de-classification of the Mühlenberger Loch site. Having regard to the statement contained in the German Chancellor's letter, which thus concerned a matter of very great importance for the economic policy of the Federal Republic of Germany, the period of about eight years which elapsed between the sending of the German Chancellor's letter (15 March 2000) and the adoption of the contested decision (19 June 2008) must be regarded as a period

during which the protection of the public interest at issue, namely the economic policy of the Federal Republic of Germany, was justified.

138 In the light of the whole of the foregoing, it must be concluded that the Commission correctly refused disclosure of the German Chancellor's letter following the objection raised by the Federal Republic of Germany pursuant to Article 4(5) of Regulation No 1049/2001 on the basis of the exception regarding the economic policy of a Member State provided for in the fourth indent of Article 4(1)(a) of that regulation.

139 There is thus no longer any need to consider either the complaint alleging an infringement of the third indent of Article 4(1)(a) of Regulation No 1049/2001 concerning the exception to the right of access regarding the protection of the public interest as regards international relations or the second plea, alleging an infringement of the second subparagraph of Article 4(3) of that regulation concerning the exception as regards the protection of the decision-making process.

The alleged infringement of Article 4(6) of Regulation No 1049/2001

Arguments of the parties

140 The Republic of Finland contends that the Commission failed in its obligation under Article 4(6) of Regulation No 1049/2001 to assess the possibility of partial access to the document at issue. The Commission should not have referred only to the statement of the Member State concerned refusing access to the document as a whole.

141 In reply to a question put by the Court concerning the admissibility of its argument, the Republic of Finland, supported by the applicant, the Kingdom of Denmark and the Kingdom of Sweden, claims that its argument is admissible inasmuch as Article 4(6) of Regulation No 1049/2001 is inseparably connected with Article 4(1) to (3).

142 The Commission disputes the arguments of the Republic of Finland.

Findings of the Court

143 The General Court may at any time, of its own motion, decide whether there exists any absolute bar to proceeding, one of which is the admissibility of an argument put forward by an intervener (see, to that effect, Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1 at 17 and 18).

144 It must be pointed out that the argument concerning an alleged infringement of Article 4(6) of Regulation No 1049/2001 as regards the question of partial access to the document at issue was raised only by the Republic of Finland. No such argument was raised by the applicant.

145 It must be pointed out in that regard that, under the fourth paragraph of Article 40 of the Statute of the Court of Justice of the European Union, which applies to the General Court by virtue of Article 53 of that Statute, an application to intervene must be limited to supporting the form of order sought by one of the principal parties. In addition, under Article 116(3) of the Rules of Procedure, the intervener must accept the case as it finds it at the time of its intervention. Although those provisions do not preclude an intervener from using arguments different from those used by the party it is supporting, that is nevertheless on the condition that they do not alter the framework

of the dispute and that the intervention is still intended to support the form of order sought by that party (see, to that effect, *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, cited in paragraph 143 above, pp. 17 and 18, and *Verein für Konsumenteninformation* v *Commission*, cited in paragraph 80 above, paragraph 52).

146 In the present case, the subject-matter of the dispute as it is constituted between the applicant and the Commission is the annulment of the contested decision. It concerns, first, the consequences of applying Article 4(5) of Regulation No 1049/2001 and, secondly, an alleged infringement of the exceptions to the right of access provided for in the third and fourth indent of Article 4(1)(a) and the second subparagraph of Article 4(3) of that regulation. Neither the application nor the defence contain arguments concerning a possible infringement of Article 4(6) of the said regulation. In addition, the applicant expressly indicated in its application that it did not challenge the contested decision in regard to partial access. The alleged infringement of Article 4(6) of Regulation No 1049/2001 was raised for the first time in the Republic of Finland's statement in intervention.

147 Contrary to what the Republic of Finland claims, Article 4(6) of Regulation No 1049/2001 is not inseparably connected with Article 4(1) to (3). Although the specific examination of the exceptions referred to in Article 4(1) to (3) of Regulation No 1049/2001 is indeed an essential condition for deciding whether to grant partial access to the document at issue (see, to that effect, *Verein für Konsumenteninformation* v *Commission*, cited in paragraph 80 above, paragraph 73; *Franchet and Byk* v *Commission*, cited in paragraph 122 above, paragraph 117; and Joined Cases T-355/04 and T-446/04 *Co-Frutta* v *Commission* [2010] ECR II-1, paragraph 124), examination of such a possibility does not concern the conditions for the application of the exceptions at issue provided for in Article 4(1) to (3). The requirement of such an examination flows from the principle of proportionality. In the context of Article 4(6) of Regulation No 1049/2001, it must be considered whether the aim pursued in refusing access to the document at issue may be achieved even if only the passages which might harm the protected public interest are blanked out (see, to that effect,

Case C-353/99 P *Council* v *Hautala* [2001] ECR I-9565, paragraphs 27 to 29, *WWF European Policy Programme* v *Council*, cited in paragraph 111 above, paragraph 50).

148 The conditions for the application of Article 4(6) of Regulation No 1049/2001 are thus examined separately, and at a different stage of the analysis, from the conditions for the application of the exceptions provided for in Article 4(1) to (3) (see, to that effect, Joined Cases T-110/03, T-150/03 and T-405/03 *Sison* v *Council*, cited in paragraph 111 above, paragraphs 86 to 89, and *WWF European Policy Programme* v *Council*, cited in paragraph 111 above, paragraphs 47 to 55). Only a possible infringement of Article 4(6) of Regulation No 1049/2001 could entail the annulment of a decision refusing partial access.

149 It follows that the argument put forward by the Republic of Finland concerning an infringement of Article 4(6) of Regulation No 1049/2001 has no connection to the subject-matter of the dispute as defined by the principal parties and therefore modifies the context of the present dispute. That argument must therefore be rejected as inadmissible.

The application for production of the document at issue

Arguments of the parties

150 The applicant requests the Court to order the Commission, by way of measures of inquiry in accordance with Article 66(1) of the Rules of Procedure, to produce the German Chancellor's letter so that the Court can examine its contents and thus determine whether, and if so to what extent, the letter is covered by the exceptions relied upon by the Commission.

151 The Commission and the interveners have not adopted a position on the applicant's request.

Findings of the Court

152 As is apparent from all of the foregoing arguments, the Court is able to rule on the application on the basis of the forms of order sought, the pleas in law and the arguments put forward during the proceedings.

153 The applicant's application that the Commission be ordered to produce the German Chancellor's letter must therefore be rejected (see, to that effect, the judgment of 10 September 2008 in Case T-42/05 *Williams* v *Commission*, not published in the ECR, paragraphs 130 and 131).

154 In the light of all the foregoing the application must therefore be dismissed in its entirety.

Costs

155 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. Furthermore, under Article 87(4), the Member States and institutions which have intervened in the proceedings are to bear their own costs.

156 Since the Commission has applied for costs and the applicant has been unsuccessful, the latter must be ordered to bear its own costs and to pay those incurred by the Commission. The Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden must bear their own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders IFAW Internationaler Tierschutz-Fonds gGmbH to bear its own costs and to pay those incurred by the European Commission;

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

Martins Ribeiro Wahl Dittrich

Delivered in open court in Luxembourg on 13 January 2011.

[Signatures]